

SUPERIOR COURT OF  
THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION  
2017 MAR 21 10:50  
SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA  
Criminal Division – Felony Division

UNITED STATES OF AMERICA

v.

KIRK L. ODOM

Criminal No. F-2473-81  
J. Dixon

**MOTION TO VACATE CONVICTIONS AND DISMISS INDICTMENT**  
**WITH PREJUDICE ON THE GROUNDS OF ACTUAL INNOCENCE**  
**UNDER THE INNOCENCE PROTECTION ACT**

Kirk L. Odom, through counsel, respectfully moves this Court to vacate his convictions for rape while armed, sodomy, armed robbery and first-degree burglary while armed and dismiss the indictment with prejudice under the District of Columbia Innocence Protection Act, D.C. Code § 22-4135, on the grounds of actual innocence. New, irrefutable DNA evidence conclusively proves that Kirk Odom did not commit these crimes. S [REDACTED] Y [REDACTED] was tragically mistaken in her identification of Mr. Odom as her assailant. The corroboration seemingly offered by the spurious “science” of microscopic hair analysis was false. The results of nuclear DNA testing scientifically exclude Mr. Odom as the donor of the sperm and semen left on the victim’s linens and bedclothes by the rapist on February 24, 1981. The results of mitochondrial DNA analysis of the Negroid hair left on Ms. Y [REDACTED] nightgown by the rapist establish to a scientific certainty that the hair could not have come from Mr. Odom. One man committed these heinous crimes; that man was not Kirk L. Odom.

Mr. Odom requests an immediate hearing on this motion. He has spent thirty years in prison or on parole for offenses he did not commit. He has been made to register for life as a violent sex offender. His horrifying ordeal began when he was a mere eighteen years old. He is now forty-nine. He has waited all this time, most of it behind bars, for this terrible miscarriage of justice to be undone. He should have to wait no longer.

#### **I. PROCEDURAL HISTORY OF THIS MOTION**

On February 14, 2011, Mr. Odom, through undersigned counsel, filed a motion for post-conviction DNA testing under the Innocence Protection Act. In it, he demonstrated that he met all of the statutory requirements for post-conviction DNA testing of the evidence seized in the investigation and prosecution that resulted in his conviction. His sworn affidavit of actual innocence was appended to the motion.

The facts that gave rise to the motion stretch back more than three decades, to a time long before the discoveries that made DNA a forensic tool with “an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty,” *District Attorney’s Office for the Third Judicial District v. Osborne*, 129 S.Ct. 2308, 2311 (2009). But the motion also depends on a more recent event. When Donald Eugene Gates was exonerated by DNA testing in December 2009, having served 28 years for a felony murder he did not commit, Richard Greenlee took notice. He recalled that he had represented a client at trial who, like Mr. Gates, had always professed his innocence and against whom, like Mr. Gates, the government had presented FBI hair match testimony that seemed to have sealed his client’s fate with the jury. Mr. Greenlee, who has since retired from the Public Defender Service, had represented Kirk Odom.

Counsel commenced an investigation to attempt to find the trial transcript, court records, relevant reports and physical evidence, and to contact Mr. Odom. No copy of the trial transcript could be found. But through Superior Court, District of Columbia Court of Appeals, and Supreme Court records, as well as records of the Metropolitan Police Department, the Federal Bureau of Investigation and the Public Defender Service, the story of Mr. Odom's wrongful conviction can be told.<sup>1</sup>

On February 16, 2011, within mere days of the filing of Mr. Odom's motion for post-conviction DNA testing, this Court ordered the government to respond.

The Metropolitan Police Department began a search for the physical evidence in response to Mr. Odom's motion for DNA testing. On May 13, 2011, the search bore fruit. A large box was found at Shannon Place which bore the Metropolitan Police Department and FBI numbers relevant to Mr. Odom's case. Among other items the box contained the hair used to convict Mr. Odom and the pillow case and robe, stained with the semen and sperm left by the perpetrator, that held the key to Mr. Odom's exoneration.

On June 27, 2011, the government filed its response to Mr. Odom's motion. The United States agreed that Mr. Odom was entitled to post-conviction testing under the Innocence Protection Act. It wrote:

Based on the government's evaluation of the history of this case and the defendant's motion, including the fact that the requested testing was not previously conducted because DNA testing was not readily available in criminal cases in the District of Columbia at the time of the defendant's conviction in this case, and because it appears that there may be a reasonable probability that testing will produce non-cumulative evidence that would help establish that the defendant is actually innocent of the crimes for which he was

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<sup>1</sup> In Mr. Gates' case, as well, the transcript of the trial was never located.

convicted in this case, the government does not oppose defendant's request for postconviction DNA testing.<sup>2</sup>

The results of the scientific testing are now in. They do, in fact, provide non-cumulative evidence that establishes that Mr. Odom is actually innocent of the crimes for which he was convicted. The nuclear DNA results, obtained by the United States from its preferred laboratory, and the mitochondrial DNA results, obtained by agreement of the United States and Mr. Odom from the leading laboratory for testing old hair, are clear, unambiguous, and dispositive. Mr. Odom is absolutely excluded as the donor of the sperm, semen, and hair left by the perpetrator.

## **II. STATEMENT OF FACTS**

### **A. The Misidentification of Kirk Odom**

#### **1. Introduction**

The government's case relied on eyewitness identification evidence of the complaining witness made under circumstances particularly conducive to misidentification. Nearly every impediment to an accurate identification that case law and social science research has identified in the last thirty years was present at the scene of the crime: a weapon, terror, the victim of a different race than her assailant, with an extremely limited opportunity to observe under conditions that made observation difficult if not impossible.<sup>3</sup> In addition, nearly every impediment to the collection and preservation of accurate identification evidence that case law and social science research has identified in the last thirty years was present in the manner in which the investigation was conducted: the viewing of hundreds of mug shots; the creation of a

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<sup>2</sup> *Government's Consolidated Response to Defendant's Motion for Post-Conviction DNA Testing Under the Innocence Protection Act and Motion to Permit Defense Inspection of Physical Evidence*, at 3 (June 27, 2011).

<sup>3</sup> In the jargon of social scientists, these factors particular to the crime and the witness are called "estimator variables." *State v. Henderson*, 27 A.3d 872, 878 (N.J. 2011)

composite drawing; the focus on Mr. Odom for no other reason than that a police officer who observed him five weeks after the crime thought he resembled the composite drawing; a six-week interval between the crime and the display of a photo array to the victim from which she tentatively selected Mr. Odom's picture; the fact that the detective directly involved in the investigation, who placed Mr. Odom's photo in the array, administered the photo array; the use of fillers in the photo array and lineup who bore no resemblance to Mr. Odom; the biasing effects of repeated viewings of the same suspect; and the confirmation that the victim had chosen correctly provided by taking her immediately to the grand jury from the lineup.<sup>4</sup> By trial, Ms. Y█████ had viewed Mr. Odom or his photograph several times, and had gained such confidence in her misidentification of him as her assailant that she could testify she was "certain."<sup>5</sup>

Indeed, this case presents a textbook example of why identification testimony is the leading cause of wrongful convictions. *Perry v. New Hampshire*, 132 S.Ct. 716, 738-39 (2012) (Sotomayor, J., dissenting) ("The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness identification.") (citations, internal quotation marks and footnotes omitted). *See also Benn v. United States*, 978 A.2d 1257, 1266 (D.C. 2009) ("eyewitness error is the leading cause of wrongful conviction in the U.S.") (footnote and internal quotation marks omitted); *State v. Henderson*, 27 A.3d 872, 885 (N.J. 2011) (same). It is strikingly similar to the case of Jennifer Thompson and Ronald Cotton. There, too, a black man broke into the apartment of a white woman at night while she slept. There, too, he held a

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<sup>4</sup> In the vernacular of social scientists these factors particular to the conduct of the investigation are called "system variables." *Id.*

<sup>5</sup> Brief for Appellee at 7 (quoting transcript), *Kirk L. Odom v. United States*, D.C. Court of Appeals, No. 82-65 (hereinafter "Gov't. br. at \_\_\_").

weapon to her head. There too, his victim, who had been raped, sodomized and terrorized, participated in a series of identification procedures in which she gained increasing confidence in her identification until she was “certain” at trial. But, as Ms. Thompson explained in her justly famous editorial in *The New York Times*, she “was certain, but [she] was wrong.”<sup>6</sup> As with Mr. Odom and Ms. Y [REDACTED] “the man [she] had identified so emphatically on so many occasions was absolutely innocent.”<sup>7</sup> Ronald Cotton had been exonerated by DNA.

## 2. The Offense

S [REDACTED] Y [REDACTED] was sexually assaulted by a stranger who broke into her apartment in the pre-dawn hour of February 24, 1981. Her assailant woke her by holding a gun to her head and threatening to kill her. She had only moments to view him in dim light as he reached across her body to turn off her alarm clock that went off at 6 a.m. Thereafter, throughout the terrifying ordeal, she was blindfolded and entirely in the dark. Her assailant tied her up, cut away her clothing, brutally sodomized and raped her, and rummaged through her belongings in search of cash. He found travelers checks which he took, but not before disparaging his ability to cash them.

Ms. Y [REDACTED] chilling description of what ensued is contained in her witness statement that was prepared at the police station on February 25, 1981, the day after the offense. It states:

I was awakened by someone putting a hard object to the side of my head and then I noticed that it was a gun. Then this man told me he had a gun and for me not to move or say anything or else he would kill me. Then he put a white rag in my mouth. I told him that I was afraid that I was going to smother because I have a cold and I have to breathe through my mouth. He told me he did not care if I

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<sup>6</sup> Jennifer Thompson, Editorial, “I Was Certain, but I Was Wrong,” *The New York Times*, A15 (Sunday, June 18, 2000). See also Jennifer Thompson-Cannino & Ronald Cotton, *Picking Cotton: Our Memoir of Injustice and Redemption* (2009); *State v. Cotton*, 394 S.E.2d 456 (N.C. App. 1990).

<sup>7</sup> *Id.*, as quoted in *Benn v. United States*, 978 A.2d 1257, 1279 n.93 (D.C. 2009).

had a cold and for me to shut up or I would be dead. Then he told me to turn over and he put the gun to my back and I had better do as I was told or I would be dead. Then he tied a scarf around my head to hold the gag in and then he tied another scarf around my eyes and blindfolded me. He either wrapped it several times or he tied several scarves around my head because I couldn't see any light after he tied my eyes. Then he pulled my hands behind my back and tied them. Then he pulled the covers off of me and he tied my feet. Then he asked me where was the money. I told him that I did not have any. Then he went over to the dresser and I could hear him going through the dresser drawers and I could hear him saying where is the money. ... I told him that there wasn't very much but I had \$400.00 in Travelers Checks. Then he said, yea, I would like to see me cash those Travelers Checks. ... Then he looked around some more and then he came over to me and I could tell that he was cutting my nightgown off of me. Then he cut my panties off with a pair of scissors. Then he stood by the side of the bed and he took off all of his clothes. ... Then he got on the bed and he kneeled on the bed straddling my legs and he inserted his penis in my rectum a little way. Then he rubbed his penis on the lips of my vagina and he tried to insert himself deeper in my rectum but he was unable to do it. Then he cut my legs apart and then he opened my legs and he inserted his penis in my rectum again but he still couldn't get very deep. Then he put pillows under my hips and he told me to lift up when he did this and that was the only conversation during this incident. Then he inserted himself again and this time he entered me all the way. He did not stay on me very long and I don't think he climaxed and then he got off of me. Then he tied my feet together again. ... Then he went into the living room and I could hear him going through my things. ... I could hear his jacket rustling. Then he moved away towards the door. Then there was a silence and I waited a few minutes. ... My hands were tied together and my feet were tied together and I got off the bed and hopped down the hall. ... I had to tell the operator that it was an emergency and she got the police. I untied my hands and got my robe and then the police arrived.<sup>8</sup>

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<sup>8</sup> Complainant witness statement at 1-2 (Feb. 25, 1981) (hereinafter "Y [redacted] statement at \_\_\_") (minor errors in spelling and grammar have been corrected). Ms. Y [redacted] affirmed that the police statement was "true and accurate" and adopted it as her testimony before the grand jury on May 19, 1981. Grand jury testimony of S [redacted] Y [redacted] at 4 (May 19, 1981) (hereinafter "Y [redacted] G.J. at \_\_\_").

At 7:05 a.m., within approximately five minutes of the gunman's departure, police officers arrived at Ms. Y [REDACTED] apartment in response to her call for help.<sup>9</sup> A crime scene search officer retrieved evidence. Among the items he collected were Ms. Y [REDACTED] nightgown, the sheets and pillowcases, and the robe she was wearing when the police arrived.<sup>10</sup> He later submitted these items to the FBI for forensic analysis.<sup>11</sup>

Metropolitan Police Department Detective Robert Catlett of the Sex Squad arrived at 7:30 a.m.<sup>12</sup> Detective Catlett stayed on the case through trial, and he was with Ms. Y [REDACTED] at every significant point in which she was involved in the investigation. He took Ms. Y [REDACTED] description of her assailant at her apartment that morning.<sup>13</sup> It is contained in his police notebook and states: "N/M 20-30, 5'6"-5'8", slight wir[.]y build[,] medium complexion, short hair[.] Brown gloves without fingertips, nylon jacket. Long barrel gun."<sup>14</sup> Then, he accompanied her to George Washington University Medical Center for an examination.<sup>15</sup>

The next day, February 25, 1981, Detective Catlett met Ms. Y [REDACTED] at the police station where he took the written statement recounted above. In it she gave a somewhat modified description of her assailant: "Black, male, young, he is in his late teens or early twenties, 5'6"-5'8", 120-130 lbs, short hair, medium complexion, clean shaven, Nylon zipper front jacket that

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<sup>9</sup> Gov't. br. at 4.

<sup>10</sup> Metropolitan Police Department letter to FBI Director submitting items for examination at 1-2 (July 10, 1981); FBI Laboratory Worksheet Re: Microscopic Analyses – Chemical Analyses at 1-2.

<sup>11</sup> *Id.*

<sup>12</sup> Gov't br. at 4. .

<sup>13</sup> *Id.*

<sup>14</sup> Although the provenance of the notebook page is not entirely certain from the available record, everything indicates that it was Detective Catlett's, provided as his Jencks material. He testified at trial that he took Ms. Y [REDACTED] initial description of the perpetrator. Gov't. br. at 4.

<sup>15</sup> Grand jury testimony of Det. Robert Catlett at 5 (June 8, 1981).

was blue or dark in color. He was armed with a dark colored long barrel gun.”<sup>16</sup> Other versions of Ms. Y [REDACTED] description of the gunman also exist and they contain slight variations.<sup>17</sup>

At eighteen years old, Mr. Odom was on the lower edge of the estimate of age. His hair was short and he was clean shaven – if he shaved at all. His actual size at the time is not known although he fit generally within the height described.<sup>18</sup> From the lineup photo he appears of medium weight; he was made to stand on a box at the lineup so that his height approximated that of the fillers. In one immutable characteristic, however, his appearance diverged markedly from Ms. Y [REDACTED] description of the gunman. Mr. Odom is dark complexioned. He was the darkest man in the lineup. But neither this discrepancy, nor his sworn testimony that he was innocent, nor the fact that no evidence tied him to the clothing worn by the gunman or to a gun, nor the incongruity that a poor, unworldly young man of limited educational ability or accomplishment who had never traveled far from his familial homes in Southeast Washington and North

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<sup>16</sup> Y [REDACTED] statement at 2.

<sup>17</sup> The PD 123 Report of Investigation contains the following description: “Negro, male young, early twenties, 5’7” to 5’9”, medium brown complexion[,] wir[ly] and slim but not skinn[ly], close cut hair, did not remember facial hair, gloves with fingers cut out, Nylon jacket, blue & long barrel handgun.” The description on the bottom of the composite drawing which Ms. Y [REDACTED] helped create on February 25, 1981, stated: “Black, male, 18 to 25 years, 5’7” to 5’9”, medium complexion, slim, close cut hair and clean shaven. He was last seen wearing a blue nylon jacket and armed with a large dark handgun.”

<sup>18</sup> He testified that he was 5’8” or 5’9”, but this was likely a faulty estimate as he is now, fully grown, only 5’7 ½.” The prosecutor called him untruthful for testifying that he did not know how much he weighed:

[L]adies and gentlemen, we still don’t know how much Mr. Odom weighs because he hasn’t weighed himself in a year if you believe him. Why? Because, ladies and gentlemen, I submit to you the reason he tells you he hasn’t done that, he knows if he told the truth, the weight would be right on the money, too.

Def. br. at 19; gov’t br. at 13 (quoting transcript).

Carolina, would know, like the rapist did, of the difficulty of negotiating travelers checks, would keep him from being wrongfully convicted.

### 3. The Circumstances of the Crime Increased the Likelihood of Misidentification

Experience, case law, and thirty years of social science research shed light on how fraught the circumstances of the offense were to the later ability of Ms. Y [REDACTED] to make an accurate identification of the man who raped, sodomized, and terrorized her. As the New Jersey Supreme Court observed in its recent landmark decision on eyewitness identifications, human memory does not act like a video recording. *State v. Henderson*, 27 A.3d at 894. Instead, memory is a “constructive, dynamic, and selective process.” *Id.* The process of remembering consists of three stages, the first of which is “acquisition,” during which the original event is perceived. *Id.*<sup>19</sup> In this first stage, the witness “gets the gist of things and constructs a memory on bits of information and what seems plausible.” *Id.* (quoting Special Master’s report<sup>20</sup>) (internal alterations and quotation marks omitted). Many factors may influence what the witness perceives and encodes into her memory. The American Psychological Association described some that may imperil identifications in its recent amicus brief to the United States Supreme Court. Justice Thomas writes:

As one of Perry’s *amici* points out, many other factors [than external suggestion] bear on “the likelihood of misidentification,” – for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the

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<sup>19</sup> The second and third stages in the process of memory are “retention” and “retrieval—the stage during which a person recalls stored information.” *Id.* (quoting Elizabeth F. Loftus, *Eyewitness Testimony* 21 (2d ed. 1996)).

<sup>20</sup> The Special Master was appointed by the New Jersey Supreme Court “to evaluate scientific and other evidence about eyewitness identifications. The Special Master presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies.” *Henderson*, 27 A.3d at 877.

witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness.

*Perry v. New Hampshire*, 132 S.Ct. 716, 727 (2012) (Thomas, J., concurring) (citing Brief from American Psychological Association as *Amicus Curiae* 9-12). Nearly all of these factors are present here.

Ms. Y [REDACTED] opportunity to view her assailant was markedly limited and the circumstances under which she viewed him were exceedingly poor. According to her trial testimony, she had gone to bed at about 1:00 a.m. on February 24, 1981, “exhausted from work and study.”<sup>21</sup> Her alarm, which she had set for 6:00 a.m., had not yet gone off.<sup>22</sup> The sun had not yet risen. The National Oceanic and Atmospheric Administration weather report for the District for February 24, 1981, indicates that sunrise occurred at 6:48 and listed the condition at sunrise as “foggy.” Ms. Y [REDACTED] testified at trial that only a “dim light” filtered into her bedroom from street lamps or from the rear of her apartment.<sup>23</sup> This dim light was soon extinguished when her assailant blindfolded her and left her completely in the dark.<sup>24</sup>

The period of time in which Ms. Y [REDACTED] could view her assailant was very short. She saw him full face when she first awoke, then in profile as he stretched across her to turn off the alarm, then again full face before he made her lie on her stomach and blindfolded her. The government explained in its brief:

Y [REDACTED] was awakened by a long-barreled gun, dull and dark, pressing against her right temple. The gunman called her “Bitch” and said if she moved or spoke she would be dead. In the dim light ... Y [REDACTED] saw the gunman’s face only two feet away. She looked

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<sup>21</sup> Gov’t. br. at 2.

<sup>22</sup> Y [REDACTED] statement at 1.

<sup>23</sup> Gov’t. br. at 2.

<sup>24</sup> Y [REDACTED] statement at 1.

at him full face and concluded that he both looked and sounded “like he meant what he said.” He put a gag in her mouth and turned her head so that the left side of her head was on the pillow. She could see his profile as he reached across her to turn off the alarm, and then she looked at his full face again. He made her lie on her stomach and held the gun against the middle of her back, repeating if she “didn’t do what he told [her, she] would be dead.”<sup>25</sup>

All told, she testified that “more than a full sixty seconds,” but not “quite two minutes” elapsed between the time she first saw the gunman and when he blindfolded her.<sup>26</sup> But such estimates of the passage of time during violent events are notoriously exaggerated. “[W]itnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful.” *Henderson*, 27 A.3d at 905 (quoting Special Master’s report). *See also Benn v. United States*, 978 A.2d at 1268. Even if her estimate of the duration were accurate, to view a stranger in dim light for fewer than two minutes in terrorizing circumstances is to have a very brief opportunity indeed.

It is well-established in social science research and case law that terror does not enhance one’s ability to remember; it may inhibit it. “Even under the best viewing conditions, high levels of stress can diminish an eyewitness’ ability to recall and make an accurate identification.” *Henderson*, 27 A.3d at 904. The effect of stress was most vividly illustrated by a famous study, described by the Special Master as follows:

[I]n a 2004 field study ... 500 active-duty military personnel in a survival-school program ... were subjected to 12 hours of confinement followed by two 40-minute interrogations, one under high stress with physical confrontation and the other under low stress, conducted by different interrogators. When asked the following day to identify their interrogators, the participants correctly identified the high-stress interrogator at only half the rate

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<sup>25</sup> Gov’t. br. at 2 (transcript cites omitted; alteration in original).

<sup>26</sup> Gov’t. br. at 3 n.2 (quoting transcript).

they identified the low-stress interrogator; some, indeed, were even unable to identify the high-stress interrogator's gender.<sup>27</sup>

Stress brought on by the presence of a weapon may diminish the ability to recall an intruder's face even more, as the presence of a weapon may draw the victim's attention to it, and not to the person wielding it. The District of Columbia Court of Appeals recognized that "[b]y 2001 ... 87% of the experts surveyed agreed that the science concerning the effect of weapon-related stress had advanced to the point that it was reliable." *Benn*, 978 A.2d at 1267; *see also id.* at n.26 ("[T]he presence of a weapon during a crime attracts the attention of the witness to the weapon, leaving less attention to the perpetrator's facial and physical characteristics.") (citation omitted). The *Henderson* court concluded, "[W]hen the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness' description of the perpetrator." 27 A.3d at 905.

Finally, one of the most robust findings in the past thirty years of eyewitness identification research has been that eyewitnesses have difficulty accurately remembering and identifying perpetrators who are of a different race than themselves.<sup>28</sup> *See Benn*, 978 A.2d at 1267 & n.29 (recognizing that the proposition "that eyewitnesses find it relatively difficult to identify members of a race other than their own" is presently accepted as "reliable by the experts") (citing Kassin, *et al.*, *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of Experts*, 56 AMERICAN PSYCHOLOGIST 405, 410-411 (2001)). Own-race bias (also known as the cross-race effect or the other-race effect) appears to be present across racial

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<sup>27</sup> *Report of Special Master*, at 43 (record cites omitted).

<sup>28</sup> John C. Brigham *et al.*, *The Influence of Race on Eyewitness Memory* in R.C.L. Lindsay, David F. Ross, J. Don Read, and Michael P. Toglia eds. *THE HANDBOOK OF EYEWITNESS PSYCHOLOGY, VOLUME II: MEMORY FOR PEOPLE* 257-81, 258 (2007).

and social groups,<sup>29</sup> yet the greatest effect has been found in white participants identifying black faces.<sup>30</sup> The victim here was white; her assailant was black.

All of these circumstances – the fact that the intruder was a stranger, of a different race, who wielded a handgun, and terrorized his victim, who viewed him briefly in dim light for a short duration – were likely factors that influenced and inhibited Ms. Y [REDACTED] acquisition of an accurate memory of the appearance of the perpetrator and led to her misidentification of Mr. Odom who, in fact, had nothing to do with this crime.

#### **4. The Methods Used to “Collect” the Identification Evidence Increased the Likelihood of Misidentification**

Equally if not more important factors in the misidentification of Mr. Odom were the methods used by investigators to have Ms. Y [REDACTED] recall the appearance of her assailant and identify him. These methods had the effect, instead, of turning Ms. Y [REDACTED] malleable memory into the firm, but false, conviction that her assailant “had left her with an image of his face etched in her mind.”<sup>31</sup> “Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues.” *Perry*, 132 U.S. at 739, (Sotomayor, J., dissenting) (footnote omitted). “We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications.” *Henderson*, 27 A.3d at 878. The *Henderson* court explained:

[M]emory rapidly and continuously decays; retained memory can be unknowingly contaminated by post-event information; and the witness’s retrieval of stored memory can be impaired and distorted

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<sup>29</sup> Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL’Y & L. 3, 4 (2001).

<sup>30</sup> *Id.* at 21–22; Brigham, *Influence*, supra note 27 at 258–59.

<sup>31</sup> Gov’t. br. at 4.

by a variety of factors, including suggestive interviewing and identification procedures conducted by law enforcement personnel.

*Id.* at 894 (quoting Special Master's report) (quotation marks and brackets omitted). Such was the case here.

Ms. Y [REDACTED] participated in the first of many identification procedures on February 25, 1981, the day following the crimes. She met with police artist James Proctor, who drew a composite sketch.<sup>32</sup> She described the process of making the drawing in her testimony to the grand jury as follows: "I looked at some photographs to help when the police artist and I were discussing, so that we could make a composite, so I could recognize him."<sup>33</sup> Afterwards, she viewed between 200 and 400 photographs of suspected sex offenders. The photographs did not include Mr. Odom. She made no identification.<sup>34</sup>

The composite drawing she created is of a rather generic looking young black male. "Composites produce poor results." *Henderson*, 27 A.3d at 902 (quoting the Special Master's report). The court explained:

Researchers attribute those results to a mismatch between how composites are made and how memory works. Evidence suggests that people perceive and remember faces "holistically" and not "at the level of individual facial features." Thus, creating a composite feature-by-feature may not comport with the holistic way that memories for faces "are generally processed, stored and retrieved."

*Id.* (citing Gary L. Wells & Lis E. Hasel, *Facial Composite Production by Eyewitnesses*, 16 *Current Directions Psycho. Sci.* 6, 9 (2007)). Whether the fact of making a composite may also

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<sup>32</sup> The composite sketch was introduced at trial as government exhibit 7, Superior Court Exhibit Summary, *United States v. Kirk L. Odom*, F-2473-81 (hereinafter "Exhibit summary"). A copy is attached as Appendix 1.

<sup>33</sup> Y [REDACTED] G.J. at 5.

<sup>34</sup> Gov't. br. at 5.

contaminate a witness' memory is a matter of debate. *Henderson*, 27 A.2d at 902 (citing conflicting studies).

On April 3, 1981, Kirk Odom had a conversation with a police officer that began the road to his eventual conviction. The exchange had nothing to do with the assault on Ms. Y [REDACTED], but the officer involved believed that he resembled the composite drawing that had been distributed among police and he notified the Sex Squad.<sup>35</sup> Detective Catlett retrieved a two-year-old black and white photograph of Mr. Odom and assembled a photo array containing nine other black and white photographs.

The composition of the array was a matter of real contention. A two-year-old photograph of eighteen-year-old Mr. Odom would have been of him as a child of sixteen. Defense counsel argued at a pretrial suppression hearing and at trial that his photo stood out from those of the others in the array. At the pretrial hearing, "defense counsel argued that 'several of the men in the photographs are fairly old. Several of them have mustaches. All of them are inconsistent with her original description of the suspect....'"<sup>36</sup> Denying the motion to suppress, the trial judge stated that "six of the ten photographs in the array were of individuals who 'appear to be of the same age, all clean shaven, hair styles different, features are similar. All appear to be young with the exception of [one who] appears to be older.'"<sup>37</sup> By implication, at least four and perhaps five of the ten did not appear to be of the same age, several were not clean shaven and many did not have short hair (instead they had "different" "hair styles").

In his closing, defense counsel stated:

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<sup>35</sup> *Id.*

<sup>36</sup> Memorandum of the United States in Opposition to Petition for a Writ of Certiorari at 3 (quoting transcript), *Kirk L. Odom v. United States*, United States Supreme Court No. 83-5368.

<sup>37</sup> *Id.*

Now, remember her initial description of the assailant, especially that he had short cropped hair, just like [Mr. Odom] has, and presumably had back in February, short cropped hair, no facial hair, just like [Mr. Odom] had back in February. Then look at the eight pictures there, the ten pictures. You will notice that eight of those pictures either have – are older men, much older, with mustaches, with long hair, with sideburns, and even if she told [sic] Detective Catlett words to the letter, she cannot ignore the fact that two of those pictures are young men, much younger than the rest, and they are clean shaven and they have short hair. Two out of the ten.<sup>38</sup>

On April 13, 1981, Detective Catlett took the array to Ms. Y█████ to view. This was the second photo array that Ms. Y█████ had been shown, but the first time that Detective Catlett had brought photographs to her to view.<sup>39</sup> Whether by coming to her residence Detective Catlett had signaled a heightened interest in the outcome of the second photo array cannot be known. What is exceedingly well-established is that “an identification may be unreliable if the lineup procedure [including photo “lineup”] is not administered in a double-blind or blind fashion.”

*Henderson*, 27 A.3d at 896. The court explained:

Dr. [Gary] Wells [a leading expert] testified that double-blind administration is “the single most important characteristic that should apply to eyewitness identification” procedures. Its purpose is to prevent an administrator from intentionally or unintentionally influencing a witness’ identification decision.

Research has shown that lineup administrators familiar with the suspect may leak that information.... Even seemingly innocuous words and subtle cues – pauses, gestures, hesitations, or smiles, can influence a witness’ behavior.

*Id.* (citations omitted).

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<sup>38</sup> *Id.* at 5 (quoting transcript).

<sup>39</sup> Earlier, on March 31, 1981, she had come to the station to look at eight Polaroid photos. She had pointed to one as resembling her attacker, but said that he was too old and too heavy. Gov’t br. at 5; Def. br. at 4.

Detective Catlett testified that before Ms. Y [REDACTED] looked at the array, he instructed her to look at facial features, not hair, because hair changes. This instruction implicitly acknowledged that not all of the photographs were of clean-shaven men with close-cropped hair.<sup>40</sup> It was also an instruction that social science has shown to be inconsistent with the way in which memory works, which, as discussed above with respect to the creation of composites, is “holistically.” The importance of individual facial features is contextual. Internal features of a face (eyes, brows, nose, and mouth) are important for recognizing a familiar face, but for unfamiliar faces the external features of a face (hair, ears, and face shape) take on more salience. Specifically, hairstyle can be a key physical marker used in characterizing and classifying faces.<sup>41</sup> Long hair, side burns and mustaches were likely features that Ms. Y [REDACTED] could not ignore.

Ms. Y [REDACTED] made a tentative identification of Mr. Odom from the photo array. She told the grand jury, “I thought that one of those photographs might be the person.”<sup>42</sup> At trial, Ms. Y [REDACTED] explained that she told Detective Catlett when she chose Mr. Odom’s photo from the array that she needed to see the man’s whole body and hear him speak before making a “complete identification.”<sup>43</sup> Detective Catlett replied that he would arrange a lineup where she could do that.<sup>44</sup>

On May 19, 1981, Ms. Y [REDACTED] had the opportunity to view the man she had tentatively selected from the photo array and to hear his voice at a live lineup, as Detective Catlett had

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<sup>40</sup> Gov’t. br. at 5. The photo array has not been located.

<sup>41</sup> Dawn McQuiston-Surrett et al., *Evaluation of facial composite evidence depends on the presence of other case factors*, LEGAL AND CRIMINOLOGICAL PSYCHOLOGY 279–98, 293 (2008), citing O.H. Maclin & R.S. Malpass, *Racial categorization of faces: the ambiguous race face effect*, PSYCHOLOGY, PUBLIC POLICY AND LAW 7(1), 98–118 (2001).

<sup>42</sup> Y [REDACTED] G.J. at 5.

<sup>43</sup> Gov’t. br. 5 (quoting transcript).

<sup>44</sup> Gov’t. br. at 5-6.

promised she would. Before she appeared at the lineup, on that very morning, Detective Catlett again showed her the photo array from which she had selected Mr. Odom's photograph.<sup>45</sup> Ms. Y [REDACTED] later claimed at trial that although she expected to see the person she had tentatively selected in the photo array at the lineup, she did not feel she had Mr. Odom's photograph in her mind.<sup>46</sup> But whether or not she was aware of it, her viewing of the lineup may have been influenced by exposure to Mr. Odom's photograph in the photo array, and whatever actual memory of the appearance of her assailant she retained, if any, likely had been further contaminated. "Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure." *Henderson*, 27 A.3d at 900. As the Supreme Court has observed, "Regardless how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." *Simmons v. United States*, 390 U.S. 377, 383-84 (1968) (footnote omitted).

The composition of the lineup was just as problematic as the composition of the photo array. Mr. Odom wore shield number five and stood in the dead center of the seven-person line. He stood on a box so that he would appear the same height as the other men.<sup>47</sup> A photocopy of a photograph of the lineup shows Mr. Odom to be a dark-complexioned young man; he is the

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<sup>45</sup> Def. br. at 4, n.2 ("Ms. Y [REDACTED] testified that she was shown the array from which she identified appellant on the morning of the lineup and that she expected to see the person she had tentatively selected in the lineup. (Tr. at 120)).

<sup>46</sup> Reply br. at 4, n.3.

<sup>47</sup> The box could not be seen by observers of the lineup.

darkest person in the lineup. He is also without facial hair. Most of the other men in the lineup (four out of six, wearing shield numbers 13, 12, 6, and 10) appear to have mustaches. Some are also visibly older than Mr. Odom.<sup>48</sup> Most, if not all, of them were police officers. Ms. Y [REDACTED] asked to hear the men speak twice, once while she closed her eyes because she had been blindfolded most of the time her assailant spoke to her.<sup>49</sup> She also requested to see the men in profile. "Finally, when asked, she identified the man wearing shield no. 5[.]"<sup>50</sup>

On the same day that she identified Mr. Odom at the lineup, Ms. Y [REDACTED] appeared before the grand jury and recounted what had occurred. Whatever else the police may or may not have said following the lineup to signal that Ms. Y [REDACTED] had made the right choice, no cue could have been as unmistakable as the fact that the United States required her to testify immediately following the lineup about her identification of Mr. Odom. The *Henderson* court explained:

Confirmatory or post-identification feedback ... occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness' recollection of the quality of his or her view of an event.

27 A.3d at 899.

In the grand jury, Ms. Y [REDACTED] testified as follows:

Q. Have you ever attended a lineup?

A. Yes.

Q. When was that?

A. This afternoon.

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<sup>48</sup> The lineup photograph was introduced at trial as government exhibit 9. A copy is attached as Appendix 2.

<sup>49</sup> Gov't. br. at 6-7. The videotape of the lineup was shown to the jury. It has not been located.

<sup>50</sup> *Id.* at 7.

Q. Did you see anybody that looked familiar in that lineup?

A. Yes.

Q. Who was that?

A. The person who assaulted me.

Q. Did you listen to the men in the lineup speak?

A. Yes, I did.

Q. Did you listen to them before you made your identification?

A. Yes, I did. Before I thought I knew who it was, but I did not say that I thought I knew who it was until after I listened to him speak.

Q. Did you then tell the police which one you thought it was?

A. Yes.<sup>51</sup>

At trial, Ms. Y [REDACTED] provided this more dramatic description of her experience:

[I]mmediately when I walked into the room, one man's face just seemed to jump out at me, and it was very scary.

I recognized him and I felt afraid that he could see me, and I had to remind myself that I knew it was impossible for him to see me, you know, it was a very physical shock to see that man.<sup>52</sup>

Ms. Y [REDACTED] made an in-court identification of Mr. Odom as her assailant at trial. “[I]t is difficult to hypothesize a more suggestive setting for an identifying witness, when the individual whom the witness had selected from the photo array was seated at the defense table, and the witness could infer that the police obviously believed that the man whose photograph the witness had described as ‘looking like’ the culprit was indeed guilty.” *Benn*, 978 A.2d at 1282. For Ms. Y [REDACTED] the suggestivity would have been exacerbated by all that had preceded it. “The end result of suggestion, whether intentional or unintentional, is to fortify testimony bearing directly

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<sup>51</sup> Y [REDACTED] G.J. at 5-6.

<sup>52</sup> Gov't. br. at 6 (quoting transcript).

on guilt that juries find extremely convincing and are hesitant to discredit.” *Perry*, 132 S.Ct at 733 (Sotomayor, J., dissenting) (citations omitted).

Ms. Y [REDACTED] identification of Mr. Odom as her assailant likely had a profound impact on her jury. By the time of trial, she was certain. She told the jury that her assailant “had left her with an image of his face etched in her mind.”<sup>53</sup> But even if the jury recognized the weaknesses in Ms. Y [REDACTED] identification, notwithstanding her confidence by the time of trial, given the circumstances under which she viewed her assailant and the nature of her pretrial identifications, the government had corroborating proof that she was correct: the perpetrator had left a hair, and that hair matched Mr. Odom.

#### **B. The False Corroboration of FBI Microscopic Hair Analysis**

The government relied on the spurious “science” of microscopic hair analysis that provided persuasive-sounding,<sup>54</sup> but false corroboration of Ms. Y [REDACTED] misidentification of Mr. Odom as the perpetrator. In its brief the government writes: “Hair analysis by Federal Bureau of Investigation Special Agent Myron T. Scholberg, an expert in microscopic analysis, showed that a hair found on Miss Y [REDACTED] nightgown was microscopically like appellant’s head hair.”<sup>55</sup> The United States explained the probative value of Agent Scholberg’s conclusion that the hairs were microscopically similar. It wrote: “This was significant because it is a very rare phenomenon; only eight or ten times in the past ten years, while performing thousands of analyses, had

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<sup>53</sup> Gov’t. br. at 4.

<sup>54</sup> See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (“Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.”) (citation omitted); *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) (“Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse.”).

<sup>55</sup> Gov’t. br. at 7.

Scholberg reported that he could not distinguish even microscopically between two or three known samples.”<sup>56</sup> The prosecutor argued in closing that there was “no reason in this world to disbelieve” him.<sup>57</sup>

FBI Special Agent Myron Scholberg’s attempt to create a statistical basis for his conclusion that the similarity of the hairs was “very rare” was deceptive and flawed. First, analysts neither routinely compared known hair samples to known hair samples, nor kept a mental log of the characteristics of each sample ever viewed. For what conceivable purpose would one, for instance, compare the known blond hair sample from Ms. Y██████ to the known African-American hair sample of Mr. Odom? Nor is it humanly possible to store and retrieve in one’s memory the characteristics of all of the hairs in the thousands of examinations an analyst has conducted. Special Agent Michael Malone testified in a similar fashion at Donald Gates’ trial. According to the government’s brief, he explained that it was “‘highly unlikely’ that the hair found on the victim came from someone other than [Mr. Gates]. Malone indicated that in approximately 10,000 hair examinations he had performed over an eight year period, there were only two instances in which hairs from two different people were so similar that he could not differentiate them.” Gov’t. br. at 8-9, *Donald E. Gates v. United States*, D.C. Court of Appeals No. 82-1529. The United States has conceded that this testimony was “unfounded” in that it “exaggerated the probative value of the hair match.”<sup>58</sup>

In fact, “there is not and never has been any statistical basis for hair comparison.”

Brandon L. Garrett and Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful*

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<sup>56</sup> *Id.*

<sup>57</sup> Def. br. at 19 n.13.

<sup>58</sup> Letter of Michael T. Ambrosino and Patricia A. Riley, Special Counsels to the United States Attorney for the District of Columbia, to Chief Judge Satterfield, at 2, n. 3 (November 15, 2010).

*Conviction*, 95 VA. L. REV. 1, 52 (2009). The National Research Council of the National Academy of Sciences' landmark report on the forensic sciences was devastating in its critique of hair analysis. It found that "[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population."<sup>59</sup> Accordingly, "[a]ll analyst testimony ... stating that a crime scene hair was 'highly likely' to have come, 'very probably' came, or did come from the defendant violates the basic scientific criterion that expressions of probability must be supported by data."<sup>60</sup> Because there is no data, there is no basis for any statistical expression of the probability of the hair match. FBI Trace Evidence Unit Chief Cary Oien has acknowledged that "[g]iven that useful statistical data are not generated . . . one must accept that the answer to the question, what is the probability of a coincidental match between the questioned hair and the known sample? is we do not know."<sup>61</sup>

Agent Scholberg's laboratory notes do not support his claim that the hairs were similar. In his notes Agent Scholberg describes the hair left by the perpetrator on Ms. Y ██████ nightgown ("Q1") in the simplest terms possible: "Bl [black] HH [head hair] frgt [fragment] in Q1 is like K3 [Mr. Odom's known sample of head hairs]."<sup>62</sup> That is, the only characteristics he described were color, part of the body, and that it was a fragment of a hair. His description of the hair sample from Mr. Odom appears to contain very few characteristics. It states: "Bl [black] - Negroid - [two words are indecipherable] very coarse, clumping dense. Thin white cut. [cuticle] hard to differentiate from cortex." *Id.* That is all the support there is in the bench

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<sup>59</sup> National Research Council, National Academy of Sciences, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD*, at 160 (2009) (hereafter "the NRC Report")

<sup>60</sup> Garrett and Neufeld at 19.

<sup>61</sup> Cary T. Oien, *Forensic Hair Comparison: Background Information for Interpretation*, 11 *FORENSIC SCI.* 1, 14 (Summer 2009).

<sup>62</sup> FBI Laboratory Worksheet, attached as Appendix 3.

notes for testimony so devastating to Mr. Odom's case, that his hair and a hair left by the perpetrator were microscopically alike, a phenomenon said to be very rare.

The National Research Council wrote in its critique of hair analysis: "There appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a 'match.'"<sup>63</sup> Former FBI trace evidence chief Oien has acknowledged that even the same examiner may describe the same hair differently on different days.<sup>64</sup> The mitochondrial DNA results now dispel any claim of hair microscopy to reliably associate a person to a crime.

No other testimony purported to link Mr. Odom to this offense. Special Agent Maureen Higgins, an FBI expert in the field of serology, testified that she had found intact sperm cells on Ms. Y [REDACTED] robe and pillow case.<sup>65</sup> Her testimony thus corroborated Ms. Y [REDACTED] testimony that she had been raped and sodomized. But it did not link Mr. Odom in any way to those crimes.<sup>66</sup>

### C. Mr. Odom and his Alibi Defense

When he was arrested on May 4, 1981, more than two months after the February 24, 1981, crimes with which he would be charged, Mr. Odom was eighteen years old, but he had the educational attainments and the intellectual ability of someone much younger. He left school in 1979, after reportedly completing the 10<sup>th</sup> grade at a vocational high school. But just two years before, at fourteen or fifteen, he had attended a school that was an extension of the Area C

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<sup>63</sup> NRC Report at 160. In Donald Gates' case, Agent Malone testified that he "tested 20 individual characteristics, using a high powered microscope" and that the questioned hairs matched Mr. Gates' sample "as to all 20 characteristics." *United States v. Donald E. Gates*, No. 82-1529, Gov't brief at 8 (emphasis added). At trial, Agent Scholberg testified to matching fifteen characteristics, but his bench notes support far fewer.

<sup>64</sup> Oien, 11 FORENSIC SCI. at 14.

<sup>65</sup> Gov't. br. at 7, Report of the FBI at 2 (Aug. 28, 1981)..

<sup>66</sup> Def. br. at 5.

Mental Health Clinic where he was functioning on a *third grade level*, according to records reviewed by the presentence report writer.<sup>67</sup> This third grade functioning was said to represent “tremendous” academic progress for Mr. Odom.<sup>68</sup> According to post-conviction psychological tests, Mr. Odom’s full scale IQ was 73, placing him in the fourth percentile of the population on which the test was based.<sup>69</sup> His verbal scale IQ was 74. His performance IQ was also 74.<sup>70</sup>

The fortuity that a sister came home from the hospital with her newborn child on the day that the offense was committed allowed Mr. Odom and his mother to recall their whereabouts on February 24, 1981, even though months separated that date from the day of Mr. Odom’s arrest. Mrs. Odom testified that Kirk was sleeping in his bedroom between 6:00 and 7:00 a.m. on February 24, 1981, the day the baby arrived at home.<sup>71</sup>

Kirk Odom testified that he had been at home asleep that morning and that he did not commit the crimes with which he was charged.<sup>72</sup> He also told the jury that he did not own a blue nylon jacket and that he did not know what a travelers check was.<sup>73</sup> The perpetrator, it will be recalled, remarked on the difficulty he would have negotiating such checks.<sup>74</sup>

A skilled felony one prosecutor, Steven Gordon, elicited a “nonsensical” response from Mr. Odom when he challenged a discrepancy between the weeks (five or six) and months (three)

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<sup>67</sup> Presentence report at 5.

<sup>68</sup> *Id.*

<sup>69</sup> Psychological evaluation at 10 (March 26, 1984). This score was said to place Mr. Odom in the “borderline” range. *Id.*

<sup>70</sup> In *Atkins v. Virginia*, the Supreme Court cited approvingly authority that places Mr. Odom’s scores within the “cutoff” for a diagnosis of mental retardation. *Atkins*, 536 U.S. at 304, 309, n.5 (U.S. 2002).

<sup>71</sup> Def. br. at 5; Gov’t. br. at 8.

<sup>72</sup> Def. br. at 5; Gov’t. br. at 7.

<sup>73</sup> Gov’t. br. at 7.

<sup>74</sup> Y█████ statement at 1 (“Yea, I would like to see me cash those Travelers Checks.”).

that Mr. Odom testified that he had been working before the start of trial. The government describes the cross-examination in its brief as follows:

[Mr. Odom] admitted that after finishing school in the tenth grade, he had been unemployed until he obtained a job at Hechinger's about three months prior to trial, where he was still working; later, however, he stated that he had been working there for only five or six weeks. When asked to explain this discrepancy in his testimony, he stated nonsensically, "I got up earlier in the morning."<sup>75</sup>

In his closing, the prosecutor argued that Mr. Odom's "nonsensical" answer showed that he was a liar:

Ladies and gentlemen, I suggest to you that there is a simple explanation for all of that, and that is that it is easy to tell the truth. The truth never changes, no matter how many times you tell it. But it is awfully hard to keep a lie straight isn't it?<sup>76</sup>

After just two hours of deliberation, the jury convicted Mr. Odom on all counts.<sup>77</sup> On January 6, 1982, Chief Judge H. Carl Moultrie I sentenced Mr. Odom to five to fifteen years for burglary while armed, eight to thirty years for rape while armed, three to nine years for sodomy while armed and four to twelve years for armed robbery for a total sentence of twenty to sixty-six years in prison. He served more than twenty-one years in prison before being granted parole. He is on parole supervision in the sex offender unit. His parole does not expire until 2047.

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<sup>75</sup> Gov't. br. at 7-8.

<sup>76</sup> Gov't. br. at 13. The briefs and citations to transcript make clear that the argument referred to the discrepancy with respect to the length of Mr. Odom's employment. On appeal, the government wrote: "Whatever the wisdom of the prosecutor's choice of the word 'lie,' it was perfectly proper for him to argue that appellant's meaningless explanation for his contradictory stories was an indication that he was not telling the truth." Gov't br. at 13.

<sup>77</sup> Docket entries, *United States v. Kirk L. Odom*, F-2473-81 (indicating that the jury deliberated for one hour and forty minutes on September 8, 1981, and twenty-five minutes on September 9, 1981).

### **III. THIS COURT MUST VACATE THE CONVICTIONS AND DISMISS THE INDICTMENT WITH PREJUDICE**

#### **A. The Statutory Framework**

The Innocence Protection Act provides that “[a] person convicted of a criminal offense in the Superior Court of the District of Columbia may move the court to vacate the conviction or to grant a new trial on grounds of actual innocence based on new evidence.” D.C. Code § 22-4135

(a). The statute requires the movant to set forth “specific, non-conclusory facts”:

- (1) Identifying the specific new evidence;
- (2) Establishing how that evidence demonstrates that the movant is actually innocent despite having been convicted at trial or having pled guilty; and
- (3) Establishing why the new evidence is not cumulative or impeaching.

D.C. Code § 22-4135 (c). Under the statute, this Court “may consider any relevant evidence” in determining this motion, but it “shall consider the following”:

- (A) The new evidence;
- (B) How the new evidence demonstrates actual innocence;
- (C) Why the new evidence is not cumulative or impeaching;
- (D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial[.]

D.C. Code § 22-4135 (g)(1).

The relief granted depends on the standard of proof that is satisfied. “If, after considering the factors listed [above], the court concludes by clear and convincing evidence that the movant is actually innocent of the crime, the court shall vacate the conviction and dismiss the relevant count with prejudice.” D.C. Code § 22-4135 (g)(2). If the court is persuaded that “it is more likely than not that the movant is actually innocent,” it must grant a new trial. D.C. Code § 22-

4135 (g)(3). Mr. Odom more than satisfies the clear and convincing standard. Therefore, this Court must vacate his conviction and dismiss the counts with prejudice.

### **B. The New Evidence of DNA Testing**

Deoxyribonucleic acid (DNA) is the blueprint of our identity and can be found in the nucleus of cells (nuclear DNA, or nDNA), as well as in other cellular components called mitochondria (mitochondrial DNA, or mtDNA). Nuclear DNA testing can provide remarkable results from biological fluids such as blood, semen, sperm and saliva. Analysis of mtDNA has proven particularly useful with biological material originating in certain types of body tissues that do not typically contain enough nuclear material to type, such as hairs.<sup>78</sup> As the Supreme Court has observed, “Modern DNA testing can provide powerful new evidence unlike anything known before. ... It is now possible to determine whether a biological tissue matches a suspect with near certainty.” *Osborne*, 129 S.Ct. at 2316. Here, the miracle of DNA technology has provided unassailable proof that the sperm and hair left by the perpetrator on Ms. Y [REDACTED] pillow case, robe and nightgown, could *not* have come from Kirk Odom.<sup>79</sup>

Bode Technologies, a private DNA laboratory with a contract with the United States Attorney’s Office, conducted nuclear DNA testing on cuttings from the two items of physical evidence that the FBI had determined, in 1981, contained seminal stains and sperm of the perpetrator: the multicolored pillowcase taken from a pillow that the assailant had placed under Ms. Y [REDACTED] hips and the robe that she put on as soon as the perpetrator had left. First, Bode

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<sup>78</sup> See, e.g., John Butler, *FUNDAMENTALS OF FORENSIC DNA TYPING* (2010), at 375. This is because “there are hundreds if not thousands of copies of mtDNA in each cell,” compared with two copies of nDNA. *Id.*

<sup>79</sup> The nuclear DNA test results, *Forensic Case Report*, Bode Technology (February 27, 2012) (hereinafter “Bode Report”), is attached as Appendix 4. The mitochondrial DNA test results, *Test Report for Mitotyping Technologies Case No. 3147*, Mitotyping Technologies LLC (January 18, 2012) (hereinafter “Mitotyping Report”), attached as Appendix 5.

extracted out a “sperm fraction” from biological material on each of the cuttings in order to separate sperm DNA from other DNA (e.g. the victim’s) that may be present. Then, using short tandem repeat (STR) tests Identifiler and Identifiler Plus, Bode attempted to produce a genetic profile at 15 different locations on the DNA chain (loci), plus a sex locus that indicates whether the source of the sample is male or female.<sup>80</sup> Bode Report at 1. For comparison purposes, Bode also obtained a full genetic profile for Mr. Odom from a saliva sample he had provided.<sup>81</sup> *Id.*

The results are remarkable. Bode obtained partial DNA profiles from four of the sperm fractions – one cutting from the multicolored pillowcase and three from the robe. These results paint a genetic picture of the perpetrator that is straightforward, simple and unambiguous. Only one man’s sperm is on the evidence, and the DNA tests provide a nearly complete genetic profile of that man. The fullest results, those obtained from the sperm fraction of the stain left on Ms. Y█████ robe, tell us the rapist’s profile at twelve loci. Bode Report at 6. At all twelve of these loci, the results are different from the genetic profile of Mr. Odom. *Id.* Bode writes that Kirk Odom “is excluded as a possible contributor of the partial DNA profile.” Bode Report at 2-3, ¶¶ 10, 15, 16, 17, 18, 19, 20, 21. Bode arrives at this conclusion for every single genetic profile it

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<sup>80</sup> STRs are short segments of DNA that are repeated in tandem at locations (loci) throughout the nuclear genome; STR analysis involves determining the number of times a particular STR repeats in a sample of biological material. Studies have established that certain STRs – including the 15 tested in this case – are extremely variable from one person to the next, making them particularly useful in forensic identification. Analysis of STRs is by far the most widely-used type of nDNA testing found in forensic laboratories today. Identifiler and Identifiler Plus are two of the newest generation of STR test kits, incorporating additional loci (i.e. additional STRs) not available in earlier tests.

<sup>81</sup> A full genetic profile using the Identifiler or Identifiler Plus test kit includes 30 numbers – two at each of the 15 loci – corresponding to the number of repeats at that locus. There are two numbers at each locus because there are two copies of DNA, called alleles at each locus – one obtained from a person’s mother, the other from his father (e.g. a 14, 17 at locus D8 indicates that the individual inherited 14 repeats from one parent and 17 from the other at that locus). Since a difference between two samples at a single locus means that they could not have come from the same person, a full profile is not necessary for exclusionary purposes. *See infra.*

obtained – including not only every sperm fraction, but also every non-sperm (also called “epithelial”) fraction. *Id.*

These results are powerfully exonerating. As is well-recognized in the scientific community, a single inconsistent locus is enough to exclude. Thus, according to the current Federal Bureau of Investigation DNA Protocol Manual, “A forensic exclusion is declared when upon comparison of the DNA profile from a reference specimen ... to the DNA profile from a single-source Q [questioned] specimen, the profiles are found to be different at *one* or more loci.” FBI DNA Unit I STR Protocol Manual at Section 7.7.1.1. (Oct. 2, 2006) (emphasis added); *see also Roberts v. United States*, 916 A.2d 922, 925 (D.C. 2007) (error to preclude defendant from arguing that result at a single locus was exculpatory). Here, the nuclear DNA results could hardly provide more resounding proof that Mr. Odom has been excluded as the donor of the sperm to a scientific certainty.

Mitochondrial DNA testing was conducted on the hair used to convict Mr. Odom by Dr. Terry Melton, of Mitotyping Technologies, LLC. A saliva swab from Mr. Odom was sent to the same lab for mitochondrial analysis and comparison to the DNA results from hair left by the perpetrator. The results exclude Mr. Odom as the donor of the hair to a scientific certainty.

Forensic analysis of mtDNA typically focuses on two regions that are particularly variable between individuals, appropriately named hypervariable region I (HVI) and hypervariable region II (HVII). Put a different way, scientists look at these areas of the mtDNA genome because studies have shown that this is where differences between individuals are most likely to exist. These two regions are composed of several hundred repeating chemical units

called bases or nucleotides.<sup>82</sup> Mitochondrial DNA typing involves determining the sequence of these bases and comparing them to a standard mtDNA sequence.<sup>83</sup> Results are reported as a compilation of base differences from this standard for each sample analyzed. The set of base differences for any questioned samples are then compared to the set of differences for any known samples provided.

Unlike nuclear DNA, which is inherited as a patchwork from both parents, mitochondrial DNA is inherited wholly from one's mother.<sup>84</sup> Thus, siblings and maternal relatives can be expected to share the same mtDNA type. But mitochondrial DNA typing is as capable of excluding a particular person as a potential source just as surely as nuclear DNA: if there are two or more base differences between the sets under comparison (*e.g.*, the hair from the nightgown vs. Mr. Odom's known sample), the person who provided the known sample is excluded to a scientific certainty as the source of the questioned sample.<sup>85</sup> Such is the case here.

Mitotyping obtained a complete mitochondrial DNA profile from the questioned hair. Mitotyping Report at 1. After it analyzed the questioned hair, it opened and analyzed the known sample from Kirk Odom and obtained a complete mitochondrial DNA profile. *Id.* The profile of the hair left by the perpetrator is different from the Mr. Odom's profile at a remarkable eleven different nucleotide positions. *Id.* at 2, Table 1. Because the mitochondrial DNA profiles of

---

<sup>82</sup> There are four bases in DNA: adenine, thymine, cytosine and guanine (A, T, C, G). All forensic mtDNA typing laboratories examine a core set of about 600 bases in HVI and HVII; some laboratories also type additional bases flanking this core region.

<sup>83</sup> This standard, known as the revised Cambridge reference sequence (rCRS; the material used to create the original CRS was resequenced, creating a revised sequence in 1999), is used by all forensic mtDNA typing labs and provides for uniformity in comparison and reporting.

<sup>84</sup> While both the father's sperm and the mother's egg contribute to the nucleus (hence the patchwork of nDNA), all of the embryo's other cellular components – including the mitochondria (and consequently mtDNA) – originate solely from the egg. Butler at 378.

<sup>85</sup> *See id.* at 380-81.

questioned hair and the known sample are different, Mitotyping concludes, "Kirk Odom and his maternal relatives are excluded as the contributor of the questioned hair." *Id.* at 2.

### **C. Mr. Odom Has Always Maintained That He Is Innocent**

This motion is supported by "an affidavit by the movant, under penalty of perjury, stating that the movant is actually innocent of the crime that is the subject of the motion, and that the new evidence was not deliberately withheld by the movant for purposes of strategic advantage," as required by the statute.<sup>86</sup> D.C. Code § 22-4135 (d)(1). Although this affidavit is new, the assertion of innocence is not.

Mr. Odom has *always* maintained that he is innocent. He testified at trial under oath and presented an alibi defense. He told the presentence report writer that he "didn't have anything to do with the charge itself. One day, the police showed this picture to me and said that it looked like me. I said it didn't look like me. ... The police took my name and address and several months later<sup>87</sup> I was placed under arrest."<sup>88</sup>

In a letter to his defense counsel after his sentence was imposed Mr. Odom wrote:

Dear: Mr. Greenlee. This is Mr. Odom I want to know why I have to do time for something I don't know about. That lady don't know me and I don't know her or were she live at. and I want to know why they pitch me Can't we do something about it cause I don't want to spend time in here away from my little girl. And I think that somebody just don't want me on the street or the police told her to say it was me. All I know is I didn't do it so can't you do something about it cause I don't want to stay down here for a long time. I told you all and everything I know and what I remember. Do you think it wood be good if I move out of D.C. Wood you ask the judge if that's o.k. with him cause I didn't do it so write me back and tell me what he said cause I can't take this

---

<sup>86</sup> Kirk L. Odom's Affidavit of Actual Innocence (March 8, 2012), is attached as Appendix 6.

<sup>87</sup> In fact it was one month later, but, as has been shown, Mr. Odom had difficulty in assessing the passage of time.

<sup>88</sup> Presentence report at 3.

anymore cause I want to be with my family and my little girl before she gets big. I just don't want to be down here cause I know I don't belong down here and my people know "too."  
Kirk L. Odom.<sup>89</sup>

Mr. Odom thus has never asserted a defense inconsistent with his claim of innocence made here.

#### IV. CONCLUSION

One man raped, sodomized and terrorized S [REDACTED] Y [REDACTED]. He left his DNA at the scene on her pillowcase, robe and nightgown. In the absence of DNA testing, which did not then exist, the government used the evidence of the sperm and semen and a microscopic comparison of the hair to convict Mr. Odom of crimes he did not commit. The scientific results are dispositive: it is scientifically impossible for Mr. Odom to have left the sperm and semen on Ms. Y [REDACTED] pillowcase and robe, or the hair on her nightgown. The conclusion is inescapable: Mr. Odom was not the perpetrator. The evidence is not merely cumulative or impeaching. It is resounding, substantive proof of innocence. It proves that Ms. Y [REDACTED] was tragically mistaken in her identification of Mr. Odom as her assailant. It proves that the corroboration purportedly offered by microscopic hair analysis through the testimony of FBI Special Agent Myron Scholberg was as unreliable as it was misleading. No other conclusion is possible from this evidence. In light of the entire record, including the indisputable scientific proof, the tragic weakness of the identification evidence, and Mr. Odom's unwavering assertion, for thirty-years, of his innocence, there exists clear and convincing evidence that Kirk L. Odom is actually innocent.

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<sup>89</sup> Letter from Kirk L. Odom to Richard Greenlee, postmarked January 26, 1982. A copy is attached as Appendix 7.

WHEREFORE, for the foregoing reasons, it is respectfully requested that this motion be granted and that this Court vacate the convictions and dismiss the indictment with prejudice on the grounds of actual innocence.

Respectfully submitted,

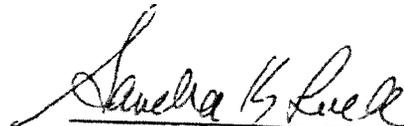


Sandra K. Levick # 358630  
Chief, Special Litigation Division  
Public Defender Service  
633 Indiana Avenue, N.W.  
Washington, D.C. 20004

Slevick@pdsdc.org  
202-824-2383 (direct)  
202-824-2983 (fax)

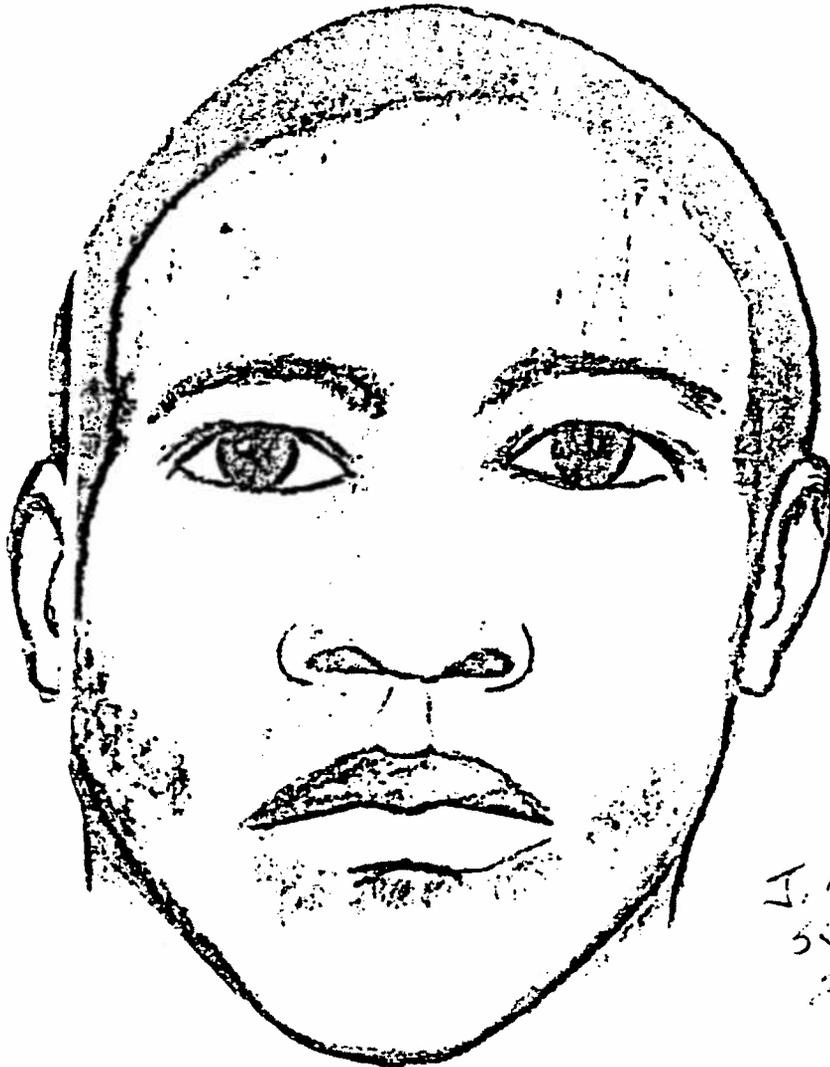
#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Vacate Conviction and Dismiss Indictment With Prejudice on the Grounds of Actual Innocence Under the Innocence Protection Act has been served by hand and by electronic mail on Robert Okun, Chief, Special Proceedings Division, and Assistant United States Attorneys James Sweeney and Kim Herd, 555 4th Street, N.W., Washington, D.C. 20001, this 14<sup>th</sup> day of March, 2012.



Sandra K. Levick

# **APPENDIX 1**



J. 111 23.10-  
55 21-117  
2 25-11

SX 31-117

BURGLARY & RAPE WHILE ARMED

CCN #095-111

ON FEBRUARY 24, 1981, ABOUT 0600 HOURS, THE BELOW DESCRIBED SUBJECT FORCED THE BARS FROM THE WINDOW AND ENTERED A RESIDENCE IN THE 200 BLOCK OF 13th STREET, SOUTHEAST. THE SUBJECT SEXUAL ASSAULTED THE COMPLAINANT AND LEFT HER TIED AND GAGGED.

LOF: BLACK, MALE, 18 to 25 YEARS, 5'7" to 5'9", MEDIUM COMPLEXION, SLIM, CLOSE CUT HAIR AND CLEAN SHAVEN. HE WAS LAST SEEN WEARING A BLUE NYLON JACKET AND ARMED WITH A LARGE DARK HANDGUN.

ANY INFORMATION PLEASE CONTACT THE SEX BRANCH ON 727-4151 or 727-4252.

Department of the District of Columbia

John S. Barry, Jr.

or

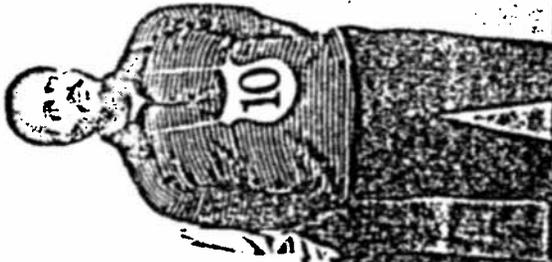
2-1-81



Reproduction Services Provided By:  
Identification and Records Division  
Reproduction Section

•  
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# **APPENDIX 2**



TUE MAY 19 1981  
LINEUP A BP  
0 88

## **APPENDIX 3**

To: Chief  
Metropolitan Police Department  
Washington, D. C. 20001

Attention: Mr. Charles E. Rinaldi  
Assistant Chief of Police  
Technical Services Bureau

FBI FILE NO. 95-243806

LAB. NO.

10610044 S ~~TR~~ MD TR

Re: KIRK ODOM - SUSPECT;  
SHERRY YOUNG - VICTIM;  
RAPE/SODOMY/BURGLARY

YOUR NO.

MCL#81-4705  
(Curtis/Board)  
CCR#095-111

Examination by:

*CC-CC to  
TR 6/22/81 re TR 8/27/81*

Examination requested by: Addressee

Reference: Letter dated June 10, 1981

Examination requested: Microscopic Analyses - Chemical Analyses

Specimens received:

Specimens personally delivered by Mr. Patrick J. Curtis  
on June 10, 1981:

ITEMS FROM VICTIM'S APARTMENT:

- Q1 Nightgown (Item 1)
- Q2 Sheet (Item 2)
- Q3 Sheet (Item 3)
- Q4 Gold pillowcase (Item 4)
- Q5 Gold pillowcase (Item 5)
- Q6 Multi-colored pillowcase (Item 6)

*PPup 8/30  
P.J. Curtis*

*AUSA Sellinger  
724-6135*

*7-1a  
7-7-81  
MTS: pms*

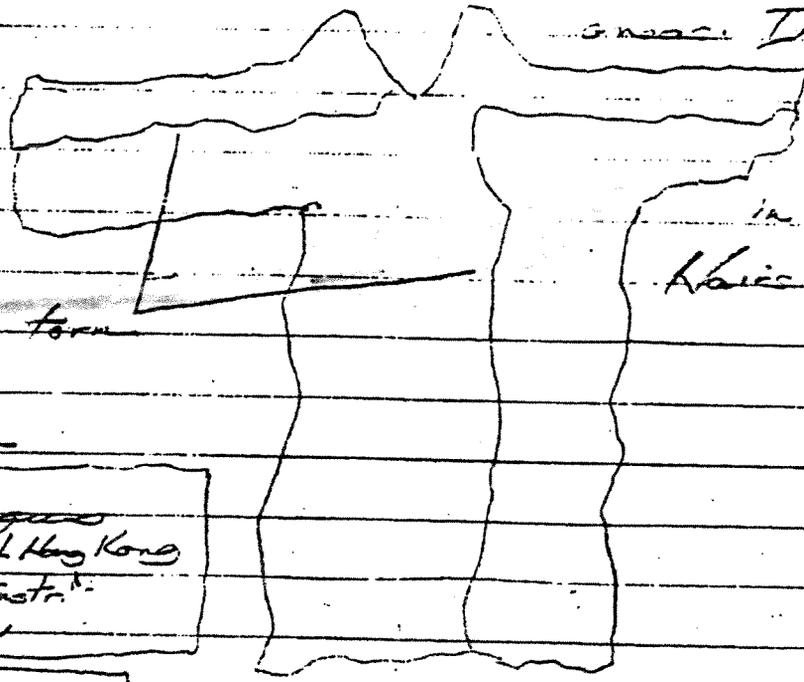
pillowcase  
Q7 Multi-colored (Item 7)  
Q8 Panties (Item 8)

ITEMS FROM VICTIM:

Q9 Robe (Item 16)  
Q10 Pubic hair combings (Item 17)  
Q11 Hair (Item 20)  
  
K1 Pubic hair sample from victim (Item 18)  
K2 Pubic hair sample from suspect (Item 21)  
K3 Head hair sample from suspect (Item 22)

Q11 - Hair taken off victim  
by hospital staff letter 6/11/71

Q1 - night gown pullover, white with red stripes and numerous designs (colors include green, red, yellow, purple) long sleeves with lace trim (also at collar), garment is torn in several places. Initial on collar



near label. Received sealed in a plastic bag. Hairs up to 3 1/2"

Label -

Magnus  
Made in British Hong Kong  
"Core Instr."  
100% cotton

STYLE: 746  
M

Q2 - white with multi-colored print (colors include orange, brown, green, blue, yellow) label -

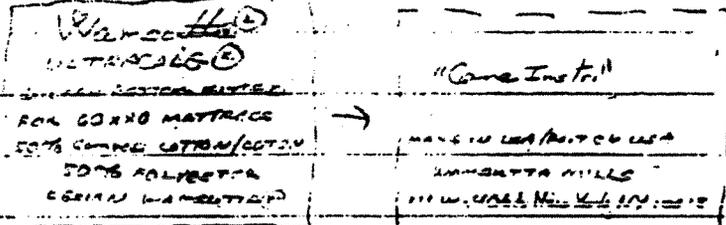
Initial on middle of back. Received sealed in a plastic bag. Hairs up to 6"

Wanamatta  
ULTRACAL  
QUEEN FLAT  
SFR 66202 HONOLULU  
STANBRO OSTEON/USTON  
5078 BOSTON  
DESIGN @ WANAMATTA

"Core Instr."  
MADE IN USA/FACTOR USA  
LANCASTER, MISSOURI  
111 W. KILLIP ST. ST. LOUIS, MISSOURI

7-7-81  
MTS: p119

Q3 - chest - same pattern as Q2 fitted chest,  
label -



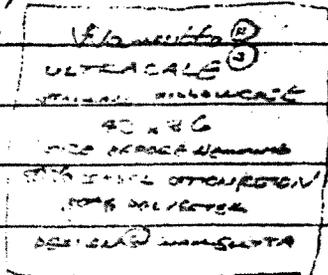
Initialed in same area as label. Recipient sealed in a plastic bag. Hairs up to 5 1/2"

Q4 - pillow case - gold - to auto folded,  
no label or markings present. Initialed in middle  
of closed end. Recipient sealed in a zip-lock plastic  
bag. Hairs < 2"

Q5 - pillow case - same as Q4, however auto folded,  
no label or markings. Initialed in middle of closed  
end. Recipient sealed in a zip-lock plastic bag.  
Hairs up to 3 3/4"

Q6 - pillow case - same pattern as Q2 chest

label -  
Hairs < 2"



Initialed in  
middle of open

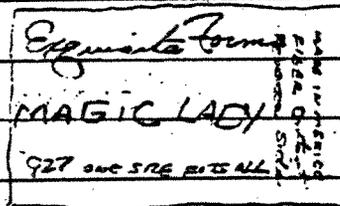
end. Recipient

sealed in a zip-lock  
plastic bag.

7-7-81  
MTS:pmg

Q7 - pillowcase - same as Q6. Initial in middle of open end. Received sealed in a zip-lock plastic bag. Hairs up to 3 1/8"

Q8 - panties - blue knit, forming, sealed label -



"One Inst" → 68% Nylon 32% Bi-Cord knit Fiber (65% Nylon, 35% Spandex) Cord knit lining, 100% Cotton

Initial on seam near label. Received sealed in a zip-lock plastic bag, hairs up to 2 3/4"

Q9 - robe - orange knit zipper from neck to waist, long sleeves. No labels present. Received sealed in a plastic bag. Initial on inside middle of collar. Hairs up to 2 1/4"

Q10 - pubic hair combing from victim received attached to a black comb then sealed in a white envelope. Hairs up to 2 1/2"

7-12  
7-7-81  
MTS:pmg

Oil - hair from victim recovered in a  
glass vial. Hair 42"

TR

A

7-1a

7-7-81

MTS: p

10610044 RQTR

K<sub>1</sub> - pubic hair sample from victim received sealed in a white envelope

K<sub>2</sub> - pubic hair sample from suspect received sealed in a white envelope, then in a larger Manila envelope with K<sub>3</sub> Hair <2''

K<sub>3</sub> - head hair sample from suspect received sealed in a Manila envelope then in a larger Manila envelope with K<sub>2</sub> Hair <2''

El. Negro - part of - very coarse clipping from. This with cut head to microscopic for cont. Al HN for in  $\phi 1$  is like  $\phi 3$ .

$\phi 11$  - Negroid h. F. T. - USCP's  
Body area?

## **APPENDIX 4**



10430 Furnace Road, Suite 107  
Lorton, VA 22079  
Phone: 703-646-9740

---

**Forensic Case Report**  
**February 27, 2012**

To:  
James Sweeney  
United States Attorney's Office  
555 4<sup>th</sup> Street, NW, Room 10917  
Washington, DC 20530

**Bode Case #:** CCA1223-0030  
**MCL #:** 81-04705  
**CCN #:** 1981-095-111

**List of evidence received on February 14, 2012 for possible DNA analysis:**

<u>Bode Sample Name</u>	<u>Agency Sample ID</u>	<u>Agency Description</u>
CCA1223-0030-E01	5-1S	Labeled as "Cuttings taken from MCL #5 Gold Pillowcase"
CCA1223-0030-E02	5-2S	Labeled as "Cuttings taken from MCL #5 Gold Pillowcase"
CCA1223-0030-E03	5-3S	Labeled as "Cuttings taken from MCL #5 Gold Pillowcase"
CCA1223-0030-E04	5-4S	Labeled as "Cuttings taken from MCL #5 Gold Pillowcase"
CCA1223-0030-E05	7-1S/2S	Labeled as "Cuttings taken from MCL #7 Multicolored Pillowcase"
CCA1223-0030-E06	16-1S	Labeled as "Cuttings taken from MCL #16 Robe"
CCA1223-0030-E07	16-4S	Labeled as "Cuttings taken from MCL #16 Robe"
CCA1223-0030-E08	16-6S	Labeled as "Cuttings taken from MCL #16 Robe"
CCA1223-0030-E09	16-7S	Labeled as "Cuttings taken from MCL #16 Robe"
CCA1223-0030-E10	16-8S	Labeled as "Cuttings taken from MCL #16 Robe"
CCA1223-0030-R11	AA-1	Labeled as "Buccal Reference Sample Kirk Odom"

**DNA Processing, Results, and Conclusions:**

Sample CCA1223-0030-E05, and samples -E08 through -R11 were processed for DNA typing by analysis of the 13 CODIS Short Tandem Repeat loci, the D2S1338 locus, the D19S433 locus, and the Amelogenin locus using the Applied Biosystems AmpFISTR Identifier kit. Samples CCA1223-0030-E01 through -E04 and -E06 through -E07 were processed for DNA typing by analysis of the 13 CODIS Short Tandem Repeat loci, the D2S1338 locus, the D19S433 locus, and the Amelogenin locus using the Applied Biosystems AmpFISTR Identifier Plus kit. Appropriate positive and negative controls were used concurrently throughout the analysis. The DNA profiles reported in this case were determined by procedures that have been validated according to recommendations established by the Scientific Working Group on DNA Analysis Methods (SWGDM) that were adopted as Federal Standards.

1. A DNA profile was obtained from sample CCA1223-0030-R11 (Kirk Odom).
2. No DNA profile was obtained from the sperm fraction (SF) of sample CCA1223-0030-E01.
3. A partial DNA profile was obtained from the epithelial fraction (EF) of sample CCA1223-0030-E01. Due to the limited data obtained, no conclusions can be made on this partial profile.
4. No DNA profile was obtained from the sperm fraction (SF) of sample CCA1223-0030-E02.

**DNA Processing, Results, and Conclusions (continued):**

5. No DNA profile was obtained from the epithelial fraction (EF) of sample CCA1223-0030-E02.
6. No DNA profile was obtained from the sperm fraction (SF) of sample CCA1223-0030-E03.
7. Alleles were obtained from the epithelial fraction (EF) of sample CCA1223-0030-E03 at the D19S433 and Amelogenin loci. Due to the limited data obtained, no conclusions can be made.
8. No DNA profile was obtained from the sperm fraction (SF) of sample CCA1223-0030-E04.
9. No DNA profile was obtained from the epithelial fraction (EF) of sample CCA1223-0030-E04.
10. The partial DNA profile obtained from the sperm fraction (SF) of sample CCA1223-0030-E05 is consistent with a male contributor.

The individual associated with sample CCA1223-0030-R11 (Kirk Odom) is excluded as a possible contributor of the partial DNA profile obtained from the sperm fraction (SF) of sample CCA1223-0030-E05.

11. Alleles were obtained from the epithelial fraction (EF) of sample CCA1223-0030-E05 at the D19S433 and Amelogenin loci. Due to the limited data obtained, no conclusions can be made.
12. No DNA profile was obtained from the sperm fraction (SF) of sample CCA1223-0030-E06.
13. Alleles were obtained from the epithelial fraction (EF) of sample CCA1223-0030-E06 at the D19S433 and Amelogenin loci. Due to the limited data obtained, no conclusions can be made.
14. No DNA profile was obtained from the sperm fraction (SF) of sample CCA1223-0030-E07.
15. The DNA profile obtained from the epithelial fraction (EF) of sample CCA1223-0030-E07 is consistent with a mixture of two individuals including a male contributor.

The individual associated with sample CCA1223-0030-R11 (Kirk Odom) is excluded as a possible contributor to the mixture DNA profile obtained from the epithelial fraction (EF) of sample CCA1223-0030-E07.

16. The partial DNA profile obtained from the sperm fraction (SF) of sample CCA1223-0030-E08 is consistent with a male contributor.

The individual associated with sample CCA1223-0030-R11 (Kirk Odom) is excluded as a possible contributor of the partial DNA profile obtained from the sperm fraction (SF) of sample CCA1223-0030-E08.

17. The DNA profile obtained from the epithelial fraction (EF) of sample CCA1223-0030-E08 is consistent with a mixture of two individuals including a male contributor.

The individual associated with sample CCA1223-0030-R11 (Kirk Odom) is excluded as a possible contributor to the mixture DNA profile obtained from the epithelial fraction (EF) of sample CCA1223-0030-E08.

Bode Case #: CCA1223-0030  
MCL #: 81-04705  
CCN #: 1981-095-111

Date: February 27, 2012

**DNA Processing, Results, and Conclusions (continued):**

18. The DNA profile obtained from the sperm fraction (SF) of sample CCA1223-0030-E09 is consistent with a male contributor.

The individual associated with sample CCA1223-0030-R11 (Kirk Odom) is excluded as a possible contributor of the DNA profile obtained from the sperm fraction (SF) of sample CCA1223-0030-E09.

19. The DNA profile obtained from the epithelial fraction (EF) of sample CCA1223-0030-E09 is consistent with a mixture of two individuals including a male contributor.

The individual associated with sample CCA1223-0030-R11 (Kirk Odom) is excluded as a possible contributor to the mixture DNA profile obtained from the epithelial fraction (EF) of sample CCA1223-0030-E09.

20. The DNA profile obtained from the sperm fraction (SF) of sample CCA1223-0030-E10 is consistent with a male contributor.

The individual associated with sample CCA1223-0030-R11 (Kirk Odom) is excluded as a possible contributor of the DNA profile obtained from the sperm fraction (SF) of sample CCA1223-0030-E10.

21. The DNA profile obtained from the epithelial fraction (EF) of sample CCA1223-0030-E10 is consistent with a mixture of two individuals including a male contributor.

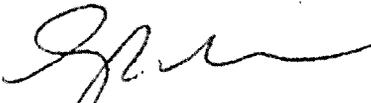
The individual associated with sample CCA1223-0030-R11 (Kirk Odom) is excluded as a possible contributor to the mixture DNA profile obtained from the epithelial fraction (EF) of sample CCA1223-0030-E10.

See Table 1 for summary of alleles reported for each sample.

**Notes:**

1. Any reference to body fluids in evidence descriptions are based on the written descriptions of the samples by the submitting agency.
2. The DNA extracts and submitted evidence will be returned to the Metropolitan Police Department.

Report submitted by,



Amy Baldwin, MSFS, F-ABC  
DNA Analyst III

Table 1: Analysis of Short Tandem Repeat Loci

Locus	CCA1223-0030- E01a1-EF	CCA1223-0030- E01a1-SF	CCA1223-0030- E02a1-EF	CCA1223-0030- E02a1-SF
D8S1179	No Results	No Results	No Results	No Results
D21S11	No Results	No Results	No Results	No Results
D7S820	No Results	No Results	No Results	No Results
CSF1PO	No Results	No Results	No Results	No Results
D3S1358	14, —	No Results	No Results	No Results
TH01	No Results	No Results	No Results	No Results
D13S317	No Results	No Results	No Results	No Results
D16S539	No Results	No Results	No Results	No Results
D2S1338	No Results	No Results	No Results	No Results
D19S433	15, 15	No Results	No Results	No Results
vWA	No Results	No Results	No Results	No Results
TPOX	No Results	No Results	No Results	No Results
D18S51	No Results	No Results	No Results	No Results
Amelogenin	X, —	No Results	No Results	No Results
D5S818	No Results	No Results	No Results	No Results
FGA	No Results	No Results	No Results	No Results

— = Possible Additional Alleles

Table 1: Analysis of Short Tandem Repeat Loci (continued):

Locus	CCA1223-0030- E03a1-EF	CCA1223-0030- E03a1-SF	CCA1223-0030- E04a1-EF	CCA1223-0030- E04a1-SF
D8S1179	No Results	No Results	No Results	No Results
D21S11	No Results	No Results	No Results	No Results
D7S820	No Results	No Results	No Results	No Results
CSF1PO	No Results	No Results	No Results	No Results
D3S1358	No Results	No Results	No Results	No Results
TH01	No Results	No Results	No Results	No Results
D13S317	No Results	No Results	No Results	No Results
D16S539	No Results	No Results	No Results	No Results
D2S1338	No Results	No Results	No Results	No Results
D19S433	15, 15	No Results	No Results	No Results
vWA	No Results	No Results	No Results	No Results
TPOX	No Results	No Results	No Results	No Results
D18S51	No Results	No Results	No Results	No Results
Amelogenin	X, —	No Results	No Results	No Results
D5S818	No Results	No Results	No Results	No Results
FGA	No Results	No Results	No Results	No Results

— = Possible Additional Alleles

Table 1: Analysis of Short Tandem Repeat Loci (continued):

Locus	CCA1223-0030- E05a1-EF	CCA1223-0030- E05a1-SF	CCA1223-0030- E06a1-EF	CCA1223-0030- E06a1-SF
D8S1179	No Results	14, 17	No Results	No Results
D21S11	No Results	No Results	No Results	No Results
D7S820	No Results	No Results	No Results	No Results
CSF1PO	No Results	No Results	No Results	No Results
D3S1358	No Results	15, 16	No Results	No Results
TH01	No Results	No Results	No Results	No Results
D13S317	No Results	No Results	No Results	No Results
D16S539	No Results	No Results	No Results	No Results
D2S1338	No Results	No Results	No Results	No Results
D19S433	15, --	11, 13	15, --	No Results
vWA	No Results	15, 19	No Results	No Results
TPOX	No Results	No Results	No Results	No Results
D18S51	No Results	No Results	No Results	No Results
Amelogenin	X, --	{X, Y}	X, --	No Results
D5S818	No Results	11, 12	No Results	No Results
FGA	No Results	No Results	No Results	No Results

( ) = Minor Allele -- = Possible Additional Alleles { } = Imbalanced Alleles

Table 1: Analysis of Short Tandem Repeat Loci (continued):

Locus	CCA1223-0030- E07a1-EF	CCA1223-0030- E07a1-SF	CCA1223-0030- E08a1-EF	CCA1223-0030- E08a1-SF
D8S1179	13, 14	No Results	13, 14, (17)	14, 17
D21S11	29, 30	No Results	29, 31	No Results
D7S820	No Results	No Results	No Results	No Results
CSF1PO	12, --	No Results	No Results	No Results
D3S1358	(14), 15, 16	No Results	14, (15), 16	15, 16
TH01	7, 7	No Results	7, --	9, --
D13S317	8, 12	No Results	11, (12)	No Results
D16S539	9, 11	No Results	11, --	No Results
D2S1338	No Results	No Results	No Results	No Results
D19S433	14, 15, 16.2	No Results	(11), (13), 15	11, 13
vWA	16, 18, 19	No Results	(15), 16	(15, 19)
TPOX	8, (10)	No Results	10, --	No Results
D18S51	16, --	No Results	No Results	No Results
Amelogenin	X, (Y)	No Results	X, (Y)	X, Y
D5S818	12, (13)	No Results	(11), 12	11, 12
FGA	19, --	No Results	24, --	No Results

( ) = Minor Allele -- = Possible Additional Alleles { } = Imbalanced Alleles

Table 1: Analysis of Short Tandem Repeat Loci (continued):

Locus	CCA1223-0030- E09a1-EF	CCA1223-0030- E09a1-SF	CCA1223-0030- E10a1-EF	CCA1223-0030- E10a1-SF
D8S1179	(13), 14, (17)	14, 17	(13), 14, (17)	14, 17
D21S11	29, (31), 32.2, (35)	32.2, 35	29, 31, 32.2, 35	32.2, 35
D7S820	8, —	8, 11	8, 11	8, 11
CSF1PO	No Results	No Results	No Results	No Results
D3S1358	(14), 15, 16	15, 16	(14), 15, 16	15, 16
TH01	7, 8, 9	8, 9	7, 8, 9	8, 9
D13S317	9, 11	9, 11	9, 11, (12)	9, 11
D16S539	11, —	10, 11	(10), 11	10, 11
D2S1338	No Results	No Results	No Results	No Results
D19S433	11, 13, 15	11, 13	11, 13, 15	11, 13
vWA	15, 16, (19)	15, 19	15, 16, 19	15, 19
TPOX	9, 10	8, 9	(8), (9), 10	8, 9
D18S51	No Results	No Results	No Results	No Results
Amelogenin	X, (Y)	X, Y	X, (Y)	X, Y
D5S818	11, 12	11, 12	11, 12	11, 12
FGA	21, 23	21, 23	21, 23, 24, (26)	21, 23

( ) = Minor Allele — = Possible Additional Alleles

Table 1: Analysis of Short Tandem Repeat Loci (continued):

Locus	CCA1223-0030- R11a1 (Kirk Odum)
D8S1179	14, 15
D21S11	29, 31
D7S820	11, 13
CSF1PO	11, 11
D3S1358	16, 17
TH01	7, 7
D13S317	11, 12
D16S539	10, 12
D2S1338	17, 22
D19S433	13, 16.2
vWA	14, 15
TPOX	[9, 10, 11]
D18S51	17, 20
Amelogenin	X, Y
D5S818	13, 13
FGA	18, 22

[ ] = Possible trallelic pattern

# **APPENDIX 5**



# MITOTYPING TECHNOLOGIES

FORENSIC MITOCHONDRIAL DNA + STR ANALYSIS

Case 3147

January 18, 2012

Sandra K. Levick  
Chief, Special Litigation Division  
Public Defender Service for the District of Columbia  
633 Indiana Avenue, N.W.  
Washington, DC 20004

Re: *MPD Laboratory #M110144; Kirk Odom*  
Test Report for Mitotyping Technologies Case No. 3147

## Items of Physical Evidence and Background

On December 14, 2011, Mitotyping Technologies, LLC received via FedEx 8768 4434 2734 from Harold Deadman of the Washington DC Metropolitan Police Department the following item:

1. One tape sealed white envelope labeled "M110144" and "Glass microscope slide inside a cardboard mailer containing hair fragment for mitochondrial DNA analysis (Q1-1)". The 1.5 cm hair in this package was taken for testing, consumed, and designated 3147Q1.

On January 5, 2012, the laboratory received via FedEx 8753 7863 4169 from Chris Pipe of the Public Defender Service the following items:

1. Two evidence tape sealed plastic ziploc bags bearing Mitotyping evidence tape labeled:
  - a. "Left cheek swab from Kirk Odom, collected by Chris Pipe, 1/4/12 3:30pm". This item was not tested.
  - b. "Right cheek swab from Kirk Odom, collected by Chris Pipe, 1/4/12 @ 3:30pm". This swab sample was designated 3147K1.

It was requested that this laboratory develop a mitochondrial DNA profile on the questioned hair and compare the profile to the mitochondrial DNA profile of Kirk Odom to determine if he could be excluded as the contributor of the questioned hair.

**Mitochondrial DNA (mtDNA) Analysis**

The 3147Q1 hair was analyzed before opening or handling the known sample. Both samples were analyzed according to standard protocol. For both samples, a complete mitochondrial DNA profile was obtained, comprising nucleotide positions 15998-16400 (hypervariable region 1; HV1) and nucleotide positions 30-407 (hypervariable region 2; HV2). All reagent blank negative controls and PCR negatives that accompanied these samples remained free of contaminating DNA throughout testing. Table 1 shows the nucleotide substitutions with respect to the standard published reference sequence for the samples in this case.

Table 1. Case 3147: Nucleotide substitutions in HV1 and HV2 for samples 3147Q1 and 3147K1.

Sample	Hypervariable Region 1						Hypervariable Region 2										
	16124	16223	16298	16300	16319	16327	73	96	105-110	114	152	249	263	309.1	309.2	309.3	315.1
Standard	T	C	T	A	G	C	A	C	CGGAGC	C	T	A	A	--	--	--	--
3147Q1	.	T	C	.	.	T	.	T	--	T	.	--	G	C	C	C*	C
3147K1	C	T	.	G	A	.	G	.	.	.	C	.	G	C	.	.	C

Table Notes: When (--) is in the published reference (Standard, top line), it means that at this position there is no nucleotide and the sample has an insertion. When (-- ) is in the sample, it means that the sample has a deletion at this position with respect to the Standard.

(.) means that the nucleotide at this position is the same as in the Standard.

(\*) means that length heteroplasmy was observed in the homopolymeric C-stretch associated with this site.

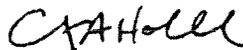
**Interpretation of Results**

The mitochondrial DNA profiles of 3147Q1 and 3147K1 are different. Therefore, Kirk Odum and his maternal relatives are excluded as the contributor of the questioned hair.

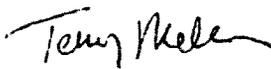
Case 3147

Please do not hesitate to contact our office if you have questions regarding this report. Unless other arrangements are made in advance, we will return all the remaining evidence and packaging to the submitting agencies within 30 days via FedEx.

Sincerely,



Charity A. Holland, MPH  
Quality Manager  
Forensic Examiner  
*Author*



Terry Melton, PhD  
Laboratory Director  
Forensic Examiner  
*Technical Reviewer*

**End of Report.**

Enclosure: Invoice

# **APPENDIX 6**

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Criminal Division – Felony Division

UNITED STATES OF AMERICA

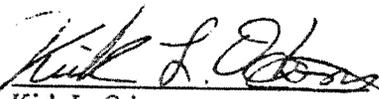
v.

KIRK L. ODOM

Criminal No. F-2473-81  
J. Dixon

**AFFIDAVIT OF ACTUAL INNOCENCE OF KIRK L. ODOM**

I, Kirk L. Odom, declare under penalty of perjury that I am actually innocent of the crimes of rape while armed, sodomy, first-degree burglary while armed and armed robbery that are the subject of the attached motion. I further declare under penalty of perjury that the new evidence set forth in the attached motion “was not deliberately withheld by [me] for purposes of strategic advantage.” See D.C. Code § 22-4135 (d)(1).

  
Kirk L. Odom

Date: March 8, 2012

District of Columbia: SS

Subscribed and sworn to before me, in my presence,  
this 8<sup>th</sup> day of March, 2012

  
Notary Public, D.C.

My commission expires ~~PATRICIA A. SLATER~~  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires September 30, 2013

# **APPENDIX 7**

Dear Mr. Greenlee This is Mr. Adams I want to know why I have to do time for something I Don't know about. That Lady Don't know me and I Don't know her or where she live at, and I want to know why they pitch me can't we do something about it cause I don't want to spend time in here away from my little girl, and I think that somebody just don't want me on the street or the police told her to say it was me, all I know is I didn't do it so can't you do some thing about it cause I don't want to stay down here for a long time. I ~~told~~ you'll and every thing I know and what I remember do you think it wood be good if I move out of D.C. wood you ask the Judge if that's ok. with him cause I didn't do it so write me back and tell me what he said cause I can't take this anymore cause I want to be with my family and my little girl before she gets big. I just Don't want to be down here cause I know I Don't belong down here and my people know "too".

Wick L. Adams

1901 D. ST. S.E.,  
Washington D.C., 20003



F.M.

Mr. Green Lee  
Public Defender Service  
451 INDIANA AVENUE, N.E.  
Washington D.C. 20001