

**[J-196-2002]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

**CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, JJ.**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 34 MAP 2002
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered on December 26, 2000 at
v.	:	No. 1511 MDA 1999, which affirmed the
	:	Order of the Court of Common Pleas of
	:	Dauphin County, Criminal Division,
	:	entered August 6, 1999 at No. 339 CD
	:	1997.
RASHEED LA-QUN WILLIAMS,	:	
	:	
Appellant	:	
	:	ARGUED: December 4, 2002

**CONCURRING OPINION**

**MADAME JUSTICE NEWMAN**

**DECIDED: June 19, 2006**

I agree with the majority that a remand is necessary to ascertain whether counsel had a reasonable basis for not seeking DNA testing. However, I write separately to set forth a different paradigm for resolving the claim raised by Appellant.

The three-prong test for determining whether counsel rendered ineffective assistance is well settled. To establish a claim of ineffective assistance of counsel, Appellant must prove that: (1) the underlying claim (entitlement to DNA testing) has arguable merit; (2) there was no reasonable basis for the inaction of his trial counsel; and (3) he suffered prejudice as a result, which means that there is a reasonable probability that

the outcome of the proceedings would have been different had counsel acted in the manner Appellant alleges he should have. Commonwealth v. Paddy, 800 A.2d 294, 306 (Pa. 2002).

Commonwealth v. Brison, 618 A.2d 420 (Pa. Super. 1992) and Commonwealth v. Reese, 663 A.2d 206 (Pa. Super. 1995), stand for the proposition that a post-conviction claim of entitlement to DNA testing has arguable merit where all of the following four elements are established: (1) the petitioner sought DNA testing at the time of trial, which counsel did not forward to the court; (2) the conviction relies on the victim's identification of the petitioner as the perpetrator; (3) the petitioner challenges that identification; and (4) the DNA testing would have the possibility of exonerating the petitioner. In the instant matter: (1) Appellant has alleged that he sought DNA testing, which counsel refused; (2) the only direct evidence linking him with the crime was the testimony of the victim; (3) Appellant testified at trial that he was not the perpetrator and was not involved in the crime in any way; and (4) Appellant presented evidence to support his defense theory that Robinson was Ames' assailant. Accordingly, I agree with the majority that Appellant has established that his claim of entitlement to DNA testing has arguable merit.

Appellant must next demonstrate that he has been prejudiced by counsel's failure to request DNA testing. Where the above pre-requisites are met, a post-conviction petitioner has demonstrated a reasonable probability that the outcome of the proceeding would have been different had counsel requested DNA testing. There is no way to determine whether the DNA test will exonerate the petitioner unless and until the test is performed. C.f. Commonwealth v. Chamberlain, 731 A.2d 593, 598 (Pa. 1999) (in ruling that the trial court erred in denying a defense request for a continuance to conduct DNA testing, this Court noted that the defense could not affirmatively establish prejudicial error without the results

of the testing, so prejudice was presumed where “[t]he defense reasonably argued that DNA testing might reveal that someone other than [the defendant] was at the scene and committed the murders”). Accordingly, I believe Appellant has presented sufficient facts to establish the prejudice prong. Therefore, unlike the majority, I do not believe that the PCRA court must wait until the petitioner receives the DNA results to determine if the failure of counsel to seek DNA testing was prejudicial.

The analysis that I set forth today is consistent with this Court’s requirement that all three prongs of the test for establishing ineffective assistance of counsel be met before relief is granted. Commonwealth v. Molloy, 856 A.2d 767 (Pa. 2004), Commonwealth v. Oqrod, 839 A.2d 294 (Pa. 2003), Commonwealth v. Lambert, 797 A.2d 232 (Pa. 2001). I disagree with the approach favored by the majority because it permits the petitioner to obtain relief in the form of DNA testing after establishing only arguable merit and lack of reasonable basis.

However, as previously stated, I agree with the majority that a remand is necessary to determine whether counsel had a reasonable basis for failing to request DNA testing.