

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

COMMONWEALTH OF VIRGINIA

V.

ROBIN LOVITT

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Record No. _____

AFFIDAVIT OF PETER NEUFELD

I, PETER NEUFELD, being duly sworn, depose and state as follows:

1. I am over the age of eighteen and have personal knowledge of the facts contained in this affidavit.
2. I am the co-founder and co-director of "The Innocence Project," at the Benjamin N. Cardozo School of Law. The Project currently represents more than two-hundred inmates throughout the nation seeking post-conviction DNA testing. Our Project has been responsible in whole or in part for exonerating more than fifty of the ninety-five men to be cleared by DNA testing long after their convictions were affirmed on appeal. Eleven of the exonerated men walked off death row. In fourteen of these cases, once the DNA testing cleared the wrongly convicted, the crime scene evidence DNA profile was entered into the convicted offender database and led to the identification of the actual perpetrator.

3. In 1995, I was appointed by the Governor of the State of New York to, and continue to serve on, the New York State Commission on Forensic Science, with responsibility for regulating all state and local crime laboratories.
4. I have been asked to examine the record and other documentation in Mr. Lovitt's case and address the evidentiary significance of potentially exculpatory DNA testing on two items of evidence – a scissors and a jacket – which were destroyed by the Commonwealth before Mr. Lovitt had exhausted his appellate and post-conviction remedies. I have been asked to comment on the relationship between additional DNA testing, which is no longer possible, and Mr. Lovitt's claim of actual innocence.
5. Although I am not a scientist, my partner and co-founder of the Innocence Project, Barry Scheck, and I have more experience than any lawyer, criminalist or scientist on the unique interface of law and post-conviction DNA testing. Often we are called upon to pursue additional post-conviction DNA testing in cases where some DNA testing had been done at an earlier phase of the proceedings. There have been several cases where further testing exonerated our clients.
6. I understand from a review of the facts contained in the Supreme Court of Virginia's opinion in the Lovitt direct appeal that in the early morning hours of November 18, 1998, Clayton Dicks was stabbed six times in the chest and back while working during the overnight shift at a billiards hall in Arlington County.

The cash drawer was removed from the cash register and carried away. Lovitt brought a cash drawer containing money to his cousin's home that same morning. An eyewitness who failed at the preliminary hearing to identify Lovitt, testified at trial that he was 80 percent certain that Lovitt was the killer. A criminalist from the Virginia Division of Forensic Science testified: (1) that DNA testing on two blood stains recovered from the blades of the presumptive murder weapon – a scissors – were consistent with the victim; (2) that the blood stain closer to the handle of the scissors was in fact a mixture of biological material from the victim and a second person; and (3) that there were blood stains discovered on Mr. Lovitt's jacket, but that the DNA testing failed to generate a result. Finally, the prosecution called a jailhouse informant with a long record of prior felonies, who had previously testified against at least one other inmate in exchange for leniency.

7. In his closing argument to the jury, the Commonwealth Attorney argued that: (1) the #17 allele found in the mixture of biological material on the stain closer to the handle of the scissors is consistent with Robin Lovitt; (2) the mixture is in the area of the scissors where somebody would likely be holding them; (3) sweat produces DNA; and (4) Lovitt was observed sweating when he arrived with the cash drawer at his cousin's. Commonwealth counsel argued that, in light of this evidence, the second contribution to the biological mixture on the scissors could have been Lovitt's sweat (J.A.1529-1530). The Commonwealth Attorney further argued that

the jacket recovered from Lovitt when he was arrested days later had been worn during the murder. He argued that the blood stains on the jacket belonged to the victim and that, given their location near the stomach, they were transferred during the struggle (J.A.1531-1532).

8. I have been informed by Lovitt's present counsel that after Mr. Lovitt was arrested, he gave a statement to the police readily admitting stealing the cash drawer but denying involvement in the murder. He described to the police how he hid in the bathroom while the murder took place and then, after the killer fled, he seized on the opportunity to steal the locked drawer from the cash register.
9. I have also been informed that Lovitt's habeas counsel uncovered the fact that the Commonwealth destroyed the scissors and the jacket, in addition to all of the other evidence used to convict Lovitt at trial, making further defense testing of these articles impossible. Given the prosecutor's theory of the case, and particularly his closing argument, current state of the art DNA testing on the jacket could definitively refute the assertion that the blood on the jacket came from the victim, and could provide material exculpatory evidence that the man who stabbed Clayton Dicks was someone other than Robin Lovitt.

THE SCISSORS

Additional DNA testing of Area B could eliminate Lovitt as the second contributor.

10. Carol Palmer, the Commonwealth's forensics expert, testified that she obtained human DNA from two areas on the scissors – Area A: the lower blade portion near the tip; and Area B: mid-section of the scissors right below the handle (J.A. 1167-68).
11. Ms. Palmer tested the DNA samples she collected using the PCR (Polymerase Chain Reaction) method and the Powerplex system (J.A. 1160-63). The Powerplex system uses eight different areas of DNA as markers: CSF1PO, TPOX, TH01, vWA, D16S539, D7S820, D13S317, and D5S818 (J.A. 1923-A).
12. Using this testing method, Ms. Palmer determined that DNA matching the DNA profile of Clayton Dicks (the deceased) at all eight loci was present at Area A of the scissors (J.A. 1175-76). She noted that Mr. Lovitt and his cousin Mr. Grant are eliminated as contributors of this DNA. Id.
13. The PCR testing of Stained Area B in the mid-section of the scissors revealed that DNA from more than one person was present in the sample (J.A. 1177). At one of the eight markers on the Powerplex System – the vWA loci – there are three alleles present, which indicate that DNA is being contributed by more than one person (J.A. 1177-78; 1923-A). In addition to the two alleles that match Mr. Dick's generic profile at this loci, there is an additional "17" allele that does not match Mr. Dick's DNA. Id. However, no non-Clayton Dicks alleles were observed for the other seven genetic locations.

14. The obvious inference from this data is that the primary contributor to the mixture at Area B is Clayton Dicks. What is far less obvious is the identity of the second contributor.
15. Nevertheless, in his closing argument, the prosecutor made much of the failure of the DNA test to exclude Lovitt as the second contributor: “Now, nobody could say yes, this is definitely the defendant’s DNA. But you will remember – and this is why it is important – that the goal of DNA analysis is to exclude people from being the contributors of the DNA. And what was on there was just one little piece, and it told you that there was an allele number 17. And what you know is that the defendant has an allele number 17. Robin Lovitt cannot be excluded as the person who left the sweat on those scissors” (J.A. 1531).
16. In context, the argument was entirely inappropriate. The presence of the #17 allele, without additional genetic information, has little probative weight. In the Caucasian and Hispanic populations, 45 percent of all persons would be expected to have the #17 allele. One would expect to see this same allele in more than 35 percent of the African-American population. In contrast, the eight marker (16 allele) match to Clayton Dicks is extraordinarily probative of identity. Only one person in the earth’s population would be expected to have this identical profile. Given the mystique of a DNA match, the prosecutor’s emphasis on the single allele concurrence could have significantly, albeit unduly, influenced the jury.

17. PCR testing today is more advanced than it was three years ago when the Virginia laboratory performed DNA tests on the evidence in this case. As applied to this case, the two most significant advances are the inclusion of five more genetic markers to the eight that were initially used on the scissors, and the addition of a specific marker that will tell you if the biological material was deposited by a female or a male. Obviously, if the DNA were further tested and it were determined that the number 17 allele were left by a female, not only would that have precluded the prosecutor's argument but it could provide information as to the gender of the murderer. Moreover, with the likelihood that additional alleles would be disclosed through the five new markers, the opportunity to exclude Lovitt as the source would be far greater. Obviously the more regions, or genes, one profiles, the more discriminating the test and the more able the test is to eliminate falsely included persons. DNA profiling is analogous to profiling physical traits. If all you knew were the eye color of the perpetrator, you couldn't eliminate as many suspects as you could if you also knew the perpetrator's height, weight, hair color and facial characteristics.

**Testing of Untested surface areas of the scissors could eliminate
Lovitt and identify someone else.**

18. Additional DNA testing could also have been done on portions of the scissors that were not swabbed and sampled by Ms. Palmer. Ms. Palmer testified that she "did

not swab the entire length of the scissors,” and that there were areas of the scissors that were not tested for genetic material (J.A. 1187-88). Ms. Plamer also failed to perform DNA testing on the handle of the scissors. Id.

19. It is more likely that the assailant put his hands on the handle of the scissors than on the blades. Likewise, people often put their hands to their mouths, eyes, or nose and then back on whatever they are holding – permitting nucleated cells to migrate from face to object. Yet the handles were never swabbed and never tested. It is also more likely, everything else being equal, that the attacker will accidentally cut himself with scissors, given the two blades, than with a knife. Small amounts of blood could be lodged in the crevices of the screw or elsewhere, however, the scissors were not taken apart and tested. This additional testing, too, could have definitively ruled Lovitt out and identified another as a DNA contributor on the scissors.
20. Genetic identification of a third person would be extremely useful. If an interpretable profile of a person other than the deceased and Lovitt is produced, not only will it, given the facts of this case, produce exculpatory evidence, the profile from the evidence can be compared to the Virginia DNA database of convicted felons with the chance of identifying the true perpetrator of this crime.

LOVITT'S JACKET.

21. Ms. Palmer also performed DNA testing on a jacket that came from Mr. Lovitt (J.A. 1169-70). She testified that the stain on the front of the jacket was blood, but that she could not tell whether the blood was human or animal blood (J.A. 1182, 1185-86). In order to extract DNA from the stain thought to be blood, Ms. Palmer cut out a portion of the material from the jacket. She tested a portion of the stain for DNA, and left a part of the stain untested. Id. Ms. Palmer's test of the purported blood on the jacket was inconclusive (J.A. 1181, 1123-A). By inconclusive, she meant that she failed to secure a genetic profile from the blood Id.
22. The remaining untested stain on Lovitt's jacket could easily have been re-tested for the presence or absence of human blood. Given improvements in forensic DNA technology in the last three years – including enhanced ability to clean up the specimen and eliminate DNA inhibitors – it is likely that an interpretable genetic profile would be achieved today. This additional testing could have confirmed either that the stain was not in fact blood, as Ms. Palmer surmised, or that it was non-human blood or Lovitt's own blood. Any of these conclusions would refute the powerful suggestion made by the prosecutor in closing that the blood belonged to the deceased and was transferred to Lovitt's jacket during the struggle.

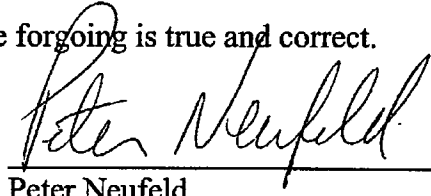
THE RELEVANCE OF ADDITIONAL TESTING TO ACTUAL INNOCENCE

23. If, for instance, further DNA testing revealed that the blood stain on the jacket came from a steak dinner and the number 17 allele was part of an identifiable genetic profile that matched someone in the Virginia Convicted Offender Database, that would constitute powerful new evidence in support of Mr. Lovitt's claim that he is innocent, that the "80 percent positive" identification is mistaken, and the jailhouse informant is a liar.
24. In the book *Actual Innocence* (Penguin Putnam paperback edition, 2001), I, along with my co-authors, examine the causes of wrongful convictions of inmates cleared through post-conviction DNA typing. In more than 80 percent of the cases, mistaken eyewitness identification was a critical factor in the wrongful conviction. In the instant case, the failure of the witness to identify Lovitt at the preliminary hearing is an important indicia of the likelihood of mistake.
25. Untruthful testimony by jailhouse informants, like Casel Lucas, played a significant role in convicting the factually innocent in approximately 20 percent of the DNA exoneration cases in the United States. *Actual Innocence*, at 203. Last month in Canada, the official government Commission of Inquiry Regarding Thomas Sophonow released its final report. Sophonow was the second Royal Commission to focus on the role of jailhouse informants in securing wrongful convictions. The report concluded that as a general rule "jailhouse informants are polished and convincing liars," and that, regrettably, "jurors will give the same

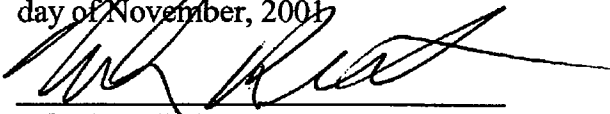
weight to ‘confessions’ made to jailhouse informants as they will to a confession made to a police officer.” *The Inquiry Regarding Thomas Sophonow*, (www.gov.mb.ca/justice/sophonow).

26. The data in *Actual Innocence* and in the Canadian experience strongly suggest that the potential significance of further DNA testing on the scissors and jacket should not be influenced by the comparatively weak identification and the purported confession to a jailhouse informant. In case after case, genetic testing has trumped other, less reliable, evidence that had been relied upon to secure a conviction. Perhaps that is one reason why the trend across America is to permit post-conviction DNA testing. I testified before the Virginia legislature’s Crime Commission last year at hearings that culminated in the passage of Section 19.2-327.1, Code of Virginia, 1950, as amended. Prior to its enactment, five men had been exonerated through post-conviction DNA testing in Virginia. Our clinic represented four of them. This statute will enable more prisoners languishing in prison to prove their innocence and at the same time, with the help of the convicted offender database, identify the real perpetrator.
27. In the instant case, the very limited DNA testing conducted before trial was unfairly exploited by the prosecutor in closing argument. Had the evidence not been destroyed, further and additional testing would have the potential to refute those arguments as well as to provide material exculpatory evidence.

28. I declare under penalty of perjury that the forgoing is true and correct.


Peter Neufeld

Subscribed and Sworn
to before me this 28th
day of November, 2001


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