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## SIXTH INNOCENT HARRIS COUNTY MAN FREED

### Hall of Shame: Texas Leads Nation in DNA Exonerations

**By: Houston Criminal Attorney John Floyd and Paralegal Billy Sinclair**

That the Houston City Police Department's Crime Lab was a lawless, rogue unit serving the "convict at any costs" philosophy of the Harris County District Attorney's Office during the Johnny Holmes and Charles "Chuck" Rosenthal administrations, between 1980 and 2005, is no longer a subject of serious debate. Dozens, possibly hundreds, of innocent people—mostly poor minorities charged with homicides or sex crimes—were railroaded off to Texas prisons based on fabricated (or at best faulty) forensic evidence supplied by the Crime Lab and/or due to mistaken identification secured to corrupt pretrial photo lineup procedures.

On June 13, 2007, former U.S. Justice Department Inspector Michael Bromwich issued a 400-page report that concluded the crime lab's DNA and serology departments had made hundreds of "serious and pervasive" mistakes in homicide and sexual assault cases. Bromwich two-year investigation examined more than 3500 cases processed by the crime lab over the previous quarter century. 135 of those were DNA cases handled by the crime lab between 1992 and 2002, Bromwich's investigators found "major issues" in 43 of those cases, and, even more disturbing, found "major issues" in 4 of the 18 death penalty cases it examined.

Before Bromwich initiated his investigation, and following a 2002 "audit" of the crime lab ordered by city officials, two Harris County criminal defendants were ordered released by local courts after it was determined that the crime lab's false forensic evidence had resulted in their wrongful rape convictions. George Rodriguez was released in 2004 after serving 17 years in the Texas prison system for kidnapping and rape. A Harris County federal jury awarded him \$5 million this past June based on the city's "deliberate indifference" to the recurring problems at the crime lab. In 2003 Josiah Sutton was released after serving 4 ½ years for a rape conviction after DNA tests discredited forensic tests performed by the crime lab. The following year Gov. Rick Perry granted a "full pardon" to Sutton.

Since the June 2007 release of the Bromwich report, four additional Harris County criminal defendants have been ordered released by local courts after it was determined they had

been wrongfully convicted of sex offenses. The first was Ronald Gene Taylor who was released in October 2007 after serving 14 years for a rape conviction. DNA evidence—semen on the rape victim's bed sheet which had not been tested by the crime lab—revealed that the semen belonged to another man who had a history of violent sexual assaults.

The same mistake was made in the case of Ricardo Rachell who was released after serving 6 years for a wrongful child sexual assault conviction. Released in December 2008, Rachell was cleared by DNA evidence collected in 2002 from the crime victim but not tested until last year. The Texas Court of Criminal Appeals this past January reversed his conviction, paving the way for him to secure an "actual innocence" pardon.

Five months after Rachael was released, Gary Alvin Richard was also ordered released after serving 22 years for kidnapping, rape and robbery convictions. Richard's release came after new forensic tests revealed a crime lab supervisor had provided false incriminating testimony at Richard's trial. The Harris County District Attorney's Office, however, has kept the case open against Richard.

The District Attorney's Office has elected to follow the same "delay-of-the-inevitable" tactic in the most recent Harris County DNA exoneration case. On July 6, 2009, a district court judge ordered Ernest Sonnier released from custody while the exoneration process in his case moves forward. Sonnier walked out of jail on July 7 after spending more than 20 years in prison for a 1986 kidnapping and rape conviction. The New York-based Innocence Project conducted nine rounds of DNA testing over an 18-month period that implicated two other men in the crime for which Sonnier was wrongfully convicted.

Barry Scheck, co-director of the Innocence Project, was not kind in his assessment of the Houston crime lab followed Sonnier's court-ordered release: "This case is the latest in a well-documented and disturbing pattern of analysts making misleading interpretations to support the prosecution's case and explain away evidence that the defendants may be innocent. There are still thousands of cases from the Houston Crime Lab that need to be reviewed, and that needs to happen quickly. In many ways, Houston is a symptom of the root problem, which is the lack of national standards and oversight for forensic science."

On February 18, 2009, the National Academies issued a report titled *"Badly Fragmented Forensic Science System Needs Overhaul: Evidence to Support Reliability of Many Techniques is Lacking."* This report echoed Barry Scheck's adamant concern about the Houston crime lab. The report found that "strong leadership" is needed in the forensic science system to promote an aggressive agenda to strengthen forensic science.

“Reliable forensic evidence increases the ability of law enforcement officials to identify those who commit crimes, and it protects innocent people from being convicted of crimes they didn’t commit,” said Senior Circuit Judge Harry T. Edwards of the D.C. Court of Appeals and co-chair of the committee involved with the report. “Because it is clear that judicial review alone will not cure the infirmities of the forensic science community, there is a tremendous need for the forensic science community to improve.”

The report strongly urged Congress to set up a new and independent National Institute of Forensic Science that could not only lead the way in strengthening the science but could also create and enforce standards for forensic science professionals and laboratories—the very same demand frequently made by the Innocence Project.

Constantine Gatsonis, professor of biostatistics and director of the Center for Statistical Sciences at Brown University, was also involved in the Academies’ study; she also strongly favors the creation of a National Institute of Forensic Science. “An organized and well-supported research enterprise is a key requirement for carrying this out,” she said following the release of the Academies report.

In its February press release, The National Academies said that “to ensure the efficacy of the work done by forensic scientists and other practitioners in the field, public forensic science laboratories should be made independent from or autonomous within police departments and prosecutors’ offices. This would allow labs to set their own budget priorities and resolve any cultural pressures caused by the differing missions of forensic science labs and law enforcement agencies.”

Data from the Innocence Project shows that there have been 241 DNA exonerations in this country since the creation of DNA testing in 1987. Texas leads the nation with the most DNA exonerations—38. Studies have shown that mistaken identifications were involved in approximately 75 percent of those exonerations—and those mistaken identifications most often occurred in cases involving a black man accused of sexually assaulting a white female.

What is lesser publicized fact about DNA exonerations is that 60 percent of those wrongful convictions involved prosecution forensic experts giving “invalid testimony that overstated the evidence” for the prosecution. This conclusion was drawn in a study published in the March 2009 issue of the Virginia Law Review. The study, featured in the law review article under the title “Invalid Forensic Science Testimony and Wrongful Convictions,” was conducted by University of Virginia Law School Professor Brandon Garrett and the

Innocence Project's co-director Peter Neufeld. The two studied transcripts of 137 trials in which prosecution forensic experts testified.

"What we mean by 'invalid' is simply that the testimony was unscientific or contrary to empirical data," Professor Garrett said. "Just because a wrong statistic was offered, does not mean that the testimony necessarily caused the wrongful conviction. However, these powerful examples support efforts to adopt and enforce scientific standards governing forensic reporting and testimony."

The situation with the Houston crime lab is more blatant. For more than two decades forensic analysts with the lab appear to have deliberately presented false or misleading testimony designed to satisfy the District Attorney's Office need for a conviction. And when the analysts were not giving false testimony, they were neglecting to conduct tests that would have either exonerated the accused or cast doubt on the test findings the prosecution needed for conviction.

The Garrett/Neufeld study was conducted at the behest of the National Academy of Sciences who wanted the results presented at one of its public hearings. Garrett/Neufeld spent the next year studying and analyzing trial transcripts, mostly in rape cases from the 1980s. The two men found that forensic experts frequently testified that a particular piece of evidence—such as a hair or a fingerprint—supported the defendant's guilt even though there was no "scientific data" to support such conclusions.

"These trial transcripts were fascinating to read, because in retrospect we know that all of the defendants were innocent," Garrett said. "Yet few have looked at these records. Even after these wrongful convictions came to light, crime laboratories rarely conducted audits or investigations to review the forensic evidence presented at the trial."

That was the case with Ernest Sonnier. While imprisoned, he kept watching the media accounts about innocent people being freed and poignantly wondered: "When's my turn coming." His nightmare began on Christmas Eve 1985 when two men kidnapped a woman in Alief, and while driving toward San Antonio, took turns raping her before she managed to escape after they stopped the vehicle. Sonnier was the only person convicted of the crime even though two men actually committed the offense.

The Sonnier case is particularly significant for the following reason: the Innocence Project said the blame for his wrongful conviction rests squarely with the crime lab analyst who gave testimony slanted toward assisting then Assistant District Attorney Rosenthal in

securing a conviction. "At the time of [Sonnier's] trial," Scheck told the Houston Chronicle, "it's obvious that the prosecutor (Rosenthal) wants a certain answer because on the face of it, the evidence is exculpatory, but they came up with something that isn't written down anywhere and is misleading."

The Sonnier case reflects the sordid prosecutorial history of the Holmes/Rosenthal era in Harris County—"convict at any costs," especially in sexual assault and capital murder cases. And there are many more Sonnier-like cases in the Texas prison system. Three local attorneys—Bob Wicoff, Thomas Martin, and Kelly Smith—have been appointed to review cases in which DNA was key to conviction. In an August 9, 2009 interview with the Chronicle, Wicoff described the purpose of their appointment:

"All we're doing for this project is people who have requested DNA testing [under Texas' post-conviction DNA testing statute]. And what the statute calls for is that if there is evidence which, if tested, shows there is exculpatory results such that there would not have been a conviction had that been known at the time of the trial, that's we're trying to establish."

Smith told the Chronicle that there are 200 DNA cases in Harris County that would fall under the purview of their appointment. But Martin was quick to dampen any unrealistic optimism: "Not every person that comes through this project is going to find an acquittal at the end. For a lot of the situations there may not have been evidence properly preserved and eligible for retesting. But when there is exculpatory evidence, that person deserves the chance to have it retested ... and they deserve their new day in court."

While we applaud the Wicoff/Martin/Smith appointments, the project they are working on will only scratch the surface of potentially wrongful convictions. Bromwich's study examined 3500 cases and found a pattern of faulty and deliberate false testing in the Houston crime lab for a period of 25 years. We agree with Barry Scheck that justice will not be served until all the cases handled by the crime lab—not just DNA cases—are thoroughly reviewed, including a reading of the trial transcripts, to determine how many innocent people were wrongfully convicted during the Holmes/Rosenthal era. Those cases number in thousands, dwarfing the meager 200 appointed to Wicoff, Martin and Smith.

The Harris County criminal justice system will continue to experience national embarrassment for possibly decades because of the "convict at any costs" prosecutorial philosophy and tactics of the Johnny Holmes and Chuck Rosenthal regimes. The interests of our justice system would be better served if all, or as many as possible, of the innocent people these two administrations railroaded into Texas prisons could be discovered as quickly as possible. Justice cries for it; fundamental human decency demands it.