

Houston Has A Problem: Bad DNA Evidence Sent the Wrong Man to Prison at Least Once. How Many More are There and What Can be Done About it?

by William C. Thompson



Josiah Sutton's nightmare began on October 30, 1998 when a woman mistakenly identified him as one of two men who had raped her. The 16-year-old Houston resident demanded to have a DNA test — confident that it would prove his innocence — but the Houston Police Department Crime Laboratory reported finding his DNA profile in semen samples from the crime. After a short trial, Sutton was convicted and sentenced to 25 years in prison for a crime he did not commit. He was

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The Sutton case has added fuel to a growing controversy about the criminal justice system in Harris County, Texas — which has sent more people to death row than any other county in the nation. The problems in the Harris County Police Department (HPD) Crime Laboratory were first brought to light last fall in a series of investigative reports by television station KHOU. I was one of several experts asked by KHOU to review laboratory records and transcripts from cases processed by the DNA/Serology unit of the HPD laboratory. I was shocked by what I saw.

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of the HPD lab was some of the worst I had ever seen. The laboratory routinely failed to follow proper scientific procedures. It interpreted DNA test results and computed statistical estimates in a manner biased against the accused. Most importantly, I found several instances in which there was outright misrepresentation of scientific findings — where the lab analysts would say that two samples had the same DNA profile when the actual test results showed they did not.

After the television exposé, the Harris County district attorney asked a state agency, the Texas Department of Public Safety, to conduct an audit of the Harris County Police Department's DNA/Serology Laboratory. The audit report, released in January, confirmed many of the problems identified in the KHOU reports, along with some others, such as a roof in the evidence room that leaked so badly that 34 DNA evidence samples were destroyed in a single stormy night, and poorly trained DNA analysts who could not verify their academic credentials.

The scathing audit report led the district attorney to shut down the DNA/Serology laboratory pending review by an outside agency. The district attorney also agreed to allow retesting of evidence in some of the cases I had identified as problematic in the television news reports.

One of these cases was Josiah Sutton's. During Sutton's trial, a DNA analyst from the HPD lab testified that Sutton's unique DNA profile was found mixed with DNA of the victim and another man in vaginal samples from the rape victim and in a semen stain collected from the back seat of the victim's automobile, where two men had raped her. According to the lab report, the probability Sutton would match by chance was 1 in 694,000.

This statistic grossly overstated the power of the DNA evidence. Although Sutton's profile was consistent with the mixture of DNA characteristics found in the vaginal samples, these samples contained so many characteristics that thou-

sands of people would also be "consistent." By my calculations, the probability of a coincidental match in the case was actually greater than 1 in 8. But that was not the worst of it.

Examination of the DNA test results showed that the semen stain from the back seat of the car did not match Sutton, as the laboratory report had stated — it appeared to be from an unknown man. Based on his DNA profile, this unknown man could have been one of the two rapists whose semen was found in the vaginal samples. But if he was one of the two rapists, Josiah Sutton could not have been the other. Sutton's DNA, when combined with that of the back seat semen donor, could not account for the mixture of genetic characteristics found in the vaginal samples. So if one makes the reasonable assumption that the semen donor was one rapist, Sutton was ruled out as the other.

The jury that convicted Sutton never heard about this problem. It was led to believe that the DNA evidence uniquely identified Sutton as one of the rapists, when it actually provided strong evidence of his innocence. The case is a striking example of what can happen when defense lawyers accept laboratory reports and expert testimony at face value without examining the underlying scientific data.

In early March, a new test of semen from the vaginal swab, in a private laboratory, revealed the DNA profiles of two men — and conclusively ruled out Sutton as a possible contributor. Because the victim had made it clear that the two rapists were the only possible sources of the semen, the new test firmly establishes his innocence. He was released on bail March 12, 2003 pending a petition to the state governor for a full pardon.

In light of Sutton's exoneration, the question is no longer whether innocent people have been sent to prison by bad lab work in Houston, but how many, whether any have been executed, and what it will take to find them. The district

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attorney is currently reviewing his files to identify cases as far back as 1992 in which DNA evidence produced the HPD laboratory figured in a conviction. So far prosecutors have ordered retesting in the cases of 68 prisoners, 17 of whom are on death row.

Many more retests may be needed. In some of the most problematic cases retesting may be impossible, however, because the HPD inappropriately consumed all of the evidence in the first round of DNA testing.

The Texas state legislature has held a series of hearings to find out what went wrong with the Houston lab, and what might be done about it. One obvious factor is the dysfunctional nature of the criminal justice system in Houston, where court appointed defense attorneys have found it difficult even to obtain copies of laboratory reports before trial, and rarely are able to have independent experts review the underlying laboratory work.

According to a recent New York Times story, Timothy Fallon, director of the Bexar County crime laboratory in San Antonio, told a committee of the Texas Legislature this month that there was only one way to assure the integrity of DNA testing by laboratories. "Resources must be made available to criminal defense attorneys," he said. "If you want the best crime lab, you need to have the best criminal defense attorneys to challenge us."

It remains to be seen whether the Texas legislators will take this advice to heart.

For more information on the Houston laboratory problems, see the NLADA Forensics Library at www.nlada.org/Defender. ♦

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with community people and groups. Many of those resources are referenced, in this article.

The Community Justice Resource Center at the Advancement Project provides information on funding sources, civil rights data, reference publications and much more. For more information, contact cjrc@advancementproject.org or go to their Web site at www.advancementproject.org.

The New England Training Consortium is developing training materials that break down the elements of the community lawyering to teachable segments emphasizing specific community lawyering skills. For more information, contact Ellen Hemley at ehemley@mlri.org.

The OSI Community Oriented Problem Solving Working Group spans all segments of the justice system including courts, prosecutors, defenders, legal aid advocates, law schools and others. This group, including some of the session organizers and participants, is working to build an

Community lawyers flexibly employ a wide variety of strategies – media, policy, outreach, transactional approaches and litigation – to advance community goals and build the capacity of communities to negotiate on their own terms with the powers that be.

infrastructure that can support and advance a community oriented problem solving approach to working on social justice issues. For more information, contact Tanya Neiman through her assistant Cari Napoles at cnapoles@sfbar.org.

The Project for the Future of Equal Justice is working closely with all of these entities to coordinate and promote the development of infrastructure that will advance lawyering for social justice. For more information, contact Camille Holmes at cholmes@clasp.org. ♦

U.S. Supreme Court Rules In Favor of IOLTA

"More than \$160 Million Protected"

In a major victory for Interest on Lawyers' Trust Account (IOLTA) programs across the country, the U.S. Supreme Court ruled on March 25, that the Washington State IOLTA program does not violate the Fifth Amendment, upholding the 9th Circuit's 2001 en banc ruling. This ruling in *Brown v. Legal Foundation of Washington* (originally *Washington Legal Foundation v. Legal Foundation of Washington*) protects approximately \$160 million currently held in IOLTA accounts nationally. Within the legal aid community, every state uses IOLTA accounts to fund legal assistance for low-income people. An amicus brief in support of the Legal Foundation of Washington was filed jointly by the NLADA, AARP, Legal Counsel for the Elderly, Inc., and The Brennan Center For Justice.

IOLTA accounts are comprised of short-term interest earned on escrow accounts established by lawyers to hold their clients' real estate transactions and other matters. Client funds that are too small in amount or held for too short of a time to earn interest for the client, net of bank charges or administrative fees, are placed in a pooled, interest-bearing trust account. In so doing, the interest earned is used to provide legal aid for low-income people.

For more information on the IOLTA ruling, visit the NLADA Web site, www.nlada.org/Civil. ♦