

## *Yet another wrongful conviction misattributed to faulty science*

February 18, 2009 by Crime Lab Report

On January 9, Steven Barnes walked out of the Oneida County Courthouse in Utica, New York a free man after spending nearly twenty years in prison.

Barnes was convicted in 1989 for the rape and murder of Kimberly Simon, whose body was found four years earlier near the Mohawk River in upstate New York. Barnes is now the twenty-fourth person in the state of New York whose conviction has been overturned largely due to the efforts of the *Innocence Project*, the post conviction litigation group founded by Barry Scheck and Peter Neufeld in Manhattan.

Forensic evidence in the Barnes case included testimony that the soil on Barnes' truck tires was *similar* to soil at the crime scene. Expert testimony was also given that an imprint on the outside of the same truck was *similar* to the fabric pattern of a particular brand of jeans worn by the victim when she was killed.

Journalists were quick to report the *Innocence Project's* claims that the comparison of soil samples and the analysis of denim patterns have not been tested to determine their scientific reliability or validity.

Barry Scheck, for example, was quoted as saying that "this is the latest in a long line of wrongful convictions based on improper or invalid forensic science that were ultimately overturned through DNA testing. Until there are clear national standards about what kind of forensic science can be allowed in court, more people like Steven Barnes will be wrongfully convicted while the actual perpetrators of violent crime remain at large."

*Crime Lab Report* contacted the forensic examiner who testified in the Steven Barnes trial. We were told emphatically that the soil and fabric-pattern evidence were non-specific and could not be used to identify the perpetrator.

But more importantly, the subsequent scientific testimony was not embellished to make the evidence seem stronger than it actually was. In fact, the evidence was reviewed by one of the nation's most well-known forensic scientists prior to trial.

In other words, the forensic science was *not* faulty.

By the time this editorial is published in the February issue of *Crime Lab Report*, the National Academy of Sciences will likely have released its long-awaited report detailing what resources and changes are needed in the forensic sciences. Leaders in the forensic science community are hoping that the report calls attention to the gross insufficiency of available resources in relationship to the skyrocketing demand for forensic science services.

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Innocence activists, on the other hand, have publicly voiced their excitement that the NAS report will finally expose the apparent fraud hidden within so many common forensic practices and subject the profession to much needed bureaucratic, government control. This way, innocent defendants like Steven Barnes can be protected from wrongful conviction.

What these activists refuse to admit is that forensic science may very well be the leading *preventer* of wrongful convictions, not a leading *cause*. Yet for two decades, the Innocence Project has fueled an entire public policy campaign by mischaracterizing non-specific forensic evidence, including benign statements of similarity, because they couldn't disprove the prosecution's charges.

*If the forensic evidence couldn't prove our client's innocence, then it must have been faulty.*

This kind of logic is indefensible in light of the facts and we are convinced that both Scheck and Neufeld know it. Unfortunately, they are too entrenched in their agenda to stop now. In our criminal justice system, when a defendant is on trial prosecutors must prove guilt beyond a reasonable doubt, which is the highest standard of proof applied in courts of law. Proof beyond a reasonable doubt, according to federal jury instructions, is "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs."

Based on *all* the evidence in the case, reasonable doubt means that the juror or judge would be uncomfortable with a criminal conviction.

Unfortunately, doubt is a personal feeling, not a scientific finding.

Circumstantial cases are often built around what seem like a mountain of incriminating facts which, when looked at individually, seem insignificant. But when they are combined, they tend to point a finger of guilt at the accused.

Neither the lay witness nor the forensic scientist can control how their testimony is spun in the courtroom, particularly during closing statements.

Testimony from forensic scientists concerning the *similarity* of known and questioned items of evidence is far different from the *identification* of fingerprints, bullets, cocaine and DNA. From a logical standpoint, the specificity of a forensic scientist who reports similarities between soil samples or fabric impressions is really no different than that of a lay person testifying that he saw the victim get into a red Chevrolet when, it just so happens, the defendant drove a red Chevrolet.

It is therefore the job of the criminal defense attorney to rigorously cross-examine witnesses and try to create reasonable doubt in the mind of at least one juror. In the presence of incriminating forensic evidence, this means demonstrating why the forensic results are, in fact, not necessarily evidence of guilt.

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No one wants to see innocent persons spend the best years of their lives in prison for a crime they did not commit, nor have the real perpetrators roaming the streets. We also know that forensic science needs to continue its aggressive metamorphosis into a scientific profession worthy of the standards and expectations of the 21<sup>st</sup> century.

But it must be understood that this evolution began long before most of today's critics decided that it was a convenient time, and possibly a lucrative one, to jump on the bandwagon.

On the eve of the long-awaited National Academies report, forensic science doesn't need critics. It needs collaborative partnerships and advocates that can help secure the resources needed to keep pace with demand and rising expectations.

Steve Saloom is the Policy Director for the Innocence Project. He chided the New York State legislature for failing to act on reforms designed to help prevent miscarriages of justice, such as laws that mandate the preservation of biological evidence for post-conviction DNA testing and laws requiring the electronic recording of police interrogations.

Many states have either passed or are currently considering such reforms. Saloom pointed out that in nearly half of the wrongful convictions in New York State alone, the correct suspects were later identified and found to have committed a total of five murders, seven rapes, two aggravated assaults, and one robbery.

*Crime Lab Report* shares Director Saloom's concerns about public safety, as do most forensic science professionals. But reforms calling for more forensic testing will simply tax existing resources even more.

We agree that many of the recommendations proposed by the Innocence Project, if funded appropriately, would go a long way to curb miscarriages of justice. But we are frankly astounded that they continue to make careless claims that faulty forensic science is a leading cause of wrongful convictions. In our opinion, the very best research that money can buy will eventually confirm this to be overwhelmingly false.

In this regard, we would like to see an objective and sweeping study conducted on the actual causes of erroneous convictions and *acquittals* in the United States and what role forensic science, and other types of evidence, play in this problem – good or bad.

In the Steven Barnes case, Innocence Project staff attorney, Alba Morales, claimed that the lack of other strong evidence caused the jury to give too much consideration to the forensic testimony. "Steven Barnes should never have been convicted in this case, and without the forensic testimony he probably wouldn't have been," Morales said.

Curiously, in a statement released after the recent exoneration of the "Beatrice Six" by the Nebraska Parole Board, Peter Neufeld was quoted as admitting that "In a lot of the cases, the serology testimony was scientifically valid and was accurate. The problem was that it wasn't sufficiently discriminating. In other words, you can't exclude most of the population."

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*Crime Lab Report* contends that the Steven Barnes case falls into the same category.

We are no longer surprised by the Innocence Project's refusal to redirect its attack on forensic science towards our legal system's procedures and the competency of lawyers who represent citizens like Steven Barnes.

We can only assume that attorneys criticizing other attorneys just doesn't make for eye-catching headlines.

Whether this speaks to the integrity of the Innocence Project or the health of journalism in America is a question for someone else to answer. \* \* \* \* \*

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