

# COVINGTON & BURLING

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July 17, 2000

By Federal Express

Honorable James Gilmore  
Governor of the Commonwealth of Virginia  
State Capitol  
Third Floor  
Richmond, Virginia 23219

Re: **Derek Rocco Barnabei**

Dear Governor Gilmore:

We represent Derek R. Barnabei, a prisoner on death row at Sussex I State Prison. We are writing at this juncture not to request clemency, but to request that you order DNA testing of certain crucial evidence that could exonerate Barnabei. A complete list of the known materials for which we seek testing is submitted as Exhibit 1.<sup>1</sup> We hope to use the results of that testing in an eventual clemency application that would be filed if Barnabei's efforts to seek redress in the courts for various violations of his constitutional rights at trial are denied. The Attorney General's office is currently attempting to schedule the execution for September 14.

**Critical Evidence Was Not Tested Before Barnabei's Trial.**

Barnabei was convicted of rape and capital murder in connection with the death of his girlfriend, Sarah J. Wisnosky. The body of Ms. Wisnosky, a freshman at Old Dominion University, was found in the Lafayette River in Norfolk on September 22, 1993. The cause of death was determined to be multiple blows to the head, with mechanical asphyxiation listed as a contributing factor. Two years later, Barnabei was convicted of her rape and murder and sentenced to death. He has consistently maintained his innocence since the moment of his arrest.<sup>2</sup>

Barnabei's conviction was based on purely circumstantial evidence. It was established at trial that the last place Sarah was seen alive was in the fraternity house that Barnabei shared with four other college-age young men. She was sitting in Barnabei's bedroom on the first floor, wearing a bathrobe and calmly smoking a cigarette.<sup>3</sup> Barnabei asserts that he and Sarah engaged in consensual intercourse that evening (as well as earlier in the day) and that he then left her in his bedroom with two men, Michael Bain (one of his housemates and

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fraternity brothers) and Stuart Macmillan.<sup>4</sup> Another of the housemates, David Wirth, was sitting in the next room. Barnabei returned a few hours later to find Sarah, as well as his bedsheets, gone.<sup>5</sup> He believes that she was killed by one or more of the young men in the house that night, who have since colluded in covering up the crime.

There was little in the way of forensic evidence at trial, and none of it is inconsistent with Barnabei's recollection of the events of the night of September 21-22, 1993. DNA testing of tiny blood spatters found on a wall, a bed and surfboard in Barnabei's room established only one thing: that Sarah was attacked at that location.<sup>6</sup> It could not and did not identify who attacked her there.

DNA testing of vaginal swabs from the victim's body showed nothing more than that Barnabei had had sexual intercourse with his girlfriend in the day -- the timing was never established more precisely -- before her murder.<sup>7</sup> In murder cases where victim and defendant are strangers, such evidence can be highly suggestive of the murderer's identity. Here, however, it was undisputed that Sarah and Barnabei had been involved in a consensual sexual relationship.<sup>8</sup> The fact that Barnabei's semen was found in Sarah's vagina meant only that the two had sex -- not that he raped or murdered her. In addition, two experts retained after Barnabei's conviction have reviewed the DNA analysis of the vaginal swabs. Although they concur with the Commonwealth's experts that Barnabei could not be ruled out as a source of the semen on the vaginal swabs, they both opine that the swabs may also contain the genetic material of a second man.<sup>9</sup> Testing not available at the time of Barnabei's trial, specifically short-tandem repeat or "STR" testing, could more accurately determine whether another man (or men) had sex with Barnabei's girlfriend that night.

The prosecution was unable to present forensic evidence on a crucial part of its case. The police thoroughly searched Barnabei's car, which purportedly had been used to transport Sarah's body from the fraternity house to the Lafayette River, over a mile away, for blood or other evidence that could connect it to the crime. None was found.<sup>10</sup>

The single most important piece of forensic evidence, one that could identify Sarah's attacker, was not tested. The medical examiner clipped the victim's fingernails as part of his routine recovery of physical evidence from her body. It is well known that crime victims, particularly victims of attempted strangulation, often scratch their attackers when trying to defend themselves -- indeed, that is why it is standard procedure to examine victims' fingernails.<sup>11</sup> Here, Sarah's fingernails contained not only traces of hair and fiber, but also bloodstains. The fingernail clippings were sent to the Division of Forensic Science, along with the vaginal swabs, for DNA testing. Yet before the technicians were able to conduct the test, police investigator Shaun Squyres directed that the fingernail clippings not be tested.<sup>12</sup>

The fingernail clippings are only the most obvious items that should be tested before Barnabei is executed. Many other items contain untested genetic material that could lead to the identity of the killer, such as bloodstains found on a washcloth near where the victim's body was found, which may contain the murderer's blood, pubic hairs from a sock that had been

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discarded outside Barnabei's home, and limb hair found on a bloodstained towel apparently used in the commission of the crime.<sup>13</sup> In addition, the vaginal swabs should be retested in order to determine whether there is evidence that more than one man had sex with Sarah before she was killed.

### **The Police Investigation Failed to Exclude the Possibility of Another Perpetrator.**

From the very beginning, the police investigation focused on Barnabei to the exclusion of all other suspects. Five other people claimed to have slept in the house that night. Two of them, Justin Dewart and his girlfriend Annette Norfleet, shared a room. Three others (Michael Bain, David Wirth and Troy Manglicmot), however, claimed to have been alone in their rooms and had no alibi for the early morning hours of September 22, 1993, when the prosecutor contended the murder had occurred.<sup>14</sup> Although all five persons who stayed at the small house that night testified at Barnabei's trial, none of them claimed to have heard a dispute or any kind of struggle. Any of those persons could have participated in the attack or a cover-up intended to implicate Barnabei, an outsider from New Jersey.

The police search for evidence did nothing to rule out that possibility. Indeed, an expert consulted to review the police investigation has concluded that the investigation of the fraternity house was "inadequate and incomplete."<sup>15</sup> The shortcomings in the investigation show that the police never even considered the possibility that someone other than Barnabei attacked Sarah:

- Although the victim's body must have been conveyed to the river by some vehicle, only Barnabei's car -- which contained no evidence of blood -- was examined. There is no evidence that any of the housemates' cars was searched, even though any of them could have been used to transport the body or hide evidence.
- The police assumed that the victim's body left the house through Barnabei's bedroom window, although no blood or other physical evidence was found there. It does not appear that any blood-enhancing reagents were used on the house's halls, doors or porches to look for traces of blood.
- There is no indication that the police searched for trace evidence of blood in any of the house's other four bedrooms. Nor did they closely examine the other rooms of the house to look for the victim's clothing, the bedsheets missing from Barnabei's bed, fingerprints, fibers or other trace evidence.

The prosecution's own time-line of the events on the night of Sarah's murder should have ruled out Barnabei as a suspect. The prosecutor suggested that the murder took

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place when Michael Bain heard loud music coming from Barnabei's locked bedroom and tried unsuccessfully with his housemate David Wirth to gain access to it so they could spray him with Wirth's "paintball" guns. This supposedly happened between midnight and 12:30.<sup>16</sup> But four witnesses testified that at that very time, Barnabei was at the unofficial fraternity house of the TKE fraternity.<sup>17</sup> Unless he could have been in two places at the same time, Barnabei could not have been at the murder scene at the time the prosecution implied Sarah was killed.

The evidence against Barnabei was weak, and looks even weaker when juxtaposed against the questions that the police investigators failed even to ask. Why did they fail to conduct a thorough search of the house for blood evidence? Why did they fail to recover items of discarded clothing found in the trash outside the fraternity house?<sup>18</sup> Why did they fail to test the fingernail clippings, the surest clue to the identity of Sarah's attacker?

This lack of hard evidence is all the more troubling in light of the prosecution's inability to establish a motive that Barnabei would have had to either rape or murder his girlfriend. On the night of the murder, Sarah had waited at the group house for Barnabei to return from a TKE fraternity meeting, as she had done on other nights. There was no evidence that the two had ever fought, and there was certainly no evidence of a fight on the night of the murder.<sup>19</sup> There was evidence, however, that Sarah previously had rebuffed the sexual advances of other men who had access to the house.<sup>20</sup> There was also testimony that she had spent one night alone (and intoxicated) with Michael Bain in his bed, although Bain said that the two had not had intercourse.<sup>21</sup> It is at least as plausible -- if not more so -- to think that Sarah was murdered by a man or men whose sexual advances she had rebuffed, than that she could be murdered by her boyfriend. Lest that possibility be dismissed as far-fetched, it should be noted that one of the young men concededly in the house that night -- David Wirth -- has since been convicted of aggravated assault for brandishing a shotgun at a young woman.<sup>22</sup>

#### **The Prosecutor's Case Relied on Unfair Innuendo.**

Barnabei had no record of violent crime. Yet in building its case, the prosecution relentlessly introduced witness after witness intended to show nothing more than Barnabei's alleged "bad character": his misappropriation of small items and amounts of cash, use of a false name, exaggerations about his background and whether he was, in fact, a member of the TKE fraternity to which two of the other residents of the group house belonged. As Barnabei himself confessed to a reporter, "I'm not an angel."<sup>23</sup> But the peccadilloes alleged by these witnesses were unfairly prejudicial to Barnabei's defense, since they did not prove anything about the identity of Sarah's killer.

One final fact bears mention. Barnabei left Norfolk on the afternoon of September 22, 1993, before the victim's body was found. The prosecutor relied upon Barnabei's departure as evidence of "consciousness of guilt." Yet the jury was never told that September 22 is the birthday of Barnabei's mother, Nettie Jane Barnabei.<sup>24</sup> She lives in Somers Point, New Jersey, and Barnabei had promised her that he would visit her for her birthday. While en route,

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he learned that Sarah's body had been found in the Lafayette River and that the Norfolk police had called his parents' home looking for him. A frightened and confused Barnabei made his way to Ohio, where he lived under an assumed name for several months until his arrest. Did Barnabei leave Norfolk to see his mother on her birthday or to avoid arrest? Such questions can never be answered with real certainty, in stark contrast to the question of whether the genetic materials under the victim's fingernails belong to Barnabei or to another man.

### **Procedural Background**

Barnabei first requested DNA testing of the fingernail clippings and other materials in 1997, in connection with his petition for a writ of habeas corpus to the Virginia Supreme Court. The Virginia Supreme Court summarily denied the petition without permitting any testing. Barnabei again requested DNA testing in connection with his federal petition for a writ of habeas corpus. That request was denied in a summary order, again without any statement of reasons. Barnabei appealed that denial to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court. On June 19, Barnabei filed a Petition for Rehearing with the Fourth Circuit urging the Court to reconsider, among other things, its ruling on Barnabei's request for DNA testing. The Fourth Circuit denied that Petition on June 30, 2000.

In addition to the requests made in the course of legal proceedings, Barnabei's counsel has sent letters requesting access to the various genetic materials to the District Attorney, the Division of Forensic Science, the Clerk of Circuit Court in Norfolk, and the Norfolk police. The only response to these letters that we have received is a letter from the Attorney General's office stating that the Division of Forensic Science returned the materials to the Norfolk police.

### **Testing Is the Right Course to Take.**

For the reasons stated above, there already is considerable reason to doubt Barnabei's guilt. The only hard facts established at his trial were that he had sex with Sarah in the day before she was killed -- which he does not dispute -- and that she was attacked in his room in a fraternity house that he shared with several other college-age men, all of whom knew her. But even if one were to disagree with our characterization of the sufficiency of the evidence against Barnabei, evidence of another man's blood under the victim's fingernails would undeniably cast doubt upon his guilt. Indeed, at least three of the jurors who condemned Barnabei to death, jurors who heard all of the evidence against him, have stated that they support DNA testing of the untested materials.<sup>25</sup> They recognize the obvious materiality of learning that the victim drew another man's blood before she died.

Probative and testable genetic material exists that could inculcate the victim's real attackers. Sarah's bloodstained fingernail clippings, while unquestionably the most important piece of untested evidence, are just one of many items containing genetic material that can and

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should be tested. Fairness and justice require that these materials be tested to avoid the unthinkable: the execution of an innocent man by the Commonwealth of Virginia.

Post-conviction DNA testing is recognized by leading local opinion-makers to be appropriate in Barnabei's case. The *Virginian-Pilot* reasons simply: if the blood under Sarah's fingernails matches Barnabei, there has been "no harm" in testing; but if the blood does not match Barnabei, or even matches someone else in the Commonwealth's DNA databank, "wouldn't the state want to know that?"<sup>26</sup> The *Daily Press*, which opposes a death penalty moratorium, nonetheless endorses DNA testing for every death row prisoner "to ensure that the system of capital punishment works."<sup>27</sup> Even though the *Daily Press* believes that the evidence of Barnabei's guilt is "overwhelming," it nonetheless says that "[i]f the state really is concerned about justice, and not just being an adversary to the defense, it will grant Barnabei's request." The *Washington Post* came to the same conclusion, arguing that "[i]t is hard to see why a state, before putting someone to death, would be unwilling to demonstrate a jury verdict's consistency with all of the evidence."<sup>28</sup>

Most Americans recognize the fairness of granting post-conviction DNA testing to all prisoners, not just those on death row. An overwhelming 92 percent of the public recognizes and supports the right of prisoners to post-conviction DNA testing "if such tests might show they were innocent."<sup>29</sup> Post-conviction DNA testing is all the more appropriate in Virginia, which is justly proud of the results it has achieved from its commitment to maintaining laboratories capable of state-of-the-art testing procedures. The Commonwealth should be just as ready to use its capabilities to clear the innocent as it is to catch the guilty, as it already has shown it is willing to do in the case of Earl Washington.

Barnabei's plea for DNA testing has even captured the attention of the international community. The European Parliament has passed a resolution endorsing Barnabei's request to be given a chance to prove his innocence.<sup>30</sup> The Italian Chamber of Deputies has signed a petition asking that Barnabei be given a chance to prove his innocence.<sup>31</sup> These world leaders do not understand how Virginia could execute Barnabei without testing evidence that could exonerate him. A grant of testing could only elevate Virginia's international standing.

Finally, although we believe that the cost of DNA testing should never be an issue in a capital case, it is not even pertinent here. Barnabei's friends and supporters have offered to pay the costs of any DNA testing that the Commonwealth permits.

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My partner Seth Tucker and I are available at your convenience to discuss this matter with you or with your staff.

Sincerely,

  
Linda C. Goldstein

Enclosure (Exhibits 1 through 33)

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- 1 If there are other materials in the possession of the Commonwealth but not known to defense counsel, Barnabei requests that they be tested as well. Photographs from the crime scene show what appear to be discarded shoes, shirts and sheets that should have been impounded by the police. Those items all would be amenable to DNA testing.
- 2 Testimony of Shaun Squyres at 2008-09 (Exhibit 2).
- 3 Testimony of W. R. Gee, III at 1308-10 (Exhibit 3).
- 4 Allocution of Derek R. Barnabei at 57, 68 (Exhibit 4).
- 5 Id. at 68-69.
- 6 Certificate of Analysis dated July 6, 1994 (Exhibit 5); Certificate of Analysis dated March 28, 1995 (Exhibit 6).
- 7 Id.
- 8 Sarah herself told several people that she had slept with Barnabei. Testimony of T. E. Walton at 1088 (Exhibit 7); Testimony of D. P. Wilson at 1125-27 (Exhibit 8).
- 9 Affidavit of Ronald S. Ostrowski, ¶¶ 11 & 15 (Exhibit 9); Affidavit of William C. Thompson, ¶ 8 (Exhibit 10).
- 10 Testimony of Special Agent John Kirkland at 1899-1912 (Exhibit 11).
- 11 See, for example, 2 Cesare G. Tedeschi, Forensic Medicine: A Study in Trauma and Environmental Hazards 946 (1977); Robert R. Hazelwood, et al., Practical Aspects of Rape Investigation 83 (1987).
- 12 Certificate of Analysis dated July 6, 1994 (referring to Item CME-1 C, stain from left fingernail cuttings) (Exhibit 5)
- 13 Myron Scholberg, a prosecution expert, opined based on a visual microscopic examination that the pubic hairs belonged to the victim. Mitochondrial DNA testing, which was not generally available at the time of trial, now can be performed upon hair shafts and could determine whether the pubic hairs belonged to the victim or to someone else. See National Institute of Justice, Post-Conviction DNA Testing: Recommendations for Handling Requests 28 (September 1999).

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- 14 Testimony of Michael Bain at 1434-35 (Exhibit 12); Testimony of Troy Manglicmot at 1463-64 (Exhibit 13); Testimony of David Wirth at 1725-26 (Exhibit 14).
- 15 Affidavit of Paul Erwin Kish, ¶ 6 (Exhibit 15). Kish also opined that he had seen only one other case in his entire professional career where the physical evidence against a defendant was as slim as it is here. Id., ¶ 9.
- 16 Testimony of Michael Bain at 1394-98 (Exhibit 12); Testimony of David Wirth at 1723-26 (Exhibit 14).
- 17 Testimony of Ross Firoved at 1239-43 (Exhibit 16); Testimony of Roland Gee at 1306-08 (Exhibit 3); Testimony of Jason Silverstein at 1164-66 (Exhibit 17); Testimony of Adrian Tate at 1261-62 (Exhibit 18).
- 18 See Exhibit 19, showing what appears to be a shirt in the trash outside the house. Unaccountably, this shirt was not recovered from the crime scene or sent to the Division of Forensic Science for testing.
- 19 Several of the housemates spent part of the evening watching a movie on television with Sarah and other guests. Although the housemates testified that Barnabei shouted at Sarah to stay awake, one of the guests who was present that evening (whom the prosecution did not call to testify at trial) stated that Barnabei acted "playfully" towards Sarah and spoke to her "in a sing-song voice." Affidavit of Andrea McKelvy, ¶ 9 (Exhibit 20).
- 20 Testimony of Michael Bain at 1427-29 (Exhibit 12).
- 21 Id. at 1374-76.
- 22 Copies of Wirth's Misdemeanor Complaint, Certified Statement of Conviction and a newspaper account of the incident are attached as Exhibit 21. Wirth also kept a police nightstick in his room at the group house, evident in one of the police photographs. (Exhibit 22). The nightstick was not tested by the Division of Forensic Science, even though its ends were of the rounded shape that caused the victim's injuries.
- 23 "A Rush on Va.'s Death Row," The Washington Post, April 28, 2000 (Exhibit 23).
- 24 Copies of Mrs. Barnabei's West Virginia birth certificate (showing her birth date) and her Virginia marriage certificate (showing her maiden name) are submitted as Exhibit 24.
- 25 Copies of the affidavits of jurors Mary Rice, David Key and William Joseph are submitted as Exhibits 25, 26 and 27, respectively.
- 26 The Virginian-Pilot editorial, dated July 11, 2000, is submitted as Exhibit 28.
- 27 The Daily Press editorial, dated July 2, 2000, is submitted as Exhibit 29.
- 28 The Washington Post editorial, dated March 20, 2000, is submitted as Exhibit 30.
- 29 "Americans Favor DNA 'Second Chance' Testing for Convicts," Gallup News Service, June 1, 2000 (Exhibit 31).
- 30 The resolution (in Italian) and a certified translation are submitted as Exhibit 32.
- 31 Copies of the Petition (in Italian) and a certified translation are submitted as Exhibit 33.