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Hair Comparison Evidence

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Forensic Science: Hair Comparison Evidence

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Introduction

Hair evidence may be invaluable in some criminal prosecutions,[1] but it is often abused. The publication of a 1996 Department of Justice report discussing the exoneration of twenty-eight convicts through the use of DNA technology highlights this point.[2] Some of these convicts had been sentenced to death. In several of these prosecutions, hair analysis was used to obtain the conviction.

Edward Honaker

In this case, the expert testified that the crime scene hair sample "was unlikely to match anyone" other than the defendant, Edward Honaker.[3] A prosecutor would later acknowledge that "[t]here was no question that the state hair expert [at Honaker's trial] had overstated the distinctiveness of the hair recovered from the victim's shorts in his trial testimony."[4] This com-

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[1] Generally, after making the determination that a sample is a hair and not a fiber, an analyst can determine: (1) whether the hair is of human or animal origin, (2) the sex of the person who was the source of the hair, (3) the race of the person who was the source of the hair, (4) the part of the body that the hair came from, (5) whether the hair has been dyed, (6) whether the hair was pulled or fell out due to natural causes or disease, (7) the presence of poisons or drugs, (8) whether the hair was cut or crushed, and (9) the ABO blood grouping of the hair source. See 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 24-2 (3d ed. 1999); Imwinkelried, "Forensic Hair Analysis: The Case Against the Underemployment of Scientific Evidence," 39 Wash. & Lee L. Rev. 41 (1982).

[2] E. Connors, T. Lundregan, N. Miller & T. McEwen, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996)[hereinafter "*Exonerated by Science*"].

[3] Id. at 58.

[4] H. Levy, *And the Blood Cried Out: A Prosecutor's Spellbinding Account of the Power of DNA* 153 (1996).

ment is a gross understatement. At best, the expert could have testified that the hairs were "consistent," which means that they could have come from Honaker or thousands of other people. A competent expert should have known this. A competent prosecutor should have also known this. Honaker spent ten years in prison. DNA proved him innocent. Indeed, another hair examiner would later opine that "the hairs were *not* comparable."[5]

There were other problems in the use of scientific evidence in this case. First, the fact that the prosecution witnesses had been hypnotized prior to trial was not revealed until the post trial proceedings.[6] This is a patent constitutional violation.[7] Second, "Honaker had a vasectomy in 1977, but the vaginal swab recovered intact sperm, inconsistent with Honaker's aspermic state."[8] The defense did not pursue this issue. This case represents all that is so troublesome in criminal litigation—bad lawyering (on both sides) combined with bad expert testimony.

Roger Coleman

Roger Coleman was executed in 1992 for a 1981 slaying in rural Virginia. The same expert who had testified against Honaker also testified against Coleman.[9] The United States Supreme Court ruled that a lawyer's mistake in filing Coleman's state collateral appeal (one day late) precluded

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[5] J. Tucker, *May God Have Mercy: A True Story of Crime and Punishment* 345 (1997) ("With the cooperation of a conscientious prosecutor, Kate Germond had the hairs reexamined by one of the world's leading experts on hair analysis and DNA tests performed on sperm found on a vaginal swab taken from the victim at the time of the rape. The hair expert said that in his opinion the hairs were *not* comparable, and the DNA analysis proved beyond doubt that Honaker was not the rapist.").

[6] Levy, supra note 4, at 153.

[7] E.g., Orndorff v. Lockhart, 998 F.2d 1426, 1436, 39 Fed. R. Evid. Serv. 283 (8th Cir. 1993), reh'g and reh'g en banc denied, (913513)(Aug. 3, 1994) (prosecution's failure to notify the defense that a witness had been hypnotized constituted a confrontation violation because it deprived the accused of the opportunity to cross-examine the witness on this issue), cert. denied, 510 U.S. 1060 (1994); U. S. v. Miller, 411 F.2d 825, 827 (2d Cir. 1969) (new trial granted because the prosecution failed to inform the defense that a key witness had undergone hypnosis); Brown v. State, 426 So. 2d 76, 81 (Fla. Dist. Ct. App. 1st Dist. 1983) (disapproved of by, Bundy v. State, 471 So. 2d 9 (Fla. 1985)) ("[D]ue process demands that counsel be afforded a fairer means by which to prepare his defense to this critical evidence."); State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386, 395 (1983); Gee v. State, 662 P.2d 103, 105 (Wyo. 1983).

[8] Levy, supra note 4, at 153. There were other problems. See also id. ("The rapist spoke obsessively about Vietnam; Honaker had never been there. Both the victim and her fiancé were sure that the rapist held the gun in his left hand, and Honaker was right-handed.").

[9] See Tucker, supra note 5, at 345 ("In October 1994, after nearly ten years in prison, Edward Honaker was released. The state forensic expert who had testified in 1985 that the hairs were comparable and unlikely to have come from anyone other than Honaker was Elmer Gist.")