

Booker Diggins

Criminal District Court

v.

Parish of Orleans

Burl Cain, Warden

Case No. 322-352 "A"

APPLICATION FOR POST-CONVICTION RELIEF

Petitioner Booker Diggins, by and through counsel, moves this Court to grant him post-conviction relief, and vacate his convictions for aggravated rape, armed robbery, and conspiracy to commit armed robbery. Recent scientific testing has demonstrated that, while Petitioner is Blood Type "O", the perpetrator of the crime for which Petitioner was convicted is Blood Type "A" - a fact which was never disclosed to the defense at trial. It is now a demonstrable scientific impossibility for Petitioner to have been the perpetrator of the crimes for which he stands convicted, and for which he has spent over twenty-two years in the Louisiana State Penitentiary.

Pursuant to Brady v. Maryland, 373 U.S. 83 (1963), State v. Mathis, 970 So.2d 505 (La. 2007), State v. Conway, 816 So.2d 290 (La. 2007); the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections Two, Sixteen, Nineteen, Twenty, Twenty-One, Twenty-Two, and Twenty-Four of the Louisiana Constitution; and on various other related grounds, Petitioner requests this Court vacate his conviction as the State withheld material exculpatory evidence denying Petitioner a fair trial, and the newly discovered scientific testing proves, beyond all doubt, his innocence of this aggravated rape and armed robbery.

Introduction

On January 25, 1988, Petitioner was convicted of aggravated rape, armed robbery, and conspiracy to commit armed robbery. The crime occurred at a restaurant on the Riverwalk. The two assailants waited in the restaurant's storeroom, and when the victim, an assistant manager, entered the room, they handcuffed her to a wooden post and gagged her. While the "short" attacker tried to open the safe, the "tall"

attacker vaginally raped the victim, ejaculated, and wiped his penis off on her shirt.¹ Afterward, the “short” attacker touched the victim’s vagina with his hand, but stopped when he discovered that she was wearing a tampon.² The attackers then left, taking the victim’s jewelry and money from the store.³

Before Petitioner’s 1988 trial, serological testing of vaginal swabs collected from the victim showed that the man who raped her is Blood Type “A”. This evidence was not introduced at trial. Although the District Attorney’s file in this case contains the serology report and an unfiled, undated, and unsigned motion for blood samples from the defendant – who was convicted for being the rapist – nothing in the record demonstrates that this motion was filed, or that the critical blood typing of the rape kit evidence was ever turned over to the defense. In short, the defense was not told that the perpetrator had left semen behind, and his blood type had been established. The defense could have used the serology results at trial as part of the defense case, and more importantly, could have performed additional testing to generate Mr. Diggins’ blood in order to scientifically demonstrate that he could not be the rapist.

More specifically, within hours of the crime, the victim underwent a rape examination.⁴ A rape kit was collected from her, including two internal vaginal swabs as well as samples of her blood and saliva. The evidence was submitted by the hospital where the victim was treated to the Parish of Orleans Coroner’s Office Forensic Laboratory, where serological testing was performed within days. Seminal fluid was detected on the swabs from the victim’s vagina, and spermatozoa were identified on her vaginal smear.⁵

¹ Tr. 1/25/88 at 66-67. Citations to Tr. at ___ refer to the trial transcripts of Petitioner’s original criminal trial, State of Louisiana v. Charles Washington and Booker Diggins, Criminal District Court Parish of New Orleans, Section “A,” Case No. 322-352, Jan. 21, 1988 to Jan. 25., 1988, Louisiana. The State was represented at trial by Assistant District Attorneys Glen Woods, Wendy Baldwin and Julia Coley. Mr. Diggins was represented by Martin Regan and Charles Washington was represented by Margaret Hammond.

² Tr. 1/25/88 at 67.

³ Id.

⁴ Cor. Office Rep. Citations to Cor. Office Rep. refer to the “Physical Findings of Hospital Examination,” August 31, 1987 12:27 A.M. (attached hereto as Exhibit A).

⁵ Forensic Laboratory Coroner’s Office report (attached hereto as Exhibit B).

ABO blood typing was also performed on the victim's vaginal swabs in an effort to determine the blood type of the assailant. According to the Forensic Laboratory Report, blood typing was performed on the semen evidence. Testing of the vaginal swabs showed "'A' blood group substance."⁶ The finding of "A" antigen activity in the vaginal swabs was significant because the victim was determined to be Blood Type "B" secretor. This means the victim is Blood Type "B," but because she is a non-secretor her blood type is not detected in her body fluids, such as saliva or vaginal fluids. (This is why the victim's blood type, "B" was not detected in the testing of her vaginal swabs). Given the victim's blood type, the "A" antigens found in her vaginal specimens could not have originated from the victim and, instead, had to belong to the semen source.⁷ In other words, the testing established that the rapist is a Blood Type "A" secretor.

Booker Diggins was charged with and convicted for being the rapist. Petitioner Diggins' blood was never tested prior to trial - even though this basic forensic test had the potential (as it has done nearly twenty three years later) to scientifically establish that he cannot be the rapist.

Not only did the State fail to type Mr. Diggins to determine whether he was included or excluded as the rapist, the State failed to disclose to the defense the Forensic Laboratory Report which documents that: (1) the victim's vaginal specimens contained semen and (2) the semen originated from a Blood Type "A" secretor. This failure to disclose denied Petitioner a fair trial. Brady v. Maryland, 373 U.S. 83 (1963). Petitioner, who has been incarcerated since his 1988 conviction, was completely in the dark about these powerful forensic test results until he obtained his case file from the District Attorney's Office through a public records request. Had the defense known at trial that the rapist left behind semen that was determined to be from a Blood type A secretor, it could have availed itself of a basic forensic test, which would have been invaluable at Petitioner's trial.

⁶ Id.

⁷ The victim reported to hospital personnel that her last consensual sexual encounter had been well over 48 hours prior to her attack, she had bathed since this encounter, and she had worn a tampon for two days prior to the attack. Cor. Office Rep 8/31/88. Thus, it is clear that the "A" antigens in the victims' rape kit originated from the man who vaginally raped the victim, the tall assailant.

Nearly twenty three years later, this test was finally performed. The blood typing results establish that Petitioner is Blood Type "O." In other words scientific tests establish that Booker Diggins can't be the rapist, he is factually innocent of this crime.

Statement of Facts

I. The Crime

On August 30, 1987, at approximately 7:00 p.m., the victim, Gayle Aaron, was closing up shop at Mike Anderson's Seafood Restaurant on the Riverwalk, where she worked as an assistant manager. As she was walking into a storeroom to put the day's receipts, checks and money in a safe, Ms. Aaron, who is White, was confronted by two African-American men who had a gun.⁸ Ms. Aaron described her attackers as the "tall one" and the "short one."⁹

After confronting Ms. Aaron in the storeroom, the two men led her to a wooden post.¹⁰ They handcuffed her to that post.¹¹ Her attackers then gagged her, by stuffing a crumpled up white paper bag in her mouth and then tied a red Mike Anderson's t-shirt around her mouth.¹² The "tall" attacker stole the jewelry which Ms. Aaron was wearing, ripped open her shirt, pulled down her overalls and pantyhose, and felt her breasts.¹³

Then, while the "short" attacker tried to open the store safe, the "tall" attacker vaginally raped Ms. Aaron, ejaculated, and cleaned his penis on her shirttail.¹⁴ The "short" attacker then penetrated Ms. Aaron's vagina with his hand, but felt that she was wearing a tampon and stopped.¹⁵ Both assailants then mocked Ms. Aaron, before leaving the store with her jewelry and the money she had been carrying to put in the safe.¹⁶ About \$ 3,000, including coins, had been taken during the robbery.¹⁷

⁸ Tr. 1/25/88 at 60.

⁹ Id.; accord at 93.

¹⁰ Tr. 1/25/88 at 63.

¹¹ Id.

¹² Id. at 64.

¹³ Tr. 1/25/88 at 64-65.

¹⁴ Tr. 1/25/88 at 66 - 67. On cross-examination, she testified that she did not know for sure whether the man ejaculated. Tr. 1/25/88 at 112. According to Det. Burkhardt's report after the crime, "the victim stated that the subject ejaculated and that he wiped himself on the tail of her shirt afterwards." Rep. of Det. Burkhardt at page 45.

¹⁵ Tr. 1/25/88 at 67.

¹⁶ Id.

After her attackers had left, Ms. Aaron managed to remove her gag and screamed for help.¹⁸

II. The Investigation and the Evidence at Trial

Detective Cindy Burkhardt of the New Orleans Police Department arrived at the crime scene.¹⁹ She interviewed Ms. Aaron about the crime. Ms. Aaron gave a description of her attackers.²⁰ At trial, Ms. Aaron described one attacker as “short” – or about her height (roughly 5’5”).²¹ Ms. Aaron described another attacker as “tall” – or about 5’8”.²² Ms. Aaron described her “tall” attacker as clean-shaven, with short hair that was parted on the left of his head.²³

As there was no sign of forced entry,²⁴ police almost immediately suspected it was an inside-job, and learned that the robbery had been set-up by two restaurant employees, Matthew Thomas and Karis Scott.

A. Testimony of Matthew Thomas

During her investigation, Detective Burkhardt was contacted by a manager of Mike Anderson’s Seafood Restaurant. One employee had told the manager that her nephew, Michael Thomas, had been bragging about the robbery. Matthew Thomas was also employed at Mike Anderson’s Seafood Restaurant as a prep chef.²⁵ Matthew Thomas, who was eighteen years old, fairly quickly admitted to providing the keys to his friend and co-worker Karis Scott, who was in charge of arranging the robbery.

Thomas had access to the store room keys on the day of the robbery.²⁶ Karis Scott had started working at the restaurant six months after Thomas; the two became friends, and would go home after work and smoke marijuana together on the porch.²⁷ In the days prior to the crime, Thomas and Scott switched work shifts so that Thomas

¹⁷ Tr. 1/25/88 at 81.

¹⁸ Tr. 1/25/88 at 72.

¹⁹ Tr. 1/21/88 at 112 – 113.

²⁰ Tr. 1/25/88 at 73.

²¹ *Id.* at 79.

²² *Id.*

²³ Tr. 1/21/88 at 174; Det. Burkhardt Rep. at 37.

²⁴ Tr. 1/21/88 at 85.

²⁵ Tr. 1/25/88 at 2.

²⁶ Tr. at 18 – 20.

²⁷ Tr. 1/25/88 at 23.

would be working the day of the crime. The day of the crime, Scott came to Thomas' booth at the restaurant and Thomas gave Scott his key to the store room.²⁸

In exchange for his trial testimony, which implicated Booker Diggins as the rapist, Thomas was promised by the District Attorney's Office that they would "try to help him out the best they "could, and that he would be charged with only accessory after the fact, which carried a potential five-year sentence for his involvement in the crime (as opposed to a possible 99 year prison sentence for being an accomplice to aggravated robbery).²⁹ Thomas also faced potential aggravated rape charges, which would carry a sentence of life without the possibility of parole.³⁰ Thomas admitted that his testimony at Mr. Diggins' trial was intended to secure a short prison sentence.³¹

It is worth noting that the use of incentivized witnesses is a demonstrated cause of wrongful conviction. A groundbreaking report that focused upon the "snitch system" and published by the Center on Wrongful Convictions in 2004, found that incentivized witnesses were the leading cause of wrongful convictions in U.S. capital cases. A recent comprehensive study of the nation's first 200 exonerations proven through DNA testing concluded that 18% were convicted, at least in part, on the basis of informant, jailhouse informant, or cooperating alleged co-perpetrator testimony.³²

Aside from admitting his and Scott's involvement and insisting that a rape was not part of the robbery plan, Thomas implicated others. He testified that shortly before the crime, he saw Petitioner Diggins, Charles Washington and Jerome Montgomery sitting at table on the Riverwalk.³³ Thomas testified that, after the robbery, he met with Scott, Diggins, and Washington.³⁴ During that meeting, Thomas testified that Diggins had distributed the stolen money and had given Thomas some money to "pay" for the opportunity to rape Gayle Aaron.³⁵ Thomas testified that Diggins bragged about raping

²⁸ Tr. 1/25/88 at 18-20.

²⁹ This deal was made by ADA Gerry Deegan. Tr. 1/25/88 at 17, 22-23.

³⁰ Tr. 1/25/88 at 23.

³¹ *Id.* at 26.

³² Garrett, Brandon L., Judging Innocence. *Columbia Law Review*, January 2008. Available at SSRN: <http://ssrn.com/abstract=999984>

³³ Tr. 1/25/88 at 9.

³⁴ *Tr.* 1/25/88 at 9.

³⁵ *Id.* at 16.

Ms. Aaron.³⁶ (Thomas' testimony is fatally undermined by the serological testing which establishes the Mr. Diggins could not be the rapist).

Notably, Thomas' ex-girlfriend, Martina Medina, testified that the day of the crime she saw Thomas working at Mike Anderson's. Shortly after 7:00pm (right before the crime), she saw Scott with **two** friends at a table (not three as Thomas claimed); she did not know the two friends. She was leaving the storage room of the restaurant where she worked, and had a brief conversation with Scott. She saw one of the guys go in to Mike Anderson's storage room with a pair of keys, which she said looked like the ones that Thomas used when she was with him.³⁷ **Medina never identified Booker as one of the men she saw with Scott.**

B. The Victim's Jewelry Was Recovered from Scott's Sister & Girlfriend

Karis Scott was initially charged with armed robbery, conspiracy to commit armed robbery and aggravated rape for his part in the crime. The victim's stolen jewelry was linked to Scott. Ms. Aaron's bracelet was recovered from Stacey Scott.³⁸ Stacey Scott was the sister of Karis Scott.³⁹ Ms. Aaron's ring was found in the possession of Debra Barnes.⁴⁰ Debra Barnes was a friend of Karis Scott and Stacey Scott.⁴¹

Ultimately, the aggravated rape charge against Scott was dropped and a *nolle prosequi* was entered by the prosecutor. He pled guilty to accessory after the fact and conspiracy, receiving a five year sentence.

C. Shirt Worn by Tall Assailant Recovered from Jerome Montgomery's Room

In addition, to the jewelry, Detective Burkhardt also recovered a shirt later identified by the victim as the white shirt with black designs worn by the man who

³⁶ *Id.* at 16-17.

³⁷ Tr. 1/21/88 at 95-99.

³⁸ Tr. 1/21/88 at 181.

³⁹ *Id.* at 182.

⁴⁰ Tr. 1/21/88 at 182.

⁴¹ *Id.*

raped her.⁴² However, the shirt was found in a laundry hamper in the bedroom of Jerome Montgomery, who was living in the same house as Booker Diggins.⁴³

A further link between the clothing worn by the tall assailant and Jerome Montgomery was provided by defense witness, Michelle McGee, Mr. Diggins' fiancé. McGee testified that she had gone shopping with Jerome Montgomery's girlfriend, Danielle, and saw her purchase that shirt for Jerome.⁴⁴

D. The Victim's Identification of Mr. Diggins

After Mr. Diggins was arrested, Detective Burkhardt proceeded to have Ms. Aaron identify Mr. Diggins in a photographic line-up.

Detective Burkhardt went to Gayle Aaron's house to perform the photographic line-up.⁴⁵ Only Detective Burkhardt and Ms. Aaron were present at the line-up.⁴⁶

The line-up consisted of two sets of photographs.⁴⁷ The first set contained a picture of Petitioner Booker Diggins and other "filler" photographs.⁴⁸ The second set contained a picture of co-defendant Charles Washington and other "filler" photographs.⁴⁹

Initially, Detective Burkhardt presented Ms. Aaron with the set of photographs that included Mr. Diggins.⁵⁰ Ms. Aaron could not identify Mr. Diggins in this set of photographs.⁵¹ Ms. Aaron became visibly upset that she could not make a positive identification from any of the photographs in the set which included Mr. Diggins.⁵²

⁴² Tr. 1/25/88 at 77-78; Tr. 1/21/88 at 181.

⁴³ Tr. 1/21/88 at 181

⁴⁴ Tr. 1/25/88 at 145. In addition to the shirt, police recovered a pair of dark colored pants from the house. McGee said Montgomery's girlfriend had purchased these the same day as the shirt. The victim did not specifically identify the pants as belonging to the assailant. Tr. 1/25/88 at 77, 146.

⁴⁵ Tr. 1/21/88 at 182.

⁴⁶ *Id.*

⁴⁷ Tr. 1/21/88 at 182 - 184.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Tr. 1/21/88 at 182 - 183.

⁵¹ *Id.*

⁵² *Id.*

In part to calm Ms. Aaron down, Detective Burkhardt then showed her the second set of pictures which included the co-defendant Charles Washington.⁵³ Ms. Aaron immediately identified Mr. Washington as one of her assailants.⁵⁴

Detective Burkhardt then re-presented the set of pictures which included Booker Diggins to Ms. Aaron.⁵⁵ Ms. Aaron looked at the pictures for five minutes without identifying Mr. Diggins.⁵⁶ Only after a full five minutes had passed did Ms. Aaron identify Mr. Diggins as one of her attackers.⁵⁷

Ms. Aaron thereafter identified Mr. Diggins and Mr. Washington as her attackers at trial.

While Ms. Aaron ultimately identified Mr. Diggins, she had reported shortly after the crime that the tall assailant was clean-shaven, with short hair that was parted on the left.⁵⁸ Mr. Diggins' arrest photo from September 4th shows that he had a mustache and sideburns.⁵⁹ Mr. Diggins' fiancé, Michelle McGee, also testified that Diggins had for the proceeding two years consistently worn long sideburns and a mustache.⁶⁰ McGee further testified that Jerome Montgomery, whom she had known for two years, had a low cut hairstyle with a part on the side of his head.⁶¹

Jerome Montgomery's photograph was never shown to the victim in a photographic line up prior to trial.⁶²

E. Jar of Money

When Mr. Diggins was arrested in his home, police alleged that he was holding a jar of money under his shirt.⁶³ The money totaled \$278.⁶⁴ (Again approximately, \$3,000 was taken during the robbery).⁶⁵

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Tr. 1/21/88 at 183.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Tr. 1/21/88 at 174; Det. Burkhardt Rep. at 37.

⁵⁹ Tr. 1/21/88 at 177-180.

⁶⁰ Tr. 1/25/88 at 144.

⁶¹ Tr. 1/25/88 at 145.

⁶² Tr. 1/21/88 at 184.

⁶³ Tr. 1/21/88 at 120.

⁶⁴ *Id.*

⁶⁵ Tr. 1/25/88 at 81.

E. The Fingerprint Evidence

The white crumpled bag, which had been stuffed inside Ms. Aaron's mouth during the attack to gag her, was tested for latent fingerprints.⁶⁶ A latent partial fingerprint was found on the crumpled bag.⁶⁷

Officer Kevin Baker, a police officer, was the Crime Scene Investigator who lifted the partial fingerprint from the bag.⁶⁸ Officer Baker had only been serving as a Crime Scene Investigator for two months.⁶⁹ Officer Baker could not remember any other case where he had lifted a fingerprint in the two months he had been working as a Crime Scene Investigator.⁷⁰ Officer Baker never had any formal training in lifting fingerprints.⁷¹

On the basis of Officer Baker's lifted fingerprint, Virgil McKinsey, who was qualified as an expert in the field of latent fingerprint identification, testified that the partial print found on the white bag was a "12 point" match with Mr. Diggins' left index finger.⁷² Mr. McKinsey further testified that he had no "doubt whatsoever" that the print on the bag came from Mr. Diggins.

Mr. McKinsey's testimony in this case is invalidated by, and violates, a recent resolution of the International Association for Identification (IAI), issued on July 16, 2010, which explicitly recognized that friction ridge skin impressions can display varying levels of commonality in appearance with other impressions which do not derive from the same source. Under the resolution, "any member, officer or certified latent print examiner who . . . gives testimony of possible, probable or likely friction ridge identification shall be deemed to be engaged in conduct unbecoming" and if such a member is a certified latent print examiner, his conduct and status shall be reconsidered by the Latent Print Certification Board. Moreover, the resolution states that "any member, officer or certified latent print examiner who **initiates or volunteers** .

⁶⁶ Tr. 1/21/88 at 190.

⁶⁷ *Id.*

⁶⁸ Tr. 1/21/88 at 189 - 190.

⁶⁹ Tr. 1/21/88 at 197 - 198.

⁷⁰ *Id.*

⁷¹ Tr. 1/21/88 at 198 - 199.

⁷² Tr. 1/25/88 at 129.

. . testimony of possible, probable or likely friction ridge identification, or who, when required in a judicial proceeding to provide such reports or testimony, does not qualify it with a statement that the print in question could be that of someone else, shall be deemed to be engaged in conduct unbecoming such member.” (Emphasis in original). Mr. McKinsey’s testimony, definitively linking the partial print from the crumpled up piece of paper stuffed inside the victim’s mouth, violates the IAI’s resolution, which were based upon the results of a multi-year study.⁷³

F. Mr. Diggins’ Defense and Alibi

Mr. Diggins’ defense was that he was misidentified and did not rape, nor rob the victim. Mr. Diggins’ fiancée, Michelle McGee, testified that she was on the phone with him at the time the crime had occurred.⁷⁴ She got home at approximately 6:20pm that day and had planned to go schoolbook shopping with her mother. After her mother cancelled, just a few minutes before 7:00pm, McGee called Mr. Diggins at his home and they talked for about thirty minutes. She remembered the day specifically because it was the day after Mr. Diggins’ birthday.⁷⁵

III. The Undisclosed Serological Evidence

Hours after her attack, Ms. Aaron was taken to Touro Hospital for a rape examination.⁷⁶ Critical biological evidence was collected from her body, including: two internal vaginal swabs; two internal vaginal smears; one tube of blood; and one saliva sample.⁷⁷ The evidence was submitted to the Parish of Orleans Coroner’s Office Forensic Laboratory for analysis of the rape kit items. Testing of the evidence was completed and a report issued on September 1, 1987.⁷⁸

⁷³ Undersigned counsel has sought access to the fingerprint evidence for an independent examination, but to date the New Orleans Police Department has failed to locate the print evidence, which is believed to be in the possession of the District Attorney’s Office.

⁷⁴ Tr. 1/25/88 at 148-149.

⁷⁵ Tr. 1/25/88 at 148-150.

⁷⁶ Cor. Office Rep.

⁷⁷ *Id.*

⁷⁸ Det. Burkhardt Rep. at page 54. On September 2, 1987, the new Orleans Police Department Crime Laboratory issued a report stating that examination of the victim’s blouse, panty hose and overalls failed to reveal the presence of seminal fluid. (Report of the New Orleans Police department Crime Laboratory, dated 9/2/87 attached hereto as Exhibit C).

That testing revealed that Ms. Aaron's vaginal swabs tested positive for the presence of seminal fluid.⁷⁹ Examination of her vaginal smears revealed spermatozoa.⁸⁰ Testing was done on Ms. Aaron's blood and saliva samples to establish her blood type and secretor status. She was determined to be a Blood Type "B" non-secretor.⁸¹ Serological testing was also performed on the vaginal swabs. The test results revealed that the swabs contained blood group "A" substance.⁸²

Ms. Aaron's last consensual sexual encounter was well over 48 hours prior to the attack.⁸³ During her hospital examination, she reported that her last consensual encounter was on August 28th at 5 am. Her rape occurred on August 30th at 7:30 pm, but critically her examination and collection of evidence did not take place until 12:27 am on August 31st – 67 hours after her last consensual intercourse.⁸⁴ Ms. Aaron also had taken a bath on August 29th, the day after her last consensual intercourse and the day prior to her rape. Additionally, she had been menstruating and wearing a tampon for the two days prior to the attack.⁸⁵ Thus, it is clear that the "A" blood type detected in her rape kit specimens was highly probative of the identity of the rapist.

While the District Attorney's file contains this critical Forensic Laboratory Report and an unfiled, undated, and unsigned motion to collect blood samples from the Petitioner pre-trial⁸⁶, there is nothing in the record to demonstrate that this motion was filed, or that blood typing of Petitioner was pursued in any way – even though such testing could have definitely excluded Petitioner as the rapist.

The State failed to disclose to the defense prior to trial the Forensic Laboratory Report which documents the existence of semen on the victim's vaginal specimens and the test results which show the semen originated from a Blood Type "A" secretor.

⁷⁹ Forensic Laboratory Coroner's Office report.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Id.

⁸⁴ Physical findings of Hospital Examination.

⁸⁵ Forensic Laboratory Coroner's Office report.

⁸⁶ Pre-Trial Motion to Obtain, Saliva, Blood and Culture Samples (undated, unsigned) attached hereto as Exhibit D.

At trial, the state did not call the doctor who performed the rape examination on the victim to testify. This was the same doctor at Touro Hospital who requested the forensic testing, and had received the results contained in the September 1, 1987. Curiously, the State presented no testimony at all from medical testimony regarding the rape, and the State simply introduced the rape kit into evidence through Detective Burkhardt.⁸⁷

IV. Serological Testing Establishes Petitioner's Innocence

Booker Diggins, who is listed as being 5'9" in his arrest report, was convicted as the tall assailant, who Ms. Aaron described as about 5'8" and who she testified was the assailant who vaginally raped her. Mr. Diggins was convicted of aggravated rape.

Charles Washington, who is 5'4" was convicted for being the "short" assailant, who Ms. Aaron reported was around her height, 5'5" and who touched her vagina with his hand. Washington was convicted of sexual battery. At sentencing the judge remarked:

But before I start to sentence you, Mr. Diggins, I want to tell you how this case has influenced and how this case has impacted our community, and more particularly, Ms. Aaron. Ms. Aaron was a, and most probably still is, I don't know, a manager of a place in the Riverwalk where seafood was served to customers. Some of the actors in this crime were employed at Mike Anderson's seafood and thus has possession of a key and that key was then handed to various other actors in this case, to wit: you. And, you all got into the storage room and there you waited for Ms. Anderson to come with the money to put it into the safe and when she got in there, you not only robbed her, but you also brutally raped her. And, I may add for the record, that you stuffed a paper into her mouth, that you gagged her and that you handcuffed her to a shelf, and that she was naked from the bottom down and that you, Mr. Diggins, decided to rape her and that you, Mr. Washington, decided to put your hand into Ms. Aarons vagina and then leave her there to her humiliation, most probably never to be found, because nobody could get to that storage room.⁸⁸

The serological testing performed prior to trial established that the rapist was Blood Type "A". Ms. Aaron's vaginal swabs contained "A" antigens which could not have originated from her because she is a Blood Type B secretor.

On July 27, 2010, blood and saliva samples were collected from Booker Diggins at the medical department at the Louisiana State Penitentiary and submitted to National Medical Services (NMS), one of the few private DNA laboratories that is still capable of

⁸⁷ Tr. 1/21/88 at 127.

⁸⁸ Tr. 2/18/88 at 1-2.

performing ABO blood typing. Testing of Mr. Diggins' blood and saliva samples established that he is a Blood type "O" secretor.⁸⁹ The test results exclude Mr. Diggins as the rapist and scientifically establish his innocence of the crimes for which he was convicted.

V. Grounds for Relief

1. Brady

Petitioner is entitled to relief on the grounds that the state's failure to disclose that testing of the victim's rape kit revealed semen from a Type "A" secretor violated his constitutional right to a fair trial pursuant to Brady v. Maryland, 373 U.S. 83 (1963).

To prevail on a Brady claim a petitioner must show that the State withheld favorable evidence from the defense that would have been material to the outcome. Brady v. Maryland, 373 U.S. 83 (1963). A petitioner must prove that: (1) the evidence was favorable to him either because it is exculpatory or impeaching; (2) the evidence was suppressed by the State, willfully or inadvertently; and (3) the evidence was material. Brady v. Maryland, 373 U.S. 83 (1963); Strickler v. Greene, 527 U.S. 263 (1999). When considering materiality, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. at 434. Therefore, a reviewing court should not employ a "sufficiency of evidence" test; "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. at 434-35.

Mr. Diggins is entitled to a new trial if the evidence withheld by the State undermines confidence in the outcome of his trial. He does not have to prove that the State otherwise would have had insufficient evidence to convict him of the crime. He need only show, by a preponderance of the evidence, that there is a reasonable probability that a reasonable fact-finder would have had a reasonable doubt as to his

⁸⁹ NMS Forensic Biology Laboratory Report attached hereto Exhibit E.

guilt. Kyles, 514 U.S. at 440. There can be no question that, under this test, he is entitled to relief.

In the similar case of John Thompson from Orleans Parish, Mr. Thompson was allegedly involved in an armed robbery and then a subsequent capital murder. For strategic reasons, the District Attorney's office decided to convict Mr. Thompson of armed robbery first, so that Mr. Thompson could not take the stand on his own behalf at his capital murder trial.

Prior to the robbery trial, the State knew of a serological examination of a pair of bloody pants that showed that the armed robber had Type B blood. Samples of John Thompson were never collected by the State to compare to the perpetrator's known blood type. Moreover, the serological examination and the bloody pants were never disclosed to the defense. Eighteen years later, after this evidence came to light, testing revealed that John Thompson had Type O blood, and thus could not have been the armed robber. John Thompson was allowed a new trial on the capital murder charge, where he finally was able to testify on his own behalf. A jury exonerated him in less than forty-five minutes.⁹⁰

In John Thompson's case, the State ultimately admitted that the undisclosed blood evidence was Brady material, and did not object to the judge's jury instruction to that effect at a subsequent civil trial.

The undisclosed serological evidence in Booker Diggins' case is identical to the undisclosed serological evidence in the Thompson case. In both cases, biological evidence was left behind by the perpetrator and serological testing by the State prior to trial established the perpetrator's blood type. In both cases, the defense was never informed of the existence of the biological evidence, nor of the perpetrator's blood type. The same result is warranted here.

⁹⁰ A fuller description of this sequence of events is laid out in Thompson v. Connick, 553 F.3d 836, 840-847 (5th Cir. 2008).

2. Actual Innocence

As discussed above, the recent serological testing which show that Booker Diggins is Blood Type "O" establish that he is innocent of the crimes for which he had been convicted.⁹¹ It violates due process and is cruel and unusual to punish someone for a crime he did not commit. Mr. Diggins did not commit the aggravated rape he is imprisoned for, and so his continued imprisonment is unconstitutional. A majority of the Supreme Court has agreed that punishing a defendant when a "truly persuasive" showing of actual innocence has been made would violate the defendant's constitutional rights to due process and protection against cruel and unusual punishment.⁹² Herrera v. Collins, 506 U.S. 390, 417 (1993). The Louisiana Constitution provides at least as much protection as the Federal Constitution. State v. Perry, 610 So. 2d 746 (La. 1992). The importance of avoiding injustices in Louisiana is demonstrated by the legislature providing "greater protection against erroneous convictions based on circumstantial evidence than is provided by the Fourteenth Amendment." State v. Williams, 423 So. 2d 1048, 1052 (La. 1982). The Louisiana Supreme Court has assumed that a *bona fide* claim of actual innocence involving sufficiently compelling new evidence would entitle a petitioner to relief, provided that it does not rely on an "alternative and inconsistent theory of defense to the one offered at trial." State v. Conway, 816 So. 2d 290 (La. 2002) (internal citations omitted). Mr. Diggins actual innocence claim is entirely consistent with his defense at trial, that he was misidentified and did not rape

⁹¹ Blood typing has been used to exonerate individuals who were identified by rape victims as their perpetrator, as in the case of Nathaniel Walker. In 1975, Nathaniel Walker was identified by the victim as her rapist, four months after the rape had occurred. Blood typing had not been performed in the case pre-trial. It was not until 1986 that blood typing was finally performed on semen gathered from the victim, and Walker was excluded. In November 1986, he was freed from jail. Alfonso A. Narvaez, *New Evidence Ends Jersey Man's Life Term*, N.Y. TIMES, Nov. 6, 1986, at B1, B2.

⁹² Altogether, six Justices in Herrera (O'Connor, Kennedy, Stevens, Souter, White, and Blackmun) explicitly held "truly persuasive" evidence of actual innocence would create a viable federal habeas claim, although they articulated slightly different standards for granting relief. See Herrera v. Collins, 506 U.S. 390, 419-20 (1993) (O'Connor and Kennedy, J.J., concurring) (recognizing constitutional right to make a "truly persuasive" showing of actual innocence as basis for federal habeas relief); *id.* at 429 (White, J., concurring) (same); *id.* at 441-42 (Blackmun, Stevens, and Souter, J.J., dissenting) (same).

the victim. He is entitled to relief based on the serology results which exclude him from the semen left behind by the rapist.

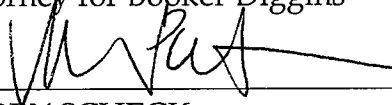
Conclusion

WHEREFORE, for the foregoing reasons, Mr. Diggins moves as follows:

1. That the State be ordered to file a response to the claims contained in this pleading pursuant to La. C.Cr.P. Art. 927(A);
2. That if the State has any procedural objections that create questions of fact, an evidentiary hearing be held pursuant to La. C.Cr.P. Art. 930;
3. That if the State make a response on the merits that creates questions of fact, an evidentiary hearing be held pursuant to La. C.Cr.P. Art. 930;
4. That he be granted leave to amend and supplement his claims for relief as necessary;
5. That he be granted relief from his conviction and sentence pursuant to La. C.Cr.P. Art. 930.3(1);
6. That he be granted such other relief as equity and justice require.

Respectfully submitted,

ROBERT GLASS (#6050)
GLASS & REED
530 Natchez Street, Suite 350
New Orleans, Louisiana 70130
Tel.: (504) 581-9083; FAX: (504) 527-6156
Email: r_glass@bellsouth.net
Attorney for Booker Diggins



BARRY SCHECK
VANESSA POTKIN
Innocence Project
100 Fifth Avenue, 3rd Floor
New York, New York 10011
Phone: (212) 364-5359
Fax: (212) 364-5341

Attorneys for Booker Diggins

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each properly addressed and postage prepaid on this ____ day of _____, 2010.

Exhibit A

Detective Cindy Burkhardt

Division Rape Invest. Unit

Item No. H-35033-87

CORONER'S OFFICE

PARISH OF ORLEANS
CRIMINAL COURT BUILDING
2700 TULANE AVENUE
NEW ORLEANS, LA. 70119

FRANK MINYARD, M. D., CORONER
Ex-Officio City Physician

JOSEPH J LEBLANC
Administrator

PHYSICAL FINDINGS OF HOSPITAL EXAMINATION

DATE August 31, 1987 TIME OF EXAMINATION 12:27a.m.

PLACE TOURO INFIRMARY EXAM

NAME OF PATIENT Gayle Aaron SEX F RACE W AGE 23

ADDRESS not stated
(if stated)

GENERAL DESCRIPTION/PSYCHOLOGICAL: In no acute distress. Calm and collected.

GENERAL BODY SURFACES: No injuries.

GYNECOLOGICAL EXAM:

- PERINEUM: No trauma noted.
- VULVA: No secretions - Woods lamp.
- INTROITUS: Hymen is untraumatized. No secretions.
- VAGINA: Intact, tampon in place.
- UTERUS:
- CERVIX: Intact. Black thread of IUD visible. Unremarkable.
- FUNDUS:
- ADNEXAE: Unremarkable.
- ANUS & ANAL CANAL:

MALE GENITALS (if applicable):

8-84
in

Exam witnessed by Lisa Chapman, RN

EXAM CONDUCTED BY C. Rehm M.D. Bus. Phone # _____

Res. Address TOURO INFIRMARY Res. Phone # _____

INVESTIGATOR Cindy Burkhardt DIVISION Rape Invest. Unit
Phone # 826-5555

"Service to the Living"

Patient brought to Emergency Department by: Nancy Burkhardt - MPT
Bonnie Stewart - room mate
Officer's Name, Phone, District, Parish

GAYLE HARRON
W1
10-14-63

INSTRUCTIONS: 1. Print clearly. 2. Do not use abbreviations. 3. Describe what is present. Do not use "NIL" or "unremarkable." 4. Enclose copy of report with evidence kit.

Item # H-35033-87

I. HISTORY

A. History of Incident:

1. Briefly note general circumstances: attacked in storeroom of her work place.
2. Date and time of incident: 8/30/87 11:30 PM
3. If patient under 18, relationship of assailant(s) to patient: _____
4. Type of sexual contact: Genital Oral _____ Anal _____ vaginal only
5. Physical abuse other than sexual: no
6. Vaginal or rectal bleeding since incident? no
7. Approximate time of last: Bath 8/29 11 PM Shower 8/26 Douche _____
Urination 4 PM Defecation 12 PM Food or Drink 4 PM

B. GYNECOLOGICAL HISTORY:

1. Gravid 1 Para _____ Miscarriages or Abortions 1
2. Last menstrual period (date) 8/25 Normal? nl
3. If pregnant, how long? _____
4. Date and time of last sexual intercourse prior to incident: 8/28 5 AM
5. Date and time of intercourse since incident: none
6. Contraceptive practice: None IUD BCP _____ Other _____
7. Prior gynecologic surgery: Hysterectomy _____ Tubal Ligation _____ NA

C. GENERAL MEDICAL HISTORY:

1. Drug Allergies: _____
2. Medical Problems: _____
3. Current Meds: _____
4. Last tetanus shot? 8/26

II. PHYSICAL EXAM

A. GENERAL

1. General Description: in NAD
2. Mental and Emotional status: calm + collected
3. General Body Surfaces: Torn Clothing no
Blood Stains no
Seminal Fluid: (use Wood's lamp) no
4. Evidence of alcohol or drugs: (e.g. needle marks, breath odor, etc.) no
5. Description of Trauma: Indicate abrasions, lacerations, contusions, hematomas, burns, and marks of hands, belts, ropes, etc., on drawings. Label and describe size and color of injuries on drawings. (over)
Do fingernails have dirt, blood, debris underneath? _____

B. GENITAL-RECTAL EXAM

1. Evidence of general trauma to perineum and genitalia (label drawing/describe) no trauma noted
2. Are fresh/dried blood or secretions present? (use Wood's lamp, describe) no
Hymen is: absent untraumatized _____ traumatized _____
(Label and describe opening and age, location, type of injury) _____
2. Speculum exam: (use no lubricant, only warm water)
Vaginal mucosa (hematoma, lacerations) intact tampon in place
Cervix intact black thread of IUD visible
Secretions (quantity, color) none
3. Bimanual exam:
Cervix unremark
Adnexa unremark
4. Male genitalia _____
5. Anus _____

III. LABORATORY TESTS: (check if done)

- | | | |
|--|---|--|
| <input checked="" type="checkbox"/> Saliva | Swabs for acid phosphatase from: | <input type="checkbox"/> Fingernail scrapings |
| <input type="checkbox"/> VDRL | <input type="checkbox"/> Introtus (take 2) | <input type="checkbox"/> X-rays (if indicated) |
| <input type="checkbox"/> GC Culture | <input checked="" type="checkbox"/> Vaginal cul de sac (take 2) | |
| <input type="checkbox"/> Cervix | <input type="checkbox"/> Rectum (if indicated) | <input type="checkbox"/> Blood alcohol |
| <input type="checkbox"/> Rectum | <input type="checkbox"/> Throat (if indicated) | <input type="checkbox"/> Toxicology screen |
| <input type="checkbox"/> Throat | Fixed smear on glass slide for sperm detection: | <input type="checkbox"/> Other _____ |
| <input checked="" type="checkbox"/> Whole blood for type | <input type="checkbox"/> Introtus | |
| <input checked="" type="checkbox"/> Pubic hairs: | <input type="checkbox"/> Vaginal cul de sac | |
| <input checked="" type="checkbox"/> Combed | <input type="checkbox"/> Rectum (if indicated) | |
| <input checked="" type="checkbox"/> Pulled (take 6). | <input type="checkbox"/> Throat (if indicated) | |

Urine Pregnancy Test

Negative Positive

308-87

Exhibit B

FORENSIC LABORATORY
Coroner's Office
Parish of Orleans
2700 Tulane Avenue
New Orleans 19, La.

REPORT OF THE LABORATORY

To: Dr. C. Rehm
TQURO INFIRMARY

Laboratory No.: L-464-87
Item No.: H-35033-87

Reference Material Received: 8-31-87

Examination Requested: Seminal Fluid/Blood Grouping/Secretor Activity

Description of Investigation: Possible Rape

Subjects: Gayle Aaron W/F/23

Specimens:

1. Two (2) internal vaginal swabs from victim.
2. Two (2) internal vaginal smears from victim.
3. One (1) tube of blood from victim.
4. One (1) saliva sample from victim.

Results:

- Specimen 1 - positive for seminal fluid.
Specimen 2 - positive for spermatozoa.
Specimen 3 - blood sample is Group "B".
Specimen 4 - no blood group substances identified.
Specimen 1 - "A" blood group substance identified.

Patricia F. Daniels
Patricia F. Daniels
Medical Technologist

Reviewed by:

Frank Minyard, M.D.

Frank Minyard, M.D.
Coroner, Parish of Orleans

Exhibit C

CRIME LABORATORY
NEW ORLEANS POLICE DEPARTMENT
715 S. BROAD ST.
NEW ORLEANS, LA. 70119

September 2, 1987

REPORT OF THE CRIME LABORATORY

To: RAPE SQUAD
ATTN: DET C. BURKHARDT

Evidence Received: 8-31-87

Type of Investigation: RAPE

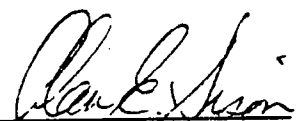
Item No.: H-35033-87

Examination Requested: SEMINAL FLUID

Subjects: VICTIM: GAYLE AARON

Specimens:
1. One blouse.
2. One pair of panty hose.
3. One pair of white overalls.

RESULTS: Examination of the above specimens failed to reveal the presence of seminal fluid stains.


ALAN SISON
Criminalist II

AS/ap

Exhibit D

STATE OF LOUISIANA

CRIMINAL DISTRICT COURT

VERSUS

PARISH OF ORLEANS

BOOKER DIGGINS

NO. 189097

MOTION TO OBTAIN A BLOOD, SALIVA
AND CULTURE SAMPLES

NOW INTO COURT, comes the undersigned Assistant District Attorney for the Parish of Orleans, State of Louisiana, who, with respect, represents to and informs the Court, that:

I.

The defendant in the above captioned and entitled matter is charged with the crime of Aggravated Rape. The defendant's blood saliva and a culture sample are necessary to the State's investigation.

II.

The State of Louisiana desires, and is entitled by law, to obtain a sample of the defendant's blood, saliva and a culture sample.

III.

The taking of such does not violate the defendant's Fifth Amendment protection against self-incrimination. Further such actions have been upheld by both the Louisiana Supreme Court and the United States Supreme Court. See Schmerber v. California, 384 U.S. 757 (1966); Cupp v. Murphy, 412 U.S. 191 (1973); State v. Carthan, 377 So 2s 308 (La. 1979).

IV.

Defense will be provided with a copy of the results of any expert examination of said sample.

V.

And so, movant herein prays for an order of this Honorable Court authorizing the taking of a blood, saliva and culture sample in accordance with good medical practice.

Respectfully submitted,

Assistant District Attorney

ORDER

IT IS ORDERED BY THE COURT THAT, the defendant, Booker Diggins show cause before this Honorable Court on the _____ day of _____, 1987, at ____ o'clock ____ M., why he should not be compelled to furnish a blood, saliva and culture sample as prayed for herein. It is requested that the Orleans Parish Sheriff's Office take said sample and forward those results to the N.O.P.D. Crime Lab.

Judge, Section " " "
Criminal District Court
Parish of Orleans

New Orleans, Louisiana, this
_____ day of _____, 1987.

PLEASE SEND COPY OF MOTION TO:

Lt. William Short
O.P.S.O. Medical Division
(drop at Subpoena-Capias Office)

Exhibit E

FORENSIC BIOLOGY

LABORATORY REPORT

2300 Stratford Avenue, Willow Grove, PA 19090
T 800.522.6671
F 215.366.1511
www.nmslabs.com



CONFIDENTIAL

TO: Innocence Project
Attention: Vanessa Potkin
100 5th Avenue, Third Floor
New York, NY 10011

REPORT DATE: 08/04/10
NMS LABS' WORK ORDER NUMBER: 10168094
AGENCY NUMBER: (not provided)

SUBJECT(S): Diggins, Booker

ITEMS SUBMITTED

On 07/28/10, the following items were submitted by Vanessa Potkin of the Innocence Project by way of Federal Express:

ITEM NUMBER(S)	DESCRIPTION
1	One manila envelope containing one clear plastic bag containing one red and white cardboard box containing one white Styrofoam container containing one purple-topped vial marked "Booker T. Diggins", "7-27-10", and "ID #124475" containing a reference blood sample from Booker T. Diggins
2	One manila envelope containing one white and black plastic bag containing one blue envelope marked "Booker T. Diggins" and "7-27-10" containing:
2.1	- one white, green, and blue paper wrapper containing three fiber-tipped swabs with blue plastic shafts, identified as bearing reference buccal samples from Booker T. Diggins
2.2	- one white, green, and blue paper wrapper containing three fiber-tipped swabs with blue plastic shafts, identified as bearing reference buccal samples from Booker T. Diggins

EXAMINATION AND SEROLOGICAL ANALYSIS

Item 1 – Reference blood sample from Booker Diggins

The reference blood sample from Booker Diggins was analyzed for the presence of ABO antigens and ABO antibodies. The following samples were collected, assigned exhibit numbers, and tested:

EXHIBIT NUMBER	DESCRIPTION	ABO ANTIGENS DETECTED	ABO ANTIBODIES DETECTED
EX01-1	Reference blood sample, collected as a liquid sample	O	α -A, α -B
EX01-2	Reference blood sample, preserved as a dry stain on FTA paper	(not tested)	(not tested)
EX01-3	Reference blood sample, preserved as a dry stain on clean cotton cloth	(not tested)	(not tested)

▪ **INTERPRETATION:** The reference blood sample from Booker Diggins is consistent with ABO Type O.

Item 2.1 – Reference saliva sample from Booker Diggins

The reference saliva sample from Booker Diggins was analyzed for the presence of ABO antigens. The following sample was collected, assigned an exhibit number, and tested:

EXHIBIT NUMBER	DESCRIPTION	ABO ANTIGENS DETECTED
EX02.1-1	Samples from two of the three swabs, identified as bearing a reference saliva sample from Booker Diggins	O

▪ **INTERPRETATION:** Booker Diggins is an ABO Type O secretor.

▪ **COMMENTS:** The majority of the human population is known as "secretors", meaning that they produce detectable levels of their ABO antigens in bodily fluids other than blood, such as saliva, semen, and vaginal

fluid. The remainder of the human population is known as "non-secretors", meaning that they lack this ability. This is a genetically-inherited trait that does not change throughout the course of one's lifetime.

- **COMMENTS:** The secretor status could not be confirmed with the traditional method, known as Lewis typing, due to the fact that the critical anti-sera are no longer available. The analytical preparation was tested for amylase activity (a characteristic, but not unique, property of saliva) and was found to contain a sufficient concentration of saliva that antigenic activity would have been expected.

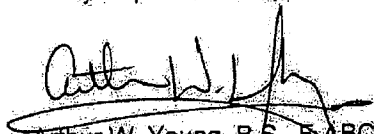
CLOSING REMARKS

The submitted items and associated exhibits will be retained until further disposition. Sufficient quantities of reference sample remains for reanalysis.


This analysis was performed under chain-of-custody. The chain-of-custody documentation is on file at NMS Labs.

Positive and negative controls in each stage of analysis of this case performed as expected.

Analysis performed by:


Arthur W. Young, B.S., F-ABC
Forensic Biologist

Review performed by:


Katherine L. Cross, M.S., F-ABC
Forensic Biologist

***** END OF REPORT *****

CONFIDENTIAL

NMS Labs Work Order Number: 10168094
Agency Number: (not provided)

Page 2

Report Date: 08/04/10