

Missing Evidence Found In Va. Death Row Appeal

Envelope Turns Up in Wrong Room in Courthouse

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The biological evidence missing from Virginia death row inmate Derek Barnabei's court file turned up yesterday in another room in the same courthouse, and the state police are now investigating whether it has been tampered with, officials said.

Scheduled to be executed Sept. 14, Barnabei, 33, contends that doing new DNA testing on a fingernail clipping taken from the body of his girlfriend, Sarah Wisnosky, would exonerate him of her rape and murder. But a court clerk reported Tuesday afternoon that the envelope containing the fingernail and other biological evidence was missing from a triple-locked evidence vault.

Virginia State Police and a court employee found the evidence in a nearby room yesterday morning, said Norfolk Circuit Court Clerk Albert Teich Jr. "It was in a place it wasn't supposed to be. It wasn't even in the room it was supposed to be in. But it was in the evidence" area of the clerk's office, he said.

A Norfolk judge yesterday granted the state police permission to look for fingerprints on the envelope and the two envelopes from unrelated cases that were found next to it on a shelf yesterday, said Andrew Protogyrou, Barnabei's Norfolk attorney.

If the state police find clear signs of tampering, the evidence is probably unusable, legal analysts say. But if the envelope appears unopened, state officials face a much thornier issue.

The evidence problems come at time when death penalty cases are receiving heightened scrutiny and DNA testing has been held out as the magic bullet for determining innocence. Barnabei's request for testing has drawn international support, including an appeal for mercy from Pope John Paul II.

"Now the governor has no excuse not to test the evidence," said Linda Goldstein, one of Barnabei's attorneys. "It's good news that it turned up, but we still want an investigation."

A spokesman for Gov. James S. Gilmore III (R) said the governor is waiting for the results of the state police investigation before discussing Barnabei's request. "We don't know whether it's been tainted or where it has been. The governor's going to withhold judgment," said the spokesman, Mark A. Miner.

On Thursday, Gilmore seemed to blame Barnabei's defense team for the envelope's disappearance when he noted in a statement that defense investigator Frank Slaton had visited the evidence room several times last month.

But Teich said Slaton was never alone with the evidence, and Goldstein said Slaton had not been allowed near the clerk's office Thursday or yesterday.

"We got nowhere near that room," Goldstein said. The reappearance "makes it look all the more suspicious to me. . . . We know that this evidence was there in early August. To find out that it has been missing under circumstances that suggest that it was someone employed by the State of Virginia points to a serious level of wrongdoing."

Barnabei was convicted in 1995 of raping and murdering Wisnosky, an Old Dominion University student from Lynchburg. He contends that his trial attorney made serious mistakes, but appeals courts have repeatedly ruled the 11-day trial was fair. DNA testing done before the trial found Barnabei's semen in Wisnosky's body, but he says they had consensual sex and then he left and someone else killed her. He theorizes that she scratched her attacker and that person's DNA will be found beneath her fingernails.

Goldstein said yesterday that the envelope's travels would not undermine new testing results--if they exonerated Barnabei. "If it's somebody else's blood, it's as exculpatory as before . . . but we think that if they find Barnabei's blood, they had his blood so they could have put it in there," she said.

If Barnabei were still on trial, the brief disappearance of the envelope might be grounds for excluding the biological material it contains, legal analysts said. That's because the courts usually require witnesses to establish the "chain

of custody" for any evidence--such as drugs or blood--that could be subject to tampering.

But that rule is most often applied to the prosecution, which must prove guilt beyond a reasonable doubt, said University of Richmond law professor Ron Bacigal.

"The courts might be more lenient with the defense wanting to use it to prove innocence," he said. "They'd have to talk about bending the rules in the interest of justice."

The latest twist in Barnabei's saga has drawn the attention of national and international groups that say the evidence problem shows the case has been mishandled. The Rutherford Institute, a conservative civil liberties group, called yesterday on the U.S. Justice Department to "conduct a full investigation and determine whether Commonwealth officials were responsible."

And Ajamu Baraka, acting director of Amnesty International USA's Program to Abolish the Death Penalty, said: "This incident casts further grave doubts on the reliability and fairness of Virginia's capital justice system. . . . A young woman is dead and a man's life is at stake, and what we get from the State of Virginia is sloppy police investigation, inadequate defense for the accused and evidence that is missing one day and found the next."

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