

## ANOTHER INMATE QUESTIONS HOUSTON CRIME LAB RESULTS

*Susman Team Joins Scheck  
On Innocence Project Case*

by MARY ALICE ROBBINS

**F**ive Susman Godfrey attorneys who usually spend their time on the civil litigation battlefield are assisting in an effort to free a man they contend was wrongly convicted of kidnapping and rape 17 years ago.

On Aug. 5, the Susman Godfrey team — partner Mark Wawro; associates Frank T. Apodaca, Victoria Capitaine and Steven Mitby; and staff attorney David Siegel, all in the Houston office — joined Barry Scheck, co-founder of the New York City-based Innocence Project, in filing an application for a writ of habeas corpus and a motion for a favorability hearing on DNA test results on behalf of George Rodriguez. Rodriguez is a Houston man serving a 60-year prison sentence for the abduction and sexual assault of a 14-year-old girl.

Wawro says the facts of *State v. Rodriguez* raise concerns about how the

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Houston Police Department's Crime Lab has been run.

T.N. Oettmeier, who served as the acting police chief, suspended DNA testing at the crime lab in December 2002 after an independent audit by crime lab professionals from the Texas Department of Public Safety and Tarrant County found that the lab failed to comply with FBI standards.

After reviewing about 1,300 convictions, the Harris County District Attorney's Office ordered retesting in about 360 cases that relied on DNA evidence to help convict defendants. [See "Grand Jurors Group Tries to Build Trust Between Public and Officials," Texas Lawyer, Aug. 11, 2003, page 5.]

Attorneys for Rodriguez filed the writ application and motion for a hearing in Houston's 230th District Court, where Rodriguez was tried in 1987. Rodriguez, one of two men convicted of abducting and raping the victim, alleges in the writ application that, based on results of DNA tests that the trial court ordered last year, he is innocent of both offenses.

"This should be an open and shut case of actual innocence," says Vanessa Potkin, an Innocence Project staff attorney who works on Rodriguez's case.

A pubic hair found in the teenage victim's panties points the finger at another man, Potkin says.

The work on behalf of Rodriguez has been a change of pace for Wawro, who is board certified in civil trial law by the Texas Board of Legal Specialization and typically is involved in commercial litigation. Wawro says this is the first time he has worked on a habeas writ application since 1980, when the 5th U.S. Circuit Court of Appeals, shortly after he completed a clerkship for Judge Carolyn Dineen King, appointed him to represent an inmate who had filed an application pro se. While Wawro says he doesn't remember much about his work on the earlier writ application, he and the other Susman Godfrey attorneys aren't likely to forget trying to win Rodriguez's freedom.

Apodaca, who previously had reviewed writ applications when he served as a judicial clerk for 9th U.S. Circuit Court of Appeals Judge Michael Daley Hawkins in 2002-2003, says he found working on Rodriguez's case interesting when the Susman Godfrey attorneys first began the effort.

"But, as you start to be persuaded that you may be dealing with someone who is innocent and who has spent 17 years in prison, it becomes less interesting and more disconcerting," Apodaca says.

Capitaine says Rodriguez's attorneys face a difficult standard in trying to prove actual innocence. She says the attorneys must demonstrate by clear and convincing evidence that no reasonable juror would have convicted Rodriguez if the proper evidence had come out — a tougher standard than beyond a reasonable doubt.

Wawro says Scheck, whom he had met through Texas Appleseed — a nonprofit, nonpartisan public law center that works on equal access to justice issues — contacted him in mid-June about working on Rodriguez's case.

Susman Godfrey gave its approval for Wawro to work on the case in late June and he sent a memo asking other attorneys at the firm to help him, Wawro says.

Potkin says the Innocence Project almost always works with local lawyers on cases in which inmates are making claims of actual innocence. But of the approximately 150 active cases that the Innocence

Project has nationwide, only a few involve civil litigators or large firms representing inmates, she says.

Wawro says he felt a lot of pressure to get the writ application and motion for a hearing filed. "You've got a guy in prison who you hope is not going to be there much longer," he says.

"We think we have the right man in prison," Harris County District Attorney Chuck Rosenthal says of Rodriguez.

Rosenthal says that, although the Houston crime lab has been under scrutiny, most of the retesting that's been done on cases confirms the lab's original findings. He says the only case in which retesting revealed clear discrepancies is that of Josiah Sutton, who was released from prison in 2003 after serving four years of a 25-year sentence for a rape conviction.

Gov. Rick Perry pardoned Sutton in May 2004. Rosenthal says he asked for a pardon in Sutton's case based on the fact that the jury received incorrect information and there was insufficient evidence for a new trial. The same situation doesn't exist in the Rodriguez case, which is still a triable case, he says.

## Battle of the Experts

According to Rodriguez's motion for a favorability hearing, the victim identified Rodriguez as one of two men who sexually assaulted her. However, the description of the rapist that the victim gave to police did not match Rodriguez's description, and the other man convicted in connection with the rape, as well as a witness, identified another suspect, Rodriguez alleges in the motion.

The motion cites the role that one hair played in Rodriguez's conviction. According to the motion, an expert witness for the prosecution testified that a pubic hair found in the victim's underwear was consistent with Rodriguez's pubic hair, and the prosecutor told jurors that the hair evidence "is what nails this man to the wall." Rodriguez alleges in the motion that retesting of the hair establishes that it could not have been his and that a mitochondrial profile of the hair matches the mitochondrial DNA profile of the suspect identified by the other man convicted of the girl's rape.

In the writ application and hearing motion, Rodriguez alleges that the then head of the crime lab's serology section, which does blood typing, testified at the trial that serological testing proved that semen from the victim could not have come from the other suspect. But Rodriguez alleges in the writ application that the evidence could not have excluded the suspect.

In a report filed in the 230th District Court with the writ application and hearing motion, six forensic experts who reviewed the former serology section head's trial testimony allege that it contains "egregious misstatements of conventional serology." The statements made during testimony reveal that "the witness lacked a fundamental understanding of

the most basic principles of blood typing analysis or he knowingly gave false testimony to support the state's case" against Rodriguez, the forensic experts allege in the report.

Rosenthal says his office has shown the same lab results to people who have done serology testing since before 1987 and they reached different conclusions than the experts who filed the report in Rodriguez's case. He contends that Rodriguez's experts either applied 2004 technology to testing

that was done in 1987 or they're finding fault with people who did the test without looking at the whole record.

Apodaca says the panel is made up of forensic experts who are leaders in the world of serology who reviewed the trial testimony, including the serology section head's testimony.

The panelists are Dr. Edward Blake, director of Forensic Science Associates; Pamela Newall, an independent consultant who does forensic DNA interpretation; Mark Stolorow, executive director of Orchid Cellmark; George Sensabaugh, professor in the school of public health at the University of California, Berkeley; Ronald Singer,

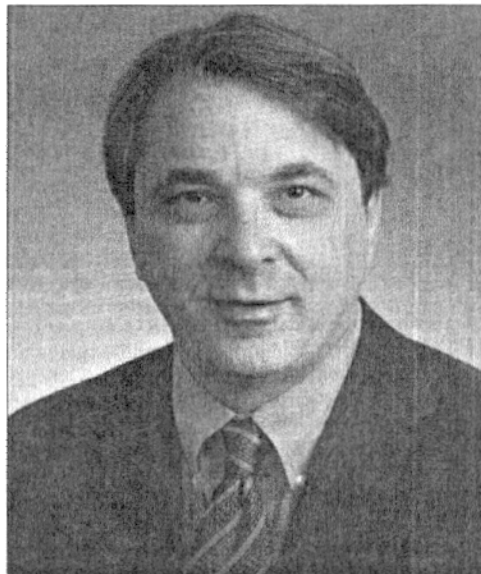
director of the Tarrant County Medical Examiner's Crime Lab in Fort Worth; and Robert Shaler, on the staff of the Medical Examiner's Office in New York City since 1978.

In their report, the experts recommend that the city of Houston appoint a special master to do an independent forensic audit of cases in which the crime lab analyzed serological evidence. The audit could be patterned after one done by the city of Cleveland, according to the report.

"The city of Houston could sure do that," Rosenthal says. But the city should look at whether there are problems in the original testimony at Rodriguez's trial before it launches into testing thousands of cases, he says.

Houston Police Chief Harold Hurtt said at an Aug. 6 news conference that his department will review Rodriguez's case. Sgt. David Crain, with the police department's public affairs office, says the department has asked the DA's office for a copy of the report that the six forensic experts filed with the 230th District Court. The department will conduct a review based on that report to "see what needs to be done," Crain says.

In the meantime, the Susman Godfrey attorneys watch and wait. Wawro, who estimates he's spent about 110 hours working on Rodriguez's case, alleges there has been "a gross miscarriage of justice."



Mark Wawro (above), who estimates he's spent about 110 hours working on George Rodriguez's case, says there has been "a gross miscarriage of justice."

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