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September 22, 2008

Hon. Jonathan W. Feldman
2120 U.S. Courthouse
100 State Street
Rochester, NY 14614

Re: *Warney v. City of Rochester, et al.*, No. 07-CV-06246 (DGL) (JWF)

Dear Judge Feldman:

Along with Don Thompson, Esq., I represent plaintiff Douglas Warney in the above-referenced case. I write pursuant to the Court's oral order to explain more precisely how we believe production of post-conviction communications between the Monroe County District Attorney's Office and the Monroe County Crime Laboratory in the crime lab file will lead to the discovery of admissible evidence against the City of Rochester and its individual police defendants (collectively, "the Rochester defendants"). The Rochester defendants are alleged to have violated Mr. Warney's Fourth, Fifth and Fourteenth Amendment constitutional rights by coercing and fabricating a false confession, and withholding the truth about their misconduct from prosecutors, thereby causing Mr. Warney to be convicted and imprisoned for nearly a decade for a murder he did not commit. (*See* Doc. No. 1 (Complaint) at Counts I & II.)

First, in my experience litigating 42 U.S.C. § 1983 wrongful conviction cases around the country, it is standard practice for forensic personnel, specifically including DNA analysts, to document each and every communication they have with law enforcement personnel and prosecutors' offices. Any written request for testing, letter of transmittal, explanation of the underlying facts of the case, or phone call, would be documented and retained in the lab's file.

Here, we expect to see communications between the DA's office and the crime lab regarding post-conviction DNA testing. Upon information and belief, these communications are likely to include:

- 1) a description of the evidence that originally convicted Mr. Warney, including his confession and, possibly, references to discussions with the police who elicited it;
- 2) a description of the forensic evidence, including the existence of non-victim blood collected from several locations at the crime scene;
- 3) the reasons the DA's Office sought to have that evidence tested with DNA technology, including the probative value DNA results would or did have in assessing Mr. Warney's guilt;
- 4) information relating to the storage of the blood evidence and its chain of custody; and
- 5) any doubts expressed by either laboratory personnel or the DA's office about the reliability of the DNA results.

Disclosing any such communications will lead to the discovery of relevant evidence against the Rochester defendants. First and foremost, any (explicit or implicit) reference to Mr. Warney's confession as reliable evidence of his guilt would be probative evidence of the Rochester defendants' fabrication and ongoing suppression of the truth from the DA's Office – namely that police fed Mr. Warney nonpublic facts about the crime and then misrepresented to prosecutors that his “confession” was reliable because those nonpublic facts originated with Mr. Warney. (Cmplt. ¶¶ 4, 5, 52-54.) Likewise, any communications reflecting doubt on the part of the D.A.'s Office that the DNA results truly exonerated Mr. Warney in light of his highly detailed confession would qualify as evidence that the police defendants' misconduct continued to influence the D.A.'s assessment of the case even at that late stage, causing Mr. Warney to remain imprisoned even after the DNA results excluded him and adding to his damages. For example, the files may reflect that the D.A. told the lab analyst, “I have trouble believing the DNA results since the police who took the confession tell me the defendant couldn't possibly have known all the facts he knew unless he was guilty.” In addition to providing evidence of suppression, causation and damages against the Rochester defendants, such a communication would be evidence of a (Rochester) party admission. *See* Fed. R. Evid. 801(d)(2).

In addition, any communications between lab and D.A. personnel regarding chain of custody of the blood evidence and/or the reliability of the DNA results are highly probative of Mr. Warney's innocence. Our fabricated confession theory of liability against the Rochester defendants relies in large part on proving Mr. Warney's innocence. That is, if, as argued at trial by the prosecutor, the confession elicited by the Rochester defendants included nonpublic facts known only to the police and the perpetrator, and if Mr. Warney was actually innocent, those nonpublic facts must have been fed to him by the police during the interrogation. *See Washington v. Wilmore*, 407 F.3d 274, 282 (4th Cir. 2005).¹ The Rochester defendants have not

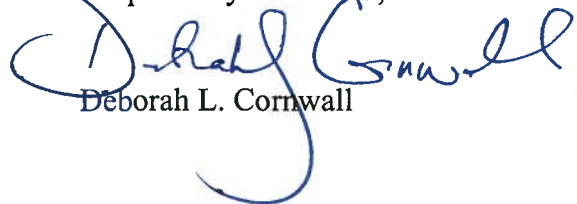
¹ Obviously, Mr. Warney's innocence is also critical to his claim for damages.

admitted Mr. Warney's innocence, notwithstanding the exclusion of Mr. Warney as the source of non-victim blood at the scene, despite the vacatur of his conviction, release from prison and dismissal of charges, despite the confession of Eldred Johnson that he committed the crime acting alone, and despite Johnson's guilty plea. As such, plaintiff must affirmatively prove innocence, and therefore should be granted access to any and all evidence tending to bear on this question, specifically including any data bearing on the reliability of the DNA results. Surely the D.A.'s Office investigated the reliability of the results before agreeing to the vacatur of Mr. Warney's conviction and his release from prison. The D.A.'s and Crime Lab's assessment of the reliability of the DNA results, as will likely be reflected in the casefile, are highly probative of this question.

In sum, communications between DA and crime lab personnel should be disclosed because they tend to prove the Rochester defendants' liability as well as Mr. Warney's damages: Mr. Warney is innocent, the Rochester police defendants suppressed and fabricated evidence, and this misconduct influenced the D.A.'s assessment of the case, delaying both DNA testing and Mr. Warney's release. As such, Monroe County's motion to quash the subpoena for the complete post-conviction lab files should be denied.

Thank you for considering these arguments.

Respectfully submitted,



Deborah L. Cornwall

cc: Mike Davis, Esq.
Igor Shukoff, Esq.
Don Thompson, Esq.

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