

7645 Hickorywood Drive
Colorado Springs, Colorado 80920

April 18, 2009

Attorney General John Suthers
Colorado Attorney General's Office
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

Colorado Springs Police Department
Internal Affairs
705 South Nevada Avenue
Colorado Springs, Colorado 80903

District Attorney—4th Judicial District
105 E. Vermijo Avenue
Colorado Springs, 80903

Re: Allegation of Serious Negligence or Misconduct in the forensic laboratory system consisting of the Colorado Bureau of Investigation Crime Laboratory the law enforcement storage facility of the El Paso County Sheriff's Office, and the Paul Coverdell Forensic Science Improvement Grant Program

Dear Attorney General Suthers, District Attorney May, and Investigatory Partners:

I allege that serious negligence or misconduct substantially affecting the integrity of forensic results has occurred in connection with evidence under the authority of the Colorado Bureau of Investigation's Pueblo laboratory or the El Paso County Sheriff's Office.

It is undisputed that spoliation occurred in evidence used at a 2006 murder trial in Colorado Springs. The condition of the alleged murder weapon changed at some point while that evidence was in possession of the CBI laboratory, the El Paso County Sheriff's Office or one of their contractors.

I allege that the spoliation constitutes serious negligence or misconduct that substantially affected the integrity of forensic results. Such spoliation raises questions about whether sufficient safeguards were in place to prevent the spoliation or otherwise detect it. The consequences of such spoliation are incredibly significant, as they have:

- a. Led the investigators away from the actual perpetrators of crimes, including the real perpetrator in the murder that resulted in Todd Newmiller's conviction,
- b. Caused investigators to discount otherwise probative physical evidence and testimony, and
- c. Resulted in trial and conviction of innocent individuals.

The spoliation of evidence in this case calls into question the integrity of all evidence handled by the CBI and the El Paso County Sheriff's Office. More broadly, the details supporting this allegation call into serious question:

1. The adequacy of safeguards to ensure preservation of evidence crucial to determining guilt and innocence.
2. The unknown number of similar instances of spoliation that could have affected other cases in Colorado.
3. Whether additional instances of spoliation will continue to affect cases in the future.

The CBI's laboratory is a recipient of Paul Coverdell Forensic Science Improvement Grant ("Coverdell") funding.¹ Under the Coverdell program, the Colorado Attorney General's Office has been designated to investigate allegations of serious negligence or misconduct involving the CBI's laboratory. As such, the Attorney General's Office is required to investigate this allegation.

The El Paso County Sheriff's Office likewise receives Coverdell funding to operate the Pikes Peak Metro Crime Laboratory, a forensic lab it shares with the Colorado Springs Police Department. The facts alleged also implicate the El Paso County Sheriff's Office, and because the Sheriff's office receives Coverdell funding for the Pikes Peak lab, members of the public also may raise allegations concerning the Sheriff's Office's forensic activities. The Colorado Springs Police Department Internal Affairs Division and the Fourth Judicial District's District Attorney's Office² have been designated to investigate allegations of serious negligence or misconduct involving the Sheriff's office.

I. Details of Spoliation and Background.

On February 27, 2006, the 10th Division of the 4th Judicial District Court, presided by Judge Gilbert Martinez became aware of evidence spoliation in the case of the People v. Todd Newmiller, 04CR5770. The evidence in question was a folding knife, which the People alleged to have been used to kill Anthony Madril.

The knife played a significant role in the prosecution of Todd Newmiller. Lead prosecutor Jeff Lindsey said of the knife, "this is crucial evidence in the People's case."³

The evidence was crucial because it was the only physical evidence connecting Todd Newmiller to the victim Anthony Madril. None of the six witnesses had seen Newmiller confronting Madril, but all had seen Madril in a fierce fight with another man, prosecution witness Brad Orgill.

¹ Details concerning the Coverdell grants and related statutory requirements will be provided in Section III of this document.

² The Colorado Bureau of Investigation also has been named as an investigative entity to vet allegations under the Coverdell program that involve the Pikes Peak laboratory. I have chosen not to send this allegation to the CBI, however, because I also challenge activities at the CBI's laboratory in this allegation. It would present a conflict of interest for CBI investigators to examine the allegations I have raised herein.

³ 04CR5770, Newmiller, Todd, Motions, 2-27-06, p. 83 at 8.

Entering the fight with Orgill enthusiastically, Madril shouted, “It’s on. Let’s go.”⁴ Madril emerged from the fight bleeding from his chest and saying, “I just got stabbed.”⁵ Orgill’s clothing contained significant quantities of blood found to belong to the victim. Newmiller’s clothing had no blood from the victim. The prosecution’s theory of the crime was that Newmiller, unseen by any of six witnesses, stabbed Madril in the chest, breaching both ventricles, and then went on to have a non-violent confrontation with one of the victim’s friends. Meanwhile, according to the prosecution’s theory, Madril, his heart now slashed, went on to fight with Orgill. Newmiller admits that after confronting the victim’s friend, he used the knife to puncture the right rear tire of the pickup truck the victim had ridden. It’s undisputed that the puncturing of the tire occurred after Madril was engaged in the fight with Orgill. Debris noted on the knife and described by Detectives Don Richer and Jeff Nohr was consistent with what one would expect to have come from the punctured tire. What was in dispute was how a small quantity of the victim’s blood—not noted until the knife arrived at the CBI lab—came to be on the knife. The defense argued that the blood had to have been deposited sometime after Madril’s confrontation with Orgill. Other physical evidence supporting that position includes the absence of Madril’s blood on Newmiller’s clothing, the absence of blood spatters on the ground in the area where Newmiller was known to be standing, and the absence of blood in the puncture of the tire. Further, there were a number of opportunities for blood transfer to the knife after the confrontation, including the possibility of cross-contamination after the evidence was received. Had the knife been preserved in its original condition, it could have been subjected to a more comprehensive and credible analysis.

Early in the investigation of the stabbing, two members of the El Paso County Sheriff’s office, Detectives Don Richer and Jeffrey Nohr examined the knife closely. Both detectives noted that the knife contained various forms of debris and material. Neither detective noted the presence of any blood on the knife. Detective Richer testified that when he examined evidence, if he observed anything that looked like blood, he would so note it.

After the knife had been delivered into the possession of the CBI, Agent Rebecca Strub examined it and has since testified that the knife did not contain any debris or material as Richer and Nohr had reported. She did, however, note a minute amount of blood on the handle of the knife and around the logo on the blade of the knife. Photographs of the knife taken shortly after it was received by the El Paso County Sheriff’s Office, and reviewed by Judge Martinez, show the debris on the knife but do not reveal the existence of any blood on the knife. Testimony by a prosecution witness, Brad Orgill, who viewed the knife prior to its being received into evidence by the El Paso County Sheriff’s Office, corroborates the existence of debris and the absence of blood on the knife.⁶

Although Judge Martinez provided no remedy for the spoliation—he permitted its use by the prosecution without sanction—he clearly implied that serious negligence or misconduct had occurred, as evidenced by his statement from the bench that “somebody did something wrong,

⁴ 04CR5770, Newmiller, Todd, Vol. IV, 3-3-06, p.134 at 24.

⁵ *Id.* p. 138 at 13.

⁶ 04CR5770, Newmiller, Todd, Vol. VII, 3-8-06, p. 69 at 23.

Counsel, because this knife should have been taken down to the CBI in the same condition as this photograph and apparently it wasn't, so somebody somewhere dropped the ball.”⁷

Remarks by Assistant Attorney General Patricia R. Van Horn indicate that the spoliation may have occurred after the evidence left the Sheriff’s storage facility. Van Horn states in the People’s Answer Brief for case 06C1402 that “The substance was still present when the detectives placed the knife in the envelope to be transported to CBI.” Initially, she denied any responsibility by the state, but during oral arguments in the case, Van Horn conceded of the evidence that the state was not going to argue “that this wasn’t destroyed by state action....we know it was in the state’s custody....”

The path taken by the evidence from its initial retrieval by Sheriff’s officers to analysis at the CBI lab is complicated and uncertain. Sheriff’s detective Don Richer retrieved the knife from Todd Newmiller’s coat pocket on the afternoon of November 20, 2004.⁸ Sheriff’s Detective Jeff Nohr testified that sometime in early February (perhaps the 3rd or 4th) evidence in the case was sent to the CBI. Coincidentally, February 5, 2005, was when the El Paso County Sheriff’s Office moved its evidence facility, an endeavor spearheaded by Jeff Nohr. The Sheriff’s annual report for 2005 describes the operation, “During the move, over 65,000 items were transferred from 305 S. Union to our new facility. The evidence was moved with two 24 foot rental trucks that each made six round trips. The move was accomplished in just under ten hours.”⁹ The letter accompanying the February evidence shipment to CBI listed the knife as one of the pieces of evidence, but on May 5, 2005, Sheriff’s Detective Jeff Nohr received a call from the CBI lab informing him that the knife was missing from the shipment. Nohr then found the knife in the evidence facility and personally transported it to the CBI lab.¹⁰

Although this allegation specifically concerns negligence or misconduct in forensic analysis, the failure of Colorado authorities to report the spoliation calls into question their truth-seeking motives. Although the spoliation had occurred by June of 2005, it was not reported, and did not surface until the knife under court order was submitted to independent analysis by Technical Associates of Ventura, California in January 2006. Analysts at Technical Associates then reported that the substance observed by Richer and Nohr was missing.

II. Implications of Spoliation

The spoliation, whenever it occurred, is clear from the existing record and it substantially affected the integrity of forensic results.

That the CBI failed to reveal evidence spoliation, that the initial state response to proof of spoliation was a denial of responsibility, that the evidence in question was crucial to obtaining a controversial conviction calls for an investigation that so far has not happened. All stakeholders in Colorado’s criminal justice system deserve to find out how the evidence in question here came to be altered—to find out what went wrong, to learn what mistakes must be avoided in the future

⁷ 04CR5770, Newmiller, Todd, Motions, 2-27-06, p. 75 at 25.

⁸ El Paso County Sheriff’s Office Supplemental Incident Report 04017134-010083.

⁹ El Paso County Sheriff’s Office 2005 Annual Report, p. 30, available at <http://shr.elpasoco.com/NR/ronlyres/362FEECB-8652-4DAB-A2F2-86C189A262C7/0/2005AnnualReport.pdf>.

¹⁰ 04CR5770, Newmiller, Todd, Vol. VIII, 3-9-06, p.54 at 18.

to ensure integrity in forensic analysis. Section IV of this document discusses more fully how an investigation can be structured to uncover the root causes of the negligence/misconduct exemplified by the case described herein. With an understanding of the deficiencies revealed by such an investigation, corrective action can be implemented to improve the integrity of the forensic laboratory system.

III. The Required Statutory Response to Allegations.

Congress initiated the Coverdell grant program in 2000 which, since 2002, has provided states with a fertile source for forensic laboratory funding. The money is intended “to improve the quality and timeliness of forensic science and medical examiner services, and to eliminate backlogs in the analysis of forensic evidence, including controlled substances, firearm examination, forensic pathology, latent prints, questioned documents, toxicology and trace evidence.”¹¹ The Department of Justice’s National Institute of Justice (NIJ), a division of the DOJ’s Office of Justice Programs (OJP), administers the Coverdell grants. The NIJ disbursed \$275,004 in 2007 and \$180,468 in 2008 to the state of Colorado, a portion of which went to the CBI.¹² An additional \$65,766 was disbursed to the Pikes Peak Metro Crime Laboratory in 2007, and \$94,904 in 2008.¹³

My allegation mandates specific action under the Paul Coverdell Forensic Science Improvement Grant Program, from which the CBI receives funds. Under 42 U.S.C. § 3797k(4)(2004), as a precondition to receive funding, each applicant was required to furnish:

A certification that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or *contractors* of any *forensic laboratory system*, medical examiner’s office, coroner’s office, *law enforcement storage facility*, or medical facility in the State that will receive a portion of the grant amount (emphasis added).

The CBI and the Pikes Peak labs both submitted to the above certification.¹⁴ That means that members of the public have the right to request investigations of serious allegations connected to their forensic results – and that includes the results of the broader “forensic laboratory system” or “law enforcement storage facility” tied to each lab, as well as their “contractors.”

The facts raised in this allegation involve forensic integrity within the CBI lab’s “forensic laboratory system,” which includes the El Paso County Sheriff’s office as well as contractors providing services to the CBI lab and the El Paso County Sheriff’s Office. The evidence in question was spoiled somewhere within that system. Notwithstanding the inclusion of the Sheriff’s office and contractors in the CBI’s laboratory system, the Sheriff’s office also is an

¹¹ A description of the funding stream is available on the National Institute of Justice’s Web site, at <http://www.ncjrs.gov/pdffiles1/nij/sl000745.pdf>. The grants play a central role in virtually all states’ forensic laboratory funding.

¹² Please see annual summaries of Coverdell grant funding disbursements, including FY 2007 and FY 2008 data, available at <http://www.ojp.usdoj.gov/nij/topics/forensics/nfsia/welcome.htm>

¹³ *Id.*

¹⁴ Please see Exhibit A for the certification covering the CBI, viewable on pages 27-28 of the 28-page document. Please see Exhibit B for the certification covering the Pikes Peak lab, viewable on pages 21-22 of the 22-page document.

independent recipient of Coverdell money, and the spoliation I have alleged must have occurred at the Sheriff's law enforcement storage facility, or while in possession of one of its contractors, if that spoliation did not occur at the CBI. As such, the jurisdiction exists to investigate the entire range of possible locations where the spoliation occurred.

In keeping with the Coverdell investigative requirement, the Colorado Attorney General's Office is named as the investigative entity for the CBI laboratory. Likewise, the Colorado Springs Police Department Internal Affairs and the Fourth Judicial District's District Attorney's Office are named as entities responsible for providing oversight in connection with the Coverdell monies allocated to the Pikes Peak lab. As such, these agencies are responsible for investigating allegations of negligence or misconduct under the parameters of the Coverdell certification requirement.

IV. Scope of the Investigations

The integrity of forensic analysis is fundamental to the confidence citizens can have in the criminal justice system. The spoliation of evidence in this case calls into question the reliability of evidentiary safeguards in the CBI's laboratory system, the Pikes Peak law enforcement storage facility, and those of connected contractors. All stakeholders in Colorado's criminal justice system deserve to find out how the evidence in question here came to be altered—to find out what went wrong, and to learn what mistakes must be avoided in the future to ensure integrity in forensic analyses, going forward.

The federal government has long recognized its duty to the public to identify and remedy the *causes* of catastrophic errors. For example, when an airplane crashes or a train derailed, the National Transportation Safety Board (NTSB) immediately conducts an investigation into the causes of the incident and makes recommendations. Such investigations enable the government to figure out what went wrong and, even more importantly, what can be done to correct the problem and prevent it from happening again. Congress realized the benefit of the approach, and with its passage of the Justice for All Act of 2004 (JFAA) and the attendant changes to the Coverdell granting process, it brought this model to the nation's forensic entities. As the designees for fielding Coverdell Program allegations connected with the forensic laboratory system discussed in this allegation, the addressees of this allegation are responsible for investigating it for the benefit of the people of Colorado and the criminal justice system at large.

The process used in conducting this investigation is a crucial consideration, as well. The U.S. Government Accountability Office has developed standards for sound audits like the one I am requesting, and the investigation will have the resonance and impact that Congress intended if it adopts the spirit of the GAO's recommendations, which can be viewed in the GAO document titled "Government Auditing Standards: January 2007 Revision," available at <http://www.gao.gov/govaud/d07162g.pdf>. See sections 3.01-3.39. With that context in mind, I ask those charged with investigating this allegation to:

- 1) identify the source of the alleged problems;
- 2) identify whether there was serious negligence or misconduct;
- 3) describe the method used and steps taken to reach the conclusions in parts 1 and 2;
- 4) identify corrective action to be taken;

- 5) where appropriate, conduct retrospective re-examination of other cases which could have been affected by the same problem;
- 6) conduct follow-up evaluation of the implementation of the corrective action, and where appropriate, the results of any retrospective re-examination;
- 7) evaluate the efficacy and completeness of any internal investigation conducted to date;
- 8) determine whether any suggested laboratory protocol change might also benefit other laboratories within its investigatory jurisdiction; and
- 9) present the results of Parts 1-8 in a public report.

Any corrective action must not result exclusively in blame of a particular person for a particular act, but instead should determine the underlying causes of the act via “root cause analysis,” the purpose of which is to solve problems by correcting or eliminating root causes, as opposed to merely addressing immediately obvious symptoms.

V. The Importance of this Investigation:

The external and independent investigation I am now requesting will help the Colorado law enforcement agencies properly identify and apprehend the guilty actual perpetrators of crimes and protect the innocent by making the forensic analysis in Colorado more accurate and reliable. It also can increase public confidence in the integrity of laboratory work serving Colorado’s criminal justice system and ensure that adequate quality control procedures are in place.

Jurors can have faith that evidence will contribute to the fair disposition of justice, rather than the risk of imprisoning an innocent person while a guilty person goes free.

I recognize the good-faith efforts of the state’s forensic community to conduct its work, regularly juggling substantial caseloads while struggling for the funding, equipment and staffing it deserves. Nevertheless, the forensic community must operate with transparency and proper state support in this technically advanced era. Thus, it is my hope that the Coverdell investigation can identify whatever negligence or misconduct, if any, affected the matters herein—and ensure that, via an effective investigation report, the state’s forensic community will benefit.

I am thankful that Congress has provided the Attorney General’s Office, Internal Affairs at the Colorado Springs Police Department, and the District Attorney’s Office of the Fourth Judicial District with the authority to investigate this allegation. I expect that public concern will be alleviated by knowing these entities are involved in ensuring that Congressional intent is fulfilled for the good of Colorado and the criminal justice system at large. I ask that these agencies, which are charged to investigate the circumstances described above, pursue investigation as promptly as possible and release their findings without undue delay.

Sincerely,

William Newmiller
bill@newmiller.com
(719)302-5550