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"Our burden was to show that Det. Senters acted in bad faith by destroying evidence to purposefully deprive the defense with the opportunity to have it tested. The timing of his actions helped to prove bad faith."

Exposing Police Misconduct

by **BILL CLUTTER**

On January 5, 2015, the U.S. Attorney for the Eastern District of Kentucky dismissed capital murder charges against two men, Gerald Lee Sizemore and Jimmy D. Benge, accused of killing DEA informant Eli Marcum. By dismissing the murder charges, prosecutors avoided a ruling on a defense motion asking U.S. District Judge Amul Thapar to dismiss the indictment based on the misconduct of a police detective who had destroyed evidence collected from the crime scene. The decision also aborted another evidentiary hearing that was scheduled that day to hear more evidence as to why the evidence had been destroyed.

Prosecutors offered my client, Sizemore, and his co-defendant Benge, a plea to reduced charges of drug distribution for their involvement in buying and selling prescription pain killers. Sizemore received a sentence of 15 years and Benge, 20 years for drug conspiracy. Although the plea ended the case, there are still lingering questions. Who killed Eli Marcum? Why was the evidence destroyed?

Eli Marcum, a veteran of the Vietnam War, and a disabled truck driver, like most of those who live on Horse Creek in the

hills of Clay County Kentucky, collected Social Security disability, and was addicted to pain killers.

Jimmy D. Benge had been arrested in November 2012 on drug conspiracy charges and was in jail at the time of Eli Marcum's murder. Authorities alleged that Benge was the mastermind who hired my client and his friend, Vernon "Red" Delph, to murder Marcum to silence his cooperation with DEA.

A disabled coal miner, Benge managed to save a small fortune and became a major sponsor of pill shopping trips to pain management clinics. Sponsors recruited pill shoppers, like Eli, who could obtain prescriptions for OxyCodone, a powerful and highly addictive opiate, because of their medical history. Sponsors fronted the money—for gas, for the doctors who insisted on payment of cash to write the scripts, and for the pills that were dispensed by often shady pharmacies—all part of the conspiracy. The "patient" and the sponsor split the pills 50/50, which in turn were consumed or sold illegally to other addicts for as high as \$40 per pill. That's the way the scheme worked.

My client was also an addict and pill shopper who, like Eli, had several sponsors. Crippled in one of his arms years ago in an ATV accident, he was prescribed OxyContin, an oxycodone brand name manufactured by Perdue and Pfizer, around the time when these pharmaceutical companies began aggressively marketing OxyContin as a "less addictive" alternative to morphine. From that crippling injury, he became addicted to opiates.

In 2012, the Attorney General of Kentucky filed a civil suit against Perdue and Pfizer, "alleging that the misleading marketing led to an epidemic of addiction in the depressed coal mining coun-

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try of Eastern Kentucky. In the spring of 2012, Kentucky Gov. Steve Beshear signed legislation cracking down on “Pill Mills”, forcing addicts to drive to other states in search of loosely regulated pain clinics still found in Florida, Virginia, and Georgia.

In June of 2012, Eli Marcum was arrested in Tennessee on his way home from a pill shopping trip to Georgia, caught with 83 pills of OxyCodone concealed in a shampoo bottle. He lived with his friend, my client, while he awaited trial, and then with a neighbor just below the hill. The day before he went missing, Eli’s ex-wife accused him of being a “Rat.” Eli was sitting on the front porch of my client’s home, drinking coffee when this happened. His ex-wife was there to buy Xanax.

When Eli failed to show up at the post office on Monday morning to pick up his SSI disability check on December 3, 2012, Eli’s daughter became concerned and filed a missing person report. A week later, she discovered the remains of her father’s charred body up on a mountain

holler, deep in the woods, on Saw Mill Hollow Road—an old logging trail that was only accessible on foot, horseback or All-Terrain Vehicle. Thin strands of wire encircled the body which was lying face up in the middle of the trail. A yellow Ethernet cord, the kind used to connect a computer to the internet was a few inches from the head. The yellow cord appeared to have been used as a possible ligature by the killer or killers.

Less than a quarter mile from the body, in the direction of Horse Creek Road, a two lane gravel road, was an open folding knife with a straight edge razor. It was dropped along the trail, as if someone were in a hurry to make an exit down the mountain. The Clay County Coroner, recognizing the significance of the knife, handed a state police trooper a pair of latex gloves to wear as he collected the knife as evidence.

At the state medical examiner’s office in Frankfort, an autopsy determined that Marcum died from a slashed throat and two stab wounds to his chest.

The case was assigned to newly promoted Kentucky State Police Detective Jeff Senters, who had grown up in Clay County. He began as a trooper in 2005 and was promoted to detective on December 1, 2012, the day before Marcum disappeared. This was his first homicide assignment. Soon after “solving” Marcum’s murder, in May of 2013, Detective Senters was awarded the highest honor within the Kentucky State Police, the “Trooper of the Year for 2013”, in recognition of his work in “solving” the case.

As the court-appointed investigator for Gerald Sizemore, I began the defense investigation in the fall of 2013. Cyndy Short, a Kansas City criminal defense attorney who specializes in death penalty cases, retained my services, along with those of Louisville Attorney Kent Wicker. The judge approved a generous budget for the defense team to conduct a thorough defense investigation as our client faced the possibility of a death sentence. The first disclosure of discovery by the prosecution was a mere 126 pages that consisted of the initial missing person investigation reports and some scattered

reports of the investigation. We had no disclosure of the key witnesses who were interviewed by the government that provided the evidence for the grand jury to indict Sizemore.

Unlike state cases, where full disclosure of the entirety of the police investigation reports and interviews are routinely disclosed to the defense team by prosecutors, the rules of discovery at the federal level leave defense attorneys and their clients in the dark as to much of the investigation that is conducted by the government. Federal prosecutors are not required to disclose the interview reports of witnesses until after a witness has testified.

In the reports we were provided, we had to piece together the puzzle to figure out what evidence the government had against our client. In one report, it said Det. Senters initiated a search of my client’s home in March of 2013. Typically, a search warrant is issued based on a sworn affidavit of a police officer that provides probable cause to search a dwelling. The affidavit was not provided, but we did get the report that was prepared by the Crime Scene Investigator. According to this report, Det. Senters was “primarily interested in the living room. He had an eyewitness statement indicating that the victim’s throat was cut in this room.” A few days after this search, Gerald Sizemore was indicted for the murder of Eli Marcum in state court. Weeks later, the feds picked up the case, charging Sizemore and another man, Vernon Delph, with capital murder. According to the informant, Delph was present and helped Sizemore get rid of the body by rolling it up in a rug and hauling the body up to Saw Mill Hollow on a fourwheeler. With this disclosure, we knew Det. Senters had a confidential informant, but we had no disclosure of the identity of this person.

Missing from the disclosure were the DNA test results. If Eli Marcum’s blood had been found during the search by the crime scene investigators, the prosecutor would have disclosed this in discovery. The only DNA report disclosed was a negative report from testing of a James Bowie knife that belonged to my client. If Eli

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Marcum had his throat slit in the living room of my client's house, there would be trace evidence of blood somewhere in the wood subfloor.

I arranged to interview the DNA analyst at the Frankfort crime lab. He said there was no blood of the victim found inside the home of my client. He also said he kept a computer entry summarizing all telephone communications concerning the case file. This fact would later become significant.

The next round of discovery was the disclosure of an October 1, 2013 memo prepared by Det. Senters that documented his destruction of the knife and Ethernet cord. The memo stated that he decided to destroy this evidence after placing a call to the DNA analyst who "advised due to the time and the weather conditions that there would probably not be DNA and if there was it wouldn't be enough to test."

In discussions with the defense team, I had suggested that we should retain Dutch Forensic Scientist Richard Eikelenboom to perform touch DNA testing on this evidence. They used a technique that could extract DNA profiles from as few as ten skin cells. Now we were told that Det. Senters had destroyed the evidence.

Our defense team invited the co-de-



fendants, Bengé and Delph, to enter into a joint defense agreement. Delph's team declined. The Bengé team agreed to join our motion to dismiss based on the de-

struction of evidence.

I knew from my work with the Illinois Innocence Project that states that receive federal grants for post-conviction DNA testing are required to have evidence preservation statutes. This statute requires that local and state law enforcement agencies undertake a policy to preserve evidence that may be suitable for DNA testing. I knew that the Kentucky Innocence Project had applied for a federal Bloodsworth Grant, named after Kirk Bloodsworth, the first death row inmate exonerated because of DNA testing in 1993.

I pulled up a copy of Kentucky's evidence preservation statute. The relevant part of the Act states: "*No item of evidence gathered by law enforcement . . . that may be subject to . . . (DNA) evidence testing and analysis in order to confirm the guilt or innocence of a criminal defendant shall be disposed of prior to trial of a criminal defendant unless . . . The court has, following an adversarial proceeding in which the prosecution and the defendant were heard, authorized the destruction of the evidence by court order.*" Anyone violating this statute commits the offense of Tampering With Physical Evidence, a Class D felony.

This was the first question Det. Senters was asked by Attorney Kent Wicker, a graduate of Harvard Law School, when the evidentiary hearing commenced in a federal courtroom in Lexington, Kentucky on July 24, 2014.

Wicker asked, "Have you been charged with tampering with physical evidence?"

He replied, "No, I have not".

The day before the hearing, I had subpoenaed the records of the medical examiner. In his file was a state court order that was served to the medical examiner, and to Det. Senters, ordering preservation of all evidence collected. So, destruction of the evidence violated a court order, as well. An earlier interview had revealed that Det. Senters brought the James Bowie knife belonging to my client to the medical examiner. The blade of the knife was wider than the slits of the two stab wounds, leading the medical examiner to conclude it was unlikely the murder weapon.

Wicker questioned Senters about the memo he wrote: "The cord was taken for evidence at the time, but after further investigation it didn't yield any leads".

"Did you show it to any witnesses?" asked Wicker.



Det. Senters replied that he showed the cord to only one witness, the woman who rented the house to Mr. Sizemore. "She stated that she had never saw the cord before", said Senters. He also said there was no computer at the house. The day after Det. Senters interviewed the landlord, he destroyed the yellow Ethernet cord.

Our burden was to show that Det. Senters acted in bad faith by destroying evidence to purposefully deprive the defense with the opportunity to have it tested. The timing of his actions helped to prove bad faith.

Under oath, Det. Senters insisted he was positive he called the DNA analyst before he destroyed the evidence on October 1, 2013. Det. Senters was caught committing perjury before a federal judge.

Waiting in the hall under subpoena was the DNA analyst whom Senters claimed he called before destroying the evidence. When I subpoenaed him for the hearing I asked, "What date did Det. Senters call when he inquired about the probability of finding DNA on the yellow cord?" The analyst confirmed that the phone call occurred on February 4, 2014, four months after Det. Senters disposed of the evidence. The DNA analyst did not rule out finding DNA, and was unaware the evidence had been destroyed.

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At the hearing, Det. Senters also admitted returning a cell phone that he had collected as evidence that belonged to a man who was the last to see Eli Marcum alive. Eli lived in the man's trailer, and was seen using the cell phone shortly before he disappeared. Det. Senters admitted he never bothered to have the phone forensically examined.

Within a few days of the hearing, I received a call from an attorney who was in court in Clay County that morning on a case where Det. Senters was the lead detective. A state court judge informed the parties that Det. Senters was no longer working for the Kentucky State Police as he had been given the choice of submitting his resignation or being indicted and chose to offer his resignation.

A few weeks after the hearing, we learned that the government offered Delph, one of the co-defendants, a ten year sentence in exchange for his cooperation against Sizemore and Bengé. This was a sign that the government was desperate to bolster its case.

The judge set another hearing date for January 5, 2015 to hear more evidence concerning former Det. Senters. By this time, Randy Edwards, an investigator working for the Bengé defense team, located a witness who identified the owner of the knife that had been destroyed by Det. Senters. This person was under investigation for sponsoring pill shopping trips to Virginia involving Eli Marcum, according to our investigation. Years ago, Edwards had been the defense investigator for Kirk Bloodsworth in Maryland, and was no stranger to miscarriages of justice. When Randy and I interviewed the owner of the knife, he acknowledged that he was the first suspect in the murder investigation. He was seen going up to Saw Mill Hollow before the body was found, perhaps to retrieve the knife that he lost.

We also learned this first suspect was questioned by police about an electric blanket, which he had several of, since he lived in a camper across from Saw Mill Hollow Road, and had no heater. It now made sense—the thin wires wrapped around the body were from an electric

blanket. This information contradicted the informant, who said the body had been wrapped in a rug.

We teamed up to track down a lead I had on the confidential informant who claimed to see my client kill Eli Marcum. When Randy and I found her, she was a twenty year old woman who had spent her youth and teenage years in psychiatric facilities and orphanages. She claimed that my client shot Eli after cutting him with a knife. The autopsy contradicted this—there were no gunshot injuries. This girl had also been involved in a sexual relationship with our prime suspect, according to court records and the man's ex-wife. The girl said she also was very close to former detective Jeff Senters and had reservations about talking to us without him being present.

I asked, "When did you last have contact with Mr. Senters?"

She replied she saw him "yesterday afternoon." He had come by to see how she was doing. This was well after he resigned as a police officer.

We were prepared to ask Mr. Senters about the credibility of this informant and the nature of his relationship with this troubled young woman at the next evidentiary hearing. However, before the hearing could commence, prosecutors offered to dismiss the murder charges in exchange for our client's plea to drug charges.

Clay County has been described as one of the most corrupt places in all of Kentucky. Judges and police officers have recently been the target of investigations and prosecutions for corruption. Even Richie Farmer, the former college All-American who led the University of Kentucky basketball team to the NCAA Regional Finals, the "Pride of Clay County", is serving time in a federal prison for political corruption.

And now there is this case—police misconduct involving the destruction of evidence and lying under oath to a federal judge. Enough to shake the confidence of federal prosecutors in their decision to seek a murder conviction with the stakes involving the death penalty. ♦



CLUTTER INVESTIGATIONS



BILL CLUTTER, founder of Clutter Investigations, specializes in criminal defense investigations, and death penalty mitigation investigations. He has expertise in bloodstain pattern analysis and crime scene reconstruction.

Clutter was a member of the defense team that helped win the release of David Camm, who was wrongfully convicted in New Albany, Indiana. He assisted with the crime scene reconstruction, along with other experts that helped win Camm's acquittal on Oct 24, 2013.

Clutter began his career as a private investigator in Springfield, IL. His investigation in several cases helped provide key evidence exonerating the innocent. His investigation helped free two innocent men, Rolando Cruz and Alejandro Hernandez in the infamous Nicarico case in DuPage County, IL. His investigation was cited by a federal judge who granted *habeas* relief to Randy Steidl in 2004, who spent 17 years in prison. His case was featured on *CNN Death Row Stories* and *On the Case with Paula Zahn*.

Clutter started the **Illinois Innocence Project** at the University of Illinois at Springfield in 2001. More recently, in Jan. 2013, he started a new national organization called **Investigating Innocence**, comprised of private investigators and criminal defense attorneys who work to free the wrongfully convicted. For more information on the organization visit www.investigatinginnocence.org

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