

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

TRIAL COURT DEPARTMENT
SUFFOLK SUPERIOR DIVISION
DOCKET NUMBER 2012 SUCR 11006

COMMONWEALTH

v.

DWAYNE McNAIR

NOLLE PROSEQUI

Now comes the Commonwealth and enters this *nolle prosequi* pursuant to Mass. R. Crim. P. 16(a) in the above-captioned case. The Commonwealth enters this *nolle prosequi* in order to allow Eurofins Scientific (Eurofins) to conduct state-of-the-art next-generation genome sequencing to differentiate the defendant's genome from that of his identical twin brother, Dwight McNair, and, in so doing, identify with scientific certainty the source of the semen recovered in connection with the September 29, 2004, rape of a nineteen-year-old woman walking home in Roxbury. This cutting-edge testing was not available until well into the prosecution of this case, and the Commonwealth has concluded that the opportunity to use next-generation genome sequencing technology to present objective, scientific evidence to the jury warrants the extraordinary measure of terminating the pending prosecution. The Commonwealth intends to seek another indictment after the receipt of the test results.

The abductions and rapes that are the subjects of the above-captioned indictment occurred on September 21 and 29, 2004. Despite an intensive investigation by the Boston Police Department's Sexual Assault Unit, detectives were unable to identify suspects at the time. The

investigation continued for years until, in 2007, the defendant emerged as a suspect as a result of conventional investigation. Shortly thereafter, however, detectives also determined that the defendant had a twin brother. DNA testing of the brothers conducted during a grand jury investigation confirmed that the brothers had identical results and thus were monozygotic (identical) twins. Each twin's DNA profile matched a semen sample collected in connection with the second assault, and, because they are identical twins, standard DNA testing could not differentiate between them. Conventional investigative methods were likewise unable to uncover evidence to establish conclusively which twin participated in the rape. Police, therefore, were unable to establish probable cause to arrest one twin or the other.

In 2011, a second suspect, Anwar Thomas, was identified by a match between his DNA and evidentiary samples from both rapes. This match was generated by the Federal Bureau of Investigation's Combined Offender DNA Index System (CODIS). As a result of the match, and after further investigation, Thomas was indicted in connection with the rapes. As his trial was approaching, Thomas provided information to investigators. In particular, he disclosed that he had been friends with both McNair twins since high school (a fact confirmed by independent investigation and Boston Public School records), that he could distinguish between them easily (also confirmed by other witnesses), and that he had committed the rapes with Dwayne McNair. On September 12, 2012, Thomas pleaded guilty in connection with the rapes pursuant to a cooperation agreement. His sentencing is pending.

As a result of the information provided by Thomas, detectives sought and obtained an arrest warrant. On November 9, 2012, the Grand Jury for Suffolk County returned this indictment. Trial in the case was initially scheduled for October 7, 2013, but was subsequently continued until April 29, 2014.

On April 2, 2014, while preparing for a meeting with the Commonwealth's DNA expert, the undersigned assistant district attorney reviewed a press release dated December 10, 2013, issued by Eurofins. See <http://www.eurofins.com/en/media-centre/press-releases/2013-12-10.aspx>. The press release "announce[d] a research breakthrough in genetic discrimination between identical monozygotic twins." *Id.* Based in Germany, but with offices in 36 countries worldwide, See <http://www.eurofins.com/en.aspx>, Eurofins is, "one of the global leaders in Genomics Services." Eurofins's forensic practice is accredited to international standard ISO 17025, see <http://www.eurofins.com/en/forensic-services.aspx>, and "provide[s] tailored DNA profiling services to police forces and legal services organi[z]ations across Europe, contributing to both national and international DNA databases." See <http://www.eurofins.com/en/forensic-services/forensic-dna.aspx>. According to Eurofins, the newly announced test is designed to be "used by authorities, courts and medicine to solve cases involving monozygotic twins as [the] originator[s] of DNA traces in crime" Eurofins's press release, in turn, referred to an article ultimately published in 2014 in the peer-reviewed journal, *Forensic Science International: Genetics*. The article, entitled *Finding the Needle in the Haystack: Differentiating "Identical" Twins in Paternity Testing and Forensics by Ultra-Deep Next Generation Sequencing*, *Forensic Science International: Genetics* 9 (2014), sets out the scientific basis of the newly announced test. The undersigned assistant district attorney then contacted an independent expert, Steven McCarroll, Ph.D., a genetics professor at Harvard Medical School who had consulted on the case for several years, and asked him to review the paper. In summary, Dr. McCarroll concluded that:

The scientists' use of technological approaches is skillful and reflects an understanding of best practices in the field, while adhering to mature analytical approaches that are used in hundreds of research laboratories. The science is sound, solid, skillfully practiced and clearly explained. The study gives reason for confidence in the forensic group that produced it.

On April 2, 2014, the undersigned assistant district attorney contacted Eurofins to explore the possibility of conducting testing in connection with this case. According to representatives of Eurofins, the proposed testing requires ten weeks from the laboratory's receipt of samples.

On April 10, 2014, the Commonwealth notified both defense counsel and the Clerk's Office that it intended to file a motion to continue in order to allow the next-generation forensic DNA testing to be conducted. The Commonwealth filed its motion to continue on April 14, 2014. On April 16, 2014, after hearing, the Court (McEvoy, J.) denied the Commonwealth's request. On April 18, 2014, the Commonwealth filed a petition with the Single Justice of the Supreme Judicial Court of Suffolk County to overturn the denial of its Motion to Continue. On April 25, 2014, the Commonwealth received notice that its petition had been denied.

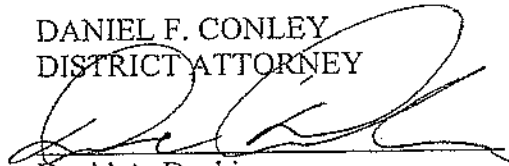
On April 28, 2014, the Commonwealth filed a motion for reconsideration asking the Court (McEvoy, J.) to reverse its decision to deny the Commonwealth's motion for continuance. The Commonwealth supported its motion for reconsideration with an affidavit from Bruce Budowle, Ph.D. Executive Director of the Institute of Applied Genetics, Professor in the Department of Molecular Genetics at the University of North Texas Health Science Center, and formerly Senior Scientist in the Federal Bureau of Investigation's Laboratory in Quantico Virginia. While at the FBI, Dr. Budowle "was involved in the research, development, and validation of numerous forensically-relevant DNA typing methods and interpretation of resultant data." *Affidavit of Bruce Budowle (Budowle Affidavit)* at ¶ 1. Indeed, Dr. Budowle "led the team that developed [the laboratory's] DNA typing capabilities." *Id.* Dr. Budowle's affidavit powerfully supports the proposition that the testing proposed by the Commonwealth is both reliable scientifically and likely to produce highly probative evidence. Nonetheless, the Commonwealth's motion for reconsideration was denied.

The Commonwealth is mindful that it brought its Motion to Continue as the defendant's scheduled trial date was approaching. The Commonwealth has concluded, however, that the interests of justice require that a jury asked to decide a case of this seriousness and complexity should have the best available evidence in order to render its decision. As the Commonwealth has a strong basis to believe that the results of this testing will definitively inculcate (or, if not, conclusively exculpate) the defendant, the Commonwealth concludes that it has no responsible alternative to terminating the prosecution and conducting the state-of-the art forensic genome-sequencing in order to distinguish scientifically between the defendant and his twin brother. The Commonwealth specifically reserves the right to initiate a new indictment against this defendant – or any other person – for the crimes alleged in this indictment.

Respectfully submitted
For the Commonwealth,

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by:



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Date: April 29, 2014