

# INNOCENCE PROJECT



## *Commonwealth v. Keith Allen Harward - Summary*

In the early morning hours of September 14, 1982, a Newport News resident awoke to find a single stranger in her bedroom, standing above her bed and bludgeoning her husband to death with a crowbar. TT 303, 310-12.<sup>1</sup> Over the next several hours, the intruder repeatedly raped the woman, at one point biting her legs. TT 315-17, 322. Around 5 a.m., the assailant took cash from the woman and fled her home. TT 309, 320, 420. The victim immediately called the police, who transported her to a local hospital for treatment and the collection of forensic evidence. TT 325-26, 405. A rape kit was prepared at the hospital, collecting genital and thigh swabbings. Meanwhile, detectives inspecting the crime scene vouchered a baby's diaper, towel, and T-shirt, all of which were handled by the lone perpetrator following the rape. The medical examiner photographed the bite marks on her legs. TT 326, 378. The victim provided detectives with a description of her attacker, whom she characterized as a young, white, clean-shaven man, NNPD 9, 214, and assisted in the creation of a composite sketch. TT 331, 335, 647-49. Based on her description of the assailant's clothing, a Navy uniform bearing an insignia of three V's, TT 305, 331, the investigation focused on sailors stationed aboard the *USS Carl Vinson*, an aircraft carrier that was dry docked at the Newport News Shipyard, near the rape victim's home. TT 252.

---

<sup>1</sup> Citations to the transcript of Harward's second trial are indicated by "TT \_\_\_." Citations to pages from the Newport News Police Department file, provided to Mr. Harward by the current Commonwealth's Attorney, are indicated by "NNPD \_\_\_." The transcripts and police reports can be furnished upon request.

### The Investigation:

In an effort to narrow the pool of suspects, police detectives and naval officials screened dental records of *Carl Vinson* personnel to determine if a sailor's teeth could be associated with the bite marks on the victim's legs. NNPD 11, 259. Through the course of screening hundreds of potential suspects, certain sailors—including Mr. Harward—were selected by a navy dentist for additional review by a local forensic dentist; however, none of the sailors' teeth were determined to match the bite marks. NNPD 32, 104. After six months, the screenings failed to produce any viable suspects.

Pressure to solve the crime came from United States Senators Alfonse D'Amato and Paul Trible, who wrote separately to Navy officials, expressing concerns about the quality of the investigation. Shortly thereafter, in late March 1983, Mr. Harward and his girlfriend at the time were involved in an argument that turned physical. NNPD 46. When Newport News detectives working the 1982 rape/murder investigation learned that Mr. Harward had been accused of biting his girlfriend, Mr. Harward became the focus of the investigation. Detectives brought the rape victim to the courtroom for Mr. Harward's arraignment on charges related to the domestic incident (which were ultimately dismissed), but she was unable to identify Mr. Harward as her attacker. NNPD 49.

Despite the victim's inability to make an identification under those suggestive conditions and discrepancies between her initial description and Harward's appearance—he wore a mustache and a uniform with three stripes rather than three V's, TT 331, 472—and in spite of the fact that Mr. Harward had previously been excluded as a potential source of the bite marks, molds of Mr. Harward's teeth were shipped to Dr. Lowell Levine, a highly regarded and high profile board-certified forensic dentist from New York. NNPD 8, 49. Dr. Levine is one of the

founders of the forensic dentist group—the American Board of Forensic Odontology (“ABFO”). Dr. Levine examined the evidence and concluded that Mr. Harward had, in fact, inflicted the bite marks on the rape victim’s legs. NNP 8, 52. To enhance the prosecution’s case with the inclusion of a local dentist, prosecutors engaged a Roanoke, Virginia, odontologist, Dr. Alvin Kagey, who, like Dr. Levine, was a member of the ABFO. Dr. Kagey concurred with Dr. Levine, concluding that “Mr. K.A. Harward is the person that did the biting.” NNP 262. The two dentists who conducted the preliminary screenings and excluded Mr. Harward as the biter were informed of Dr. Levine’s conclusion and were asked to reevaluate their opinions; both revised their conclusions to match those of the Commonwealth’s experts (Levine and Kagey). NNP 57, 63.

On May 16, 1983, a grand jury indicted Keith Harward on four charges: capital murder, robbery, rape, and forcible sodomy; he was arrested later that day at his parents’ home in Forsyth County, Virginia. NNP 54-55. Apart from the bite mark evidence, the only other inculpatory evidence offered at trial was testimony by Donald Wade, a sailor who previously had told the homicide detectives that he had noticed a sailor with what appeared to be a bloodstain on his uniform return to the *Carl Vinson* on the morning of the crime. Months later and one week after Dr. Levine identified a positive association between the bite marks and Mr. Harward, Mr. Wade identified this person as Mr. Harward through a six-photo lineup. TT 468-69. However, unbeknownst to Mr. Harward, Mr. Wade had undergone hypnosis prior to making the identification. This information was not disclosed to Mr. Harward or his attorneys until Mr. Harward sought DNA testing in 2015.

## Trials and Appeals:

Knowing that the bite mark evidence would be central to the case, Mr. Harward's defense attorneys contacted another board-certified odontologist in advance of his October 1983 trial; however, that dentist, ABFO founding member Dr. Stanley Schwartz, agreed with Dr. Levine's and Dr. Kagey's conclusion that Mr. Harward's teeth must have inflicted the bite marks. Thus, at trial, testimony from the Commonwealth's experts went entirely un rebutted. Though Mr. Harward testified in his own defense, a jury found him guilty of all four charges. Mr. Harward only escaped a death sentence because his mother and father testified at the penalty phase and begged the jury to spare their son's life. The court sentenced Mr. Harward to life imprisonment.

Although the conviction was ultimately reversed on a technical legal issue, the prosecution presented a nearly identical case at a second trial. Both forensic odontologists again testified for the Commonwealth. Dr. Levine instructed the jury that "everybody has a set of teeth which are unique and individual," TT 506, and that "as a practical thing," no two individuals have identical dentitions. TT 559. With respect to the evidence at issue in this case, Dr. Levine stated to a "[v]ery, very, very, very high degree of probability" that there were "no discrepancies" between the bite marks and Mr. Harward's teeth, and therefore it would be a "[p]ractical impossibility that someone else would have" left the marks. TT 522, 559. Similarly, Dr. Kagey told the jury that he could match Mr. Harward to the bite mark "with all medical certainty," meaning "that there is just not anyone else that would have this unique dentition." TT 584-85.

Like Mr. Harward's first trial attorneys, the defense at the second trial contacted a Richmond-based dentist for assistance. That dentist agreed with the five others that Mr. Harward's teeth matched the bite mark, bringing the total number of dentists who incorrectly

linked him to the crime to six. In addition, a serologist from the Commonwealth’s forensic lab, David Pomposini, testified for the prosecution that the serology results on the rape kit samples were inconclusive, neither inculcating or exculpating Mr. Harward. TT 397-98. This testimony was at best misleading and possibly false.<sup>2</sup> In March 1986, a jury again found Mr. Harward guilty of the murder, and he was sentenced to life in prison.

Mr. Harward argued on appeal that bite mark evidence was insufficiently reliable, but the Court of Appeals ruled, consistent with every other court that has considered the issue, that the Newport News Circuit Court did not err in admitting bite mark evidence at trial. *Harward v. Com.*, 5 Va. App. 468, 475-76 (1988). Additionally, the appellate court found that the Commonwealth’s circumstantial case established Mr. Harward’s guilt beyond a reasonable doubt because the bite mark evidence, “[i]f believed . . . proves that Mr. Harward murdered [the rape victim’s husband].” *Id.* at 481. The Supreme Court of Virginia declined to review the Court of Appeal’s decision. Order Refusing Petition for Appeal, *Harward v. Com.*, Record No. 880341 (Va. Dec. 21, 1988).

#### Post-Conviction Appeals and Exoneration:

Mr. Harward wrote to the Innocence Project seeking assistance, noting that “the jury was GA-GA over [Dr. Levine] just from his background.” Although Mr. Harward—then over two decades into his incarceration—“felt / feel[s] beat down over” his case, he wanted the opportunity to finally prove his innocence.

---

<sup>2</sup> Mr. Pomposini’s bench notes reveal that the secretions were actually consistent with a type O secretor. Since the rape victim was a type B secretor and Mr. Harward was a type A secretor, TT 745, he could have been *excluded* from the rape kit evidence at the time of trial. The Commonwealth did not disclose those bench notes to Mr. Harward until he sought post-conviction DNA testing in 2015, over three decades after his trial. Mr. Pomposini gave similar false and misleading testimony in the case of Troy Webb, another Virginia man who was wrongfully convicted and subsequently exonerated through post-conviction DNA testing. See The Innocence Project, *Troy Webb*, available at <https://www.innocenceproject.org/cases/troy-webb/>.

Since it was uncontested at trial that a single individual, acting alone, committed the crimes, TT 248, the Innocence Project and the Newport News Commonwealth's Attorney recognized that the presence of an unidentified male's DNA on probative crime scene evidence would reveal the true perpetrator. With the consent of the Commonwealth's Attorney, in July 2015 Mr. Harward secured DNA testing of multiple items recovered from the crime scene. The first round of test results, obtained in January 2016, conclusively excluded Mr. Harward as the contributor of semen recovered from the victim's rape kit and from semen stains on the diaper and towel handled by the perpetrator after he ejaculated. Moreover, the testing uncovered a redundant DNA profile from a single male on each of those pieces of evidence that, when uploaded into the National DNA Data Bank, matched to an entry for Jerry L. Crotty. Like Mr. Harward, Mr. Crotty was a white sailor stationed aboard the *USS Carl Vinson* in September 1982. He died in an Ohio prison in 2006 after pleading guilty to a charge of abducting a Cleveland woman a year earlier.

On the basis of the new DNA evidence, Mr. Harward filed a petition for a writ of actual innocence with the Supreme Court of Virginia in March 2016. The Commonwealth, upon reviewing the evidence, agreed that Mr. Harward was entitled to relief. The next day, the Supreme Court of Virginia found "by clear and convincing evidence . . . that no rational trier of fact would have found proof of Harward's guilt beyond a reasonable doubt." Order Granting Petition for Writ of Actual Innocence, *In re: Harward*, Record No. 160353 (Va. April 7, 2016). The Court ordered his convictions vacated and his record expunged immediately. On April 8, 2016, Mr. Harward walked out of prison as a free man, having spent 34 years in prison for crimes he did not commit.

To this day, neither Dr. Levine nor Dr. Kagey has admitted error in Mr. Harward's case, accepted any responsibility for the conviction, or apologized. Mr. Harward is at least the 21st person to be wrongfully convicted based at least in part on bite mark evidence; seven other individuals have been falsely accused and indicted for murders they did not commit based on false bite mark evidence.<sup>3</sup> Cumulatively, these innocent defendants spent over 300 years in prison for crimes they did not commit.

#### The Shift in the Scientific Community's View of Bite Mark Evidence:

The bite mark evidence and individualization claims that featured so prominently at Mr. Harward's trials have been thoroughly discredited by all sectors of the scientific community since the time of Mr. Harward's trial. Starting with the National Academy of Sciences in 2009, which concluded "the scientific basis is *insufficient to conclude that bite mark comparisons can result in a conclusive match*," every scientific body to consider bite mark evidence has rejected it as profoundly unreliable. *See* National Academy of Sciences, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science in the United States: A Path Forward*, 175 (2009) (emphasis added); *id.* at 7 (forensic odontologists lack "the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source").

Last year, the Texas Forensic Science Commission ("TFSC"), a non-partisan entity comprised primarily of scientists, undertook a six-month investigation into the validity and reliability of bite mark evidence, ultimately concluding that "there is no scientific basis for stating that a particular patterned injury can be associated to an individual's dentition." Texas

---

<sup>3</sup> Details of each case are available on the Innocence Project's website: [www.innocenceproject.org/wp-content/uploads/2017/01/Description-of-bite-mark-exonerations-and-statistical-analysis\\_final.pdf](http://www.innocenceproject.org/wp-content/uploads/2017/01/Description-of-bite-mark-exonerations-and-statistical-analysis_final.pdf).

Forensic Science Commission, *Forensic Bitemark Comparison Complaint Filed by National Innocence Project on Behalf of Steven Mark Chaney - Final Report*, 11-12 (2016). Based on its findings, the TFSC recommended that “bitemark comparison not be admitted in criminal cases in Texas unless and until” the technique has been scientifically validated. *Id.* at 15. Most recently, the President’s Council of Advisors on Science and Technology (“PCAST”) issued a report to the President on forensic science, and its conclusions on bite marks were even more damning still. PCAST concluded that

bitemark analysis does not meet the scientific standards for foundational validity, and is far from meeting such standards. To the contrary, available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of [a] bitemark with reasonable accuracy.

PCAST, *Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, 87 (2016); *see id.* (noting that “PCAST considers the prospects of developing bitemark analysis into a scientifically valid method to be low” and “advis[ing] against devoting significant resources to such efforts”).

Despite 28 known wrongful convictions and indictments, the unanimous conclusions of the National Academy of Sciences / National Research Council, the Texas Forensic Commission and President’s Council of Advisors on Science and Technology, no court in the United States has ever precluded the introduction of bite mark evidence in a criminal trial.