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Nearly 500 Military DNA Cases Under Investigation

By Tim McGlone, The Virginian-Pilot

During his military trial on a rape charge at Langley Air Force Base, Staff Sgt. Haxel D. Marcenaro argued that he could not possibly have assaulted his teenage accuser.

However, a civilian scientist working for the military took the stand and said DNA showed that the pair “most probably” had intercourse. The testimony was enough to convict; Marcenaro is serving a six-year prison term.

Now, the Army is investigating allegations that the scientist falsified DNA test results in Marcenaro’s case and hundreds of others across the country.

Two months after Marcenaro’s trial, the Army suspended the scientist, Phillip Mills.

Legal experts say the ripple effects of the alleged falsified DNA testing could continue for years as more attorneys learn that Mills was involved in their cases.

During Marcenaro’s two-year appeals battle that followed his trial, the military never informed Marcenaro or his attorneys of their investigation. Marcenaro exhausted all of his appeals and never had the chance to argue that the DNA testing in his case might have been tainted.

“I had no idea,” said Jonathan S. Schwartz, one of Marcenaro’s appeal attorneys, in a recent interview. “They didn’t tell us anything about that.”

The Army’s Criminal Investigation Command is reviewing 479 DNA cases, including Marcenaro’s and at least 15 others from Hampton Roads that were handled by Mills.

Mills has been suspended from his job at the Army’s laboratory at Fort Gillem, Ga.

No charges have been filed against him, and the Army is not commenting on the investigation.

The first case to challenge DNA testing by Mills recently was heard by the U.S. Court of Appeals for the Armed Forces, the military’s highest court.

The court ruled that the defendant, a Navy man who had been based in Hawaii, is entitled to a new hearing in his sexual assault case. Hundreds more cases could be affected, military justice experts say.

Without DNA evidence, Marcenaro's case essentially boils down to he-said, she-said.

According to court records, on New Year's Eve 2002, Marcenaro and his wife made plans to go out. They hired a baby sitter, a girl under 16, to watch their children. The girl brought her pajamas and planned to stay the night.

After several hours of drinking and playing cards with friends, the couple decided to stay home. When the friends left, the baby sitter fell asleep on the living room sofa. At some point in the night, the girl awoke to find Marcenaro on top of her, the court records say. Both had their pants off.

The girl told him to stop, then put on her pajama bottoms and ran from the house, according to court records. Air Force security guards found her wandering around Langley, crying, at about 3:30 a.m. She said she had just been raped, according to the records.

In his defense, Marcenaro claimed that in a late-night daze, he thought the girl was his wife. He testified that when he realized it was the baby sitter, he backed away before having sex.

At his trial at Langley in November 2003, a nurse and a forensic child abuse expert testified that results of a physical exam showed probable penetration.

Mills testified that DNA taken from a swab of Marcenaro's pubic area matched the DNA of the girl. He concluded that the "most probable" explanation for this was that the pair had sexual intercourse.

Marcenaro's attorneys argued that the DNA could have transferred without penetration. No DNA evidence from the girl's vaginal area was brought into evidence.

Marcenaro was convicted and sentenced.

Schwartz, an expert in DNA legal issues, was part of Marcenaro's appeals team, which included three military attorneys.

He suspected there were problems with the DNA evidence, but an appeals court refused to address the issue. Schwartz said, though, that he had no idea of the depth of the problems until informed by a reporter last week.

"We made a big deal of the DNA," he said in a phone interview. "Our position was that it was incompetently done."

The U.S. Air Force Court of Criminal Appeals in November dismissed Schwartz's argument and upheld the guilty verdict and sentence.

During the appeals process in 2004, Mills was under investigation by Army Criminal Investigation Command on allegations that he falsified DNA test results. Military attorneys never informed the defense team of the investigation, Schwartz said.

It wasn't until August 2005 that the lab sent a memo to all staff judge advocates alerting them to the internal investigation of Mills' work, according to court records.

"Evidently, they knew there was evidence they didn't provide us," Schwartz said.

Air Force public affairs officials did not respond to questions about why Marcenaro's attorneys were not notified of the investigation into Mills' work.

Mills first came under suspicion in January 2004, two months after Marcenaro's trial. Mills was suspended after some of his work was found to be contaminated, the Army said. He was retrained and returned to the job in September 2004.

In May 2005, allegations surfaced that Mills was falsifying test results. He was suspended and the following month Mills admitted making one false entry in a DNA case, the Army said.

No reason was given for Mills' suspected actions. He remains suspended pending internal audits and a review by independent agencies, which also are looking at whether other scientists at Fort Gillem may have been fudging results. The Army base near Atlanta processes DNA for all Department of Defense branches.

Meanwhile, Marcenaro had his first parole hearing earlier this month. If he is denied parole, Schwartz said, "I have no doubt we're going to file a motion to rehear the issue."

Air Force officials said that of the 479 DNA cases being reviewed by the Army Criminal Investigation Command, 93 of them were from the Air Force and two originated at Langley, including Marcenaro's.

About 119 of the cases involve Navy and Marine Corps defendants, with about 14 of those from Hampton Roads, officials said.

Charges include murder, rape, robbery and other violent acts.

The Army and Navy refused to release the identities of the defendants in those cases, although they are all in the military justice system, which is, by law, open to the public.

Shaun P. Martin, a law professor at the University of San Diego School of Law, submitted a court brief in the first – and so far only – case involving Mills' testing procedures that was returned to a lower court for a new hearing.

“There will be many, many other cases like this,” Martin said in an interview.

In that case, Navy corpsman Ivor G. Luke was convicted in 1999 of two counts of sexual assault, sentenced to two years in prison and given a bad-conduct discharge. He was found guilty of molesting a woman aboard the guided missile cruiser Port Royal at Pearl Harbor. His appeals have been pending six years.

Defense attorneys learned of the Mills issue and raised it before the U.S. Court of Appeals for the Armed Forces.

The DNA testing in Luke’s case was conducted by Mills and other scientists at Fort Gillem, according to court records. In an opinion issued April 7, the appeals court ruled that Luke should get a new hearing on whether the DNA evidence in his case was tainted. His conviction could be reversed as a result. No hearing date has been set.

The court found that Mills “could have had the opportunity to engage in improper practices” and that the results could have been altered.

“Whether Mr. Mills engaged in the improper activities,” the court said, “is a factual question that this court is not in a position to resolve.”

Luke’s attorney, Marine Capt. Peter H. Griesch, said his client “holds no animosity toward the United States Navy or the U.S. government.”

“He looks forward to the resolution of this issue and wishes to return to active duty in the Navy some day,” he said in an e-mail.

Griesch called Mills’ actions criminal.

“Based on the fact that he may have testified in cases for which he has falsified evidence, it would be fair to characterize his testimony as perjured,” Griesch said.

“We hope that these matters will be properly handled by the United States and that any criminal activity that Mr. Mills may have engaged in will be disclosed to the proper authorities,” he said.

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