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CLERK, SUPREME COURT
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IN THE SVPREME COURT OF FLORIDA

IN RE: AMENDMENTS 10 FLORIDA RULES OF CRIMINAL PROCEDURE PROPOSED EMERGENCY RULE 3.853

No, SC 01-363

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COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.

The Florida Public Defender Association, Inc. ("FPDA") respectfully submits the following comments to proposed emergency Rule 3.853, Florida Rules of Criminal Procedure, promulgated by the Criminal Procedure Rules Committee of The Florida Bar ("the Committee"). The FPDA submitted comments to The Bar's Board of Governors, along with suggested changes to the Committee's proposed rule. The Board of Governors voted to forward the Committee's proposed amendment to this Court without the Board's endorsement and to also forward the alternative version of the rule proposed by the FPDA.

Some members of the Board of Governors expressed concern that the Committee's proposed rule is too narrow. *See Bar endorses concept of DNA testing rule* The Florida Bar News 22 (March 1, 2001). The FPDA's alternative version is broader with respect to both the grounds for a motion for DNA testing and the time limits, if any, that should apply. The FPDA's comments also emphasize that the essential lesson of recent DNA exonerations is not merely that DNA testing should be more widely available, but that there are serious flaws in our criminal justice system that must be corrected to prevent further miscarriages of justice, including in the majority of cases in which there is no DNA evidence to be tested.

The following comments address the Committee's proposed rule and support the FPDA's proposed alternative:

,Groundsfor Motion

The Committee's proposed rule, in sections (a) and (b)(3), provides that a defendant may obtain **DNA** testing if it will "exonerate the dekndant." "'Exonerate" is not defined. It should be made clear **that** "exonerate" does not necessarily mean to relieve the defendant of ~~all~~ criminal liability but would include, for example, establishing the defendant's innocence of **m e** of several offenses of which he **has** been convicted; establishing that he would be guilty **of** only **a** lesser offense; or making him ineligible for the death penalty, For example, if a defendant were convicted of burglary and sexual battery, DNA testing could exonerate the defendant of the sexual battery conviction and call into doubt, but not necessarily exonerate him of, the burglary conviction. Similarly, "newly discovered" DNA evidence could create reasonable doubt about, or even eliminate, the sale aggravating circumstance that made a defendant eligible for a death sentence.

Accordingly, the FPDA's proposed alternative amends sections **(a)** and (b)(3) and b(4) to expand the scope of the rule to apply to all cases in which **a** defendant should have **the** right to seek and then present DNA evidence based on new scientific discoveries or testing methods.

Identification in Dispute

Section (b)(4) of the Committee's proposed rule requires that the motion allege that identification is a genuinely disputed issue "in the case." This must be construed to mean that the defendant presently asserts that he is not the one who committed the relevant offense.[1] The Committee's proposed **rule** properly includes within **its** scope defendants who have pleaded guilty or *nolo contendere* and therefore at one time conceded or did nbt dispute their identity. Several recent **DNA** exonerations have involved defendants who pled guilty and/or confessed falsely to the offense. *See, e.g.*, **Brooke A.** Masters, *Death Row to Freedom: A Journey Ends* THE WASHINGTON POST (Feb. 12, 2001)(Earl Washington)[2]; Henry Weinstein, *DNA Testing Clears Texas Murderer and 'Accomplice'* THE LOS ANGELES TIMES (Oct. 14, 2000)(Christopher Ochoa);[3] Brooke Masters, *Virginia man wrongly convicted of murder: Real killer emerges after disabled man was imprisoned for 5 years* THE

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[1] We **assume** that the rule would apply where identity is an issue as to one of multiple charged offenses in a case, even though identity may not be disputed as to other offenses. For example, in the case of the defendant who is convicted of burglary **and** sexual battery, DNA testing may exonerate the defendant of the sexual battery, but the defendant may still be guilty as a principal for being the look-out in the burglary. **DNA** testing must be available where identity is a disputed issue as to any relevant offense.

[2] http://www.washingtonpost.com/wp-dyn/articles/A61237-2001Feb12.html Earl Washington, who had an IQ of **69,** confessed to a total of four crimes he did not commit and came within days of being executed for the rape and murder of which he was ultimately exonerated. *Id.*

[3] Reprinted at http://www.crimelynx.com/dnaconf.html. Christopher Ochoa gave a false confession **and** pled guilty after he **was** threatened with the death penalty and told (falsely) that another man, Richard Danziger, had implicated him in the crime Ochoa subsequently testified against Danziger, who **was** also innocent. After eleven years in prison, both men were released when another **man** confessed to the crime. and DNA tests cleared Ochoa and Danziger, *Id.*

DETROIT NEWS (May 3, 2000)(David Vasquez).[4] In response to these cases, **DNA** testing bills passed by the Texas and Virginia legislatures this year – like the Committee's proposed rule – include cases in which the defendant has pled guilty. ***See*** Kevin Miller, ***21-day Rills*** *Head* ***Back to*** *Gilmore:* ***Gilmore Made*** *Changes* ***to the*** *Rule* ***Limiting Appeals,*** THE ROANOKE TIMES (April 5, 2001); **Bob Richter,** ***Texas Legislature Approves DNA Testing as Recourse for Convicted Felons,*** KNIGHT RIDDER TRIBUNE BUSINESS NEWS (March 22, 2001). Investigations in the wake of the posthumous **DNA** exoneration of **Frank** Lee Smith in Florida have exposed a pattern of coerced confessions obtained by the Broward Sheriffs Office. ***See*** Wanda J. Demarzo, ***DNA advocate*** *demands* **review** ***of all homicide*** *cases: Lawyer claims troubling pattern* THE **MIAMI** HERALD {March 2, 2001).

Because these cases establish that innocent people do falsely confess and **plead** guilty – **because** of mental disability, fear of the death penalty, or other coercion - it is essential that DNA testing be available to defendants who did not originally contest their identity **as** the alleged perpetrator.

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[4] http://www.detroitnews.com/2000/nation/0005/03/a16-47948.htm; ***see also*** Edward Connors et al., ***Convicted by Juries, Exonerated*** *by* ***Science: Case Studies in the Use of DNA Evidence to*** *Establish* ***Innocence*** *After Trial* (U.S. Department of Justice June 1996) http://www.ncjrs.org/txtfiles/dnaevid.txt. David Vasquez, who is borderline mentally retarded, supposedly described a "dream" that paralleled police accounts of the crime and pled **guilty** to rape and second degree murder to avoid the death penalty. He was pardoned when **DNA** tests established that another **man** had committed a string of crimes identical to the one for which Vasquez was convicted. *See* Masters, *supra*; Connors et al, ***supra.***

Standard for Relief

Section (c)(4)(C) must also be revised to reflect that relief should be granted if there is a reasonable probability not only that the **DNA** evidence would have caused an acquittal' at trial but also a reasonable probability that the defendant would have been convicted of a lesser offense or would not have been subject to the death penalty.

Time Limitations

The Committee's proposed rule, section (d)(1), contains a two year time limit. The **FPDA** believes there should not be any time limit. The principle of finality should not be applied to allow **a** person who is demonstrably innocent to remain in prison because he or she missed a deadline. There is simply no legitimate government interest that could justify such a result.'

As a practical matter, a one-time, two-year window period may not be sufficient to ensure that everyone with a valid claim gets relief. It is unclear whether or how all inmates **will** be notified of the new rule; some defendants may be incarcerated in other jurisdictions and would not receive notice; even if they do receive notice, very few inmates will have access to counsel to assist them in filing a motion; many inmates are illiterate, mentally

[5] See Jones v. State, 709 So.2d 512,521 **(Fla.** 1998) (setting standard for granting of motion for post-conviction relief and new trial based on "newly discovered evidence.")

impaired, or otherwise ill-equipped to present their claims themselves.[6] Inmates like these should not be denied relief because they missed a deadline.

If the Court does retain a deadline for the consideration of these claims, it must be tied to the availability of the relevant testing technology. As currently drafted, the proposed rule requires motions seeking DNA testing to be filed within two years from the adoption of the rule or the judgment and sentence becoming final. The proposed rule fails to take into consideration motions based on *future* scientific advances and testing methods. In so doing, the proposed rule is at odds with the decisions of this Court.

Under present law, after a conviction has become final, claims of "newly discovered evidence" must be brought in a Motion for Post-Conviction Relief pursuant to Rule 3.850 or Rule 3.851, Fla. R. Crim. P., see Thompson v. State, 759 So.2d 650, 668 (Fla. 2000), n. 13 and Richardson v. State, 546 So.2d 1037 (Fla. 1989). As a result of new (and ongoing) scientific discoveries and testing methods, many such claims have been based on genuinely newly discovered DNA evidence, Despite the recent advances in DNA testing, the method and timeliness of raising and presenting such claims under the present Rules of Procedure has remained in dispute,

This Court has explained the timeliness of claims based on new testing methods in two recent cases. In Zeigler v. State, 654 So.2d 1162 (Fla. 1995), the Court said:

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[6] For example, as noted above, both Earl Washington and David Vasquez, who were exonerated by DNA testing, were borderline retarded.

> We agree with the trial court that Zeigler's **DNA** claim is procedurally barred. Assuming for the sake of argument that the more sophisticated PCR (a DNA testing method) was not in use when Andrews was decided: Zeigler concedes that the method was available in 1991. Therefore, he should have raised the claim in his pending motion for post-conviction relief in order to avoid the procedural bar of successive motions. Instead, he waited in excess of two years before first raising the claim in 1994. See Adams v. State, 543 So.2d 1244(Fla. 1989)(motions for post-conviction relief based on newly discovered evidence must be raised within two years ***of*** *such discovery.)* (Footnote added.) (Emphasis added.)

Zeigler at 1164.

In Sireci v. State, *25* Fla. L. Weekly S673 (Fla. September 7, 2000), the Court further explained Zeigler's holding, stating that:

> **DNA** typing was recognized in this State as a valid test as early as 1988. See Zeigler v. State, 654 So.2d 1162, 1164 (Fla.1995) (citing Andrews **v.** State, *533* So.2d 841 (Fla.5th DCA 1988.) In Zeigler, **we** held that the two-year period. for filing a 3.850 motion based on newly discovered evidence ***begins*** *to* ***run*** on a defendant's post-conviction request for **DNA** testing ***when the*** *testing* ***method became*** *available.* See 654 So.2d at 1164; see also Adams **v.** State, 543 So.2d 1244 (Fla.1989) (holding that a motion for post-conviction relief based on newly discovered evidence must be raised ***within*** *two years of such discovery.*)[8] The final amended version of Sireci's *3,850* motion was

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[7] Andrews v. State, 553 So.2d 841 (Fla.5th **DCA** 1988), review denied, 542 So.2d 1332 (Fla.1989), recognized **"DNA** typing" as a valid test in **1988.**

[8] At the time of the 1989 Adams decision cited in both Zeinler and Sireci, paragraph (b) of Rule 3.850 provided that all motions for post-conviction relief had to be filed within two years of the judgment and sentence becoming final. However, with the adoption of Rule 3.851, Collateral Relief **After** Death Sentence Has Been Imposed (adopted October 21, 1993 and effective **January** 1, 1994, 626 So.2d 198), which stated that any Rule 3.850 motion to vacate a conviction and sentence of death was required to be filed within ***one*** year of the judgment and sentence becoming final, Rule 3.850 **was** amended, to be consistent with new Rule 3.851, and now also states that a motion for post-conviction relief "in a capital case in which a death sentence has been imposed," must be filed within one year of the judgment **and** sentence becoming final. Rule 3.850, amended October 21, 1993, effective **January** 1, 1994, (626 So.2d 198).

filed in 1997 - approximately nine years after **DNA** testing was recognized in Florida. Thus, this portion of the claim is time-barred. (Emphasis added.)

(Footnote added.)

Based upon the holdings of Adams, Zeigler, and Sireci, any new rule concerning **DNA** testing should take into consideration not only those ***present*** valid claims which might otherwise be time barred, but also establish clear time limitations with respect to raising claims based on *future* scientific advances, i.*e.*, "when the testing method became available." Sireci. Fundamental fairness – as well as society's interest in the accuracy of convictions - requires a rule that is sufficiently flexible to adapt to modern scientific advances.

The FPDA's proposal adds two sentences to the end of section (b)(2) *to* reflect the fact that scientific discoveries are dynamic and ongoing, and that advances may be made even after motions under this rule and Rules 3.850 and 3.851 are filed. In addition. proposed Rule 3.853 provides ***only for the testing*** of items for **DNA** evidence, the results of which would then need to be incorporated into a motion for post-conviction relief filed pursuant to Rules 3.850 or 3.851.

The additional language to section (d)(1), as discussed above, is for the purpose of allowing the new rule to encompass not only present **DNA** claims which might otherwise **be** time barred, but to make the rule meaningful, and in accordance with the Court's holdings in Adams, Zeigler and Sireci, with respect to scientific discoveries and testing methods that are developed and become available in the future.

Section (d)(2) concerning the "time limitations provided in Fla. R. Crim. P 3.850-

3.851" is confusing. The purpose of this provision is apparently to waive the time limits for filing a motion under Rule 3.850 or 3.851 based upon the results of tests obtained under the new rule. In other words, since the new rule is only a mechanism for obtaining **DNA** testing, a defendant who receives favorable results would still have to move separately under Rule 3.850 or 3.851 to vacate the relevant conviction(s) and sentence(s). The FPDA agrees there should be no bar to a defendant obtaining appropriate relief once DNA tests establish that he or she has been wrongfully convicted or sentenced, However, the Court should clarify the purpose of this provision in comments accompanying the new rule.

Preservation of Evidence

The proposed rule, in sections (c)(4)(A) and (B), requires the trial court to find that "the physical evidence that may contain **DNA** still exists'' and that there is "reliable proof to establish that the evidence has not been materially altered." However, the rule does not specifically require law enforcement agencies to retain and preserve the integrity of all physical evidence for possible future testing. Such a requirement is essential for any **DNA** testing rule to be meaningful.

Commission to Studv Wrongful Convictions

While the **FPDA** strongly supports a rule to allow inmates easier access to **DNA** testing, **we** also believe *it* is essential to recognize that **DNA** testing is not a panacea **for** the problem of wrongful convictions. In the vast majority of criminal cases, there is no DNA

evidence to be tested. There is absolutely no reason to believe, however, that the same errors that led to the miscarriage of justice in cases like Frank Lee Smith's do not also occur in cases in which there is no **DNA** evidence.

Frank Lee Smith is one of 95 death-sentenced persons in the United States to be exonerated since **1973.** Of these inmates, 20 were from Florida — more than any other state.[9] These figures should prompt a searching inquiry into what went wrong with our criminal justice system to allow the conviction of innocent people in the first place and what can **be** done to prevent similar miscarriages of justice in the future, including in cases in which there is no **DNA** evidence.

We therefore propose that the Court create a special commission, like those it created to study problems of racial and gender bias in Florida's legal system , to study the problem of wrongful convictions in Florida, identify the causes, and propose safeguards to prevent similar errors in the future. **As** Barry Scheck, Peter Neufeld, and Jim Dwyer point out in their book, ACTUAL INNOCENCE: FIVE ***DAYS*** TO EXECUTION **AND** OTHER **DISPATCHES** FROM THE WRONGLY CONVICTED (2000), **we** have review commissions to determine the causes of airplane accidents, medical errors, and product defects, but no analogous method for reviewing and learning from wrongful convictions. News accounts of the Frank Lee Smith case suggest that we could learn a great deal from that case, and that preventing similar tragedies will require more than easier access to **DNA** testing:

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[9] http://www.deathpenaltyinfo.org/Innocentlist.html.

Erroneous eyewitness identification, which sent Frank Lee Smith to Death Row, was a factor in 84 percent of **62** wrongful convictions examined by the Innocence Project. *Id.* at **246,** This suggests a need to more rigorously enforce rules against suggestive identifications **and** to reconsider the bar against expert testimony regarding the reliability of eyewitness identification. *Id.* at 246, 255-56.

Police and prosecutorial misconduct kept Smith on Death Row even as evidence of his innocence mounted. ***See*** Sidney O. Freedberg, ***He*** *Didn't* ***Do*** *It,* The St. Petersburg Times (Jan. 7, 2001).[10] Such misconduct does not arise from maliciousness but rather from **a** more dangerous and pervasive problem — a prosecutorial and police culture that believes so strongly in its own infallibility and in the finality of convictions that it has frustrated past attempts to bring erroneous convictions to light. Police and prosecutorial misconduct were the second and third most common causes of wrongful convictions examined by the Innocence Project, occurring in 50 and 42 percent of the cases, respectively. ACTUAL INNOCENCE, ***supra,*** at **246.**

Coerced Confessions have also emerged as a significant problem, as an ongoing investigation of the Broward Sheriffs Office has discovered in the wake of the Smith case. ***See*** Demarzo, *supra.* According to news reports, the Broward Sheriff's Office coerced false confessions in at least two other murder cases involving a total of four defendants. *Id.* Fortunately, in those cases, the real killer was caught before the defendants were convicted.

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[10] **http://www.sptimes.com/News/0l0701/news**/State/He didn t do it .shtml

Id. False confessions were a factor in **24** percent of the **DNA** exoneration cases. **ACTUAL** INNOCENCE, ***supra,*** at **246.**

The other leading causes of wrongful convictions include informant and "snitch" testimony, inadequate resources and training for defense counsel, and unreliable or fraudulent forensic science. *Id.*

The FPDA believes it is crucial that we **attempt** to learn from and avoid repeating our mistakes by carefully studying the problem of wrongful convictions,

CONCLUSION

For the foregoing reasons, the **FPDA** asks that this Court adopt the FPDA's revisions to the Committee's proposed emergency Rule of Criminal Procedure **3.853** and that the Court create a commission to study the problem of wrongful convictions.

Respectfully Submitted,

Florida Public Defender Association

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to John F. Harkness, Executive Director, The Fla Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300 and Hon. O.H. Eaton, Chair, Criminal Procedure Rules Committee, Seminole County Courthouse, 301 N. **Park Ave,** Sanford 32771-1243, on this 16th day of April, 2001.

Paula S. Saunders
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CERTIFICATE—OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, **a** font that is not proportionately spaced.

Paula S. Saunders
PAULA.S. SAUNDERS

APPENDIX

1. FPDA's alternative proposed emergency Rule of Criminal Procedure **3.853**

2. Brooke **A.** Masters, *Death Row to Freedom: A Journey Ends* THE WASHINGTON POST (Feb. 12,2001)

3. Henry Weinstein, *DNA Testing Clears Texas Murderer and 'Accomplice'* THE LOS ANGELES TIMES (Oct. 14,2000)

4. Brooke Masters, *Virginia man wrongly convicted of murder: Real killer emerges after disabled man was imprisonedfor 5years* THE DETROIT NEWS (May 3,2000)

5. Kevin Miller, *21-day Bills Head Back to Gilmore: Gilmore Made Changes to the Rule Limiting Appeals,* THE ROANOKE TIMES (April 5,2001)

4. Bob Richter, *Texas Legislature Approves DNA Testing as Recourse for Convicted Felons,* KNIGHT RIDDER TRIBUNE BUSINESS NEWS (March 22,2001)

7. Wanda J. Demarzo, *DNA advocate demands review of all homicide cases: Lawyer claims troublingpattern* THE MIAMI HERALD (March 2,2001)

8. Sidney **O.** Freedberg, *He Didn't Do It,* The St. Petersburg Times (Jan. 7,2001)

RULE 3.853 MOTIONS FOR DNA EVIDENCE EXAMINATION

(a) **Grounds for Motion.** A person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime that may contain DNA (deoxyribonucleic acid) and that would ~~exonerate the defendant~~ lead to a result other than the guilt of the defendant for the highest offense for which the defendant was convicted, or which would exonerate the defendant from eligibility for the death penalty as a matter of law.

(b) **Contents of Motion.** The motion must be under oath by the defendant and must include the following:

(1) a statement of the facts relied on in support of the motion, including a description of the physical evidence to be tested containing DNA, and, if **known,** the present location of the evidence and how it originally was obtained;

(2) a statement that the evidence was not tested previously for DNA or a statement that the results of any previous DNA testing were inconclusive and that subsequent scientific developments in the DNA testing technique likely would produce a definitive result;. This statement should contain a description of the DNA technology to be relied upon by the defendant. The motion may be amended after filing to include this description.

(3) a statement that the defendant is innocent, that the defendant is not guilty of the highest offense for which the defendant was convicted ~~and~~ or that DNA evidence will ~~exonerate the defendant of the crime for which the defendant was convicted~~ lead to a result other than the guilt of the defendant for the highest offense for which the defendant was convicted, ox which would exonerate the defendant from eliaibilitv for the death penalty as a matter of law.

(4) a statement that identification of the defendant is a genuine disputed issue in the case~~;~~. Identification shall not be limited to the issue of the defendant's participation in the crime charged, but shall include the presentation of DNA evidence that leads to a result other than the guilt of the defendant for the highest offense for which the defendant was convicted, or which would exonerate the defendant from eligibility for the death penalty as a matter of law.

(5) any other material facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority.

(c) **Procedure.**

(1) The clerk of the court shall file the motion when it is received and deliver the court file to the assigned judge.

(2) The assigned judge shall review the motion and deny the motion if it is insufficient. If the motion is sufficient, the prosecuting authority shall be ordered to respond to the motion within a specified time.

(3) The court shall review the response of the prosecuting authority and either enter an order on the merits of the motion or set the motion for hearing.

(4) The court shall make the following findings when ruling on the motion:

(A) whether the physical evidence that may contain DNA still exists;

(B) whether the results of DNA testing of that physical evidence would have been admissible at the trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and

(C) whether there is a reasonable probability that the defendant would have been acquitted, or that there is a reasonable probability that there would have been a result at trial other than the guilt of the defendant for the highest offense for which the defendant was convicted, or which would exonerate the defendant from eligibility for the death penalty as a matter of law if the DNA evidence had been admitted at trial.

(5) The court may tax the cost of DNA testing against the defendant if the defendant is not indigent.

(d) **Time Limitations.**

(1) No motion shall be filed or considered more than **2** years after the date that this rule is adopted by the Supreme Court of Florida, nor more than 2 years after the judgment and sentence in the case become final, whichever is later, except that, a motion may be filed and considered no more than 2 years after the date that the Supreme Court of Florida approves any new DNA technology for use in the courts of the State of Florida.

(2) The time limitations provided in Fla. R. Crim. P. 3.850–3.851 do not apply to a motion made under this rule if the motion for postconviction relief is based on the results of DNA testing.

(e) **Appeal; Rehearing.** An appeal may be taken by any adversely affected party from the order entered on the motion. All orders denying relief must include a statement that the defendant has the right to appeal within 30 days after the rendition of the order denying relief. The defendant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered. The court or the clerk shall serve on all parties a copy of any order rendered with a certificate of service including the date of service.

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Death Row to Freedom: A Journey Ends

By Brooke A. Masters
Washington Post **Staff Writer**
Tuesday, February 13,2001; **Page A01**

VIRGINIA BEACH, Feb. **12** -- Earl Washington Jr. walked out of prison today, marking the first time in the modern era that newly discovered evidence has freed a man sentenced to death in Virginia.

A congressman, three other wrongly convicted men **and** two dozen reporters were on hand to greet Washington, 40, as he arrived at his new home. Although Washington grew up in Fauquier County, he decided not to return to the area where he was wrongly convicted of raping and murdering a Culpeper mother of three in 1982.

"I'm glad to be home," Washington said. **"I'm** nervous, [but] I'm not bitter. I've always believed in God since I was little, **and** God played a big **part** in this, **and** so did the lawyers. I thank God every day, **and** I thank the lawyers every day."

Gov. James **S.** Gilmore III (R) pardoned Washington in October after new **DNA** tests showed no trace of the inmate's genetic material on evidence from the killing of Rebecca Lynn Williams, 19. But the governor left intact **an** unrelated 30-year

Earl Washington Jr. laughs at a press conference which was held at Support Services of Virginia, in Virginia Beach. (Tracy A Woodward - The Washington **Post)**

-----Ea Washington Jr.-----
• Pardoned Inmate to Walt For a Chance at **Freedom** (The Washington Post, Oct 5, 2000)
• Va. **Inmate** To Get Back '**Good Time**' (The Washington Post, Oct 4, 2000)
• DNA Clears Inmate in 1982 **Slaying** (The Washington Post, Oct 3, 2000)
• Advocates Demand **DNA** Results (The Washington Post, Sep **26,** 2000)
• Va. Takes Another Look At DNA in 1982 **Murder** (The Washington Post, Sep 15, 2000)
• 'Time for Action" in **Slaying** Case (The Washington Post, Sep 7, 2000)
• Death-Raw Inmate Gets Clemency (The Washington Post, Jan 15, 1994)
• Wilder Undecided **on Plea for DNA**-Based **Pardon** (The Washington Post, **Dec 31, 1993)**
• Va. Death Row Inmate Awaits More **Tests** (The Washington Post, Oct **27,** 1993)
• **DNA** Test Could Lead to Man's **Release** (The Washington Post, Oct 26, 1993)
• **Fighting** for Survival on Death **Row** (The Washington Post, Jul 2, 1990)

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sentence for burglary and assault. Washington was released today on mandatory parole for that crime after nearly 18 years in prison -- 9 1/2 on death row.

Washington's case has sparked a very public reexamination of Virginia's death penalty, as the General Assembly considered and rejected calls for an end to or at least a moratorium on executions.

Many legislators were shaken by the news that the commonwealth had come within days of executing an innocent man. In 1985, Washington was moved to the death house and could hear state workers tuning up the electric chair while prisoners' rights activist Marie Deans scrambled to find him an attorney to file his appeals.

"There is a mantra in the highest level of state government that the exoneration of Earl Washington shows the system works," said Fairfax lawyer Robert Hall, who has been working to free Washington since 1985. "The system is in a shambles."

Washington is the fifth man to be released from a Virginia prison, and one of more than 80 exonerated nationwide, because of post-conviction DNA testing. The Virginia legislature is on the verge of passing a bill that would create an exception -- for DNA testing -- to the state's shortest-in-the-nation deadline for introducing new evidence after a conviction. That 21-day rule prevented Washington's attorneys from going back to court with blood type evidence and then DNA results that could exonerate him.

The legislature's research arm is also studying allegations of attorney incompetence and racial and regional disparities in the application of the death penalty in Virginia. Washington was convicted largely on the strength of a confession in which he gave the wrong race for the victim, incorrectly said she was alone and misstated the number of times she had been stabbed. His attorney did not tell the jury about most of the inconsistencies, nor were jurors told that a semen stain at the scene of the crime came from a man with a different blood type.

"If the state had spent a few thousand dollars to ensure that Earl had competent [trial] counsel, he would have been acquitted and we would have been spared the expense of $10 million in . . . lawyers, mental health experts" and others, said Hofstra University law professor Eric Freedman, who has been working on the case for 15 years, "And we would have been spared the expense of 18 years in the prime of Earl's life."

Washington was released from Greensville Correctional Center in Jarratt early this morning and driven to Virginia Beach, There, he met with his parole officer and learned that he will be under state supervision for at least three years. If he commits a crime or violates parole he could be returned to prison to serve the rest of the sentence he received for

breaking into his neighbor's home and hitting her on the head with a chair.

Washington has apologized for that offense, which is what originally drew him to the attention of sheriffs deputies in Fauquier. Under their questioning, Washington, who has an IQ of **69,** confessed to at least four unrelated crimes, including the Williams killing, which had gone unsolved for nearly a year.

Despite his recanting that confession and the absence of physical evidence, Washington was convicted and sentenced to death. His sentence was reduced to life in **1994** by then-Gov. L. Douglas Wilder (D) because early DNA tests had cast doubt on his guilt.

The more recent DNA testing that exonerated Washington found genetic material belonging to **a** convicted rapist on a blanket at the crime scene. But no one has been charged with the crime.

"Nothing is happening. I don't have much faith in the judicial system," said Williams's widower, Cliff Williams.

In Virginia Beach, Washington will have his own apartment, but he will be under the constant supervision of counselors **and** social workers with Support Services of Virginia, which hosted his arrival festivities. He will participate in job training and educational programs and will get help applying for Medicaid and services for the retarded, said the company's president, Kay Reed Miric.

Washington is not allowed to leave the Virginia Beach area without permission from the state. The Department of Corrections last week denied a request to allow him to go to Capitol Hill today and talk with Rep. Robert C. "Bobby" Scott (D-Va.) and several other lawmakers about their efforts to pass a national law reforming the death penalty.

Instead, Scott came to Virginia Beach to join the welcoming throng.

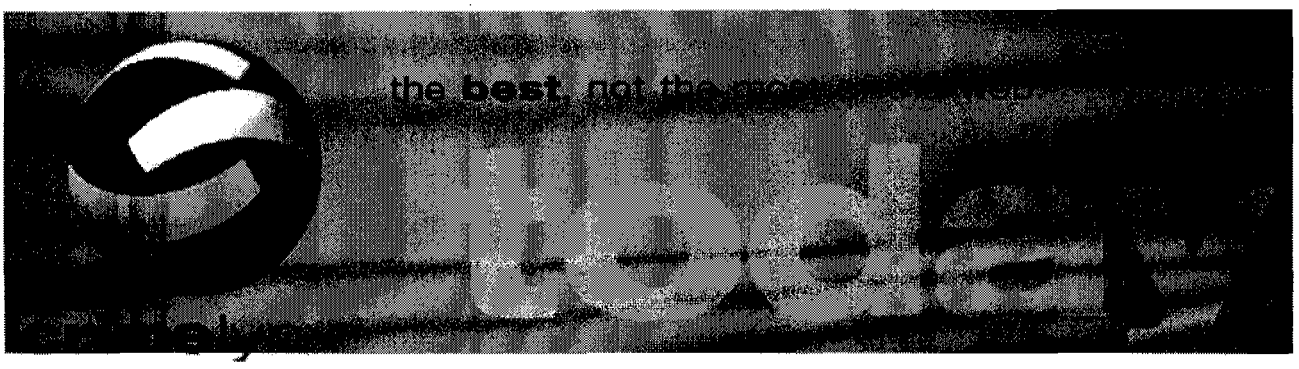
"I'm pleased to welcome Earl to his new home. . . . He should have been released years ago," Scott said. "The challenge now is to reform the system to be sure that innocent people are not put to death. . . . God bless you, and I look forward to working with you."

Plans for a family reunion in Northern Virginia were also nixed by the Corrections Department, so Washington's sister, Alfreda Pendleton, drove from Manassas to see her younger brother as a free man.

"Oh, you're here," Washington said with surprise after the cameras were turned off and he found his sister in a private back room. Then he gave her a big hug.

"It's great," Pendleton said. "I feel weird. I thought this day would never

come. We've been looking forward to him coming home for so long."



Los Angeles Times
October 14,2000

DNA Testing Clears Texas Murderer and 'Accomplice'

By HENRY WEINSTEIN

Preliminary DNA tests have cleared two Texas men who have spent 11 years in prison for a **1988** rape and murder that another man confessed to several years ago, sources close to the case said Friday.

Ronnie Earle, the district attorney in Austin, Texas, reopened the case earlier this year. Preliminary **DNA test** results, ordered by Earle, have exonerated the two inmates, Christopher Ochoa and Richard Danziger, according to several sources. Further tests are being conducted to see if they implicate Achim Josef Marino, the man who confessed to the crime and is serving a life sentence on a separate conviction of aggravated robbery with a deadly weapon.

"We are confident that the final test results will exonerate Ochoa and Danziger and incriminate Marino," New York attorney Barry Scheck said Friday night. Scheck, co-founder of the Innocence Project at Cardozo Law School, is one of the attorneys now attempting to secure the freedom of Ochoa and Danziger.

On Friday, a spokesman for Texas Eov. George W. Bush said that Bush had received a confession letter from Marino on Feb. 25, 1998, but had not turned it over to law enforcement authorities. Bush spokesman Mike Jones said the governor's office had not turned over the letter because Marino said in the letter that he also was sending it to the Travis County district attorney's office.

The four-page letter is a statement of contrition that includes details about the crime. Marino stated that **he** "robbed, raped and shot" Nancy DePriest, 20, at an Austin Pizza Hut in October 1988.

The letter states the name of the victim and the location of the Pizza Hut. Marino also said that the crime was committed "after purchasing the murder weapon via the Austin American

Statesman's classified section," according to a copy of the letter provided to The Times by Scheck.

Scheck, defense lawyer Bill Allison of Austin, and law professors Keith Findley and John Pray of the University of Wisconsin's Innocence Project all praised Earle for "doing the right thing" and attempting to ferret out the truth. Earle was not available for comment Friday night.

Scheck said that the case was very disturbing on a number of levels. He said that Ochoa, 22 at the time of the crime, only confessed to the crime after being threatened with a capital murder prosecution.

"There is **no** way to explain what happened here without pointing out one of the real problems with the death penalty," Scheck said. "We have a man [Ochoa] who gave a false confession and testified falsely against another man [Danziger] in order to avoid execution. These are two men without criminal'records who **were** convicted because **of** the actions of a coercive police officer.**"**

"The threat of the death penalty seems to have led to a false confession," Findley added. "The police officers scared the daylights out of Ochoa. They told him Danziger had confessed and" implicated Ochoa in the crime--statements that were untrue, Findley said.

Scheck said that a particularly tragic aspect of the case was that Danziger, **19** at the time of his arrest, **was** severely beaten in prison and sustained permanent head injuries.

Dist. Atty. Earle started investigating the case earlier this year, after Ochoa's family had contacted the Innocence Project. Earle ordered that **DNA** tests be done by Forensic Science Associates, the Richmond, Calif., firm headed by Edward Blake, who specializes in DNA testing and has worked on several other cases that have led to exonerations of people who have been wrongfully convicted.

Reports that Marino had written a confession first was reported by television station KVUE, an ABC affiliate in Austin. The letter was posted Friday night on Salon.com's Web site.

Jones, the Bush spokesman, said that the governor's office had no legal obligation to turn the letter over to the district attorney. "This matter was handled appropriately." Jones said the governor's office gets about 1,400 letters a year from inmates and normally refers them to a law enforcement agency.

Scheck said he thought the governor's office clearly should have followed up because the letter was **coherentdetailed and plainly sincere."

In his February 1998 letter, Marino wrote that in 1990 he learned from another inmate that Ochoa and Danziger had pleaded guilty to the crime. (In fact, Ochoa had pleaded guilty and testified against Danziger. Both got life sentences.)

"Governor Bush, sir, I do not know these men nor why they [would] plead guilty to a crime they never committed," Marino wrote in the letter. "I can only assume that they must have been facing a capital murder trial with a poor chance of acquittal, but I tell you this, sir, I did this awful crime and I was alone."

Marino wrote that he earlier had tried to alert other parties to the truth. "Early last year, I wrote the editor of the Austin American Statesman," the Austin police chief and the Austin office of the American Civil Liberties Union, "confessing to this crime because I believed that I was about to be killed here at the prison, and therefore I wanted to clear my conscience somewhat in regard to the lives of [Danziger], Ochoa and their loved ones."

Marino said that his life was "no longer in danger, but my conscience still sickens me. I cannot help Nancy Lena Dupriest or her family, but at least I can make amends to [Danziger] and Ochoa and their [loved] ones by doing my Christian duty and come clean about this terrible crime which has been enlarged and magnified by the arrest and conviction of two innocent men."

Marino wrote that he was "insane" at the time of the murder, but he does not attempt to excuse his conduct. Rather, he explained that "I have had a spiritual awakening and conversion resulting in me becoming a Christian."

He added, "The Christian lifestyle and value system demands that I do this, even at the loss of my life, which I'm fully prepared to lose and expect to lose."

Marino said that he also was sending the letter to Earle. He concluded the letter by saying, "I wish to respectfully remind you, that in the event that you all decide to once again ignore this confession that you all are legally and morally obligated to contact [Danziger] and Ochoa's attorneys and families concerning this confession."

In the letter, Marino said that a month after he murdered DePriest he was arrested in El Paso for another crime, "where the murder weapon was confiscated by the El Paso Police Department."

"At the time of my arrest, I had the key as well as two currency bags from the Pizza Hut with the name of Pizza Hut's bank on the bag, in my possession and which remained in my personal property in the county jail for approximately 14 months." Marino wrote that a friend of his eventually picked up the property "and took them to my parents' home where they remain to this day." Sources said that the authorities now have recovered those items.

Earle, a veteran prosecutor, previously has expressed concern about the possibility of innocent people being in jail and on his own initiative started reexamining old cases. On Thursday, he and defense lawyer Allison jointly asked a judge to release another man who has been in prison 16 years on a rape conviction, saying that he had been cleared by DNA tests.

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Virginia man wrongly convicted of murder

Real killer emerges after disabled man was imprisoned for 5 years

By Brooke Masters / Washington Post

RICHMOND, Va. -- Even though concern about the possibility of executions in Virginia is mounting, defenders of the state's death penalty point with pride to one statistic: Since 1973, no Virginia death row inmate has ever been exonerated.

Technically, they are right.

But they've forgotten about David Vasquez. Almost everyone has.

A developmentally disabled man in Manassas, Va., Vasquez was so scared of execution that he effectively pleaded guilty to a 1984 rape and murder he did not commit.

Frank Johnston /

David Vasquez said he was railroaded into pleading guilty for a crime he didn't commit because he feared execution. "They didn't put a man in prison, they put a child," said his mother, Imelda Shapiro.

And he would still be in prison today -- or perhaps executed, had he not agreed to a plea bargain -- except for a bizarre stroke of luck. In 1987, the real killer finished serving an unrelated prison term and went on a murderous rampage. Faced with a swath of similar crimes, Virginia officials realized their mistake. But not before Vasquez had spent five years behind bars and been repeatedly raped.

"The system stinks," said Vasquez, 53, who lives in Manassas with his disabled mother, "They read (the plea agreement) to me, and I didn't understand it. But they told me, Sign it and you won't go to the electric chair.'"

In January 1984, Carolyn Jean Hamm was found raped and hanged in her Arlington basement. A neighbor told police she had seen Vasquez, who used to live nearby, outside Hamm's home. Two detectives yelled, cajoled and lied to Vasquez, saying they had found his fingerprints inside Hamm's house, court records show.

Confused, he fell apart. As the officers questioned Vasquez about the brutal details, he began to parrot them, and in two subsequent police interviews, he described a "horrible dream" that paralleled the case.

"They pushed me. They put words into my mouth," Vasquez said. "I was repeating everything they were saying."

His lawyers argued that the interrogations were tainted because of Vasquez's low intelligence and because he was not told of his rights at the first interview. A judge ruled prosecutors could use the third statement, which came after Vasquez waived his rights.

Faced with the "dream," Vasquez's court-appointed attorneys persuaded him to enter an "Alford plea," acknowledging that the state had enough evidence to convict.

One of the lawyers, Richard McCue, said recently that he believed the judge was wrong to admit the dream as evidence. But McCue said he was trying to save his client's life. "To rely on ... appeal was a long shot," he said. "The Virginia Supreme Court rarely reverses these cases.

"If he had gone to trial and had been sentenced to death, by the time the exculpatory evidence was discovered, he could have been executed," McCue said.

Three years after Hamm's murder, Timothy W. Spencer finished serving a prison sentence for burglary. Over the next three months, he assaulted and killed three women near Richmond, and, while visiting family in Arlington, he raped and strangled a woman four blocks from Hamm's former home.

Eventually, police used DNA to link Spencer to the four 1987 killings and a 1983 rape in Arlington. He was executed in 1994. There was no DNA left from the Hamm case, but the similarities convinced Arlington prosecutors that Vasquez was innocent.

But under Virginia law, neither Vasquez nor the prosecutors could go back to court. The state's 21-day deadline for introducing new evidence, the toughest in the nation, had long since passed.

"I was absolutely shocked that if a prosecutor determined that someone was innocent that we couldn't just let the person out of jail," said U.S. Attorney Helen F. Fahey, then the local prosecutor. "Instead, we had to go to the governor."

Then-Gov. Gerald L. Baliles, D, obliged with a pardon in 1989. Now Vasquez works as a supermarket clerk and tries not to think about his years in prison.

"It makes you want to cry. They didn't put a man in prison, they put a child," said Vasquez's mother, Imelda "Mel" Shapiro.

Other inmates have also turned to the governor. Since 1981, Virginia governors have commuted 12 death sentences, more than any state except Texas.

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(Publication page references are not available for this document.)

Roanoke Times & World News

Thursday, April 5, 2001

VIRGINIA

21-DAY BILLS HEAD BACK TO GILMORE GILMORE MADE CHANGES TO THE RULE LIMITING APPEALS

KEVIN MILLER THE ROANOKE TIMES STAFF WRITER LAURENCE HAMMACK CONTRIBUTED TO THIS REPORT.

The General Assembly sent bills loosening Virginia's controversial 21-day rule back to Gov. Jim Gilmore on Wednesday after rejecting by wide margins the governor's attempts to limit the appeal window for violent criminals.

Under current Virginia law, those found guilty of certain felonies have just 21 days after their conviction to present new evidence to the court. After three weeks, only the governor can hear appeals based on new evidence.

But Virginia's 21-day rule, which is the most restrictive evidentiary law in the nation, has come under harsh criticism in recent years as being too severe, particularly in cases involving people sentenced to death or life in prison. Opponents of the 21-day rule received a boost last year when former death row inmate Earl Washington was exonerated of a 1982 murder based on new DNA testing.

Spurred largely by the Washington case, lawmakers passed bills this year eliminating the 21-day rule when introducing new biological evidence. The bills also require the state to keep genetic material from violent crime cases indefinitely for possible future DNA **testing.**

But Gilmore amended the legislation to only allow DNA testing within three years of conviction for most crimes and within three years of the final appeal in death penalty cases. The governor also rewrote the bill to strip people who plead guilty of the right to later request DNA testing of evidence.

On Wednesday, lawmakers rejected each of the governor's

substantive amendments, most by wide margins. House members voted down the three-year restriction by a vote of 89 to 5. Lawmakers approved several technical amendments.

"I don't think the governor was in tune with the main purpose of the bill," Del. Clifton "Chip" Woodrum, D-Roanoke, said afterward. "He intended to amend the bill into oblivion."

Gilmore did have several supporters, however.

Del. Robert McDonnell, R-Virginia Beach, argued that people who plead guilty to a crime waive their right to appeal.

"We ought to reserve that writ to those who truly come before the court and say they are not guilty," McDonnell said.

But Del. William Robinson, D-Norfolk, responded that he encountered many people during his years as a prosecutor who maintained they were innocent but pleaded guilty in exchange for a lesser sentence. Robinson said it would be a wrong to deny those people freedom later on if DNA evidence exonerates them.

"There are all kinds of reasons why people plead guilty," Robinson said.

The only place where the House and Senate disagreed was on a Gilmore amendment mandating that the state notify crime victims when the assailant requests DNA testing. Gilmore can now either sign one of the bills without most of his amendments or veto it. The legislature would need a two-thirds majority to override a veto.

The legislature's bill will likely do little to silence criticism of the 21-day rule, however.

Only inmates who may be able to show their innocence through DNA testing would benefit from the bills. Other types of newfound evidence - recanted testimony from key witnesses, the discovery of new witnesses, or proof of prosecutorial misconduct - would still be barred 21 days after sentencing. One such inmate is Aleck J. Carpitcher, a Roanoke County man serving 38 years for molesting his girlfriend's daughter.

The girl, now 12, has recanted her testimony, saying she falsely accused Carpitcher of abusing her because she was upset that he was spending too much time with her mother. A polygraph test indicates the girl is being truthful in saying she made up her testimony, which

was not corroborated at trial by medical tests or other evidence of any kind.

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Thursday, March 22,2001

Texas Legislature Approves DNA Testing as Recourse for Convicted Felons

Bob Richter

AUSTIN, Texas--The House approved and returned to the Senate a bill Wednesday that formalizes procedures to allow DNA testing for felons who think they were wrongfully convicted.

Post-conviction DNA testing has resulted in the exoneration of six Texas prisoners and more than 70 nationwide in recent years, House Criminal Jurisprudence Committee Chairman Juan Hinojosa said following a voice vote on the bill he co-sponsored.

"It means," the McAllen Democrat said, "that a prisoner must ask: 'I am requesting DNA testing because it can exonerate me.'" Senate Bill 3 sets up a procedure for collecting and storing evidence, and removes any objections district attorneys have about convicts asking for DNA testing, he said.

Michael Bernard, deputy Bexar County district attorney, who testified earlier in support of the bill, said Bexar County District Attorney Susan Reed was a "moving force early on" in the drive to establish post-conviction DNA testing.

"We always thought there should be a procedure," Bernard said.

DNA testing of blood, hair, skin, saliva or semen can identify people.

The bill would allow post-conviction testing only if the biological evidence met specific criteria related to the crime. The request, which would be heard by a judge, also would have to be accompanied by an affidavit supporting the request.

"These are people who have more than a hunch that they didn't commit the crime," said Rep. Trey Martinez Fischer, D-San Antonio.

Martinez Fischer, who practices civil and criminal law and who voted

for the measure in committee, said the bill provides safeguards and "ensures the people of Texas that we are convicting guilty people and not the innocent."

And San Antonio Democrat Carlos Uresti, who also practices criminal defense, said: "I like to think Texas has the best justice system in the country.

"This bill makes it better. Just think about all the people we may have executed who might have been freed if DNA testing had been around."

The Senate version of the bill was amended on the House floor to allow prisoners who have pleaded guilty to a crime to seek DNA testing.

Hinojosa cited the case of Chris Ochoa, the Austin man was freed in January after DNA testing and the confession of another man led to his exoneration. Ochoa pleaded guilty and spent 12 years in prison for a murder he didn't commit, just to avoid possible execution.

On the flip side, Hinojosa noted that Ricky McGinn, a child rapist and murderer, had sought and received DNA testing, which proved his guilt. He was executed.

Supporters of the bill said the legislation would not swamp the criminal justice system with appeals because most inmates requesting the testing would have been convicted before the early 1990s, when DNA testing became routine.

Also, they added, some inmates would not request the test because if their DNA was tested and placed in the state's databank, it might tie them to other crimes.

A fiscal note attached to the bill, based on similar DNA testing in New York and Illinois, estimated about 50 tests per year would be performed, at an annual cost of about $73,000.

Hinojosa predicted the cost would be nearer to $35,000 a year and that, because most candidates for post-conviction DNA testing would exercise their option expeditiously, the cost would fall each year.

THE MIAMI HERALD

DNA ADVOCATE DEMANDS REVIEW OF ALL HOMICIDE CASES

Friday, March 2,2001 Section: Broward Edition: Broward Page: 1B **BY WANDA J. DeMARZO, wdemarzo@herald.com** Memo: Correction ran on March 3rd, **2001;** see end of text ***Correction: *In two stories this week, on Thursday and on Friday, The Herald misstated how Gov. Jeb Bush came to appoint aprosecutor to conduct an inquiry into allegations that a Broward homicide detective lied under oath during a murder trial. Broward State Attorney Michael Satz requested the inquiry after attorney Barry Scheck asked him to intercede.***

Illustration: color photo: Richard Scheff (n); photo: Barry Scheck (n)

A renowned lawyer representing the family of *a* man wrongfully sent *to* Death Row wants an independent review of all homicide cases investigated by the Broward Sheriffs Office over a several-year period.

Barry Scheck, the O.J. Simpson Dream Team lawyer who runs a group that seeks to exonerate people through **DNA** digging, is calling for an audit of all Broward court convictions won by BSO's homicide unit when its ranks included Detective Richard Scheff.

Gov. Jeb Bush has already authorized an investigation into a claim that Scheff lied under oath **to** help convict Frank Lee Smith, who was exonerated by DNA evidence last year, 11 months after he died of cancer on Death Row.

Scheck, who heads The Innocence Project, now believes a broader review is **in** order.

''The real issue here is when an officer commits perjury in a capital case, what else has he done?'' ***Scheck*** said. ''What is the story with that homicide unit and the detectives in it? There should be an investigation and a full audit of all their capital cases."

''We are cooperating with the investigation [into the Smith case|, '' said Sheriff Ken Jenne. ''But as to any [other **BSO]** investigations Mr. ***Scheck*** is talking about, I can't comment. There aren't any other investigations as far as I know, and if there are, well, those cases weren't under my tenure.''

Scheck said there is a troubling pattern in BSO investigations of corner cutting and coerced confessions.

In 1990, Scheff and Detectives James Carr and Eli Thomasevich charged John ``Woody'' Wood, an alcoholic who said he suffered from flashbacks from his duty in Vietnam, with the murder of Christopher Morris. Scheff said Wood confessed to the shooting of the 42-year-old Pompano Beach man and knew details only the killer would know.

But Wood was innocent. Weeks later homicide investigators arrested Morris' parents, who were later convicted. Wood was freed.

That same year, the homicide unit made another major blunder. But this time three men

were arrested. Peter Dallas, **27** at the time, Carl Stephen Rosati, 30, and Peter Phillip Roussonicolos, were charged with the murder and robbery of Joseph Viscido Jr., **a** Deerfield Beach resident who was shot to death in his house.

BSO charged the men after Dallas confessed. Dallas later recanted and said his confession was coerced by homicide detectives Dominick Gucciardo and Steve Wiley who, he claimed, repeatedly banged him against a wall at the sheriffs office.

The case dissolved in 1992 when a Boca Raton businessman told police he knew about the slaying and led authorities to the alleged murder weapon. Authorities charged two other men with killing Viscido, and cleared Roussonicolos, Dallas and Rosati.

''The kept telling him if he didn't confess he was going to burn in the electric chair,'' said Douglas Bates, who is representing Rosati in a suit against the Sheriffs Office.

Scheff was the lead homicide investigator in the Frank Lee Smith case and testified at the trial and subsequent appeal hearings. Smith was accused of raping and murdering 8-year-old Shandra Whitehead in her Fort Lauderdale area home May **14,1985.**

Scheck, who has been hired by the Smith family, asked Gov. Bush for an independent inquiry into whether Scheff gave false testimony under oath to bolster a fragile case.

Gov. Bush appointed Bruce Colton, the state attorney for Martin, St. Lucie, Okeechobee and Indian River counties.

At issue is whether Scheff lied when he testified that a photo lineup shown to a key witness included a photograph of **a** second man, who could have committed the crime.

That man is Eddie Lee Mosley, who lived in the neighborhood and has spent time in and out of mental institutions since being charge with numerous rapes and murders in the **1980s.** Mosley remains locked up in a Gainesville program for mentally retarded sexual offenders.

Scheck has scheduled a rally ''forjustice and accountability'' on the steps of the Old Capitol in Tallahassee Monday.

''When you look at Frank Lee Smith and Peter Dallas you can see there is something going on that should be investigated,'' *Scheck* said. ''If this were any other institution that was making serious mistakes where lives were at jeopardy a responsible agency would begin an investigation. That's what must be done with Scheff and BSO's homicide unit.''

St. Petersburg Times ONLINE STATE

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He didn't do it

Frank Lee Smith was the kind of guy you'd suspect of murder. He lived near the scene and had killed before. All it took to put him on Florida's death row was a malleable witness, a hard charging cop and an ambitious prosecutor, The only problem ...

By **SYDNEY** P. FREEDBERG

FORT LAUDERDALE -- The moment she entered the courtroom, Chiquita Lowe felt uneasy about what she was about to do.

The man she saw lurking outside the little girl's house that Sunday night had a droopy eye and didn't wear glasses, He also seemed huskier than the man on trial for raping and killing 8-year-old Shandra Whitehead.

Under the gentle guidance of the prosecutor, however, Lowe, 20, pointed at the man with thick glasses at the defense table. "Over there," she said. That is the man.

What happened next seemed like justice. Frank Lee Smith was portrayed to the jury as a murderer. Chiquita Lowe said so, the police said so, the prosecutor said so. When Smith, 37, stood before the judge, there was no shock in the sentence: The people of Florida would usher him to death row and execute him.

Eye for **an** eye. Case closed. That's the way the system works.

Or so it seemed.

Now, 15 torturous years later -- with the benefit of some late-arriving **DNA** evidence -- it is clear that in the case of Florida vs. Frank Lee Smith the system could not have failed more miserably.

But what is surprising and revealing in this case is how easily it all went awry, how little the fate of a human being rested on. Virtually everyone involved, from the police and the prosecutors to the defense attorneys and judges, can look back, debate the case and defend their actions. But they can't deny this point:

They got it all wrong. Florida locked **up** the wrong man for 14 years and left the real killer free -- to commit other grievous crimes.

Alone in **X** Wing, the notorious solitary confinement unit just **a few** steps away from the execution

chamber, Smith cursed at the guards and paced in anger. He peered out a quarter-inch slit under his metal cell door and frequently wrote down thoughts of his own death.

"Dying for a crime at someone else's hands," he once said, "is the thought that has killed me already."

Smith died of cancer Jan. 30, 2000, still protesting his innocence, still hopeful he would win his case.

Ten and a half months later, when he finally did, Smith made some dubious history. It is thought to be the first time in this country that posthumous **DNA** testing has proved a person's innocence.

He fit the description of the 'usual suspect'

To the police, Frank Lee Smith had the look of a guilty man. He had twice been convicted of killing by the age of 19 and, in the view of many cops, never did the time he deserved for his explosive acts of violence.

He fit the description of the "usual suspect" the police would check out when a murder happened nearby.

The place where Smith lived and Shandra Whitehead died is a neighborhood of pastel-colored houses mixed haphazardly with crowded apartments and crumbling shacks.

Residents in the northwest Fort Lauderdale neighborhood, known as Washington Park, had long complained about a small group of brazen criminals whom the police couldn't seem to put away.

On April 14, 1985, the Broward Sheriffs Office came under intense community pressure to solve a wretched crime.

When Dorothy McGriff pulled into her driveway just before midnight that Sunday, her headlights beamed on a shadowy figure standing outside a broken bedroom window.

McGriff, a **3**1-year-old nurse's aide who worked the 3-to-11 shift, yelled at the man, grabbed a weed-cutter and began chasing him. **As** he jumped a chain-link fence, McGriff ran into the house and screamed for her children, whom she had left alone.

Reggie, 9, jumped from bed. Shandra, **8,** didn't answer. She was in the back bedroom, her 47-pound body covered with blood. She had been raped, beaten into a coma and strangled with her pajamas. She died nine days later.

The case was assigned to Detective Richard Scheff and his partner, Philip Amabile.

Both officers were ambitious, with files full of commendations, Scheff, the lead investigator, had been commended for his commitment to the homicide unit "at the expense of his and his family's personal life."

The police originally thought the assailant might be someone the girl knew because the front door showed no sign of forced entry.

Scheff briefly considered two of McGriff s cousins, Edwin McGriff and Eddie Lee Mosley, both of whom lived in the neighborhood.

But Scheff quickly discounted both after McGriff was adamant that no one in her family would do such a thing.

McGriff said she got only a glimpse of the fleeing man, whom she described as a muscular black man with a beard, a short Afro and an orange T-shirt.

Scheff soon found a potentially better witness, 18-year-old Gerald Davis, who worked in a shoe store and lived nearby. Davis said he thought the killer had tried to sell him drugs and proposition him for sex about an hour before the murder. But Davis, like McGriff, gave only a vague description. His was of a husky black man with a "tacky looking" beard who was possibly wearing a plaid shirt.

"I kept telling them from the beginning, 'I'm not sure,' " he said,

Chiquita Lowe was more helpful. A friend of Shandra's family, she told police she had seen a "delirious" man come from the girl's front yard.

She described the stranger as 6 feet tall and about 190 pounds, with a muscular frame, big arms and big chest, oily face, scraggly hair and a droopy eye. She said she thought he had on a sterling ring and a white shirt.

But she, too, gave conflicting details, After police found a blue windbreaker near the crime scene, for example, Lowe said the man must have been wearing the blue windbreaker over his white shirt.

Lowe and Davis helped police sketch artists put together a drawing of the suspect.

As Scheff and Amabile circulated copies of the drawing, a rumor spread that the killer had just been seen pushing around a stolen TV in a shopping cart.

Egged on by neighbors, Lowe called the detectives four days after the murder. She said the crazed-looking man she saw that night had returned to the neighborhood and tried to sell a TV to her grandmother.

Someone playing dominoes provided a street name for the suspect: Frank L. And police fanned out to search for Frank Lee Smith.

Many residents of Washington Park knew Smith. He was an eccentric man with coke-bottle-thick glasses and a history of violent crimes.

When Smith was a baby, his father killed a policeman and was killed by police bullets. His mother, an alcoholic with a criminal record, was deemed unfit to raise kids (and later raped and murdered), Smith spent three years in a foster home and eventually moved in with his grandmother, who beat him. He also lived with an uncle in an apartment social workers called "crowded and filthy."

When he was 13, Smith stabbed a 14-year-oldboy to death after a high school sporting event. He spent 11 months at a reform school.

Five years later, he and several accomplices shot and killed a man while robbing him. Smith confessed and was sentenced to life in prison. At the time, life meant only 15 years, so he was paroled in 1981.

When deputies picked him up, Smith didn't have a shopping cart and wasn't wearing a sterling ring. He

told detectives Scheff and Amabile he didn't commit the murder. He denied knowing the girl and insisted he was home at the time of the crime.

Scheff didn't videotape or tape record the interview, and Amabile said he didn't take notes.

But they eventually made Smith a killer out of his own mouth. They told prosecutors that he made "several very damning admissions."

For example, Scheff testified that when he lied to Smith by telling him that Shandra's brother had seen the killer, Smith blurted out: "No way that kid could have seen me, it was too dark. . . . The lights were out.' "

Scheff had no physical evidence -- no fingerprints, no fibers, no blood, no traces of hair to match to a culprit.

But he was convinced he had his man. Smith was charged with murder, rape and burglary.

Smith later called Scheff "a vengeful detective out for a rep."

"(Scheff) stated I made a statement because he couldn't make his witnesses uphold his lies," Smith wrote in a letter. "He tried to shove words down their throat."

To shore up his paper-thin case, Scheff got Gerald Davis, one of the uncertain witnesses, to identify Smith from a photo and then a lineup. But Davis said later that the police pressured him into making a definite identification.

The detectives had better luck with the girl's mother, who sobbed as she picked Smith out of a photo montage even though she had only a fleeting glimpse of her daughter's murderer.

And when they showed Chiquita Lowe a photo array with six pictures, she agreed that No. 2 "looked like the man."

The Sheriffs Office applauded Scheff and Amabile for their "professional and diligent investigation" and honored them as "Deputies of the Month."

Conflicting details lead to a 'minimal' case

Smith's arrest posed two serious problems for the Broward State Attorney's Office: Besides the other discrepancies, Frank Lee Smith did not have a droopy eye. And he was legally blind and couldn't function without very thick glasses, Lowe and Davis testified that the man they saw was not wearing glasses.

Assistant State Attorney Robert B. Carney knew he had a "minimal" case. But he also figured it wasn't going to get any better, so he had Smith indicted.

The Broward State Attorney's Office knew something about wrongful convictions,

In 1976, it got the death penalty for Sonia "Sunny" Jacobs and Jessie Tafero, concealing evidence suggesting that its star witness -- not the defendants -- was the shooter in the murders of two police

officers. Jacobs eventually was freed, but Tafero had been executed by the time her appeal prevailed.

In 1985, they locked up John Purvis, a mental patient who had been coerced into a murder confession, leaving him in prison for eight years before admitting a mistake.

In 1991, they sent a black defendant, Robert Hayes, to death row although hair evidence suggested the killer was white. He later won a new trial and was acquitted.

Carney became a judge before Smith's trial, leaving the case to William Dimitrouleas.

The task of keeping Smith out of the electric chair fell to defense attorney Andrew Washor, He received less than $5,000 for more than 100 hours of work for his indigent client.

Washor, who says he always believed his client was innocent, whittled away at inconsistencies in the identifications and challenged what he called improper police tactics.

Washor also complained about prejudicial media coverage and the judge. The defense wanted Circuit Judge Robert W. Tyson to disqualify himself because he allegedly made unflattering off-the-bench comments about Smith.

But Tyson, known as a tough, no-nonsense jurist, said he couldn't remember the comments. He swept aside most of the defense's objections, and at the two-week trial in January 1986, he gave the prosecution wide latitude to make its case.

Dimitrouleas adroitly led his 10 witnesses through their testimony, including Shandra's grieving mother and a star witness -- Lowe -- who hadn't seen the crime.

Attractive, soft-spoken and seemingly sincere, Lowe explained away Smith's slight build and that he didn't have a droopy eye. Then she pointed to the only black man in the courtroom and said he was the man outside Shandra's house.

"No doubt in my mind," she said.

Washor grilled the state's witnesses and tried to show that the police had neglected to pursue other credible suspects.

Washor didn't call witnesses. He didn't hire experts to test hair or blood. He didn't call an optometrist to say Smith suffered from 20-400 vision and couldn't jump a fence at night without his glasses.

Washor kept Smith off the stand because he didn't want the jury to learn about Smith's two homicide convictions.

Dimitrouleas was powerful in his closing argument. He touted the detectives, appealed to jurors' emotions and depicted Smith as a strange liar, suggesting that because Smith had invoked his right to remain silent, he must be guilty.

"Our system is the best in the world," he said. "I submit to you that the defendant Frank Lee Smith has gotten a fair American trial . . . and I know that you will return a fair and American verdict."

On Jan. 31, 1986, after eight hours of deliberating, the jury convicted Smith of murder, rape and

burglary.

When they returned for the sentencing, Smith took the stand.

"My past seems to follow me everywhere I go, and now it has got me sitting here for something I haven't done," he said.

"I am innocent. I didn't do it. . . . It really hurt me to be accused of something like this, when my mama was raped and . . . my mama was killed like that. . . . How do you think I feel about a baby like that?"

He began to cry. "Have mercy on me . . . because I haven't done anything."

By a 12-0 vote, the jury recommended death. Judge Tyson, calling the crime "outrageously wicked and brutal and pitiless," sentenced Smith to die in the electric chair.

Death warrant signed only 3112 years later

Most inmates live on Florida's death row for at least a decade before the governor signs their death warrant. Not Smith. From the moment he arrived at Florida State Prison -- refusing to obey the guards until they helped him with his case -- the system seemed determined to dispatch him as quickly as possible.

In October 1987, the Florida Supreme Court unanimously rejected every point in his appeal, and the U.S. Supreme Court declined to take the case.

After Attorney General Bob Butterworth called it "legally sufficient," Gov. Bob Martinez signed Smith's death warrant. That was on Oct. 18, 1989, 31/2 years after his conviction.

Martinez had promised during his campaign that, if he was elected, "Florida's electric bill will go up," and he was signing a lot of death orders. The office that represents indigent death row inmates was so overwhelmed with prisoners under death warrant that it hadn't even started on Smith's case.

The state-paid lawyers dashed off a 164-page motion alleging 25 irregularities at Smith's trial and accusing the state of hiding evidence that someone else committed the crime. Judge Tyson, calling the motion a "work of art," rejected them all.

He also refused to sign an order declaring Smith insolvent, essentially depriving him of legal representation. (The Florida Supreme Court later reversed that ruling.)

The defense lawyers' most noteworthy claim concerned Eddie Lee Mosley, a notorious neighborhood criminal who lived near the victim. Jeff Walsh, an investigator for the defense, had discovered that the prosecution had not, as the detectives testified, eliminated Mosley but had simply abandoned its investigation of him.

Mosley, a husky lawn service worker and onetime mental patient, should have been a serious suspect. Broward police thought Mosley might have committed more than 100 sex crimes and eight murders involving women ages 7 to 70 over 15 years.

But Mosley always had great luck foiling the charges. In 1974, a judge sent Mosley to a mental hospital after he was ruled incompetent to stand trial on a 1973 rape charge. In 1979, he was released from a state

hospital, and within months the string of rapes and killings started again. Mosley was charged with rape again in 1980 and 1984, but again he beat the charges. The first time a guilty verdict was overturned on appeal; the second time he was acquitted.

And then angry detectives saw it happen again. After they charged him with two counts of murder in 1987, a judge sent him to a mental institution instead of a trial,

Mosley's M.O. was to rape women and strangle them with an article of clothing. Most of the victims lived within a mile of where Mosley lived with his mother. Sometimes, he pushed a shopping cart through Washington Park. (Neighbors speculated that the suspect in Shandra's case pushed a shopping cart.) And Mosley bore a striking resemblance to the man in the composite sketch,

Walsh thought Mosley fit the description of Shandra's killer far better than Frank Lee Smith,

With Walsh's information, the defense filed an appeal. Then three weeks before Smith's scheduled execution, the investigator hunted down Chiquita Lowe.

When she opened the door and Walsh introduced himself, her eyes welled with tears. Ever since that day in the courtroom, she told him, her conscience had hurt.

She thought about the little girl and her mother, and she had nightmares about Frank Lee Smith. She said she felt terrible because she had sent an innocent man to death row.

"It just seriously hurt me," she testified later. "It hurts talking about it."

She explained why she had testified against Smith:

Friends and neighbors kept telling her, "I know how the mother feels, how the mama. . . was hurt. . . . They were just afraid to have that person on the street again so . . . something else can happen to somebody else's little girl."

And the detectives: "They told me they captured the person who hurt this little girl. . . . He's dangerous and they kept saying, 'This is the man, you Just have to say 'This is the man.' "

The prosecutor: He "told me that the man on trial had committed several crimes like the one that happened.. .."

When Walsh showed Lowe a photo of Eddie Lee Mosley, she said she was certain that he -- not Smith -- was the man she saw outside the victim's house.

"I swear on my mother's grave," she said in an affidavit.

With the clock ticking, Smith's lawyers again filed a motion on newly discovered evidence, affixing Chiquita Lowe's affidavit.

Again, Judge Tyson denied it.

In late fall of 1989, Smith went through the pre-execution rituals. He ordered a last meal of steak and eggs, but he refused to make funeral plans.

Eight days before he was to die, the Florida Supreme Court stayed the execution.

Pointing to the importance of Chiquita Lowe's testimony at the trial, the justices reversed Tyson and ordered him to hold a hearing on her claim.

Hearing brings to light new, and interesting, details

Smith, who didn't have many friends or supporters, didn't hold out much hope that the state would simply confess error and let him out. But he wasn't prepared for what came next.

Prosecutor William Dimitrouleas became a judge, and the Smith case was assigned to Assistant State Attorney Paul Zacks.

Zacks proved to be another death penalty hardliner. Instead of reinvestigating the case or listening to what Lowe now had to say, Zacks went after Smith with renewed zeal.

At the hearing in March 1991, Zacks objected when Smith's new lawyer, Martin McClain, tried to put on corroborative evidence that Mosley, the man Lowe now said committed the crime, was indeed the murderer.

Zacks called Scheff to the stand. Scheff contradicted his earlier accounts of the case, testifying for the first time that back in 1985 he showed Lowe and two other witnesses a photo montage with Mosley in it. He said she did not pick him out.

McClain thought Scheff was lying. If he had shown such a photo montage, why wasn't it documented in a police report or Scheff's detailed notes? Why wasn't there a mention of it during the trial?

Scheff revealed another new piece of information: Mosley was the cousin of the victim's mother, Dorothy McGriff. He said he had asked her about Mosley during the original investigation, and she insisted he was not the man she saw fleeing her house.

Could the mother have been protecting Mosley? That could explain how he managed to get into the house.

The detective scoffed at the defense theory that Mosley was the killer. He said Mosley's M.O. was to lure his victims into an empty field or abandoned building. Mosley didn't kill kids, Scheff said, calling him a "most convenient escape to try and pin a murder on."

When Lowe took the stand, she denied Scheff showed her a picture of Mosley. If he had, she would have said he was the man. She emphatically testified that Smith was not the man she saw.

Tyson, the judge, seemed openly contemptuous of Smith. And just before Tyson ruled against Smith's motion for a new trial, McClain learned that the judge and the prosecutor had improper one-on-one conversations about the case. Apparently, they had discussed the contents of an order denying Smith's motion for a new trial.

The Florida Supreme Court has ruled that nothing is more "destructive of the impartiality of the judiciary" than a one-sided communication between a judge and a single litigant. The justices ordered a hearing into McClain's charges.

Frank Smith's case was about to take a long side trip through the courts.

"Just as one problem is solved, another one pops up, and I'm getting tired of this," he wrote after returning to death row. God, he said, was giving him a "test" in "the shadows of death to see if I fear it."

Branded a liar, a troublemaker, 'the worst of the worst'

The guards at Florida State Prison increasingly regarded Smith as a crazy liar and a troublemaker. They frequently locked him on X Wing, the solitary confinement unit for inmates they called "the worst of the worst."

X Wing was where guards are charged with gassing and beating death row inmate Frank Valdes to death in July 1999 and where other unruly prisoners say they were harassed and beaten.

Smith said the guards denied him things that made life bearable, such as yard time, contact with his aunt, even a small mirror *so* he could see out of what he called his punishment "tomb."

As the motions, countennotions and emergency motions stretched over seven years, he went from rage to worry to despair, feeling abandoned, even by his lawyers.

"My life is nothing here," he wrote, adding that he was looking for "flames to give me new life. But I don't know if I have what it takes to fight any more."

Finally, in January 1998, the Florida Supreme Court gave Smith a flicker of hope. The justices found that Judge Tyson had at least three improper conversations with prosecutor Zacks. During one discussion, Tyson acknowledged, Zacks "changed my mind" over the wording of an important court document.

Saying their conversations violated basic fairness, the Supreme Court sent the case to Broward Circuit Judge Mark A. Speiser for a new hearing.

For 13 years -- five years longer than Shandra Whitehead lived -- the state of Florida had watched its case against Smith grow weaker and weaker.

Besides the victim's mother, who didn't get a good look at the killer and was a relative of Eddie Lee Mosley, there was no longer evidence linking Smith to Shandra's murder. There were mounting allegations that police tactics were so suggestive that they created false eyewitness testimony. And. Chiquita Lowe did not waver from her new testimony that Mosley -- the serial rapist with a droopy eye -- was the man she saw.

The Broward State Attorney's Office wasn't about to own up to a tainted conviction, however. *So* on Sept, 14,1998, two days before Judge Speiser's hearing into Lowe's new testimony, Smith's new lawyer, Bret Strand, adopted a new strategy, He filed a motion for crime-scene evidence so the defense's expert could conduct DNA testing.

The killer's DNA had been retrieved from the victim, and if experts couldn't match it to a sample from Smith, he was not the murderer. What's more, if the DNA matched Mosley, he was the murderer and Lowe was right.

DNA testing wasn't available at the time of Smith's trial in 1986. Moreover, DNA analysis had advanced

rapidly since then. Testing procedures adopted in **1998** made it possible to get results from minute **and** very old samples that previously could not be tested,

DNA carried a big **risk,** however, which was one reason Smith's previous lawyers didn't consider it for so many years: If the test proved Smith did it or even if it came out inconclusive, it could hasten his execution.

Strand sought help from former O.J. Simpson lawyer Barry Scheck, who had used **DNA** to clear nine death row inmates, some in prison for almost two decades.

After reviewing the case, Scheck became convinced it was one of the weakest capital punishment cases he had seen. But he was concerned that the DNA sample was too small for a conclusive test.

At about the same time, by coincidence, Fort Lauderdale detective John Curcio also got interested in new **DNA** technology. He had pulled the files of some old, unsolved homicides to see which cases might be clarified by **DNA.**

One case: the brutal 1979 rape and murder of 13-year-old Sonja Yvette Marion, Her partially clothed body was found at a high school in northwest Fort Lauderdale.

A mentally retarded carnival worker named Jerry Frank Townsend had confessed to Sonja's murder, **as** well as a string of 1970s sex slayings in Broward and Miami-Dade counties. He got a life sentence after being convicted of two of the murders. Then he pleaded guilty to two other murders, and prosecutors dropped the charges in Sonja's case.

But Curcio and retired Detective Doug Evans had long doubted that Townsend killed Sonja. They saw many inconsistencies between Townsend's confession and the evidence, notably employment attendance punch cards showing that Townsend had been working when Sonja was killed.

Maybe it was Townsend, Curcio thought. Or maybe it was Frank Lee Smith. Or Eddie Lee Mosley.

As Curcio tracked the biological evidence, Smith's lawyers ran into opposition to their DNA testing request in Shandra's case.

At the hearing in September 1998, Assistant State Attorney Carolyn McCann objected to the defense's motion. The state would allow the test, she said, but McCann insisted it be on the prosecution's terms.

When Strand agreed to those terms, the prosecutors then threw **up** another roadblock: Under Florida law putting time limits on new evidence, they said, it was too late for Smith to request the **DNA** test.

They took more steps to protect their shaky conviction. For the first time, they presented a photo montage with Mosley in it, which Scheff now claimed he showed Chiquita Lowe and other witnesses back in 1985.

Strand calls it the "phantom lineup" because it had never surfaced -- not during the trial, not during the death warrant arguments, not during the 1991 hearing into Lowe's new testimony.

Under oath, Scheff had trouble explaining his failure to mention the montage in his handwritten notes, his report, his deposition and his trial testimony.

Scheff said he made a mistake when he denied he had shown a Mosley montage to the witnesses.

Strand suspected a more sinister motive.

Either way, Judge Speiser overlooked the detective's contradictory testimony. On Oct. **21, 1998,** he ruled against **Smith** on the **DNA,** and four months later, he denied the motion for a new trial. Chiquita Lowe's identification of Mosley, the judge said, was "utterly lacking in credibility."

Eight days before his death, he hears, 'I will clear your name'

On New Year's Day 2000, Smith was transferred to North Florida Reception Center in Lake Butler. He had lost **27** pounds and experienced stomach pain and nausea thought at first to be caused by a bacteria. But doctors then diagnosed pancreatic cancer that spread to the bone.

On Jan. **20,** a state prison nurse reported that Smith, heavily sedated on morphine, mumbled a supposed confession -- "I'm guilty, I'm guilty."

They were the last words recorded on Smith's official medical record.

When investigator Jeff Walsh visited two days later, he said Smith was tied to a gurney and "writhing in pain." But he still wanted to know the status of his DNA request.

Walsh said he would keep pressing. "I'll clear your name," he told Smith.

Eight days later, Frank Lee Smith was dead at the age of 52.

His legal team raised money for a burial and filed a court motion to preserve the DNA evidence for posthumous testing. But even after his death, the state resisted.

Defense attorney Scheck told prosecutor McCann that the testing might not only reveal the truth about Smith, but could resolve doubts about dozens of rapes **and** murders tied to Eddie Lee Mosley.

"Isn't there a public safety obligation?" Scheck said he asked McCann.

An agreement was reached in July, but it wasn't until November that Broward authorities finally sent the samples to the FBI lab in Washington.

By then, Curcio had learned the DNA results in Sonja Marion's case: The test cleared Jerry Townsend. It cleared Frank Lee Smith. Semen found on the girl's shorts matched a sample from Eddie Lee Mosley.

On Dec. 11, when the FBI crime lab reported that **Smith** did not kill Shandra Whitehead, McCann was shaken. She immediately asked the FBI to compare specimens in the Shandra Whitehead case to Mosley.

She was shaken again.

"They told me, 'It's a hit for **sure,'"** McCann said.

What a fool I was,' says witness, promising to make amends'

Chiquita Lowe Olige, a 35-year-old mother of two, went to Smith's gravesite on Thursday morning. She said she talked to him for 45 minutes and promised to do ,whatever she can to make amends.

"What a fool I was," she wept after her visit. "If it wasn't for me, the man wouldn't be where he is. I want to put a tombstone on his grave. I want to apologize to his family and everybody."

Most of the other people involved in the case now admit a mistake. But only Lowe, who says she can still see the crazed face of Eddie Lee Mosley, offers an apology.

Paul Zacks, now the No. 2 prosecutor in the Palm Beach State Attorney's Office, downplays the scolding he got from the Florida Supreme Court for his improper conversations with the judge. He says the Florida Bar cleared him of misconduct.

William Dimitroaleas, the prosecutor who put Smith on death row, says he never intentionally presented false evidence and has no second thoughts about the case.

Police, he says, told him Lowe "had a drug problem and she was cajoled" by Smith's defense lawyers to change her testimony.

When he learned Smith was innocent, "it knocked me over like a feather," says Dimitrouleas.

He is now a federal judge.

Judge Robert Tyson, now retired, declines comment.

So does Philip Amabile, now a district commander in the Broward Sheriffs Office.

His partner, Richard Scheff, says he didn't pressure witnesses, lie or manufacture the Mosley photo photo montage. But he says Smith's vindication has shaken his faith in the death penalty.

"It's like an epiphany," says Scheff, who is in charge of the internal affairs unit that polices police for misconduct.

The Broward Sheriffs Office depicts the case as an aberration and bristles at the suggestion that two of its most esteemed officers railroaded an innocent man.

Detective John Curcio, the Fort Lauderdale cop who solved Sonja Marion's case, says it's his job to prove innocence as much as guilt. He is re-interviewing Mosley's victims and vows not to let him slip through another legal loophole. He is also looking into other homicides that might be falsely pinned on Jerry Frank Townsend.

"I couldn't live with myself if a man was locked up for something he didn't do," Curcio says.

For the victims' families, the revelations have reopened old wounds.

When an investigator with the state attorney's office told Shandra's mother that Frank Lee Smith was innocent, she began weeping and broke down in confusion. "I thought it was all over," she told him.

"I wish they would have left it the way it was," says 25-year-old Reginald Whitehead, who was in the house when his sister was murdered.

Prosecutor McCann denies thwarting the DNA test and blames Smith's defense lawyers for not pursuing it sooner or more aggressively.

"A lot of people who touched this case share in the blame," she says. "It's a nightmare, But it doesn't mean people acted with criminal intent."

The defense team counters that the state attorney's office is trying to shift blame to cover up misconduct.

"Frank Lee Smith was an impoverished, powerless, mentally ill, African-American man who was snatched off the street and wrongly convicted and sentenced to death by a handful of less-than-honest white people with a lot of power," says Jeff Walsh, now a private investigator.

Defense attorney Scheck wants Gov. Jeb Bush to appoint a special prosecutor to investigate possible perjury and obstruction of justice and to examine other death penalty cases made by the Broward Sheriffs Office.

And Eddie Lee Mosley, the man who DNA evidence now ties to two murders?

Broward prosecutors say they aren't sure he will face trial for either murder. Mosley, now 53, lives in the Tacachale state center for mentally retarded defendants in Gainesville.

The center won't comment on his movements off the grounds, or allow Mosley to be interviewed. But authorities in Broward say he is apparently doing everything he can to please the staff, so he can earn privileges and maybe get back his freedom.

-- Times researchers Caryn Baird and Kitty Bennett contributed to this report.

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