

DNA clears inmate too late

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The FBI clears the death-row inmate of rape and murder 10 1/2 months after cancer killed him.

Death-row inmate Frank Lee Smith lay strapped to a prison hospital bed, wasting away from cancer, moaning "Help me!"

Smith, who had spent 14 years on death row for a murder he said he did not commit, kept mumbling about his appeal, wondering whether prosecutors would grant his longstanding request for DNA testing to prove his innocence.

They did, but it came too late for him.

On Thursday, 10 1/2 months after cancer killed him at North Florida Reception Center, a prosecutor said the FBI had cleared Smith of the 1985 rape and murder of 8-year-old Shandra Whitehead.

It is thought to be the first case in which posthumous DNA testing proved a man's innocence.

"They told me, 'The DNA excludes him from being there,'" said Broward Assistant State Attorney Carolyn McCann. "He didn't do it," she quoted the FBI.

Smith's lawyers are outraged.

A spokeswoman for Gov. Jeb Bush said Thursday that the governor wants to offer DNA testing to other condemned inmates.

"If the FBI data is accurate, this man should not have been on death row," said spokeswoman Katie Baur. "The governor's office has been working for several months to provide DNA testing for all death row inmates in which a DNA test could prove their innocence."

On Thursday, Smith's lawyers accused prosecutors of stubbornly ignoring evidence of his innocence for years and then blocking DNA testing while Smith was alive.

"We knew he was innocent in December of 1989," said Martin McClain, Smith's former lawyer. "We told the courts, and we told them who was the real killer, but no one cared, and they kept Frank Lee Smith on death row for another 10 years until he died."

In the Smith case, the DNA evidence is "just a snapshot of how unreliable the system is," McClain said. "If you were grading the system, this case shows it flunked."

Smith, convicted of two earlier homicides, had been on parole when police accused him of sneaking into Shandra's home and raping and fatally beating her in her bed. No physical evidence linked him to the crime, but a jury convicted him in 1986 based largely on an eyewitness. A judge sent him to death row.

Gov. Bob Martinez signed a death warrant on Oct. 16, 1989, but less than a month before Smith's scheduled execution, the eyewitness, Chiquita Lowe, recanted. She testified she wrongly identified Smith after police pressured her, telling her Smith was dangerous.

A week before he was to die, the Florida Supreme Court stayed the execution.

But then a judge in Broward turned down his request for a new trial after prosecutors depicted Lowe as a liar.

In fact, Lowe never wavered from her testimony that she saw someone else lurking outside the victim's house that night: Eddie Lee Mosely, an insane killer who was the prime suspect in a number of other rapes and killings in the same neighborhood.

In 1998, Smith's attorneys began pressing for DNA testing. But the Broward State Attorney's Office said that under longstanding court rules it was too late for Smith to get his conviction overturned - even if the semen found in the victim belonged to someone else.

At one hearing, prosecutor McCann accused Smith's lawyers of "playing games" to delay justice.

"This is not a game," countered Smith's attorney, Bret B. Strand. "If Smith's DNA does not match the evidence, he is innocent. The interests of justice in preventing the execution of an innocent man outweigh the state's interest in a procedural rule."

Former O.J. Simpson lawyer Barry Scheck, who served on Smith's legal team, argued that DNA testing might not only vindicate Smith but also solve a series of homicides and rapes in the area.

McCann now insists she wasn't opposed to DNA testing, but she did object to a defense team condition to keep the results secret.

Strand said that after Smith, 52, came down with cancer, prison officials were slow to respond. "He lost 30 or 40 pounds" the lawyer said, adding that Smith was left writhing in pain in solitary confinement at Florida State Prison.

Eventually, he was transferred to the prison hospital, where investigator Jeff Walsh visited a week before Smith died. "He was moaning, begging for water," Walsh said in an interview shortly after Smith's death on Jan. 30. "He was lying in his own excrement."

He asked Walsh how his appeal for the DNA testing was going.

After his death, attorney Hilliard Moldof sought an order to keep the state from destroying the DNA evidence so that it could be compared to the dead man's DNA. Prosecutors originally opposed the testing, but an agreement was finally worked out in July.

Prosecutor McCann said she still is waiting for the FBI's written report. When it arrives, she said she probably will move to vacate Frank Lee Smith's conviction.

Shandra's mother has been informed, and Mosely is now a suspect in the killing, McCann said. She added she is very upset about Smith's conviction.

"No prosecutor wants this to happen," McCann said. "Unfortunately, we're in an imperfect system where the guilty go free, and sometimes innocent people are convicted."

Caption: COLOR PHOTO
Frank Lee Smith

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