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## After 5 years, Va. DNA project has cleared 5 people

By Frank Green



The first break to come Thomas E. Haynesworth's way in more than a quarter century was a letter notifying him that there had been DNA testing in one of his 1984 convictions.

The Greensville Correctional Center inmate learned in March 2009 that the testing of semen recovered from a rape at a Richmond day-care center implicated a convicted serial rapist, not Haynesworth.

He was lucky there had been testing, and he was lucky he learned about it in a letter.

Haynesworth's potential ticket to freedom was buried for decades in a case file in the 15,876-square-foot State Records Center on Charles City Road, not far from his old East End neighborhood.

Virginia's groundbreaking, sometimes bumpy post-conviction DNA project aimed at clearing the wrongly convicted began in late 2005 after testing in a sampling of just 31 old forensic case files cleared two men of rapes.

The effort continues and five years, almost \$5 million and more than 5,000 DNA tests along, a total of five people have been cleared.

Some believe there are simply few innocent people to be found in such a search, and others contend the results show that far more investigation — outside the lab — remains and that the results thus far are already worth the price.

In addition to exonerations, some old crimes have been solved, among them a 1975 rape and murder of an elderly Emporia woman.

The project's genesis was in 2001 when the state forensic science lab learned that some serologists who performed blood typing kept samples of evidence — largely blood and semen on fabric or swabs — in their case files from 1973 through 1988.

The discovery was made after the lab was contacted by the Innocence Project in New York, which was looking for biological evidence to test for Marvin Anderson, an Ashland man convicted in a savage 1982 rape.

It is the only biological material remaining in cases such as Anderson's, prosecuted before forensic DNA testing was available.

After Anderson and two others were exonerated by testing the old evidence, then-Gov. Mark R. Warner ordered testing in 31 randomly chosen files. In 2005, two more men were cleared.

At the time Barry Scheck, a co-founder of the Innocence Project, said such a high exoneration rate from a random sample raised serious questions about the criminal justice system.

Warner ordered all the old files searched and testing conducted in cases where there had been convictions. He said it was the only morally acceptable thing to do.

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**It was initially** estimated that there were about 300 such cases among 165,000 old files. But the project quickly proved far larger and more expensive than the two-year, \$1.4 million effort initially envisioned.

According to the Virginia Department of Forensic Science, more than 530,000 files were searched. Three thousand files held biological evidence and among them were almost 800 cases involving about 1,100 suspects.

The first 400 cases sent for testing required supplemental testing after it was learned that the independent lab performing the work did not use the most effective technique possible. The supplemental testing has been performed in 240 of those cases.

As of Jan. 5, testing results had been received in 665 cases — some had just one or two items to be tested, others with a dozen or more — at about \$800 a test. In those 665 cases, 549 official lab reports called certificates of analysis have been issued.

The certificates in all cases, even when inconclusive, are sent to law enforcement and prosecutors where the crimes occurred to determine the significance.

So far the \$1.4 million set aside by Warner has been spent, as well as \$3.5 million of a \$4.4 million grant received from the National Institute of Justice in 2008.

The samples tested are small and old and were subjected to blood-typing testing years ago. In the cases of about half of the convicted people where testing has been completed, the results are either inconclusive or DNA samples are needed for comparison.

The DNA profiles of 189 of the suspects were found to match the evidence, and in 82 cases the suspect was excluded as the source of the DNA. Most, if not all, of both groups were convicted of crimes.

Just the absence of DNA is not necessarily proof of innocence. Of those 82, three, including Haynesworth, have been exonerated or otherwise cleared since the initial two in the 2004 sample testing.

Haynesworth remains in prison on other convictions for which he also is seeking exonerations. One other man has an exoneration petition pending.

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**Former California** prosecutor Rockne P. Harmon, a DNA expert, said DNA exonerations are rare — just 265 in 20 or so years.

"Virginia's results so far show that contrary to what the Innocence Project has been asserting ... instead of being the tip of the iceberg, the iceberg's really an ice cube," Harmon said.

He says there is a big difference between not finding a rape suspect's DNA profile in semen recovered from a rape and failing to find his DNA on a cigarette butt discarded at the scene.

"It just means somebody else smoked the cigarette. ... It's not material to innocence," explained Harmon, who teaches at the University of California at Davis.

He believes the money might be better used to search for the innocent by groups like the Innocence Project, which screens cases for testing where it might be of use.

In 2001 the Virginia General Assembly passed a law giving eligible inmates the right to request DNA testing, but only if, among other things, the results could have a bearing on innocence.

However, inmates such as Haynesworth and at least two others cleared by the project apparently did not get the word and had not requested state testing.

Stephanie E. Merritt, counsel for the Department of Forensic Science, said the evidence sent for testing was largely considered probative of guilt decades ago when it was subject to blood-typing tests by the serologists.

"We would still not have begun testing at this point had we tried to go back and try to find facts for all of these cases," she said. Haynesworth might still be waiting.

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**Peter Neufeld**, who founded the Innocence Project with Scheck, disagrees with Harmon's "ice cube" assessment.

"There's only two numbers that matter — the cases where they got results confirming guilt, versus the cases where they got results and exonerated somebody," he said.

Of the original 31 cases, testing implicated 16 convicted people and exonerated two. The results in nine of the 31 cases were said to be inconclusive, four of them because there was no sample from the suspect with which to make a comparison.

Neufeld complained that the results are sent to law enforcement first to make determinations. "We have an adversarial system, and there should be somebody trying to work on this from the point of view of a defendant," Neufeld said.

William C. Thompson, a DNA expert and professor of criminology, law and society at the University of California at Irvine, agrees. "It strikes me as problematic that this assessment is being made solely by commonwealth attorneys. ... You kind of want a more open and balanced review," he said.

Merritt said that once certificates of analysis are completed by the lab, they are sent to the prosecutor and top law-enforcement officials. "When we have an elimination, I personally call to let them know," she said.

The people whose cases are being tested are also being notified and asked if they would like to learn the results. The Virginia Board of Forensic Science initially decided not to notify them.

Haynesworth would not have received that letter in 2009 if the board had not been required by legislators to make notifications. As a result, letters were sent to convicted people alerting them that the evidence had been found.

The letters also tell the recipients that they can request the results and they are given contact information for the Mid-Atlantic Innocence Project. The search and notification effort has proved daunting and continues.

Betty Layne DesPortes, a Richmond lawyer and an expert on legal aspects of the forensic use of DNA who has followed the effort closely, said a major problem has been that no one has taken responsibility for the entire project.

"Somebody needs to step up and see it through," she said.

It should not be the laboratory's job, nor should it be the responsibility of prosecutors, many of whom were not in office when the crimes occurred and may not understand the significance of the exclusions or other results, DesPortes said.

In any case, Steven D. Benjamin, a criminal-defense lawyer and member of the Forensic Science Board, maintains that the project is well worth the cost and effort.

"If Haynesworth was the only innocent person exonerated as a result of all this work, it would be worth it a thousand times over," he said.

"But even if we had not realized even a single exoneration, it still would have been the right thing to do. There's never any justification for remaining ignorant about the truth."

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