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Despite backing, Haynesworth case poses challenges

By Frank Green

In 2004, legislators listened to the concerns of law enforcement and the Virginia Attorney General's Office and passed a law that critics said was of little value.

Intended to free wrongly convicted people with new, non-biological (non-DNA) evidence of innocence, a case now before the Virginia Court of Appeals could support the critics' complaints.

Though Virginia Attorney General Ken Cuccinelli and prosecutors in Henrico County and Richmond believe Thomas E. Haynesworth is innocent of two attacks on women, the appeals court may find itself unable to exonerate him.

A three-judge panel heard arguments in Haynesworth's case in March, but last month, before the panel could rule, the full court decided to take the case over and asked for briefs from Haynesworth's lawyers and Cuccinelli.

In recent years, DNA testing cleared Haynesworth of two other attacks on area women in 1984 and implicated his former neighbor, Leon W. Davis Jr., a serial rapist serving life for startlingly similar crimes that same year.

No evidence exists for testing in Haynesworth's two remaining convictions. But the DNA evidence in the two associated crimes, the similarities of the attacks with Davis', the resemblance of the two men and other factors have persuaded authorities that Haynesworth, who was paroled this year, is innocent and the victims mistaken in those cases, too.

"The combined force of the new evidence is so compelling that it creates the firm conviction or belief that no rational trier of fact could have found Haynesworth guilty beyond a reasonable doubt," Alice T. Armstrong, an assistant attorney general, wrote to the court last week on Cuccinelli's behalf.

Haynesworth's lawyers, in their brief, told the court it is now faced with the unusual question of whether a judge or juror could have found guilt beyond a reasonable doubt in a case that neither prosecutor would even bring to trial given the new evidence.

Haynesworth's exoneration through the writ is far from assured, however. It is not up to Cuccinelli or the prosecutors to decide the facts; it is up to the appeals court.

In 2000, after DNA testing began proving there were innocent people in Virginia prisons — notably former death-row inmate Earl Washington Jr. — the Virginia Supreme Court proposed easing what is called Virginia's "21-day" rule but held off so the General Assembly could pass a law addressing the issue.

Under the rule, the toughest in the country, people convicted of a crime have just 21 days to discover new evidence of innocence if they ever hope to get it considered by a Virginia court.

The rule is intended to bring finality to criminal cases for the sake of victims, the system and others. Critics, however, argue that innocence and accuracy must always trump finality.

Under the rule, even DNA evidence proving innocence could not go before a Virginia court if discovered more than 21 days after conviction. The only remedy available in such a case was a pardon by the governor.

So in 2001, the legislature passed a law allowing new DNA evidence as an exception to the 21-day rule. In 2009, Haynesworth became the first, and thus far only, person granted such a DNA writ by the Virginia Supreme Court.

In 2004, the legislature enacted a law for people with newly discovered, non-biological evidence of innocence to petition the Virginia Court of Appeals for writs of actual innocence.

Among other things, law-enforcement officials and others were concerned there would be a flood of such cases and urged legislators to write the law tightly to curb abuse.

The law requires that the new evidence was not and could not have been discovered at the time of the trial and that after considering the new evidence, "no rational trier of fact" could have found guilt beyond a reasonable doubt.

The only non-biological writ granted was in 2008, when a firearm-possession conviction was tossed out because the "firearm" in question did not meet the definition of a firearm under state law.

Betty Layne DesPortes, an area criminal-defense lawyer, said that when the 2004 law was initially proposed, "I think the intent and focus … was to expand the 21-day rule to bring Virginia more in line with other states."

But, she argues, the law was written so restrictively that a genuine and convincing recantation of testimony of a victim or witness implicating a defendant would not be enough to win a writ of actual innocence.

DesPortes contends that short of some new scientific evidence as compelling as DNA or the discovery of a video of the crime, it is difficult or impossible to establish actual innocence with clear and convincing evidence under the writ.

Cuccinelli's brief in the Haynesworth case — which refers to DNA evidence indirectly supporting his innocence claim in similar crimes — says as much.

It notes that since the 2004 law took effect, the Court of Appeals has rejected several cases of people with claims of innocence in which a witness or victim changed their story after the trial.

They include those of former Navy SEAL trainer Dustin Turner, whose case has been appealed to the Virginia Supreme Court, as well as Aleck J. Carpitcher and Dwayne Lamont Johnson.

Turner and his SEAL training buddy implicated each other in the murder of a college student in Virginia Beach, and both were convicted. Later, Turner's friend changed his story and said he acted alone. A lower-court judge found the new confession to be credible, but the full court of appeals ruled that even if Turner's friend acted alone, Turner would still be guilty of abduction by deception with the intent to defile and, therefore, of guilty of felony murder.

DesPortes also said the difficulty with a recantation is that a reasonable juror could believe either version — what the victim said during the trial or what they said afterward.

Unlike those cases, wrote the attorney general's office in its brief last week, Haynesworth's "cases involve neither a recantation nor an alternative theory of guilt.

"Instead, these cases epitomize why the General Assembly created the remedy of a writ of actual innocence for non-biological evidence: advances in technology have brought to light new evidence that was not available at the time the challenged convictions became final and which points clearly and convincingly to innocence," the attorney general said.

The Court of Appeals asked the lawyers in Haynesworth's case to answer several questions, among them:

"What, if any, specific newly-discovered non-biological evidence in the record conclusively establishes that the person who sexually assaulted the other victims, based on the newly-discovered DNA, is the same person who sexually assaulted victims that are the subject of the petitions for writ of actual innocence before this court?"

A problem for Haynesworth, said DesPortes, is that his petition for a writ of actual innocence is based on the assumption the same person did all the crimes when DNA can prove only that he did not commit two of them.

The attorney general notes that that no single piece of evidence "conclusively" establishes that Davis, not Haynesworth, assaulted the women. Instead, the totality of the evidence, based on the DNA findings, is strong circumstantial evidence of Haynesworth's innocence.

"These cases present the extraordinary circumstance that the prosecuting authorities would not (even) bring the charges in light of the newly discovered evidence," Cuccinelli's brief told the court.

"To our knowledge, this circumstance is unprecedented in Virginia," the attorney general said.
