

SMITH, Frank Lee, (B/M)

DC# 016296

DOB: 07/20/47

Seventeenth Judicial Circuit, Broward County, Case # 85-4654CF

Sentencing Judge: The Honorable Robert W. Tyson, Jr.

Trial Attorney: Andrew D. Washor, Special Public Defender

Attorney, Direct Appeal: Michael Gelety

Attorneys, Collateral Appeals: Thomas Dunn, Leslie Delk, Martin McClain,
Brett Strand, CCRC

Date of Offense: 04/14/85

Date of Sentence: 05/02/86

Circumstances of the Offense:

According to information located in the defendant's court file and pre-sentence investigation the circumstances of the offense were as follows:

On Sunday, April 14, 1985, at approximately 11:55, the Broward County Sheriff's Office responded to the victim's home in reference to a burglary with an assault. Upon arrival detectives discovered Shandra Whitehead, an eight-year-old black female, who had been beaten and strangled around the neck with her pajamas. The victim was transported to the hospital where it was discovered that she had been sexually assaulted, with evidence of both vaginal and anal penetration. The examination revealed numerous lacerations from a blunt instrument to the face, head and temples. The victim subsequently died nine days later on April 23, 1985, as a result of her injuries.

The victim's mother, Dorothy McGriff, stated that at the time of the offense, she had left her two children home alone while she worked the late shift, as a nurse. She had requested that her sister check in with the children periodically. When Ms. McGriff returned home that evening, at approximately 11:55 p.m., she observed a black male exiting her residence through a side window. Ms. McGriff stated that the suspect began to run when she shined her headlights on him and blew her horn. She then picked up a rake in an attempt to chase him off of her property. When she entered her residence, she discovered her son asleep in one room, and her daughter Shandra, nude from the waist down, unconscious and beaten. Ms. McGriff discovered that her television had been removed from its usual place and was sitting on her bed next to the open window. A bloody rock thought to be the weapon was discovered outside the bedroom window.

At the time of the initial report, Dorothy McGriff provided a description of the suspect. During a canvass of the area, investigators made contact with Ms. Chiquita Lowe and Mr. Gerald Davis, both of whom would later become witnesses for the prosecution. Ms. Lowe related that she had been in the area near the victim's home, when a black man approached her and attempted to solicit money. She related that the suspect was acting in a bizarre manner. Mr. Davis informed investigators that, prior to the approximate time of

the crime, he observed a black male in the area. He claimed the suspect approached him and made homosexual advances toward him. Mr. Davis also described the man's behavior as odd.

On April 18, 1985, Ms. Lowe called the Broward County Sheriff's office. She reported that she had just seen the subject in question outside of her home, attempting to sell a television set. Police responded to the area, where they observed a black male fitting the description with a large object concealed underneath his shirt. The suspect, Mr. Frank Lee Smith, was ordered to the ground at gunpoint and subsequently searched. Police discovered a knife, with a seven-inch blade, hidden under his clothing. The subject was placed under arrest for Carrying a Concealed Weapon.

At the time of the subject's arrest, he denied his involvement in the crime and provided investigators with an alibi for his location at the time of the offense. When law enforcement attempted to verify his statement, they questioned the relatives that Smith had provided as witnesses. Law enforcement officials claimed that his relatives' statements did not match Smith's. The detectives, in an attempt to solicit information from Smith, falsely told Smith that the victim's brother had witnessed the crime. The subject reportedly replied, "No way could that kid have seen me, it was too dark."

The witnesses, Ms. Chiquita Lowe and Mr. Gerald Davis, selected Smith's photo from a photographic lineup provided by investigators as the man they saw the night of the offense. On 4/19/85 based on the positive identification provided by the witnesses Frank Lee Smith was charged with Sexual Battery on a Minor, Criminal Attempted Murder, and Burglary with an Assault. When the victim died Smith was subsequently charged with First-Degree Murder.

Additional Information:

At the time of the defendant's arrest for the 1985 murder of Shandra Whitehead, Smith was on lifetime parole from a Life sentence for First-Degree Murder, Broward County Case # 89-Sauls. The defendant was paroled on 04/22/81.

Prior Incarceration History:

Juvenile Record:

On 09/30/60, at the age of 13, Smith was arrested for Manslaughter and turned over to the Juvenile Authorities. He was declared delinquent and committed to the State School for Boys. He was released in August, 1961.

Smith was arrested for numerous Breaking and Entering cases that occurred in Ft. Lauderdale, FL., between 09/19/63 and 11/20/63. Smith admitted to eleven burglary cases and the theft of numerous items. He was committed to the School for Boys, and while there obtained a poor disciplinary record, which included: fighting, a disrespectful attitude, unkempt room and using obscene language. He was released on 10/13/64.

Adult Record:

Offense Date	Offense	Sentence Date	County	Case No.	Prison Sentence
12/07/1965	1ST DG MUR/PREMED. OR ATT.	03/17/1966	BROWARD	0000000	SENTENCED TO LIFE
04/14/1985	1ST DG MUR/PREMED. OR ATT.	05/02/1986	BROWARD	8504654	DEATH SENTENCE
04/14/1985	SEX BAT BY ADULT/VCTM UNDER 12	05/02/1986	BROWARD	8504654	SENTENCED TO LIFE
04/14/1985	BURGLARY ASSAULT ANY PERSON	05/02/1986	BROWARD	8504654	SENTENCED TO LIFE

Trial Summary:

05/09/85 Defendant was indicted.
05/30/85 The Public Defender appointed to represent the defendant.
08/24/85 Court granted the Public Defender's Motion to Withdraw.
09/04/85 Court appointed Special Public Defender Andrew Washor.
09/11/85 The defendant entered a plea of "Not Guilty".
11/18/85 Motion for Change of Venue denied.
01/31/86 The defendant was found guilty by the trial jury of all counts as charged.
02/05/86 Upon Advisory Sentencing, the trial jury, by a majority vote of 12-0, recommended the death penalty.
05/02/86 The defendant was sentenced as follows:
Count I: First-Degree Murder- Death
Count II: Sexual Assault- Life, 25-year mandatory minimum.
Count III: Burglary with an Assault- Life, consecutive to Count II.

Appellate Summary:

Florida Supreme Court, Direct Appeal

FSC# 68,834
515 So. 2d 182

05/23/86 Appeal filed.
10/22/87 FSC affirmed the convictions and sentences.
12/09/87 Motion for rehearing denied.
01/14/88 Mandate issued.

United States Supreme Court, Petition for Writ of Certiorari

USSC# 87-6368
485 U.S. 971

01/27/88 Petition filed
03/21/88 USSC denied petition

State Circuit Court, 3.850 Motion

Circuit Court # 85-4654

11/17/89 Motion filed.
12/13/89 Motion denied.

Florida Supreme Court, Petition for Writ of Habeas Corpus

FSC# 75,038

565 So. 2d 1293

11/17/89 Petition filed
02/15/90 FSC denied petition.
09/06/90 Rehearing denied.

Florida Supreme Court, Appeal of 3.850 Denial

FSC# 75,208

565 So. 2d. 1293

01/08/90 Appeal filed.
01/08/90 FSC granted a temporary Stay of Execution.
01/18/90 FSC granted a Stay of Execution.
02/15/90 FSC affirmed the Trial Court's summary denial of motion; however,
remanded the case to the Trial Court for an evidentiary hearing regarding a
claim of newly discovered evidence.
09/06/90 Motion for rehearing denied.

State Circuit Court, On remand from Florida Supreme Court

Circuit Court Case # 85-4654

03/07/91 Evidentiary hearing held.
06/07/91 Motion denied.

Florida Supreme Court, Appeal of 3.850 denial

FSC# 78,199

708 So. 2d 253

10/05/92 Appeal filed.
01/22/98 FSC reversed the 3.850 denial
05/08/98 Motion for rehearing denied.
05/08/98 Mandate issued

State Circuit Court, On Remand

Circuit Court Case # 85-4654

09/16/98 Evidentiary hearing begins.
02/24/99 Motion denied.

Warrants:

10/18/89 Death Warrant signed by Governor Bob Martinez
01/18/90 Florida Supreme Court granted a Stay of Execution.

Clemency:

09/14/88 Clemency Hearing held (denied).

Case History:

On Direct Appeal, Smith's attorney argued on one claim, that the Trial Court erred by not granting the Defense's request for an expert to analyze the semen and blood found at the crime scene. He was critical of the State's lack of physical evidence linking Smith to the crime scene. This issue was brought up in the appeal, although it was not the main area of focus, and a response to this claim was not mentioned in the Florida Supreme Court opinion. The claims on appeal were: (1) the argument that the State committed a discovery violation by submitting additional witnesses on the day of trial, (2) prosecutorial misconduct, in that a relative of Smith's, observed the prosecutor coaching a witness, (3) the claim that the Trial Court erred by allowing the testimony of a Court witness on the request of the State, who claimed that they could not vouch for his credibility, (4) the evidence is circumstantial and insufficient to convict, V: the Trial Court made a series of erroneous rulings that cumulatively denied Smith a fair trial, (5) the Trial Court erred in departing from sentencing guidelines for the offense of Burglary with an Assault, (6) the Trial Court erred in imposing the death penalty. After considering these claims, the Florida Supreme Court affirmed the convictions and sentences.

Smith's attorneys filed a Petition for Habeas Corpus in the Florida Supreme Court and a 3.850 Motion. The attorneys did argue in the 3.850 Motion, ineffective assistance of counsel, claiming that that trial counsel erred by not consulting with serology experts to establish evidence that would rule out Smith, and only moved for an expert chemist to analyze the evidence post-trial. The Trial Court denied the motion and attorneys appealed this denial to the Florida Supreme Court. The Supreme Court acknowledged this claim but rejected it and others as procedurally barred, having already been raised on Direct Appeal. The Florida Supreme Court denied the Petition for Habeas Corpus; however, remanded the 3.850 denial to the Trial Court for an evidentiary hearing based on newly discovered evidence. Chiquita Lowe, a witness for the State, recanted the testimony she gave at trial, and in a sworn affidavit, admitted that she had identified the wrong man. Ms. Lowe claimed the State pressured her to identify the defendant, Frank Lee Smith, despite the fact she knew at trial that he was the wrong man. She claimed after the trial, she was shown a photograph of Eddie Lee Mosely and stated that he was the suspect that she observed the evening of the murder.

On remand the Trial Court held an evidentiary hearing, and denied relief.

The Trial Court's denial was appealed to the Florida Supreme Court. This appeal focused once again on the mistaken identity claim and emphasized Chiquita Lowe's recantation and subsequent identification of Eddie Lee Mosely. Smith's attorney's also claimed that there was ex-parte communication between the Trial Court Judge and the State during the handling of the 3.850 Motion. The lack of DNA testing was not argued in this motion. The Florida Supreme Court reversed the Trial Court's denial of the 3.850 Motion and remanded the case to the Trial Court based on improper ex-parte communication.

The Trial Court, on remand, scheduled an evidentiary hearing for 09/16/98. On 09/14/98 Smith's attorney filed a motion for DNA testing. This was the first formal motion requesting DNA testing to be filed during Smith's collateral appeals. This issue was argued at the evidentiary hearing. The State agreed to conducting a DNA test, however, requested that several conditions be met. The State argued that although DNA testing should be procedurally barred in this case, they would agree based on the following conditions: the results of the testing would be shared with all parties, testing would be conducted by FDLE, and that the Court would defer ruling on the motion until the results of the DNA tests were obtained.

Attorneys for Smith argued that the results of the test should be held confidential. The Trial Court denied this motion, and subsequently denied the 3.850 Motion on 02/24/99. This was the last appeal heard in Smith's case prior to his death on 01/30/00.

On 12/11/00, the FBI informed the State that the DNA samples on the vaginal swabs of the victim did not match Frank Lee Smith's. The State subsequently filed a Motion to Vacate and Set Aside Judgments and Sentences of Frank Lee Smith. The Trial Court on 12/22/00 granted the motion.

The evidence presented at trial was largely circumstantial, with no forensic evidence to definitively link Smith to the crime. The defendant had allegedly made a very incriminating statement to investigators, which was used at trial as a confessional statement. The eyewitnesses, at trial, identified Smith as the suspect they observed the evening in question. It appears that, with the defendant's reported statement and the positive identification of Smith at trial, the jury did not believe that Smith was innocent, and made a unanimous decision regarding his guilt.

Prosecution/Law Enforcement Statements:

The FBI has recently determined, through an examination of case evidence utilizing DNA analysis, that the defendant, Frank Lee Smith, did not commit the offenses of conviction. Mr. Smith died of cancer, while incarcerated, on January 30, 2000. He maintained his innocence from the time of his arrest in 1985 until his death.

According to Parole and Probation Officer, Marc H. Johnson, who conducted the pre-sentence investigation, Smith stated "he was not in the area of the murder on 04/14/85, and, in fact, had never been in that area in his life". He also stated that the police know who committed the crime, but arrested him because he had a prior record. He claimed

that since he had been paroled from prison he had been trying to take steps in a positive direction, but claimed that someone is always “messing with me.”

Captain Richard Scheff of the Broward County Sheriff’s Office stated, “My opinion is irrelevant because I have a conflict of interest, and it is inappropriate for me to comment. In an abundance of caution I would defer to the opinion of others who do not have a conflict.”

Carolyn V. McCann, Assistant State Attorney in Charge, 17th Judicial Circuit provided the following written statement:

Initially I would like to say that there is no doubt that the system failed Frank Lee Smith. Had DNA testing been in existence at the time of Shandra Whitehead’s murder, Mr. Smith would have been excluded as the perpetrator and he would not have been prosecuted for that 1985 crime. Unfortunately, Mr. Smith’s lawyers, for reasons unknown, did not ask for DNA testing until September of 1998.

Therefore, while it is indisputable that Mr. Smith was prosecuted and incarcerated for a crime he did not commit, we believe that the blame for this injustice can and must be shared by all persons who were involved in Mr. Smith’s case, as demonstrated by a factual history of this case which many have chosen to ignore.

To be specific, enclosed with this letter is a chronology, time line and record excerpts from the legal proceedings in Mr. Smith’s case. These are the same documents prepared for the Florida Senate’s Criminal Justice Committee when they investigated the circumstances of Mr. Smith’s conviction, incarceration, and death in prison. The record in Mr. Smith’s case is a matter based upon facts and is contained in these documents. I hope that you will take the considerable time to peruse them yourself. These documents will tell you several things that others have not. First, as previously mentioned in this letter, lawyers for Smith did not ask for DNA testing until September 14, 1998, two days before the scheduled Evidentiary Hearing. It is well established that DNA evidence was recognized as admissible evidence as early as 1988 in the case of Andrews v. State, 533 So. 2d.841 (Fla. 5th DCA 1988). The Supreme Court of Florida addressed the admissibility of DNA evidence in the context of the timelines of requests for DNA testing in the case of Ziegler v. State, 654 So. 2d 1162 (Fla.1995). Thus, DNA testing was available in 1989 when Mr. Smith filed his first motion for post-conviction relief. Inexplicably, lawyers for Mr. Smith did not ask for DNA testing then or in 1990, 1991, 1992, 1993, 1994, 1995, 1996, or 1997. Instead, they waited until two days before a scheduled evidentiary hearing was to commence and filed for DNA testing on September 14th 1998. It is crucial to note that at no time prior to September 14, 1998, did defense attorneys ever ask for DNA testing in Mr. Smith’s case. In fact, this was conceded by lawyers for Mr. Smith at the 1998 hearing on Mr. Smith’s motion for post conviction relief. Any claims that original trial counsel Mr. Washor, pursued an independent chemist for blood group typing should not and cannot be equated with a request for DNA testing. Incidentally,

the denial of Mr. Washor's Motion to Inspect and Test Evidence and for the Appointment of an Expert Chemist and costs for the purpose of same was appealed to the Florida Supreme Court and was summarily disposed of. See, *Smith v. State*, 515 So. 2d 182, 184 (Fla. 1987). The issue of group typing was raised by the defense in a motion to post-conviction relief and denied. It was also raised on appeal from that denial and rejected by the Florida. The fact that DNA had not been done or requested was never an argument, major or otherwise, raised by Mr. Smith's trial or post-conviction lawyers until DNA was requested on September 14, 1998. These facts clarify and correct what is currently in the case history, tab 18, page 7, with regard to the defense's total lack of request and lack of argument concerning DNA testing prior to September 14, 1998.

The second thing that the documents will tell you is that when the State asked for DNA testing at the 1998 hearing, the defense objected. Third, that the Judge who presided over the post-conviction hearing in 1998 told Mr. Smith's lawyers that they could pursue an appeal of his ruling denying DNA testing, but they did not. In fact, lawyers for Mr. Smith did not again bring up DNA testing to the State until December of 1999, one month before Frank Lee Smith's death.

Finally the State is compelled to point out that at Mr. Smith's trial; Attorney Andrew Washor argued that Eddie Lee Mosely, among others, could have been responsible for the crimes charged. Eddie Lee Mosely was not the focus of the defense but was one of several names suggested by Mr. Washor as being the perpetrator. The case history at page 8 paragraphs 4 and 5 is a totally inaccurate and misleading characterization of the argument presented by Mr. Washor. Should you wish to read the voluminous transcript of Mr. Smith's trial to verify my statements in this letter, please let me know as I will send them to you. I am confident that if you read them you will agree with my statements.

Lawrence Mirman, Attorney in Charge, Legal Affairs Division, 19th Judicial Circuit, conducted an investigation into the circumstances surrounding the Smith case¹⁴. Included in Mr. Mirman's report was his opinion of the most likely scenario of the crime:

Based upon my review of all the facts of this case, I believe that Chiquita Lowe was telling the truth in 1991 and 1998 when she stated that the man she saw on the street on the night of the murder was Eddie Lee Mosely, not Frank Lee Smith. I believe that after Eddie Lee Mosely approached Gerald Davis and Chiquita Lowe he then went into the McGriff home and raped and murdered Shandra Whitehead. In light of the DNA evidence, this conclusion is virtually inescapable. However, I also believe that after Mosely left the house, Dorothy McGriff saw Frank Lee Smith (the "figure at the window" in [Smith's] own words) attempting to steal a television set from the McGriff home. Smith's final

¹⁴ Pursuant to the request of Governor Bush (Executive order #01-24), the State Attorney's Office for the 19th Circuit conducted an investigation as to whether Detective Scheff committed perjury during the original trial by falsely implicating Frank Lee Smith.

words prior to sentencing are haunting in this regard. He stated, “The point must be established *whether this figure was actually the figure that raped and killed the victim.*”

. . . The McGriff home was described as a “target of opportunity” for burglars like Frank Lee Smith. Days after trying to steal a television, Smith was trying to sell a “hot” television. Smith told (Detective) Scheff the house was dark which is consistent with Smith’s presence at the window. It stands to reason that if Scheff fabricated this admission, he would have fabricated a more incriminating statement. Smith denied being at the house to his lawyers because he was on parole for murder. He knew that if he admitted being at the window he would have been sent back to prison despite his innocence of the rape and murder. Mosely approached Davis, a.k.a. “Gigi,” and asked him for sex. Part of Mosely’s modus operandi was to approach persons (usually female prostitutes) and sexually proposition them. Dorothy McGriff remains adamant that Frank Lee Smith was the man she saw at her window. It is also important to note that, under this scenario, though Smith would be guilty of burglarizing the McGriff home, Shandra’s death did not occur *as a consequence of* and while Smith was engaged in the commission of Smith’s burglary. Consequently, he would not be criminally responsible for her death. There is no evidence that Mosely and Smith acted in concert.

Defense Statement:

Defense Attorney Andrew Washor was contacted for his comment on the case; however, no comment has been received to date; therefore, the following was obtained from court documents:

During the trial, special counsel Andrew Washor, brought up the lack of physical evidence obtained at the crime scene and the failure of the evidence to definitively link Smith to the crime. DNA testing was a new scientific procedure at this time and was not readily available or readily used. At the time of sentencing, Mr. Washor filed a motion to Inspect and Test Evidence and for the Appointment of an Expert Chemist and Costs for the Purpose of Same. The motion claimed that the State’s chemist, Howard Seiden, found intact spermatozoa in the vaginal smears taken from the victim. Mr. Seiden testified, in depositions and at trial that he could not pick up any blood group substance from the evidence, meaning that defendant Smith could neither be eliminated nor pinned down as the actual perpetrator. Mr. Washor requested that an independent chemist, with more sophisticated equipment than that of Mr. Seidel, be appointed to test the evidence in question. Judge Tyson denied this motion on 04/04/86.

Mr. Washor did bring up the lack of serological evidence; however it was not the main basis for Smith’s defense. He focused his defense of Smith on the State’s circumstantial evidence, improper police technique for soliciting suspect identification from witnesses, and the lack of credible eyewitness testimony.

There was no physical evidence to link Smith to the crime. The State was not able, at the time of trial, to provide evidence against Smith by providing any hair and fiber samples or fingerprints.

Mr. Washor focused on the mistaken identity of Smith. Mr. Washor claimed that the only real eyewitness to the crime was the mother of the victim, Dorothy McGriff. He claimed that, since Ms. McGriff did not get a good look at the suspect, and that she would have been in an agitated state at the time of the offense, she was not a credible witness. Mr. Washor later requested a mistrial after Ms. McGriff's testimony, because she became hysterical and unresponsive, which he felt prejudiced the jury.

Mr. Washor also argued that there was improper police handling of the other two witnesses for the State, Chiquita Lowe and Gerald Davis. Washor argued that Lowe and Davis had different police sketch artists, but later switched and then collaborated on their effort despite the fact they were not together at the time of identification. He also argued that the witnesses were given a photographic lineup up and not a physical lineup. Both witnesses claimed the suspect was over 6 ft. tall and weighed in the 190's. Frank Lee Smith was approximately 5'11'' and less than 170 lbs.

Mr. Washor alleged throughout the trial that this was a case of mistaken identity. He named an alternative suspect, Eddie Lee Mosely, as the likely perpetrator. The police listed Mr. Mosely as a suspect during the investigation, and this information was provided to Mr. Washor by the State. He discovered that Mosely had been arrested for numerous sex offenses and murders in the neighborhood. Mr. Washor contended that the description of the suspect by Ms. Lowe and Mr. Davis actually better described Mosely than his client Smith.

Washor argued that the physical build, erratic behavior, the homosexual advances, the nature of the violent sexual assault, and the method of selling stolen merchandise out of a shopping cart could all be attributed to the known characteristics of Eddie Lee Mosely. Smith, although he had offenses of violence in his past, did not have any prior arrests related to sexual crimes. Mr. Washor claimed the witnesses were not offered the chance to view Mosely in the photo lineups.

Prior to sentencing Mr. Washor requested that a psychiatrist be appointed to evaluate Smith. He was determined competent and the Court proceeded with sentencing. Mr. Washor claimed that Smith was not competent and argued diminished capacity. Mr. Washor did not feel that Smith would have ever made the confessional statement to detectives claiming the victim's brother could not have seen him, because it was too dark. He claimed that Smith was not mentally competent and was often incomprehensible.

Alternate Prosecuted Suspect:

There has been DNA evidence linking the rape offense to Eddie Lee Mosely. Mosely has been determined mentally incompetent to proceed with other pending charges and has not been charged in this case.

Report Date: 01/18/01 WHS
Updated: 10/05/06 JFL