

# Los Angeles Times

48 inches; 1711 words

SUNDAY, AUGUST 19, 2001, PART A, PART A, PAGE 1  
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FAX page #3

## THE NATION

### Condemned Man Could Go Free After DNA Testing

■ Justice: On death row 17 years, Charles Fain has insisted he is innocent. New technology could finally prove his claim.

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Three strands of hair that helped put Charles I. Fain on Idaho's death row 17 years ago for the rape and murder of a 9-year-old girl may just give him his life back.

For nearly two decades, Fain has maintained he was wrongfully convicted in the February 1982 slaying of Daralyn Johnson, who was abducted while walking to school in the small town of Nampa, Idaho.

Fain passed a polygraph examination, and several witnesses said he was in Redmond, Ore., 360 miles away, at the time of the murder. But two jailhouse informants said they had heard Fain make incriminating statements. Local police said Fain had lied about his whereabouts and that shoe prints found near the crime scene could have been made by his shoes.

Yet the most critical evidence against Fain was provided by an FBI specialist, who testified at the 1983 trial that pubic hair found on the dead girl's clothes was similar to Fain's, based on a microscopic comparison.

In late June, after a protracted legal battle by Fain's lawyers, sophisticated new DNA testing proved conclusively that the hairs—one found in the victim's sock, the other two in her underwear—did not come from Fain.

A week later, a federal judge, who earlier said he would not consider Fain's claims of innocence, set aside the conviction. U.S. District Judge B. Lynn

Winmill in Boise, Idaho, gave prosecutors a deadline of Sept. 4 to either initiate retrial proceedings against Fain, now 52, or release him.

It now appears that as early as next week Fain could walk off death row a free man—the 94th prisoner exonerated as a result of DNA testing in the last decade. Ten of those exonerated were on death rows in five states, including five in Illinois, where the governor responded by declaring a moratorium on executions last year.

If he is freed, Fain also would be the second convicted rapist cleared as a result of mitochondrial DNA testing, which can extract DNA directly from the shaft of a hair and is dramatically altering the field of forensic hair analysis. Besides establishing innocence, it also is used to prove guilt.

Late last week, David Young, the prosecuting attorney in Canyon County, Idaho, said he hoped to announce his decision next week about whether to seek a retrial in Fain's case. First he wants to complete further forensic tests, which he would not describe.

Idaho state court documents show that Young's office now is focusing its attention on two other suspects, both of whom have a history of sex crimes.

Fain's appellate attorneys, who have been working on his case for nearly 10 years, expressed confidence that he would be released.

"I firmly believe it would be improper to retry Mr. Fain," said defense lawyer Spencer C. McIntyre of Seattle. "The hair was really the linchpin of their case, and the other evidence is highly suspect. It is not just that the state has the same case minus the hair evidence; the pubic hair evidence is now our evidence. It is exonerating evidence.

"Mr. Fain is completely innocent. This has been a gross injustice."

Fain, an inmate at a maximum security prison near Boise, was not available for comment. But his other attorney, Frederick Hoopes of Idaho Falls, said Fain told him, "I'm walking on air" after

hearing that Winmill had set aside his conviction.

The Fain case is particularly significant because of its use of mitochondrial DNA testing, said defense lawyer Barry Scheck, co-founder of the Innocence Project at Cardozo Law School in New York, whose work is responsible for freeing numerous inmates through the use of DNA examination.

Mitochondrial testing was first used in the U.S. in a September 1996 trial in Chattanooga, Tenn., where it played a key role in the conviction of a man later sentenced to life without possibility of parole for the rape and murder of a 4-year-old girl.

Since then, its use has burgeoned. On Friday, an FBI spokesman said that the agency's laboratory had worked on 700 cases involving mitochondrial DNA since 1996 and that FBI agents had testified on the subject in cases in 26 states, Canada and Australia.

The technology also has been used to confirm that the infamous 19th century outlaw Jesse James is buried in Missouri and to identify the remains of U.S. servicemen found in Southeast Asia.

"Mito" testing, as people in the field refer to it, has several advantages over other types of DNA testing, primarily because it can be used on very old, degraded or small samples of hair, bones and body fluids.

Mitochondrial DNA differs from nuclear DNA in its sequence, its quantity in the cell, its location in the body and its mode of inheritance, according to an FBI report. In humans, mitochondrial DNA is inherited only from the mother. Consequently, mitochondrial analysis cannot distinguish between individuals of the same maternal lineage.

Funding Sought to Ease Backlogs at Labs

At a June congressional hearing chaired by Rep. Stephen Horn (R-Long Beach), Scheck urged legislators to appropriate funds so that government crime laboratories—saddled with vast

backlogs of DNA samples from incarcerated offenders and from unsolved crimes—can expand their ability to do DNA testing, including mitochondrial testing. No action has been taken so far, though earlier this month Atty. Gen. John Ashcroft committed more than \$30 million to help ease the backlogs.

FBI officials agree on the need to increase their testing capacity. The bureau has estimated that 5% to 10% of the agency's traditional hair analyses, done using a microscope, have been proved wrong by mitochondrial testing—a finding that could affect many cases because strands of hair frequently are found at crime scenes.

Indeed, more than a fourth of the cases in which DNA testing was used to exonerate prisoners have involved faulty hair analysis, Scheck said. He said that conventional hair analysis, based on looking at one strand of hair under a microscope and comparing it to another, is "junk science."

Just five months ago, Jeffrey Pierce was released from an Oklahoma prison after DNA tests demonstrated that he had not committed the rape for which he had served 15 years. Joyce Gilchrist, a supervisor in the Oklahoma City police laboratory, had testified that samples of Pierce's hair matched those found at the crime scene. Oklahoma officials now are reviewing her work in hundreds of cases after an initial FBI review found she had given misleading testimony in five of eight cases the agency investigated. Polygraph Answers 'Substantially the Truth'

Daralyn Johnson, the 9-year-old murder victim, was killed more than a decade before mitochondrial testing was used in court.

She left her house shortly after 8 a.m. on Feb. 24, 1982, for the four-block walk to school in Nampa. She never arrived. Three days later, her body was found by fishermen on the Snake River outside town. Several hairs and fibers were recovered from her clothing. The police immediately began taking hair samples from a number of suspects but eliminated them from consideration after their hair was judged to be dissimilar, according to court records.

At the time, according to his lawyers, Fain was unemployed and living with his parents in Redmond. He had been a garbage collector in Nampa before being laid off in June 1981.

Fain said that he returned to Idaho

in mid-March 1982 to look for work and eventually moved in with a woman who lived about a block from the Johnson home. That September, police stopped Fain and asked him if he would provide a sample of his hair. Fain agreed and an FBI examiner concluded that the sample exhibited similar characteristics to the hair recovered from the victim's clothing.

Fain, a Vietnam War veteran who had burglary convictions, became the leading suspect but steadfastly maintained his innocence. He agreed to take a polygraph conducted by Idaho law enforcement officials. Fain denied raping Daralyn or having any knowledge of the incident, and the polygraph administrator concluded that "he is telling substantially the truth."

Nonetheless, Fain was convicted in November 1983 of murder, kidnapping and lewd and lascivious conduct with a minor. The trial judge, James R. Doolittle, did not permit the polygraph results as evidence. Doolittle sentenced Fain to death in March 1984.

Fain appealed on numerous grounds. The Idaho Supreme Court ordered Doolittle to hold a special hearing concerning Fain's contention that the state had destroyed semen swabs collected at the crime scene. A state chemist said then that the evidence might have exonerated Fain.

Ultimately, Doolittle decided that the swabs had been destroyed in good faith, a ruling that was upheld by the state Supreme Court, which sustained the conviction despite reservations by two of the five judges.

But Justice Stephen Bistline issued a blistering dissent, saying the trial judge made several key errors, especially by allowing the testimony of the jailhouse informants, in particular that of Ricky Chilton. Chilton faced charges of fraud, escape, armed robbery and kidnapping at the time. He faced a possible sentence of 230 years but, after testifying against Fain, got a plea agreement for a considerably shorter sentence and was released after three years.

At one point, Chilton filed a formal statement asserting that the prosecutor's office "had conspired to force him into testifying" and that the prosecutor's office made death threats against him.

But when Chilton faced the jury, he said he was testifying freely and voluntarily.

Bistline was severely critical of the

use of Chilton's testimony that he had overheard Fain telling another inmate he was guilty:

"In these many years in this profession, I have never before seen the equal of these circumstances and would hope to never see them again. Where a witness has testified to being intimidated into testifying by state officers, there is no way to rehabilitate him as to make him a palatable witness in a jury trial. From a reading and rereading of his testimony, Chilton comes across as a person who would and did say anything—and nothing in the record refutes his sworn testimony that he was intimidated by the authorities in a manner made felonious by law."

Despite sustaining the conviction in 1989, Idaho's highest court ordered Doolittle to resentence Fain, saying he had not properly weighed other factors. Once again Doolittle issued a death sentence, and in 1991 the state Supreme Court affirmed the decision. The U.S. Supreme Court declined a review the following year.

In 1993, new lawyers launched a lengthy legal attack on the conviction in federal district court in Boise. Ultimately, Fain's lawyers prevailed and paved the way for the DNA testing, which was not available at the time Fain was convicted.

First a DNA test was done on a small amount of sperm found at the crime scene. The laboratory said that it had identified one gene pair that could not have come from Fain or the victim but that there was not enough DNA for any conclusive reports. Then the public hair was tested by Bode Technology Group in Virginia, and the laboratory concluded definitively that the sample did not come from Fain.

A week after the DNA test results came back in late June, Idaho Atty. Gen. Al Lance issued a statement saying he agreed that Fain's death sentence should be vacated.

"The DNA test is significant because the testimony of an FBI agent at trial, nearly 20 years ago, may have been a factor in the jury's decision to find Fain guilty," Lance said. "The agent testified that microscopic examination indicated that the hairs could have been Fain's. . . . We cannot know how much weight the jury gave to the FBI agent's testimony. However, it is clear from this new evidence that the hairs were not Fain's."

Lance stressed that the test results did not prove that Fain was innocent and said it was up to Canyon County prosecutor Young to decide whether to retry Fain.

Lance said the victim's family had expressed its support for the judicial system "and their desire that the person responsible for Daralyn's murder be punished."

Defense attorney Hoopes said it was tragic that Fain had been imprisoned so long, but he said the dramatic DNA test results represented "a fortunate marriage between jurisprudence and science. Fortunately, we were able to keep him alive until technology caught up with the evidence."

**Photo:**

Daralyn Johnson was raped and killed in 1982 after being abducted on her way to school.

ID NUMBER: 20010819hmn0044

**Photographer:**

Associated Press

**Photo:**

DNA tests were ordered on hair samples that had helped put Charles Fain on death row.

ID NUMBER: 20010819hmn0045

**Photographer:**

Associated Press

**Descriptors**

DNA;  
PRISONERS — IDAHO;  
MURDERS — IDAHO;  
EVIDENCE;  
APPEALS

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