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HEADLINE: Why was new Atkins case info held so long?: A lawyer has alleged that prosecutors acted improperly in the initial murder trial in 1998.

By Danielle Zielinski, Daily Press, Newport News, Va. McClatchy-Tribune Regional News

Dec. 16--YORK -- Convicted of capital murder, Daryl Atkins has sat on death row for nearly 10 years. In that time, at least three execution dates have been set. But just months ago, an attorney involved with the case at its inception came forward with allegations of misconduct by prosecutors that potentially could have affected Atkins' initial 1998 murder trial.

As new details came to light Thursday during a motions hearing in a York County courtroom, some people wondered why it had taken so long, especially when Atkins' life was at stake. "With all these people coming forward now to testify, this man could be dead," said Carmen Taylor, president of the Hampton chapter of the NAACP.

Hampton attorney Leslie Smith was appointed in 1996 to help represent Atkins' co-defendant William Jones, who also faced murder charges. Smith testified Thursday that prosecutors turned off a tape recorder during an August 1997 interview and "coaxed Jones to make aspects of his story fit with forensic evidence -- but that such information was never revealed to Atkins' attorney.

Atkins and Jones were charged with murder in the Aug. 16, 1996, shooting of Langley Airman Eric Nesbitt. Each said the other pulled the trigger, but prosecutors offered Jones a plea deal, and he testified against Atkins at the 1998 trial. Smith said in court Thursday the events of that 1997 interview bothered him enough that he penned an internal memo within a day of the meeting, recording what happened and his concerns. His decision to withhold the information has bothered him since that time, he said.

"My interpretation of what went on during that two hours was -- it was exculpatory," he testified. "There was a duty on their part to expose it to Mr. Rogers (Atkins' attorney George Rogers)." Smith's co-counsel on the case, Timothy Clancy, testified that he contacted the Virginia State Bar in 1998 about the issue and was told to stay quiet. Smith testified that he contacted the bar again this year about disclosing the misconduct, now that

Jones' case was finalized. Ethics counsel for the Virginia State Bar wouldn't comment for this article because it involved a continuing case but referred the Daily Press to the Virginia Rules of Professional Conduct for attorneys in the state.

The rules say a lawyer should report "information concerning the misconduct of another attorney to the appropriate professional authority." However, the rules say that when the information necessary to report the misconduct is protected by confidentiality, the attorney must first consult their client and obtain consent.

"You do have the duty to reveal the serious misconduct of a fellow lawyer but not when that would break a duty of confidentiality," College of William and Mary law professor Jim Moliterno said. "The duty of confidentiality trumps the duty to report.

Moliterno said confidentiality was one of the chief responsibilities of an attorney and noted that such a responsibility didn't end with the end of the case -- or even with a client's death. He mentioned a North Carolina case in which an attorney was being disciplined by that state's bar for revealing a murder confession of a former client after the client's death -- even though another man sits in prison for committing the murder.

Moliterno said Jones' attorneys faced a similar dilemma. "They were duty-bound not to reveal things that could hurt their client," he said.

Jeffrey Geiger is a partner at *Sands Anderson Marks & Miller* in Richmond and an adjunct assistant professor at the University of Richmond. He likewise said that duty to a client was "unshakable," unless an attorney knew that a client wasn't being truthful with the court. Therefore, if Jones' attorneys thought that he'd changed his story for prosecutors and lied in his testimony, they would be required to report that information.

"The attorneys are absolutely not to permit false testimony to go before the court," Geiger said. The NAACP's Taylor said that though she's glad the facts were finally coming out, the motions hearing left her feeling disturbed.

"He had a moral obligation to report this," she said of Smith. "It would appear that lawyers are operating under a different set of ethical standards than the rest of us adhere to." INSIDE A summary of the case C7

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