

Death Row Foes See New Hurdle to DNA Testing

By TIM ARANGO

Opponents of the death penalty looking to exonerate wrongly accused prisoners say their efforts have been hobbled by the dwindling size of America's newsrooms, and particularly the disappearance of investigative reporting at many regional papers.

In the past, lawyers opposed to the death penalty often provided the broad outlines of cases to reporters, who then pursued witnesses and unearthed evidence.

Now, the lawyers complain, they have to do more of the work themselves and that means it often doesn't get done. They say many fewer cases are being pursued by journalists, after a spate of exonerations several years ago based on the work of reporters.

The decline in newsroom resources has also hampered efforts by death-penalty opponents to search for irrefutable DNA evidence that an innocent person has been executed in America.

Because judges and prosecutors are usually reluctant to reopen cases after an execution, advocates have been seeking to enlist the media as plaintiffs, to file motions under a novel legal theory that news organizations should have access to physical evidence under the First Amendment and state sunshine laws, which establish access to government records.

And here, the worry is that weakened newspapers will be increasingly reluctant to dedicate any resources.

"It's extremely troubling, some of the leading investigative journalists in this country have been given golden parachutes or laid off," said Barry Scheck, the co-founder of the Innocence Project in New York, which is affiliated with the Benjamin N. Cardozo School of Law. "When procedural mechanisms begin to fail, the press is the last resort for the public to find out the truth."

One such case in Texas took a long time to reach the courts because advocates had difficulty finding a media plaintiff. In December of 2000, Claude Jones died by lethal injection for robbery and murder.

For the last two years, a group including lawyers from the Innocence Project and The Texas Observer, a liberal magazine that signed on after larger media organizations declined, have been seeking to have a single strand of hair tested for DNA. These people, including Mr.



Sedley Alley, convicted of murder, was executed in 2006.

Scheck, say they believe that Mr. Jones was present at the crime scene, but was not the killer. So far, they have succeeded in preserving the evidence, but not in winning a judge's approval for testing.

In a case in Tennessee, DNA evidence from a rape and murder for which a man was executed in 2006, but for which doubts about his guilt exist, sits untested because Mr. Scheck and others have not been able to recruit a local newspaper or media organization to become a plaintiff.

Since 1992, 238 people in the United States, some who were sitting on death row, have been exonerated of crimes through DNA testing. But proving with scientific certitude that an innocent person has been executed is difficult.

"The problem that we've had in these capital cases is that evidence has been destroyed," said Mr. Scheck.

This approach — enlisting a newspaper as a plaintiff to petition courts to preserve and test DNA evidence — has been tried before in some states, including Virginia, where testing confirmed a defendant's guilt, and Georgia, where the results were inconclusive. Still, Mr. Scheck said of the Jones case: "We were in the legal netherworlds of law. We're doing it on the grounds of the First Amendment and the public's right to know."

Some news organizations are reluctant to join the effort out of fear of blurring the line between advocate and objective collector of the news. "My feeling always was we should do it on our own," said Maurice Possley, who won a Pulitzer Prize for his work on death penalty and wrongful conviction stories while a reporter for The Chicago Tribune.

Mr. Possley, who left The Tribune last year, had discussions with Mr. Scheck about the paper becoming involved as a plaintiff in the Jones case. "I think the more you link up, people will think you have a bias or an agenda," Mr. Possley said.

There are only a handful of cases where there is enough evidence of innocence for lawyers to pursue after a defendant is executed. The American Bar Association estimated in 2003 that the wrongful conviction rate was 0.5 percent.

The case in Tennessee, in which Sedley Alley was executed in 2006 for the rape and murder of a 19-year-old woman, attracted the notice of Mr. Scheck. Mr. Alley tried without success to have crime scene evidence tested for DNA as he waited on death row. Since then, Kelley Henry, a Nashville public defender who represented Mr. Alley, has paid out of her own pocket to preserve and store material that could be tested for Mr. Alley's DNA. But no motions can be filed until a plaintiff is found.

"No Tennessee media outlet has shown any willingness to be a media plaintiff," said Ms. Henry.

More broadly, the issue of fewer journalistic resources around the country to pursue stories tied to innocence claims has lawyers fretting that fewer wrongful convictions will be overturned.



Nicole Bengivono/The New York Times

Barry Scheck, left, in the Innocence Project's New York case room, with Shawna Enright, a law student, and David Loftis, a lawyer. Mr. Scheck called losses in the news media "troubling."

"The problem is that stories that were getting written three, four years ago that supplemented the legal work the innocence projects were working on, are just not happening," said Seth Miller, the executive director of the Innocence Project of Florida. Mr. Miller is working on his own postexecution case, but with a twist: the claim is that the dead body in the murder case did not belong to the alleged victim. He is currently looking for a plaintiff to file a lawsuit seeking the testing, and has sought help from The St. Petersburg Times, which so far has not agreed.

At a time of sharp cutbacks, newspapers are reluctant to take on the costs associated with pursuing such investigations.

"If you're talking about wrongfully convicted people, it takes a long time," said Henry Weinstein, a former reporter at The Los Angeles Times who now teaches law and journalism at the University of California, Irvine. "You may run up some travel bills, some massive photocopying bills."

At a conference earlier this year, Mr. Possley said he differentiated between cases in which the stories were gift-wrapped for reporters versus earlier-stage cases in which reporters tracked down witnesses themselves.

"I think that largely those opportunities to bring those types of cases to journalists is largely reduced," said Mr. Possley. "More and more, journalists are going to want the stories packaged with a bow."