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# As Exonerations Grow, States Make Them Harder To Win

*Law360, New York (February 12, 2014, 2:28 PM ET)* -- Last month, Law360 reported about a lawsuit brought against Los Angeles County by Thomas Goldstein, who had been imprisoned 24 years on a murder conviction for which he was later exonerated in 2004. Tragic stories like Goldstein's are coming to light with alarming frequency.

According to a report just released by the National Registry of Exonerations, 2013 saw 87 individuals exonerated of crimes for which they had previously been convicted, and 40 of those had been convicted of murder (including one who had been sentenced to death). Last year's figures continue a long-term trend in this country — exonerations have been on the increase over many years, thanks to increasing sophistication of DNA testing and the hard work of public interest and pro bono lawyers on innocence cases.

This growing rate of exonerations would seem to be a wake-up call about the imprecision of our criminal justice system and the very real risk of punishing, even executing, human beings for crimes they did not commit. In response to this trend toward exonerations, several states, like Illinois, have abandoned the death penalty to prevent wrongful executions. Unfortunately, some other states have taken an opposite tack, passing legislation that makes it less likely that wrongful convictions will be uncovered. Have these states viewed the upturn in exonerations as a warning that too much scrutiny of capital cases can cause a state to be deprived of the opportunity to carry out executions?

Following the lead of Texas, lawmakers in Alabama, Florida and North Carolina have all taken steps to speed up the execution process by diminishing the appellate reviews available to death row inmates. Alabama's Legislature is currently considering that state's so-called "Fair Justice Act," which would require that an inmate's direct appeals and post-conviction review processes run concurrently, instead of the post-conviction clock beginning to run when direct appeals are exhausted.

In addition, the law would require the trial court to appoint counsel for both proceedings at the same time, and would impose deadlines for reviewing courts to issue decisions. Florida recently enacted the "Timely Justice Act," requiring the governor to sign death warrants within 30 days of an inmate's appeals being exhausted, and that executions take place within six months of a warrant. And in North Carolina, where five convicted murderers were exonerated between 1999 and 2013, legislators repealed the "Racial Justice Act," which, among other things, had created an additional appellate review process for inmates who claimed their death sentences were the result of racial bias.

Proponents of these speedier execution laws defend them as a way to provide more immediate justice to families of murder victims and to save money for the state. These explanations do not, however, counter the cost of wrongful executions, for which the state can provide no adequate remedy.

Victims' rights advocates have long argued that the lengthy wait for executions to be carried out forces families to live in limbo, for decades perhaps, and to relive their tragedies rather than to begin the process of healing, only adding to their trauma. But is it really more just for these families to increase the risk that the wrong person will be executed while the real killer walks free?

The state's interest — if not the families' — lies in identifying the actual killer, not in executing the innocent. If those 40 individuals who were exonerated of murder charges in 2013 had been executed, there would likely be no chance that the actual killers would ever be identified or punished. Perhaps the families could have had some sort of peace in their mistaken belief that the real killer had been put to death, but that certainly cannot be called justice. Moreover, if a convicted killer is sentenced to life in prison without parole instead of death, the litigation will end much sooner and the family of the victim will be able to go on with their lives many years earlier.

The claim to fiscal justice for the taxpayer through cost savings is also largely illusory. The death penalty is massively expensive. According to a study recently released by the Kansas Judicial Council, that state spends twice as much annually to house death row inmates than it spends on inmates in the general prison population. In addition, death row appeals cost Kansas 70 percent more than other cases. Abolishing the death penalty would likely generate far greater cost savings, in Kansas and across the country, than any tweaks to the death penalty process ever could.

A 2009 study of costs associated with the capital punishment system in North Carolina found that state would spend about $11 million less per year on criminal justice activities if the death penalty was abolished, and that additional criminal justice resources would be made available for other purposes.

In fact, Alabama's proposed law may wind up costing that state more, not less. Alabama currently does not appoint counsel for indigent death row inmates (and they are virtually all indigent) in post-conviction proceedings. Instead, Alabama has chosen to rely upon the largesse of pro bono lawyers from around the country to provide that representation without remuneration from the state.

Under the new law, not only would post-conviction counsel be appointed, the appointment would occur at the same time as the appointment of counsel for direct appeals. While the direct appeals are ongoing, post-conviction counsel will necessarily be working at state expense to prepare a case that may or may not be necessary, depending on how the appeal works out. Should the conviction and sentence survive all state court proceedings, federal appellate review will remain available, making both time and cost savings more apparent than real.

The appointment of post-conviction counsel at state expense may sound like progress, but it is a wolf in sheep's clothing. The shoddy systems of appointment in Alabama and many other death penalty states have directly and substantially contributed to putting hundreds of poor people on death row who would not have otherwise been there. Those exonerated over the years, as well as many others who have also won significant relief from conviction or sentence in post-conviction proceedings, have been represented by pro bono attorneys who spared no expense and who devoted the days, months and, yes, the years of toil that were necessary to uncover the truth, to overcome the obstacles, and to champion and protect the rights of those about whom the states care nothing. Is this what new death penalty laws are really intended to end ... ?

What's at stake here is vividly unfolding right now in New York, where this month two men were exonerated after more than 20 years in prison for murders they did not commit. DNA evidence played a

crucial role, in a case that also raised questions of shaky evidence, deal-making, coerced confessions, unprepared defense counsel, and renegade policing and prosecutorial misconduct. These last two elements, dating back to the 1980s, may call into question literally hundreds of convictions. Many of these convictions are therefore decades old.

Many were convictions of very young men. The two men just exonerated were only 15 and 18 years old. One of the murder victims was the 15-year-old's own mother. He's now been cleared of that conviction, but just beginning to reclaim his life. A speedy conviction law and the death penalty, which New York does not have, would have robbed him of that chance.

Most states have done away with the death penalty. But many that haven't cling to it with ferocity. Like any old machinery, it can be improved with testing and close scrutiny though it will remain flawed and inefficient. Exoneration, or rather the due process that allows for exoneration to occur, provides the scrutiny that is vital to avoiding many (though likely not all) of the tragic errors that occur. It should not be diminished in a rush to finality.

—By Kevin J. Curnin and Lisa W. Borden, Association of Pro Bono Counsel

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