

May 18, 2009

## Prosecutors Block Access to DNA Testing for Inmates

By [SHAILA DEWAN](#)

In an age of advanced [forensic](#) science, the first step toward ending Kenneth Reed's prolonged series of legal appeals should be simple and quick: a DNA test, for which he has offered to pay, on evidence from the 1991 rape of which he was convicted.

Louisiana, where Mr. Reed is in prison, is one of 46 states that have passed laws to enable inmates like him to get such a test. But in many jurisdictions, prosecutors are using new arguments to get around the intent of those laws, particularly in cases with multiple defendants, when it is not clear how many DNA profiles will be found in a sample.

The laws were enacted after [DNA evidence](#) exonerated a first wave of prisoners in the early 1990s, when law enforcement authorities strongly resisted reopening old cases. Continued resistance by prosecutors is causing years of delay and, in some cases, eliminating the chance to try other suspects because the statute of limitations has passed by the time the test is granted.

Mr. Reed has been seeking a DNA test for three years, saying it will prove his innocence. But prosecutors have refused, saying he was identified by witnesses, making his identification by DNA unnecessary.

A recent [analysis](#) of 225 DNA exonerations by Brandon L. Garrett, a professor at the [University of Virginia](#) School of Law, found that prosecutors opposed DNA testing in almost one out of five cases. In many of the others, they initially opposed testing but ultimately agreed to it. In 98 of those 225 cases, the DNA test identified the real culprit.

In Illinois, prosecutors have opposed a DNA test for Johnnie Lee Savory, convicted of committing a double murder when he was 14, on the grounds that a jury was convinced of

his guilt without DNA and that the 175 convicts already exonerated by DNA were “statistically insignificant.”

In the case of Robert Conway, a mentally incapacitated man convicted of stabbing a shopkeeper to death in 1986 in Pennsylvania, prosecutors have objected that DNA tests on evidence from the scene would not be enough to prove his innocence.

And in Tennessee, prosecutors withdrew their consent to DNA testing for Rudolph Powers, convicted of a 1980 rape, because the victim had an unidentified consensual sex partner shortly before the attack.

Such arguments, defense lawyers say, often ignore scientific advances like the ability to identify multiple DNA profiles in a single sample.

Defense lawyers also say the arguments ignore the proven power of DNA to refute almost every other type of evidence.

In a case before the Pennsylvania Supreme Court, for example, Lynne Abraham, the Philadelphia district attorney, argued that the defendant, Anthony Wright, was not entitled to DNA testing because of the overwhelming evidence presented at trial, including his confession, four witnesses and clothing stained with the victims’ blood that the police said was found at Mr. Wright’s home. The Pennsylvania DNA statute requires the courts to determine if there is a “reasonable possibility” that the test would prove innocence.

Prosecutors say they are concerned that convicts will seek DNA testing as a delay tactic or a fishing expedition, and that allowing DNA tests undermines hard-won jury verdicts and opens the floodgates to overwhelming requests.

“It’s definitely a matter of drawing the line somewhere,” said Peter Carr, the assistant district attorney who handled the case of Mr. Wright, who was accused of raping and killing a 77-year-old woman. The defendant did not request testing until 2005, three years after the statute was passed, Mr. Carr said, and in his view there was no possibility that the test would show innocence.

“There’s also the idea that you want finality for the victim’s sake,” Mr. Carr said. “If someone else’s semen was found at the crime scene, we’d have to talk to the victim’s family about whether the victim was sexually active.”

[Barry Scheck](#), a co-founder of the Innocence Project, a New York legal advocacy group that uses DNA to help the [wrongfully convicted](#), said that most prosecutors no longer resisted testing in cases like Mr. Wright’s, where there is one perpetrator. More obstacles arise, Mr.

Scheck said, in cases with multiple defendants or cases where a test result might point to another suspect, even if it does not clearly prove the innocence of the defendant.

In one such case near Austin, Tex., a defendant who was convicted in the bludgeoning death of his wife requested a DNA test on a bloody bandanna found 100 feet from the house. On its own, a test of the bandanna would not prove the guilt or innocence of the defendant the same way testing semen in a rape case might. But if it matched DNA found at the scene of a similar crime in the same county, or DNA in a database of convicted felons, it would be significant evidence that someone else might be responsible — the kind of evidence that might plant a reasonable doubt in a juror’s mind or lead to a confession by a perpetrator.

Although such matches have been found in many cases, most state DNA statutes focus only on whether a test alone could prove innocence. The purpose of Tennessee’s DNA statute, a court there said, was “to establish the innocence of the petitioner and not to create conjecture or speculation that the act may have possibly been perpetrated by a phantom defendant.”

Law enforcement officials often say, “ ‘We’re not going to consider the possibility that a third party did it,’ ” Mr. Scheck said, adding, “which is completely crazy because you use the databank every day to make new criminal cases.”

In Mr. Reed’s case in East Baton Rouge Parish, the district attorney who first prosecuted the case and now his successor, Hillar C. Moore III, have appealed every DNA-related ruling in Mr. Reed’s favor and objected to even a hearing on the matter.

They have argued that Mr. Reed’s identity was not an issue in the trial because he was identified by the victim, even though DNA evidence has repeatedly contradicted eyewitness identifications. They have argued that there was no way of knowing whether the evidence would yield a usable DNA profile — a question that would be settled by testing it.

The victim testified that two attackers had sexual intercourse with her, but the prosecutors now argue that it might have been only one, Mr. Reed’s accomplice. Even if Mr. Reed’s DNA was nowhere to be found, said Prem Burns, the first assistant district attorney, he would still be guilty of aiding the rapist.

Mr. Reed’s lawyers have argued that a test on a rape kit and semen could prove his innocence if it shows two distinct profiles and neither is a match.

But Ms. Burns said that under her reading of the law, the mere possibility that the test would show two profiles is not enough — Mr. Reed has to demonstrate, in advance, that a favorable test result would resolve his innocence without question.

But the prosecutors also seem to believe that Mr. Reed's arguments are far-fetched. "There are simply too many 'ifs' in this case," Mr. Moore wrote in a recent appeal.

Prosecutors said much the same when Douglas Warney, convicted of murder in Rochester in 1997, argued that a DNA test could lead to the real killer. They called his assertion "a drawn-out kind of sequence of if, if, if." Yet that is exactly what happened after Mr. Warney's DNA test, and the killer, when he was identified, confessed.

Nina Morrison, a lawyer for Mr. Wright, said: "The one thing I've learned in doing this for seven years is there's no reason to guess or speculate. You can just do the test."

This article has been revised to reflect the following correction:

Correction: May 19, 2009

An article on Monday about resistance by prosecutors to agree to DNA tests for prison inmates misstated a point made by prosecutors in the case of Kenneth Reed, a Louisiana inmate who was convicted of rape and is seeking such a test. The prosecutors have argued that Mr. Reed's identity is not at issue in the case because he was identified by the victim — not that he was identified by the defendant.

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