THE NATIONAL LAW JOURNAL

Federal habeas corpus and actual innocence

As shown in the Jeffrey MacDonald case, a shake-up of the federal post-conviction system is long overdue.

By Philip G. Cormier, Andrew Good, Barry C. Scheck, and Harvey A. Silverglate
The National Law Journal
May 16, 2011

Two murders in North Carolina, separated by 21 years and 50 miles, have recently been united by the ability of scientific testing to cast doubt on the convicted. In one case, handled by state authorities, a special commission helped exonerate the wrongfully convicted. The other, under federal jurisdiction, has seen courts view piecemeal claims of innocence and reject, until late last month, pleas to consider the evidence as a whole. Taken together, the two cases highlight the procedural hurdles of the federal system that serve to unacceptably hinder claims of innocence.

Dr. Jeffrey R. MacDonald, a Green Beret physician convicted in 1979 of murdering his wife and two daughters at his apartment near Fort Bragg, N.C., in 1970, asked the U.S. Court of Appeals for the 4th Circuit last March for a full review of the findings unearthed in the decades since his first trial ð both the forensic evidence and the prosecutorial misconduct (resulting in suppressed evidence) that have put into question his conviction. After courts for decades examined one by one the steady trickle of exculpatory evidence ð and rejected MacDonald's request for a new trial each time ð the 4th Circuit on April 19 ordered the long-overdue and heretofore elusive review of the "evidence as a whole."

In stark contrast, Gregory F. Taylor, accused of murdering a prostitute in Raleigh in 1991, became the first person freed with the help of the North Carolina Innocence Inquiry Commission last year. Established in 2006 after a wave of wrongfully convicted state prisoners were exonerated by DNA evidence, the commission helped bring to light faulty blood tests and implausible testimony in Taylor's case. On Feb. 17, 2010, after spending 6,149 of his adult days behind bars, Taylor was exonerated by a three-judge panel.

Even when scientific evidence casts serious doubt on culpability, procedural roadblocks can still prolong the prison terms of the demonstrably innocent. The state of North Carolina has taken seriously this formula for injustice; the federal criminal justice system, on the other hand, has been largely immune from having its defects exposed. The 4th Circuit's ruling in *U.S. v. MacDonald* rolls back this immunity, marking a significant step toward fairness, and the pursuit of truth, in the federal system.

The MacDonald case presents the rare opportunity to see the myriad ways in which the innocent can be so readily convicted in the federal system, because it involves a crime ð in this case, murder ð which is usually the subject of state jurisdiction. Relatively rare is the crime that can

be substantially resolved by a DNA test ð less than 10% according to recent estimates ð but rarer still is a federal crime of that variety. Yet MacDonald's case is one of them.

The investigation was first taken up by Army authorities, who in 1970 found no evidence to justify bringing MacDonald to court-martial. In fact, the investigating colonel urged investigators to look instead into one Helena Stoeckley, who was reported to have confessed to friends and others to having participated, with three of her drugged-out cohorts, in the murders of MacDonald's family members. Indeed, a woman fitting her description was spotted on a street corner in the middle of the night by a military policeman who was responding to MacDonald's 911 call for help.

Ignoring the Army investigator's findings, the U.S. Department of Justice then picked up the baton ð the crime being of federal concern and jurisdiction because it occurred on a military base. After four years and more than 600 witness interviews, DOJ secured MacDonald's indictment for murder. In 1979, he was found guilty and sentenced to consecutive life terms.

Not long thereafter, MacDonald was labeled the so-called *Fatal Vision* murderer in a best-selling book and a made-for-TV movie, which became the "lore" of the case for the uninitiated public. Despite a widespread belief in his guilt on the part of people who have not examined the totality of the evidence, MacDonald has not once wavered from his claim of innocence.

In 1997, the courts finally acquiesced to MacDonald's requests to test crime-scene evidence, buried away by then for some three decades. The results of the mitochondrial DNA testing ð a technology not available earlier ð broke open the case. Human hairs found in strategically important locations ð under his wife's body, under the fingernails of one of his daughters and in her bedding where she was killed ð did not match MacDonald nor any member of the family. This strongly suggested the involvement of someone other than MacDonald in the murders.

These forensic findings lent impressive scientific support to the wealth of other evidence accumulated by MacDonald over the decades, including the recent discovery that one of MacDonald's trial prosecutors had threatened Stoeckley the day before she was to testify, according to a retired deputy U.S. marshal. When Stoeckley informed the prosecutor that she would testify that she was present in the MacDonald home ð a potentially fatal blow to the prosecution's case ð he threatened to indict her for murder if she so testified, the deputy marshal said. The next morning in court she claimed not to remember much of anything, and she denied any involvement, including being in the home or seeing the murders committed.

This evidence, one concludes from the deputy marshal's claim, was lost to the defense as a result of the threats. (It later turned out that this prosecutor was convicted in an unrelated case,

sentenced to prison and disbarred for stealing from his clients, forgery and obstruction of justice.)

As the evidence mounted, MacDonald's various legal teams filed successive habeas petitions over the decades. All of these petitions were denied by the district court in North Carolina and by the 4th Circuit, in large measure because each new discovery was viewed, and analyzed, in isolation.

This pattern of piecemeal rather than integral examination of evidence in fact started with the very first plenary direct appellate review of the conviction in 1982, when one concurring judge expressed discomfort at the trial judge's exclusion of a significant amount of evidence of the presence of Stoeckley and her friends at the murder scene. "MacDonald would have had a fairer trial," wrote the panel member, "if the Stoeckley related testimony had been admitted" and if the jury had the benefit of a "rounded picture, necessary for the resolution of the large questions." Without such evidence admitted, said the panel member, "the case provokes a strong uneasiness in me." *U.S. v. MacDonald,* 688 F.2d 224, 230-236 (4th Cir. 1982, Murnaghan, J., concurring).

That "uneasiness" proved prescient over the years, as petition after petition was denied, but the accumulated evidence began to provoke doubts on the part of successive panels that reviewed the case. When the DNA test results were finally available, the 4th Circuit, in an abrupt turnaround, derided the piecemeal approach previously taken to one evidentiary discovery after another and instructed the district court this time to review "the evidence as a whole" and apply "a fresh analysis." Suddenly, the previous roadblocks to habeas corpus review were swept aside, and the district judge was ordered to look at the full panoply of evidence accumulated since 1970 to determine whether a case of "actual innocence" was convincingly made.

Without the powerful ð and, in a federal case, unusual ð tool of modern DNA technology, MacDonald's post-conviction team and its amici supporters would not have gotten far enough to even earn this chance to present a full evidentiary picture to a habeas court. It is time to recognize that the federal criminal justice system is equally prone to error as are the various state systems, and to sweep aside, by both legislative and judicial fiat, the accumulated barriers to habeas corpus review of claims of factual innocence.

MacDonald should be the last prisoner ð state or federal ð to have to spend 32 years (and counting) in prison while dodging one procedural pitfall after another. In a society that holds itself up as free, nothing should block the presentation of overwhelming evidence not only of wrongful conviction, but of actual innocence.

Philip G. Cormier and Andrew Good, partners at Good & Cormier of Boston, and Harvey A. Silverglate, of counsel to Zalkind, Rodriguez, Lunt & Duncan of Boston, were lead counsel for MacDonald from 1989 until 2004. They then joined Barry C. Scheck, co-director of the Innocence Project, in representing the Innocence Project as amicus curiae. Scheck is the co-author (with Peter Neufeld and Jim Dwyer) of Actual Innocence: When Justice Goes Wrong and How to Make it Right *(New American Library 2003). Silverglate is the author of* Three Felonies a Day: How the Feds Target the Innocent *(Encounter Books 2009).*

http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202493925730