THE NATIONAL LAW JOURNAL

Free at last? Not so fast.

After 40 years, it's time to acknowledge in Jeffrey MacDonald's case that federal courts are fallible and rigid finality is inappropriate.

By Philip G. Cormier, Andrew Good and Harvey A. Silverglate
The National Law Journal
April 5, 2010

There are indelible moments in a lengthy legal career. One of ours was April 16, 1991, just days before we were to file reply papers in a habeas corpus action in the Eastern District of North Carolina. We were confident our petition would at long last free our then-client, Dr. Jeffrey R. MacDonald, serving consecutive life sentences in one of the most infamous cases in American criminal law.

MacDonaldôs guilt had been cemented in public (and, likely, judicial) memory with the publication of Joe McGinnissô best-selling book *Fatal Vision*. MacDonald, a Green Beret physician convicted of murdering his wife and two young children at Fort Bragg, N.C., consistently maintained that he and his family had been attacked by intruders who broke into the familyôs base apartment on Feb. 17, 1970. By 1991, we believed that we finally had the evidence to prove that the widely accepted impression of the case was a myth, that MacDonald had been deprived of a fair federal trial and that a demonstrably innocent man was in prison.

But on that morning the U.S. Supreme Court delivered its opinion in *McCleskey v. Zant*. By a 6-3 vote, it raised the bar for habeas petitioners like MacDonald who were seeking relief in a second or subsequent petition. The majority reasoned that a system that easily countenances successive petitions creates ñ[p]erpetual disrespect for the finality of convictions [that] disparages the entire criminal system.ò Although the Court retained the ñfundamental miscarriage of justiceò exception to the abuse-of-the-writ doctrine, it now required habeas courts to be less receptive to claims of prisoners who sought relief based on evidence not presented in their first petition. We realized immediately that MacDonaldôs case, and the general landscape of habeas corpus law, changed dramatically. As anticipated, we lost.

Since that unsuccessful filing, powerful new evidence has been unearthed by a combination of dogged investigation and remarkable serendipity. With the habeas bar raised, however, our repeated additional filings were routinely rebuffed. But in 1997, the mounting exculpatory evidence caused a perceptibly uncomfortable U.S. Court of Appeals for the 4th Circuit to take the then-unusual step ð especially in a federal case ð of ordering DNA testing. This testing ð conducted by the respected Armed Forces

Jeffrey MacDonald

Institute of Pathology ð revealed that hairs found under MacDonaldôs wifeôs body and under one daughterôs fingernail did not come from any MacDonald family member. This, along with additional forensic and other evidence unearthed since trial, corroborated his account.

Then, in 2005, retired Deputy U.S. Marshal James Britt made a startling admission to MacDonaldôs new lawyers (by then we had moved over to allow for new perspectives to occupy the driverôs seat). Britt said that he had been present when government prosecutor James Blackburn allegedly intimidated a key witness, one Helena Stoeckley, during MacDonaldôs trial. A first-responder police officer at the time of the murders had described passing by a woman fitting Stoeckleyôs description less than a mile from the scene. Within days of the murders, Stoeckley had confessed to numerous people to having been one of the intruders. She was to have been a key trial witness for MacDonald. According to Britt, during an interview that occurred just before Stoeckley took the witness stand, Blackburn threatened to indict her for murder if she persisted in her account. The threat apparently worked. Stoeckley testified that she could not recall her whereabouts during the critical hours.

In 2006, Brittôs accusation of witness intimidation was presented to the district judge, who, while crediting the account, still denied MacDonaldôs petition and ð crucially ð refused to consider the DNA test results and other exculpatory evidence.

Whether the district court erred when it denied MacDonald relief on his Britt-based claim by failing to review the totality of the evidence of innocence is now before the 4th Circuit, which heard oral argument on March 23. We, along with other counsel, have filed an amicus brief on behalf of the Innocence Project, the New England Innocence Project and the North Carolina Center on Actual Innocence. We believe that the weight of the evidence is now so great that it demands that MacDonald be freed, but for that to happen it must all be weighed.

However, on March 12, the government, attempting again to impose procedural obstacles, requested the 4th Circuit to rescind MacDonaldôs certificate of appealability. It argued that the COA was improvidently granted because it supposedly refers only to MacDonaldôs procedural claims, not his underlying constitutional claims. The 4th Circuit still heard oral argument and is considering that motion along with the merits of the appeal.

This last-ditch effort to block MacDonald from having all of the evidence evaluated on the merits is a telling sign that the government recognizes the weakness of its case. Wholly aside from the technicalities and vagaries of habeas law, MacDonald is entitled to independent relief under the Innocence Protection Act (IPA), enacted in 2004 to ensure that DNA testing would be available to prisoners in appropriate cases, and to provide a mechanism for relief independent of habeas procedural roadblocks. Under the IPA, a court is required to evaluate all of the evidence in conjunction with its review of the DNA results. MacDonald may finally get a court to look at the full picture.

Criminal justice has come a long way since *McCleskey*. DNA testing has taught even law-and-order supporters of finality that the ability of our justice system to determine truth is much less reliable than many have cared to admit. The time has come in MacDonaldôs case to acknowledge

that the federal courts are fallible and that rigid finality is an inappropriate concept for a human institution.

Philip G. Cormier and Andrew Good are partners at Boston's Good & Cormier. Harvey A. Silverglate, a former partner at the firm, is the author of Three Felonies a Day: How the Feds Target the Innocent *(Encounter Books 2009). They have been representing MacDonald and supporting his fight for freedom since 1989, either as lead counsel or, currently, in their capacity as amicus counsel.*

http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202447314159&Free_at_last_Not_so_fast