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State court performs better than federal system on innocence claims

The media continues to highlight the subject of wrongful convictions. In October, the Chicago International Film Festival's "Audience Choice Award" was given to Ken Burns' documentary "The Central Park Five." It deals with the 1989 case of five black and Latino teenagers convicted of the rape of a white woman in New York's Central Park. All five confessed and were convicted. Years later, a serial rapist confessed to being the only person responsible for the rape. The five boys, now men, were released from prison, but not before each of them served between six and 13 years behind bars. Last month, the New York Film Critics Circle named it "Best Documentary of the Year."

There's more. Texas Monthly magazine recently ran a two-part article on Michael Morton, a man whose wife was found bludgeoned to death in their home near Austin in 1986. The police quickly focused on Morton as the chief suspect, despite the fact that an unknown person's footprint and fingerprints were found at the scene. Their focus on Morton led them to ignore a bloodstained bandana found behind the family home. A quarter of a century after Morton was convicted, DNA testing determined that the blood on the bandana belonged to the victim and an unknown man. The man turned out to be responsible not just for the murder of Morton's wife, but also the clubbing death of another woman as well. Morton was exonerated after 25 years in prison. The whole story can be found at texasmonthly.com.

And you cannot ignore Errol Morris' new book, "A Wilderness of Error" (2012). Morris re-examines the three-decades-old murder case of Dr. Jeffrey MacDonald. Unlike Joe McGinniss' conclusion in "Fatal Vision" (1983) that MacDonald killed his wife and children, Morris makes the case that Mac-

Donald was wrongly convicted.

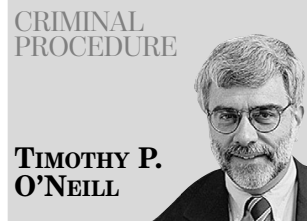
In light of all these stories, non-lawyers may well be surprised by this legally accurate observation made by Justice Antonin G. Scalia about the work of the U.S. Supreme Court in regards to federal habeas corpus review of state court convictions: "This court has never held that the Constitution forbids the execution of a convicted defendant who had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." *In re Davis*, 557 U.S. ___ (2009)(Scalia, J., dissenting).

An example of how claims of innocence can get lost in the habeas shuffle can be seen in the recent 2nd U.S. Circuit Court of Appeals case of *Hawthorne v. Schneiderman*, 695 F.3d 192 (2012). Hawthorne was convicted in a New York state court of an assault that left the victim partially paralyzed and unable to speak. His confession to the police constituted the only evidence linking him to the assault. In his federal habeas petition, he alleged that his attorney was constitutionally ineffective during the pretrial hearing to determine whether the confession was voluntary.

The New York state appellate court summarily denied Hawthorne's claim without any analysis. Nonetheless, the U.S. Supreme Court has held that a federal court must give deference even to a summary disposition. *Harrington v. Richter*: 131 S.Ct. 770 (2011). The 2nd Circuit conducted its deferential review by imagining arguments that could have supported the state appellate court decision.

It concluded that the state decision was not "unreasonable" and thus denied relief. Nevertheless, the per curiam opinion noted that "we are troubled by the outcome we are constrained to reach."

Concurring Judge Guido Calabresi was blunter: "This is one of the rare cases in which a habeas petitioner may well be innocent ...



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Hawthorne was convicted solely on the basis of his confession ... a confession that he claims was coerced and that is squarely contradicted in many of its particulars by the physical evidence obtained at the crime scene." But Calabresi goes on to complain that the current state of habeas law does not encourage — or, at times, even allow — the consideration of innocence. Instead, as in this case, it instructs federal courts to defer to completely unreasoned, unsupported conclusions of state courts — even where innocence is a real possibility. It does this ostensibly in the interests of comity. But, as Calabresi said, imputing views to

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state courts that they have never expressed is not comity, but rather an insult to those state courts.

This term the U.S. Supreme Court has the opportunity to revisit this general area of the law in *McQuiggin v. Perkins*. No. 12-126 (cert. granted, Oct. 29). The court will decide whether a claim of actual innocence can excuse untimely filing of a federal habeas claim and-or the lack of diligence in pursuing habeas relief.

Yet regardless of what is decided in *McQuiggin*, the good news is that Illinois state law is well ahead of the federal curve. It is true that, under Illinois law, a criminal defendant is generally allowed to file only one petition under the state Post-Conviction Act. 725 ILCS 5/122.

Yet the Illinois Supreme Court has recognized an exception when a petitioner is raising a claim of actual innocence. *People v. Ortiz*. 235 Ill.2d 319 (2009). It holds that actual innocence claims based on newly discovered evidence are protected by the due process clause of the Illinois Constitution. *Id.*, at 333.

And it is a rule with bite. A few weeks ago, the 1st District decided a case in which the appellant claimed that the judge below had erroneously denied him a hearing on an "actual innocence" claim in his post-conviction petition.

Finding his evidence to be newly discovered, material, non-cumulative and likely to have changed the result of the trial, the 1st District reversed and remanded it to the circuit court for an evidentiary hearing. *People v. Carl Williams*. 2012 Ill. App. LEXIS 959 (decided Nov. 27, 2012).

If there is one issue everyone in criminal law can agree on, it is that we want a system where the innocent are not convicted. Right now, in terms of collateral review, the Illinois state system does a far better job than the federal system.