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IS A CASE *EVER* TOO "COLD"?

Citing factual errors, an Illinois prosecutor successfully moves to free a convicted killer

By Julius (Jay) Wachtel. Two weeks ago, in an Illinois courtroom, DeKalb County State's Attorney Richard Schmack implored Judge William Brady to do the right thing.

Surprisingly, he wasn't asking that someone be locked up. Precisely the contrary. Characterizing a conviction gained by the former D.A. as "a fraud on both the trial court and appellate court," the area's chief prosecutor moved for the unconditional release of Jack D. McCullough, 76, who was serving a life term for the December 1957 abduction and murder of seven-year old Maria Ridulph.

No, this isn't a story about a possibly innocent someone who (oops!) served decades in prison. McCullough could be considered "lucky," as more than five decades passed before his arrest. Celebrated by officials and the media as a record for "cold cases," his conviction, in 2012, became the subject of a mini-documentary on CNN.

McCullough (his birth name was John Tessier) was a suspect at the start. He not only lived in the same neighborhood as Maria but resembled her playmate's description of "Johnnie," the personable young man who frolicked with the child shortly before her disappearance. McCullough was also something of an oddball. When interviewed by the FBI shortly after the crime, he admitted keeping a "black book" on local girls and conceded a past sexual encounter with a child. On the other hand, he steadfastly denied any involvement with Maria, offered what seemed an ironclad account of his whereabouts (supported by his mother) and passed a polygraph. So cops and agents crossed him off their list.

McCullough went on to lead what can most charitably be called a checkered life. On the one hand, he served in the Army, left as a captain, and became a police officer. On the other, he had problems with money and booze and seemed obsessed with young females. In 1982, while employed as a cop, he was arrested for the statutory rape of a 15-year old girl. McCullough pled to a misdemeanor and was fired from the force.

Another quarter-century passed. In 2008 McCullough's half-sister, who had long tried to put cops on his trail, offered some startling news. Many years earlier, as their mother lay on her deathbed, she supposedly accused her son, for whom she had provided an alibi, of killing the child. McCullough's sibling soon dropped another bombshell – when she was fourteen McCullough raped her, then had three friends join in.

McCullough was arrested in July 2011. Prosecutors successfully argued that his absences from the state extended the statute of limitations, so in addition to Maria's murder he would also face charges for raping his half-sister. That trial took place first, in April 2012. McCullough's decision to waive a jury proved an excellent strategy, as the judge found the victim's testimony unconvincing and, since that's all there was, promptly returned an acquittal.

McCullough went to trial for Maria's murder in September 2012. Emboldened by the earlier result, he again opted for a bench trial. Again, there was no physical evidence. But what came in was damning. Two years earlier the victim's childhood playmate had identified McCullough as "Johnny" from a photospread. She did it again in court, fifty-five years after the fact. McCullough's half-sister then took the stand. Improbably, she was allowed to repeat their mother's accusation – that McCullough was the killer. (Her statement was allowed because it supposedly went against the late woman's self-interest.) Three inmates who were in McCullough's cellblock also testified – although not without stumbling – that McCullough admitted killing the child.

McCullough didn't take the stand. This time he was convicted, and got life without parole.

But the man may have more lives than a cat. In a startling motion filed earlier this year, the new D.A. blasted police and his predecessor for dragooning an innocent man. His harshest criticism was reserved for what he considered a purposeful distortion of the timeline of events, making it seem as though McCullough was in the area although cops and FBI agents originally concluded that a telephone call placed him elsewhere. (Their reports were ruled inadmissible hearsay by the judge. An appeals court later ruled the exclusion in error but found it insufficient to disturb the verdict.)

There were also issues with the photospread. Assembled decades after the crime, its photo of the young Tessier differed substantially from the others. What's more, the witness had, as a child, incorrectly identified someone else as "Johnny." Indeed, stymied cops had long blamed Maria's murder on a serial molester who supposedly killed an eight-year old in another state. Alas, that man was long dead.

Throughout it all, McCullough has steadfastly denied guilt. He represented himself until recently, when a pair of Chicago lawyers heard about the case and came in *pro bono*. Their motion for post-conviction relief was vigorously seconded by the current state's attorney, who filed his own brief. On the other side is the victim's brother, who vigorously disputes McCullough's version of events and appeared at the hearing to oppose his release.

To keep from convicting the innocent criminal cases must be proven "beyond a reasonable doubt." Here is a jury instruction approved by the Supreme Court:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (Sandoval v. California, no. 92-9049, 1994)

Criminal justice's "moral certainty" threshold has a parallel in social science, where your blogger occasionally dabbles. There, the obstacle to overcome is called "point oh-five," meaning that findings cannot be considered true unless the probability that they were reached in error (i.e., a "false positive") is less than five in one-hundred.

Of course, important decisions are always supposed to rest on evidence. Still, in both policing and research critical information often goes unrecognized, uncollected or ignored, and errors, negligence and

– yes – self-interest can distort whatever kernels of truth remain. Precise numerical goals might seem more reliable, but in actual practice it's all about fallible humans. To that extent, "point oh-five" and "moral certainty" seem equally useful – and equally flimsy.

Two days ago the judge tossed out McCullough's conviction. An embittered 75-year old walked out of court a free man, leaving behind a trail of unanswered, perhaps unanswerable questions. Although the judge held out the possibility of a retrial, that seems most unlikely, as the D.A. lobbied for McCullough's release. Fifty-nine years after a child's vicious murder, a manhunt may begin anew. Whether it *should* is another question.