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TRUTH FROM TESTING

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C O V E R S T O R Y

Truth from Testing By Barry Kolar

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'I'm not guilty.'

For years it's been a common jailhouse lament, but today it's also a driving force behind the use of DNA analysis in post-conviction appeals.

Nowhere is the power of this new testing more dramatic than in the case of Clark McMillan, a Memphis man who never stopped proclaiming his innocence following a 1980 rape conviction. After 17 years, his claims finally reached someone who could do something about them. The New York-based Innocence Project agreed to take on his case in 1997 and five years later - with the help of prominent Memphis criminal attorney Kemper Durand - McMillan is a free man.

The 22 2 years he spent behind bars is the longest of any wrongfully convicted U.S. prisoner who was later cleared by genetic testing, his attorneys say.

And his release adds to an impressive list put together by the Innocence Project, a nonprofit legal clinic operated out of the Benjamin N. Cardozo School of Law in New York that now has had convictions overturned in 108 cases across the United States.

In McMillan's case, the DNA testing may also lead to an arrest. Innocence Project attorney Vanessa Potkin had encouraged police to look at a suspect in two other Memphis rape cases from the same period. At the time the rapes were committed, McMillan had believed the perpetrator was the same as in his case.

According to a Commercial Appeal article on July 16, he may have been right. The paper says that Tennessee Bureau of Investigation tests matched DNA from the rape scene with that of David Louis Boyd, a suspect in other rape cases who is now serving a life sentence in Texas, where he was convicted of aggravated rape with a deadly weapon.

While this reversal of fortune for McMillan is dramatic, Innocence Project attorneys say the case shows more than just the power of DNA testing.

"It's not just getting someone out of jail," says Potkin, who worked with Durand on the case. "It's also about shedding light on the criminal justice system's problems."

Life changes on Oct. 30, 1979

For McMillan, those problems began in October 1979 when he was arrested and detained for the rape and robbery with a deadly weapon of a 16-year-old girl. On Oct. 26 of that year, the victim and her boyfriend were abducted from the Overton Park area in Memphis by a knife-wielding man, who forced them out of their car and into the nearby woods. According to an account compiled by

the Innocence Project, the perpetrator then forced them to disrobe and lie face down on the ground. He then raped the girl and fled after ordering them to remain on the ground and not get dressed until he had gone.

A medical exam at a rape crisis center confirmed their story and the pair gave similar descriptions of the attacker to the police. Four days later, McMillan was arrested and detained in connection with the incident.

The two victims did not immediately identify McMillan as the attacker, according to the Innocence Project report. Looking at a photo spread that included McMillan, the girl did not identify anyone as the perpetrator and the boyfriend picked someone else. In a lineup, the girl picked McMillan, but the boyfriend again picked out someone else. Also, neither of the descriptions provided by the pair included mention of a limp. McMillan had earlier been shot in the leg, wore a brace and walked with an obvious limp.

Despite these problems and testimony from his sister and girlfriend that he was with them at the time of the crime, McMillan was charged with the crime, convicted and sentenced to 119 years in prison. After appeals failed to win McMillan a new day in court, he began serving his sentence at the West Tennessee State Penitentiary in Henning.

Opening a window of hope

Salvation from this sentence did not come quickly. It was not until advances in science and technology made DNA testing reliable and acceptable in the courtroom that a window opened for McMillan. And that's where his story merges with that of the Innocence Project, a clinic founded in 1992 by Barry Scheck and Peter Neufeld with the mission of taking on cases in which post conviction DNA testing could yield conclusive proof of innocence. McMillan's appeal for help was one of thousands the clinic has received, and it took two years before they decided to pursue DNA testing in his case.

This new ally brought hope, but McMillan's journey to freedom was still far from complete.

In Memphis, Kemper Durand - a lawyer with Thomason, Hendrix, Harvey, Johnson & Mitchell PLLC - was recruited by Scheck to join in the case. His first task was to work with the Shelby County District Attorney General's office to develop processes and procedures for obtaining the evidence for testing and having the actual testing performed.

Since the case was breaking new ground, this took time. Lots of time. And while Durand praises the cooperation he received - he went so far as writing a letter to the editor of The Commercial Appeal praising the work of Shelby County District Attorney General William Gibbons and his assistants, James Challin and John Campbell - it still took years to work things out.

As his partner in the case from the Innocence Project, Vanessa Potkin, recalls, "Every step of the way there were procedural problems." For example, she says, it took until 1999 to establish that there was evidence available for testing. As in many of the cases the Innocence Project takes on, locating evidence.

presented in decades-old cases can be a challenge. As Durand says, "There's no central place where the evidence is kept." Sometimes lawyers locate it at rape crisis centers, sometimes at medical centers, sometimes at court clerks' offices. Sometimes there is no rhyme or reason as to where evidence ends up.

And often it is never found. Aliza Kaplan, deputy director of the Innocence Project, says that in 70 percent of the cases it reviews the evidence has either been destroyed or lost. No evidence, no DNA testing.

After locating the evidence in the McMillan case, attorneys still had to decide who would do the testing, who would pay for it and whether enough evidence would be available after initial testing to have a second round of tests if there were problems. The final agreement allowed for testing by the Tennessee Bureau of Investigation, as the District Attorney General wanted, with some of the evidence set aside so that the Innocence Project could ask for a second test by a private laboratory if it didn't think the results from the first test were reliable.

Today that process would take much less time. While Durand and Potkin were working out these procedures from scratch, the Tennessee General Assembly passed the Post-Conviction DNA Analysis Act of 2001. Sponsored by Sen. Steve Cohen, D-Memphis, and Rep. Rob Briley, D-Nashville, the bill establishes when and how DNA testing can be used in post-conviction cases. The legislation amends Tennessee Code Annotated Title 40, Chapter 26, and Title 40, Chapter 30.

"Had we had this legislation (when we started the case), it would have taken months, not years," Potkin says.

Tennessee is now one of 28 states that have DNA testing statutes for post-conviction cases, Kaplan says. Just a few years ago, she says, only a handful of states had such laws.

A second piece of legislation originally introduced earlier this year by Cohen would have taken the process a step further by requiring more preservation of evidence. Cohen says he held the bill until next year's session at the request of attorneys from the Innocence Project and the Public Defenders Conference.

He plans to reintroduce the bill next year and hopes he'll be able to convince his fellow legislators to fund the cost of maintaining the evidence, even in the state's current financial climate. "Cost is always a problem," Cohen says, "but the justice that comes from freeing an improperly convicted person is worth it." In addition, he adds, if the wrong person is in jail, then the man or woman who actually committed the crime is still out on the streets.

Test results show innocence

Once the process and procedures were finally agreed upon in McMillan's case, Durand and Potkin sought an order from the 30th Judicial District Criminal Court in Shelby County. In July 2001, it was granted by Judge Chris Craft. The test was delayed a final time when questions were raised over whether the TBI should bear the costs of the testing. Resolving that and other issues delayed testing until this spring.

Finally on April 18, the tests were performed. McMillan's attorneys soon got the news from John Campbell in the District Attorney General's office that the results showed McMillan's DNA did not match that from the rape evidence, and that he could not have committed the crime. At a hearing before Judge Craft on May 2, District Attorney General Gibbons and his staff agreed that the conviction should be set aside.

Even after Craft had dismissed the charges, one additional wrinkle kept McMillan behind bars for 12 more days. Before he could be released, federal officials had to iron out how it would handle a two-year sentence McMillan had received for a 1977 firearms violation. To free McMillan, the prison

bureau retroactively started his federal sentence on Oct. 8, 2000. With days credited for good behavior, his sentence was completed in May.

The larger issues

While McMillan attempts to rebuild his life and figure out where his future leads, attorneys in the case look back at what they learned and what the work means to the criminal justice system.

For Durand, the hundreds of pro bono hours he spent on the case are just a part of the obligation he believes he has to the public and the legal system.

"The case is obviously very important," Durand says, pointing to a recent statement from a New York federal judge who questioned the constitutionality of the federal death sentence, saying it probably results in innocent people being sentenced to die. According to press reports, Judge Jed Rakoff cited the growing number of cases where people have been cleared of charges because of DNA evidence in making his argument in a pre-trial order regarding a 1999 murder case.

For Potkin and Kaplan at the Innocence Project, cases are analyzed to see what can be learned to keep innocent people out of jail. The biggest problem they've found, Kaplan says, is mistaken identities. In 70 percent of the cases where they've had verdicts overturned that's been the problem, she says.

Potkin says they have learned that there are procedures that can reduce these misidentifications. For example, sequential lineups produce more accurate results than lineups where the victim views all of the people at one time, she says. The organization is pushing to get reforms such as this adopted across the country.

Another issue is the preservation of evidence. Until legislation is passed to ensure there is an established procedure for keeping evidence and storing it, Potkin says it will remain a problem for post-conviction cases. In one instance, she says, the Innocence Project had been working on a case for four years and had reached a working agreement with the District Attorney General for testing when the police department destroyed the evidence.

With the evidence gone, her client's chances for release disappeared.

Of course, in some cases the evidence works the other way. Durand relates one story of a case in which a client pursued DNA testing, went through the complicated process of obtaining the evidence and having it tested only to have it show that he was indeed guilty.

Making sure the right people are in jail is also a goal of prosecutors. Gus Radford, who is the District Attorney General in Huntingdon and president of the Tennessee District Attorneys General Conference, is comfortable with DNA testing as a tool.

"In general terms, DNA testing is a very valuable tool, because it gives us the truth," he says. It can be used to convict people as well as finding them innocent

As for reforms that might be suggested from analysis of Innocence Project cases, Radford is a bit skeptical. The criminal justice system "is not a foolproof system," he says. Errors are made on behalf of both defendants and victims, and eyewitness accounts can be both harmful and beneficial to the accused. "We use it, defense attorneys use it," he says. "It's a two-edged sword."

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