

# The Jeffrey MacDonald Case: Miscarriage of Justice

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**A**S MANY classmates know, I was one of Jeffrey MacDonald's military lawyers in the 1970 Army Article 32 pretrial investigation at Fort Bragg, which resulted in the Army's dismissing its charges against Jeff for the murder of his wife and two daughters as "not true." I was also involved in the subsequent federal court grand jury investigation in the Eastern District of North Carolina, and the various challenges to the indictment which resulted from that proceeding. Those challenges ultimately were thrown out by the Supreme Court, after the U.S. Court of Appeals for the Fourth Circuit on two separate occasions, and for two separate reasons, had ordered the indictments dismissed.

Eventually Jeff's case went to trial in the Eastern District of North Carolina, presided over by Franklin Dupree, a most unsympathetic judge whose dislike for MacDonald and his lawyers, and whose bias toward the government's case and lawyers, were palpable. The trial resulted in Jeff's conviction and sentence to life imprisonment on charges of killing his wife, Colette, and his two daughters Kim and Kristen. Many appeals followed, most of which resulted in not much. Jeff remains in prison today, and probably will for life.

I myself dropped out of the defense "team" (which changed over time) in the late 1980s-early '90s—I just didn't see what more use I could be—but I remained in touch with Jeff. Harvey Silverglate '64, who was a year ahead of me at Harvard Law School, agreed to take up the appellate representation of Jeff around that time. Harvey has expressed his scathing appraisal of the government's unfair dealings with MacDonald's defense lawyers in several publications.

In repeated proceedings over the years, new forensic evidence and testimony has been presented to challenge the government's evidence at trial. But the North Carolina District Court has uniformly rejected all these arguments and evidence. Occasionally the U.S. 4th Circuit Court of Appeals—having been slapped down twice by the Supreme Court after ruling in Jeff's favor—would issue a somewhat sympathetic opinion requiring the District Court to take a "second look." But invariably the District Court simply dismissed the proffered new evidence as of little consequence.

After Dupree died, one of his best friends, Judge James C. Fox, now a senior judge in the North Carolina District Court, took up the cudgel to ensure that his predecessor's rulings against Jeff and for the government survived further appellate inquiry. The latest (and perhaps last) battle

to get the jury judgment of guilty set aside or a new trial, was the subject of a hearing before Judge Fox in September 2013, after the Fourth Circuit ordered him to take another look to see if there was a basis to Jeff's claims that he has persistently been denied a fair trial.

Fox reluctantly held the hearing, after delaying it for a year or so, and then took nearly another year before finally issuing a written opinion. (Nothing happens in less than a year in this case.) Fox's decision pretty much tracks and summarizes the government's point of view. He held that all of the ambiguities, uncertainties, missteps, and simple contradictions which Jeff's lawyers have pointed out over the years don't actually prove by clear and convincing evidence Jeff's innocence, after the jury found him guilty. Fox noted that post-conviction, it is the defendant's obligation to prove his innocence, and not the government's duty to prove his guilt.

**I**N 2012 Errol Morris, a well-known and respected documentary film maker, wrote *A Wilderness of Error*—a wonderful, extensively-researched, and perceptive look at all the messiness of “the case.” (I was among those he interviewed.) In his *New York Times* review (August 29, 2012), David Carr judged that the book “may not exonerate [MacDonald], but it makes a forceful argument that his conviction was riddled with shortcomings.” Morris takes on, and devastates, Joe McGinnis's bestseller *Fatal Vision*. Morris also dismisses the anguished-reporter plaint of Janet Malcolm's *The Journalist And The Murderer*, which recounts how McGinnis betrayed a friendship to get a (sure-fire bestselling) story, because, she concludes, that's how journalism works.

I knew McGinnis well and spoke at length with him over many months—I even lived with him during the trial in North Carolina—and thought of him as a friend. I found his book remarkably evil, and I felt betrayed. I also knew and spoke at length with Janet Malcolm, and found her to be uncertain of what was true. I respected her for that and I still do, though I agree with Errol that her conclusions are a way of avoiding saying what the “facts” demonstrate, because, she concludes, one can't ever believe there is a factual truth in anything.

I wish I could offer up hope that somehow Jeff will ultimately be “exonerated,” but I can't. The sloppy police work, the prosecutorial misconduct, the flawed judicial process, the passage of time—all work against that. I don't know what is being done about appealing Judge Fox's latest pronouncement, which can be roughly paraphrased as holding that since Jeff can't prove his innocence, he must be guilty. In my opinion, the trial evidence certainly did not prove Jeff was guilty. So his not having been proven guilty beyond a reasonable doubt should have led to his acquittal. He should not have been convicted.

On the other hand, I believe the physical and testimonial evidence doesn't absolutely prove Jeff's innocence, because it's muddled, contaminated, and lied about. But there's one further piece of evidence to consider, which the jury didn't buy, but I do: Jeff's own testimony. After all these years, I believe that evidence. I believe his story. So, as far as I am concerned, he is innocent. And that is as much as I can tell you.