779 F.2d 962

779 F.2d 962, 19 Fed. R. Evid. Serv. 1151

(Cite as: 779 F.2d 962)

H

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Appellee,
v.
Jeffrey R. MacDONALD, Appellant,
National Association of Criminal Defense Lawyers,
Amicus Curiae.
No. 85-6208.

Argued Oct. 7, 1985.
Decided Dec. 17, 1985.

Defendant, who had been convicted of the murders of his wife and daughters, filed motions for relief from sentence, for new trial, and for recusal of trial judge. The United States District Court for the Eastern District of North Carolina, Franklin T. Dupree, Jr., Senior District Judge, denied all motions, and defendant appealed. The Court of Appeals, Haynsworth, Senior Circuit Judge, held that: (1) trial judge's relationship with former United States Attorney who had married judge's daughter did not warrant recusal; (2) newly discovered evidence in form of confused hearsay statements did not warrant new trial; and (3) Government did not improperly suppress exculpatory evidence.

Affirmed.

West Headnotes

[1] Judges ⇐46
227k46 Most Cited Cases
Fact that former United States Attorney, who had made statements indicating belief that defendant should be indicted and prosecuted, was formerly married to trial judge's daughter provided no basis for recusal of trial judge; trial before judge did not commence until more than eight years after former U.S. Attorney's resignation and almost seven years after his divorce from trial judge's daughter.

[2] Criminal Law ⇐940
110k940 Most Cited Cases
To obtain new trial on basis of after discovered evidence, that evidence must be admissible in new trial. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

[3] Criminal Law ⇐944
110k944 Most Cited Cases
Defendant, who had been convicted of murder of his wife and two young daughters, was not entitled to new trial on basis of subsequent confused hearsay statements of drug addicts suggesting that they may have been involved in murders; addicts all had serious mental problems, and their statements contained numerous inconsistencies. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

[4] Criminal Law ⇐700(3)
110k700(3) Most Cited Cases
Government's failure to produce for murder defendant syringe containing bloody fluid was not improper suppression of exculpatory evidence; reasonable interpretation of investigator's statement concerning syringe was that it was found in closet which contained evidence of blood, not that blood was in syringe itself, and, in any event, other investigators stated there was no syringe at all.

[5] Criminal Law ⇐700(3)
110k700(3) Most Cited Cases
Pair of boots examined for blood stains that might connect them to scene of murders were not exculpatory evidence which Government had duty to provide to defendant; defendant's claims that boots belonged to actual murderer and that they would be exculpatory if found to have been stained with blood were pure speculation, inasmuch as they did not fit description of boots worn by alleged killer and examination revealed no blood stains.

[6] Criminal Law ⇐700(3)
110k700(3) Most Cited Cases
Government's failure to supply investigator's

handwritten observations that letter written by individual whom defendant claimed to be actual killer seemed to resemble letter in word printed on wall at murder scene did not constitute impermissible failure to disclose exculpatory evidence; defendant was provided with photographs of words printed by alleged killer, and FBI crime lab report stated that letters did not contain "inherent individual characteristics essential to a ... meaningful comparison."

[7] Criminal Law ⇐956(4)
110k956(4) Most Cited Cases
Evidence at hearing on motion for new trial supported finding that psychiatrist, by whom defendant had agreed to be examined during trial, did not depart from his properly assigned role and act as "government investigator."

***963** Brian O'Neill (Myrna K. Greenberg, Santa Monica, Cal., on brief), for appellant.

Brian M. Murtagh, Sp. Asst. U.S. Atty., John F. De Pue, Dept. of Justice, Washington, D.C., (Samuel T. Currin, U.S. Atty., Raleigh, N.C., on brief) for appellee.

(Ephraim Margolin, Chairman, Amicus Curiae Committee, Natl. Ass'n of Criminal Defense Lawyers, San Francisco, Cal., on brief), for amicus curiae.

Before RUSSELL and MURNAGHAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

HAYNSWORTH, Senior Circuit Judge:

Jeffrey MacDonald was convicted of the gruesome murder of his wife and two young daughters, and his convictions were affirmed on appeal. *United States v. MacDonald,* 688 F.2d 224 (4th Cir.1982). Subsequently he filed two motions for relief under 28 U.S.C. § 2255, one motion for a new trial under Rule 33 F.R.Cr.P., and a fourth motion under 28 U.S.C. § 455 to have the trial judge recuse himself. All four motions were denied.

We find no merit in this appeal, and affirm.

I.

[1] The attempt to disqualify the trial judge was based upon the judge's relationship with Jimmy Proctor, who, at the time of the judge's appointment, was an assistant United States Attorney in the Eastern District of North Carolina and married to the judge's daughter. In apparent recognition that he should not be practicing in his father-in-law's courtroom, Proctor resigned as assistant United States Attorney in February 1971, approximately two months after the judge's appointment. At that time the MacDonald case was in the investigative stage, and Proctor had made statements indicating a belief that MacDonald should be indicted and prosecuted.

Proctor was divorced from the trial judge's daughter on July 27, 1972.

MacDonald was not indicted until January 1975, and trial before Judge Dupree did not commence until July 1979, more than eight years after Proctor's resignation as assistant United States Attorney, and almost seven years after his divorce from the trial judge's daughter.

These circumstances present no basis for a disqualification or recusal. By the time the trial judge was called upon to make any discretionary ruling in the case, Proctor had long since ceased to be a United States Attorney and ceased to be the judge's son-in-law. The earlier relationship would have disqualified either the judge or the son-in-law, and they treated it as disqualifying the son-in-law. Termination of both branches of the disqualifying relationship, however, left no vestige of the taint requiring the trial judge to disqualify himself at the time of trial in 1979 or at the time the post conviction motions came on for a hearing in 1984. *S.J. Groves & Sons Co. v. International Brotherhood of Teamsters,* 581 F.2d 1241 (7th Cir.1978).

***964** II.

It is contended that MacDonald is entitled to a new trial because of evidence discovered after his conviction. This evidence consists primarily of post trial statements by Helena Stoeckley, and one

each by two of her former associate drug addicts.

MacDonald's version of the events that fatal night was that his home was invaded by three men and a woman, all drunk on drugs. It was they who had attacked him and had viciously murdered his wife and children. The female invader he described as a blonde woman wearing a floppy hat and brown boots coming almost up to her knees. Helena Stoeckley had brown hair, but she sometimes wore a blonde wig, a floppy hat and high brown boots. After hearing of Dr. MacDonald's accusations, Helena Stoeckley thought that she might have been the female he described. She disposed of the wig, the hat and the boots.

Helena Stoeckley was also heavily addicted to drugs. She was a witness at the trial where she testified that she was so heavily intoxicated with drugs in the early morning hours of the night in question that she had no idea of what she had done or where she had been. Before trial, however, she had made statements to the effect that she had been, or might have been, in the MacDonald home. The statements contained internal suggestions that they were the product of fantasy. She stated, for instance, that she held a lighted candle for illumination but "it was not dripping wax; it was dripping blood."

At the trial, the defense sought to introduce evidence of two earlier hearsay statements. They were excluded as being untrustworthy, and this court affirmed the exercise by the trial judge of his discretion in excluding them for lack of trustworthiness. *United States v. MacDonald,* 688 F.2d at 230- 34.

Helena Stoeckley has since died, apparently as the result of drug abuse. After the trial and during her lifetime, however, she continued to make conflicting statements. Sometimes she remembered nothing about what happened that night, while, apparently depending upon who questioned her, she sometimes remembered in some gory detail being with the slayers of the MacDonald mother and children. The details she gave, however, contain many inconsistencies with MacDonald's version of what occurred and with the circumstantial evidence derived from the scene.

Evidence was proffered that Greg Mitchell, a former associate of Helena Stoeckley, had explained to friends an apparent state of depression by saying that he had been involved in some murders.

Cathy Perry Williams, a former associate of Stoeckley's and a schizophrenic, allegedly confessed that she was one of the invading murderers. She claimed to have recalled evidence of that night in some detail, but the detail varied widely from the known physical facts, from Dr. MacDonald's version of what transpired, and from Helena Stoeckley's numerous confessions. Notably, the Williams statement would have had two women among four intruders; she had gone upstairs to get to the bedrooms, and the two children were boys.

[2][3] To obtain a new trial on the basis of after discovered evidence, that evidence must be admissible in a new trial. There is substantial doubt that these hearsay statements would be admissible since corroborating circumstances do not clearly indicate their trustworthiness. *See* F.R.E. 804(b)(3); *United States v. Carvalho,* 742 F.2d 146 (4th Cir.1984). However, we need go no further than to observe that the district judge found that this melange of hearsay evidence would not produce a different result in a new trial. *United States v. Lott,* 751 F.2d 717 (4th Cir.1985). That assessment was for the district judge. There is an evidentiary basis for the finding, and there are no extraordinary circumstances that might warrant our intervention. *See United States v. Carmichael,* 726 F.2d 158 (4th Cir.1984).

If these hearsay statements had been before the jury, it is most unlikely that the jury would have given them any credence. ***965** The circumstantial evidence made a strong case against MacDonald and demonstrated that his story was a fabrication entirely or in substantial part. Nevertheless, when his story first came out, Helena Stoeckley had no reason to doubt his truthfulness. It is clear that she

thought his description of the blonde woman with the floppy hat and brown boots fit her, and a pitiable person whose memory had been completely blocked by drugs is bound to be highly suggestible. Since she could not remember where she had been or what she had been doing, MacDonald's description of the blonde woman necessarily would cause her to wonder whether she had been in the MacDonald residence and to fantasize participation in a crime as horrible as it was senseless. And, if Helena Stoeckley had been one of four intruders, some of her friends whose memories were similarly blocked by drugs might well have had similar fantasies.

Perhaps it would have been better if evidence of Stoeckley's pretrial statements had been received, as Judge Murnaghan observed in his concurring opinion, 688 F.2d at 234-36, but the district judge could appropriately find that the post trial statements were all lacking in trustworthiness and that they did not meet the materiality requirement for a new trial.

III.

Relief under § 2255 was sought on the basis of claimed suppression of exculpatory evidence. The district judge considered each claim extensively and meticulously. We think he properly rejected them.

A.

[4] Blood of MacDonald's type was found on the door of a linen closet. Inside the closet were a number of medications and a supply of syringes and needles. When one of the Army investigators was being debriefed, he said that "a half filled syringe that contained an as yet unknown fluid was located in a hall closet which also contained some evidence of blood." The defense interprets the statement to refer to a syringe containing a bloody fluid, and suggests that production and analysis of such bloody fluid might have lent some support to the claim of an intrusion by drug addicts and corroborated Cathy Perry Williams' claim that the intruders had injected a drug in MacDonald.

The statement is more readily interpreted to refer to blood on or in the closet rather than to blood in a fluid within a syringe. There were, indeed, blood stains on the closet door, and, though there were detailed inventories of the contents of the closet, there was no other reference to a syringe containing fluid of any kind. The statement was made by one who had not been a participant in making the inventory of the contents of the closet; he purported to be repeating what someone else had told him, but, according to the other investigators who actually examined the contents of the closet, there was no such syringe.

B.

[5] In December 1970 Cathy Perry, later Williams, stabbed the soldier with whom she had been living. After she was sent away, he and a Mrs. Garcia undertook to collect Cathy's belongings. A pair of beige boots and other items were turned over to military investigators.

The beige boots were examined for blood stains or material that might connect them to the scene of the MacDonald murders. Nothing was found, and the boots were returned.

MacDonald speculates that the beige boots belonged to Helena Stoeckley rather than to Cathy Perry, and that they would be exculpatory if they were found to have been stained with blood. It is simple speculation, however, for they did not fit the description of the brown boots mentioned by MacDonald, and examination by the CID revealed no blood stains.

C.

During an autopsy performed on the body of Mrs. MacDonald, scrapings were taken from beneath her fingernails and *966 placed in a vial. An Army investigator reported that he saw in the vial what he believed to be a small piece of skin. Thereafter, detailed laboratory analysis was performed, and the report of the analysis contains no mention of any skin.

Either the investigator was mistaken in believing that what he had seen in the vial was a small piece of skin, or the piece of skin was lost.

Interestingly, there were scratches on Dr. MacDonald's chest, which might have been made by Mrs. MacDonald if her husband were her slayer.

D.

[6] Helena Stoeckley had refused to be fingerprinted. Seeking her prints, an investigator was dispatched to Nashville, Tennessee to examine an apartment she had recently occupied and that was being monitored by Nashville police with her consent. He found many prints and made many photographs. Apparently with her finger, she had painted words on the walls, and the investigator photographed an upper case "G" as it appeared in such words as "Good" and "Gemini." In a handwritten note, he stated that the letter seemed to resemble the "G" in the word "Pig" that had been painted on the headboard of Mrs. MacDonald's bed. That word also had been finger painted, but there was expert opinion that it had been done by one wearing rubber gloves, for there were no traces of ridges. Dr. MacDonald had such gloves, of course, and pieces of one were found on the bed near the headboard and in a pile of bedclothing.

Prints of the photographs made in the Nashville apartment were supplied to defense counsel before trial, but, unfortunately, the investigator's handwritten note about a possible resemblance of the "G's" did not find its way into the typed explanatory material supplied to the lawyer. It is now contended that failure to supply the handwritten observation made the photographs meaningless.

Subsequent inspection in the FBI crime laboratory produced a report that neither the "G's" on the wall of the apartment in Nashville nor the "G" on the headboard contained the "inherent individual characteristics essential to a ... meaningful comparison." Moreover, the investigator who took the Nashville photographs opined that the "G's" in Nashville resembled "G's" he had seen in MacDonald's military notebooks as well as the "G" on the headboard.

E.

The district judge concluded that the government had not deliberately suppressed anything and had acted in complete good faith. More important, however, the district judge found that this evidence did not meet the materiality requirements of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). We agree, and our view is not altered by the more recent case of *United States v. Bagley,* 473 U. S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

IV.

[7] MacDonald also claims that his Fifth and Sixth Amendment rights were violated when a psychiatrist examined him during trial. There had been an agreement upon the examination, but MacDonald now claims that the psychiatrist was a "government investigator" who asked many questions about the facts and disclosed MacDonald's answers to the prosecution. There is no support for the contention except speculation, and the district court found that the psychiatrist did not depart from his properly assigned role.

V.

In much greater detail than we, the district judge considered every contention that MacDonald advanced. The care with which it was done is evident, and we may conclude this much briefer opinion with the statement that there is no basis upon which any ruling in this case by a meticulous district judge can be overturned.

AFFIRMED.

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H

United States District Court,
E.D. North Carolina,

Fayetteville Division.

UNITED STATES of America, Plaintiff,
v.
Jeffrey R. MacDONALD, Defendant.
Nos. 75-26-CR-3, 90-104-CIV-3-D.

July 8, 1991.

Defendant's convictions for the murder of his family were reversed by the Court of Appeals, 632 F.2d 258, 635 F.2d 1115. The United States Supreme Court reversed, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696, and the conviction was affirmed, 688 F.2d 224. After initial writ of habeas corpus was denied, 640 F.Supp. 286, and the denial was affirmed, 779 F.2d 962, defendant filed a second petition. The District Court, Dupree, J., held that: (1) evidence which defendant asserted the Government suppressed was insufficient to alter the verdict; (2) defendant did not establish that Government suppressed the evidence; and (3) claims were barred by abuse of the writ doctrine.

Petition denied.

West Headnotes

[1] Constitutional Law ⚿257
92k257 Most Cited Cases
Purpose of criminal law and constitutional protection afforded to those accused of crimes is to ensure orderly and fair administration of justice and, while law should not erect technical roadblocks for defendants seeking to receive due process, each of the legal doctrines designed to ensure due process is applied together with some derivation of the concept of materiality, keeping in mind that the courts strive ultimately for just results rather than for technical perfection.

[2] Constitutional Law ⚿268(5)
92k268(5) Most Cited Cases
Only suppression of evidence that is material to the outcome of the trial violates due process. U.S.C.A. Const.Amend. 14.

[3] Criminal Law ⚿700(2.1)
110k700(2.1) Most Cited Cases
(Formerly 110k700(2))
Failure to turn over statements of witness required by the Jencks Act will only warrant a new trial where the prosecutor's error was not harmless. 18 U.S.C.A. § 3500.

[4] Habeas Corpus ⚿401
197k401 Most Cited Cases

[4] Habeas Corpus ⚿409
197k409 Most Cited Cases

[4] Habeas Corpus ⚿898(2)
197k898(2) Most Cited Cases
In addition to showing cause for failure to raise claims earlier, habeas corpus petitioner must show actual prejudice from the errors of which he complains or else must show circumstances implicating a fundamental miscarriage of justice.

[5] Habeas Corpus ⚿480
197k480 Most Cited Cases
Failure to disclose to defendant that certain fibers had been found at scene of his family's murder did not require a new trial where there was no likelihood that the jury would have reached a different verdict had it known about the existence of those fibers, despite defendant's claim that the fibers would be linked to the intruders whom he said committed the crime.

[6] Habeas Corpus ⚿480
197k480 Most Cited Cases

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Laboratory notes concerning fibers found at scene of murder of defendant's family would not have affected jury's verdict, despite defendant's claim that fibers could be linked to the intruders whom he claimed committed the crime, so that failure to provide the notes to defendant did not require a new trial.

[7] Habeas Corpus ⇐480
197k480 Most Cited Cases
Failure to provide defendant prior to trial with laboratory notes concerning fibers found at scene of murder defendant's family, which defendant asserted could be linked to intruders whom he asserted committed the crimes, did not require new trial despite defendant's claim that the fibers would have been adequate corroborating evidence to permit indirection of hearsay evidence of confession of one of the alleged intruders, where the court's primary reason for excluding the hearsay testimony was not the absence of corroboration but the utter unreliability of the declarant as evidence by her demeanor on the stand and her history of drug abuse.

[8] Habeas Corpus ⇐480
197k480 Most Cited Cases
To the extent that failure to turn over lab notes concerning fibers found at scene of murder of defendant's family was a violation of the Jencks Act, any error was harmless as it would not have affected the jury's verdict, despite defendant's efforts to link the fibers to the intruders whom he asserted committed the offense. 18 U.S.C.A. § 3500 .

[9] Habeas Corpus ⇐898(2)
197k898(2) Most Cited Cases
Petitioner did not establish that failure to provide him prior to trial with laboratory notes concerning fibers found at scene of murder of his family resulted in such prejudice were fundamental miscarriage of justice as to excuse his failure to raise the claim as part of his initial habeas corpus proceeding.

[10] Habeas Corpus ⇐480
197k480 Most Cited Cases
Defendant did not establish that Government suppressed any evidence to which he was entitled, even though he was not given access to handwritten laboratory notes describing certain fibers found at scene of murder of his family, where the Government allowed defendant to examine and test any of the physical evidence, including those fibers.

[11] Habeas Corpus ⇐480
197k480 Most Cited Cases
Defendant did not establish that prosecuting attorneys had read laboratory notes which defendant alleged were suppressed by the prosecution and did not show that prosecution had any reason to believe that the notes were of any potential exculpatory value.

[12] Habeas Corpus ⇐491
197k491 Most Cited Cases
Government did not present false or misleading evidence when Government expert testified that fibers from defendant's pajama top had been found on murder weapon but did not reveal that another fiber had been found on the weapon or when second witness failed to mention certain blonde fibers found in hairbrush at the scene, which would allegedly have corroborated defendant's statement that the offense was committed by a group of intruders, one of whom was blonde.

[13] Criminal Law ⇐627.7(3)
110k627.7(3) Most Cited Cases

[13] Criminal Law ⇐700(2.1)
110k700(2.1) Most Cited Cases
(Formerly 110k700(2))
Jencks Act request must be made at trial following testimony of a witness, and Government is under no obligation to turn over prior statements absent request from the defendant. 18 U.S.C.A. § 3500(b).

[14] Habeas Corpus ⇐898(1)
197k898(1) Most Cited Cases
Abuse of writ made it unnecessary for court to reach merits of petitioner's claim where the information upon which the petition was based was in his possession when previous petition for writ of habeas corpus was filed.

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[15] Habeas Corpus ⇐899
197k899 Most Cited Cases
Where Government properly pleaded abuse of the writ, defendant bore the burden of disproving abuse.

[16] Habeas Corpus ⇐896
197k896 Most Cited Cases

[16] Habeas Corpus ⇐898(2)
197k898(2) Most Cited Cases
Defendant's intent is irrelevant to application of doctrine of abuse of writ and fact that he had not deliberately withheld claims in his initial habeas corpus petition did not preclude application of the doctrine.

[17] Habeas Corpus ⇐898(2)
197k898(2) Most Cited Cases
Attorney's failure to recognize significance of certain documents did not amount to ineffective assistance of counsel constituting cause excusing abuse of writ.
***1344** Brian Murtagh, Sp. Asst. U.S. Atty., Eric Evenson, Asst. U.S. Atty., Raleigh, N.C., John F. Depue, Crim. Div., U.S. Dept. of Justice, Washington, D.C., for U.S.

Harvey Silverglate, Philip Cormier, Thomas C. Viles, Boston, Mass., Norman Smith, local counsel, Greensboro, N.C., for Jeffrey R. MacDonald.

MEMORANDUM OF DECISION

DUPREE, District Judge.

Jeffrey R. MacDonald, who is serving three consecutive life sentences for the murders of his wife and two children, filed a petition for a writ of habeas corpus on October 19, 1990 pursuant to 28 U.S.C. § 2255 seeking to vacate his conviction on the grounds that the prosecution failed to disclose prior statements of witnesses at trial, withheld laboratory notes written by government agents which would have aided the defense, and exploited the suppression of the prior statements and lab notes by knowingly presenting a false and perjurious picture of the evidence and underlying facts. The government has responded that it fully complied with its duty to disclose exculpatory evidence and prior statements and that in any case, the allegedly suppressed evidence would not have altered the jury's verdict. The government further argues that MacDonald should be barred from raising these claims at this time since the information upon which the instant petition is based was in MacDonald's possession in 1984 when a previous petition for a writ of habeas corpus was filed. The court has allowed numerous extensions of time in which to file pleadings and has waived the normal page limitations so that both sides could adequately present their respective positions. Having considered the voluminous pleadings, affidavits, and exhibits, and the arguments of counsel at a hearing on June 26, 1991, the court finds for the reasons which follow that MacDonald's petition must be denied.

I. FACTS AND PROCEDURAL HISTORY

In the court's twenty years on the bench, no other case has been the subject of more public and judicial scrutiny than this one. Virtually every aspect of the case has been detailed in eleven reported judicial opinions, ***1345** a best-selling book, a television drama, various documentaries, and countless articles and news reports. Although more than twenty years have passed since the murders, interest in the case remains seemingly unabated, as evidenced by the fact that even minor scheduling orders prompt calls to the court from local and national press organizations.

The facts of the case and prior proceedings have been previously reported and will not be fully repeated here. *See United States v. MacDonald,* 531 F.2d 196 (4th Cir.1976) (pre-trial ruling that four-year delay between dismissal of military charges and subsequent federal indictment violated constitutional right to speedy trial), *rev'd,* 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) (holding that defendant may not appeal order denying motion to dismiss on speedy trial grounds before trial); *United States v. MacDonald,* 585 F.2d 1211 (4th Cir.1978) (Fifth Amendment guarantee against double jeopardy does not bar federal prosecution following Article 32 hearing resulting in dismissal

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of army charges), *cert. denied,* 440 U.S. 961, 99 S.Ct. 1504, 59 L.Ed.2d 774 (1979); *United States v. MacDonald,* 485 F.Supp. 1087 (E.D.N.C.1979) (denying post-conviction bail pending appeal); *United States v. MacDonald,* 632 F.2d 258 (4th Cir.1980) (reversing conviction on speedy trial grounds), *reh'g en banc denied,* 635 F.2d 1115 (4th Cir.1980) (over published dissents of five judges), *rev'd,* 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) (finding no speedy trial violation); *United States v. MacDonald,* 688 F.2d 224 (4th Cir.1982) (rejecting due process and evidentiary challenges to conviction), *cert. denied,* 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983); *United States v. MacDonald,* 607 F.Supp. 1183 (E.D.N.C.1985) (denying government's motion for forfeiture of proceeds from book and television program concerning the case); *United States v. MacDonald,* 640 F.Supp. 286 (E.D.N.C.1985) (denying motions for a new trial and for a writ of habeas corpus), *aff'd,* 779 F.2d 962 (4th Cir.1985) (affirming denial of motions for recusal, new trial, and habeas relief), *cert. denied,* 479 U.S. 813, 107 S.Ct. 63, 93 L.Ed.2d 22 (1986). Nevertheless, some background review is necessary for a complete understanding of the pending claims.

In the early morning of February 17, 1970, MacDonald's pregnant wife, Colette, and his two daughters, two-year-old Kristen and five-year-old Kimberly, were clubbed and stabbed to death in their apartment at Fort Bragg, North Carolina where MacDonald was stationed as an Army Medical Corps captain. Military police arrived at the scene and found MacDonald lying unconscious across Colette's body in the master bedroom. The bodies of Kristen and Kimberly were found in their bedrooms. MacDonald suffered multiple stab wounds, most superficial, but one which partially collapsed a lung, and was treated and released after a brief hospitalization.

MacDonald maintained in initial and subsequent interviews that the murders had been committed by a group of drug-crazed intruders. He stated that after falling asleep on the couch in the living room, he had been awakened by the screams of Colette and Kimberly and had seen a woman with blond hair wearing a floppy hat, boots and a short skirt carrying a flickering light and chanting "acid is groovy; kill the pigs." He said that three men standing near the couch attacked him, pulling and tearing off his pajama top which he then used to ward off their blows, and that the attackers continued to club and stab him until he lost consciousness. According to MacDonald, he awoke on the hall steps to the living room, found his wife's body in the master bedroom, covered her with his pajama top, and then found the children's bodies in their bedrooms. He called the military police for assistance, but had lost consciousness by the time they arrived.

Investigators initially accepted MacDonald's account of the murders and immediately began searching for four people fitting his descriptions of the alleged intruders. Considerable suspicion was focused upon Helena Stoeckley, a nineteen-year-old Fayetteville resident who resembled MacDonald's description of the female assailant. Stoeckley had been seen returning to her apartment at 4:30 on the ***1346** morning following the killings in the company of men also generally fitting the descriptions given by MacDonald. Within days of the crime, Stoeckley, an acknowledged heavy drug user, began telling people that she was involved in the murders or that she had been in the MacDonald apartment with friends who had committed the murders. She admitted to owning and frequently wearing a blond wig and a pair of white boots and said that she destroyed them within a few days after the crime because they might connect her with the MacDonald murders. At other times, however, Stoeckley denied any knowledge of the murders, saying that she had taken so many drugs on the night in question that she could not remember anything.

As the military police, the Army's Criminal Investigation Division (CID), the Federal Bureau of Investigation (FBI) and the Fayetteville police department examined the crime scene, they began to discover physical evidence which cast doubt on MacDonald's story and caused them to view him as a suspect. For example, threads from MacDonald's blue pajama top, supposedly torn during a struggle

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in the living room, were found in large numbers in the master bedroom and in the children's bedrooms, but not in the living room. A piece of a plastic surgeon's glove, with which the word "pig" appeared to have been written in Colette's blood on the headboard in the master bedroom, was found to match gloves found under a sink in the MacDonald apartment. Moreover, investigators felt that the relative lack of damage to the apartment and the absence of direct physical evidence they could link to intruders was inconsistent with MacDonald's version of events. From this and similar evidence, they became convinced that MacDonald had killed his family and staged the crime scene to cover up the murders.

The Army formally charged MacDonald with the three murders on May 1, 1970, but charges were dropped on October 23, 1970 on the recommendation of the investigating officer following hearings held pursuant to Article 32 of the Uniform Code of Military Justice, and MacDonald was granted a discharge from the Army. The investigation into the murders continued over the next several years, however, and MacDonald was eventually indicted by a federal grand jury on January 24, 1975. A series of pre-trial motions and interlocutory appeals delayed commencement of the trial until July 1979.

At the trial, which lasted seven weeks, the government called twenty-eight expert and lay witnesses and introduced approximately 1,100 pieces of evidence to support its theory that MacDonald, under the stress of long work hours, marital problems, and an argument with his wife over his younger daughter's bed wetting, flew into a rage and killed his wife and older daughter. According to the prosecution, MacDonald then attempted to avoid prosecution and punishment by killing his youngest daughter and staging the crime scene, using an Esquire magazine containing an article about the celebrated murders committed by Charles Manson and his cult and stained with a mixture of Colette and Kimberly's blood, so that it would appear that a similar drug crazed cult had murdered his family.

The heart of the government's case was a painstaking reconstruction of the events surrounding the murders based on government scientists' analysis of blood, fibers, and other physical evidence found at the crime scene. Specifically, the government introduced evidence tending to show that contrary to MacDonald's story, his blue pajama top had not been torn and punctured during a struggle in the living room and later placed by MacDonald on his wife's body to prevent shock, but instead had been torn during a struggle with his wife and punctured while lying stationary on her body. While no fibers from the blue pajama top were found in the living room, 79 such fibers were found in the master bedroom, 19 in Kimberly's bedroom, two in Kristen's bedroom, and two on the blood-stained wooden club which was found outside the house near a utility room door. When the blue pajama top was folded in the same manner as it was found on Colette's body, it was shown that the pattern of puncture holes through the garment was strikingly similar to the pattern of icepick ***1347** wounds suffered by Colette. Moreover, the pocket to the blue pajama top was found in the master bedroom, and it was shown at trial that the pocket had been stained with Colette's type blood prior to being torn from the garment. Because each member of the MacDonald family had a different blood type, the government was also able to present evidence showing that MacDonald's version of the events was contradicted by the actual location of blood stains, spatterings and footprints. The foregoing is only a brief summary of the evidence against MacDonald which is reviewed in more depth in the court's 1985 order denying motions for a new trial and for habeas relief. *See United States v. MacDonald,* 640 F.Supp. at 310-15.

MacDonald's defense consisted primarily of his own testimony, character witnesses, and impeachment of the integrity of the crime scene and evidence offered by the government. MacDonald also argued at trial that the presence of hair, fibers, fingerprints, and candle wax found by government investigators at the crime scene but not matched to any source in the MacDonald household supported MacDonald's testimony that there were intruders in the apartment.

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During the trial, Helena Stoeckley was found by the government in South Carolina and was brought to Raleigh under a court subpoena to testify on behalf of MacDonald. After a day-long recess during which time Stoeckley was interviewed by MacDonald's counsel, she testified before the jury at length regarding her knowledge of the MacDonald murders. The substance of her testimony was that she had never seen MacDonald before trial and had never been in his home. However, she vaguely felt that she might have had some connection with the crimes, since extensive drug use had left her with no memory of her whereabouts between midnight and 5:30 a.m. on the date of the murders. She testified that she had owned a shoulder length blond wig, but to the best of her recollection, was not wearing it when she went out on the night of the murders. She admitted to behavior suggesting that she had gone into mourning following the murders and to burning the wig two days later.

Because Stoeckley's trial testimony was at best inconclusive, MacDonald sought to introduce the testimony of seven witnesses who had heard Stoeckley state at various times that she was involved in the crimes or at least present in the MacDonald apartment on the night of the murders. After listening to the proposed testimony of these individuals without the presence of the jury, the court excluded the evidence on the grounds that it would be inadmissible hearsay and unduly confusing and prejudicial. While the testimony of these out-of-court statements by Stoeckley could arguably have been admissible as statements against Stoeckley's penal interest, the court found that there were no corroborating circumstances clearly indicating the trustworthiness of the statements. *See* Fed.R.Evid. 804(b)(3).

Following his conviction on two counts of second-degree murder and one count of first-degree murder, MacDonald filed an appeal on due process and evidentiary grounds, all of which were ultimately rejected. *United States v. MacDonald,* 688 F.2d 224 (4th Cir.1982), *cert. denied,* 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983). In the fall of 1982, MacDonald retained attorney Brian O'Neill to pursue collateral post-conviction remedies. O'Neill and his staff conducted an extensive investigation of the case, which included a review of materials received in response to Freedom of Information Act (FOIA) requests filed with the Department of Justice, the FBI, and the Army. On April 5, 1984, MacDonald filed motions seeking to have his convictions set aside or a new trial, one styled as a motion for a new trial under F.R.Crim.P. 33 and two for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. The motions were based on: (1) the alleged use of a psychiatrist as a government agent to obtain information from MacDonald in violation of his Fifth and Sixth Amendment rights, *see, e.g., Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); (2) the suppression of ***1348** exculpatory evidence allegedly in possession of the government, including a half-filled bloody syringe, bloody clothes and boots, skin found under Colette's fingernail, and the notes and photographs of a CID photographer suggesting that the letter "G" written on Stoeckley's apartment wall resembled the letter "G" in the word "pig" which was written in blood on the headboard in the master bedroom of the MacDonald apartment, *see, e.g., Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and (3) post-trial statements by Stoeckley and two of her friends, Greg Mitchell and Cathy Perry Williams, in which they confessed to having participated in the murder of MacDonald's family. After an evidentiary hearing and legal arguments by counsel, the court denied all three motions, finding in part that the statements of Stoeckley and her friends would not be admissible at a new trial since circumstances strongly suggested that the confessions were fabricated. The court also found that the evidence that MacDonald claims was suppressed and the new evidence that he would present at a second trial would not have affected the jury's verdict. *United States v. MacDonald,* 640 F.Supp. 286 (E.D.N.C.), *aff'd,* 779 F.2d 962 (4th Cir.1985), *cert. denied,* 479 U.S. 813, 107 S.Ct. 63, 93 L.Ed.2d 22 (1986).

MacDonald continued his quest to overturn his convictions with the aid of private investigators who

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reviewed documents from FOIA releases and conducted further interviews. One of these investigators, Ellen Dannelly, who had been working for MacDonald since 1983, compiled a report for MacDonald in October 1989 containing her findings that FBI laboratory technicians had discovered the presence of one black wool fiber and one white wool fiber in the debris taken from the right biceps area of Colette's pajama top, two black wool fibers and one green wool fiber in the debris removed from the wooden club murder weapon, and two black wool fibers in the debris removed from the mouth area of Colette, none of which were matched to any known source in the MacDonald home. *See* Affidavit of Dannelly at 3. These unmatched fibers were referred to in the government scientists' handwritten lab notes included in FOIA releases, but the fibers were not mentioned in the typewritten FBI lab reports given to MacDonald prior to trial.

In December 1989, attorney Anthony P. Bisceglie, who had been retained by MacDonald to obtain additional FOIA information and who remains as one of MacDonald's attorneys of record for the present motion, received FOIA releases from the FBI consisting of handwritten lab notes compiled by FBI technicians. In order to obtain additional information pertaining to the MacDonald case, Bisceglie went to the Army records office in Baltimore, Maryland to review the entire Army CID MacDonald file. He was accompanied by John Murphy, a paralegal for MacDonald's current habeas counsel Harvey A. Silverglate, and by Fred Bost, an author researching a book on MacDonald's case.

Murphy states that in the course of reviewing copies of handwritten lab notes that he saw for the first time in May 1990, he found evidence indicating the government technicians' awareness of: (1) unmatched blond synthetic hairs, as long as 22 inches, on a hairbrush taken from the MacDonald home, (2) the presence of unmatched black, green, and white woolen fibers found in debris taken from critical places on Colette's body and the wooden club, (3) the presence of unmatched brown/green cotton fibers underneath Colette's body, and (4) the presence of unmatched human hairs in the bedding of the victims. *See* Affidavit of Murphy at 2. Murphy also states that he reviewed several documents received in post-trial FOIA releases indicating that the government was concerned about the lab technicians' findings of unmatched hairs and fibers and the prospect of the defense gaining access to the handwritten lab notes which documented these findings. These documents included: (1) a 1973 memorandum from the United States Attorney for the Eastern District of North Carolina, Thomas P. MacNamara, stating that unidentified hairs found in Colette's hand would "aid the defense"; (2) a pretrial legal research memo written to prosecutor ***1349** Brian M. Murtagh by a law student assistant, Jeffrey S. Puretz, outlining the government's obligation to turn over the lab notes; and (3) a letter from Murtagh to the FBI written two years after trial requesting that all of MacDonald's FOIA requests be denied pending final resolution of the litigation. *Id.* at 39-40.

On October 19, 1990, MacDonald filed the instant petition on the basis of the evidence found by Murphy and listed in the preceding paragraph. MacDonald claims that the lab notes alone require that MacDonald be granted a new trial since they provide direct evidence that MacDonald was not lying when he told of four drug-crazed hippies murdering his family. MacDonald further asserts that the three additional documents consisting of prosecution memos and letters, although not essential to his request for a new trial, demonstrate that prosecutor Murtagh purposefully withheld the handwritten lab notes prior to trial because he had concluded that they were highly exculpatory and would have been material in producing a verdict of acquittal.

II. DISCUSSION

A. Materiality of Allegedly Suppressed Evidence

MacDonald seeks relief under several different legal theories. First, he argues that the prosecution's failure to turn over exculpatory lab notes prior to trial violated the doctrine of *Brady v.*

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Maryland, which forbids "suppression by the prosecution of evidence favorable to an accused ... irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196-97. Second, MacDonald argues that the government violated due process by manipulating the trial testimony of expert witnesses to knowingly mislead the jury and conceal the existence of hair and fiber evidence corroborating MacDonald's story. *See Alcorta v. Texas,* 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Mooney v. Holohan,* 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1934). In a footnote, MacDonald also argues that the government's failure to turn over lab notes written by government agents who testified at trial regarding the subject of the notes may have violated his right to obtain statements and reports of witnesses under the Jencks Act, 18 U.S.C. § 3500. In response, the government attacks the merits of MacDonald's claims and also argues that MacDonald's petition should be legally barred under the doctrine of abuse of the writ. *See McCleskey v. Zant,* 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

[1] Regardless of the legal theory invoked in support of habeas relief or the theory invoked to prevent the court from reaching the merits of MacDonald's claims, the ultimate question that the court must address--and the question of most interest to those who have followed the progress of this case for the past twenty years--is whether the jury's verdict would have been different had the defense been aware of the allegedly suppressed evidence at the time of trial. The purpose of criminal law and the constitutional protection afforded to those accused of crimes is to ensure the orderly and fair administration of justice. The law should not erect technical roadblocks for defendants seeking to receive the due process they are entitled to under the Constitution. At the same time, each of the legal doctrines designed to ensure due process is applied together with some derivation of the concept of materiality, keeping in mind that courts strive ultimately for just results rather than for technical perfection. *See, e.g., Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967) ("[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.").

[2][3][4] Thus, under *Brady* and its progeny, only suppression of evidence that is material to the outcome of a trial violates the due process clause of the Fourteenth Amendment. *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196. Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have *1350 been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). A reasonable probability has in turn been defined as "a probability sufficient to undermine confidence in the outcome." *Id.* Under *Alcorta,* where a conviction is obtained by the prosecutor's false presentation of evidence, a new trial must be ordered "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). A failure to turn over statements of witnesses required under the Jencks Act will only warrant a new trial where the prosecutor's error was not harmless. *Goldberg v. United States,* 425 U.S. 94, 111 n. 21, 96 S.Ct. 1338, 1348 n. 21, 47 L.Ed.2d 603 (1976); *Rosenberg v. United States,* 360 U.S. 367, 371, 79 S.Ct. 1231, 1234, 3 L.Ed.2d 1304 (1959). Finally, under *McCleskey,* second and subsequent habeas petitions will only be permitted where the petitioner, in addition to showing cause for failure to raise the claims earlier, can show actual prejudice from the errors of which he complains or circumstances implicating a fundamental miscarriage of justice. *McCleskey,* 111 S.Ct. at 1470. The fundamental miscarriage of justice exception applies only to "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime" or to cases where "petitioner supplements a constitutional claim with a 'colorable showing of factual innocence.' " *Id.* at 1470-71.

[5] With these various standards of materiality in

mind, the court turns first to the effect that the allegedly suppressed evidence would have had on the trial and the jury's verdict. MacDonald states that he now has sufficient evidence to gain his acquittal and that only "the most blatant result-oriented intellectual dishonesty" could cause the court to conclude that the government's case would have survived a fair trial. Petitioner's Reply Brief at 88. After careful review of the handwritten lab notes at the core of the instant petition, the court finds that MacDonald has somewhat overstated the importance of the newly offered evidence.

The basis of MacDonald's claim is his argument that the allegedly suppressed lab notes reveal the existence of forensic evidence of intruders that was critically lacking at trial. MacDonald asserts that the fibers discussed in the lab notes provide evidence which could have corroborated his testimony that drug-crazed hippies, and not MacDonald, were responsible for the crimes. In the absence of such forensic evidence supporting MacDonald's account of intruders murdering his family, the jury had no alternative but to conclude that MacDonald was lying and that he himself had committed the murders. During closing arguments, the government argued that there was no physical evidence of any intruders in the MacDonald home on the night of the murders and suggested that MacDonald was lying. The court in fact instructed the jurors that if they found that MacDonald had offered an exculpatory statement which proved to be false, they were permitted to consider whether the discrepancy pointed to a consciousness of guilt.

However, close analysis of the actual fiber evidence at issue reveals that the fibers provide little, if any, support for MacDonald's account of the crimes. In order to formulate its response in this action, the government submitted the fibers and hair at issue to an FBI forensic examiner, Michael P. Malone, for reexamination. According to Malone, the blond synthetic fibers found in Colette's clear-handled hairbrush and discussed in the lab notes were not consistent with blond wig hairs from any known wig fibers currently in the FBI laboratory reference collection. Of the four synthetic fibers from the brush which have been analyzed, one matches a grey wig reportedly owned by Colette and three are composed primarily of "saran", a substance which is not suitable for human wigs, but is used to make mannequin and doll hair, dust mops, and patio screens. MacDonald has presented no evidence that blond saran fibers have ever been used in the manufacture of human wigs. While MacDonald argues that Stoeckley's blond ***1351** wig, which was described by one witness as "stringy", may have been a mannequin wig, such speculation is unsupported by any evidence in the record.

The second class of allegedly newly discovered fiber evidence consists of one black wool fiber and one white wool fiber in the debris taken from the right biceps area of Colette's pajama top, two black wool fibers and one green wool fiber in the debris removed from the wooden club murder weapon, and two black wool fibers in the debris removed from the mouth area of Colette, none of which were matched to any known source in the MacDonald home. Despite what MacDonald describes as their "strategic" location, the significance of these fibers is diminished by the fact that they were found in relatively small numbers and that no two of these fibers appear to be from the same source. While MacDonald argues that these fibers' "only possible source is an intruder who had contact with both Colette and the wooden club murder weapon," Petitioner's Brief at 35, the government argues that the fibers could have fallen in the house at any time prior to the murders and then attached to Colette as a result of her contact with various rugs on the night of the murders. The government points out in support of this theory that blood evidence introduced at trial showed that Colette's body was in contact with three different rugs after being attacked. In fact, the white wool fiber found on the right biceps area of Colette's pajama top appears to be a fiber from the white shag rug in the master bedroom. Affidavit of Malone at 10.

Further, the government asserts that these fibers are unmatched to any known sources in the MacDonald household in part due to the fact that the MacDonald family's possessions are no longer available for forensic comparisons. Since most of

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the family's clothing was returned to MacDonald and disposed of after the Army charges against him were dropped, the actual origin of these fibers will never be conclusively determined. However, even allowing for this uncertainty, the court finds that there is no likelihood that the jury would have reached a different verdict had it known about the existence of these few wool fibers.

MacDonald also mentions two other classes of allegedly newly discovered fiber evidence consisting of unmatched brown/green cotton fibers found underneath Colette's body and unmatched human hairs found in the bedding of the victims. As with the wool fiber evidence, the court finds no reason to believe that the result at trial would have been altered had this fiber and hair evidence been brought to the attention of the jury.

[6] Perhaps because the actual fibers would do little to provide evidence that drug-crazed intruders were in the MacDonald home on the night of the murders, MacDonald attempts to argue that the lab notes discussing the presence of the fibers--and not the fibers themselves--constitute the important new evidence that would result in acquittal if presented to the jury. However, even if the lab notes could have been introduced at trial, in the court's opinion the jury's verdict would not have been affected, since the government would have been able to show the relative insignificance of the underlying fibers as discussed above.

Given that the synthetic blond fibers appear not to be wig hair and that the other fibers at issue are unmatched to each other and to known sources, the allegedly suppressed evidence would simply mirror other evidence of unexplained household debris that was presented to the jury. At trial, MacDonald introduced evidence of unidentified fibers, hairs, fingerprints, and candle wax found at the crime scene by government investigators. MacDonald was permitted to argue to the jury that the large amount of unmatched evidence in the apartment supported a conclusion that intruders had committed the murders. Nevertheless, the jury apparently rejected MacDonald's argument that the unexplained household debris undermined the showing made by the government's presentation of physical evidence pointing toward MacDonald's guilt. Where, as here, the allegedly suppressed fibers "would have ***1352** provided merely cumulative evidence" of unmatched household debris, a new trial is not warranted. *United States v. Page,* 828 F.2d 1476, 1479 (10th Cir.), *cert. denied,* 484 U.S. 989, 108 S.Ct. 510, 98 L.Ed.2d 508 (1987)

In addition to the claim that the allegedly newly discovered fiber evidence would have corroborated his account of the murders, MacDonald argues that this evidence would have caused the court to admit the testimony of the seven witnesses who had heard Stoeckley admit to some involvement with the crimes. MacDonald points out that the court barred this hearsay testimony in part due to the fact that "no physical evidence was uncovered at the crime scene which would support Stoeckley's confessions." *United States v. MacDonald,* 640 F.Supp. at 323. MacDonald asserts that the court would have admitted the proposed testimony had it known that the government's own experts had discovered blond synthetic fibers in the hairbrush, unmatched hair in the victims' beds, and other unmatched fibers in strategic locations. MacDonald states that the Fourth Circuit, in reviewing the conviction on direct appeal, noted that had MacDonald been able to present to the jury the witnesses who had heard Stoeckley confess to involvement in the crimes, it would have destroyed the government's case. *See* Petitioner's Brief at 25.

[7] However, the court's exclusion of the Stoeckley hearsay witnesses was based only in part on the absence of corroborating physical evidence. The primary reason for the exclusion of these witnesses was Stoeckley's utter unreliability as evidenced by her demeanor on the stand and her history of drug abuse. As the court explained, most of Stoeckley's statements appeared to be made while she was under the influence of powerful narcotics and "were so clearly untrustworthy that the court should not hesitate to exercise its discretion to exclude the evidence under Rule 403, F.R.E." *United States v. MacDonald,* 485 F.Supp. at 1093. The court's decision on the admissibility of the Stoeckley

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hearsay witnesses would not have been different had the court been aware of the allegedly suppressed fiber evidence at issue here.

Even had these hearsay witnesses been allowed to testify before the jury, the likely effect of such testimony would not have been as great as MacDonald contends. Contrary to MacDonald's assertion, the Fourth Circuit has never stated that these hearsay witnesses would have destroyed the government's case. The Fourth Circuit stated only that: "Had *Stoeckley* testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great." *United States v. MacDonald,* 632 F.2d at 264 (emphasis added). In fact, the holding most relevant to determining the effect that testimony of Stoeckley's hearsay statements would have had on the jury is this court's decision regarding the materiality of post-trial statements by Stoeckley, wherein the court stated that: "[I]f the jury had not heard [Stoeckley's] testimony but instead had heard her so-called confessions, in the court's opinion the jury would not have reached a different verdict, for the government's cross-examination would surely have developed the glaring inconsistencies in her story as previously noted and that because of her drug-crazed condition she was a totally unreliable, untrustworthy witness." *United States v. MacDonald,* 640 F.Supp. at 333. In affirming that decision, the Fourth Circuit held that "the district judge could appropriately find that the ... statements ... did not meet the materiality requirement for a new trial." *United States v. MacDonald,* 779 F.2d at 965. Moreover, even Judge Murnaghan, who stated that he would have admitted the Stoeckley hearsay witnesses at trial had he been the trial judge, recognized that "[i]f such evidence was not persuasive ... the jury, with very great probability, would not have been misled by it." *United States v. MacDonald,* 688 F.2d at 234 (Murnaghan, J., concurring).

[8][9] In sum, the court finds that under any of the relevant legal standards of materiality, the fiber evidence at issue here is insufficient to warrant habeas relief. As *1353 the court noted in its order denying a previous motion for new trial, at a second trial:

> the government would again be able to introduce such damaging evidence against MacDonald as his pajama top, the location of fibers from the pajama top in parts of the house which would be inconsistent with MacDonald's story, the bloody footprint leaving Kimberly MacDonald's bedroom, the pajama top demonstration whereby it was shown that the holes in the top matched icepick wounds on the body of Colette MacDonald, and the other evidence which proved, apparently conclusively so, that MacDonald murdered his family.

United States v. MacDonald, 640 F.Supp. at 332. Having reviewed the history of the proceedings and the newly offered evidence in detail, the court finds that MacDonald has not shown either a "reasonable probability", *see Bagley,* 473 U.S. at 682, 105 S.Ct. at 3383, or "any reasonable likelihood," *see Agurs,* 427 U.S. at 103, 96 S.Ct. at 2397, of a different result had MacDonald been given access to the lab notes at trial. To the extent that the failure to turn over the lab notes could be construed as a violation of the Jencks Act, the court finds that any error by the prosecutor was harmless. *See Goldberg v. United States,* 425 U.S. at 111 n. 21, 96 S.Ct. at 1348 n. 21. Finally, MacDonald has not demonstrated that the alleged suppression of evidence resulted in either actual prejudice or a fundamental miscarriage of justice necessary to excuse his failure to raise the instant claims as part of his initial habeas proceeding. *See McCleskey,* 111 S.Ct. at 1470.

B. Government's Suppression of Exculpatory Evidence

[10] While the court primarily rests its denial of habeas relief on a finding that the allegedly suppressed evidence would not have caused the jury to reach a different verdict at trial, the decision could alternatively be based on the court's finding that the prosecution adequately complied with its duty to turn over exculpatory evidence. In order to establish a *Brady* violation, a petitioner must show that: "(1) the prosecution suppressed the evidence; (2) the evidence would have been favorable to the accused; and (3) the suppressed evidence is

material." *United States v. Wolf,* 839 F.2d 1387, 1391 (10th Cir.), *cert. denied,* 488 U.S. 923, 109 S.Ct. 304, 102 L.Ed.2d 323 (1988).

Regarding the first element of a claim under *Brady,* MacDonald has not shown that the government suppressed any evidence to which he was entitled. While MacDonald was not given access to the handwritten lab notes describing the fiber evidence, the government complied with its duty under *Brady* by allowing MacDonald to examine and test any of the actual physical evidence, including the fibers at issue here. *See, e.g., United States v. Wolf,* 839 F.2d at 1391 ("If the means of obtaining the exculpatory evidence has been provided to the defense, however, a *Brady* claim fails, even if the prosecution does not physically deliver the evidence requested."); *United States v. Page,* 828 F.2d at 1479 ("[A] new trial is not warranted by evidence which, with reasonable diligence, could have been discovered and produced at trial."); *United States v. Gaggi,* 811 F.2d 47, 59 (2d Cir.), *cert. denied,* 482 U.S. 929, 107 S.Ct. 3214, 96 L.Ed.2d 701 (1987) ("no *Brady* violation occurs if the defendant ... should have known the essential facts permitting him to take advantage of any exculpatory evidence"); *United States v. Ramirez,* 810 F.2d 1338, 1343 (5th Cir.), *cert. denied,* 484 U.S. 844, 108 S.Ct. 136, 98 L.Ed.2d 93 (1987) ("a *Brady* violation does not arise if, with reasonable diligence, [defendant] could have obtained the information"); *United States v. Griggs,* 713 F.2d 672, 674 (11th Cir.1983) ("Where defendants ... had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government.").

Here, it is undisputed that MacDonald was given unfettered access to the physical evidence. Pursuant to a June 19, 1979 order of this court, all of the government's physical evidence was made available to Dr. John Thornton, a forensic expert retained by MacDonald. Thornton made no ***1354** effort to examine the hair and fiber evidence currently at issue, choosing instead to concentrate on MacDonald's pajama top, the sheets from the master bedroom, floor boards containing a bloody footprint, and cuttings from the surgical rubber glove fragments. Affidavit of Murtagh at 25. MacDonald now argues that Thornton would have had no reason to look at the fiber evidence since its significance was hidden by the suppression of the lab notes and the fact that the box containing the blond synthetic fibers from the clear-handled hairbrush was labeled "black, black & grey [illegible] synthetic hairs." However, the fact remains that Thornton, for whatever reason, chose not to examine any of the fiber evidence, despite being given an opportunity to do so.

[11] Further, suppression of evidence under *Brady* can only occur with "information which had been known to the prosecution but unknown to the defense." *Agurs,* 427 U.S. at 103, 96 S.Ct. at 2397. Here, MacDonald has presented no evidence that the prosecuting attorneys had read the lab notes currently at issue and there is no reason to suspect that they were aware of any potential exculpatory material in the notes. Prosecutor Brian M. Murtagh, in fact, states affirmatively that he never read the lab notes pertaining to fiber analysis prior to trial and would have had no reason to have done so. *See* Affidavit of Murtagh at 7, 14. In a case such as this one, where the allegedly suppressed evidence was discussed only in a few isolated notations buried in hundreds of pages of handwritten lab notes, *Brady* does not require the prosecution "to peruse through all of its evidence with an eye to the defendant's theory of the case and then to specify to the defendant the evidence which supports that theory." *United States v. Davis,* 673 F.Supp. 252, 256 (N.D.Ill.1987) (emphasis omitted).

Regarding the second element of a claim under *Brady,* while the court is willing to accept MacDonald's assertion that the handwritten lab notes were exculpatory, there is some doubt as to whether the allegedly suppressed evidence would have actually aided the defense had the notes been available at trial. Without any evidence that saran is used in the production of human wig hair, the presence of blond saran fibers in a hairbrush in the MacDonald home would have done little to corroborate MacDonald's account of an intruder with blond hair or a blond wig. Moreover,

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Stoeckley testified at trial that she was not wearing her wig on the night of the murders, although she apparently told Jane Zillioux, a neighbor in Nashville, Tennessee, that she was worried about her wig getting wet from the rain. Similarly, the other allegedly suppressed fiber evidence would have been of rather limited exculpatory value given that the unmatched fibers were not found in sufficient quantity-- particularly in comparison to the large numbers of fibers from MacDonald's pajama top--to suggest a life and death struggle with four intruders.

C. Government's Presentation of False or Misleading Evidence

[12] In addition to his claim under *Brady,* MacDonald asserts a claim under *Alcorta v. Texas* and *Mooney v. Holohan.* Those cases hold generally that due process is denied when the government presents to the jury testimony which is false and the government knows of its falsity. *Alcorta,* 355 U.S. at 31, 78 S.Ct. at 105; *Mooney,* 294 U.S. at 112, 55 S.Ct. at 341. As with MacDonald's *Brady* claim, the court primarily bases its decision to deny relief under *Alcorta* on the grounds that any alleged violation of MacDonald's due process rights was not material to the result at trial. However, the court addresses the elements of MacDonald's claim beyond materiality to make it clear that MacDonald has not met his burden of establishing even a technical violation of his rights under *Alcorta* and *Mooney.*

Critical to the analysis of constitutional violations under the *Alcorta* doctrine is the question of whether the prosecution knew of the falsity of the testimony it had elicited and permitted it to go uncorrected. Petitioner "must show that the prosecutor or other government officers knew the testimony in question was false in order to *1355 prevail." *Thompson v. Garrison,* 516 F.2d 986, 988 (4th Cir.), *cert. denied,* 423 U.S. 933, 96 S.Ct. 287, 46 L.Ed.2d 263 (1975). *See also Beasley v. Holland,* 649 F.Supp. 561, 566 (S.D.W.V.1986) (Petitioner must show "that the false testimony was knowingly and intentionally employed by the government in order to obtain a conviction."). The focus of an inquiry into an *Alcorta* claim is therefore on the state of mind of the prosecution team. However, "speculative and conjectural possibilities" or "bald allegations ... are not sufficient to impute knowledge to the government." *United States v. Cole,* 755 F.2d 748, 763 (11th Cir.1985).

MacDonald claims that the alleged misleading testimony was elicited from witnesses Dillard Browning, Paul Stombaugh, and Janice Glisson, all of whom were government forensic experts who had conducted tests on portions of the physical evidence. MacDonald asserts that the jury was misled by the testimony of Browning and Stombaugh, who stated that two fibers from MacDonald's pajama top had been found on the wooden club murder weapon but did not reveal the presence of a dark woolen fiber on the club, as reported in the handwritten lab notes. MacDonald also argues that the government manipulated the presentation of evidence so that Glisson would only testify about her blood examinations so as to avoid any mention by her of the blond fibers found in the hairbrush.

In arguing that his due process rights were violated by prosecutorial misconduct, MacDonald engages in a vicious, but largely unsupported, attack on the conduct, ethics and integrity of prosecutor Murtagh. MacDonald states that Murtagh "ignored the guidelines of his employer, the United States Department of Justice," Petitioner's Brief at 75, n. 59, engaged in "intentional suppression," Petitioner's Reply Brief at 75, n. 28, and "orchestrated one of the cruelest charades in American legal history." *Id.* at 89.

Despite MacDonald's protestations that he has set forth a specific claim and has identified the sources of all of his information, *id.* at 52 n. 39, the court finds that MacDonald's invective against Murtagh is based on mere speculation regarding the motivations for his actions. While MacDonald attacks Murtagh's failure to turn over exculpatory material as a "reprehensible" deception of the court, *id.* at 64 n. 52, no evidence is offered to show that Murtagh was aware of the contents of the

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handwritten lab notes at issue. Further, there is no evidence that Glisson's testimony was limited to discussion of her blood analysis for any reason other than the fact that she was the government's primary serology expert in the case. Regarding the failure of Browning and Stombaugh to mention the presence of an unmatched fiber on the club, a review of the record shows that they testified about the presence of items of debris from the club that matched the pajama top but never specifically stated that these were the only fibers found in that location. Trial Transcript at 3784 (Browning), 4097-98 (Stombaugh). Moreover, the jury was told by Browning that "there were many single fibers or loose fibers" found in the MacDonald home and not matched to any known source, thus negating the suggestion that the jury would have been led to believe that no other fibers were found on the club. *Id.* at 3880.

In short, what MacDonald ascribes to Murtagh's bad faith manipulation of testimony at trial appears to the court to be the result of factors unrelated to prosecutorial misconduct. The court has had the opportunity to observe the conduct of counsel for the government and for MacDonald over the last sixteen years and has found all counsel, without exception, to have performed in a diligent and professional manner. While there have been sharp conflicts over a multiplicity of procedural and substantive issues, the court has not perceived any instance where attorneys for either side crossed the boundary between zealous advocacy and impropriety. Any suggestion that the government engaged in conduct intended to deny MacDonald his right to a fair trial is unsupported by the extensive record in this action.

***1356** *D. Government's Failure to Turn Over Statements of Witnesses*

In a footnote, MacDonald argues that the government's failure to turn over lab notes written by government agents who testified at trial regarding the subject of the notes may have violated his right to obtain statements and reports of witnesses under the Jencks Act, 18 U.S.C. § 3500. *See also Jencks v. United States,* 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). MacDonald has not pressed this argument either in briefs or during the motion hearing, but for the sake of completeness, the court will address the merits of the claim. Again, the primary basis for denying this claim is that any alleged Jencks Act violation would not have materially affected the result at trial. Additionally, MacDonald has failed to show that the government wrongfully withheld any prior statements of witnesses relating to the fiber evidence at issue.

[13] Under the Jencks Act, the government is only required to produce to the defendant a statement of a witness "which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). A Jencks Act request must be made at trial following the testimony of a witness, and the government is under no obligation to turn over prior statements absent a request from the defendant. *United States v. Lemus,* 542 F.2d 222, 223 (4th Cir.1976), *cert. denied,* 430 U.S. 947, 97 S.Ct. 1584, 51 L.Ed.2d 794 (1977).

In the present case, MacDonald has not shown that any of the lab notes discussing the allegedly suppressed fiber evidence were the focus of Jencks Act requests. The lab notes of Janice Glisson, which discussed the blond synthetic fibers, could not be construed as Jencks material since she gave no testimony relating to her fiber examinations. The lab notes of James C. Frier, which noted the presence of black wool and other fibers, were not subject to disclosure under the Jencks Act because Frier never testified at trial. MacDonald also complains that he did not receive the lab notes of Dillard Browning which referred to findings of unmatched hair and fiber, but no request was made for Browning's lab notes after his direct testimony or at any time during his cross examination. Affidavit of Murtagh at 9-10.

E. Abuse of the Writ

[14] As the court has made clear above, MacDonald's petition fails to establish a violation of his constitutional rights entitling him to habeas relief. An additional independent ground for

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denying MacDonald's petition is provided by the doctrine of abuse of the writ, which defines the circumstances in which federal courts may decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus. Under this doctrine, the court need not reach the merits of MacDonald's claims at this time, since the information upon which the instant petition is based was in MacDonald's possession in 1984 when a previous petition for a writ of habeas corpus was filed.

In *McCleskey v. Zant,* a case released during the pendency of these proceedings, the Supreme Court held that second or subsequent habeas actions will only be allowed upon a showing of "cause and prejudice" or a showing "that a fundamental miscarriage of justice would result from a failure to entertain the claim." *McCleskey,* 111 S.Ct. at 1470. The cause standard, borrowed from procedural default cases, "requires the petitioner to show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim" previously. *Id.* The Supreme Court did not specifically address the issue of prejudice, but held generally that a petitioner must show actual prejudice from the errors of which he complains. *Id.* The "miscarriage of justice" exception applies only to "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." *Id.*

[15] Procedurally, since the government has properly pleaded abuse of the writ, MacDonald bears the burden of disproving abuse. *Id.* MacDonald first attempts to fulfill that burden by arguing ***1357** that the instant petition is not a second habeas petition, because the 1984 motions, some of which were purportedly based on 28 U.S.C. § 2255, should have been considered simply as a motion for new trial based on the ground of newly discovered evidence filed within the two-year time limit of F.R.Crim.P. 33. However, it cannot be seriously contended that the 1984 motions were not at least in part brought under the habeas corpus statute. In particular, MacDonald's claim based on the alleged use of a psychiatrist as a government agent to obtain information from MacDonald in violation of his Fifth and Sixth Amendment rights was not supported by any newly discovered evidence and therefore could only have been brought under 28 U.S.C. § 2255.

Next, MacDonald contests the retroactive application of *McCleskey* to create a procedural barrier to his action, which was filed almost six months before the *McCleskey* decision was released. However, in the *McCleskey* case itself, the rule announced was applied retroactively to bar a second habeas petition filed by the petitioner in 1987. Moreover, decisions refining legal principles governing habeas petitions are routinely applied retroactively to pending habeas petitions. *See, e.g., Felix v. Virgin Islands Government,* 702 F.2d 54, 57 (3d Cir.1983); *O'Berry v. Wainwright,* 546 F.2d 1204, 1218 n. 23 (5th Cir.), *cert. denied,* 433 U.S. 911, 97 S.Ct. 2981, 53 L.Ed.2d 1096 (1977). The Supreme Court stated that its decision in *McCleskey* was consistent with other modern abuse of the writ decisions. *McCleskey,* 111 S.Ct. at 1471. Thus *McCleskey* is a refinement of existing law rather than a statement of new law, and its holding can be applied to MacDonald's pending habeas petition.

MacDonald also attempts to distinguish *McCleskey* on the grounds that it involved a habeas proceeding following a state criminal conviction, while the instant petition arises out of a federal criminal proceeding. Although the concerns of federal deference toward state proceedings present in Section 2254 petitions are absent in Section 2255 petitions, the underlying rationale of *McCleskey* was based on ensuring finality in habeas litigation regardless of the origin of the criminal conviction. *Id.* at 1468.

[16] Regarding his failure to raise the instant claims at the time of the initial habeas proceedings, MacDonald argues that he did not deliberately withhold claims based on the lab notes from his 1984 petition. However, MacDonald's intent is irrelevant, since "[a]buse of the writ is not confined to instances of deliberate abandonment." *Id.* at 1467. The real issue here is not whether the allegedly newly discovered evidence was

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deliberately withheld from the 1984 petition, but rather whether the failure to raise these issues in 1984 was due to inexcusable neglect on the part of MacDonald's first habeas counsel. A lengthy quote from *McCleskey* is instructive here:

> That McCleskey did not possess or could not reasonably have obtained certain evidence fails to establish cause if other known or discoverable evidence could have supported the claim in any event. "[C]ause ... requires a showing of some external impediment *preventing* counsel from constructing or raising a claim." For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim. Abuse of the writ doctrine examines *petitioner's* conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process. The requirement of cause in the abuse of the writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence ***1358** discovered later might also have supported or strengthened the claim.

Id. at 1472 (cites omitted; emphasis in original).

MacDonald contends that the reason that the instant claim was not raised in 1984 is that "[t]he government never disclosed until 1990 the documents upon which this claim is based." Petitioner's Reply Brief at 80. However, a close inspection of the affidavits and documents submitted by both sides belies MacDonald's assertion that the crucial documents were not available in 1984. The affidavit of Karen R. Davidson, an associate of MacDonald's previous habeas counsel Brian O'Neill, states that lab notes of James Frier documenting the existence of black, green and white wool fibers taken from the body of Colette and from the club are date-stamped as having been received by O'Neill's office from the FBI on July 20, 1983. Affidavit of Davidson at 6. Davidson, though, has no memory of having seen these notes or recognizing their importance.

Regarding the synthetic blond fiber from the clear-handled hairbrush, Davidson admits to having seen a page from Janice Glisson's lab notes which mentions the presence of synthetic blond fibers but contains a question mark after the word "synthetic". This page not only bears a date-stamp showing that it was received in O'Neill's office on June 30, 1983, but also has attached to it a post-it note from a law student clerk, John Crouchley, showing that the potential significance of this document was explored by members of the MacDonald legal team at the time. *See* Affidavit of Davidson, Exhibit 2. Davidson states that the presence of the blond synthetic fiber in the hairbrush was not included in the 1984 motion because of the legal team's inability to find any confirmation of the ambiguous reference to blond synthetic hair. Davidson further states that had she been aware of a so-called confirmatory note in which Glisson again referenced findings of blond synthetic hairs, she would have brought them to O'Neill's attention for inclusion in the 1984 motion. This second reference to blond synthetic hairs was apparently not discovered by any member of his legal or investigative team until 1990.

Thus according to evidence submitted by MacDonald, all of the lab notes at issue except Glisson's confirmatory note regarding blond synthetic hair were date-stamped as having been received in O'Neill's office in 1983. Clearly the 1983 and 1984 FOIA releases contained much, if not all, of the information upon which the instant claims are based. The court notes that private investigator Ellen Dannelly had by October 1989 compiled a report for MacDonald discussing the unmatched fibers found on the club and on Colette's mouth and biceps area. Since the lawyer retained by MacDonald to obtain FOIA releases did not begin to receive additional documents until December 1989, Dannelly's conclusions must have been based

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on information available to MacDonald by 1984.

Moreover, there is evidence submitted by the government that the confirmatory note, which MacDonald claims would have led to the inclusion of a claim based on suppressed fiber evidence in the April 1984 motions, was actually part of a FOIA release sent by the government to O'Neill in August 1984, while the first habeas petition was awaiting oral argument. Although not date-stamped as received by O'Neill's office, the page of Glisson's lab notes containing the confirmatory note bears a handwritten number 785 in the lower right hand corner. Janice W. Barkley, who was involved in processing FOIA requests in the MacDonald case as a civilian employee of the army, states that she numbered that document prior to January 26, 1984 as part of a sequence of documents to be released to O'Neill. Affidavit of Barkley at 11. G.M. Andersen, who replaced Barkley upon her resignation, states that this document was included in a FOIA release sent to O'Neill in August 1984. Affidavit of Andersen at 12.

Taken as a whole, the evidence regarding dates of FOIA releases of lab notes undermines MacDonald's contention that he did not have information sufficient to advance the claims made in this petition until 1990. At the very least, by early 1984 O'Neill had ***1359** possession of--if not knowledge of--lab notes making reference to all of the fibers claimed by MacDonald to show the presence of intruders. Prior to the filing of the 1984 motion, the only document of arguable significance unavailable to O'Neill was the confirmatory lab note regarding synthetic blond fibers, and this document appears to have been sent to O'Neill in August 1984.

MacDonald earnestly contends that the confirmatory note was never received by O'Neill, despite the appearance of FOIA release numbers indicating that it was sent in August 1984. Even accepting MacDonald's avowal that this confirmatory note was never sent or was somehow lost en route, the court finds that MacDonald was put on notice of a potential claim based on the blond synthetic fibers in 1984 and should not be permitted to raise such a claim more than six years later. It is undisputed that MacDonald's counsel in 1984 had actual knowledge of the initial Glisson note making reference to synthetic blond fibers found in the clear handled hairbrush. Glisson's reference to blond synthetic fibers could have been confirmed by examining the actual fibers at issue, since the physical evidence taken from the scene remained available to MacDonald at all times. MacDonald's further suggestion that, in the absence of the confirmatory note, a claim based on the blond synthetic hairs would have subjected him to sanctions under Rule 11 of the Federal Rules of Civil Procedure is without merit.

In addition to the lab notes, MacDonald ascribes significance to three memoranda found by Murphy in the FOIA releases, including: (1) a 1973 memorandum from the United States Attorney for the Eastern District of North Carolina, Thomas P. MacNamara, stating that unidentified hairs found in Colette's hand would "aid the defense"; (2) a pretrial legal research memo written to prosecutor Brian M. Murtagh by a law student assistant, Jeffrey S. Puretz, outlining the government's obligation to turn over the lab notes; and (3) a letter from Murtagh to the FBI written two years after trial requesting that all of MacDonald's FOIA requests be denied pending final resolution of the litigation. These memoranda relate primarily to MacDonald's *Alcorta* claim of knowingly orchestrated false or misleading presentation of evidence.

As with the lab notes, it appears that some or all of these memoranda were available to MacDonald prior to the filing of the 1984 motion. With respect to the U.S. Attorney's prosecution memo, the copy submitted by MacDonald bears a date stamp apparently indicating that it was received in O'Neill's office on February 17, 1983 from the Department of Justice. *See* Affidavit of Murphy, Exhibit 32. With respect to the Puretz Memorandum, it is apparent from the FOIA number at the bottom right hand corner that this document was released to O'Neill at least by November 1983. *See* Affidavit of Murphy, Exhibit 33; Affidavit of Murtagh at 31; Affidavit of Ross at 2-5. With respect to the Murtagh letter about FOIA requests,

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the copy submitted by MacDonald bears a date stamp apparently indicating that it was received in O'Neill's office on August 1, 1983 from the Department of Justice. *See* Affidavit of Murphy, Exhibit 35. Thus to the extent that these memoranda could have given rise to a habeas claim, MacDonald is barred from introducing such a claim for the first time in 1990, since the documents were in MacDonald's possession when he filed his initial habeas petition.

[17] As a final attempt to establish cause for not including the instant claim in the 1984 motion, MacDonald argues that O'Neill's failure to recognize the significance of documents received in his office amounted to ineffective assistance of counsel and therefore constituted cause excusing abuse of the writ. However, this argument is precluded by the Supreme Court's recent holding that where there is no constitutional right to counsel, as in habeas proceedings, a showing of attorney error is insufficient to meet the cause standard in procedural default cases. *Coleman v. Thompson,* 501 U.S. 722, ---- - ----, 111 S.Ct. 2546, 2564-67, 115 L.Ed.2d 640 (1991).

***1360** Thus MacDonald has failed to show cause for his failure to include the current claims in his first petition for a writ of habeas corpus filed in April 1984. At that time, MacDonald either possessed or could have discovered through reasonable investigation the information upon which the instant petition is based. Further, as discussed above, MacDonald has not shown actual prejudice resulting from the errors of which he complains. Even in the absence of a showing of cause and prejudice excusing abuse of the writ, courts are required to address the merits of a second or subsequent habeas petition where a petitioner "supplements a constitutional claim with a 'colorable showing of factual innocence.' " *McCleskey,* 111 S.Ct. at 1471. However, as explained more fully above, MacDonald has not demonstrated that his case fits within this "narrow class of cases" implicating a fundamental miscarriage of justice or that "a constitutional violation probably has caused the conviction of one innocent of the crime." *Id.* 111 S.Ct. at 1470.

III. CONCLUSION

In the 1985 order which denied motions for a new trial and for a writ of habeas corpus, the court noted that the evidence presented at trial was the result of an extensive analysis of the crime scene over a period of nine years and that five years of additional investigation had failed to uncover evidence which would undermine confidence in the jury's verdict. Now, more than six years later, the court is again asked to review the jury's findings in light of evidence only recently discovered by MacDonald's apparently indefatigable team of investigators and lawyers.

Although relief could be denied solely on the basis of a procedural barrier due to MacDonald's failure to raise the instant claims as part of his initial habeas proceedings, the court has reviewed in detail the newly discovered evidence and has considered the merits of MacDonald's claims. Having done so, the court finds that the fiber evidence presented here for the first time would have been insufficient to alter the result at trial. In the end, the additional evidence has not changed the court's opinion that "if the government were again called upon to present its evidence at a new trial and MacDonald was able to put all, or even selected parts of his new evidence before a second jury, the jury would again reach the almost inescapable conclusion that he was responsible for these horrible crimes." *United States v. MacDonald,* 640 F.Supp. at 334.

Based on the foregoing, MacDonald's petition for a writ of habeas corpus must be denied. An order accordingly will be entered.

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(Cite as: 966 F.2d 854)

H

Briefs and Other Related Documents

United States Court of Appeals,
Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Jeffrey R. MacDONALD, Defendant-Appellant.
No. 91-6613.

Argued Feb. 5, 1992.
Decided June 2, 1992.

Petitioner's convictions for murder of his family were reversed by the Court of Appeals, 632 F.2d 258, 635 F.2d 1115. The United States Supreme Court reversed, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696, and conviction was affirmed, 688 F.2d 224. After initial writ of habeas corpus was denied, 640 F.Supp. 286, and denial was affirmed, 779 F.2d 962, second petition was filed. The United States District Court for the Eastern District of North Carolina, Franklin T. Dupree, Jr., Senior District Judge, denied petition, 778 F.Supp. 1342, and petitioner appealed. The Court of Appeals, Donald Russell, Circuit Judge, held that: (1) petitioner failed to show cause for not raising newly discovered hair and fiber evidence in prior habeas petition, and (2) dismissal, under abuse of the writ doctrine would not result in fundamental miscarriage of justice.

Affirmed.

West Headnotes

[1] Habeas Corpus ⇐896
197k896 Most Cited Cases
Federal statutes governing successive habeas petitions do not foreclose application of judicially created abuse of writ doctrine. 28 U.S.C.A. §§ 2244(a), 2255.

[2] Habeas Corpus ⇐898(1)
197k898(1) Most Cited Cases
Abuse of writ doctrine in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in first federal habeas proceeding.

[3] Habeas Corpus ⇐899
197k899 Most Cited Cases
Government bears initial burden of pleading abuse of the writ; it meets its burden by identifying particular claims not raised in prior habeas petition and asserting abuse of writ.

[4] Habeas Corpus ⇐899
197k899 Most Cited Cases
After government satisfies initial burden of pleading abuse of the writ, burden then shifts to petitioner, in order to avoid dismissal, to show that failure earlier to raise claims in prior habeas petition may be excused under one of two narrow exceptions.

[5] Habeas Corpus ⇐898(2)
197k898(2) Most Cited Cases
Under first exception to abuse of the writ doctrine, petitioner can overcome dismissal upon showing of cause for not raising claim previously and showing of prejudice; if petitioner fails to meet first exception, court can review petition only upon showing that fundamental miscarriage of justice would result from failure to entertain claim.

[6] Habeas Corpus ⇐898(2)
197k898(2) Most Cited Cases
In asserting "cause and prejudice" justification for failing to raise claim in earlier habeas petition, petitioner must show cause by some objective factor external to defense, which impeded counsel's efforts to raise claim in prior habeas petition.

[7] Habeas Corpus ⇐898(2)

197k898(2) Most Cited Cases
Attorney error in initial habeas proceeding cannot serve as cause to review subsequent petitions. U.S.C.A. Const.Amend. 6.

[8] Habeas Corpus ⚿898(2)
197k898(2) Most Cited Cases
If petitioner fails to establish cause, court may still entertain successive habeas petition in extraordinary cases where failure to do so would result in fundamental miscarriage of justice.

[9] Habeas Corpus ⚿898(2)
197k898(2) Most Cited Cases
Petitioner can satisfy "fundamental miscarriage of justice" exception to abuse of the writ doctrine only where he or she makes colorable showing of factual innocence; that is, petitioner must show fair probability that, in light of all evidence, including that alleged to have been illegally admitted, and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, trier of fact could have entertained reasonable doubt of his or her guilt.

[10] Habeas Corpus ⚿898(3)
197k898(3) Most Cited Cases
Petitioner convicted of murdering his wife and children failed to show cause for not raising newly discovered hair and fiber evidence in prior habeas petition, as required for exception to abuse of the writ doctrine to apply; lab notes relating to hair evidence were seen and passed over by counsel in previous habeas appeal, and lab notes pertaining to fiber evidence were in possession of petitioner's counsel prior to filing first petition.

[11] Habeas Corpus ⚿898(3)
197k898(3) Most Cited Cases
Dismissal, under abuse of the writ doctrine, of successive habeas petition brought by petitioner convicted of murdering his wife and children, would not result in fundamental miscarriage of justice; although petitioner claimed that newly discovered hair and fiber evidence was consistent with his theory that intruders had committed murders, there were other likely explanations for such evidence, and evidence did not create reasonable doubt concerning petitioner's guilt.

***855** Harvey A. Silverglate, Silverglate & Good, Boston, Mass., and Alan M. Dershowitz, Cambridge, Mass., argued (Philip G. Cormier, Thomas C. Viles, Andrew Good, Silverglate & Good, Boston, Mass., Roger C. Spaeder, David A. Hickerson, Zuckerman, Spaeder, Goldstein, Taylor & Kolker; Anthony P. Bisceglie, Bisceglie & Walsh, Washington, D.C., Norman B. Smith, Smith, Follin & James, Greensboro, N.C., and John J.E. Markham, II, Santa Clara, Cal., on brief), for defendant-appellant.

John Fichter DePue, Crim. Div., U.S. Dept. of Justice, Washington, D.C., argued (Robert S. Mueller, III, Asst. Atty. Gen., James S. Reynolds, Chief, Terrorism and Violent Crime Section, Laura Ross Blumenfeld, Crim. Div., U.S. Dept. of Justice, Washington, D.C., Margaret Person Currin, U.S. Atty., Brian M. Murtagh, Sp. Asst. U.S. Atty., and Eric Evenson, Asst. U.S. Atty., Raleigh, N.C., on brief), for plaintiff-appellee.

Before RUSSELL and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

OPINION

DONALD RUSSELL, Circuit Judge:

Jeffrey MacDonald appeals the district court's denial of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2255 (1988). MacDonald seeks relief through a second habeas petition from his 1979 conviction for the murders of his wife ***856** and two daughters. He presents newly discovered evidence, which, he claims, the government suppressed at trial and which, he also claims, discredits the government's case against him and corroborates his exculpatory account of the murders. We find that MacDonald does not meet the stringent requirements of *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), necessary to overcome dismissal of a second or subsequent collateral claim for abuse of the writ. He does not show sufficient cause for failing to raise this evidence in his first habeas petition. Neither does he persuade us that

dismissal of the petition would result in a fundamental miscarriage of justice. Accordingly, we affirm that portion of the district court's opinion dismissing MacDonald's petition as an abuse of the writ and decline to reach the merits of his petition.

I.

We set forth briefly the circumstances of the murders and trial, providing only facts relevant to the newly discovered evidence raised here. The details of this case have been adequately presented in our several prior decisions. *See, e.g., United States v. MacDonald,* 688 F.2d 224 (1982); *United States v. MacDonald,* 632 F.2d 258 (1980); *United States v. MacDonald,* 531 F.2d 196 (1976).

In the early morning of February 17, 1970, the wife and two young daughters of Captain Jeffrey MacDonald, an Army surgeon, were brutally murdered in their home on Fort Bragg Army base. Physical evidence found on the scene and analyzed by government forensic experts convinced federal investigators that MacDonald himself carried out the killings. The United States relied principally on this forensic evidence, and an absence of evidence corroborating MacDonald's story, to prove its case at trial.

MacDonald has consistently maintained his own account of the murders. He claims that a group of drug-crazed intruders, including a woman with blond hair, entered the house, murdered his family and injured him. Government investigators located a woman living locally named Helena Stoeckley, who generally met the description given by MacDonald. She told investigators that she could not remember her whereabouts the night of the murders because of heavy drug use. Her trial testimony was similarly inconclusive. The trial judge then refused to admit Stoeckley's out-of-court statements inculpatory of herself, which were offered into evidence by the defense, including recanted confessions, because Stoeckley proved too unreliable a witness.

A federal jury convicted MacDonald of the murders, and the convictions were affirmed on direct appeal. [FN1] Counsel for MacDonald then filed the first habeas petition in district court. The petition sought relief based on, *inter alia,* alleged suppression of exculpatory evidence by government prosecutors. The district court denied relief and we affirmed the denial. *United States v. MacDonald,* 640 F.Supp. 286 (E.D.N.C.1985), *aff'd,* 779 F.2d 962 (4th Cir.1985), and *cert. denied,* 479 U.S. 813, 107 S.Ct. 63, 93 L.Ed.2d 22 (1986).

> FN1. This Court initially dismissed the conviction under the Sixth Amendment on the grounds that MacDonald had not been afforded a speedy trial. *United States v. MacDonald,* 632 F.2d 258 (1980). The Supreme Court then reversed dismissal, finding no Sixth Amendment violation. *United States v. MacDonald,* 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). On remand, the panel confirmed the conviction, denying the Sixth Amendment claim and various evidentiary claims. *United States v. MacDonald,* 688 F.2d 224 (1982), *cert. denied,* 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983).

On October 19, 1990, MacDonald filed a second habeas petition, at issue here, pursuant to 28 U.S.C. § 2255. MacDonald offered newly discovered, and allegedly exculpatory, evidence he claimed the government suppressed during trial in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In addition, MacDonald claimed that the government violated his due process rights by presenting its case in a manner intentionally designed to conceal this exculpatory evidence. The evidence consists of government forensic lab notes describing (1) three blond synthetic hairs found in a hairbrush located in ***857** the MacDonald home and (2) black and green wool fibers, not matched to any source in the MacDonald home, found on the murder weapon and on Colette MacDonald's body. [FN2]

> FN2. Counsel for MacDonald challenges suppression of the lab notes themselves and not the actual physical evidence. Counsel concedes that the physical evidence alone does not offer conclusive

proof of MacDonald's account of intruders. However, counsel asserts that the notes made by the government's own forensic experts showing unidentified, suspect evidence would have diminished the strength of the government's forensic case.

MacDonald contends that the lab notes corroborate his story of intruders entering the home and murdering his wife and children. He has consistently maintained that one of the intruders was a woman with blond hair. Other evidence at trial showed that the suspected female intruder, Stoeckley, owned and often wore a cheap blond wig and may have been wearing it on the night of the murders. [FN3] Investigators located the hairbrush containing the blond hairs near the kitchen telephone in the MacDonald house. In a post-trial confession, Stoeckley recalled answering the MacDonald's telephone during the attacks and then hanging up after the caller asked for Dr. MacDonald. [FN4]

FN3. Forensic experts have never been able to compare the blond hair strands to Stoeckley's wig because she burned the wig a few days after the murders.

FN4. After MacDonald's conviction, Jimmie Friar, a mental patient of Dr. MacDonald's, corroborated Stoeckley's statement. He claimed to have called the MacDonald home at 2:00 a.m. on the morning of the murders, heard a woman answer the phone, and then heard a man in the background say, "Hang up the Goddamned phone."

MacDonald also contends that evidence of various unidentified dark wool fibers found in Colette's mouth, on her arm, and on the wooden club used to murder her is further proof of intruders. These fibers were not matched to any tested source in the MacDonald home. Furthermore, Stoeckley was known to wear black and dark clothing.

Compounding the value of this evidence for MacDonald is the fact that the district court refused to admit Stoeckley's out-of-court confessions into evidence at trial. The court found her confessions untrustworthy due, in part, to the lack of corroborating evidence supporting the presence of intruders. MacDonald, of course, contends that had the lab notes been made known to the district court judge at the time of trial, the court would have allowed into evidence Stoeckley's out-of-court confessions. He further argues that the cumulative effect of the hair and fiber evidence and the confessions would have been a reasonable doubt in the minds of the jurors.

In reply, the government dismisses the evidence as inconsequential, just as it had done at the time of trial. According to one of its forensics experts, the three blond synthetic hairs found in the brush were made of saran, an inexpensive substance generally used only in doll hair and mannequin wigs. The hairs differed from one another in chemical composition, indicating that they did not originate from the same source. Family photos show that the MacDonald girls owned several dolls, and they were known to brush the dolls' hair. The black and green wool fibers were only a few of several unidentified fibers found on Colette MacDonald and on the murder weapon. Because government experts considered these wool fibers forensically insignificant at the time of trial, they did not attempt to match them to any source in the MacDonald home. One government expert explained that a carpet or rug is particularly conducive to the transfer of fibers, leading the government to conclude during its investigation that the unidentified fibers likely came from contact with one of the carpets in the MacDonald house.

The government further argues that the court still would not have admitted Stoeckley's out-of-court confessions had it known of the evidence presented in this appeal. The government asserts that Stoeckley's mental instability due to prolonged, heavy drug use and her unreliable character were the primary reasons for not admitting the *858 confessions, reasons unchanged by the new evidence.

Moreover, the government claims that MacDonald

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is now procedurally barred from raising this claim because MacDonald's counsel had possession, if not actual knowledge, of the lab notes at the time of his prior collateral appeal. [FN5] In 1983-84, in preparation for MacDonald's first collateral appeal, counsel requested and received copies of investigation files from the Army Criminal Investigation Division (CID), the Department of Justice, and the FBI. The files contained lab notes of CID Chemist Janice Glisson describing the blond synthetic hairs and lab notes reflecting the presence of black and green wool fibers. All documents were date stamped upon receipt by MacDonald's counsel, providing evidence that these particular lab notes were actually received in 1983-84. In fact, that portion of Janet Glisson's lab notes discussing the blond synthetic hair was tagged and annotated by defense counsel, showing that a member of the defense team had at least seen and considered the evidence. These are the same documents which present counsel for MacDonald now introduces as newly discovered evidence.

> FN5. MacDonald's trial counsel has had access to the physical evidence since before the original trial. Present counsel argues that access should not impute knowledge because the physical evidence of blond synthetic hair and woolen fibers was effectively hidden from MacDonald. It was among thousands of pieces of physical evidence filling an entire jail cell. We do not address this dispute since it is the lab notes, and not the physical evidence itself, that MacDonald now brings into issue.

The district court agreed with the government. It issued an exhaustive Memorandum of Decision, carefully addressing and rejecting on the merits each argument raised in this collateral appeal. *United States v. MacDonald,* 778 F.Supp. 1342 (E.D.N.C.1991). Although the court found the petition procedurally barred under *McCleskey v. Zant* as an abuse of the writ, it nevertheless addressed the merits of MacDonald's claims in an effort to ensure justice in this highly public and controversial case. Ultimately, the court based its denial on a finding that the evidence would not have produced a different jury verdict if known to defense counsel at the time of trial.

MacDonald now appeals the district court's denial of his habeas petition.

II.

As the following discussion will explain, we find the abuse of the writ doctrine, as defined in *McCleskey v. Zant,* 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), sufficient grounds for disposing of MacDonald's habeas petition. [FN6] We feel confident that the doctrine, as applied in this case, provides adequate safeguards against dismissal of any truly meritorious claims. [FN7]

> FN6. Without deciding whether or not *McCleskey* announces a new rule, we find no retroactivity issue here. *See Harris v. Vasquez,* 949 F.2d 1497, 1512 (9th Cir.1991) (*McCleskey* does not announce new rule), *cert. denied,* 503 U.S. 910, 112 S.Ct. 1275, 117 L.Ed.2d 501 (1992); *Andrews v. Deland,* 943 F.2d 1162, 1172 n. 7 (10th Cir.1991) (*McCleskey* does not announce a new rule of substantive law), *cert. denied,* 502 U.S. 1110, 112 S.Ct. 1213, 117 L.Ed.2d 451 (1992); *McCleskey,* 111 S.Ct. at 1477 (Marshall, J., dissenting) (majority opinion announces new rule). Recently, a majority of the Supreme Court extended application to the civil context the rule that new rules applied retroactively in the deciding case should be applied retroactively to similar pending cases. *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 111 S.Ct. 2439, 2446, 115 L.Ed.2d 481 (1991); *see Howard v. Haddad,* 962 F.2d 328, 330 (4th Cir.1992). Here, the Supreme Court decided *McCleskey* on April 16, 1991, while MacDonald's second habeas petition was still pending before the district court. The district court did not decide the fate of MacDonald's petition until July 8, 1991. Application of *McCleskey* here complies with *Beam* and furthers justice by treating

similarly situated parties, i.e. McCleskey and MacDonald, in the same manner. *See Beam,* 111 S.Ct. at 2446.

FN7. We have considered MacDonald's substantive claims and the district court's disposition of those claims. We do not find it necessary to reach, and, therefore, refrain from exhaustive discussion of, those substantive claims.

[1] Courts have developed the abuse of the writ doctrine in order to curtail endless filings of successive habeas petitions. Successive petitions strike at the finality of a *859 judgment. "Neither innocence nor just punishment can be vindicated until the final judgment is known." *McCleskey,* 111 S.Ct. at 1468-69. Further concerns for the allocation of scarce judicial resources underlie the abuse of the writ doctrine. *Id.* at 1469. [FN8]

FN8. Federal statutes governing successive habeas petitions do not foreclose application of the judicially created abuse of the writ doctrine, under which we decide this case. *See* 28 U.S.C. §§ 2244(a) , 2255 (1988). The statutes codify the basic principles of the judicially created doctrine but "do[ ] not state the limits on the district court's discretion to entertain abusive petitions." *McCleskey,* 111 S.Ct. at 1466.

[2][3][4][5] The Supreme Court clarified the restrictions on bringing second and subsequent habeas petitions in its *McCleskey* decision. As stated in that case, the abuse of the writ doctrine "in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." *Id.* at 1468. The government bears the initial burden of pleading abuse of the writ. It meets its burden by identifying particular claims not raised in a prior habeas petition and asserting abuse of the writ. The burden then shifts to the petitioner, in order to avoid dismissal, to show that failure earlier to raise such claims may be excused under one of two narrow exceptions. Under the first exception, a petitioner can overcome dismissal upon a showing of cause for not raising the claim previously and a showing of prejudice. If petitioner fails to meet the first exception, a court can review the petition only upon a showing "that a fundamental miscarriage of justice would result from a failure to entertain the claim." *Id.* at 1470.

[6][7] The first exception is not easily met. In asserting a "cause and prejudice" justification, petitioner must show cause by " 'some objective factor external to the defense[,] [which] impeded counsel's efforts' to raise the claim ..." in a prior habeas petition. *McCleskey,* 111 S.Ct. at 1470 (quoting *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)). Examples given by the Court of cause are government interference with raising a claim or unavailability of facts necessary to make such a claim. *McCleskey,* 111 S.Ct. at 1470. Negligence or error in failing to raise a claim are not sufficient to show cause. Likewise, "[a]ttorney error short of ineffective assistance of counsel ... does not constitute cause...." [FN9] *Id.* Once cause is established, petitioner must then show actual prejudice.

FN9. But note that where no Sixth Amendment right to counsel attaches to the proceeding, an ineffective assistance claim cannot be sustained. Prisoners have no right to counsel in a collateral proceeding. *Pennsylvania v. Finley,* 481 U.S. 551, 555, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987). Therefore, attorney error in an initial habeas proceeding cannot serve as cause to review subsequent petitions.

[8][9] If the petitioner fails to establish cause, a court may still entertain the habeas petition in extraordinary cases where failure to do so would result in a fundamental miscarriage of justice. This is a narrower exception intended only to relieve from conviction one who is factually innocent of a crime. *Id.* A petitioner can satisfy this exception only where he or she makes a "colorable showing of factual innocence." *Id.* at 1471 (quoting *Kuhlmann v. Wilson,* 477 U.S. 436, 454, 106 S.Ct. 2616, 2627,

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91 L.Ed.2d 364 (1986)). That is, a petitioner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted ... and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U.Chi.L.Rev. 142, 160 (1970); *see McCleskey,* 111 S.Ct. at 1470; *Kuhlmann,* 477 U.S. at 454-55 n. 17, 106 S.Ct. at 2627 n. 17 (adopting Judge Friendly's explication).

III.

[10] We now apply the abuse of the writ doctrine to the case before us. The parties do not dispute that the government has satisfied its initial burden of proof by properly pleading abuse of the writ. Our ***860** first determination, then, is whether MacDonald has shown cause for not raising this newly discovered evidence in his prior habeas petition. We easily conclude that he has not. Lab notes relating to the blond hairs, now claimed significant in corroborating MacDonald's account of the murders, were seen and passed over by counsel in the previous habeas appeal. As found by the district court, a law clerk had tagged the relevant lab report and brought it to the attention of the legal team working on the first habeas petition. Members of the team considered its evidentiary significance and made a tactical decision not to use the evidence. Such deliberate bypass clearly cannot survive abuse of the writ analysis on a second habeas appeal. *See McCleskey,* 111 S.Ct. at 1467, 1471. Although such decision by counsel may in retrospect be deemed attorney error, erroneous strategic decisions do not amount to cause. *See supra* note 9.

MacDonald similarly fails to show cause for not raising in his first habeas petition the lab notes pertaining to the dark wool fibers. The lab notes were in the possession of MacDonald's counsel in 1983-84, prior to the filing of the first petition, as evidenced by a date received stamp. Even though these notes may not have been known to MacDonald's counsel, abuse of the writ is not confined to deliberate decisions to bypass information. "[A] petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." *McCleskey,* 111 S.Ct. at 1468. Thus, if a petitioner should have known and understood the significance of evidence through reasonable investigations prior to filing a first habeas petition, such petitioner has no cause for not then raising the claim. We find that MacDonald's first habeas counsel, through reasonable and diligent investigation, should have discovered the lab notes in their possession. No external force, beyond the control of MacDonald and his defense team, interfered with discovery. We will not excuse as cause failure to review and consider the significance of evidence within counsel's possession.

MacDonald's counsel argues that government concealment of this evidence at trial prevented counsel from later discovering and then raising the evidence in the first habeas petition. While MacDonald may have an argument for cause at trial, the argument is inapposite here. Counsel's possession of the relevant documents prior to the first habeas petition negated any concealment claim. We find that MacDonald has made no credible showing of cause.

[11] Having dispensed with the cause and prejudice exception, we now determine whether MacDonald has shown that dismissal of his petition would result in a fundamental miscarriage of justice. This is a difficult showing to make. Courts are instructed to grant review under this exception only in "extraordinary instances." *McCleskey,* 111 S.Ct. at 1470. We find that this case does not constitute such an instance. The evidence raised here, when considered with all the trial evidence, simply does not rise to a "colorable showing of factual innocence" necessary to show a fundamental miscarriage of justice. It neither supports MacDonald's account of the murders nor discredits the government's theory. The most that can be said about the evidence is that it raises speculation concerning its origins. Furthermore, the origins of the hair and fiber evidence have several likely

explanations other than intruders. The evidence simply does not escalate the unease one feels with this case into a reasonable doubt.

We have carefully reviewed the voluminous record of evidence in this case, beginning with the original military Article 32 proceedings through the present habeas petition, which contains over 4,000 pages. Yet we do not find anything to convince us that the evidence introduced here, considered with that previously amassed, probably would have raised reasonable doubts in the minds of the jurors.

We are persuaded that this is precisely the type of collateral appeal the Court through *McCleskey* intended to obstruct and deter. Here, over twenty years after ***861** the event of the crime, MacDonald reopens his case with specious evidence. While we are keenly aware of MacDonald's insistence as to his innocence, at some point we must accept this case as final. Every habeas appeal MacDonald brings consumes untold government and judicial resources. Furthermore, successive appeals of little merit must cruelly raise and then disappoint the hopes of one, like MacDonald, faced with a long term of incarceration. We feel that our review of MacDonald's case through the mechanism of the abuse of the writ doctrine has been thorough and fair. Any evidence truly pointing to MacDonald's innocence would have prompted a review on the merits by this Court.

CONCLUSION

Finding that MacDonald's second habeas petition constitutes an abuse of the writ, we affirm the district court's order denying the petition.

AFFIRMED.

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Briefs and Other Related Documents (Back to top)

• 1991 WL 11251786 (Appellate Brief) Reply Brief of Appellant (Nov. 25, 1991)

• 1991 WL 11248711 (Appellate Brief) Brief for the United States (Nov. 01, 1991)

• 1991 WL 11248251 (Appellate Brief) Brief Ofappellant (Oct. 31, 1991)

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H

United States District Court, E.D. North Carolina, Fayetteville Division.
UNITED STATES of America
v.
Jeffrey R. MacDONALD
Nos. 75-26-CR-3, 90-104-CIV-3-F.

Sept. 2, 1997.

Defendant's convictions for the murder of his family were reversed by the Court of Appeals, 632 F.2d 258, 635 F.2d 1115. The United States Supreme Court reversed, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696, and the conviction was affirmed, 688 F.2d 224. After initial motion to vacate was denied, 640 F.Supp. 286, and denial was affirmed, 779 F.2d 962, defendant filed a second motion, which was denied, 778 F.Supp. 1342, and denial was affirmed, 966 F.2d 854. Defendant moved to reopen proceedings on second writ. The District Court, James C. Fox, Chief Judge, held that: (1) allegedly false testimony of FBI agent that saran fibers found in hairbrush at murder scene could not have come from human wig was not material to outcome of motion to vacate, and thus could not form basis for reopening of proceedings; (2) defendant failed to show that FBI agent's testimony and other government conduct constituted fraud on the court that entitled him to reopen; and (3) claim that newly discovered evidence, when combined with other evidence, entitled defendant to new trial would be transferred to Court of Appeals for possible certification as successive petition.

Ordered accordingly.

West Headnotes

[1] Criminal Law ⇐1470
110k1470 Most Cited Cases
(Formerly 110k9971/4(7))

[1] Criminal Law ⇐1615
110k1615 Most Cited Cases
(Formerly 110k9971/4(7))
Petitioner seeking to reopen proceedings on motion to vacate conviction on ground of fraud, as moving party, must establish fraud by clear and convincing evidence, and he must show that this fraud prevented him from fully and fairly presenting his case. 28 U.S.C.A. § 2255.

[2] Criminal Law ⇐1668(8)
110k1668(8) Most Cited Cases
(Formerly 110k9971/4(7))
Allegedly false testimony of FBI agent that "saran" fibers found in hairbrush at murder scene could not have come from human wig and that FBI library contained no references to use of saran fibers in manufacture of human wigs was not material to outcome of proceedings on motion to vacate, and thus could not form basis for reopening of proceedings, where relief had also been denied on alternative and independent ground of abuse of writ, and there was no reasonable probability that, had agent not testified as he did, evidence would have been viewed more favorably as supporting petitioner's theory that murders were committed by wigged intruder and, as result, fundamental miscarriage of justice exception to dismissal of successive petition for abuse of writ would have been applied. 28 U.S.C.A. § 2254.

[3] Criminal Law ⇐1668(8)
110k1668(8) Most Cited Cases
(Formerly 110k9971/4(7))
Evidence was insufficient to support reopening of proceedings on motion to vacate conviction on ground of "fraud upon court" arising from FBI's allegedly incorrect testimony at hearing and government's failure to disclose allegedly exculpatory evidence that wig industry executive had refused to sign affidavit supporting agent's conclusion that saran fibers found at murder scene could not have come from human wig, and opinions

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of two toy industry employees that it was not probable that 22" saran fibers were from doll hair; later evidence tended only to disprove collateral government theory that fibers came from doll, which had been posited as one alternative to petitioner's theory that they came from wig worn by murderer. 28 U.S.C.A. § 2255.

[4] Criminal Law ⇦1668(3)
110k1668(3) Most Cited Cases
(Formerly 110k997.18)
Petitioner who was seeking to reopen successive motion to vacate on ground of fraud on court was not entitled to additional discovery giving him access to physical evidence where discovery would have been relevant only to question of petitioner's factual innocence, which could not be addressed by district court on motion to reopen successive petition. 28 U.S.C.A. §§ 2244, 2255.

[5] Criminal Law ⇦1668(8)
110k1668(8) Most Cited Cases
(Formerly 110k997.18)
District court considering whether to reopen successive motion to vacate conviction on ground of fraud was barred by Antiterrorism and Effective Death Penalty Act of 1996 from considering whether newly discovered evidence, when added to weight of petitioner's other exculpatory evidence from trial and earlier motions, warranted new trial, as argument was akin to third habeas petition, but court would transfer matter to Court of Appeals to consider whether to certify petitioner's argument as successive petition. 28 U.S.C.A. §§ 2244, 2255.

[6] Criminal Law ⇦1668(8)
110k1668(8) Most Cited Cases
(Formerly 110k9971/4(7))
Petitioner who sought to reopen proceedings to vacate conviction would be permitted to file supplement affidavit incorporating documents of unknown origin sent anonymously to petitioner, purportedly calling into doubt FBI expert's conclusions in petitioner's murder case. 28 U.S.C.A. § 2255.
***1058** Harvey A. Silverglate, Boston, MA, for MacDonald.

Robert S. Mueller, III, James S. Reynolds, Brian M. Murtagh, Asst. U.S. Attys., John F. DePue, U.S. Dept. of Justice, for U.S.

ORDER

JAMES C. FOX, Chief Judge.

This matter again is before the court on Jeffrey MacDonald's "Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery," filed April 22, 1997 ("motion to reopen"). MacDonald has filed an extensive memorandum of law and hundreds of pages of affidavits and exhibits in support of his motion to reopen. In response, the Government filed on May 12, 1997, a motion to dismiss and suggestion, in the alternative, to transfer the matter to the Court of Appeals, along with a memorandum of law. MacDonald replied to these Government filings on May 27, 1997. Also pending before the court is MacDonald's motion for leave to file a supplemental affidavit, which the Government opposes.

The undersigned drew this matter following the death of the Honorable Franklin T. Dupree, Jr., who presided over the trial and all subsequent proceedings herein until his death in December, 1995, and the recusal of the Honorable Malcolm J. Howard by Order of April 25, 1997. The court has waived the page limitations for supporting memoranda so that both parties might fully present their positions. The undersigned has carefully read and considered everything the parties have filed. Neither party has requested oral argument on the motion to reopen, and the court finds that none shall be necessary for a resolution of the motion. [FN1] Local Rule 4.09, EDNC. While the court DENIES the motion to reopen, the court TRANSFERS this matter to the United States Court of Appeals for the Fourth Circuit for consideration of certification as a successive motion under 28 U.S.C. § 2255. 28 U.S.C. §§ 2255, 2244, as amended by Pub.L. No. 104-132, Title I, §§ 101, 105, 106, 110 Stat. 1217, 1220 (1996). Accordingly, the Government's motion to dismiss and suggestion, in the alternative, to transfer to the Court of Appeals, is DENIED IN PART and ALLOWED IN PART. Finally,

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MacDonald's motion for leave to file a supplemental affidavit is ALLOWED.

> FN1. The court will not grant MacDonald's request for an evidentiary hearing, MacDonald's Reply at 1, because, as explained fully below, he has not shown sufficient evidence of a "fraud upon the court."

I. Statement of the Case

By his motion now before the court, MacDonald seeks to reopen the proceedings on his petition for post-conviction relief, filed pursuant to 28 U.S.C. § 2255 on October 19, ***1059** 1990 ("the 1990 petition"). Judge Dupree denied that 1990 petition by Order dated July 8, 1991. *United States v. MacDonald,* 778 F.Supp. 1342 (E.D.N.C.1991). The United States Court of Appeals for the Fourth Circuit affirmed. *United States v. MacDonald,* 966 F.2d 854 (4th Cir.), *cert. denied,* 506 U.S. 1002, 113 S.Ct. 606, 121 L.Ed.2d 542 (1992). This court will not again repeat in detail the circumstances of the murder of MacDonald's family, his subsequent conviction for those murders, or the numerous appeals and other legal proceedings herein. However, a brief recitation of the history of this famous case and, particularly, the proceedings on the 1990 petition which MacDonald seeks to reopen by his motion, is necessary to an understanding of the motion and its resolution.

MacDonald was an Army physician living at Fort Bragg, North Carolina, with his wife, Colette, and two young daughters, Kimberly and Kristen. In the early morning hours of February 17, 1970, Colette, Kimberly, and Kristen were brutally clubbed and stabbed to death in their home. MacDonald, who was present in the home, told military police officers who responded to his call for help that he and his family had been attacked by a group of drug-crazed hippie intruders consisting of several men and a blond woman wearing a floppy hat. He has stood by this story ever since. In fact, shortly after the murders, a woman named Helena Stoeckley surfaced who generally fit MacDonald's description and who related to several individuals her belief that she had been involved in the crime. However, because of the physical evidence found at the crime scene, Government investigators became convinced that MacDonald himself had committed the murders. The crime scene yielded forensic evidence which was inconsistent with MacDonald's story that he struggled with intruders who murdered his family and wounded him. Following numerous legal twists over the course of many years, MacDonald came to trial in Raleigh in July, 1979, for the murder of his family. A crucial moment in the trial came when the defense called as a witness Helena Stoeckley, whom authorities located in South Carolina and took into custody pursuant to a material witness warrant. Stoeckley did not confess on the witness stand; rather, she testified that, due to heavy drug use on the night of February 16, 1970, she had no memory of the critical hours. She did admit, however, to owning a floppy hat and a blond wig, which she had burned shortly after the murders for fear that it might link her to the crimes.

As Stoeckley did not testify as MacDonald had hoped, he sought to call as witnesses those to whom Stoeckley had earlier related her belief of her involvement. Judge Dupree, however, after a voir dire examination of these proposed witnesses, would not allow the testimony because of the utter unreliability of Helena Stoeckley and the lack of any corroborating evidence of her presence in the MacDonald home on the night of the murders. On August 29, 1979, the jury convicted MacDonald of two counts of second-degree murder and one count of first-degree murder, and this court sentenced him to three consecutive terms of life imprisonment. Following further legal proceedings, the United States Supreme Court denied certiorari on MacDonald's final direct appeal in 1983.

In 1984, MacDonald filed his first post-conviction motions for a new trial and for a writ of habeas corpus, on the basis of newly discovered evidence and other grounds. Judge Dupree denied the motions, and the Fourth Circuit affirmed. *United States v. MacDonald,* 640 F.Supp. 286 (E.D.N.C.1985), *aff'd,* 779 F.2d 962 (4th Cir.1985), *cert. denied,* 479 U.S. 813, 107 S.Ct. 63, 93 L.Ed.2d 22 (1986). [FN2]

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FN2. For a list of citations of all previously reported opinions in this matter, see *MacDonald,* 778 F.Supp. at 1345.

II. The 1990 Petition

MacDonald filed a second petition for a writ of habeas corpus on October 19, 1990, the petition which he now seeks to revive by the motion to reopen. In the 1990 petition MacDonald sought "to vacate his conviction on the grounds that the prosecution ... withheld laboratory notes written by government agents which would have aided the defense, and exploited the suppression of the ... lab notes by knowingly presenting a false ***1060** and perjurious picture of the evidence and the underlying facts." *Id.* at 1344. MacDonald based his petition in part on handwritten laboratory notes regarding unmatched blond synthetic hairs, as long as 24 inches, found on a hairbrush taken from the MacDonald home. He argued that the prosecution's failure to turn over to him these lab notes prior to trial violated the doctrine of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny, because the notes and the synthetic hairs themselves would have corroborated his account of the murders, that a group of drug-crazed hippies, including Helena Stoeckley in her blond wig, broke into his house and attacked him and his family. *MacDonald,* 778 F.Supp. at 1349. MacDonald also argued that the prosecution's manipulation of the trial testimony of expert witnesses to conceal the existence of hair and fiber evidence violated his constitutional rights under *Alcorta v. Texas,* 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957), and its progeny. *MacDonald,* 778 F.Supp. at 1349.

In denying the 1990 petition, Judge Dupree first determined that the allegedly suppressed evidence was not material--that is, that the jury would not have acquitted MacDonald had his lawyers been aware of the allegedly suppressed lab notes at the time of trial. The court wrote,

> [C]lose analysis of the actual fiber evidence at issue reveals that the fibers provide little, if any, support for MacDonald's account of the crimes. In order to formulate its response in this action, the government submitted the fibers and hair at issue to an FBI forensic examiner, Michael P. Malone, for reexamination. According to Malone, the blond synthetic fibers found in Colette's clear-handled hairbrush and discussed in the lab notes were not consistent with blond wig hairs from any known wig fibers currently in the FBI laboratory reference collection. Of the four synthetic fibers from the brush which have been analyzed, one matches a grey wig reportedly owned by Colette and three are composed primarily of "saran," a substance which is not suitable for human wigs, but is used to make mannequin and doll hair, dust mops, and patio screens. MacDonald has presented no evidence that blond saran fibers have ever been used in the manufacture of human wigs. While MacDonald argues that Stoeckley's blond wig, which was described by one witness as "stringy," may have been a mannequin wig, such speculation is unsupported by any evidence in the record.

Id. at 1350-51.

The court also found, however, alternate, independent bases for denying the 1990 petition. Judge Dupree found that the Government attorneys had not violated the requirements of *Brady* because, prior to trial, they afforded MacDonald's experts the opportunity to examine and test the actual fibers at issue, and because the Government attorneys had not read the lab notes regarding the fibers and were not aware of any potentially exculpatory material therein. *Id.* at 1353-54. Finally, Judge Dupree found the 1990 petition barred by the doctrine of abuse of the writ, since the lab notes, the information upon which the 1990 petition was based, were in MacDonald's possession in 1984, when he filed his first petition, and MacDonald had failed to show "cause and prejudice" or "that a fundamental miscarriage of justice would result from a failure to entertain the claim." *Id.* at 1356-60 (quoting *McCleskey v. Zant,* 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991)). Thus, the court denied the 1990 petition on three separate and independent grounds--that the "new evidence" would not have been material to the outcome of the trial, that the mandates of *Brady* were not violated by the Government attorneys, and that the 1990 petition was procedurally barred by the doctrine of

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abuse of the writ.

The Fourth Circuit Court of Appeals affirmed on only the third ground, abuse of the writ, declining to reach the merits of the petition.

> We find that MacDonald does not meet the stringent requirements of *McCleskey v. Zant,* 499 U.S. 467 [111 S.Ct. 1454, 113 L.Ed.2d 517] (1991), necessary to overcome dismissal of a second or subsequent collateral claim for abuse of the writ.... Accordingly, we affirm that portion of the district court's opinion dismissing MacDonald's petition as an abuse of the writ ***1061** and decline to reach the merits of his petition.

United States v. MacDonald, 966 F.2d 854, 856 (4th Cir.), *cert. denied,* 506 U.S. 1002, 113 S.Ct. 606, 121 L.Ed.2d 542 (1992).

III. The Motion to Reopen

By his motion to reopen,

> MacDonald seeks to have the 1990 petition re-opened on the ground that the government submitted to this Court affidavits of FBI Special Agent Michael P. Malone which were materially false and misleading concerning facts which were central to this Court's dismissal of the 1990 petition, and to the Fourth Circuit Court of Appeals' affirmance of that dismissal, namely, whether or not certain long blond fibers made from a substance called Saran, found at the crime scene, were used in the manufacture of wigs for human cosmetic purposes prior to the time of the crime.

(Mot. to Reopen at 1.) MacDonald attacks two affidavits of Michael P. Malone, senior examiner of the Hairs and Fibers Unit of the FBI Laboratory in Washington, D.C. The Government had submitted the saran fibers in question to Malone for analysis in preparing its response to the 1990 petition, and Judge Dupree cited Malone's testimony in his Order denying the petition. *MacDonald,* 778 F.Supp. at 1350-51.

Malone testified in those affidavits, in substance, that the saran fibers likely came from a doll and not from a wig. In his first affidavit, dated February 14, 1991, he stated,

> "All of these saran fibers ... are consistent with the type of fibers normally used in the production of doll hair and are similar to a known sample of saran doll hair from the FBI Laboratory reference collection.... These fibers ... are not consistent with the type of fibers normally used in the manufacture of wigs, and based on my comparisons, are not like any of the known wig fibers currently in the FBI Laboratory reference collection."

(Aff. of Michael P. Malone, Ex. 1 to Aff. of Philip G. Cormier No. 1, at 7.)

Also, Malone testified in a May 21, 1991, supplemental affidavit as follows:

> 4. [T]o the extent that petitioner contends that the "22-inch blond synthetic" fibers ... are consistent with having originated from a cosmetic blond wig allegedly owned by Helena Stoeckley, there is no factual or scientific basis for this conclusion. I base my statement on the following facts and observations.
>
> * * * * * *
>
> 5. [O]ne [saran fiber] matched the FBI Laboratory's known saran doll hair reference exemplar ... and did not match any wig exemplar in the reference collection. 1. Similar examinations performed on [another saran fiber] revealed a single light blond striated saran fiber, which was 22-inches in length, and also did not match any wig exemplar in the FBI reference collection....Therefore, I can state that the only blond synthetic fibers which are 22 inches or longer and which were removed from Exhibit K, E-323 [the clear-handled hairbrush], are saran, which does not resemble human hair, and not modacrylic, which does resemble human hair.
>
> FN1. The FBI Laboratory's reference collection of fibers has been maintained for over forty years. Among other items, it contains numerous samples from wigs, all of which I have personally examined and none of which revealed a known wig exemplar of saran. Rather all of the known wig exemplars are composed of polyvinyl chloride (PVC), modacrylic or

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human hair.

* * * * * *

6. In addition to performing physical examinations in this case, I have consulted numerous standard references (see Exhibits 1-6 attached to this affidavit) which are routinely used in the textile industry and as source material in the FBI Laboratory, concerning the industrial applications for fibers, including saran. None of these standard references reflect the use of saran fibers in cosmetic wigs; however, they do reflect the use of saran fibers for wigs for dolls and manikins, in addition to such uses as dust mops and patio screens. [Citation omitted].

7. Further, based upon my own investigation and research in this case, I can state that saran has the following physical characteristics which make it unsuitable for use in cosmetic wigs, in which the objective is to have the wig hair appear indistinguishable ***1062** from natural human hair. Saran is very straight, is only manufactured as a continuous monofilament, does not lay or drape like human hair, and is also too shiny to resemble human hair. Lastly, saran can not be manufactured as a "tow" fiber, which is essential to the cosmetic wig manufacturing process.3

> FN3. A "tow" is a large group of continuous filaments, without any definite twist, which is cut into definite lengths.

8. Based upon these factors described above, and in the absence of any evidence to the contrary, I conclude that the 22 and 24 inch blond saran fibers in this case are not cosmetic wig fibers.

(Supp. Aff. of Michael P. Malone, Ex. 2 to Aff. of Philip G. Cormier No. 1, at 2-4.)

MacDonald's attack on the credibility of this testimony began even before the conclusion of the proceedings on the 1990 petition, and culminates in the motion now before the court. Following Judge Dupree's denial of the 1990 petition, and in the course of their appeal therefrom, MacDonald's defense team uncovered two standard reference texts on textiles that, contrary to Malone's assertions, *did* state that saran could be manufactured in "tow" form and *was* used in the manufacture of wigs. MacDonald's lawyers cited these texts, Dembeck and Stout, in their appeal to the Fourth Circuit, (Exs. 3-6 to Aff. of Philip G. Cormier No. 1), but that court did not address the controversy in its decision.

After the Fourth Circuit affirmed Judge Dupree's denial of the 1990 petition, the MacDonald defense team continued its investigation into Malone's testimony and the characteristics and uses of saran. It now claims that the Government had acquired, prior to filing its response to the 1990 petition and Malone's affidavits, information which contradicted, first, Malone's claim that saran was not and could not be manufactured in a form suitable for use in wigs, and second, the Government's "repeated assertions" that the saran fibers at issue had likely come from a doll owned by MacDonald's daughters.

Briefly, this contention is based upon the following: 1) evidence that the FBI had in its own reference collection the Dembeck and Stout texts that stated that saran could be manufactured in tow form and was used in wigs, 2) evidence that Government agents interviewed a textile industry executive who would not testify, as they wished, that saran could not be manufactured in tow form and was not used in wigs [FN3], and 3) evidence that Government agents interviewed two doll experts in California who told them that 22 or 24 inch saran fibers probably did not come from a doll. MacDonald now claims that this evidence indicates that Malone and the Government committed a fraud upon the court when, in 1991, Malone testified in his affidavits that saran could not be manufactured in tow form and was thus not suitable for use in wigs. He also cites an article from the *Wall Street Journal* and a report of the Department of Justice Inspector General critical of the work of Malone and the FBI laboratory in other cases.

> FN3. As explained below, this textile industry executive did not express the opinion that saran could be manufactured in tow form and *was* used in wigs, either. He simply declined to sign an affidavit

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> Government attorneys drafted for him because he did not consider himself an expert on saran.

Finally, MacDonald offers affirmative evidence, recently accumulated by his defense team, that saran was used in wigs prior to 1970. This new evidence, consisting of the statements of wig and fiber industry executives only recently located by MacDonald, is not relevant to MacDonald's claim that Malone committed a fraud upon the court in 1991. Rather, he submits this new evidence in an attempt to demonstrate his factual innocence.

On his fraud claim, MacDonald argues that Judge Dupree and the Fourth Circuit Court of Appeals relied on Malone's testimony in concluding that evidence of the saran fibers would not have changed the outcome of the trial and thus could not serve as a basis for habeas relief, and that the court therefore should reopen the proceedings on the 1990 petition. MacDonald seeks discovery, including access to various items of physical evidence examined by Malone and the FBI lab, as well as other items such as unsourced hairs found in critical locations at the crime scene, for testing using new DNA technology. ***1063** Ultimately, he seeks allowance of the 1990 petition and a new trial. For the reasons discussed below, MacDonald is not entitled to reopen the 1990 petition.

IV. Discussion

[1] MacDonald bears a heavy legal burden on the motion to reopen. Under principles governing an analagous motion pursuant to Federal Rule of Civil Procedure 60(b)(3), MacDonald, as the moving party, must establish fraud by clear and convincing evidence, and he must show that this fraud prevented him from fully and fairly presenting his case on the 1990 petition. "The motion will be denied if it is merely an attempt to relitigate the case or if the court otherwise concludes that fraud or misrepresentation has not been established." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2860 at 314-15 (1995). Further, as the late Justice Brennan wrote when sitting on the New Jersey Supreme Court,

> [T]estimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been willfully and purposely falsely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result.

Shammas v. Shammas, 9 N.J. 321, 88 A.2d 204, 208 (1952).

As the court discusses below, MacDonald has shown neither that Malone's testimony was material to the outcome of the litigation on the 1990 petition, nor clear and convincing evidence of any fraud.

A. Malone's testimony was not material to the disposition of the 1990 petition.

[2] First, and most significantly, MacDonald grossly overstates this court's and the Fourth Circuit's "reliance" on Malone's affidavits in their decisions on the 1990 petition. (Mem. in Supp. of Mot. to Reopen at 3-7, 17- 18, 20-21, 38.) As noted above, Judge Dupree denied the petition on *two alternate and independent grounds,* neither of which is called into question by the motion to reopen. Mention of these alternate and independent grounds is conspicuously absent in MacDonald's voluminous filings. Nor does MacDonald acknowledge that the Fourth Circuit affirmed the denial of the 1990 petition only on grounds of abuse of the writ, declining to reach the merits of the petition. Moreover, MacDonald called to the attention of the Fourth Circuit in his appeal in 1992 Malone's alleged "selective citation" of textile reference texts which omitted "wigs" as an end use for saran, as well as the Dembeck and Stout texts which did note that saran was used in wigs. (*See* Exs. 3 & 4 to Aff. of Philip G. Cormier No. 1.) Apparently finding it unnecessary to address the controversy, the Fourth Circuit held only that MacDonald's petition was barred by the doctrine of abuse of the writ, because he could have raised his claims in his earlier petition for habeas corpus.

MacDonald argues that, had Malone not testified as he did, the court would have viewed the 1990 petition and the entire evidence in a different light,

perhaps invoking the narrow exception to the abuse of the writ doctrine for a "fundamental miscarriage of justice." (MacDonald's Reply at 2-6.) He contends, "In defending against MacDonald's 1990 petition, the government misled this Court, the Court of Appeals, and the defense by (1) withholding critical exculpatory evidence which was clearly material to the outcome of the proceedings, and (2) painting a false picture by claiming that the source of the blond Saran fibers found at the crime scene could not have been a wig for human use, as opposed to a doll." (Mem. at 37-38.) MacDonald claims this conduct violated his rights under *Brady* and under *Alcorta v. Texas,* 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957), respectively. Ironically, this contention mirrors MacDonald's argument six years ago on the 1990 petition itself, that the Government attorneys knowingly withheld critical evidence (the handwritten lab notes documenting the saran fibers) which was clearly material to the outcome of the proceedings (i.e., which would have provided the missing forensic support for MacDonald's version of the facts), in violation of *Brady,* and by painting a false picture of the known forensic evidence, in violation of *Alcorta.* But in 1991 Judge Dupree rejected MacDonald's argument based on *Brady* and *Alcorta* that the lab notes and the existence of the saran ***1064** fibers would have changed the tenor of the entire body of evidence, persuading the trial judge to admit Helena Stoeckley's out of court "confessions," and, in domino fashion, thereby producing in the jurors' minds more than a reasonable doubt as to his guilt. And this court now rejects MacDonald's argument that the evidence the Government attorneys allegedly "withheld" in 1991 would have produced in Judge Dupree's mind the notion that dismissing the 1990 petition for abuse of the writ would result in a fundamental miscarriage of justice.

For this reason, the Government's conduct in defending the 1990 petition did not violate MacDonald's Due Process rights under either *Brady* or *Alcorta.* Even if the Government can be said to have "withheld" evidence in its possession, consisting of textbook references and witness statements that saran could be manufactured in tow form and was used in wigs prior to 1970, there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding [on the 1990 petition] would have been different." *Kyles v. Whitley,* 514 U.S. 419, 433, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995) (quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.) (withheld evidence must have been material for Constitutional error under *Brady* to have occurred)). Nor is there "any reasonable likelihood that the false testimony could have affected" Judge Dupree's, or the Court of Appeals', decision. *See Bagley,* 473 U.S. at 679-80 n. 9, 105 S.Ct. at 3382 n. 9.

B. MacDonald has shown insufficient evidence of a "fraud upon the court".

[3] Second, this court finds MacDonald's allegations that Malone committed a "fraud upon the court" and that his testimony was "knowingly false and misleading when made" cavalier and unverified. Again, MacDonald bases his allegations on three "revelations" resulting from his Freedom of Information Act ("FOIA") requests of the Department of Justice following the conclusion of the litigation of the 1990 petition: 1) evidence that the FBI had in its own reference collection the Dembeck and Stout texts that stated that saran could be manufactured in tow form and was used in wigs, 2) evidence that Malone and other Government agents interviewed a textile industry executive who would not testify, as they wished, to the contrary, and 3) evidence that Malone and other Government agents interviewed two doll experts in California who told them that 22 or 24 inch saran fibers probably did not come from a doll. The court shall address each item in turn.

MacDonald's "evidence" that the FBI's reference library included the Dembeck and Stout texts prior to Malone's execution of his affidavits consists largely of an identification stamp and a handwritten notation, both of unknown origin or significance, on the cover page of the FOIA-released Dembeck excerpt. (Aff. of Philip G. Cormier No. 1 at 24-30.) This "evidence," even construed in the light most

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favorable to MacDonald, does not expose any statement in Malone's affidavits as knowingly untrue when made. Malone testified in paragraph 6 of his supplemental affidavit only that he had consulted "numerous standard references," not "every standard reference in the library," and there is no indication Malone or anyone else for the Government consulted the Dembeck or Stout texts and decided to ignore them. Moreover, as noted above, MacDonald called to the attention of the Fourth Circuit Court of Appeals the Dembeck and Stout texts and his belief that Malone had "selectively cited" standard references to suit the Government's purposes. That court failed to address the issue--probably not because of "the power of the FBI Lab's long-standing reputation for probity and accuracy," (Mem. of Law in Supp. of Mot. to Reopen at 20), so much as because the texts were not a part of the record on appeal and because the court rested its decision on the doctrine of abuse of the writ. *See* Tr. of Oral Argument, Ex. 3 to Aff. of Philip G. Cormier No. 1; *MacDonald,* 966 F.2d 854.

Similarly, MacDonald's complaints that the Government's 1990 field investigation into the end uses of saran unearthed "exculpatory" information that contradicted Malone's later testimony are unconvincing. First, MacDonald claims that on December 4, 1990, Malone, accompanied by other Government agents, contacted A. Edward Oberhaus, Jr., an executive at Kaneka America Corporation, ***1065** which produces modacrylic (non-saran) fibers for use in wigs and doll hair. Reportedly, Oberhaus told the agents that, "based on his limited knowledge, Saran fibers were used in the doll industry, but that this did not mean that Saran was not used in the wig industry as well." (Mem. in Supp. of Mot. to Reopen at 26.)

Oberhaus refused to sign an expert affidavit drafted for him by the Government agents to the effect that saran was not used in wigs because it could not be produced as a tow fiber, and that saran was primarily used in the manufacture of doll hair, even though an FBI Form 302, Report of Interview, completed by the interviewing agent shortly after the 1990 meeting with Oberhaus, reflects that Oberhaus did so state in his interview. Rather, Oberhaus submitted an affidavit of his own drafting, which the Government did not use. Oberhaus' affidavit stated only that "Wigs and hairpieces during the period 1960 to date have most often been manufactured with human hair, modacrylic fibers, *other fibers* or a *combination of any of these filaments."* (Aff. of Philip G. Cormier No. 1 at ¶ 50, emphasis supplied.)

However, neither MacDonald nor Oberhaus has questioned the accuracy of the FBI Form 302, Report of Interview, completed shortly after the 1990 meeting with Oberhaus. This Report of Interview closely resembles the draft affidavit which Oberhaus refused to sign because he did not consider himself an expert on saran. (*Compare* Aff. of Philip G. Cormier No. 1, Ex. 12 *with* Ex. 10 and Aff. of Philip G. Cormier No. 1 at 31-38; *see* Opp'n of the United States to Mot. to Reopen at 41.) Whether Oberhaus reflected on his interview with the agents and later decided he had not been precise in his spoken statements, the court cannot know. In any event, the court does not view Oberhaus' statement or his refusal to sign the draft affidavit as exculpatory, with a concomitant duty incumbent upon the Government attorneys to disclose the same.

Next, on December 5, 1990, Malone and other Government agents interviewed Judith Schizas and Mellie Phillips, two employees of Mattel, Inc. knowledgeable about dolls. MacDonald's defense team claims to have learned, from the Form 302 Reports of Interviews obtained through FOIA requests, and from new affidavits obtained directly from Schizas and Phillips, that these ladies "provided [Malone and the agents] with ... information which directly contradicted the subsequent sworn claims by Malone, filed by the government, as to the provenance of the 22 inch and 24 inch Saran fibers found at the crime scene." (Mem. in Supp. of Mot. to Reopen at 28.) Reportedly, Phillips told the agents that saran *was* made in tow form. Both Schizas and Phillips told the agents that they were not aware of any doll made by Mattel that had saran hair fibers as long as 24 inches. Schizas told the agents that "while it was 'possible' [that the 22 inch and 24 inch saran

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fibers had come from a doll], it was 'not probable,' because even if fibers of that length were used in a doll, it would be very difficult to pull out an entirely intact fiber because of the way that the fibers are rooted...." (*Id.* at 30-31.)

MacDonald decries,

> None of the information which Phillips' and Schizas state they imparted to Malone and the other government investigators, including Schizas' and Phillips' FBI 302s [reports of interviews], was ever disclosed to the defense nor included in any government filing with this Court. The defense never knew that the government had even spoken with Schizas and Phillips, let alone that they had provided the government with exculpatory information which put the lie to the government's claims that the source of the long blond Saran fibers found at the crime scene was a doll.

(*Id.* at 31-32.) As to Schizas' and Phillips' being unaware of any Mattel doll with saran hair as long as 24 inches, and as to Schizas' explanation of why the fibers did "not probabl[y]" come from a doll, the court knows of no obligation incumbent upon the Government to disclose this information to the court or to MacDonald. The information was not "exculpatory" in the true sense, in that it did not tend to show MacDonald's innocence. Rather, the information tended to disprove a collateral Government theory regarding certain evidence, which theory the Government posited as *one alternate* to MacDonald's theory of the origin of the saran fibers. This ***1066** controversy is one step removed from the question of MacDonald's guilt or innocence.

Moreover, in addition to the information Schizas and Phillips gave the agents which MacDonald seeks to highlight, these ladies also told the agents that "one might possibly find a doll hair fiber that long [22 or 24 inches] if the fiber were doubled over in the hair rooting process to produce two 11-12 inch hairs...." (*Id.* at 30; *see* Opp'n of the United States to Mot. to Reopen at 42.) Further, Schizas and Phillips contradicted each other. Phillips told the agents that her best recollection was that Mattel never made any doll, other than a Barbie doll with 3 and a half or 4 inch hair, using saran type material, and that no other doll manufacturers used saran. In contrast, Schizas told the agents that, prior to 1970, the longest length saran used by Mattel was in the "Charmin' Chatty" doll and was 16-17 inches long, but that Mattel used saran as long as 18 inches in a doll manufactured in approximately 1973. (Mem. in Supp. of Mot. to Reopen at 29 n. 11.) When these ladies' complete statements are considered in context, they do not "put the lie to the government's claims that the source of the long blond Saran fibers found at the crime scene was a doll."

The only contradiction MacDonald has shown between what any witness reportedly told Malone and the substance of Malone's affidavits is Phillips' current recollection that she told the Government agents, during her December, 1990, interview, that saran *was* made in tow form, and Malone's testimony that saran could not be made in tow form. (*See* Ex. 14 to Aff. of Philip G. Cormier No. 1 at 2.) But Phillips' purported statement is not recorded in the FBI Form 302, Report of Interview (Ex. 1 to Ex. 14 to Aff. of Philip G. Cormier No. 1), and--not to cast aspersions on Phillips' credibility--memories inevitably fade and warp with the passage of time. Further, even if Phillips did tell the agents that saran could be manufactured in tow form, this contradicted Oberhaus' statement that it could not, as recorded in the Form 302 report of his interview. (Opp'n of the United States to Mot. to Reopen at 42-43.)

MacDonald has submitted extensive legal arguments that the court has the power to reopen a judgment final for years to rectify a fraud upon the court. This the court does not doubt. [FN4] But as the court has discussed, MacDonald has not Made a sufficiently strong showing of any fraud to cause this court to doubt the integrity of the predicate for Judge Dupree's 1991 decision. Unlike the cases cited by MacDonald in which the wronged party produced irrefutable evidence of fraud, *see* Mem. in Supp. of Mot. to Reopen at 40-44, MacDonald here has produced only possibilities, amplified by hyperbole. In one of the cases cited by MacDonald, the Supreme Court wrote,

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> FN4. The court need not address the Government's jurisdictional arguments, Opp'n of the United States to Mot. to Reopen at 33-38, due to the failure of the motion to reopen on its merits.

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after discovered evidence, is believed possibly to have been guilty of perjury. Here ... we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.

Hazel-Atlas Glass v. Hartford-Empire Co., 322 U.S. 238, 245-46, 64 S.Ct. 997, 1001, 88 L.Ed. 1250 (1944). Here, however, MacDonald has not shown a "deliberately planned and carefully executed scheme to defraud;" he has at the very most raised the specter of "a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." [FN5] *Id.* The law in this regard raises much more substantial obstacles to, and presumptions against, revisiting the prior judgment. *See, e.g., United States v. Custis,* 988 F.2d 1355 (4th Cir.1993), *aff'd,* 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994) (setting forth five-prong standard for granting new trial where newly discovered evidence tends to show witness may have committed perjury at criminal trial).

> FN5. As the court has shown, even that characterization applied to these facts would be exaggerated.

Finally, MacDonald outlines evidence of what he calls a "pattern of deception" by Malone in other cases, evidence which includes excerpts from the Final Report of Department of Justice Inspector General Michael ***1067** R. Bromwich, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other* Cases, dated April 15, 1997; and an April 16, 1997, article from the *Wall Street Journal,* attached to Aff. of Philip G. Cormier No. 2 as Ex. 3. and Ex. 1, respectively. This thin and collateral "evidence," however, does not persuade the court any more than the evidence discussed above that Malone has committed a "fraud upon the court." (*See* Opp'n of the United States to Mot. to Reopen at 45-48.)

[4] On the basis of Malone's "suspect" conduct, MacDonald also seeks access to all items of physical evidence on which Malone conducted laboratory examinations, and other items of physical evidence not examined by Malone, "but which contain unsourced hairs, blood debris and fibers, found in critical locations such as underneath the fingernails of the victims, which may very well contribute toward a demonstration of Dr. MacDonald's factual innocence." (Mem. in Supp. of Mot. to Reopen at 69.) MacDonald seeks access to these exhibits to conduct independent laboratory analyses, including new DNA tests not previously available. However, since the court will not reopen the proceedings on the 1990 petition and, as explained below, has no authority to consider the question of MacDonald's factual innocence based on all of his exculpatory evidence plus his new evidence regarding the possible origin of the saran fibers, there is no basis on which to allow MacDonald discovery. Moreover, the significance of the items other than the saran fibers has been fully litigated in the past, and nothing now presented impugns the validity of the Government's conclusions concerning them. (*See* Opp'n of the United States to Mot. to Reopen at 51-52.)

C. MacDonald's new evidence that saran was used in wigs prior to 1970 is irrelevant to the motion to reopen and cannot now be considered by the court as evidence of MacDonald's innocence.

[5] Finally, MacDonald's attorneys have, since the conclusion of the prior litigation of the 1990 petition, located several individuals in the fiber and wig manufacturing industries who aver that saran fibers were manufactured in tow form, and were used in wigs, prior to February, 1970. MacDonald recounts this newly discovered evidence, not in support of his claims that Malone and the Government committed a fraud upon the court, but to show that some of Malone's claims in the 1991 affidavits were objectively false. But this contention, even if true, is inappropriate to the

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court's limited area of concern on the motion to reopen--which is simply whether to reopen proceedings on the 1990 petition due to the possibility of fraud. As the Government cogently explains, the court is barred by the Antiterrorism and Effective Death Penalty Act of 1996 [FN6] from considering whether this new evidence, added to the weight of MacDonald's other exculpatory evidence previously Amassed in a trial and two habeas proceedings, finally tips the balance in his favor so as to warrant a new trial. (See Mem. in Supp. of Mot. to Reopen at 52-65 & MacDonald's Reply at 19-38, recounting evidence of MacDonald's innocence collected over the years and arguing that this evidence, in conjunction with what is now known about the saran fibers, demonstrates that he is entitled to a new trial; ***1068** Opp'n of the United States to Mot. to Reopen at 33-35.)

> FN6. The Antiterrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. § 2255 to add the following:
> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense....
> 104 Stat. 1220, Title I, § 105. In turn, as amended by the 1996 Act, 28 U.S.C. § 2244 provides in pertinent part as follows:
> (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three judge panel of the court of appeals.
> 110 Stat. 1221, § 106.

In that respect, the motion to reopen is, as the Government argues, akin to a third habeas petition. MacDonald's apparent inability to comprehend this is demonstrated by a footnote explaining the difficulty his defense team has met in investigating, since 1991, whether the two saran fibers could have come from a wig:

> Conducting such an investigation has been extremely difficult, due to limited resources, the passage of time and the difficulty in locating witnesses in an industry which was comprised of many relatively unorganized, marginal businesses, and the fact that much wig manufacturing during the relevant time period took place outside the United States. This being said, at this late date, it is the government which should bear the burden of proving definitively that the long blond Saran hair-like fibers found at the crime scene did not come from a wig, as it is the government which withheld from MacDonald during the pre-trial stages of this case, the exculpatory handwritten laboratory notes which documented Janice Glisson's initial discovery of the long blond Saran fibers.

(Mem. in Supp. of Mot. to Reopen at 32-33 n. 14.) This court has never suggested that the Government had "definitive proof" as to the origin of the saran fibers, and the court in 1991 gave two other good reasons why MacDonald's claim that the Government had "withheld" from him during the pre-trial stages of this case the handwritten lab notes did not entitle him to a new trial. MacDonald histrionically mischaracterizes both the nature and magnitude of the dispute now before the court.

Further, no matter how weak Malone's testimony now, six years later, appears to be, it was the only evidence before the court in 1991. Judge Dupree, in his Order denying the 1990 petition, so noted after reciting the substance of Malone's affidavits. "MacDonald has presented no evidence that blond saran fibers have ever been used in the manufacture of human wigs." *MacDonald,* 778 F.Supp. at 1350. And later, "Without any evidence that saran is used in the production of human wig hair, the presence of blond saran fibers in a hairbrush in the MacDonald home would have done little to corroborate MacDonald's account of an intruder with blond hair

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or a blond wig." *Id.* at 1354. Following the amendment of 28 U.S.C. § 2255 by the Antiterrorism and Effective Death Penalty Act, the court cannot consider MacDonald's presentation of such evidence now, but must transfer this matter to the Court of Appeals for the Fourth Circuit for consideration of certification of MacDonald's argument as a successive habeas petition pursuant to 28 U.S.C. §§ 2244 and 2255. If that court remands the matter for consideration of the merits, only then could this court address the weight of the evidence.

D. MacDonald's Motion to File Supplemental Affidavit

[6] In his motion for leave to file supplemental affidavit of Philip G. Cormier, MacDonald calls to the attention of the court twelve pages of documents of unknown origin sent anonymously to MacDonald in prison. According to MacDonald, the documents "appear [to be] briefing documents used by the Department of Justice Inspector General's Office or the FBI for the purpose of answering inquiries concerning the April 15, 1997 report issued by Inspector General Michael Bromwich on his FBI Laboratory Investigation." (Mot. for Leave to File Supp. Aff. at 2.) MacDonald specifically directs the court to a paragraph in the documents that reads

> We are aware of one Lab employee (Michael Malone) who may have overstated his conclusions in several cases including the appeal of former Green Beret, JEFFREY MACDONALD. The Task Force is reviewing each of Malone's past cases, including the MacDonald case, and if his scientific analysis/testimony is found flawed, appropriate disclosures will be made.

MacDonald questions how the Government's omission of this "fact" (*Id.*) from its response squares with its position that Malone has committed no wrongdoing.

In response, the Government correctly points out the shortcomings of the documents as "evidence," and submits further affidavits of the Inspector General himself and the Deputy Assistant Attorney General supervising***1069** the Criminal Division Task Force on the FBI Laboratory to the effect that "neither is presently investigating the professional activities of Malone in connection with the Defendant's preceding habeas petition." (Opp'n of the United States to Mot. to File Supp. Aff. at 2-3.) Nevertheless, as the court has carefully read and considered every page filed herein, MacDonald's motion for leave to file supplemental affidavit is ALLOWED, and the Clerk is DIRECTED to file that document. The Supplemental Affidavit and the twelve pages attached do not impact the court's disposition of the motion to reopen, for the reasons stated above.

V. Conclusion

In conclusion, MacDonald has not convinced the court that Michael Malone's testimony was material to the disposition of MacDonald's 1990 habeas petition, or that Malone or any other agent of the Government committed any wrongdoing in defending against the 1990 petition. Thus, MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery is DENIED. His claim that newly gathered evidence that saran fibers were in fact used in the manufacture of human wigs prior to 1970, added to the weight of previously amassed exculpatory evidence, demonstrates his factual innocence and that he is entitled to a new trial, is TRANSFERRED to the United States Court of Appeals for the Fourth Circuit. Thus, the Government's Motion to Dismiss 28 U.S.C. § 2255 Petition for Lack of Jurisdiction and Suggestion, in the Alternative, to Transfer to the Court of Appeals, is DENIED IN PART and ALLOWED IN PART. Finally, MacDonald's Motion for Leave to File Supplemental Affidavit is ALLOWED.

SO ORDERED.

979 F.Supp. 1057

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