affected by the outcome of its investigation.").

In Hazel-Atlas, the Court overturned the verdict in a patent infringement suit twelve years after the verdict had been entered, on the grounds that the plaintiff company had committed fraud on the court. The plaintiff in Hazel-Atlas had submitted as part of its patent application and in the underlying patent infringement case a copy of a trade journal article that had been written by an ostensibly disinterested person who touted the plaintiff's invention as a remarkable new advance in glass manufacturing. Many years later, during a government anti-trust prosecution, it came to light that the trade journal article that had been submitted in the patent infringement case was bogus because it had been written by a person employed by the plaintiff, and the allegedly disinterested author had been paid to lend his name to it.

In exercising its equitable power to overturn the verdict in the defendant's favor, the Hazel-Atlas Court stated that

> 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.
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> * * *
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> This matter does not concern only private parties. There are issues of great moment to the public in a patent suit.
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> * * *
>
> Furthermore, tampering with the administration of

> justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot be complacently tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas, 322 U.S. at 245-246, 64 S.Ct. at 1001.

More recently, in United States v. Shaffer Equipment Co., 11 F.3d 450 (4th Cir. 1993), the Fourth Circuit considered a fraud on the court claim brought by defendants in a civil action prosecuted by the Environmental Protection Agency.[20] Using strong language, the Court rebuked the government attorneys in the case with regard to their lack of candor:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions - all directed with unwavering effort to what, in good faith, is believed to be true on matters

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[20] Schaffer involved a suit brought by the EPA under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et. seq., to recover the cleanup costs at a hazardous waste site. The district court had found that "the EPA's on-scene coordinator for the cleanup in question had misrepresented his academic achievements and credentials in this and in other cases and that the government's attorneys wrongfully obstructed the defendants' efforts to root out the discrepancies and failed to reveal them once they learned of them." Id. at 452. As a sanction, the district court dismissed the action with prejudice. Id. The appellate court affirmed the district court's findings, but vacated the judgment of dismissal and remanded the case to the district court for entry of a lesser sanction. Id.

> material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

Id. at 457. (emphasis added, citations omitted).

The Court went on to add that

> [i]t is without note ... that we recognize that the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit.

Id. at 458. (emphasis added).

Finally, the Court discussed its general "inherent power" to superintend the proceedings before it:

> Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers ... Under the inherent power, a court may issue orders, punish for contempt, vacate judgments obtained by fraud, conduct investigations as necessary to exercise the power, bar persons from the courtroom, assess attorney's fees, and dismiss actions.

Id. at 462. (emphasis added).

Likewise, in Demjanjuk v. Petrovsky, 10 F.3d 338, 356 (6th Cir. 1993), cert. denied sub nom, Rison v. Demjanjuk, ___U.S.___, 115 S.Ct. 295, 130 L.Ed.2d 205 (1994), the Court of Appeals for the Sixth Circuit invoked its inherent powers to protect the integrity of the judicial process by reopening sua sponte a habeas challenge to an extradition order and then vacating the order on the ground that the Department of Justice had committed

fraud on the court by failing to disclose Brady material which indicated that Demjanjuk was not the Nazi prison guard known as "Ivan the Terrible."[21] In doing so, the Sixth Circuit rejected the government's claim that mere nondisclosure could not form the basis of a fraud on the court, id. at 348, and held that a "subjective intent to commit fraud is not required in a case such as this. Reckless disregard for the truth is sufficient." Id. at 353 (emphasis added). Moreover, while noting that many fraud-on-the-court claims turn on whether or not the fraud was carried out by a party or by an attorney (since attorneys, as officers of the court, always have a duty to be honest and forthright in dealing with the court), the Sixth Circuit held that this distinction makes no difference when the party is the United States:

> When the party is the United States, acting through the Department of Justice, the distinction between client and attorney actions becomes meaningless. The Department acts only through its attorneys.

10 F.3d at 352.[22] As demonstrated herein, the fraud practiced by the government demands that MacDonald's 1990 petition be reopened and reevaluated.

In addition to relying on this Court's inherent authority to

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[21] In addition to acting pursuant to its inherent power to protect the integrity of the judicial process, the Sixth Circuit stated that it was acting as well pursuant to Fed.R.Civ.P. 60(b)(6) and the All Writs Act, 28 U.S.C. § 1651. Demjanjuk, supra, 10 F.3d at 356.

[22] Until an evidentiary hearing is held, it is not clear, of course, who on the government side knew of or participated in Agent Malone's fraud.

protect the integrity of the judicial process, Fed.R.Civ.P. 60(b)(6) provides an alternative and independent basis for reopening MacDonald's 1990 petition. Fed.R.Civ.P. 60(b) provides inter alia:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> * * *
>
> or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of judgment or suspend its operation. This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court. [emphasis added]

Under Rule 60(b)(6), a federal court has "broad authority to relieve a party from a final judgment `upon such terms as are just,' provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 862, 866 (1988) (footnote omitted). "'Extraordinary circumstances' are required to bring the motion within the 'other reason' language . . . ." Id. at 866 n.11.

While the Fourth Circuit has also indicated that Rule 60(b)(6) cannot be used by a litigant to circumvent the one year time limitation that applies to 60(b)(3) claims, see e.g., Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 133 (4th Cir.), cert. denied, 113 S. Ct. 70 (1992); Great Coastal Express v. International Brotherhood of Teamsters, Etc., 675 F.2d 1349, 1355 (4th Cir. 1982), cert. denied, 459 U.S. 1128 (1983), reasoning that in these civil cases "the Rule suggests that equitable considerations prevail in such cases for one year, and that the interests of finality of judgments prevails thereafter," id. at 1355, this reasoning is inapposite to the situation presented here involving the liberty rights of an incarcerated individual. Indeed, in Demjanjuk, supra, the Sixth Circuit, in addition to relying on its inherent power to protect the integrity of the judicial process, relied as well on Rule 60(b)(6) as a ground for vacating the extradition order that had been entered some six and a half years earlier.[23]

Here, even though MacDonald's claim of fraud might have been cognizable under Rule 60(b)(3) had he been aware of the factual bases for his claim within one year of the order dismissing his

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[23] In Demjanjuk, the Court of Appeals had issued a decision declining to grant Demjanjuk habeas relief from extradition on October 31, 1985. Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985). Some six and a half years later, on June 5, 1992, the Court of Appeals ordered sua sponte that the habeas proceeding be reopened based on the evidence which had come to its attention in press reports and articles that the Department of Justice had worked a fraud on the court. Demjanjuk v. Petrovsky, supra, 10 F.3d at 356-257.

1990 petition,[24] it is his position that because of the "extraordinary circumstances" presented in this motion, 60(b)(6) provides this Court with an independent source of authority for reopening the § 2255 proceedings in this case. As a rule of civil procedure, and in the context of a civil case, Rule 60 seeks to strike a balance between the interest in providing a mechanism by which an erroneous or unjust judgment can be corrected on the one hand, and the interest in finality on the other hand. In the context of a civil case where the issue is whether a longstanding money judgment should be reopened, there may be some logic in permitting the interest in finality to prevail over the interest in correcting an unjust judgment. However, the instant case is qualitatively different. It is a criminal case where the defendant's liberty interest is at stake and there is clear evidence that the decisions of this Court and the Court of Appeals have been based on false evidence -- deemed crucial by those courts to the outcome of the case -- knowingly proffered by the government. The fraud in this instance is not inconsequential. It is directly related to the primary issue that was being litigated in 1991-1992 and bears directly on the question of MacDonald's factual innocence. As in Demjanjuk, the instant case clearly involves "extraordinary circumstances" that

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[24] As a practical matter, a large portion of the information which undergirds this motion to reopen was not obtained by the defense until 1996, when the government finally began to respond to FOIA requests made some four years earlier.

permit, and indeed require, a reopening of MacDonald's 1990 petition under Fed.R.Civ.P. 60(b)(6).

B. The Government's Conduct in Defending the 1990 Petition Violated MacDonald's Due Process Rights and Constituted a Fraud Upon the Court.

Under Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), and its progeny, due process is denied where the government withholds evidence in its possession which is material to a defendant's guilt or innocence. See also, Kyles v. Whitley, ___ U.S. ___, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995); United States v. Bagley, 473 U.S. 667, 675-76, 105 S.Ct. 3375, 3379-3380, 87 L.Ed.2d 481(1985); United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400-2401, 49 L.Ed.2d 342 (1976); Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Due process is denied regardless of whether the suppression is the "result of guile" or merely of innocent error. Kyles, supra, 115 S.Ct. at 1565; Agurs, supra, 427 U.S. at 108 & 110, 96 S.Ct. at 2400-2401. "[C]onstitutional error results from [the government's suppression of evidence favorable to the accused] 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Kyles, supra, 115 S.Ct. at 1565, quoting, Bagley, 473 U.S. at 682 (opinion of Blackmun, J.).

Closely related to the Brady doctrine, and also relevant to the instant motion to reopen, is the "Alcorta doctrine," which

holds that due process is denied when the government knowingly presents false testimony or a false case to the jury or fact-finder. 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 (1935). If the prosecution knew or should have known that false evidence had been presented and did nothing to correct it, the verdict is invalid. The conduct proscribed by the Alcorta doctrine ranges from the knowing presentation of perjured testimony, Miller v. Pate, 386 U.S. 1, 7, 87 S.Ct. 785, 788, 17 L.Ed.2d 690 (1967), to orchestrating the government's proof to create a "false impression" of the true facts. Hamric v. Bailey, 386 F.2d 39 0 (4th Cir. 1967). Whenever the government deliberately has permitted a witness to create in the jurors' minds a false impression of the true facts -- whether through the witness' ignorance, misinformation, innocent misunderstanding, or perjury -- the courts treat such misconduct with equal reprehension. See e.g., Miller v. Pate, 386 U.S. 1, 7, 87 S.Ct. 785, 788, 17 L.Ed.2d 690 (1967); Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); Campbell v. Reed, 594 F.2d 4, 7 (4th Cir. 1979); Boone v. Paderick, 541 F.2d 447, 449 (4th Cir. 1976), cert. denied, 430 U.S. 959, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977); Gunning v. Cousin, 452 F. Supp. 916, 920 (W.D.N.C. 1978); cf. United States v. Griley, 814 F.2d 967 (4th Cir. 1987). Under Alcorta, the verdict may not stand if there is "any reasonable likelihood that the false testimony

could have affected the jury's verdict." Bagley, supra, 473 U.S. at 679-80 n.9.[25]

Distilled down to their most basic elements, the Brady and Alcorta doctrines hold that it is fundamentally unfair for the prosecution to withhold exculpatory evidence or deliberately present perjured, false or misleading evidence in a criminal proceeding, and that the proceeding in which the violation occurred should be overturned where the withheld or false evidence is material to the outcome. These doctrines ensure that the proceeding in question is constitutionally fair and provide a remedy when unfairness has infected the proceeding. The obligations imposed on the government by Brady, Alcorta, and their progeny, are not limited to the trial stages, but apply as well to post-conviction and habeas proceedings.[26] See e.g., Thomas v. Goldsmith, 979 F.2d 746, 749-750 (9th Cir. 1992) (under Brady, state ordered to turn over potential exculpatory evidence (semen sample) relevant to habeas proceeding); United States v.

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[25] See also Chavis, supra, 637 F.2d at 223 ("any reasonable likelihood test"); United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976)("reasonable likelihood"); Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976), cert. denied, 430 U.S. 959, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977)(same); compare Barbee, supra, 331 F.2d at 847 (verdict is invalid if there is "possibility" that deceptive withholding of exculpatory lab reports "might have contributed" to it); Redmon, supra, 437 F. Supp. at 1053 ("reasonable likelihood").

[26] As noted in the 1976 Advisory Committee's Notes to Rule 1 of the Rules Governing Section 2255 Proceedings for the United States District Courts, "a motion under § 2255 is a further step in the movant's criminal case, and not a separate civil action, as appears from the legislative history of section 2 of S.20, 80th Congress in title 28 U.S.C. as § 2255."

Burnside, 824 F.Supp. 1215, 1271 (N.D.Ill. 1993) (government's concealment of Brady information "continued beyond the trial, into the post-trial hearings and even after the post-trial hearings concluded"); United States v. Griffin, 856 F.Supp. 1293 (E.D.Ill. 1994) (companion case to Burnside; government violated its Brady obligations by failing to disclose at post-trial hearings log books which corroborated pre-trial illegal drug use by incarcerated government witnesses); United States v. Mitchell, 372 F.Supp. 1239 (S.D.N.Y. 1973)(commenting on prosecution's Brady obligations and noting "[t]his obligation has no chronological boundaries, but applies equally to the pretrial, trial and post-trial stages of the proceeding"). Cf. Demjanjuk v. Petrovsky, supra, 10 F.3d at 353-354 (applying Brady's principles to habeas proceeding which challenged extradition order).

In the case at bar, the government violated MacDonald's due process rights under both Brady and Alcorta when it submitted false information and withheld exculpatory evidence that was material to this Court's and the Court of Appeals' consideration of the claims made in MacDonald's 1990 petition. As noted, supra, one of the principal claims made by MacDonald was that the 22 and 24 inch blond Saran fibers found at the crime scene came from a blond wig worn by Helena Stoeckley. Had this Court accepted in the 1990 habeas proceeding that the fibers could have come from a wig (as opposed to the government's misleading claim that they could not have come from a wig), that proceeding would

not have been summarily dismissed for lack of support for MacDonald's account. Such support not only would have allowed the proceeding to go forward to an evidentiary hearing, but would have obviously resulted in a reversal of the trial judge's controversial but crucial evidentiary ruling at trial that excluded the evidence of Helena Stoeckley's confessions.

C. The Evidence Of MacDonald's Factual Innocence Is Overwhelming, and When It Is Evaluated In Light Of What Is Now Known About the Saran Fibers, It Clearly Demonstrates That He Is Entitled to a New Trial.

This Court and the Court of Appeals relied largely on Malone's "expert" opinion in denying MacDonald's 1990 petition. See pp. 13-21, supra. The Saran wig issue was the pivotal point on which the viability of the petition stood, for had there been forensic evidence linking Stoeckley to the crime scene, a very different picture would have been presented to this Court, and, earlier, to the jury. Contrary to the false position taken by the government, the evidence now clearly indicates that the long blond Saran hair-like fibers found in the clear-handled hairbrush at the crime scene most certainly could have come, and likely did come, from a cosmetic wig. In light of Malone's deceptions, the evidence of MacDonald's factual innocence must be re-evaluated in its totality. When such a review is undertaken, the evidence not only establishes a "colorable showing of [MacDonald's] factual

innocence,"[27] but it creates a reasonable probability that, had all of this evidence been disclosed at trial, the result would have been different.[28] Here, it is clear that MacDonald did not

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[27] Because this motion to reopen is based on a fraud perpetrated by the government, any reevaluation of the claims made in MacDonald's 1990 petition should be conducted under the standards in existence at the time that petition was being considered by the this Court and the Court of Appeals. At that time, a petitioner bringing a second or subsequent habeas petition had to make a "colorable showing of factual innocence" to have the merits of his petition considered by the court. As noted by the Court of Appeals in the last decision issued in this case,

> 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."

United States v. MacDonald, 966 F.2d 854, 859 (4th Cir. 1992) (citations omitted). However, as the Fourth Circuit stated in its 1980 opinion, had the evidence of Stoeckley's involvement been admitted, the government's case would have been destroyed. 632 F.2d at 264. MacDonald's innocence, under the facts as they are now known, would not even be a close question.

[28] If MacDonald establishes a "colorable showing of factual innocence," he also satisfies the materiality tests imposed by Alcorta ("any reasonable likelihood that the false testimony could have affected the jury") and Brady/Bagley ("a reasonable probability that the outcome would have been different"). As to the latter, the Supreme Court recently has stated:

> Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in verdict worthy of confidence. A "resonable probability" of a different result is shown when the government's evidence undermines confidence in the outcome of the trial." Bagley, 473 U.S. at 678.

receive "a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, supra, 115 S.Ct. at 1566. Indeed, the confidence of the courts in this verdict has been shaky for some time, even before the discovery of Agent Malone's fraud. This judicially recognized "unease" surely must now "escalate." United States v. MacDonald, Supra, 966 F.2d at 860.

To understand the significance of the blond Saran hair-like fibers and of the other evidence of intruders which has surfaced since trial, one must first recognize that at trial the prosecution presented no direct proof of MacDonald's guilt, nor any plausible motive for why he would have killed his family.[29] Instead, MacDonald was prosecuted and convicted under a circumstantial evidence theory that the physical evidence, analyzed by forensic experts, demonstrated that his account of events was a lie because the physical evidence either

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Kyles v. Whitley, ___U.S.___, 115 S.Ct. 1555, 1566 (1995). In Kyles, the Court further instructed that in applying this standard, a court should make an "assessment of the cumulative effect of the evidence, as opposed to a "series of materiality evaluations." In other words, a court may not dismiss particular items of evidence as immaterial, but must look at the evidence in its totality.

[29] The government admitted that it had no evidence of motive. (Tr. 7139) It speculated that MacDonald may have argued with his wife about his youngest child's bedwetting, and that he flew into a homicidal rage during this argument, killing his wife and oldest daughter and then killing his youngest daughter as part of a cover-up. The notion that MacDonald, a physician trained in emergency medicine, would destroy his entire family over a bedwetting incident is ludicrous. Any person who has children or is even remotely familiar with childrearing, knows that bedwetting is a common occurrence, hardly a motive for a triple homicide.

contradicted or failed to support his account. The prosecution argued to the jury in closing:

> Not to put too fine a point on it, has the Defendant lied about the alleged struggle with the intruders?

(Tr. 7056) (emphasis added).

> [I]t doesn't make any difference if there were 5,000 hippies outside Castle Drive at 4:00 o'clock in the morning screaming, "Acid is groovy; kill the pigs" because they have not shown that hippies were inside the house. It does not matter what was going on outside unless they can also tie that in to the inside. . . . . I can only tell you from the physical evidence in this case that things do not lie, but I suggest to you that people can and do lie.

(Tr. 7114) (emphasis added).

> It boils down to two things. One is the Defendant's story and his credibility that it is true. If you believe it is true, if you believe everything he said, then your task is relatively simple. You will acquit him.
>
> If, on the other hand, you contrast that with the physical evidence and somehow it doesn't wash, it doesn't make sense, then you have got a little bit more of a difficult task and it might take you a little longer. I suggest that when you compare and contrast his story versus the Government's story -- testing the credibility of the Government's case as well, as I think you should -- you have got to come down on one side or the other because I suggest to you that the evidence in this case, if it shows nothing else, it does show that what he said and what the physical evidence says are not reconcilable and that they are diametrically opposed.

(Tr. 7118) (emphasis added).

As outlined in MacDonald's 1990 petition, there was a wealth of physical evidence found at the crime scene consisting of hairs and fibers which the government was unable to match to any known sources from the MacDonald home, and which corroborated MacDonald's account of intruders. This evidence, which was

recorded in the handwritten laboratory notes of the government's forensic examiners, was not disclosed to the defense at trial, and was not discovered by MacDonald until he received these notes via post-trial FOIA requests.

Aside from the question of whether there was any physical evidence to support MacDonald's account, a related and equally important issue to the outcome of the case was the exclusion at trial of the out-of-court confessions of Helena Stoeckley, who admitted within days of the murders that she and a group of her friends had attacked Dr. MacDonald and murdered his family. In 1970, during the Army's Article 32 Hearing, the defense had learned that Stoeckley had information concerning the MacDonald murders. It was also learned at that time that Stoeckley often wore a long, stringy, blond wig and a floppy hat, meeting the description of the woman whom Dr. MacDonald claimed to have seen in his living room. During the 1979 trial, Stoeckley was taken into custody and called by the defense as a witness. While testifying before the jury, she denied a memory of any involvement in the murders, claiming a memory lapse for precisely the hours during which the murders took place, although she recalled events occurring just prior to, and just after, that crucial time period.

However, Stoeckley had previously made statements to a number of individuals confessing her involvement in the murders and knowledge of the crime scene. When Stoeckley refused to acknowledge her involvement before the jury, the defense sought

to introduce her confessions by calling as witnesses the persons to whom she had confessed. This Court (Dupree, J.) ruled these confessions inadmissible pursuant to Fed.R.Crim.P. 804(b)(3) on the ground that Stoeckley was unreliable since there was insufficient evidence to corroborate her presence in the MacDonald home. (Tr. at 5806-10).

The exclusion of Stoeckley's confessions was highly controversial. On direct appeal, the Fourth Circuit noted that if the jury had heard Stoeckley confess, it would have destroyed the government's case:

> 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 258, 264 (4th Cir. 1980) (emphasis added).[30] In a later Fourth Circuit opinion, Judge Murnaghan lamented that the jury had been deprived of obviously crucial evidence by the exclusion of evidence of Stoeckley's confessions that the jury would have heard if the persons to whom she had confessed had been allowed to testify. He recognized, as did every other Fourth Circuit panel that touched the issue of the Stoeckley confessions, that evidence supporting the Stoeckley scenario would have given the jury an alternative explanation of events -- the account given by MacDonald. Judge Murnaghan was

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[30] In this appeal, the Fourth Circuit reversed MacDonald's conviction, not on the ground that Judge Dupree had abused his discretion in excluding Stoeckley's confessions, but on the ground that MacDonald's speedy trial rights had been violated, resulting in prejudice when Stoeckley suffered her memory loss at trial. The Supreme Court reinstated the conviction.

sufficiently disturbed to write in a concurring opinion:

> On the discretion of the district judge, the opinion of Judge Bryan rests. On the present state of the law as it applies to the particular case before us, I find myself, albeit not without substantial misgiving, obliged to concur.
>
> Nevertheless, I perceive a useful purpose for future cases in addressing one troubling aspect. It is evident that a basis may be erected for finding the hearsay statements of Helena Stoeckley untrustworthy. Given the wide discretion vested in the trial judge, we should not fault Judge Dupree to the extent of reversing. Nevertheless, in view of the issues involved, and the virtually unique aspects of the surrounding circumstances, had I been the trial judge, I would have exercised the wide discretion conferred on him to allow the testimony to come in. My preference derives from my belief that, if the jury may be trusted with ultimate resolution of the factual issues, it should not be denied the opportunity of obtaining a rounded picture, necessary for resolution of the large questions, by the withholding of collateral testimony consistent with and basic to the defendant's principal exculpatory contention.

United States v. MacDonald, 688 F.2d 224, 234 (emphasis added).

* * * * *

> I conclude with the observation that the case provokes a strong uneasiness in me. The crimes were base and horrid, and whoever committed them richly deserves severe punishment. As Judge Bryan has pointed out, the evidence was sufficient to sustain the findings of guilt beyond a reasonable doubt. Still, the way in which a finding of guilt is reached is, in our enduring system of law, at least as important as the finding of guilt itself. I believe MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted. In the end, however, I am not prepared to find an abuse of discretion by the district court, and so concur.

Id. at 236 (emphasis added).

As argued in the papers submitted to this Court and the Court of Appeals in 1991 and 1992, these blond Saran hair-like fibers corroborate MacDonald's account of events that he and his

family were attacked by a group of intruders that consisted of three men and a blond-haired woman with a floppy hat, and are direct evidence that Stoeckley was actually present in the MacDonald home during the murders. The forensic evidence of Stoeckley's involvement, her confessions, and various sitings of a group of persons in the Fort Bragg area on the night of, and the morning after, the murders, which closely matched the description of some of the intruders that was provided by Dr. MacDonald, all help demonstrate his factual innocence.[31] The damning evidence of involvement on the part of Stoeckley and others consists of, among other things:[32]

> [1] Stoeckley's appearance matched MacDonald's description of the female intruder. Stoeckley herself testified at trial that in February 1970 she owned a shoulder-length blond wig "just a bit longer than [her] own hair," several pairs of long boots, and an "old, floppy hat." (Tr. 5589, 5589-90, 5583) Stoeckley also testified that she burned her wig shortly after the murders took place, because she feared it would link her to the crimes. (Tr. 5602-04)

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[31] Judge Dupree's comments in his last opinion -- that he believed Stoeckley to be "utterly unreliable" and that even if the jury had heard Stoeckley's confessions, it would not have reached a different verdict, see 778 F.Supp. 1342, 1352 (E.D.N.C., 1991) -- were made in the context of Judge Dupree's finding (based on Agent Malone's representations) that the Saran fibers could not have come from a wig. This assessment of Stoeckley's reliability clearly changes once it is understood that the long blond Saran fibers could have originated from the wig that Stoeckley claimed she owned and was known to have worn.

[32] The evidence of Stoeckley's involvement is fully discussed in the Addendum to MacDonald's Reply Brief: Compilation and Analysis of Case Evidence (Rec.) which was filed in this court on May 14, 1991, (hereinafter "Case Evidence Addendum").

[2] Stoeckley testified at trial that she always wore purple or black clothing (Tr. 5634). The Army CID lab examiners found black wool[33] fibers on the wooden club murder weapon used on Colette MacDonald and on two places on Colette MacDonald's body. These findings, while reported in the examiner's handwritten lab notes, were not disclosed to the defense at trial. The location of these fibers, and the fact that they did not match any known clothing sources in the MacDonald home,[34] are further evidence of intruders in the MacDonald home.

[3] Other witnesses gave similar descriptions of Stoeckley's attire. William Posey, Stoeckley's next-door neighbor, testified that Stoeckley often wore a shoulder-length blond wig, floppy hat, knee-length white boots, and a purple shirt. (Tr. 5754-55). Fayetteville police detective Prince Everett Beasley testified that "on numerous occasions" he had seen her wearing a blond wig and floppy hat. (Tr. 5832).

[4] Numerous witnesses in the vicinity of Fort Bragg and the MacDonald home saw persons on the night of the murders who matched MacDonald's description of the intruders.

a. Military Police Officer Kenneth Mica testified at trial that on his way to the crime scene, he noticed a woman with shoulder length hair wearing a "wide brimmed . . . somewhat `floppy'" hat standing in the rain on a street corner a little more than a half mile away from the MacDonald home. (Tr. 1453-54). Mica told other MPs at the scene that he had seen such a woman and told them to send a patrol to see if they could locate her, but could not recall if that was done. (Tr. 1598)

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[33] Agent Malone claims to have reexamined these fibers and concluded that they are "dark purple" and "bluish black." Malone Aff. (Rec.) at ¶¶ 16-18. These fibers clearly corroborate Stoeckley's statement that she wore purple and black clothing.

[34] FOIA materials released on April 30, 1996 reveal that Agent Malone did have available to him various for comparison purposes black and dark blue clothing items from the MacDonald home. Cormier Aff. No. 2 at ¶¶ 19-20. Agent Malone did not reveal this fact in his affidavits, but instead stated simply that "the source of [these] fiber[s] was not known due to the absence, at this time, of known standards for comparison." Cormier Aff. No. 2 at ¶ 20. Malone Aff. at ¶ 16-18.

b. Helena Stoeckley's neighbor, William Posey, testified that Stoeckley told him that she remembered being on the particular street corner that Mica passed by on the morning of the murders. (Tr. 5759). Posey also testified that he saw Stoeckley arrive home several hours after the murders in a blue Mustang from which he heard laughter and voices. (Tr. 5751-52)

c. Numerous other witnesses, whose statements formed the basis for MacDonald's 1984 petition for relief and hence were not before the jury, recall having seen a group of persons matching MacDonald's description of the assailants on or near Fort Bragg during the evening of February 16, 1970 and morning of February 17th. They described seeing a woman with stringy blond hair wearing a floppy hat, in the company of two or three men, one of whom was black, or white with a dark complexion, wearing an Army fatigue jacket.

[5] MacDonald had described the female intruder as holding a flickering light. (Tr. 6592) Government lab examiners found candle wax on the living room coffee table (near where MacDonald claimed to have seen the blond haired woman in the floppy hat), on the arm of a chair in Kimberly's bedroom, and on her bedspread. This wax did not match any candles taken from the MacDonald home. James Milne, a neighbor of the MacDonalds, testified that he had seen near his house a group of persons dressed in white sheets (one a woman with shoulder-length blond hair) carrying candles during the early morning of February 17, 1970. (Tr. 5454-57)

[6] Helena Stoeckley made repeated statements implicating herself in the MacDonald murders. Until her death in 1983, Stoeckley's pre- and post-trial confessions remained consistent and virtually unchanged. In addition to making statements to more than ten witnesses, Stoeckley confessed her involvement in the murders to an investigator and to a retired police detective on at least seven occasions. The jury was not allowed to learn of these confessions.

a. During his trial <u>voir dire</u>, Posey stated that she told him "all she did, you know, was like hold the light ... she wouldn't kill anybody because she wasn't a hostile person." (Tr. 5759) She told Posey she remembered being on the corner of Honeycutt -- the location where Mica saw a woman matching her description (Tr. 5759)-- the morning

of the murders, and that she remembered seeing in the house a broken hobby horse that "wouldn't roll." (Tr. 5760)

b. Prince Edward Beasley, a Fayetteville, NC police detective, testified on voir dire to Stoeckley's statements the day after the murders: "In my mind, it seems that I saw this thing happen." "I was "heavy on mescaline."[35](Tr. 5742) He said "after the night of the MacDonald incident, ... [Stoeckley] joked about her icepick." (Tr. 5750)

c. Shortly after the murders, Stoeckley fled to Nashville, where she again confessed:[36]

[1] "I was involved in some murders." (Tr. 5693)

[2] "When I came to myself, I was in the rain"; "I was with three boys . . . [b]ut I don't know their names"; "So much blood. I couldn't see or think of anything except blood." (Tr. 5694-97)

[3] "She thought she had been there when the murders took place." "She felt she had been at the scene." (Tr. 5704)

[4] The men she was with on the night of the murders "killed her and the two children, they killed the children and her." (Tr. 5711-13)

[5] "[S]he was convinced that she participated in

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[35] In the presence of the jury, Beasley testified he spoke to Stoeckley for more than an hour in the early morning hours of February 18th, but he was not permitted to testify to what she told him. With Stoeckley were a black male and at least three white males, one of whom Beasley believed was Greg Mitchell. He said he had the police dispatcher call the CID at Fort Bragg and ask them to come view suspects who matched the description in the MacDonald murders. No one from the CID showed up, and, after waiting about an hour, Beasley released Stoeckley and the men.

[36] Among those to whom Stoeckley confessed were Jane Zillioux, James Gaddis, Robert Brisentine, and Charles "Red" Underhill. As discussed infra, these witnesses testified on voir dire, but were not allowed to testify to the jury because of the lack of evidence to corroborate the trustworthiness of Stoeckley's statements. This is precisely the issue to which the presence of 22-inch blond wig fibers at the murder scene would have spoken loudly.

the murder of Mrs. MacDonald and her two children . . . that she personally did not actively participate in these homicides, but may have been physically present at the time of the murders."[37] (Tr. 1517)

[6] "If the Army would give her immunity from prosecution, she would furnish the identity of those offenders who committed the murder and explain the circumstances surrounding the homicides." (Tr. 5721)

[7] "She told me she had on her wig and her white boots." "I loved them [the boots], but I had to get rid of them." (Tr. 5698)

[8] "It was raining heavily; and she was afraid her wig would be ruined, and she was worried about the wet wig." (Tr. 5698)

d. Stoeckley also made inculpatory statements to Wendy Rouder, an attorney assisting one of MacDonald's trial counsel, Bernard Segal. During trial, Segal asked Rouder to visit Stoeckley at her motel because of reports she was being abused by her fiancé. Stoeckley told Rouder:

> "I still think I was there in that house that night .... It's a memory. I remember standing at the couch, holding a candle, only -- you know -- it wasn't dripping wax. It was dripping blood." (Tr. 5937)

[7] In a post-trial statement that was submitted as part of MacDonald's 1984 petition, Stoeckley gave a description of events which is consistent with MacDonald's account. Stoeckley stated that her group, which included her boyfriend, Greg Mitchell, and Dwight Smith, a black male wearing an army jacket with E6 stripes, entered the MacDonald home through the back door into what "looked like to [her] was a laundry room of some sort or a utility room."

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[37] Stoeckley made these statements to Robert Brisentine, who claims that she retracted these statements when he interviewed her again a day later (Tr. 5718). Stoeckley's behavior is not at all out of character for a person who was concerned that her confessions to a law enforcement official might lead to her being indicted. Indeed, on the second day, Stoeckley told Brisentine that "she had talked too much" (Tr. 5721).

(DX 13 at 52)[38] Stoeckley recalled holding a burning candle and standing at the foot of the couch on which MacDonald was sleeping (DX 21 at 1). She described MacDonald's struggle with one of the intruders: "MacDonald was laying on the couch and when he put his hands up like to fight them off, because the person I am speaking of was trying to assault him and everything, he got excited and tried to fight him" (DX 12 at 8). Stoeckley saw Smith hit MacDonald, after which she shouted, "Acid is groovy, kill the pigs, Hit em' again" (DX 21 at 1). She heard Colette MacDonald scream, "Jeff, why are they doing this to me?" (DX 13 at 7A) Stoeckley then went into the master bedroom, where she saw Greg Mitchell standing over Colette MacDonald and pounding her with something. The word "PIG" was written on the headboard of the bed (DX 21 at 1).

[8] Stoeckley stated in a post-trial statement that she recalled answering MacDonald's telephone while in the MacDonald home on the night of the murders. When a soft-spoken man asked if MacDonald was home, Stoeckley said that she began to laugh and was admonished by one of the intruders to "hang up the god dam [sic] telephone" (DX 21 at 1). This occurrence was independently corroborated by the caller, James Friar, who inadvertently called the MacDonald home.[39]

[9] Stoeckley's account contained details which she would not have learned from any public source. Stoeckley mentioned fine points such as a potted plant knocked over by one of the intruders (DX 4 at 5), a Valentine's Day card lying near MacDonald (DX 4 at 5-6), and a television set which was turned on but without a picture (DX 8 at 6). In addition, she described objects in Kristen's and Kimberly's bedrooms, such as a 12-inch rag doll (DX 8 at 9), a record

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[38] Stoeckley's statements are referenced herein according to the defense exhibit("DX") number which was assigned to them at the September 1984 hearing held by this Court on MacDonald's 1984 motions.

[39] An in-patient at the army hospital on Fort Bragg, Friar mistakenly called the MacDonald home while trying to contact his doctor, Dr. Richard MacDonald. Friar said that the woman who answered the telephone was laughing, and that he heard someone in the background say "Hang up the God-damned phone." This information was included as part of MacDonald's 1984 § 2255 § petition. The patient James Friar, incidentally, is not to be confused with FBI forensic examiner James Frier, who figures in the claims made in MacDonald's 1990 § 2255 petition.

player, a jewelry box (DX 8 at 9-11), and a broken hobby horse (DX 21 at 2).

[10] Stoeckley's boyfriend at the time of the murders, Greg Mitchell, also made statements suggesting his involvement in the murders to Norma Lane, Bryant Lane and Sam Lee. (Murphy Aff. (Rec.) #2 ¶6 (d))

While the corroboration necessary to admit Stoeckley's out-of-court confessions was deemed insufficient at trial, this has changed in light of the overwhelming evidence discovered post-trial which demonstrates that Stoeckley's confessions were truthful. Now that there is direct evidence of her presence at the crime scene, the "incalculably great" damage that would have been done to the government's case by allowing Stoeckley's confessions into evidence would be even greater. This evidence more than adequately demonstrates MacDonald's factual innocence, and shows that he did not receive "a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, supra, 115 S.Ct. at 1566.

D. MacDonald Seeks Access to the Physical Evidence Taken From the Crime Scene for the Purpose of Conducting His Own Independent Laboratory Examinations on the Evidence.

As described in this instant motion to reopen, MacDonald has moved this Court to order the government to permit him access to the physical evidence so that he may conduct his own independent laboratory examinations on the physical evidence. As outlined in the Cormier Aff. No. 2, filed herewith, Agent Malone not only presented false and misleading evidence in connection with his

Saran fiber presentation in the 1990 habeas proceeding, but there is credible evidence that he has engaged in similar conduct in other cases by giving false testimony and misleading information.[40] As described in the Cormier Aff. No. 2, these other instances include:

(1) Judicial Investigation of former U.S. District Judge Alcee S. Hastings. Malone testified falsely by stating that "he himself had performed a tensile test on a purse strap and also testif[ying] inaccurately and outside his expertise concerning the test results." See Final Report of DOJ Inspector General Michael R. Bromwich, The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases, April 15, 1997 at 385, excerpts of which are attached to the Cormier Aff. No. 2 as Ex. 3. Further, the evidence suggests that Malone lied to the Office of Inspector General when he was interviewed about his testimony in the Hastings matter, when he asserted that counsel for the Investigating Committee knew that another agent had conducted the tensile tests. Id. at 386. See also Cormier Aff. No. 2 at ¶¶ 10-11.

(2) Warren County, Pennsylvania, murder case (Buckley). The Wall Street Journal article reports that Agent

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[40] Attached as Exhibit 1 to the Cormier Aff. No. 2 is an April 16, 1997 investigative article from The Wall Street Journal which describes in detail Agent Malone's pattern of deception.

Malone testified for the prosecution in a 1991 murder case in Pennsylvania involving a defendant by the name of Jay William Buckley. The truthfulness of Agent Malone's testimony in this Pennsylvania case is highly suspect. Viewed in the best light, it demonstrates that Malone is, at best, utterly incompetent when it comes to accurately identifying the source of hairs found at crime scenes, and is, at worst, a perjurer. According to the Journal article, Malone, who held the position of senior examiner at the hairs and fibers unit, and who touted the accuracy of his hair examinations, was tasked in this Pennsylvania case with determining whether certain hairs found on a blanket taken from the crime scene were from the victim. The article reports that Pennsylvania authorities accidently gave agent Malone a different blanket (belonging to the defendant) which "had never been anywhere near the crime scene," and that Malone, not realizing their error, testified that he had found the hairs of the victim on this blanket. When Malone was confronted with this fact on cross-examination, he reportedly continued to insist that he had found the victim's hairs on the blanket. See Cormier Aff. No. 2 at ¶ 12. Defense counsel are in the process of seeking documentation of this case, which they learned about for the first time from the Journal.

(3) Florida Cases in Which Malone Testified.

In addition to the Hastings matter and the Buckley case, the Journal article reports on a series of cases from the State of Florida where Agent Malone testified, in which he routinely overstated the reliability and accuracy of his hair examinations. The article reports that "Malone was so effective in winning convictions that Florida state prosecutors would bypass the more-cautious state hair examiners and rely on the FBI instead . . . ." The article states that Malone apparently overstated the reliability and the accuracy of his findings to such an extent that, in one case in which Malone "had told jurors that the chances were 'almost nonexistent' that hairs found on the victim originated from anyone other than the defendant," the appellate court ordered the defendant's acquittal, stating that "[w]e do not share Mr. Malone's conviction in the infallibility of hair-comparison evidence. Thus we cannot uphold a conviction dependent upon such evidence." Hosrtman v. State of Florida, 530 So2d 368 (Fla.Dist.Ct.App., 1988). See Cormier Aff. No. 2 at ¶ 13.

* * *

As a result of Agent Malone's false and misleading Saran fiber presentation in the MacDonald case and his pattern of deception in other cases, the reliability and accuracy of all laboratory examinations conducted by him in the MacDonald case

are suspect, as well as the truthfulness of any conclusions which Malone has drawn from such examinations. In light of this evidence, the defense seeks access to all items of physical evidence on which Malone conducted laboratory examinations -- including, but not limited to, the blond fibers found in the clear-handled hairbrush, the black wool fibers found on Colette MacDonald and on the wooden club murder weapon, and any natural hairs examined by Malone — for the purpose of conducting its own independent laboratory examinations to verify the accuracy and reliability of Malone's examinations and the truthfulness of his conclusions. The Cormier Aff. No. 2 at ¶¶ 17-20 lists a series of exhibits which the defense seeks to test. In addition, the Cormier Aff. No. 2 lists a series of exhibits which Malone apparently did not examine, 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.[41] The defense seeks access to these exhibits, as well, for the purpose of conducting independent laboratory examinations on these items, including, if appropriate, DNA testing. Cormier Aff. No. 2 at ¶ 21. As far as the defense is aware, none of the hairs, skin and blood debris in this case have

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[41] Many of the handwritten labnotes indicate the presence of unsourced hairs and fibers, as well as agent Malone's 2/14/91 affidavit in which he identified hairs that he claimed he could not source due to insufficient characteristics for comparison purposes.

ever been subjected to any form of DNA testing, including the recently developed mitochondrial DNA testing which can, in appropriate circumstances, be used to identify hairs more accurately than can be achieved through microscopic examinations. Cormier Aff. No. 2 at ¶¶ 22-29.

As this Court and the Fourth Circuit recognized on more than one occasion, MacDonald was convicted largely because there was no physical evidence to support his account of events, a fact which the prosecution continually emphasized throughout the case.[42] In the circumstances presented by this case, there is

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[42]

> MacDonald's account of the murders found little, if any, support from the physical evidence gathered by investigators at the crime scene. There were no threads, yarns, splinters, or blood, except on the Esquire magazine, found in the living room, the area where MacDonald said he struggled with intruders....Furthermore, despite MacDonald's contention over the years that four people which he later identified in some detail had been the assailants on the night of the murders, none of their fingerprints were ever found in the apartment.

U.S. v. MacDonald, 640 F.Supp. 286, 314 (E.D.N.C. 1985).

> 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.

U.S. v. MacDonald, 778 F.Supp. 1342, 1346 (E.D.N.C. 1991).

> The United States relied principally on this forensic evidence, and an absence of evidence corroborating MacDonald's story, to prove its case at trial.

"good cause"[43] to grant MacDonald discovery by ordering that the government permit him access to the physical evidence so that independent forensic examinations can be conducted for the purpose of verifying the accuracy of Agent Malone's examinations, and to examine the evidence using new technology which may result in more accurate identifications of certain items.[44] See Toney

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U.S. v. MacDonald, 966 F.2nd 854, 856 (4th Cir. 1992).

[43] Rule 6(a) of the Rules Governing Section 2255 cases provides that a party "may invoke the processes of discovery under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the principles and usages of law if, and to the extent that the judge in the exercise of his discretion and for good cause shown grants leave to do so . . . ." In addition, it would violate MacDonald's due process rights under Brady and similar doctrines if he were denied discovery which is necessary to proving his "factual innocence" and his claims on the merits.

[44] Attorney General Reno has publicly recognized the utility of DNA technology to assure greater accuracy in the search for truth:

> Our system of criminal justice is best described as a search for truth. Increasingly, the forensic use of DNA technology is an important ally in that search. The development of DNA technology furthers the search for truth by helping police and prosecutors in the fight against violent crime. . . .
> At the same time, DNA aids in the search for truth by exonerating the innocent. The criminal justice system is not infallible . . . .

Convicted by Juries, Exonerated by Science, Case Studies in the use of DNA Evidence to Establish Innocence After Trial, National Institute of Justice, June 1996, (attached to Cormier Aff. No. 2 as Exhibit 7).

The Attorney General has also stated that

> Laboratories must also be in a position in cases where evidentiary samples have been appropriately preserved

v. Gammon, 79 F. 3d 693, 700 (8th Cir. 1996) (ordering that state habeas petitioner be given access to evidence under Rule 6 (a) for the purpose of conducting laboratory testing, including DNA testing).[45] In Thomas v. Goldsmith, supra, 979 F.2d at 746, involving a state habeas petitioner, the Ninth Circuit ordered that the petitioner be given access to semen samples for the purpose of conducting laboratory testing so that he might further establish his factual innocence which was necessary before his procedurally defaulted claims could be heard. Likewise, MacDonald should be granted access to the physical evidence to verify the accuracy of agent Malone's testing and to permit him demonstrate his factual innocence.

V. CONCLUSION

For all of the reasons set forth in the papers filed herewith and already on file in connection with the 1990 habeas proceeding, this Honorable Court should order the government to

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> and maintained to re-examine, using modern technology, evidence used years ago to convict someone. Properly conducted scientific tests are accurate and impartial and in the right cases, as I've indicated, can correct a miscarriage of justice. Forensic science can play no more important role than that.

Keynote Address By Janet Reno, Attorney General of the United States of America Before the American Academy of Forensic Sciences, February 21, 1996 at Nashville, TN, Alderson Reporting Co., at 15. Cormier Aff. No. 2 at ¶ 29.

[45] Undersigned counsel has learned through a December 3, 1996 letter issued by James C. McCloskey of Centurion Ministries, Inc. that Steven Toney was released from prison on July 16, 1996, as a result of DNA tests which exonerated him.

respond to this motion to re-open. If the government is unable to support Agent Michael Malone's aforesaid two affidavits, or if the government withdraws those affidavits, the Court should allow the 1990 petition and grant MacDonald a new trial. In the event contested material issues remain after the government's response to this motion, the Court should convene an evidentiary hearing and also grant MacDonald's discovery requests in support of his motion and petition.

The end result should be the grant of a new trial.

DATED: APRIL 22, 1997

Respectfully submitted,

Harvey A. Silverglate
MA BBO #462640

Andrew Good
MA BBO #201240

Philip G. Cormier
MA BBO #554515
SILVERGLATE & GOOD
83 Atlantic Avenue
Boston, MA 02110
Tel. (617) 523-5933
Fax. (617) 523-7554

Wade M. Smith
NC State Bar # 4075

Melissa Hill
NC State Bar # 14130

THARRINGTON SMITH
209 Fayetteville Station Mall
P.O. Box 1151
Raleigh, NC 27602-1151
Tel. (919) 821-4711
Fax. (919) 829-1583

John J.E. Markham, II
CA Bar #69623
MARKHAM & READ
One Sansome Street, Suite 2000
San Francisco, CA 94104
Tel. (415) 951-1038
Fax. (415) 951-1042

Roger C. Spaeder
DC Bar #28720
Bonnie Robin-Vergeere
DC Bar #429717
Zuckerman, Spaeder, Goldstein, Taylor & Kolker
1201 Connecticut Ave., N.W.
Washington, D.C. 20036
Tel. (202) 778-1800
Fax. (202) 659-9164

Alan M. Dershowitz
BBO #121200
26 Reservoir Street
Cambridge, MA 02138
(617) 661-1965
(617) 495-7855

Attorneys for Jeffrey R. MacDonald

Of Counsel:
Anthony P. Bisceglie
BISCEGLIE & WALSH
1130 17th Street, N.W.
Suite 400
Washington, D.C. 20036
Tel. (202) 778-1160
Fax. (202) 659-9536

On the Brief:
Lisa M. Kavanaugh
Paralegal

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 1997, a true copy of the foregoing was served via hand delivery upon Eric Evenson, Assistant United States Attorney, Eastern District of North Carolina, New Bern Avenue, Suite 800, Federal Building, Raleigh, NC 27601

Melissa Hill
THARRINGTON SMITH
209 Fayetteville Station Mall
P.O. Box 1151
Raleigh, NC 27602-1151

I hereby certify that on this 21st day of April 1997, a true copy of the foregoing was served via first class mail upon

John F. DePue, Attorney
Room 2521
Main Justice Building
10th and Pennsylvania Avenue, NW
Washington, D.C. 20530

Harvey A. Silverglate
Silverglate & Good
83 Atlantic Avenue
Boston, MA 02110

G:\clients\macdonal\habeas\reopen\reopdoc.wpd

United States Attorney
Eastern District of North Carolina

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