IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 75-26-CR-3
NO. 90-104-CIV-3-D

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| UNITED STATES OF AMERICA | ) GOVERNMENT'S MOTION TO DISMISS |
| | ) 28 U.S.C. § 2255 PETITION FOR |
| v. | ) LACK OF JURISDICTION AND SUGGES- |
| | ) TION, IN THE ALTERNATIVE TO |
| JEFFREY R. MACDONALD | ) TRANSFER TO THE COURT OF APPEALS |

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, respectfully submits this motion to dismiss the pleading filed April 22, 1997, captioned Jeffrey R. MacDonald's Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery, for lack of jurisdiction.

For the reasons stated more fully in the accompanying memorandum entitled Opposition of the United States to Defendant's Motion to Reopen § 2255 Proceedings and for Discovery, the Court lacks jurisdiction to grant any relief sought in this third or successive habeas petition pursuant to 28 U.S.C. § 2255, because of the defendant's deliberate failure to first seek a certificate of appealability from the appropriate court of appeals as required by 28 U.S.C. §§ 2244 and 2255. Accordingly, it is respectfully submitted that the Court should dismiss the petition for lack of jurisdiction. In the alternative, it is respectfully suggested that this Court transfer the petition, and this memorandum in

opposition, to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted this 12th day of May 1997.

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CERTIFICATE OF SERVICE

This is to certify that on this 12th day of May, 1997, the undersigned caused to be served by first class mail, postage and fees paid, copies of the Government's Motion to Dismiss For Lack of Jurisdiction, together with the accompanying memorandum in Opposition of the United States to Defendant's Motion to Reopen 28 U.S.C. § 2255 Proceedings, on counsel for petitioner whose names appear below:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3
No. 90-104-CIV-3-D

UNITED STATES OF AMERICA

v.

JEFFREY R. MACDONALD

# OPPOSITION OF THE UNITED STATES TO DEFENDANT'S MOTION TO "REOPEN § 2255 PROCEEDINGS" AND FOR DISCOVERY

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 75-26-CR-3
NO. 90-104-CIV-3-D

| | | |
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| UNITED STATES OF AMERICA | : | |
| | : | OPPOSITION OF THE UNITED STATES |
| v. | : | TO DEFENDANT'S MOTION TO "REOPEN |
| | : | § 2255 PROCEEDINGS" AND FOR |
| JEFFREY R. MACDONALD | : | DISCOVERY |

## SUMMARY OF ARGUMENT

For the third time, the defendant seeks from this Court habeas relief from his convictions for the February 17, 1970 murders of his wife and young children. On this occasion, the basis of his claim is that FBI Agent Michael Malone, acting as a government expert during the prior round of habeas litigation, visited "fraud on the court" by furnishing opinion evidence that saran "wig" fibers, found in a hairbrush in the MacDonald household and argued by the defense to demonstrate the presence of intruders, could not have originated in a human cosmetic wig. In its present submission, however, the defense has utterly disregarded the fact that evidence relating to the saran fibers had virtually no impact upon the courts' earlier disposition of this case. Although this Court credited Malone's affidavit, it also found that the defense was barred from relying upon the "wig" fiber evidence in the first place, because of its intentional failure to include claims relating to it in its first petition. This procedural default constituted the exclusive basis for the subsequent affirmance by the court of appeals, which concluded that the defense team had made a tactical decision not to use such evidence. Thus, the claim

presented by the defendant now is foreclosed by the courts' earlier disposition of this case.

Despite the defendant's plain disentitlement to any relief, however, this court lacks jurisdiction to dispose of this case on the merits. Under the habeas "gatekeeping" provisions of the Antiterrorism and Effective Death Penalty Act of 1996, a habeas petitioner must obtain leave from the court of appeals before filing a second or successive motion for habeas relief in a district court. The defendant has not complied with this statutory requirement and could not possibly satisfy the stringent requirements for obtaining such leave if he attempted to do so. Accordingly, this Court must either dismiss the petition outright or transmit it to the Fourth Circuit for a gatekeeping determination under 28 U.S.C. §§ 2244, 2255.

## STATEMENT

a. Procedural History

Following a jury trial in the United States District Court for the Eastern District of North Carolina, the defendant was convicted of one count of first degree murder and two counts of second degree murder, in violation of 18 U.S.C. § 1111. He was sentenced to three consecutive terms of life imprisonment. Following the defendant's trial, the court of appeals reversed his conviction on the ground that his right to a speedy trial had been violated. 632 F.2d 258 (4th Cir. 1980). The Supreme Court reversed [456 U.S. 1 (1982)] and remanded the case to the court of appeals for disposition of the remaining issues. Thereafter, the court of

appeals affirmed. United States v. MacDonald, 688 F.2d 224 (4th Cir.), cert. denied, 459 U.S. 1103 (1983).

After his conviction became final, the defendant filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 on the basis of newly discovered evidence, as well as two motions for postconviction relief under 28 U.S.C. § 2255. This Court denied the motions, United States v. MacDonald, 640 F. Supp. 286 (1985), and the court of appeals affirmed. United States v. MacDonald, 779 F. 2d 962 (4th Cir. 1985), cert. denied, 479 U.S. 814 (1986).

In October 1990, the defendant filed a second habeas petition alleging, once again, newly discovered evidence as well as the concealment by the government of such evidence. This Court, once again, denied relief, United States v. MacDonald, 778 F. Supp. 1342 (1991), and the court of appeals affirmed. United States v. MacDonald, 966 F.2d 854 (4th Cir. 1992), cert. denied, 506 U.S. 1002 (1992).

b. Factual Background

The factual setting resulting in the defendant's convictions is detailed in this Court's prior opinions denying post-conviction relief (640 F. Supp. 289-290; 778 F. Supp. 1345-47). We summarize the facts in order to place the defendant's most recent assertions in their proper context.

1. The Crime and Events Leading to the Trial.

In the early morning of February 17, 1970, while the defendant was stationed at Fort Bragg as an Army Medical Corps captain, his pregnant wife, Colette, and two daughters, Kimberly (age 5 1/2) and

Kristen (age 2 1/2), were murdered in the military quarters which they shared with him. The defendant summoned the Military Police.

When the Military Police arrived on the scene, they found the defendant lying across his wife's body in the master bedroom. His children's bodies were found in their bedrooms. All three victims suffered multiple stab wounds; Colette and Kimberly also suffered blunt trauma injuries caused by a club (Tr. 2494-2520, 2567-67, 2577-89). Although the defendant was treated for a number of wounds, he required only brief hospitalization (640 F. Supp. 289). The word "PIG" had been written in Colette's blood on the headboard in petitioner's bedroom (GX 43).[1] The weapons used in the killings -- a bloodstained club, an "Old Hickory" brand paring knife, and an icepick -- were discovered outside the rear door (Tr. 2342-44).

During subsequent interviews with Army Criminal Investigation Division (CID) investigators, the defendant recounted his version of what occurred on the night of the murders. He stated that he had fallen asleep on a living room sofa at approximately 2:30 a.m. and was awakened by the screams of family members. He claimed to observe a blond woman wearing a floppy hat, muddy boots, and a short skirt, carrying a lighted candle and chanting "acid is groovy, kill the pigs." Allegedly, three men standing near the couch attacked the defendant, pulling or tearing his pajama top over his head, which the defendant used to ward off their blows until he lost consciousness. The defendant stated that, when he

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[1] As all of the victims and petitioner had different ABO blood groups, the probable sources of the blood evidence within the MacDonald household could be determined.

regained consciousness, he went to the master bedroom where he found his wife dead. After removing a knife from her chest, he covered her body with his pajama top and a bath mat. He then went to his children's bedrooms and discovered that they were also dead. He then summoned the Military Police (640 F. Supp. 289).

As early as the day following the MacDonald murders, Helena Stoeckley, an admitted drug addict and member of the local "hippie" community, made a series of statements to investigators and acquaintances that purported to link her to the crimes (640 F.Supp. at 315-317). On each occasion, however, she either contradicted or qualified her statements by asserting that she could not recall her whereabouts on the night of the murders, or that her account of the events of that night was the product of drug-induced hallucinations.

Forensic evidence cast doubt on both the defendant's story and Stoeckley's statements concerning her involvement. It also led military investigators to believe that the defendant had committed the murders of his family. The Army charged the defendant with the murders in May 1970 and a formal pretrial investigation, pursuant to Article 32 of the Uniform Code of Military Justice, 10 U.S.C. § 832, was convened. At the recommendation of the Article 32 investigating officer, however, the charges were dismissed and the defendant was discharged from the Army. Nonetheless, the investigation of the murders by both civilian and military authorities continued. On January 24, 1975, the defendant was indicted on three counts of murder (640 F. Supp. at 289-290).

After several interlocutory appeals,[2] trial commenced in July 1979.

2. The Government's Case At Trial.

The government introduced a wealth of physical and other circumstantial evidence which affirmatively established that petitioner was the murderer (640 F. Supp. 310-315; 778 F. Supp. 1346). Additionally, that evidence demonstrated that the defendant's version of the events of February 17, 1970, was false. The defendant's pajama top was, perhaps, the single most inculpatory piece of evidence. He claimed it was torn in the living room during his efforts to ward off the attackers and that he later placed it over his wife's body to keep her warm. The garment had two cuts and 48 puncture holes in it, whereas Colette's chest area sustained 21 puncture wounds in all; five on the right side, 16 on the left. When a forensic technician experimented with the top by folding it in the same manner in which it had been found on Colette's body, the garment's 48 puncture holes aligned in a pattern corresponding to the 21 puncture holes in Colette's chest (Tr. 4192-4196). This showed that the defendant had placed the garment on Colette's chest, in order to account for the presence of her blood on it and then stabbed her through it, to lend support for his account of the attacks. (See 640 F. Supp. 311-312). The

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[2] Prior to trial, the defendant moved to dismiss the indictment on the ground that his speedy trial rights had been violated. This Court denied the motion but the court of appeals reversed and ordered the indictment dismissed. 531 F.2d 196 (4th Cir. 1976). The Supreme Court, however, vacated that judgment on the ground that the defendant could not take an interlocutory appeal from the denial of a motion to dismiss an indictment on speedy trial grounds. 435 U.S. 850 (1978).

fact that the holes in the pajama top were clean and showed no tearing indicated to a forensic expert that the pajama top was not moving when the punctures were made, flatly contradicting the defendant's claim that he used it to ward off his attackers (Tr. 4074-75).

Threads and yarns from the defendant's pajama top were found underneath Colette's body in the master bedroom, in the bedding in which Kimberly was wrapped, and in Kristen's bedroom. No threads from the pajama top, however, were found in the living room where petitioner claimed he was assaulted (Tr. 1689-90, 1727, 3790-3811). Additionally, the pajama top's pocket was found on a throw rug at Colette's feet (Tr. 1683). A forensic expert testified that the pocket was stained with blood of Colette's blood type before it was torn from the pajama top and that the staining was the result of smearing and soaking caused by direct contact. In addition, Colette's blood was found in numerous places on the pajama top. Some of the stains were bisected by tears in the garment indicating to the expert that the top had been stained before it was torn. Blood in Kimberly's type was also found on the garment (Tr. 3648-54, 4076-79).

This evidence refuted the defendant's story that his pajama top was torn when unknown intruders attacked him in the living room, and that, after they left, he went directly into the master bedroom where he placed the torn garment over Colette. Instead, it showed that the pocket had been torn off the pajama top while petitioner struggled with Colette in the master bedroom, that

petitioner had gone to other rooms still clad in the pajama top, that he later returned to the bedroom and placed it -- minus the pocket -- over Colette's body, and then stabbed her (subsequent to the infliction of the fatal knife wounds) with the icepick to make her death appear as the work of crazed intruders.

In addition, blood spatterings throughout the apartment demonstrated that, contrary to the defendant's story that he found Colette in the master bedroom and Kimberly in her own bed, he had moved the bodies of Colette and Kimberly, rearranging the crime scene to conform to his story. Spattered blood demonstrated that the defendant had assaulted Colette and Kimberly in the master bedroom and subsequently moved Kimberly's body to her own bedroom where he again assaulted her. Further, the blood evidence demonstrated that, at some point, the defendant's attack on Colette resumed in Kristen's bedroom as large amounts of Colette's blood were found on Kristen's bedding as well as on the wall above Kristen's bed (Tr. 3662-67: GX 982). The defendant's bare footprint, stained in Colette's blood, was discovered leading out of Kristen's bedroom (Tr. 1616), but no such footprints leading in were found. This further demonstrated that he carried Colette's body back to the master bedroom after stepping on the bloodstained bedding apparently used to effect the transfer.

The sheet and bedspread from the master bed were found on the floor of the master bedroom. The sheet was heavily stained with Colette's blood and bore bloody imprints from Colette's pajama top and the sleeves of the defendant's pajama top (Tr. 3662-66, 4133-

39, 4146-52). The bedspread was also heavily stained with Colette's blood (Tr. 3667, 4103-10). Adhered to the bedspread was a bloody hair from Colette which was entwined with a thread from the defendant's pajama top. In addition, sixty threads and yarns from the defendant's pajama top were found in the master bedroom, many of them underneath Colette's body (Tr. 3790-3811, GX 654). Taken together, this evidence showed that the defendant attacked Colette, not only in the master bedroom but also in Kristen's bedroom, and carried her heavily bleeding body, wrapped in the bedding, back to the master bedroom. He then deposited Colette's body over pajama top threads resulting from their earlier struggle. The presence of the defendant's footprint in Colette's blood leading out of Kristen's room also refuted his story that Colette was in the master bedroom when he first discovered her, and that he was neither present when she was attacked, nor had he moved her bloody body.

Similarly, Kimberly's blood was found on a rug and bedding in the master bedroom, on the bath mat used both to cover Colette's body and to wipe off the murder weapons, in the hallway leading to Kimberly's bedroom, on the wall of her bedroom, on the club, and on the defendant's pajama top (Tr. 3615-17). Threads and yarns from the defendant's pajama top were found within the bedding in which Kimberly was wrapped. Collectively considered, this evidence demonstrated that Kimberly, who sustained blunt trauma injuries inflicted by the club, was struck in the master bedroom and then carried by petitioner -- still wearing his pajama top -- to her own

bedroom where he continued to assault her in order to support his story that his wife and children were attacked in their own bedrooms while they slept (Tr. 3615-17, 3639-46; 640 F. Supp. 312-313). It also refuted his claim that he was not wearing his pajama top when he entered Kimberly's room.[3]

Kristen's blood was found on the defendant's eyeglasses. This suggested that it had gotten there during his assault. It also contradicted the defendant's story that he was not wearing his eyeglasses either during or after the attack (640 F. Supp. 313).

The murder weapons implicated the defendant in the murders and discredited his statements to investigators. Although the defendant denied that he had ever seen the wooden board which was used as a club to assault Colette and Kimberly (I Apr. 6 Tr. 45-46),[4] the weapon was shown to have been used to support Kimberly's

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[3] Expert testimony established that Kimberly would not have been ambulatory after sustaining blunt trauma injuries from the initial club attack in the master bedroom (Tr. 2571).

[4] The club had Colette's and Kimberly's blood on it as well as seam threads from the defendant's pajamas and fibers from a throw rug in the master bedroom. This demonstrated that the defendant's story was false and that the club had contact with the throw rug after his pajama top had been torn in the master bedroom and before the club was removed from the house by the murderer. A splinter from the club with Colette's blood was found in the master bedroom. Splinters from the club were also found close to seam threads from the defendant's pajama top in the childrens' rooms. And an impression corresponding to the end of the club was found on Colette's chest (Tr. 1700-01, 2340, 3404-05, 3425-27, 3804-12). The fact that, even though splinters from the club were found in Kristen's bedroom, Kristen bore no blunt trauma injuries, further demonstrates that the defendant, whose pajama top yarns were found there, assaulted Colette in Kristen's bedroom.

bed when it was painted and testimony established that petitioner had used other pieces from the same board to construct a bed slat (Tr. 3812-19). The defendant also denied that the family ever owned an icepick like the one that had been used to stab his family (i Apr. 6 Tr. 46-47). However, both his mother-in-law and the baby sitter recalled using one in his home (286 F. Supp. at 311).

A copy of Esquire magazine found in the living room contained an article describing the Charles Manson murders. It also bore the defendant's latent fingerprints, and was stained with Colette's and Kimberly's blood. This suggested that the defendant had read the article and sought to exculpate himself by fabricating a similar crime scene.

The word "PIG" was written in Colette's blood on the master bed headboard. But there were no ridge lines in the writing as there would have been if it had been written with a bare finger (610 F. Supp. at 313). A finger section of a latex surgical glove stained with Colette's blood was found in bedding at the foot of the master bed and had apparently been used to paint the word "PIG" on the headboard (Tr. 1730-31). The chemical composition of the glove was similar to that of other surgical gloves found in a kitchen sink cabinet and a trail of petitioner's blood type was found leading to the cabinet (Tr. 1760-61). This showed that the defendant had gotten gloves from the cabinet following his attacks on his family and then written on the headboard with a glove to reinforce his story that the murders had been committed by drug-crazed hippies.

As this Court has recognized (640 F.Supp. 314), almost no physical evidence supported the defendant's version of events on the night of the murders. For example, the defendant claimed that he was attacked with a club and stabbed in the living room and that his pajama top was torn there by one of his assailants. But no bloodstains, threads, yarns, or fibers from the pajama top, or splinters from the club were found there. The defendant testified that he had been stabbed with an icepick. However, he sustained no wounds on his arms, hands, or body consistent with wounds inflicted by an icepick. Moreover, his injuries were either superficial or could easily have been self-inflicted with the disposable scalpel blades he was known to have kept in a linen closet (640 F. Supp. at 314). In fact, his blood was found on the door of the linen closet which contained scalpel blades and in a sink beneath a mirror in the master bedroom.[5]

3. The Defense Case.

The defendant testified at trial that four hippies murdered his wife and children (e.g., Tr. 6579-6624). To support his story, the defendant called Helena Stoeckley as a witness. She testified that on the day before the murders, she had injected herself with heroin six or seven times. The last thing she remembered was taking mescaline furnished by a male companion, Greg Mitchell,

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[5] Shortly before the murders, the defendant observed another physician treat a pneumothorax (collapsed lung) by making an incision in the chest wall and inserting a chest tube (Tr. 2866--67). At trial, that physician testified that a doctor can readily control the depth of an incision (Tr.3037).

around midnight, approximately three hours before the murders (Tr. 5553-54, 5643-44). She further stated that she did not recall her activities between midnight and around 4:30 the next morning when she returned to her apartment.

Although Stoeckley admitted that at the time of the murders she owned a floppy hat, a blond shoulder length wig, and boots, she testified that she was not wearing the wig during the early morning hours of February 17 (Tr. 5583-89, 5645; 778 F. Supp. 1347).[6] She denied any recollection of having participated in the killing of the MacDonald family or of being in the vicinity of their quarters on the night of the murders (Tr. 5646-50; 640 F. Supp. at 317-318; 778 F. Supp. 1347).

Following Stoeckley's testimony, pursuant to Fed. R. Evid. 804(b)(3), the defendant's counsel attempted to introduce evidence of her pretrial statements suggesting her involvement in the murders. Following a voir dire of potential witnesses, this Court excluded the evidence. In concluding that the statements were not trustworthy, the Court noted that, for the most part, the statements were made while Stoeckley "was under the influence of powerful narcotics." United States v. MacDonald, 485 F. Supp.

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[6] Testifying at trial, William Posey, a neighbor of Stoeckley's who saw her return home on the early morning hours of February 17th, could not recall what color her hair was at that time but agreed that her hair was brunette. Tr. 6012. When asked by the defense during the 1970 Article 32 U.C.M.J. investigation what Stoeckley was wearing that morning, Posey responded that "she didn't have a hat on or anything like that on at that time. She had her -- she has brunette hair, and I guess it was down close to her shoulders." Art. 32 Invest. Tr. 1299-1300.

1087, 1091-1093 (E.D.N.C. 1985); see also 778 F. Supp. at 1347. The court of appeals agreed.[7]

The defense also introduced some testimony concerning physical evidence purporting to corroborate petitioner's story about the band of "hippies" in his home on the night of the murders. This included many fingerprints in the MacDonald home which did not match those of any family members or other known sources (640 F. Supp. at 289), candle drippings in Kimberly's bedroom and living room that did not match any candles found in the house (Tr. 3838-45), as well as unmatched hair and fibers throughout the household that had no identifiable source. (Tr. 3845-55, 3880-86; 778 F. Supp. at 1347). Despite this unidentified debris evidence, some of which had been found in Colette's hands and on the defendant's glasses, the jury concluded beyond a reasonable doubt that the defendant, and not intruders, had killed his wife and children.

c. The 1983-1984 FOIA Releases and Motions for Post-Conviction Relief

1. Following the defendant's conviction Brian O'Neill, then his attorney, filed Freedom of Information Act (FOIA) requests for investigative files with the Department of Justice (DOJ), with the

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[7] In affirming this ruling, the Fourth Circuit stated (688 F.2d at 233):

> [that Stoeckley's] apparent longstanding drug habits made her an inherently unreliable witness. Moreover, her vacillation about whether or not she remembered anything at all about the night of the crime lends force to the view that everything she has said and done in this regard was the product of her drug addiction. Given the declarant's "pathetic" appearance, our conviction is that the District Court was not in error in adjudging that defendant failed to carry his burden under Rule 804(b)(3).

Army Criminal Investigation Command (CID) and with the Federal Bureau of Investigation (FBI). The documents released to O'Neill at that time included photostatic copies of Army CID serologist Janice Glisson's bench notes describing "blond synthetic fibers made to look like hairs" found in a clear-handled hairbrush from the MacDonald home. See 778 F. Supp. at 1385.

On April 5, 1984, O'Neill filed a motion on behalf of the defendant for a new trial under Fed. R. Crim. P. 33 and two motions for collateral relief under 28 U.S.C. § 2255. One of the motions for collateral relief was based upon the FOIA releases. It alleged that the government had suppressed certain items of evidence -- the presence of a bloody syringe in the defendant's apartment, information concerning a pair of boots and items of clothing that could have belonged to Stoeckley, information concerning the loss by the government of a piece of skin that had been found underneath Colette's fingernail -- that would have demonstrated the presence of intruders. Significantly, however, the motion made no mention of Glisson's bench notes memorializing the presence of blond synthetic fibers in the hairbrush.

2. This Court denied the motions. It held, inter alia, that "[a]fter reviewing the evidence and arguments on both sides, the court concludes that the government did not suppress any evidence and, in any event, there has been an insufficient showing that the * * * items [upon which the claim was based] would have been favorable to the defense if introduced at trial." 640 F. Supp. at 300.

d. The Second Round of FOIA Releases and Motion for Post-Conviction Relief

After the court of appeals affirmed the denial of the defendant's first set of motions for post-conviction relief, he retained a new battery of lawyers who, between 1988 and 1990, made additional and duplicative requests under FOIA for the investigative case files and laboratory notes. Among the items specifically requested from the CID were laboratory bench notes concerning the presence of synthetic hair in a hairbrush -- the very same notes that had been released to the defendant in 1983 and in 1984. Following this request, all of the CID laboratory bench notes and draft reports, which had been furnished to O'Neill in 1983 and 1984, were again released to the defendant's new counsel.

In October 1990, the defendant filed yet another motion under § 2255 alleging that he had obtained "critical new" and "previously unreleased" exculpatory evidence from the CID and the FBI which the government had improperly suppressed prior to trial. According to the motion, the "most significant" of this suppressed evidence were Glisson's bench notes showing that in May 1971, she identified blond synthetic fibers in a clear handled hairbrush from the MacDonald household. According to the defense, if made available prior to trial, the notes would have "directly link[ed] Stoeckley to the crime scene" and accorded her out-of court-statements a sufficient indicia of reliability to have compelled their admission.

The government responded to this claim in three separate and independent ways. First, it alleged that the defendant's claim

constituted an abuse of the writ as Brian O'Neill could have, but did not, raise claims relating to the presence of the synthetic fibers in the earlier petition. Pertinent to this argument, Karen R. Davidson, an associate of O'Neill, executed an affidavit (submitted by the defense in connection with the defense Reply Brief) admitting to having seen Glisson's bench notes prior to submission of the first habeas petition. A page from the notes, which was appended to Davidson's affidavit, bore a date stamp showing that it had been received in O'Neill's office on June 30, 1983. A post-it note from a defense law clerk, which had been attached to the document, showed that its potential significance was understood and that its possible use in connection with the petition was explored by the defense team at that time (see 778 F. Supp. at 1358; United States v. MacDonald, 966 F.2d 854, 860 (4th Cir. 1992)).

Second, the government argued that it did not improperly conceal information concerning the discovery by Glisson of the blond fibers in the clear handled hairbrush. In this respect, it demonstrated, that although the prosecutor was unaware of the notation in Glisson's handwritten bench notes and therefore did not furnish them to the defense, it made available to the defense all of the government's physical evidence, including the actual fibers found in the hairbrush, but that the defense expert declined to examine them.

Finally, the government argued that, even if the blond synthetic fibers had been improperly concealed, they were not

exculpatory and, consequently, their presence at trial could not have affected its outcome. To support this claim, it requested the FBI laboratory to examine the fibers, themselves. The slides containing the fibers had been labeled by the FBI as "Q-46" "Q-48 and "Q-49." Special Agent Examiner Robert F. Webb, of the Materials Analysis Unit, determined the composition of the fibers to be of two distinct types. In particular, he examined one fiber from Q-49 and two fibers from Q-46, and determined that all three were composed of polyvinylidene chloride, also known as "saran". The Q-46 fibers differed slightly in chemical composition from the Q-49 fibers indicating that they did not originate from the same source or batch during the manufacturing process. Webb also determined that the Q-48 fiber was composed of "modacrylic". Upon comparing the modacrylic fiber removed from the clear handled hairbrush, with known "hair" samples from a wig or "fall" owned by Colette MacDonald,[8] Webb concluded that "[t]hese fibers match each other in chemical composition and did therefore, originate from the same manufacturing source and particular product or from separate products composed of raw materials from the same source or batch." In other words, the modacrylic fiber found by Glisson in the clear handled hairbrush and claimed by the defendant to be exculpatory came from Colette MacDonald's own wig. See 778 F. Supp. at 1350.

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[8] Colette MacDonald's fall had been returned to MacDonald by the Army in 1970. He then gave it, and other effects, to Colette's parents, the Kassabs. Fortunately, the Kassabs retained the fall until it was needed in 1990. But for this fortuity, the defense could have and surely would have argued that the synthetic fibers originated in a wig that did not originate in the MacDonald household.

In addition to the examinations performed by Agent Webb, Special Agent Examiner Michael A. Malone, the senior hair and fiber examiner in the Lab's Hair and Fiber Unit, performed the following examinations of Q-46, Q-49 and Q-48. Using a microscope, he compared Q-48 (the modacrylic fiber) with the known fibers of Colette MacDonald's fall, and concurred with Webb that the modacrylic fiber matched the known modacrylic fibers of Colette's fall. For descriptive purposes Malone referred to Q-49 as "a light blond saran fiber", and Q-46 as being "two blond saran fibers". Malone personally removed two additional light blond saran fibers (Q-131A) from the clear handled hairbrush, which he microscopically determined to be consistent with the light blond saran fiber (Q-49) previously removed by Glisson. Malone's examination of the two blond saran fibers from Q-46 determined that they were "striated", and that one of the blond saran fibers matched the FBI's known saran doll hair reference exemplar (See photo exhibits 11 and 12 to Malone Affidavit). Neither blond saran fiber matched any of the FBI wig exemplars in its extensive reference collection[9]. Similar examinations of Q-49, the light blond saran fiber, revealed a single striated fiber, 22 inches in length, which also did not match any of the wig exemplars in the FBI reference collection.

As reflected in his initial affidavit filed in support of the Government's Response, Malone concluded that:

All of these saran fibers (Q-46, Q-49, Q-131A) are

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[9] All of the FBI known wig exemplars are composed of polyvinyl chloride (PVC), modacrylic or human hair, and none are composed of saran.

> 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 in the FBI Laboratory reference collection (See Photo Exhibit 12). These fibers (Q-46, Q-49, Q-131A) 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.

(Malone Aff. at 6-7 -- (Cormier Aff. No. 1 in support of Mot., Tab 1).[10]

On May 21, 1991, the government filed a Supplemental Memorandum of Law addressing the impact of McCleskey v. Zant, 499 U.S. 467 (1991) on the pending petition and responding to assertions in the defendant's Reply. This submission included a Supplemental Affidavit by Agent Malone. After recounting the examinations he had performed, Malone addressed the uses of the synthetic fiber known as saran. In particular, he stated:

> 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.

Malone Supp. Aff. at 3 -- (Cormier Aff. No. 1 in Support of Mot., Tab 2). Malone went on to state:

> ...[B]ased 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 from natural hair. Saran is very straight, is only manufactured as a continuous monofilament, does not lay or drape like human hair.

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[10] Malone's findings were incorporated into the Response of the United States filed in the District Court on February 22, 1991. See Gov't. Response at 28-29.

> Lastly, saran can not be manufactured as a "tow" fiber* (Footnote: A "tow" fiber is a large group of continuous filaments, without any definite twist, which is cut into definite lengths * * *)

Malone Supp. Aff. at 4 (emphasis supplied). Malone concluded that, "based upon the factors described above, and, in the absence of any evidence to the contrary, * * * the 22 and 24 inch blond saran fibers in this case are not cosmetic wig fibers. Id. at 4. (emphasis supplied). Appended to Malone's submission were excerpts from the six standard reference works upon which he relied to support his conclusion that saran was unsuitable for the manufacture of human cosmetic wigs. Id. Exh. 1-6.

On May 14, 1992 -- prior to the submission of Malone's Supplemental Affidavit -- the defendant filed a Reply Memorandum in this Court. In that submission, he observed that "there is no conflict of material fact in the record * * * ." (Reply at 4.) The defendant's Reply concluded with the similar statement that:

> The facts critical to the decision of this case are undisputed, and the record compels that the requested relief be granted. If the Court concludes that there are areas were the record must be amplified with an evidentiary hearing, petitioner requests those areas be enumerated in a court order so that he may pursue pre-hearing discovery.

Id. pp.89-90. Additionally, the defendant responded to the government's claim that he had been afforded access to the physical evidence prior to trial but that he did not avail himself of that opportunity to review it by asserting that Glisson's bench notes discussing the fibers -- and not the fibers themselves -- "constituted a compelling showing of factual innocence" that would have "triggered an evidentiary chain reaction that would have

resulted in [his] acquittal." 778 F. Supp. at 1351; Def. Reply at 56, 87-88.

On May 22, 1991, the Clerk of this Court issued notices setting a "Motion Hearing" on the § 2255 petition for June 17, 1991. By letter of May 24, 1991, defense counsel requested guidance from the Trial Judge's Law Clerk concerning the significance of the term "Motion Hearing" in local practice. In this connection, the letter asserted:

> I further assumed that the hearing that the Court contemplates would probably be an oral argument, at which each side might argue on the basis of the briefs and papers filed, and the Court might ask questions and ascertain with more precision the respective positions of the parties.

On May 28, 1991, the trial judge sent a memo to counsel in reply to defense counsel's letter. Noting that normally such motions are determined without a hearing, but that, in view of the massive filings by the parties, a hearing would be held pursuant to Local Rule 4.09, he explained "[t]he hearing will encompass all issues raised by the parties in their respective briefs and attachments. No further evidence will be taken at the hearing." He reminded the defendant's attorney that he had asserted in his Reply Brief "there is no conflict of material fact in the record" and added that, if the government agrees and the parties are willing for the motion to be decided on the present record without a hearing, they may so inform the court and the presently scheduled hearing will be cancelled. On May 31, 1991, defense counsel responded that, "counsel for the Petitioner would appreciate the

opportunity to appear before Your Honor on June 17, as scheduled, for the purpose of conducting an oral argument."

The argument took place on June 26, 1991. During the proceeding, the defense neither requested an evidentiary hearing, nor challenged the factual basis for any of the government's assertions.

e. The Decision of the District Court

This Court denied relief. 778 F. Supp. 1342. It based its decision upon three separate and independent grounds. First, addressing the "newly-discovered" evidence proffered by the defense, including the synthetic fibers mentioned in Glisson's bench notes, the Court observed:

> In order to formulate a response to this action, the government submitted the fibers and hair at issue to Michael P. Malone for examination. According to Malone, the blond synthetic fibers found in the clear handled hairbrush and discussed in the lab notes are 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 had been analyzed, one matches a wig reportedly owned by Colette and three are composed primarily of "saran", a substance not suitable for human wigs, but 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 being "stringy", may have been a mannequin wig, such speculation is unsupported by any evidence in the record.

778 F. Supp. at 1351.[11] Given that the synthetic blond fibers appear not to be wig hair, and that the other fibers are unmatched to each other and to known sources, the allegedly suppressed

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[11] The district court appears to use the phrase "human wig" in the same context that Malone used the phrase "cosmetic wig."

evidence would simply mirror other evidence of unexplained household debris that was presented to the jury. Id.

Refuting the defendant's related claim that, if available at trial, the "newly-discovered" evidence would have compelled him to admit Stoeckley' out-of-court admissions, the trial judge observed that "[t]he primary reason for the exclusion of these witnesses was Stoeckley's utter unreliability on the stand. * * * The court's decision on the admissibility of the Stoeckley hearsay witnesses would not have been different had the court been aware of the allegedly suppressed fiber evidence at issue here." 778 F. Supp. at 1352.

Second, this Court held that the defendant was not entitled to relief because he had not established a violation of Brady v. Maryland, 373 U.S. 83 (1963). In particular, it noted that, "MacDonald had not shown that the government suppressed any evidence to which he was entitled. While MacDonald was not given access to the handwritten notes describing the fiber evidence, the government complied with * * * Brady by allowing MacDonald to examine and test any of the actual physical evidence, including the fibers at issue here." 776 F. Supp. at 1353.

Finally, relying upon McCleskey v. Zant, 499 U.S. 467 (1991), this Court added as an "additional, independent ground for denying MacDonald's petition," the abuse of the writ doctrine, which authorizes a court to decline to entertain a second or subsequent habeas petition where the basis for the petition was known to the defense but not asserted at the time of the first submission.

Noting that annotations on the defendant's own exhibits demonstrated that the key memoranda upon which the petition was based -- including Glisson's lab notes -- had been furnished to it by the government prior to submission of the first habeas petition, it concluded that, "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." 778 F. Supp. at 1359.

f. Litigation in the Court of Appeals

1. As he had done following denial of his earlier petition for habeas relief, the defendant appealed. The government, once again, argued that the defendant was not entitled to relief: (1) because the petition constituted an abuse of the writ; (2) the government had not withheld exculpatory evidence; and (3) in any event, the "newly-discovered" evidence could not possibly have altered the outcome of the trial.

In a footnote contained in its Reply in the court of appeals, the defendant for the first time controverted Agent Malone's opinion that saran was unsuitable for the manufacture of human cosmetic wigs. See No. 91-6613 Reply Brief of Appellant at 14 n.16. The footnote observed that two references not cited in Mr. Malone's affidavit, A. Dembeck, Guidebook to Man-Made Textile Fibers and Textured Yarns of the World (3d ed. 1969); and E. Stout, Introduction to Textiles (3d ed. 1970) were contrary to his opinion in this respect.

2. During oral argument, defense counsel noted that the defense had located "three [sic] standard textbooks not cited by the government, all of which indicate that wigs are made of saran," and speculated that "[t]he FBI deliberately omitted these three standard references" but conceded, in response to a question from a member of the panel, that the defense had not controverted the issue below.[12] Afforded the opportunity to respond to this assertion, government counsel observed that the defense had waived an evidentiary hearing in the district court, and questioned whether the two citations upon which the defendant relied plainly referred to human cosmetic wigs in any event. The government proffered xerox copies of the pertinent portions of these texts to members of the panel, which they declined to examine. See Cormier Aff. No. 1 in Support of Mot., Tab 3.

Thereafter, in a post-argument submission, the defendant's attorneys submitted copies of the two texts to the panel for its inspection. One bore a stamp showing that it had been obtained in the Boston Public Library. The other bore similar library reference numbers reflecting that it likely came from the same source. See Cormier Aff. No. 1 in Support of Mot., Tab 4.

3. The court of appeals affirmed. Although the court summarized the government's arguments in this Court concerning the significance of the items proffered by the defense in support of

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[12] To support his contention that the government had inaccurately characterized the purposes to which saran could be put, defense counsel brandished what he claimed to be a wig of the type that was at issue. See. Tr. of Oral Argument at 22.

its petition, it pretermitted the question whether the blond synthetic fibers at issue lent support to the defendant's claim of intruders.[13] Instead, it based its holding solely upon the abuse of the writ doctrine. In particular, the court observed that:

> [l]ab 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. * * * 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.

MacDonald, 966 F.2d at 860. Addressing the question whether application of the abuse of the writ doctrine would result in a fundamental miscarriage of justice, the court continued:

> 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 origin of the hair and fiber evidence have several likely explanations other than intruders. The evidence does not escalate the unease one feels with this case into a reasonable doubt.

Id.

g. The Subsequent FOIA Inquiries and the Instant Litigation

1. Following this decision and subsequent denials of petitions for rehearing and certiorari, the defense renewed its

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[13] The defendant's instant submission asserts that the court of appeals relied upon Agent Malone's conclusion that saran is unsuitable for the manufacture of human cosmetic wigs and disregarded its own controverting sources. Defense Mot. at 20-21. That claim is incorrect. The court simply summarized the government's claims with respect to such fibers. See 966 F.2d at 857.

FOIA requests, focusing this time upon items relating to Agent Malone's conclusion that saran is unsuitable for human cosmetic wigs. In response, it obtained from the Department of Justice copies of both the Dembeck and Stout reference texts.

It also learned that, in preparation for litigation, Agent Malone, accompanied by the FBI case agent and Assistant U.S. Attorney Evenson, interviewed Edward Oberhaus, Jr. an executive of Kaneka America Corporation, the world's largest producer of modacrylic fibers. A copy of an FBI interview summary (Form 302) obtained by the defense reflected that, during the interview:

> Oberhaus advised that he is also familiar with the production and use of saran fibers, both now and prior to 1969-70. He advised that saran is a synthetic fiber that cannot be produced as "tow" fiber and for that reason it cannot be used in the hairgoods industry. He advised that saran can only be made as a continuous filament fiber, which is not suitable for the manufacture of wigs. He advised that to the best of his knowledge, saran fiber has never been used in the manufacture of wigs.

Cormier Aff. No. 1 in Support of Mot., Tab 12. However, when Mr. Evenson drafted an affidavit for Oberhaus to execute that reflected these statements, he declined to do so, ostensibly because he did not consider himself an authority on saran. Instead, he prepared and executed his own affidavit stating, inter alia, 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. Of all the man-made fibers used by the wig and hairpiece industry, modacrylic fiber most closely resembles animal hair or human hair." Cormier Aff. No. 1, Tab 11.

The defense also obtained FBI 302s summarizing December 5, 1990, interviews by Malone, AUSA Evenson and the FBI case agent of Judith Schizas and Mellie Phillips, who were then both employees of Mattel, Inc. Schizas, who was a doll specialist and possessed an extensive collection of dolls, told the interviewers that many dolls had "wigs" and that the primary material used for such wigs was saran, a substance that was also used for tails and manes on toy rocking horses. She was of the opinion that the longest saran fiber used for doll hair by Mattel approximated 18 inches. During a subsequent interview (prior to April 15, 1997) by defense counsel, she advised that, during the 1990 FBI interview, she was asked whether any dolls made by Mattel or any other manufacturer might have had hair 22 to 24 inches long. She responded that, to her knowledge, no Mattel doll had ever been made with synthetic fibers that long but that one might possibly find a doll hair fiber that long if the fiber were doubled over in the hair rooting process. She added that, while it was possible for such a long fiber to come from a doll it was not probable because of manufacturing techniques. Following the defense interview, Schizas conducted a selective survey of her own doll collection and found no dolls which appeared to have 24 inch synthetic hair fibers. Cormier Aff. No. 1 in Support of Mot., Tab 13.

According to Phillips' FBI 302, she informed the interviewers on December 5, 1990, that, during the late 1960s and early 1970s, Mattel used saran material in the manufacture of doll hair, particularly for the 7 and a half inch "Barbie" doll, as well as

for hobby horses. She did not, however, recall using saran doll-like hair longer than 14 inches as equipment in its plant had limitations for hair lengths. In her view, although it was possible to use saran for hair wigs it was not practical because of the type of fiber saran is and she could not identify any manufacturer of such wigs. When interviewed by the defense in relation to the instant litigation, Phillips recalled furnishing the information contained in the FBI 302. She added, however, that, when asked whether saran was made in "tow" form, she told them that it was. She also told Malone that no doll manufactured by Mattel had hair as long as 22-24 inches. Cormier Aff. No. 1, Tab 14.

In addition to these efforts, the defense located individuals in the artificial fiber and wigmaking industries who were not interviewed by either party to the 1990-1991 habeas litigation. One of these individuals, Sue Greco, of National Plastics, informed the defense that saran can be manufactured in "multifilament" form, commonly referred to as "tow" and that one of the end uses of Saran fibers made by her company included wigs for human use, doll hair, and other textile applications." Cormier Aff. No. 1 Tab. 15. Other interviewees advised the defense that they were employed by firms that manufactured or distributed novelty, theatrical, mannequin, masquerade and cosmetic wigs from saran during the 1960s and the 1970s.

Further, the defense proffered portions of the April 1997 Department of Justice Inspector General's Investigation into

Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases in which Agent Malone was criticized for giving inaccurate testimony during the 1985 judicial inquiry concerning alleged misconduct by U.S. District Judge Alcee Hastings. In particular, the Report determined that Malone, who had performed microscopic examinations on a purse strap belonging to Judge Hastings to determine whether it had been cut or broken, had testified that he had also performed a tensile test of the strap when, in fact, he observed another examiner conduct it. Finally, the defense proffered a Wall Street Journal article alleging that Malone had presented exaggerated or inaccurate testimony in other cases as well.

2. On the basis of the totality of the foregoing material, the defendant now claims that, during the 1990-1991 habeas action, Agent Malone committed a fraud on the court, causing the government to file an affidavit asserting that saran was not employed in human cosmetic wigs, and the courts to rely upon such assertions when, in fact, Malone knew that they were false. As a consequence, he seeks to reopen that proceeding, not only to permit reevaluation of the significance of the saran fiber -- which he maintains was "central to this Court's dismissal of the 1990 petition and to the Fourth Circuit * * * affirmance of that dismissal" (Mot. at 1) but also a wholesale reexamination -- to include DNA testing -- of all the forensic evidence upon which his conviction was based or which was otherwise obtained during the preceding investigation. See Def. Memo. at 68-70.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THIS CAUSE OF ACTION

a. Introduction

During the most recent round of litigation in the instant case, the court of appeals concluded its decision with the observation that MacDonald had presented "specious evidence" and that his submission was precisely the type of case judicial and statutory restraints upon the submission of successive habeas petitions were designed to obstruct and deter. 966 F.2d at 860-861). Despite that court's ensuing admonition that MacDonald must "accept this case as final" (ibid.), he has submitted yet an additional claim for habeas relief, apparently hoping to exploit criticism to which certain FBI Laboratory personnel, including Agent Malone, have been subjected in the DOJ Inspector General's Report, publicly issued just several days earlier.

Resorting, once again, to obfuscation and personal attack[14], the defendant seeks to litigate matters -- such as the purposes to which saran may be put -- which he had ample opportunity to raise during the course of two earlier habeas proceedings and waived during the second. He also seeks to relitigate matters -- having

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[14] During the 1990-1991 proceedings, the defendant, through present counsel, based their claim for habeas relief on the alleged "intentional suppression" of exculpatory evidence and the presentation of "false or misleading evidence" by one of the trial prosecutors. The habeas court characterized the defendant's tactic as a "vicious, but largely unsupported attack." 778 F. Supp. at 1355. During the initial round of habeas proceedings, the defendant attacked the impartiality of the trial judge. See United States v. MacDonald, 779 F.2d 962, 963 (4th Cir. 1985).