UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	Nos. 75-26-CR-3
v.	)	90-104-CIV-3-D
	)	
JEFFREY R. MacDONALD	)	

JEFFREY R. MacDONALD'S REPLY TO THE OPPOSITION OF THE UNITED STATES TO DEFENDANT'S MOTION TO "REOPEN" § 2255 PROCEEDINGS AND FOR DISCOVERY, AND RESPONSE TO THE GOVERNMENT'S MOTION TO DISMISS 28 U.S.C. § 2255 PETITION FOR LACK OF JURISDICTION AND SUGGESTION, IN THE ALTERNATIVE TO TRANSFER TO THE COURT OF APPEALS

The government has not filed a responsive affidavit from FBI Agent Michael P. Malone to rebut MacDonald's sworn and documented claims that Malone committed fraud upon this Court. This is telling. Instead, the government has presented a series of arguments (unsupported by affidavit) in which it attempts to obfuscate the issue of Malone's fraud, and tries steer this Court away from closely scrutinizing the impact of Agent Malone's fraudulent actions on this Court's and the Court of Appeals' consideration and disposition of MacDonald's 1990 petition. The government's attempt in its opposition papers to rehabilitate Malone in absentia fails as a matter of law and logic. MacDonald requests an evidentiary hearing for the purposes of further demonstrating Malone's fraud in this case and considering the substantial body of evidence that has surfaced since trial (much of it from the government's own files) which corroborates

MacDonald's account of intruders and destroys the speculative crime scene interpretation offered by the government at trial -- an interpretation which the government has repeated in its opposition papers, without apparent hesitation even in light of the facts that have emerged since trial.

A. It is Patently Untrue that Agent Malone's Statements Concerning the Saran Fibers Had "Virtually No Impact Upon the Courts' Earlier Disposition of this Case."

Throughout its opposition, the government has attempted to re-write history by arguing that Agent Malone's fraudulent and misleading statements had "virtually" nothing to do with the courts' disposition of MacDonald's 1990 petition. See Gov't Opp. at 1, 24, 25, 27, 33, 39 & 43 n.23. The government's revisionist view of the earlier proceedings is out of touch with reality.

It is without question that this Court and the Court of Appeals relied on Malone's statements concerning the end-uses for Saran fibers when analyzing, among other things, MacDonald's claim of factual innocence. At the outset of its discussion of the legal standards of materiality that should be applied to the suppressed evidence, this Court (Dupree, J.) expressly acknowledged that, among other things, MacDonald was seeking relief under the "miscarriage of justice exception." 778 F.Supp. 1342, 1350 (E.D.N.C. 1991), citing McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 1470-71 (1991). Then, in the very next paragraph of its opinion, this Court stated "[w]ith these various standards of materiality in mind, the court first turns to the effect that the allegedly suppressed evidence would have had on

the trial and the jury's verdict," 778 F.Supp. at 1350 (emphasis added), and then two paragraphs later, in the course of this same discussion, the Court credited Malone's fraudulent and misleading statements:

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

778 F.Supp. at 1350-51 (emphasis added).[1]

Finally, near the end of its opinion, this Court (Dupree, J.)

---

[1] The government's present claim that Malone's supplemental affidavit played virtually no role in the courts' consideration of MacDonald's 1990 petition is further belied by the fact that the government itself relied on Malone's supplemental affidavit "to definitively resolve" the Saran fiber issue when it responded to MacDonald's factual innocence claim. See Supplemental Memorandum of the United States, filed 5/20/91, at 12-15.

once again made it clear that it had considered MacDonald's claim of factual innocence, referring back to its earlier discussion in which it credited Malone's statements:

> Even in the absence of a showing of cause and prejudice excusing abuse of the writ, courts are required to address the merits of a second or subsequent petition where a petitioner "supplements a constitutional claim with a 'colorable showing of factual innocence.'" McCleskey, 111 S.Ct. At 1471. However, as explained more fully above, MacDonald has not demonstrated that his case fits within this "narrow class of cases" implicating a fundamental miscarriage of justice or that "a constitutional violation has probably caused the conviction of one innocent of the crime." Id. 111 S.Ct. at 1470.

778 F.Supp. at 1360 (emphasis added). In short, Malone's persuasive — but false — declarations that the blond fibers were not from Stoeckley's wig, persuaded the Court that the "factual innocence" threshold had not been met by MacDonald.

Likewise, the government's claim that the Court of Appeals "pretermitted" any consideration of Malone's false and misleading statements concerning the Saran fibers because it decided the case "solely upon the abuse of the writ doctrine," Gov't Opp. at 27, is equally fanciful. The Court of Appeals, like this Court, clearly considered Malone's false statements in assessing whether MacDonald had made a colorable showing of factual innocence.

In its opinion, the Fourth Circuit described the arguments that the parties had made in the District Court, stating, inter alia:

> [a]ccording to one of [the government's] forensic experts [Malone], the three blond synthetic hairs found in the brush were made of Saran, an inexpensive substance generally used only in doll hair and mannequin wigs.

United States v. MacDonald, 966 F.2d 854, 857 (4th Cir. 1992). The Court of Appeals then observed that "[t]he district court agreed with the government," id. at 858, and it further noted that "[a]lthough the [district] court found the petition to be procedurally barred under McCleskey v. Zant as an abuse of the writ, [the district court] nevertheless addressed the merits of MacDonald's claims in an effort to ensure justice in this highly public and controversial case." Id. The Court of Appeals then proceeded with its own discussion of the historical origins of the miscarriage of justice exception to the abuse of the writ doctrine, id. at 858-859. Next, it set forth the standard by which a claim of factual innocence should be evaluated, id. at 859, and then proceeded to assess whether MacDonald had "shown that dismissal of his petition would result in a fundamental miscarriage of justice." Id. at 860. The Court of Appeals concluded that "[t]he evidence raised here [i.e., the Saran fiber and black wool fiber evidence], 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." Id. at 860. The Court then explained this result by making what can only be a reference to Malone's statements: "the origins of the hair and fiber evidence have several likely explanations other than intruders. The evidence simply does not escalate the unease one feels with this case into a reasonable doubt." Id.

Hence, there is absolutely no merit to the government's

argument that Agent Malone's statements "had virtually no impact upon the courts' earlier disposition of this case." Gov't Opp. at 1.

B. The Government's Opposition Utterly Fails To Rebut MacDonald's Factual Allegations that Agent Malone Committed Fraud Upon this Court.

In its opposition, the government broadly declares that "the record is devoid of evidence supporting the defendant's accusation that Agent Malone . . . made averments that were 'intentionally false' or evidenced 'reckless disregard for the truth.'" Gov't Opp. at 39. This statement is simply not true in light of the extensive body of evidence concerning Malone's Saran fiber investigation which demonstrates that Malone had more than adequate notice that the statements he made -- concerning whether Saran fibers could be and were used in wigs -- were false and misleading.

Noticeably absent from the government's opposition papers is a sworn affidavit from Malone rebutting MacDonald's factual contentions. The government does not attempt to deny by sworn affidavit that

(1) the FBI Laboratory had copies of the Dembeck text (which states that Saran was made in "tow" form and was used in wigs), and possibly the Stout text (which likewise states that Saran was used in wigs), in its reference library;

(2) Malone consulted the Dembeck text, the Stout text, or both, prior to the filing of his supplemental affidavit

to which he selectively appended six other reference texts from the FBI Laboratory which happen not to mention the use of Saran in wigs;

(3) Malone was told by Mellie Phillips of Mattel that Saran was made in "tow" form and that Phillips she never recalled any doll manufactured by Mattel which had hair made from Saran fibers as long as 22 or 24 inches;

(4) Malone was told by Judith Schizas of Mattel that it was "not probable" that a 22 or 24-inch Saran fiber would have come from a doll and that she did not know of any doll manufactured by Mattel or any other manufacturer which would have had hair made from fibers as long as 22 or 24 inches;

(5) Edward Oberhaus of Kaneka America told Malone that he was not an expert on Saran fibers, and that he would not sign the affidavit that had been drafted for him by the government in an effort to have Oberhaus state: "Saran . . . cannot be produced as a 'tow' fiber and, for that reason, cannot be used in the hairgoods industry. Saran can only be made as a continuous filament fiber. . . ." Cormier Aff. No. 1 at ¶ 49.

(6) Oberhaus provided the government with a sworn affidavit approximately 3 months before Malone filed his supplemental affidavit, in which Oberhaus stated that "[w]igs and hairpieces from 1960 to date [1991]" were made from all manner of fibers, including "human hair, modacrylic

fibers, other fibers, or a combination of any of these filaments." Cormier Aff. at ¶ 25 (emphasis added).

The lack of a responsive affidavit from Malone concerning each of the aforementioned material points is quite telling and highly significant. After all, Malone still works for the FBI. The government had no trouble obtaining two affidavits from him during the last proceeding. The government's attempt to defend Malone's conduct in the face of this evidence, while he is "in absentia," should give this Court pause. Until and unless the government formally withdraws Malone's affidavits, or responds with a new sworn affidavit from him, this Court should credit MacDonald's factual contentions.

1. The Reference Texts in the FBI Laboratory.

The government claims that "there is no evidence whatsoever to support the defendant's apparent assumption that . . . Malone went on to consult either the Dembeck or the Stout texts . . . ." Gov't Opp. at 40. As noted supra, the government does not deny that Malone consulted the Dembeck and Stout texts, and it has not submitted an affidavit from Malone on the issue. Moreover, the assertion that "there is no evidence" that Malone consulted these texts is simply not true. To the contrary, the defense obtained these texts in response to a FOIA request which sought, inter alia, "books, texts, reference works, treatises . . . that were reviewed in connection with the MacDonald case." Cormier Aff.

No. 1 at ¶ 29 (emphasis added).[2] In the absence of a sworn statement to the contrary, this Court can, and should, infer that Malone consulted the Dembeck and Stout texts. If Malone does file an affidavit, an evidentiary hearing should be held to test his veracity.[3]

2. The Oberhaus Information.

The government argues that Malone's statements in his supplemental affidavit -- that Saran fibers were not made in "tow" form and that Saran was not used in the manufacture of wigs -- were entirely proper, because they were derived from information obtained by Malone during an interview with Edward Oberhaus. Gov't Opp. at 41. In attempting to justify Malone's statements concerning Saran and its end-uses, the government conveniently ignores the fact that (a) Oberhaus told Malone that he was not an expert on Saran fibers, Cormier Aff. at ¶ 45; (b) Oberhaus refused to sign the government's draft affidavit which included the statement that "Saran . . . cannot be produced as a

---

[2] Further, as noted in the Cormier Aff. No. 1, the Dembeck text has the same FBI Laboratory identification stamp as one of the texts which Malone did append to his supplemental affidavit, which is evidence that the Dembeck text was just as accessible to Malone as the texts that he selected.

[3] The fact that MacDonald eventually located the texts does not ameliorate Malone's false statements about the end uses for Saran fibers. Besides, defense counsel cannot be faulted for having credited, as did Judge Dupree, the reputation of the FBI crime lab, and its representative, Michael Malone. Now that the truth has emerged, the government seeks to hide behind its claim that MacDonald learned too late that Malone's reputation, and his statements concerning Saran fibers, were a well-constructed illusion.

'tow' fiber and, for that reason, cannot be used in the hairgoods industry. Saran can only be made as a continuous filament fiber, . . ." Cormier Aff. No. 1 at ¶ 49; and, (c) the signed affidavit which Oberhaus gave to the government was in fact "inconsistent" with the information Oberhaus gave to Malone, since Oberhaus stated in this affidavit that wigs during the relevant time period were made with, among other things, "other fibers," which category could clearly include Saran. Cormier Aff. at ¶ 25.

The government's statement that "[w]hen shown his prior FBI 302 by the defense, Oberhaus apparently did not repudiate the accuracy of its contents or his prior statements to Malone" (Gov't Opp. at 41 n. 21), is incorrect. Contrary to the government's assertion, the defense did not have Oberhaus "302" in its possession when it interviewed Oberhaus, because this 302 was released to the defense via the FOIA in May 1996, after the defense interviewed Oberhaus.[4] More importantly, Oberhaus stated during the defense interviews that he informed the government that he was not an expert on Saran fibers, Cormier Aff. at ¶ 45, and therefore he could not make the statements the government wanted him to make, which is evidenced by his refusal to sign the affidavit which the government drafted for him. One can only

---

[4] It has been the experience of undersigned counsel that the FBI never shows an interviewee a copy of the 302 so that the interviewee may comment on its accuracy and completeness. If Oberhaus had been given his 302 to make corrections, it is doubtful that he would have seen it as accurate and complete in light of his rejection of the government's draft affidavit and in view of the substance of his signed affidavit which he provided to the government.

wonder how it is that Malone, who is not a wig expert, could himself swear to the very statements which Oberhaus could and would not.

3. The Mattel Witnesses.

The government tries to justify Malone's false and misleading statements concerning the provenance of the Saran fibers by arguing that he was permitted to "discount" or ignore the information that was given to him by the two Mattel witnesses, on the ground that their information was "tentative" or was contradicted by information provided to Malone by Oberhaus, and therefore Malone could, on his own, decide which information was correct and which was not. Gov't Opp. at 42-43.

Specifically, as to the information provided by Judy Schizas, the government argues:

> Although Schizas expressed her opinion that Mattel had never manufactured a doll with hair longer than 18 inches in length, she explained that dolls hairs could be "doubled" in length because of the weaving process used by manufacturers. According to her subsequent interview by the defense, she also informed investigators that, although, in her opinion it was unlikely a 24 inch Saran fiber was used in [sic] manufacture of a doll, "one might possibly find a doll hair that long. In view of the fact that Agent Malone had microscopically compared the 24 inch Saran fiber and found it "similar to a known sample of doll hair from the FBI Laboratory reference collection," and, "not like any of the known wig fibers currently in the FBI laboratory collection" (Cormier Aff. No. 1, Tab 1 at 1), the fact that he may have <u>discounted Schizas' tentative conclusion</u>, that the strand was too long for a doll's hair made by Mattel, is surely not tantamount to reckless disregard for the truth.

Gov't Opp. at 42 (emphasis added).

The above-quoted description mischaracterizes and distorts

in material respects the information that Schizas provided to Malone, by stating that her statements were "tentative," as if she did not have the requisite knowledge and experience to make the statements she made concerning the length of Saran fibers used in dolls, and by omitting significant and relevant portions of exactly what she told Malone.[5]

As noted in MacDonald's opening papers, Schizas has worked at Mattel for over 24 years and has been collecting dolls for over 30 years. Cormier Aff. No. 1, Tab 13. Schizas' personal collection consists of approximately 4,000 dolls. Hence, Schizas' statements -- or as the government characterizes them, her "opinion[s]" -- that Mattel had never manufactured a doll with hair longer than 18 inches, are firmly grounded in expertise and experience. The government does not deny that Schizas told Malone (a) that Mattel had never made a doll with hair fibers as long as 22 or 24 inches, Cormier Aff. No. 1 at Tab 13, ¶ 7, (b) that while it might be "possible" to find a doll with hair that long, she did not know of such a doll, id., and, perhaps most critically, (c) that it was "not probable" that the 22 or 24 inch Saran fibers found at the crime scene originated from a doll, because it would be very unlikely that an intact fiber could be pulled out of the doll's head under normal use. Id. at ¶ 10.

The government's suggestion that Malone was permitted to

---

[5] Importantly, the government does not deny anything which Schizas states in her affidavit that she told Malone. Cormier Aff. No 1, Tab 13.

"discount" Schizas' exculpatory information is flawed as a matter of law and logic. Schizas' statements were clearly exculpatory in that they contradicted Malone's assertion that the 22 and 24 inch Saran fibers found at the crime scene came from a doll. It is without question that this information impugned the accuracy and integrity of Malone's conclusions. Yet, this information was never disclosed to the defense as required under Brady, Alcorta, and their progeny. Instead, the government has suggested that it was appropriate for Malone to "discount" this information, based on his microscopic lab examination in which he concluded that the 24 inch Saran fiber was micrcoscopically "similar" to a known Saran fiber in the FBI doll hair reference collection, and not similar to fiber exemplars from the FBI wig reference collection. Gov't Opp. at 42. This argument ignores the fact that the issue surrounding Malone's interview of Schizas was not simply whether Saran was used to make doll hair, but rather whether the 24 inch Saran fiber found at the crime scene could have come from a wig, rather than from a doll. Malone's conclusion that the 24 inch Saran fiber was "similar" to the Saran doll hair exemplars is not unexpected, since both fibers were made of Saran. What is important is that there was no evidence from Malone that the Saran fiber in the FBI doll hair reference collection was itself 24 inches long, and if it was 24 inches long, that the exemplar had actually been removed from a doll's head. The fact that the FBI wig collection did not, according to Malone, contain a wig made with Saran fibers in no way answered the question as to

whether Saran fibers had been used in wigs. Had the mere absence of such a wig from the FBI collection answered the question, it would not have been necessary for Malone to conduct an outside investigation into the question, seeking an expert to say that which, in the end, Malone had to say as the "default expert."

As for Mellie Phillips' statement that Saran was made in "tow" form, the government does not deny that Phillips told this to Malone. Rather, it argues that Malone was permitted to credit the "contrary information furnished by Oberhaus." Govt' Opp. at 43. In light of the fact that Oberhaus, who denied he was a Saran expert in any event, would not sign the affidavit which the government drafted for him, and the fact that both Mellie Phillips and the Dembeck text informed Malone that Saran was made in "tow" form, this argument is simply not credible, much less persuasive.

C. This Court's Inherent Power to Superintend the Proceedings Before It and to Remedy Fraud Perpetrated by the Government in Such a Proceeding Is Not in Any Way Circumscribed or Affected By the Anti-Terrorism and Effective Death Penalty Act of 1996.

The government argues that this Court does not have jurisdiction to consider MacDonald's motion to reopen because this motion is nothing more than another successive petition for which MacDonald's only remedy is to seek Court of Appeals certification under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Gov't Opp. at 32-38. This argument fails.

As held by the Fourth Circuit, a court's power to

superintend the proceedings before it and to remedy fraud on the court 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.

United States v. Shaffer Equipment Co., 11 F.3d 450, 462 (4th Cir. 1993) (emphasis added). The text of the AEDPA, as it amends 28 U.S.C. § 2255, provides no support for the government's argument that this statute circumscribes or limits in any way this Court's inherent power to superintend the proceedings before it and to remedy the fraud committed by Malone.

Clearly recognizing the deficiency in its legal argument, the government mischaracterizes MacDonald's motion to reopen the earlier proceedings on fraud grounds, by claiming that it is a "third habeas submission" that requires Court of Appeals certification before it may be heard by this Court. Gov't Opp. at 33-38. It is abundantly clear, however, that MacDonald's motion to reopen is predicated upon "fraud on the court" grounds — fraud which took place in this Court and which significantly impacted on this Court's consideration of MacDonald's 1990 petition. Far from the situation which the government describes, this situation is one where this Court can and should utilize its inherent authority to remedy fraud.

The cases relied on by the government, in its argument that this Court may not exercise its inherent supervisory authority in

this case because it "would 'contradict the plain language' of the gatekeeping provisions of the AEDPA" (Gov't Opp. at 38), are inapposite. First, neither Carlisle v. United States, ___U.S.___, 116 S.Ct. 1460 (1996) nor Bank of Nova Scotia v. United States, 487 U.S. 250, 254-255 (1988), involved "fraud on the court" claims.[6] Rather, these cases involved situations where the invocations of the courts' inherent supervisory authority were in direct conflict with clearly written procedural rules. In Carlisle, the defendant sought to have the court invoke its inherent supervisory authority to circumvent the plain language of Fed.R.Crim.P. 29(c), which clearly establishes a seven day time-limit for filing post-trial motions. Similarly, in Bank of Nova Scotia, the rule at issue was Fed. R. Crim.P. 52(a), which clearly and plainly directs a district court to disregard harmless errors. Second, there is nothing in the text of the AEDPA which expressly limits a district court's inherent supervisory power to remedy fraud on the court in the same way that Rule 29(c) and Rule 52(a) limited the courts' ability to in Carlisle and Bank of Nova Scotia. The AEDPA simply sets out a procedural framework for evaluating successive habeas petitions. It does not impose any limitation on a district court's inherent supervisory authority to investigate and remedy fraud perpetrated on it during the course of a habeas proceeding. This court's

---

[6] A court's ability to remedy fraud on the court to preserve the integrity of the judicial system is of paramount importance. See Hazel-Atlas Glass v. Hartford Empire Co., 322 U.S. 238, 245-246 & 248 (1944); United States v. Shaffer Equipment Co., 11 F.3d 450 (4th Cir. 1993).

invocation of its inherent powers to investigate and remedy Malone's fraud would in no way conflict with the text or the spirit of the AEDPA, because MacDonald's motion to reopen is not a third habeas petition.[7]

None of the remaining cases cited by the government in support of its argument that the AEDPA gatekeeping provisions apply to "any habeas related submission after April 24, 1996," Gov't Opp. at 35, n.16, are apposite to MacDonald's motion to reopen.[8]

---

[7] The cases cited by the government in support of its argument that Fed.R.Civ.P. 60(b)(6) does not provide this Court with a basis upon which to reopen MacDonald's 1990 petition (Gov't Opp. at 36) are distinguishable. First, the cases of Scott v. Singletary, 38 F.3d 1547 (11th Cir. 1994), Clark v. Lewis, 1 F.3d 814 (9th Cir. 1993) and Kyles v. Whitley, 5 F.3d 806 (5th Cir. 1993), rev'd on other grounds, 115 S.Ct. 1555 (1995), did not involve motions to reopen based on fraud. The defendants in these cases raised new facts or new claims not raised in prior proceedings, as opposed to claiming that the judgment obtained in the prior proceeding was based on fraud. The case of Felker v. Turpin, 101 F.3d 657 (11th Cir. 1996) is also inapposite for the reasons stated in n. 8, infra.

[8] In Nunez v. United States, 96 F.3d 990 (7th Cir. 1996) and Hatch v. Oklahoma, 92 F.3d 1012 (10th Cir. 1996), the defendants filed second or successive habeas petitions after April 24, 1997, the effective date of the AEDPA. As a result, those courts held that the successive petitions filed in those cases would be evaluated under the gatekeeping standards established by the AEDPA. Neither of these cases involved a situation, such as the one presented here, where MacDonald's petition was filed in October 1990, well before the effective date of the AEDPA. In Felker v. Turpin, 101 F.3d 657 (11th Cir. 1996), the defendant filed a motion to reopen his first federal habeas petition immediately after he had been denied permission to file a second federal petition under the AEDPA gatekeeping provisions. While Felker apparently cited, inter alia, Fed.R.Civ.P. 60(b)(3)(fraud) in his motion to reopen his first petition, there is absolutely no evidence in the court's opinion that Felker had actually set out facts which demonstrated that the prosecution had committed fraud on the court in his first habeas proceeding. Instead, the Court's analysis focuses solely on a series of Brady violations.

By arguing that the AEDPA gatekeeping provisions should be applied to MacDonald's motion to reopen, the government is effectively claiming that it may reap the fruits of Malone's fraud by taking advantage of these gatekeeping standards which were established long after MacDonald filed his petition. Stated differently, had it not been for Malone's fraudulent conduct in the 1990-1991 proceedings, MacDonald would not even be in a situation in which the government could claim that the AEDPA gatekeeping provisions apply to him.[9] Here, there is more than

---

Hence, the facts of Felker are not at all like the present situation involving agent Malone's fraud. The case of Smith v. Gilmore, 111 F.3d 55 (7th Cir. 1997) is also inapposite. Smith did not involve a motion to reopen for fraud on the court. Rather, it was simply a third petition filed pro se by a prisoner who was a "frequent filer of frivolous petitions," id. at 3 (slip op.), and the Court held that it neither met the abuse of the writ requirements of the AEDPA nor the McCleskey standards. Indeed, the Fourth Circuit has stated that provisions of the AEDPA should not be applied retroactively unless Congress so indicated as it has done in some of the provisions of the AEDPA. Mackall v. Murray, 109 F.3d 957 (4th Cir. 1997)("Absent some indication that Congress intended the revisions to apply retroactively, . . . we will not review the district court's disposition under standards that did not exist until after this appeal had divested the court of jurisdiction"). See also, Williams v. Calderon, 83 F.3d 281 (9th Cir. 1996) (gatekeeping provisions for § 2254 petitioners do not apply to claims filed in the district court prior to effective date of AEDPA).

[9] As argued in MacDonald's opening memorandum at 53 n.27, this Court should evaluate MacDonald's claims under the "factual innocence" standards that were applied to his 1990 petition by this Court and the Court of Appeals, rather than any new standard established by the AEDPA. MacDonald's present situation is very similar to the "mousetrap" situation described in Burris v. Parke, 95 F.3d 465 (7th Cir. 1996) (en banc), where the Seventh Circuit held that the AEDPA gatekeeping provisions governing the filing of a second or successive § 2254 petition did not apply to a situation in which the petitioner deliberately did not contest his sentence in his first petition because he had not exhausted his state remedies on the subject and the rules governing the abuse of the writ at that time led him to believe that he was not

ample authority for this Court to invoke its inherent supervisory powers and the authority conferred by Fed.R.Civ.P. 60(b)(6) to remedy Malone's fraudulent conduct. See Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), cert. denied sub nom, Rison v. Demjanjuk, ___U.S.___, 115 S.Ct. 295 (1994). See also, May v. Collins, 961 F.2d 74, 75-76 (5th Cir. 1992)(addressing defendant's Rule 60(b)(2) and 60(b)(6) claims on the merits).

D. The Government's Analysis of the Evidence Presented at Trial Collapses Under the Weight of the Evidence Discovered Post-Trial Which Supports MacDonald's Account of Intruders.

In its opposition at pp. 6-14, the government argues that the evidence demonstrating MacDonald's guilt is overwhelming. It does this by reciting the same crime scene interpretation which the government's experts presented at trial, while ignoring the substantial body of evidence that has surfaced since trial (much of it from the government's own files) which corroborates MacDonald's account of intruders and destroys the government's speculative crime scene interpretation.

There were two key components to the government's case at trial. The first of these was the government's crime scene

---

foreclosed from filing a second petition at a later date challenging his sentence. In Burris it was held that retroactive application of the gatekeeping provision attached "new legal consequences" to the filing of the first petition which would have the effect of "mousetrapping" the defendant. Here, MacDonald has been mousetrapped in a different sort of way in that the government is arguing that the delay created by Malone's fraud entitles it to have a more onerous gatekeeping standard applied to MacDonald's 1990 petition.

interpretation, presented to the jury by way of opinion testimony from the government's forensic examiners.[10] The second was the government's oft-repeated contention that MacDonald could not point to any significant physical evidence demonstrating that intruders had actually invaded his home.[11] As the prosecution argued in its closing at trial, the only thing that made Jeffrey MacDonald's story "perhaps not believable was the inconsistency of the physical evidence" with respect to MacDonald's version of events. Tr. 7124. The corollary to this argument was the prosecutors' contention that MacDonald must have been lying when he testified that he and his family were attacked by a group of intruders.

Both components of the government's case fail in light of the suppressed evidence of intruders. The government's circumstantial evidence at trial, repeated in its current opposition brief, was highly equivocal and based in large part on

---

[10] The government's reliance on the "interpretations" of the crime scene offered by its forensic examiners is demonstrated by its closing argument in which one of the prosecutors argued: "you could throw the whole shooting match away except for two pieces of evidence...I think you could just hold onto two -- these two (holding up the club and the pajama top" (Tr. 7136).

[11] The government argued in closing as follows:

> [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).

the speculative theories proffered by the government's forensic experts. However, in the absence of evidence of intruders, the jury had no choice but to credit the government's theories and reject MacDonald's account of events as a lie. Now, when the government's case is viewed through the lens of the newly discovered evidence proving Stoeckley's involvement and the presence of intruders in the MacDonald home, its speculative crime scene interpretation utterly collapses.

For the purpose of illustrating to this Court how and why the evidence of the Saran fibers and other evidence of intruders found by the government in the MacDonald home would have changed the outcome of the trial, we have taken the liberty of addressing the major pieces of evidence upon which the government relied at trial to show just how speculative and flawed the government's crime scene interpretation was, and how a jury would not have been swayed by this evidence had it been presented as well with the evidence which demonstrates the presence of Stoeckley and other intruders in the MacDonald home.[12]

1. The Government's Speculative Crime Scene Interpretation.

a. The Pajama Top Evidence

According to the government's brief, "Petitioner's pajama top was, perhaps, the single most inculpatory piece of evidence."

---

[12] For a more detailed and well-documented review of the government's crime scene interpretation, the reader should consult the "Addendum to MacDonald's Reply Brief: Compilation and Analysis of Case Evidence," hereafter "Addendum," which was filed with the Court on May 14, 1991.

Gov't Opp. at 6. And yet the pajama top, more than any other single piece of evidence, shows how the government has been forced to fashion improbable, speculative theories because of the lack of direct physical evidence pointing to MacDonald as the murderer.

(i) The government argues that the "pajama top experiment," in which FBI Lab Technicians Paul Stombaugh and Shirley Green aligned the garment's 48 puncture holes in a pattern corresponding to the 21 puncture wounds in Colette's chest,[13] demonstrates that MacDonald placed the pajama top on his wife's chest and stabbed her through it with the icepick, thereby refuting his explanation that the holes must have been made when he used the pajama top to ward off the icepick blows of an attacker in the living room. (Gov't Opp. at 6-7) Yet Paul Stombaugh, the architect of the pajama top experiment, testified that the pajama top reconstruction merely demonstrated one possible explanation for what caused the holes in the pajama top, not the only explanation (Tr. 4371, 4381). Stombaugh further admitted that the government's reconstruction positioned the pajama top in a different location relative to the chest wounds than it appeared in the government's crime scene photograph. (Tr. 4197) It was also demonstrated and established at trial that the

---

[13] The government claimed that its reconstruction demonstrated that the pajama top was folded on top of itself so that in some instances a single thrust of the icepick had created more than one stab hole in the fabric. This reconstruction used large toothpick-like probes to represent what the government claimed were the 21 thrusts of the icepick.

complicated folding of the pajama top could not be duplicated merely by looking at this photograph. (Tr. 4579)

In addition to Stombaugh's admissions at trial, Shirley Green admitted on cross-examination that she failed to take into consideration (a) any of the holes that were in the pink pajama top that was worn by Colette (Tr. 4501), and (b) any of the knife holes in either garment (Tr. 4476-4477). Furthermore, Green was unable to state affirmatively that she took into account the "directionality" of the holes in the pajama top (Tr. 4571-72) or the fact that the holes in the pajama top varied slightly in size.[14] As the defense has already pointed out in the record (See "Addendum"), the failure of government examiners to take into account any of these complicating factors in their reconstruction clearly demonstrates the glaring inaccuracy and speculative nature of the pajama top experiment, and undermines any conclusions drawn from the reconstruction.

(ii) The government maintains that the fact that "the holes

---

[14] In 1971, Stombaugh had inspected the pajama top at the request of the Army CID and identified the "directionality" of 11 holes in the pajama top. Stombaugh was able to tell from which side of the material the icepick had been thrust based on how the fabric was torn or shaped. Green herself testified at trial that she made no record of whether or not she took the majority of these directionalities into account. (Tr. 4571-72) The defense forensic expert, Dr. John Thornton, testified that the entire demonstration was invalid because the directionality of six holes, as recorded by Stombaugh in 1971, was reversed when Green assembled the pajama top with the "probes" that resembled the icepick thrusts. (Tr. 5326-27) In other words, Green had folded the pajama top in such a way that when she inserted the probes into the holes in the garment, at least six of the probes were going in a direction that was opposite the direction that Stombaugh had earlier concluded the icepick had been thrust.

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 defendant's claim that he used it to ward off his attackers (Tr. 4074-75)." (Gov't Opp. at 7) Yet Dr. John Thornton, the chief defense forensic expert at trial, testified that, based on his own experiment, the pajama top did not have to be stationary to have round holes produced (Tr. 5151-52). Thornton furthermore challenged the in-court demonstration in which prosecutor James Blackburn stabbed with the icepick at a pajama top held and moved by Murtagh, on the grounds that it relied upon too many assumptions about the position of the pajama top and the manner in which the thrusts were made. (Tr. 5236-38)

(iii) According to the government's theory of the case, the presence of blue pajama top fibers in Kimberly's bedding, in Kristen's bedroom, and under Colette's body, as well as the absence of such fibers from the living room where MacDonald claimed to have been assaulted, refuted MacDonald's account that his pajama top was torn when unknown intruders attacked him in the living room, and that, after he left, he went directly into the master bedroom where he placed the torn garment over Colette. (Gov't Opp. at 7) Yet Michael Newman, an orderly at the army hospital where MacDonald was taken for treatment, testified at trial that MacDonald was wearing pajama bottoms, the inseam of

which was "ripped out from about mid-thigh all the way across."[15] (Tr. 2661). And, as CID lab examiner Dillard Browning confirmed in his testimony, there was no way of telling whether the various pajama threads and fibers came from MacDonald's pajama top or his pajama bottoms. (Tr. 3876-77). Thus MacDonald's trial testimony that he ran throughout the house attempting to resuscitate his wife and children after he regained consciousness (Tr. 6595-6603) provides an equally, if not more plausible explanation than that of the government for the presence of pajama fibers in Kristen and Kimberly's room. MacDonald's ripped pajama bottoms could have -- indeed, must have -- left behind fibers as he checked on each victim, including his wife Colette. In addition, Dr. William Neal, who pronounced the victims dead at the MacDonald home, testified to rolling Colette's body and the bodies of the children to examine their backs (Tr. 6915, 6921-22, 6924), thereby providing an explanation for the pajama fibers beneath Colette, in Kimberly's bedding, and in Kristen's bedroom.

The government's claim that MacDonald's account of being attacked in the living room is untrue because "no threads from the pajama top . . . were found in the living room where petitioner claimed he was assaulted (Tr. 1689-90, 1727, 3790, 3811)" (Gov't Opp. at 7) is also highly disingenuous. One of the government's own CID investigators, Robert Shaw, testified that during the processing of the crime scene, he saw a "tangled bunch

---

[15] Newman eventually threw away the pajama bottoms because the CID failed to claim them. (Tr. 2661)

or ball" of blue threads or fibers at the end of the hallway near the top of the stairs from the living room (Tr. 2480-81), the place where MacDonald testified that he regained consciousness. (Tr. 6595) The government's experts also found blood at the end of the hallway, which supports MacDonald's account that this is where he collapsed after the attack. (Tr. 3479)

(iv) The government maintains that the pajama top pocket found on the throw rug at Colette's feet was stained with blood of Colette's type before it was torn from the pajama top, and the staining was therefore a result of smearing and soaking caused by direct contact with Colette's body. The government argues that the pocket, considered along with other blood stains on the pajama top, showed that the pocket had been torn off the pajama top while MacDonald struggled with Colette in the master bedroom, and that he later returned to the bedroom and placed it -- minus the pocket -- over Colette's body. (Gov't Opp. at 7-8) The government's repeated claim that expert testimony supports this theory is incorrect,[16] since no expert testified at trial that "the pocket was stained with blood of Colette's type before it was torn from the pajama top." In fact, quite contrary to the government's theory about the timing of the ripped pocket, CID

---

[16] In closing arguments at trial, Blackburn made essentially the same argument as the government's opposing papers:

> You recall Terry Laber's saying that in his opinion, that A type blood got on there prior to the pocket being torn off and yet it didn't bleed from the inside out, but it bled from the outside in. (Tr. 7129)

lab examiner Terry Laber testified that it was his opinion that the pocket had to have been detached before the pajama top became soaked with blood, (Tr. 3612) thereby validating a variety of explanations for the stains on the pajama pocket other than that of the government.

(v) The government contends that a bloody hair from Colette entwined with a thread matching the pajama top found on the bedspread on the floor of the master bedroom contributes to the vast cumulative evidence that the defendant attacked Colette both in the master bedroom and in Kristen's bedroom, and that he carried her bleeding body wrapped in bedding back to the master bedroom. (Gov't Opp. at 9) In fact, the detailed lab notes of CID technician Dillard Browning, who microscopically examined this exhibit on two occasions six months apart, never once indicate that a hair and pajama thread were entwined. The notes, never disclosed to the defense before nor during trial, refer simply to hair and pajama threads without describing them as entwined around one other. (Murphy Aff.#2 ¶ 6 (a))[17] Stombaugh testified that this exhibit was not mounted on a glass slide (Tr. 4291), but that the hair and thread were stored inside a vial (Tr. 4291), where they could have easily curled due to moisture and/or chemical treatment in the CID lab. Since the original 1970 examinations never once described the hair and thread as entwined, the government's conclusion that this exhibit provides evidence of a struggle between MacDonald and his wife is far-

---

17 These notes were obtained post-trial via the FOIA.

fetched at best.

b. Wooden Club Weapon

In its attempt to prove that MacDonald was responsible for murdering his wife and children, and that his account of an attack by unknown intruders is untrue, the government has argued that the weapons found at the scene can be specifically linked to MacDonald. With respect to the wooden club murder weapon, the government contends that because its lab examiners found two seam threads from MacDonald's blue pajama top on the club, as well as fibers from the throw rug in the master bedroom, this demonstrated that MacDonald's account was false and that the club had contact with the throw rug after his pajama top had been torn in the master bedroom, and thus he himself must have been the one who wielded the club against his wife and children. (Gov't Opp. at 10, fn 4) This contention fails to account for the fact that MacDonald's vague recollection of being struck by something like a baseball bat (Tr. 6791) does not preclude the wooden club's being the weapon with which the intruders struck him, since MacDonald said at trial he would be unable to recognize the weapon which struck him if he were to see it again. (Tr. 6788) According to the Transfer Theory of Locard cited by the government's own FBI examiner (Malone Aff. ¶ 10), it is reasonable to assume that threads from MacDonald's pajama top or pajama bottoms certainly could have been transferred to the club when he was struck during the attack in the living room. Fibers from the rug in the master bedroom could likewise have become

attached to the club during the attack on Colette. The argument that the presence of these fibers on the club "demonstrated that petitioner's story was false and that the club had contact with the throw rug after petitioner's pajama top had been torn in the master bedroom and before the club was removed from the house by the murderer" has no basis in fact, logic, or reality. Nothing about the presence of these fibers on the club has any bearing whatsoever on whether or not MacDonald, rather than intruders, committed the murders and moved the club through the locations in the house where it could have picked up these fibers.

Likewise, the presence of a splinter and pajama threads in one of the children's bedrooms fails to link MacDonald to the wielding of the wooden club, because the presence of pajama fibers is explained by MacDonald's circuits through the house in which he attempted to resuscitate his family. The government's conclusion that this fact, and the wooden club impression found on Colette's chest, "demonstrate" that MacDonald was the perpetrator, is patently fallacious. Finally, MacDonald's failure to recognize that the wooden club murder weapon (which the government claims had once been part of the piece of wood used to support Kimberly's bed) was a piece of scrap wood from somewhere around his house (Gov't Opp. at 10-11) is not nearly as significant as the government contends, because this piece of wood was simply one piece of wood among many in and about the MacDonald home. (Tr. 6754)

c. Blood evidence

Like the pajama top evidence, the blood evidence derived from the crime scene is replete with ambiguities that prevent the government from drawing reliable conclusions that the evidence points to MacDonald. In its opposition brief, the government makes statements about the blood evidence that do nothing more than establish that the murders did, in fact, take place at 544 Castle Drive. Among the most troubling and inconclusive of the government's conclusions concerning blood evidence are the following:

(i) The government contends that the bare footprint of the defendant stained in blood of Colette's blood type leading out of, but not into, Kristen's room, demonstrates that MacDonald likely stepped on a bloody bedsheet or bedspread before carrying Colette's body to the master bedroom. (Tr. 7083, 7133-34)(Gov't Opp. at 9) However, no footprints or ridge impressions were ever found on this bedding. In addition, defense expert James Osterburg testified that the wheeled stretchers which rolled down the hallway from the master bedroom to the living room and out the front door could have destroyed any footprints present in the hallway. (Tr. 5062-63) Bloody footprints entering Kristen's room from the hallway would have rendered useless any argument about the exiting footprints.[18]

---

[18] FOIA releases obtained in 1990 show that the hallway floor -- despite heavy traffic by CID investigators, medics wheeling out victims, and observers -- was not processed by CID blood technicians until four days after the crimes, and was, in

(ii) The government further contends that MacDonald carried Colette's body in the sheet found on the floor of the master bedroom, based upon the fact that this sheet was heavily stained with blood of Colette's blood type and bore bloody imprints from Colette's pajama top and the sleeves of MacDonald's pajama top. (Gov't Opp. at 8-9) This conclusion was challenged at trial by defense experts Charles Morton, who characterized the "impression" in the sheet as more accurately resembling palm prints, and Thornton, who contended that the pajama top impressions in the sheet could have been made by "rather gentle contact" between the pajama top and the sheet.

(iii) The government argues that because "Kristen's blood was found on the defendant's eyeglasses" (Gov't Opp. at 10), this suggested that the blood had gotten there during "his assault," and that this evidence contradicted MacDonald's statements that he was not wearing his eyeglasses during or after the attack. In fact, the blood on MacDonald's eyeglasses was never specifically identified as Kristen's.[19] First, no matching

---

fact, among the last areas processed. (Murphy Aff.#2 ¶ 6 (b)) Thus, any footprints entering Kristen's room easily could have been obliterated by the time the hall was processed.

[19] In its opposition brief, the government makes repeated, disingenuous assertions in which it fails to distinguish the difference between matching a stain to a general blood type and matching the stain to the blood of a specific individual. The government continually argues that certain blood stains belonged to Colette or one of the children, rather than correctly stating that the stain was simply blood of their particular type. In truth, the government can say nothing more than that blood stains are blood of a particular type, not that it belonged to a certain individual. What this means in light of the suppressed evidence of intruders is that any of the blood stains found within the

of blood to specific individuals was ever accomplished in the MacDonald case, as no DNA tests were ever conducted. The most the government can say is that the blood was Type O, which is the same type as Kristen's blood. More importantly, FOIA-released materials not available to the defense at trial indicate that an FBI agent who was assigned to the MacDonald investigation determined that MacDonald, an emergency physician, came into contact with no less than five patients who had Type O blood on the day before the murders. The agent further noted in his notes that one of these patients had a puncture wound and had "O Positive blood . . . which blood could have possibly splattered on Dr. MacDonald's glasses." (Murphy Aff.#2 ¶ 6 (c))

2. The Government's Speculative Crime Scene Interpretation Would Not Have Been Accepted by the Jury Had the Government Disclosed to MacDonald and the Jury the Forensic Evidence Which Demonstrates the Presence of Stoeckley and Other Intruders.

It is evident both from the government's closing argument at trial and from subsequent court decisions, that the government's crime scene interpretation, speculative and demonstrably faulty as it was at trial, produced a conviction only in the absence of forensic evidence of intruders to support MacDonald's account. Yet, 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

---

MacDonald home could in fact have been left by these same intruders, further weakening the government's theories about blood spatterings.

sources from the MacDonald home, and which therefore 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. More importantly, now that it has been established that Agent Malone's statements that Saran could not be and was not used in wigs were in fact false, and now that it is clear that the long blond Saran fibers could have come from a wig worn by Stoeckley, the equation shifts decisively in MacDonald's favor, and the government's "overwhelming" crime scene interpretation is completely decimated.

The government's dependence on the "absence of evidence of intruders" is demonstrated by its closing argument to the jury:

> 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).

Indeed, at trial Judge Dupree instructed the jury that, if it chose to disbelieve MacDonald's account of events, it could then conclude that MacDonald was in fact the murderer (Charge at 10). This "false alibi" charge virtually condemned MacDonald in the event he were unable to prove his own account, even in the absence of direct evidence of his culpability.

On direct appeal, the Fourth Circuit held that the forensic case compiled by the government's experts was sufficient for the jury to find MacDonald guilty beyond a reasonable doubt. United States v. MacDonald, 688 F.2d 224, 234 (4th Cir. 1982).

The importance of forensic evidence had not diminished two years later, when the District Court ruled on MacDonald's 1984 motions. Judge Dupree repeatedly cited the lack of exculpatory physical evidence, summarizing the case as follows:

> [N]o direct evidence of the alleged intruders was found to support MacDonald's version as to what happened on the night of the murders.

United States v. MacDonald, 640 F.Supp. 289, 290 (E.D.N.C. 1985). Judge Dupree again cited the lack of exculpatory forensic evidence, agreeing with the government's contention that

Stoeckley could not be linked to the inside of the MacDonald house, and hence MacDonald was lying:

> The government [ ] pointed to the absence of evidence of evidence in the apartment linking Helena Stoeckley or anyone else to the crimes.

Id. at 290 (emphasis added).

> MacDonald denied any knowledge of the murder weapons but the government offered evidence from which the jury could have found that the weapons came from the MacDonald home...This evidence negated any contention that the weapons belonged to intruders and that they had brought them with them when they entered the apartment...The lack of any physical evidence supporting MacDonald's claim that he had been attacked by drug-crazed intruders wielding these weapons directly supported this theory.

Id. at 311 (emphasis added).

Finally, Judge Dupree rejected MacDonald's 1984 motions in large measure because of the "absence of any direct physical evidence proving MacDonald's story" Id. at 333. This evidence was finally presented in the 1990 petition, which was procedurally barred because Malone's false affidavit deprived MacDonald of the ability to show factual innocence.

As summarized in MacDonald's opening memorandum, the unmatched hairs and fibers demonstrate the presence of intruders because of (1) the critical locations where these items were found, and (2) the way in which they interlock with other evidence to demonstrate Helena Stoeckley's presence at the crime scene.[20]

---

[20] In response to MacDonald's 1990 petition, the government (via agent Malone) defended its non-disclosure of this forensic evidence by arguing that the unsourced evidence found at the crime scene was simply household debris because under the "Transfer Theory of Locard" individuals "are constantly

(a) The blond saran hair-like fibers, up to 24 inches in length, were found on a clear-handled hairbrush on a table in the living room/dining area of the MacDonald apartment. As argued in the papers submitted to this Court and the Court of Appeals in 1991 and 1992, and summarized in Defendant's Opening Memorandum, these fibers corroborate MacDonald's account 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.[21]

---

exchanging hairs, fibers and other trace evidence with their immediate environment," Malone Aff. (2/14/91) at ¶ 10, and therefore the presence of foreign fibers and hairs "is of no forensic significance." Id. On this basis, the government argued that its laboratory examiners were permitted to conclude that this evidence was forensically insignificant because it could not be identified with any known sources. This rationale is patently illogical in the context of this case in which MacDonald has maintained from day one that he and his family were attacked by a group of intruders. Here, the very inability to match these fibers with "knowns" belonging to MacDonald or to the apartment's contents was of enormous forensic significance because if intruders invaded MacDonald's house as he claimed, they would, according to the government's theory, have left "hairs, fibers and other trace evidence" at the crime scene.

[21] There is ample evidence that Helena Stoeckley owned and wore a blond, shoulder-length wig. She testified herself to owning such a wig, and stated that she burned it shortly after the murders because she feared it would link her to the crimes. Her next door neighbor William Posey, as well as Prince Everett Beasley, a Fayetteville police detective, also recalled that she wore such a wig. Def. Mem. at 60. While Stoeckley stated that she was not wearing the wig at 12:00 midnight on the night of the murders, this in no way forecloses the possibility that she was wearing the wig later during the early morning hours of February 17, 1970, especially because of her curious memory lapse precisely during the period when the murders took place. Further, as demonstrated above, the bluish-black wool fibers found on Colette MacDonald's body and on the wooden club murder weapon are further evidence of her presence in the MacDonald

(b) Bluish-black/ purple wool fibers were discovered on the mouth and biceps area of Colette MacDonald and on the wooden club murder weapon that the government claimed was used on Mrs. MacDonald, and which was found outside the MacDonald home. The government made several attempts to match these black wool fibers to known clothing sources in the MacDonald apartment, but was unable to do so. The presence of these unsourced fibers in addition to the blue pajama top seam threads and rug fibers cited by the government (Gov't Opp. at 10, fn 4) debunks the government's elaborate crime scene interpretation linking MacDonald directly to the wooden club murder weapon. Furthermore, in light of countless witness statements and the trial testimony of Helena Stoeckley herself that Stoeckley always wore dark and purple clothing, the presence of these unsourced dark fibers in a critical, inculpatory location provides direct evidence that Stoeckley was actually present in the MacDonald home during the murders.

(c) Numerous "natural" hairs and a piece of skin were found in critical locations at the crime scene (on or near the victims' bodies) which could not be matched to any member of the MacDonald family. As argued in the papers submitted to this Court and the Court of Appeals in 1991 and 1992, and in the Cormier Affidavit No. 2 submitted with MacDonald's opening

---

home, because Stoeckley herself stated that she always wore black and dark purple clothing. Besides, Stoeckley could not have been expected to admit under oath that she was wearing the wig on the night in question.

memorandum, these unmatched hairs, some of which were found under the victims' fingernails, are additional direct evidence of intruders and further corroborate MacDonald's account of events.

Had the government disclosed the existence of these items of forensic evidence to the defense at the time of trial, the government never would have been able to argue that there was no evidence of intruders at the crime scene. Moreover, this evidence would have triggered the admission of Stoeckley's out-of-court confessions by corroborating her presence at the scene, thereby doing "incalculably great" damage, 632 F.2d at 264, to the government's case. Finally, had this evidence been presented to the jury at trial, the government's speculative crime scene interpretation would surely not have been accepted by the jury. This result is even more certain when one considers this forensic evidence of intruders in tandem with the evidence from eyewitnesses who saw a group of persons in the vicinity of Fort Bragg on the evening before and the morning after the murders which met the description of the intruders that doctor MacDonald gave to the MPs who responded to his call for help.[22]

---

[22] When viewed in its totality, it is without question that MacDonald has made out a colorable claim of factual innocence and has demonstrated that the there is a reasonable probablity that the outcome would have been different had the suppressed evidence been available to him at the time of trial. See Def. Mem at 53, n. 27 & 28.

E. MacDonald Is Entitled to Have Access to the Physical Evidence For the Purpose of Conducting His Own Laboratory Examinations To Ascertain the Reliability of All Examinations Conducted by Agent Malone, and For the Purpose of Demonstrating His Factual Innocence.

As demonstrated above, the government has not rebutted MacDonald's factual contentions with an affidavit from Agent Malone, and the government's attempt to justify Malone's fraudulent actions fails. Because of Malone's false and misleading Saran fiber presentation in this case, and his pattern of deception in other cases, the accuracy and reliability of all examinations he conducted in the MacDonald case, and any conclusions he drew from such examinations, must be viewed as highly suspect. Therefore, MacDonald should be given access to the physical evidence for the purpose of subjecting it to laboratory examinations, including mitochondrial DNA testing which was not available in 1990.[23]

In its opposition at pp. 46-48, the government suggests that agent Malone's conduct in these other cases is irrelevant to Malone's conduct in the MacDonald case, and then proceeds (again, without any supporting affidavit) to minimize and justify Malone's conduct in these other cases. These cases are clearly

---

[23] As noted in the Cormier Aff. No. 2, there are two categories of evidence which MacDonald seeks to test. The first categeory consists of all items which were examined by agent Malone, including the Saran fibers, the "bluish-black" wool fibers, and natural hairs. The second category consists of evidence which Malone may not have tested, but which may assist MacDonald in establishing his "factual innocence" using new technology that was not available in 1990.

relevant to the issue at hand -- the reliability of any examinations conducted by Agent Malone -- to the extent that they demonstrate that Malone has, over the years, engaged in a pattern of false, deceptive and misleading conduct, beginning at least as early as the Hastings matter and continuing through the MacDonald case. Undersigned counsel is still in the process of investigating Malone's activities in these other cases. MacDonald submits that in the event this Court orders the requested evidentiary hearing into Agent Malone's conduct, MacDonald should be allowed to inquire into these other matters for the purpose of demonstrating that Malone's conduct in the case at bar is part of a larger pattern of misleading and fraudulent conduct. An evidentiary hearing, with witnesses under oath, is highly preferable to this Court's accepting the government's convoluted and unpersuasive footnotes at pp. 47-48 of its opposition brief.

CONCLUSION

It was Agent Michael Malone's false evidence presented to this Court that caused the Court to dismiss Jeffrey MacDonald's 1990 petition on procedural grounds. That dismissal, in turn, prevented the Court from properly considering the totality of the newly uncovered (largely through FOIA) evidence that would have decimated the government's trial presentation -- a presentation that the government seeks yet again, in this proceeding, to foist on this Court, as if the suppressed evidence were still lying, undiscovered, deep in government files. The damage done by

Malone should now be undone, and MacDonald should be put back into the position he would have been in had Malone's affidavits, undefended now by further sworn submissions by Malone, not been filed.

For all the foregoing reasons, this Court should deny the government's motion to dismiss, and grant MacDonald's motion to reopen by (1) ordering that the government grant MacDonald access to the physical evidence, and (2) ordering an evidentiary hearing into Agent Michael Malone's actions and for the purpose of considering the substantial body of evidence which has surfaced from the government's own files which corroborates MacDonald's account by demonstrating the presence of intruders in the MacDonald home.

DATED: May 27, 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 27th day of May, 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 27th day of May 1997, a true copy of the foregoing was served via first class mail upon

John F. DePue, Attorney
Terrorism and Violent Crime Section
United States Department of Justice, Room 2513
950 Pennsylvania Avenue, NW
Washington, DC 20530

Brian M. Murtagh, Attorney
Terrorism and Violent Crime Section
United States Department of Justice, Room 2513
950 Pennsylvania Avenue, NW
Washington, DC 20530

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

g:\clients\macdonal\habeas\reopen\replybrf.wpd