UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 75-CR-26-3
No. 5:06-CV-24-F

UNITED STATES OF AMERICA	)	MEMORANDUM IN SUPPORT OF RESPONSE OF THE UNITED STATES TO PETITIONER'S MOTION TO EXPAND THE RECORD
v.	)	
JEFFREY R. MacDONALD	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this memorandum in support of its opposition to the petitioner's "Motion to Expand the Record" and shows unto the Court the following:

SUMMARY OF ARGUMENT

By the instant motion the defendant/petitioner Jeffery R. MacDonald ("MacDonald") attempts to circumvent the prohibition on re-litigation of prior habeas claims that were either rejected on the merits or on abuse of the writ grounds. Such claims include assertions of suppression of evidence and prosecutorial misconduct which have been previously litigated and found to be without merit. See McClesky v.Zant, 499 U.S. 467 (1991). It is also an attempt to insert into the record affidavits and other documents, such as newspaper articles, offered to prove the truth of Stoeckley's statement, in support of claims for relief which are either barred by the one-year statute of limitations applicable under 28 U.S.C § 2255, the requirement that the evidence be reliable, or by the prohibition against raising in a subsequent application information which was deliberately bypassed in earlier application. See United States v. MacDonald, 966 F.2d 854, 860 (4th Cir. 1992), citing McClesky, *supra*, at 1468. It is further an attempt by MacDonald to avoid the requirements of seeking a pre-filing authorization

("PFA") from the court of appeals as required by 28 U.S.C.§2255 ¶ 8. Without a PFA, this Court has no jurisdiction to entertain his claim for relief based upon selective DNA test results. It is further an attempt to insert into the record the inadmissable opinion of a polygraph examiner offered to bolster the credibility of Britt's affidavit, in contravention of the Fourth Circuit's post-Daubert rule that such testimony is *per se* inadmissible. See United States v. Prince-Oyibo, 320 F.3d 494, 501-02. Finally, MacDonald seeks to pack the record with otherwise unreliable hearsay sound bites contained in a 90-minute video entitled "False Witness," which aired in 1990, because it contains less than a minute of television news footage of Britt accompanying Stoeckley into the courthouse during the trial.

MacDonald's proffered justification is that the Court is mandated to consider the newly discovered evidence in "the light of the evidence as a whole" in support of his claim of factual innocence. We submit that MacDonald's aim is anything but the Court's consideration of the new evidence (Britt) in light of the evidence as a whole, because to do so would involve consideration of evidence that the jury found demonstrated the falsity of his exculpatory account. Rather, MacDonald's aim here is to ignore or distort the evidence that sustained his conviction on direct appeal and collateral attack, and re-argue and re-litigate previous claims which were rejected by this Court in a series of decisions, all of which have been affirmed on appeal. In essence, MacDonald seeks to use Britt as a device to churn the record--a record which he characterized in 1997 as "immense." We further submit that MacDonald's reliance on Schlup v. Delo, 513 U.S. 298 (1995) is misplaced. To the same effect, Rule 7 of the Rules Governing Section 2255 Proceedings For The United States District Courts does not empower MacDonald to circumvent the prohibitions referenced above. Accordingly, MacDonald's motion should be denied.

I. MacDonald's Reliance on Rule 7(a) is Misplaced.

MacDonald' use of this rule is flawed as it is within the Court's power to expand the record, request materials, and ensure opposing counsel has time to review those materials.[1] Furthermore, this rule only comes into effect once the court orders an answer. This would be done by the court to facilitate a disposition on the merits without the need for an evidentiary hearing. Lonchar v. Thomas, 517 U.S. 314, 326 (1996). In McNair v. Haley, 97 F.Supp. 2d 1270, 1284 (M.D. Ala. 2000) that court stated:

> Rule 7, in its traditional role, would not effectively render subdivision (e)(2) a nullity, nor is it true vice versa; the habeas court may expand the record motivated only by its "responsible concern that it provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history" and should review additional materials that are "no broader than necessary to meet the needs of the court." Vasquez v. Hillery, 474 U.S. 254, 260, 106 S.Ct. 617, 621, 88 L.Ed.2d 598 (1986).

McNair v. Haley, 97 F.Supp. 2d 1270, 1284 (M.D. Ala. 2000). The court also stated:

> Thus, Rule 7 facilitates, among other things, the early summary resolution of habeas cases on an expanded record, generally when the relevant issues are not ones of credibility.
>
> Read together, the two provisions establish a coherent scheme: applicants who fail to develop the factual bases of their federal constitutional claims in the state courts are taxed a stiff penalty--they are denied the right to demand an evidentiary hearing in which they fashion a persuasive case with materials of their own choosing and in which the federal court would typically then make credibility choices--but they are

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[1]Rule 7 provides as follows: **Expanding the Record** (a) **In General.** If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the motion. The judge may require that these materials be authenticated.

(b) **Types of Materials.** The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.

(c) **Review by the Opposing Party**. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

> not denied meaningful review altogether, because the federal habeas court can nonetheless order the production of materials that the court needs in order to conduct an initial or summary review.

McNair v. Haley, 97 F. Supp. 2d at 1284

MacDonald's attempt to apply this rule is misguided. The rule is designed to obviate the need for an evidentiary hearing because of slight omissions in the state record. Raines v. U.S. 423 F.2d 526, 529-530 (4th Cir. 1970). The Rule is in place to protect against a state petitioner who, having failed to assert a constitutional claim at an earlier proceeding may now, without Rule 7, may be precluded from an evidentiary hearing on that claim. The advisory committee notes to Rule 7 of the rule Governing Section 2255 Proceedings note that "[i]t is less likely that the court will feel the need to expand the record in a § 2255 proceeding than in a habeas corpus proceeding [under § 2254] because the trial . . . judge is the one hearing the motion . . . and should already have a complete file on the case in his possession." In this case the petitioner is trying to expand the record to bring in evidence that is wholly collateral to the "newly discovered [Britt] evidence", and which has, for the most part, already been considered and rejected.

Should this Court not agree with our argument in the Response of the United States, filed April 13, 2006, to the effect that the instant petition be summarily dismissed, then an evidentiary hearing will almost certainly have to be held, and Britt will have to testify and his credibility will be very much at issue.[2] MacDonald's motion predicated on Rule 7, to expand a record which is already immense, is misplaced. In the absence of any valid basis provided to the Court, it should be denied.

II. MacDonald's Statement of Itemized Material

[2]To the extent that the instant motion's re-submission of Exhibits 1-5 and 7, the same affidavits filed in support of the §2255, is an attempt to avoid having to produce Britt and the other witnesses and have them subject to cross examination, it should be rejected.

A. Evidence Elicited at Trial

Paragraphs "1" through "31" of MacDonald's Statement of Material Evidence contain excerpts from the trial transcript which have been carefully parsed so as to recount only MacDonald's exculpatory account of an attack by intruders.[3] Of course no attempt has been made to reflect any of the evidence which caused the jury to find that account false. These snippets from the transcript must indeed be viewed in the light of the testimony of the witness both on direct and cross-examination, and the trial evidence as a whole. We reserve for the appropriate time an opportunity to respond on the merits. For purposes of this response, it is sufficient to note that there is no basis to "expand the record" to include the transcript excerpts contained in Appendix 2 which have been taken from the record of the trial and are that already "in the record."

Paragraphs "32" through "36" of the Itemized Evidence is a reiteration of his claim for relief based upon the allegations contained in the affidavit of Jimmy Britt. Consequently, the information repeated in these paragraphs as well as in Exhibits "1" through "6" of the instant motion to expand the record, are already before the Court by virtue of the court of appeals having granted a PFA and the petition having been filed on January 17, 2006. Accordingly, there is no need to "expand" the record, for some as yet unspecified purpose, to encompass what is already before the Court, particularly before the Court has ruled on the underlying petition.

B. James Blackburn's Conviction

_____Paragraph "37", Exhibit 10

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[3]See Petitioner's Statement of Itemized Material Evidence--With Citations To the Record Or To Authenticated Proofs--In Support Of His Motion Under 28 U.S.C. Section 2255 To Vacate His Sentence ("Itemized Evidence").

Mr. Blackburn's December 6, 1993, conviction for events occurring between February 16, 1991 and December 31, 1992, is already before the Court by virtue of the pending 28 U.S.C. § 2255 petition to vacate MacDonald's conviction. To the extent that MacDonald seeks to offer it again for some purpose other than the Britt allegations, he is precluded from doing so by virtue of 28 U.S.C.§§ 2255 and 2244 on the grounds that (1) he has not sought a PFA from the court of appeals, and (2) it is outside the one- year statute of limitations.

C. Post-Trial Evidence- Set Forth in 1984 Motion For A New Trial

Paragraphs "38" through "41" of the Itemized Evidence, and the corresponding affidavits and declarations found in Appendix Two, Tabs 1-10, relate entirely to issues that were fully litigated in the course of the first collateral attack. See United States v. MacDonald, 640 F. Supp. 286 (U.S.D.C. E.D.N.C. (1985) (App. Vol. I, Tab10); United States. MacDonald, 779 F.2d 962 (4th Cir. 1985) (App. Vol. I, Tab 11).[4] Consequently, claims for relief based upon these documents are both successive and abusive, and MacDonald is precluded from re-litigating them under the guise of consideration of the evidence as a whole.

MacDonald also seeks to expand the record by inclusion of the affidavits of Morse Buffkin and Bryant Lane found at Exhibit 7 to his Motion Under 28 U.S.C. §2255. (See also ¶ 46.) The government has moved to have these affidavits stricken as time barred.[5] MacDonald has opposed

[4]See Also Transcripts of Hearings before the District Court, September 19- 20, 1984 and January 14, 1985. (App. Vol. VIII and App. Vol. IX, respectively.)

[5]See Motion of the United States To Strike Exhibits Submitted In Connection With Petition For Relief Under 28 U.S.C. §2255, And For Additional Relief

the government's motion.[6] As we understand his opposition, ". . . the issue before this court is whether the newly discovered evidence [Britt plus DNA], taken together with everything else that is now available and relevant to the question of guilt or innocence, tips the balance in favor of the petitioner. The question is not . . . whether the newly discovered evidence taken together with the evidence from the trial, and the evidence discovered only within the last year, tips the balance in favor of the petitioner." Id. at 5.

MacDonald offers no authority for this theory of newly discovered evidence. Were his interpretation of the law to be accepted it would render the one-year limitation enacted by Congress meaningless. Here, Morse and Buffkin contacted MacDonald's then attorneys several years before the instant petition was filed and, for whatever reason, they chose not to act on this information. In the case of the 1988 declaration of Bryant Lane, which was recycled in 2005, MacDonald makes no effort to explain this attempted subterfuge. Instead, he points to the absence of any specific mention of Lane in Judge Dupree's Memorandum of Decision as indicating that the 1988 declaration was never rejected on the merits. In doing so, MacDonald ignores the express language of Judge Dupree's ruling:

> The court has allowed numerous extensions of time in which to file pleadings and has waived the normal page limitations so that both sides could adequately present their respective positions. Having considered the voluminous pleadings, *affidavits and exhibits*, and the arguments of counsel at a hearing on June 26, 1991, the court finds for the reasons which follow that MacDonald's petition must be denied.

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[6] See Petitioner's Opposition To the Government Motion To Strike Exhibits Submitted In Connection With Petition For Relief Under 28 U.S.C. §2255,

MacDonald, supra, 778 F.Supp at 1344." (emphasis supplied).[7]

Judge Dupree did not base his ruling solely on abuse of the writ grounds, but rather also denied relief on the merits stating:

> *...the court has reviewed in detail the newly discovered evidence and has considered the merits of MacDonald's claims*. . . . In the end, the additional evidence has not changed the court's opinion that. . . the jury would again reach the almost inescapable conclusion that he was responsible for these horrible crimes.

Id. at 1360. (emphasis added).

MacDonald claims that because the application filed with the court of appeals contains claims for relief based on the alleged confessions of Stoeckley (to Britt) and Mitchell (to Morse, Buffkin and Lane), the one-year limitation does not apply to the Mitchell confessions because the court of appeals authorized the filing of the draft petition accompanying the application. MacDonald's position is contrary to the Fourth Circuit's application of the 28 U.S.C § 2244(b)(4) as well as the plain language of the statute itself. In United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003), the court of appeals addressed the substantive limitations on successive petitions under AEDPA.

Because of the language of 28 U.S.C. §2244 (b)(3)

> [t]he court of appeals must examine the application to determine whether it contains any claim that satisfies . . . .§ 2255 ¶ 8 (for federal prisoners). If so, the court should authorize the prisoner to file the entire application in the district court, even if some of the claims in the application do not satisfy the applicable standards. See Nevius v. McDaniel, 104 F.3d 1120, 1121 (9th Cir. 1996). Compare 28 U.S.C.A. § 2244(b)(3) (establishing gatekeeping function for court of appeals with respect to

[7]The 1988 Declaration of Bryant Lane, which contains the same Mitchell confession as the 2005 Affidavit, was Exhibit 8 to the Affidavit of John J. Murphy,(#2), and was filed on May 14, 1991, and accompanied the filing that same day of MacDonald Reply Brief In Support of 28 U.S.C. Section 2255 Petition. See Docket Entries 22 and 25 (App. Vol. II, Tab 1)

> second or successive *application[s] (*emphasis in original), with id. §2244(b)(4) (requiring district courts to dismiss "any *claim* presented in a second or successive application that does not satisfy applicable standards (emphasis in original). When the application is thereafter submitted to the district court, that court must examine each claim and dismiss those that are barred under . . . § 2255 ¶8. See 28 U.S.C.A. §2244(b)(4); see also Reyes-Requena v. United States, 243 F.3d 893, 899 (5th Cir. 2001) (holding that § 2244 (b)(4) applies in § 2255 cases).

Id. at 205.

Accordingly, it is respectfully submitted, pursuant to Winestock, *supra*, and 28 U.S.C. Section 2244(b)(4),[8] that this Court dismiss MacDonald's claim for relief based upon Mitchell's alleged confessions, and strike the affidavits found at Exhibit 7. MacDonald has conceded that the affidavits themselves (and the claim they support) do not meet the applicable one-year limitation period of 28 U.S.C. Section 2255. To the extent MacDonald asserts that he is not making a *claim* for relief based on Mitchell's alleged confessions, but is only seeking consideration of these materials as part of the cosmic evidence as a whole, we submit that his argument is without merit. The confession contained in the recycled Lane affidavit was rejected on the merits in 1991, and MacDonald's attempt to slip it into the instant petition should not be permitted. The Morse and Buffkin affidavits are facially time barred. To the extent that any consideration should be given to these "confessions," which cannot support a grant of relief in any event, the evidence as a whole demonstrates that these statements were the wanderings of an alcoholic in the terminal stages of liver disease.

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[8] 28 U.S.C. Section 2244(b)(4) states: "A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirement of this section."

D. **Post-Trial Evidence Set Forth in 1990 Motion to Vacate and 1997 Motion To Reopen**

In paragraph "42" MacDonald attempts to re-open the 1997 Motion To Reopen the 1990 habeas based on the saran fiber issue. MacDonald is still attempting to establish that the saran fibers were "very likely wig hairs" and that they came from Stoeckely's wig. As the detailed procedural history of the saran fiber issue set forth at pages 2-15 in the Response of the United States to Petitioner's Motion To Add An Additional Predicate Based Upon the Results of DNA Testing demonstrates, in 1997, MacDonald's previous successive application on these very same grounds was denied. As he must, MacDonald recognizes this fact (Statement at 18) but argues that ". . . Jim Britt now provides evidence that Helena Stoeckley was prepared to directly admit her involvement to the jury could very well change the prior analysis and conclusion on this issue." Id.

For the present, it is sufficient for the government to simply point out that the Court has yet to rule on the Britt motion and, from Britt's affidavit, his statement adds nothing to the saran issue. MacDonald is barred from re-litigating the saran-as-component-of-cosmetic-wigs-worn-only-by-hippies issue, because it is both a successive and an abusive claim which the court of appeals has previously rejected, and, further, he failed to seek a PFA in 2005. There is no reason to "expand the record" to include affidavits previously made part of the record in 1990 and 1997.

The Black Wool Fibers.

MacDonald contends that the prior ruling of Judge Dupree in relation to the black woolen fibers-in which he found that had the jury known of these fibers, it would not have altered the jury's verdict-is inapplicable to the current petition. He maintains that ". . . if he is able to establish to this Court's satisfaction that the new evidence he puts forward from U.S. deputy marshal Jim Britt is reliable. . . [he] is entitled to have *all of the evidence considered as a whole,* that which was adduced

at trial, and that which has been discovered since the trial." (Statement at 20-21) (MacDonald at least recognizes that this Court must first be satisfied that the new evidence from Britt is reliable, but he assumes that he has already met that burden and the evidentiary door is wide open and all prior rulings have been vitiated.) Claiming that Britt's former status as a Deputy U.S. Marshal obviates any requirement to test the reliability of his new evidence, ". . . the question then becomes, not whether any one new piece of evidence would have altered the result but whether all of the new evidence, taken cumulatively would have altered the jury's decision.[9] (Statement at 20-21). Therefore, MacDonald requests that this Court consider the black wool fibers found on Colette MacDonald's body and on the wooden club." Id.

We need only refer the Court to Judge Dupree's meticulous treatment of the claim that intruders are the only possible source of the black wool fibers. See MacDonald, 778 F. Supp. at 1351. Judge Russell writing for the panel of the Fourth Circuit, which affirmed the district court's ruling on abuse of the writ grounds, also noted that "the hair and fiber evidence have several likely explanations other than intruders." MacDonald, 966 F.2d, at 860-61. This evidence, Judge Russell called "specious." Id.

However, nothing better illustrates the fact that MacDonald's motion to expand the record is merely a pretext to re-litigate complex factual issues, and previously rejected claims of suppression, than his attempt, once again, to maintain that the purple cotton threads matching his pajama top found on the club were misidentified by the FBI. That "inaccurate" testimony was elicited from Dillard Browning by "prosecutor [Murtagh]," and the jury was "further mislead" by Blackburn's final argument. (Statement at 21-22) As we demonstrate *infra,* recovered from the club were both purple

[9]MacDonald misstates the test applicable under Schlup, which provides that:

cotton threads, which matched the seam threads of MacDonald's torn pajama top, and black woolen fibers, for which in 1979 there were no longer black woolen items from the MacDonald household available for comparison and elimination purposes. MacDonald expressly waived any opportunity to challenge these facts in 1990-91, and he cannot be permitted to do so at this late date.[10] The testimony of Browning was true in 1979, and it would be so today. Given MacDonald's stipulation at trial that FBI Examiner James Frier would testify that rayon fibers from the throw rug in the master bedroom matched rayon fibers recovered from the club, Blackburn's argument was neither misleading nor inaccurate.[11]

The laboratory bench notes of Army Chemist Dillard Browning reflect that on March 6, 1970, he examined the contents of a vial designated ~~CSC~~ E -205. Browning's notes state:

> Vial contained fibers removed from club- vial contains two purple multi-strand cotton fibers, identical to the purple thread used in the seams of the pajama top. Numerous blue, green, yellow /green, single strand nylon mostly all are bloodstained.

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[10] See Reply Brief at 3 n. 4 (App. Vol V, Tab II) ("there is no conflict of material fact in the record.")

[11] The significance of the presence *on the club found outside the quarters* of both threads from MacDonald's pajama top, and rayon fibers from the throw rug in the *inside the master bedroom*, where the other threads and the pocket torn from the pajama top were also recovered, relates to the fact that it is further proof of the falsity of MacDonald's account that his pajama top was torn in the living room, and not in the master bedroom during the attack on Colette and Kimberly with the club. MacDonald also denied ever going outside the quarters. If MacDonald is to be believed, then his torn pajamas, the club, and the throw rug were never in the master bed room at the same time. If that were true, then, as Blackburn asked rhetorically how did these two different types of fiber get on the club? The jury was fully entitled to infer from these proven facts that the pajama threads and the throw rug fibers got on the club, not as MacDonald claimed, but as the result of the pajama top having been torn in the master bedroom, and the club coated with Colette and Kimberly's blood having come in contact with the throw rug. Needless to say, Jimmy Britt cannot shed any light on this issue that was resolved by the jury's verdict.

These fibers are identical to the fibers from the multi-colored rug. Exhibit D-227.[12]

As chronicled by FBI physical science technician Shirley S. Green after receiving the vial of debris from the club on September 24, 1974, E205 was given the FBI designation "Q89." In connection with FBI Lab No. PC-L2082 JV IZ, she removed 2 short pieces of purple cotton thread (like Q12) and placed them in "pillbox." Her chronology for Q89 further reflects:

> Exam by PMS - notes & yn comp's
> " " MSC- notes-wood comp's
> Results (10-17-74) to Charlotte
> 2 pcs purp. Cot. Sew thr like used in const of Q12.
> Results (11-5-74) to Charl.
> Wood particles in Q 89 could not be fitted into Q14, but may have come from Q14.
> Evid retained in Lab.

See App. Vol. X, Tab 10.

The November 5, 1974 Report of the FBI Laboratory, which supplemented the report of October 17, 1974, states in pertinent part on page 6 that:

> Purple cotton sewing threads like that used in the construction of Q 12 were found in specimens .....Q89 (2 pieces)...
> The above-described ...sewing thread could have originated from the torn areas of the Q12 pajama top.

(See App. Vol. X, Tab 6, Tab 9 at p. 58.)

As explained in her Affidavit of February 13, 1991, she received a letter dated December 14, 1978, from Department of Justice Attorney Brian Murtagh requesting certain laboratory examinations, and at the time she was working with FBI Laboratory Examiner James C. Frier. The

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[12] See App. Vol. X , Tab 5 containing page 0000216, Affidavit of Janice Barkley at tab 11.

first thing she did after receiving the letter was to prepare a hand written inventory of all items listed in Murtagh's letter. (App. Vol. X, Tab 9, para.. 2). Green's affidavit further recounts at page 3, paragraph 6 that:

> On February 9, 1979, Mr. Murtagh contacted me and requested that Q-89 the fibers and debris from a piece of wood, be compared to K-30, a multi-colored throw rug, and K-32, a green throw rug. At this time, I made an additional slide of fibers from the Q89 debris, which I marked with the initials "JCF." It should be noted that this examination was in addition to the comparison of the debris from Q-89, with the known threads from Q-12 performed by Mr. Stombaugh in 1974.

The February 8, 1991, Affidavit of James C. Frier, states at ¶ 6:

> I was not asked in the letter of December 14, 1978, to compare any black wool fibers to any known sources. Since there are no known exemplars of black wool available to me at the time, with which to compare them, I could not have done so in any event. . . I did not include any of this information in my report since . . . it is FBI policy to report only those items of forensic significance, which is usually effected by comparing unknown items to known sample.

Frier's affidavit continues at ¶ 7:

> "Q-89" contained debris originally removed from a piece of wood which included two black woolen fibers and one green woolen fiber. I was unable to make comparisons for these due to lack of known sources available to me at that time. I also found synthetic fibers of different colors which matched "K-30", the multi-colored throw rug which I reported. Two of these synthetic fibers were green lobed, and one was a gold lobed fiber, all of which were rayon. I also found a number of white cotton fibers which were not sufficient for comparison, as well as several animal fur hairs which I could further identify."

(See App. Vol. X, Tab 9). Frier also explains at ¶ 8 that: "It should be noted that I was not asked to make any comparisons with the blue cotton polyester pajama top Q-12."

The results of the 1979 microscopic comparison of miscellaneous specimens retained in the FBI Laboratory since 1974, but not previously examined, and the results of those comparison examinations conducted by Frier, are reflected in FBI Lab No. 90103084 S RR IZ. (See App. Vol

X, Tab 7). As Frier explained, the report did not include any information on un-compared black fibers.

At trial. defense counsel Bernard Segal stipulated that Frier would testify to his examination of GX 307 (Q-89) "that he examined fibers–that is single strands–found in this vial and compared those with Government Exhibit 322, which is the multi-colored throw rug found by the feet of Colette MacDonald in the master bedroom; and that fibers found in the vial which had been removed from the piece of wood microscopically matched the fibers composing the composition of the multicolored throw rug, and in his opinion, they could have a common source." (Tr. 4612.)

In addition to Dillard Browning's testimony concerning GX307 (E-205/Q-89) on August 6, 1979, two days later on August 8, FBI Examiner Paul Stombaugh also testified concerning Q-89. The result of this examination was that "Q-89" consisted of "two purple sewing threads," which "could have originated from the pajama top." (Tr. 4097-98.)

In closing argument to the jury prosecutor Murtagh asked the jury to consider the significance of the presence on the club of pajama top threads and fibers from the composition of the throw rug:

> Now, you have the multi-colored throw rug here which has Type A Blood on it. I would ask you to recall if you look at Exhibit 322 [throw rug from master bedroom] and Exhibit 116 [photo depicting throw rug in master bedroom] you would see that the throw rug, in addition to having the fibers with which it is composed, had on it purple cotton seam threads which we would ask you to find came from the pajama top. I also recall for you that on the club outside the house, it had both the purple cotton seam threads and the yarns from the rug. From that, I would ask you to find that thee was a fiber interchange from this rug after the blue threads and yarns got on it to the club.

Tr. 7075-76.

In his portion of the closing argument, prosecutor Blackburn also asked the jury to consider

MacDonald's account of his movements in relation to the presence of the threads and fibers themselves, and further emphasized their significance, in the sentence which follows the one quoted in MacDonald's Statement at 22:

> I suggest from the evidence that there is an explanation and that is that this club was not outside the back door until after—not before–that pajama top dropped threads and yarns and blood to the floor, and as it fell on the floor, it picked up the threads and picked up the yarns with the blood and it was thrown out the door. I suggest that you can infer from the evidence as to how it there.

See: Tr. 7137.

MacDonald's assertion that "the FBI found no fibers matching Jeff MacDonald's pajama top" is simply false. The two purple cotton threads which Shirley Green placed in a pill box in 1974, and which Paul Stombaugh then matched to the seam threads of MacDonald's pajama top, are depicted in photographs 76 and 77 of the Appendix of the 1991 Affidavit of Michael P. Malone, and are found at App. Vol. X, Tab 4.

E. Additional Post Trial Evidence

At paragraph "44" MacDonald claims that he has found newly discovered evidence in "laboratory reports obtained through FOIA requests since the trial that show that 'Type B" blood was found precisely where MacDonald said he struggled." He directs the Court to Appendix 1, Tab 2 (filed previously herein), Exhibit D-144 is set forth as containing red-brown stains found at the west entrance of the hallway. And in Appendix 1, Tab 3, D-144 is examined and found to be as made up of B or O type blood.[13] Here again MacDonald is being deceptive with his use of FOIA documents. While it may be literally true that current counsel "discovered" the results regarding D-144 in the

[13] In fact then, the report does not say that "Type B" blood was found here. The paucity of the stain precluded further testing to determine whether the stain was Type B (Jeffrey MacDonald) or Type O (Kristen MacDonald).

FOIA copies of the 6 April 70 Preliminary Laboratory Report of the Army Criminal Investigation Laboratory (Mac App. Vol. One, Tab 2) and the laboratory list of serology tests (Tab 3), the fact remains that trial defense counsel Bernard Segal received the same information in the "Consolidated" CID Lab Report (Mac App. Vol. One, Tab 4, pp. 5, C-2, ¶ 18) in a copy furnished in pre-trial discovery. This fact is proven by Segal's express reference to this report in his Motion Of Defendant To Compel Production of Tangible Objects, filed April 23, 1979. "Exhibit A" of the motion demands access to all exhibits which are referred to in the following laboratory reports. The first item listed under category A "USACIL Laboratory reports numbered as follows is "(1) FA-D-P-CFP- -82–70 [referred to as the 'Consolidated' laboratory report]; dated 29 March , 1972". (See App. Vol. X, Tab 8).

Consequently, MacDonald had full disclosure prior to trial of the information which he now claims to have only discovered post trial via FOIA. The claim is false, and should be rejected on grounds of abuse of the writ. The record should not be expanded for this purpose by the Tabs 2, 3 or 4 of MacDonald Appendix One.

Paragraph 45 of the statement has been omitted for some reason. Accordingly, the government will address, at this juncture, Exhibit 6, a Newspaper Article, *The Register,* (Fayetteville, NC) January 10, 1981 concerning Helena Stoeckley, Exhibit 8 a FOIA release of an FBI report concerning the blood type of patients treated at Hamlet Hospital between February 15-16, 1970, and Exhibit 9 Addendum To MacDonald's Reply Brief: Compilation And Analysis of Case Evidence, dated 14 May 1991.

(a) Exhibit 6

No explanation is offered the Court as to why the record should be expanded to include a

1981 newspaper article by unnamed reporters who purport to quote various inculpatory statements made by Helena Stoeckely after the trial but prior to the filing in 1984 of the first habeas attack, based upon other post trial confessions from Stoeckley. To the extent that this articled is to be included in support of a claim for relief, the court should dismiss it, for the reasons stated, supra, as an abuse of the writ, and for failure to comply with the 1 year limitation on such claims. To the extent the article is offered as proof that Stoeckley was in fact in the house, and for the truth of the matter stated, namely that "one of the springs on the rocking horse was loose" the Court should dismiss it has unreliable hearsay. It may be that the Court should consider the publication of Stoeckley's alleged statement's about the rocking horse (which in fact did not have loose or broken springs) in assessing the scope of information publicly available to Britt. However, in the absence of a clear indication as to the purpose for which the Court should consider this news story, the motion to expand the record to include it for some unspecified purpose should be denied.

(b) Exhibit 8

Again no justification is offered by MacDonald as to why the Court should expand the record to include a report by the FBI as to the analysis of hospital records obtained by subpoena concerning the blood type of patients treated by MacDonald prior to the murders. Although it has no relation to the revelations of Jimmy Britt, or the recent DNA results. However, it is clear that MacDonald is attempting to re-litigate the jury's First Degree murder conviction for the stabbing death of Kristen MacDonald, who had Type "O" blood. The jury heard evidence that, despite MacDonald's claim that he was not wearing his eyeglasses when allegedly attacked, or at anytime thereafter during his movements throughout the crime scene, Type O Blood was recovered from the outer surface of one lens of his eyeglasses. The lens surface where the blood was found was in contact with livingroom

floor and the possibility of a random spatter was eliminated. No doubt MacDonald would now like try to explain away this evidence by arguing that it came from one of the patient's he treated at Hamlet Hospital.

The Court should not permit him to expand the record in this manner. In the first place MacDonald himself knew he had treated patients at Hamlet Hospital, and he could have subpoenaed the same records himself. The FBI report, bears the telltale stamp "Received Jul 20, 1983 FBI" demonstrating that it was received by MacDonald's defense Attorney Brian O'Neill on that date, which substantially preceded the April 1984 filing of the first habeas petition. Therefore, not only is this evidence unrelated to that called into question by Britt, but its use as the basis for a claim of relief is barred both by the 1 year statute of limitations but by the abuse of the writ doctrine.

(c) Exhibit 9 - The Addendum to MacDonald's 1991 Reply Brief

This document is already part of the record by virtue of it having been filed in 1991 in support of Macdonald's second claim for habeas relief. As we described in detail, *supra,* Judge Dupree considered all of MacDonald's claims for relief , and having considered the voluminous pleadings, denied relief on the merits.

Newly Discovered DNA Results

At paragraph 47, MacDonald repeats his claim for relief based upon the recent DNA results made in his Motion To Add An Additional Predicate. The government has previously responded to the DNA motion by demonstrating that the Court does not have jurisdiction at this time to entertain this claim because MacDonald has deliberately failed to obtain the necessary PFA from the court of appeals. For the reasons stated in the government's response to the DNA motion, the Court should deny the instant motion to expand the record by inclusion of this matter, and Appendix # 1 filed in

support thereof, until such time as the Court has jurisdiction.

Character Evidence

Although MacDonald has made no specific proffer of evidence in paragraph "48" , he seems to suggest that the Court consider his post trial record as a model prisoner. He recently made this same argument unsuccessfully to the U.S. Parole Commission.[14] We respectfully submit that his conduct in prison is irrelevant to the resolution of the Britt motion.

Conclusion

Wherefore, for all the foregoing reasons MacDonald's Motion To Expand The Record should be denied, except insofar as it pertains to Exhibit 10 (Judgement and Commitment Order- James L. Blackburn) and the video stills depicting Deputy U.S. Marshal Jimmy Britt escorting Helena Stoeckley into the U.S. Courthouse during the trial extracted from the "False Witness" and filed herewith.

[14]MacDonald was denied parole and cannot reply until 2020. His mandatory release date remains April 5, 2071.

Respectfully submitted, this 17th day of April, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the defendant in this action either electronically or by placing a copy of same in the United States mail, postage prepaid, and addressed to counsel for defendant as follows:

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This, the 17th day of April, 2006.

By: /s/ Brian M. Murtagh
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