IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 08-8525

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY R. MACDONALD,

Defendant-Appellant.

SUPPLEMENTAL OPENING BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
AT RALEIGH

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This Court has expanded the certificate of appealability in this case and ordered supplemental briefing. The expanded COA specifies the following issues:

> (1) Whether the district court erred in assessing the Britt claim by applying the standard of 28 U.S.C. § 2244(b)(2)(B)(ii), rather than § 2255(h)(1); by prohibiting expansion of the record to include evidence received after trial and after the filing of the 28 U.S.C. § 2255 motion; and by excluding, and thus ignoring, relevant evidence and drawing flawed conclusions from the evidence it did consider; and
>
> (2) Whether the district court's procedural decision with respect to the freestanding DNA claim, requiring additional prefiling authorization from this Court, was erroneous in light of 28 U.S.C. § 2255(h).

Appellant Jeffrey R. MacDonald submits this Supplemental Brief to supplement his previous filings. This Brief will not repeat the arguments in his previous filings, but will make reference to them as necessary.

INTRODUCTION

The Section 2255 motion that is the subject of this appeal involves two areas of newly discovered evidence that show that MacDonald was convicted in violation of his constitutional rights. First, Deputy United States Marshal Jimmy Britt has stated facts under oath establishing that then-AUSA Blackburn, one of the prosecutors at the trial of this case, interviewed Helena Stoeckley during trial and Stoeckley told him that she was present in the MacDonald home at the time of the murders. In response, then-AUSA Blackburn told Stoeckley that he would charge her with murder if she testified to those facts in court. (JA 983). When called as a

defense witness the next day, Stoeckley claimed that she could not remember the four hour period during which the murders took place.

To make matters worse, during a later court session then-AUSA Blackburn, at a bench conference regarding MacDonald's efforts to admit the testimony of six separate persons who would testify about Stoeckley's admissions to them of her presence in the MacDonald home at the time of the murders, told the trial judge that during his interview of Stoeckley, Stoeckley never admitted being present in the MacDonald home at the time of the murders. DUSM Britt's sworn affidavit shows then-AUSA Blackburn's statement to the judge to be a falsehood. At least in part because of Blackburn's statement, the trial judge refused to permit MacDonald to call these six witnesses in his defense at trial, and MacDonald was convicted.

DUSM Britt was a respected and life-long law enforcement official who had no motive to fabricate. The district court accepted Britt's affidavit as true -- "The court accepts Britt's affidavit as a true presentation of what he heard or genuinely thought he heard on August 15-16, 1979." (JA 1554). The importance and power of the evidence that then-AUSA Blackburn's conduct concealed from MacDonald and the jury has previously been noted by this Court on direct appeal:

> Had Stoeckley testified as it was reasonable to expect she might have testified [admitting to presence in the MacDonald home at time of the murders], the injury to the government's case would have been incalculably great.

United States v. MacDonald, 632 F.2d 258, 264 (4th Cir. 1980), *rev'd on other grounds*, 456 U.S. 1 (1982). Given the import of the Stoeckley evidence, the result of then-AUSA Blackburn's conduct was a trial infected with constitutional error.

Second, in addition to the Britt affidavit, MacDonald has submitted new DNA evidence to the district court in support of his Section 2255 motion. The DNA evidence includes a hair, lodged under the fingernail on the left hand of Kristen MacDonald in a place where it would have been lodged while she was struggling with her attacker, that DNA testing shows conclusively is not the hair of MacDonald, but instead the hair of a stranger to the home. The district court expressly refused to even consider this evidence, on faulty procedural grounds.

MacDonald now seeks Section 2255 relief based on the Britt affidavit, the new DNA evidence, and all of the other exculpatory evidence that has been uncovered since the 1979 trial in this case. In assessing this Section 2255 motion, this Court now is in a position to review all of the evidence in this case -- including the mass of exculpatory evidence that MacDonald has uncovered in the twenty-one years since the trial of this case in 1979 -- something no court has ever done previously. This is particularly important given the theory under which the Government prosecuted this case.

The Government's theory at trial was that MacDonald, a medical doctor with no history of violence whatsoever, somehow went into a rage because his

daughter wet the bed, resulting in an altercation with his wife that ended with her murder, and then resulting in a decision by MacDonald to kill his children as well, stage the crime scene to make it appear that "hippie" followers of Charles Manson had committed the crime, and also inflict serious injuries upon himself to make it look like he too had been attacked. No evidence of motive was ever introduced at trial in an effort to explain why MacDonald would massacre his family, contrary to his character and background.

No direct evidence of MacDonald's guilt was offered to support this bizarre and far-fetched theory. Instead, the Government relied entirely upon attempting to show that MacDonald's version of the events of the night, that he voluntarily told to the police, the military court, the grand jury, and ultimately the trial jury, was not accurate, and that therefore MacDonald must be guilty because his version of what occurred was not accurate. One of the Government's key themes in its trial presentation was its contention that there was a lack of evidence supporting the presence of intruders in the MacDonald home, contrary to MacDonald's voluntary statements about what had occurred.

In this appeal, this Court is in the position to review the body of exculpatory evidence that has been uncovered by MacDonald since the 1979 trial that directly contradicts the Government's theory, and which establishes the presence of intruders in the MacDonald home who committed the murders. No court has ever

previously conducted such a review. No court has ever considered the highly exculpatory DNA evidence that now exists. The district court explicitly refused to do so, because of its procedural rulings that are in part the basis of this appeal. A consideration of all of the evidence shows that (a) then-AUSA Blackburn's misconduct during the 1979 trial deprived MacDonald of valuable exculpatory evidence that would have revealed the truth and resulted in his acquittal at trial, and (b) that MacDonald is actually innocent of the murders for which he is currently imprisoned, as shown by the DNA evidence and other newly discovered evidence uncovered since the trial. A review of all of the evidence shows that MacDonald should receive Section 2255 relief, and a new trial should be ordered.

ARGUMENT

I. The District Court Erred in Refusing to Grant MacDonald Relief on the "Britt" Claims, Whether Examined Under Either 28 U.S.C. § 2244(b)(2)(B) or 28 U.S.C. § 2255(h), Because No Reasonable Factfinder Would Find MacDonald Guilty When the Facts Underlying the Britt Claims Are Considered In View of the "Evidence as a Whole".

A. 28 U.S.C. § 2244(b)(2)(B) or 28 U.S.C. § 2255(h)?

The first issue raised in this Court's expanded COA is whether the district court erred in applying 28 U.S.C. § 2244(b)(2)(B) rather than the standard of 28 U.S.C. § 2255(h) in conducting its "gatekeeping" function. Section 2244(b)(2)(B) requires that a habeas claim submitted by a state prisoner in a second or successive petition, based on newly discovered evidence, must be dismissed unless:

> the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

By its terms, Section 2244(b)(2)(B) applies to a "claim presented in a second or successive habeas corpus application under section 2254" -- that is, a habeas petition submitted by a state prisoner.

Section 2255(h) applies only to persons in federal custody. The standard in Section 2255(h) is identical to that in Section 2244(b)(2)(B), except that it omits the language "but for constitutional error." Section 2255(h) employs the same "viewed in light of the evidence as a whole" and "no reasonable factfinder"

standards to assessment of newly discovered evidence claims by federal habeas applicants.

As noted in Appellant's Opening Brief (Opening Br. at 37), the district court found that this Court's precedent, *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir), *cert. denied*, 540 U.S. 995 (2003), required it to apply the Section 2244(b)(2)(B) standard to MacDonald's claims to determine if they met the "stringent requirements for litigating a successive § 2255 petition." (JA 1540). But a close reading of *Winestock* reveals that it does not so hold.

This Court in *Winestock* set out the procedural requirements for filing a successive habeas petition under the AEDPA:

> [A] prisoner seeking to file a successive application in the district court must first obtain authorization from the appropriate court of appeals. The court of appeals must examine the application to determine whether it contains any claim that satisfies § 2244(b)(2) (for state prisoners) or § 2255 P 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. When the application is thereafter submitted to the district court, that court must examine each claim and dismiss those that are barred under § 2244(b) or § 2255 P 8.

Winestock, 340 F.3d at 205 (citations omitted and emphasis added). The last line of this quotation suggests that this Court holds that the district court's "gatekeeping" function upon receiving a successive petition that has been granted prefiling authorization by a court of appeals applies either Section 2244(b)(2)(B) or Section 2255(h), depending upon whether it is submitted by a state or federal

applicant. *See also United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164 n.4 (9th Cir. 2000) (finding that district court's gatekeeping function, in case of successive Section 2255 motion filed by federal applicant, is subject to review under Section 2255(h) rather than Section 2244(b)(2)(B)). Accordingly, MacDonald submits that it is Section 2255(h), rather than Section 2244(b)(2)(B), that is the appropriate standard under which the district court should examine his Section 2255 Motion, because he is a federal, not state, applicant.

But this is a distinction with little difference in this case. In the context of this appeal, the operative portions of both Section 2244(b)(2)(B) and Section 2255 (h) relating to the phrases "viewed in light of the evidence as a whole" and "sufficient to establish by clear and convincing evidence that ... no reasonable factfinder would have found the applicant guilty of the underlying offense" are the key terms at issue, and they are identical. *See Hazel v. United States*, 303 F.Supp.2d 753, 761 (E.D. Va. 2004) (discussing difference between Section 2244(b)(2)(B) and 2255(h) standards and concluding that "while the language Congress used may have been different, there is no practical difference between the standards set out in § 2244 and § 2255").[1]

[1] As noted in Appellant's Opening Brief, (Opening Br. at 38), this gatekeeping standard in both Section 2244 and 2255 is derived from the pre-AEDPA "cause and prejudice" standard. *See* Hertz & Leibman, Federal Habeas Corpus Practice and Procedure, § 28.3(e) at 1321 (4th Ed. 2001) (noting that Section 2244(b)(2)(B) "appears to adopt an 'innocence' standard roughly equivalent to the Supreme

The district court erred in its application of this standard, and MacDonald, as demonstrated below, is entitled to relief under either of these standards.

B. Under Either Standard, the District Court Erred by Failing to Consider the "Evidence as a Whole," and by Failing to Recognize that MacDonald Should Receive a New Trial on the Basis of the Claims Supported by the Britt Affidavit.

Whether the Section 2244(b)(2)(B) standard or the Section 2255(h) standard is employed, MacDonald has met the standard, and the district court erred in concluding otherwise. First, the district court erred in expressly refusing to consider the "evidence as a whole", resulting in a flawed analysis. Second, in light of the "evidence as a whole," it is plain that MacDonald is entitled to relief under both the "threat" claim and the "fraud" claim, because when the evidence underlying these claims is viewed in light of the evidence as a whole, these claims establish by clear and convincing evidence that no reasonable factfinder would find MacDonald guilty of the murders for which he is presently incarcerated.

1. The District Court Erred, as a Matter of Law, in Refusing to Consider the "Evidence as a Whole."

MacDonald has set out in his previous filings how the district court erred, as a matter of law, in its parsing of the evidence uncovered by MacDonald and its express refusal to consider the "evidence as a whole" as required by the statute. (Opening Br. at 38-42 and Reply Br. at 6-10). The law plainly required the district

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Court's definition of 'innocence' or 'manifest miscarriage of justice'" in *Sawyer v. Whitley*, 505 U.S. 333 (1992) and *Schlup v. Delo*, 513 U.S. 298 (1995)).

court to consider all of the evidence that MacDonald has uncovered in this case, in evaluating MacDonald's Section 2255 claims. The district court expressly refused to do so, and this was error. MacDonald has also previously explained the fallacy of the Government's position. (Reply Br. at 6-10). No court has ever read the statute in the manner proposed by the Government, and the Government's tortured reading of the statutory language is contrary to its plain meaning.

2. The District Court's Error Is Not Harmless, MacDonald Should Receive Relief on Both the "Fraud" and "Threat" Claims, and this Court Should Direct That the Section 2255 Motion be Granted.

The Britt affidavit, when considered with the other new evidence and record evidence submitted with it, shows that MacDonald's trial was infected with constitutional error. With respect to the Britt-based claims, MacDonald's previous filings set out how the district court erred in rejecting the merits of the claim, and how its conclusions were flawed by its refusal to consider the "evidence as a whole." (Opening Br. at 45-54).

The district court's error cannot be considered harmless. MacDonald's claims arising from the Britt affidavit, and the evidence submitted therewith, are based on both the Fifth Amendment, *see Kyles v. Whitley*, 514 U.S. 419 (1995) (suppression by the Government of evidence materially exculpatory toward the defendant under *Brady v. Maryland* and its progeny), as well as the Sixth Amendment. *See United States v. Golding*, 168 F.3d 700, 703 (4th Cir. 1999)

(where defendant's wife had been prepared to testify that gun belonged to her, the Government's threat to prosecute her if she so testified, then repeatedly referring to her failure to testify during closing argument, violated defendant's Sixth Amendment right to obtain witnesses in his favor); *Webb v. Texas*, 409 U.S. 95 (1972) (discussing defendant's Sixth Amendment right to present witnesses in his behalf).

This Court has previously noted that the standard to be applied in harmless error review of the erroneous denial of a Section 2255 motion alleging constitutional error is an open question in this Circuit:

> In the context of a section 2255 motion alleging constitutional error ... the Fourth Circuit has not decided whether the harmless-beyond-a-reasonable-doubt standard of *Chapman* applies, as it would on direct appeal, *see Coleman*, 399 U.S. at 11 ("The test to be applied is whether the denial of counsel as the preliminary hearing was harmless error under *Chapman v. California*"), or whether the less stringent test of *Brecht v. Abrahamson* applies, as it would on review of a section 2254 petition. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993) (requiring a section 2254 petitioner alleging constitutional error to show "substantial and injurious effect or influence in determining the jury's verdict"); *see also Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003) (adopting the *Brecht* standard for section 2255 motions); *United States v. Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (same); *Peck v. United States*, 106 F.3d 450, 456 (2d Cir. 1997) (same).

United States v. Owen, 407 F.3d 222, 229 (4th Cir. 2005).

MacDonald submits that because *Brecht* relies heavily on federalism and comity concerns, *see Brecht v. Abramson*, 507 U.S. 619, 633-38 (1993), and unlike

MacDonald's claims, Brecht's claims did not rely on newly discovered evidence, the Government should bear the more stringent *Chapman* burden to demonstrate harmlessness beyond a reasonable doubt.

With respect to the Fifth Amendment aspect of MacDonald's claims, the question of which standard to apply is of no consequence, because the violation of MacDonald's Fifth Amendment rights is necessarily not harmless. In *United States v. Bagley*, 473 U.S. 667 (1985), the United States Supreme Court held that favorable but undisclosed evidence is material and constitutional error results from its suppression "if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different." *Id.* at 682; *id.* at 685 (White, J., concurring in part and concurring in the judgment). There can be no doubt in this case that the non-disclosure of Stoeckley's mid-trial admission to then-AUSA Blackburn, Blackburn's response to her admission during the interview, and Blackburn's false account of the interview to the trial judge, whether considered singly or collectively, more than satisfies this materiality standard. *See Kyles*, 514 U.S. at 436 (materiality of non-disclosures must be weighed collectively). This Court practically noted as much during the direct appeal of this case when it noted the import of the Stoeckley evidence. *See MacDonald*, 632 F.2d at 264 (stating that had Stoeckely testified as expected,

admitting to presence in the MacDonald home at time of murders, "the injury to the government's case would have been incalculably great").

If this Court concludes, as it should, that the non-disclosure meets this materiality standard, then "there is no need for further harmless-error review" to determine whether MacDonald's Section 2255 motion should be granted. *Kyles*, 514 U.S. at 435-36. As explained by the *Kyles* court, "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different ... necessarily entails the conclusion that the suppression must have had a 'substantial and injurious effect or influence in determining the jury's verdict'" under *Brecht*. *Kyles*, 514 U.S. at 435. "In sum, once there has been *Bagley* error as claimed in this case, it cannot be found harmless under *Brecht*." *Id.* at 436. Accordingly, with respect to the Fifth Amendment aspect of MacDonald's claims, the error cannot be harmless.

With respect to the Sixth Amendment aspect of MacDonald's claims, the Government cannot satisfy either the more demanding *Chapman* or the less onerous *Brecht* standard. The Government has the burden to prove harmless error in habeas review, and this Court must conduct a *de novo* review to determine if the Government has met its burden . *Barbe v. McBride*, 521 F.3d 443, 460-62 (4th Cir. 2008) (finding error to not be harmless, and remanding case with instruction that the writ issue). In this case, the Government cannot show that the result of

Blackburn's misconduct -- which deprived MacDonald of both the testimony of Stoeckley as well as the testimony of the six witnesses who would have testified to Stoeckley's admissions to them -- did not have a "substantial and injurious effect or influence in determining the jury's verdict." As set out *supra*, this Court has previously noted the import of Stoeckley's testimony. Given the nature of the Government's theory at trial, the substantial impact that the Stoeckley evidence would have had in undercutting the Government's theory, and the other evidence now uncovered that supports MacDonald's version of events, it is plain that the Government cannot satisfy either the *Chapman* or the *Brecht* standard.[2]

In short, the Government cannot establish that the district court's error is harmless. The district court accepted Britt's affidavit as true, and the evidence in that affidavit, when considered with the new DNA evidence and in light of the evidence as a whole, establishes that MacDonald was convicted at trial in violation

[2] This is doubly true here, because the *Brecht* court stated:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of a proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

Brecht, 507 U.S. at 638 n.9. MacDonald submits that the record in this case would support a finding that this case falls into this exception, even if *arguendo* the influence on the jury is not deemed as overwhelming as it was.

of his constitutional rights. This Court should reverse the district court's holding otherwise.

II. The District Court Erred in Refusing to Consider MacDonald's Freestanding DNA Claim, as No Additional Prefiling Authorization from This Court is Required as a Prerequisite to the District Court's Consideration of the DNA Claim, and the DNA Results Establish That MacDonald is Actually Innocent and Should be Granted Relief.

The district court refused to consider MacDonald's claim that he should receive relief because of his actual innocence, based upon the DNA evidence he has submitted. The district court found that "the facts underlying [the DNA claim] have been the subject of neither an application for a PFA nor an award thereof" [JA 1535], and refused on that basis to consider MacDonald's DNA claim or to even consider the DNA evidence as part of the "evidence as a whole" in connection with the claims arising from the Britt affidavit. [JA 1536]. In so finding, the district court expressly adopted the Government's position on the matter. [JA 1536]. This Court has now granted a COA on the issue of the correctness of the district court's decision in this regard. The district court's holding on this issue is error.

A. This Court Has Authorized the District Court to Consider the Results of the DNA Testing and Any Claim Based Thereon.

The issue of DNA testing was first raised by MacDonald in the district court in 1997, when he filed a motion to reopen a previous habeas petition and sought, through discovery, access to physical evidence for the purpose of conducting DNA

testing. [Supp. App. 119-124].[3] MacDonald sought DNA testing for a number of purposes, including "to permit him to demonstrate his factual innocence." [Supp. App. 123]. On September 2, 1997, the district court denied in part MacDonald's motion to reopen the earlier habeas petition, but transferred the portion of MacDonald's motion relating to newly discovered evidence to this Court, to be treated as a request for certification of a successive habeas petition under 28 U.S.C. § 2244 and 2255. [Supp. App. 151-53]. The district court stated: "While the court denies the motion to reopen, the court transfers this matter to the United States Court of Appeals for the Fourth Circuit for consideration of certification as a successive motion under 28 U.S.C. § 2255." [Supp. App. 155].

MacDonald thereafter filed with this Court, on September 18, 1997, a "Motion Under 28 U.S.C. § 2244 for Order Authorizing District Court to Consider Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255." [Supp. App. 156]. In this Motion, MacDonald stated:

> Second, in addition to my fraud on the court claims, I presented evidence in my motion to re-open that was discovered by the defense post-trial which demonstrates my innocence. This evidence, the existence of which is documented in laboratory notes that were not disclosed to the defense at the time of the trial, consists of unsourced hairs and blood evidence which was found under the victims'

[3] Contemporaneous with the filing of this Supplemental Opening Brief, MacDonald has filed a Supplemental Appendix to MacDonald's Supplemental Brief, containing the record materials relevant to the new issues raised in the Court's amended COA, and will cite to such supplemental appendix as [Supp. App. ___].

> fingernails, in their hands, at other critical locations on their bodies, or in their bedding. The present motion seeks access to these items of physical evidence for the purpose of examining this evidence further by utilizing a new form of DNA technology (mitochondrial DNA testing) which has only recently begun to be utilized by forensic scientists. The District Court denied my request for discovery and access to this evidence for mitochondrial DNA testing.

[Supp. App. 162].

This Court, on October 17, 1997, entered an Order stating that "the motion with respect to DNA testing is granted and this issue is remanded to the district court" and further holding that "[i]n all other respects, the motion to file a successive application is denied." [Supp. App. 184]. There was no separate motion for DNA testing filed by MacDonald with this Court or the district court -- his request for DNA testing was contained in his § 2244 motion to this Court wherein he stated that he sought access to these items because they "demonstrate[] my innocence" and because the existence of the items were "documented in laboratory notes that were not disclosed to the defense at the time of the trial." [Supp. App. 162].

These facts establish that there is no need for any separate pre-filing authorization process under 28 U.S.C. §§ 2244 and 2255 for the district court to consider any claim based upon the results of the DNA testing. This Court, having received MacDonald's motion under § 2244 in 1997 seeking authorization to file a successive motion, granted to the motion "with respect to the DNA testing ... and

this issue is remanded to the district court." Put simply, if this Court did not intend for MacDonald to be permitted to file a claim based upon such testing, then why grant the § 2244 motion in 1997, ordering DNA testing, at all? The only logical purpose for this Court's October 17, 1997 Order is to permit MacDonald to assert a claim under Section 2255 based upon the DNA test results.

This result is also congruent with the purposes underlying the AEDPA. Courts have uniformly held that the purpose of the AEDPA is to streamline habeas litigation and ensure the efficient administration of habeas claims in the federal courts. *See, e.g. Holland v. Florida*, ___ U.S. ___, No. 09-5327, Slip Op. at 16 (U.S. June 14, 2010) ("We recognize that AEDPA seeks to eliminate delays in the federal habeas review process"); *Calderon v. Thompson*, 523 U.S. 538, 558 (1997) (noting that "AEDPA's central concern [is] that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of factual innocence"); *Hohn v. United States*, 524 U.S. 236, 265 (1998) (Scalia, J., dissenting) (stating that Congress' intent in enacting AEDPA is to "streamline and simplify" the habeas corpus scheme). The position urged by the Government, and adopted by the district court, would do the opposite -- it would encourage piecemeal litigation and inefficiencies through the need for the institution of multiple proceedings. Nothing in the AEDPA would support this result.

Notably, there is no precedent that holds otherwise. Other appellate courts that have granted a request for DNA testing as part of examination of a motion under 28 U.S.C. § 2244 to file a successive habeas petition have appeared to accept that by granting the request for testing, the district court was empowered to consider any claim arising from the testing. *See Cooper v. Brown*, 510 F.3d 870, 874 (9th Cir. 2007) (court, in remanding case after granting PFA to file successive habeas application, also orders DNA testing requested by defendant on hairs found in hand of victim so that "the question of Mr. Cooper's innocence can be answered once and for all"; results did not establish Cooper's innocence). In *Cooper*, as part of his motion for a pre-filing authorization under Section 2244, the defendant also requested that the appellate court order DNA testing on hairs found in the hand of the murder victim. The defendant sought this testing to show that the hairs came from a third party while the murder victim was struggling with the third party, thereby establishing that he was not the murderer. The court ordered the testing on this basis:

> Cooper's theory was that the hairs came from a third party, that is, from the real killer, and if this could be shown, then the presence of a third party at the scene would prove his innocence. That is why the en banc court ordered mitochondrial testing.

Cooper, 510 F.3d at 882. Ultimately, the testing on these hairs did not reveal any human DNA, *id.* at 881, and for that reason the issue of a habeas claim based upon that DNA was never reached. However, as the *Cooper* court noted, this DNA

testing was ordered so that "the question of Mr. Cooper's innocence can be answered once and for all." *Id.* at 874. As here, it is difficult to discern a reason why an appellate court would grant DNA testing, in the context of a pre-filing authorization application under Section 2244, if it was not also authorizing the filing in the district court of any habeas claim arising from the DNA test results.

In short, there is no precedent or policy reason to support the position urged by the Government. The district court was authorized by this Court to consider MacDonald's claims based upon the DNA testing results, and erred by concluding otherwise.

B. Assuming Arguendo That this Court's 1997 Order Does Not Constitute a PFA, the District Court Still Erred in Refusing to Consider MacDonald's DNA Claim, Under this Court's Holding in *Winestock*.

Even assuming *arguendo* that this Court's 1997 Order did not authorize the district court to consider any claim arising from the results of the DNA testing, the district court still erred in refusing to consider MacDonald's DNA-based claims.

This Court, in *Winestock*, held that where this Court does grant a pre-filing authorization under 28 U.S.C. § 2244, the federal prisoner can then file his application in the district court even if it includes a mix of certified and uncertified claims. *Winestock*, 340 F.3d at 205. The district court then must conduct its second "gatekeeping" review of all of the claims in the application. *Id.*

This Court granted a prefiling authorization permitting MacDonald to file his successive application with the Britt-based claims in the district court on January 12, 2006. MacDonald thereafter filed his successive Section 2255 motion in the district court on January 17, 2006. When the DNA results became available after the filing of MacDonald's Section 2255 motion in the district court, in March 2006, MacDonald promptly sought to add these results as a predicate to that already-pending motion. Under the rule set out in *Winestock*, the district court should have considered the claim based upon the DNA results, as the claim was being added to a petition pending in the district court that had already been the subject of a prefiling authorization by this Court. *Winestock* provides an alternative basis for the district court to consider the DNA claim, and the district court erred in refusing to consider the claim. *See Hazel v. United States*, 303 F.Supp.2d 753, 758-59 (E.D. Va. 2004).

C. MacDonald Should be Granted A New Trial Based Upon the Results of the DNA Testing.

As set out in MacDonald's previous filings, (Opening Br. at 26-30; 43-45), the DNA evidence in this case is highly powerful and exculpatory. The Government's theory at trial was not that it could directly prove that MacDonald murdered his family. Instead, the Government relied upon the dubious theory that it could disprove what MacDonald had voluntarily told the Government had

occurred, and therefore because, in its view, MacDonald's statement of events was not accurate, this meant that MacDonald had committed the crimes.[4]

Accordingly, at trial and in opposition to MacDonald's previous habeas filings, the Government stressed that there was no physical evidence to support MacDonald's statement that intruders had entered the MacDonald home and committed the murders. This evidence now exists, in a most powerful way, in the DNA evidence submitted by MacDonald.

In his Opening Brief, MacDonald has set out the three separate items of DNA evidence that form the basis of his claim. (Opening Br. at 26-30). Most

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[4] This point is shown by the Government's closing argument at trial: "The Government's case, stripped to its essentials, consists of the crime, the physical evidence, the defendant's story voluntarily told, the conflict between that story and the physical evidence, from which we submit that it was a fabrication of the evidence, and from that we infer and ask you to find his guilt." (TT 7059).

The trial judge's statements, during the trial, only buttress this conclusion. On the nineteenth day of trial, the trial judge made the following statement at a bench conference, out of the hearing of the jury:

> THE COURT: Gentlemen, first off, and this is not why I got you up here but it is something that is on my mind so I am going to tell you; all these experiments and all this examining and cross-examining and so forth -- it is interesting and it is technical and it may be going somewhere. <u>But, for whatever it is worth, I think this case is going to rise or fall on one thing and one thing alone and that is whether or not this jury buys the Defendant's story as to what happened. That is all there is in this case.</u> We have been here five weeks, and that is still all there is in this case. I just make that as an observation.

(JA 198-99) (emphasis added).

powerful is Specimen 91A -- the hair from the fingernail scrapings from the left hand of Kristen MacDonald. The DNA testing of this hair produced a DNA profile that is not consistent with MacDonald, any member of his family, Helena Stoeckley , or Greg Mitchell. Given the location of his hair, and the Government's own evidence that establishes that Kristen struggled with her attacker, the existence of this evidence is powerful proof that while struggling with her attacker, Kristen lodged a hair from her attacker under her fingernail, and the DNA test results prove that the hair is not a hair from Jeffrey MacDonald.

The other two specimens are likewise exculpatory. Specimen 75A establishes that a hair, unmatched to MacDonald or any other known sample, was found under the body of Collete MacDonald. The hair had both root and follicular tissue attached, indicative that it was pulled from someone's skin. Specimen 58A1 establishes that a hair, unmatched to MacDonald or any other known sample, was found on the bedspread on the bed where Kristen MacDonald was killed.

1. There is No Question That the DNA Sample Underlying MacDonald's Claim Came From the Fingernail of Kristen MacDonald, and the Government Has Previously Stated as Much in Its Court Filings.

In an unsuccessful attempt to persuade this Court to dismiss MacDonald's appeal on the ground that the COA was improvidently granted, the Government asserted for the very first time that there is "no evidence of record that the D-237/Q91A hair was observed, found, or removed from under Kristen's fingernail,

either at the crime scene or autopsy." Gov't Reply to MacDonald's Opposition to Motion to Dismiss, filed March 18, 2010, at 9. This attempt to suggest that the D-237 hair did not originate from Kristen's fingernail on her left hand is baseless, and a regrettable example of the lengths the Government appears willing to go to avoid the result dictated by this evidence. The Government's position is belied by its own conduct in this litigation, and by documents from its own files that are in the record.

Until 2010 the Government never once suggested that the D-237/Q91A hair did not originate from under the fingernails of Kristen's left hand. Rather, the Government itself has always stated without qualification that this hair originated from under the fingernails of Kristen's left hand. [Supp. App. 189 at n. 1] (describing exhibits to be tested as including "Ex D-237 (fingernail scrapings from the left hand of Kristen MacDonald)"); [Supp. App. 213] (noting that an affidavit submitted by the defendant "included bench notes of CID chemist Janice Glisson, which catalogued unidentified human hairs with 'intact roots' found in the hands of Kimberly and Kristen MacDonald").

That the Government has never asserted previously that the D-237/Q91A hair did not originate from the fingernail of Kristen's left hand is not surprising, because the records from the Government's own files directly contradict this assertion. The U.S. Army CID Preliminary Lab Report dated April 6, 1970 issued

within six weeks of the murders describes D-237 as "Fingernail scrapings from the left hand of Christine [sic] MacDonald." [JA 1144]. An undated U.S. Army Chart of Exhibit Findings describes D-237 as "Fingernail scrapings from the left hand of Kristen MacDonald," and notes that chemical analysis detected blood on the hair. [JA 1171]. The U.S. Army Consolidated Laboratory Report also describes D-237 as "Fingernail scrapings from the left hand of Kristen MacDonald." [JA 1183].

The handwritten lab notes compiled by Army CID Laboratory chemist Janice Glisson prior to the production of the above-described typewritten reports further confirm the provenance of D-237. Glisson began working on various pieces of evidence in the MacDonald case in February 1970 and performed some hair examinations. [Supp. App. 46 at ¶ 4]. Glisson's handwritten lab notes state:

> Received in masking tape sealed box cont. br. paper bag labeled 137-70 cont two plastic bags stapled tag c evid. Tag "13 vials cont. fingernail scrapings, hair samples, fibers + vag smears taken from victims at Womack Army Hospital" marked on bottom of vials 17 Feb 70 BSH

[Supp. App. 5] (emphasis added). At the bottom of the same page, Glisson wrote:

> # 7 fingernail scrapings left hand smaller female
> MacDonald (not labeled by Browning)
> 1 hair ? -- 2 fragments

[Supp. App. 5].

Glisson also examined microscopically the contents of various vials. For vial # 7, she wrote:

> #7 fibers + one light brown narrow hair, no medulla, striated with "intact root", tapered end.

[Supp. App. 6]. As noted above, the fingernail scrapings from the left hand of Kristen MacDonald were subsequently designated "D-237" in the Army CID's typewritten reports. Subsequently, in 1999, as part of the DNA testing process, the Government submitted to the district court photo exhibit volumes of various items of evidence that were being submitted for DNA testing, which included exhibit D-237. The Government labeled the photos of the vial and the microscope slide on which the hair was mounted as follows:

D-237 (GX-285)
Fingernail scrapings left hand of
Kristen MacDonald

(From Vial No. 7)

[Supp. App. 226-28].

Given this clear evidentiary record and the Government's own descriptions of this piece of evidence over the years, its attempt now to suggest some twelve years after this Court ordered the DNA testing that there is something questionable about the provenance of the D-237/Q91A hair is disingenuous at best. The Government's attempt is quite telling -- it realizes that this hair is an extremely powerful piece of evidence demonstrating the presence of intruders in the MacDonald home at the time of the murders, and thereby demonstrating MacDonald's innocence.

2. MacDonald Should Be Granted a New Trial Under Section 2255 Because of the DNA Results.

At the time of the filing of MacDonald's Opening Brief in this matter, the United States Supreme Court has previously assumed, without deciding, that a freestanding claim of actual innocence was cognizable under federal law in a habeas petition brought a prisoner under sentence of death. *Herrera v. Collins*, 560 U.S. 390, 417 (1993); *House v. Bell*, 547 U.S. 518, 554-55 (2006). Though the Supreme Court had not ever articulated the standard for such a claim, lower courts have held the standard for such a claim to be that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 474 (9th Cir. 1997) (en banc).

More recently, the United States Supreme Court has issued a ruling that has as its unstated premise the conclusion that a freestanding claim of innocence is a valid claim under federal habeas corpus law. In *In re Davis*, 130 S.Ct. 1 (2009) (per curium), the petitioner, a state prisoner convicted of murder and under a sentence of death, filed a habeas petition directly with the Supreme Court pursuant to 28 U.S.C. § 2241(a), asserting his actual innocence of the murder for which he was convicted. The Supreme Court, in a per curium order joined by six justices, transferred the petition to the district court for the following purpose:

> The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence.

Davis, 130 S. Ct. at 1. There could be no purpose to this exercise if the petitioner could not assert a claim for relief based upon his actual innocence. This point is noted in the concurring opinion of Justice Stevens, 130 S. Ct. at 1, and only bolstered by the dissenting opinion of two justices, who conclude that remand to the district court is a "fool's errand" because, in their view, no habeas claim could be asserted based upon the petitioner's actual innocence. The dissenting opinion sets out, and disagrees with, the underlying premise of the majority opinion -- that a freestanding claim of innocence is a valid claim under federal habeas law. *Davis*, 130 S.Ct. at 2-4 (Scalia, J., dissenting).

The rule in *Davis* should apply with equal force here, although this is a Section 2255 proceeding rather than a habeas corpus petition involving a state prisoner. There is no principled basis for any distinction between federal and state prisoners in this context.[5] MacDonald asserts that the DNA evidence and other

[5] The fact that MacDonald is serving a sentence of life imprisonment, rather than facing a death sentence, also is of no import to this analysis. Though *Herrera* speaks in terms of the unconstitutionality of executing an innocent person, there can be no less constitutional protection for someone facing a lengthy term of imprisonment for a crime that he did not commit. *See Herrera*, 506 U.S. at 398 ("that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted ... has an elemental appeal, as would the similar proposition that the

evidence of record "clearly establishes" his actual innocence, as required by *Davis*. The linchpin to the Government's argument at trial, and its arguments against admission of the Stoeckley testimony and MacDonald's other habeas petitions through the years, has been the lack of any physical evidence to corroborate the presence of intruders in the MacDonald home on the night of the murders. The new DNA findings now provide this evidence, in the strongest form -- the presence of an unmatched human hair under the fingernail of Kristen MacDonald, in a location that shows that during Kristen's attempts to defend herself, a hair from her attacker was lodged under her fingernail, and that hair is not the hair of MacDonald.

MacDonald recognizes the extremely high standard for proof of a freestanding claim of innocence. But the DNA evidence in this case completely undercuts the Government's central theme at trial -- that the physical evidence in the MacDonald home was not consistent with, and in fact contradicted, the account of intruders given by MacDonald, and therefore the murders must have been committed by MacDonald. Had this evidence been available at trial, the DNA results generated by the Defense Department's Armed Forces Institute of Pathology would have categorically refuted the Government's key claim that there was no evidence of intruders in the MacDonald home. Had this evidence been

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Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted").

available at trial, MacDonald would have been in a position to point out that there exists DNA evidence under the fingernail of his daughter, in a place where the DNA of his daughter's attacker would be, and that DNA categorically did not match him, but rather some unknown person. In short, this DNA evidence would have provided the exact corroboration demanded by the Government at trial as necessary to prove MacDonald's innocence to the jury.

Moreover, this new DNA evidence must be evaluated in light of all of the other evidence of record in this case that directly contradicts the Government's far-fetched trial theory. This evidence includes:

- the Britt evidence [JA 981-84];
- the admissions made by Stoeckley of her presence in the MacDonald home at the time of the murders to six other individuals, including three law enforcement officers, who were at trial and prepared to testify, as well as her admissions to Wendy Rouder during the trial (TT 5508-5799); [JA 985-99];
- the fact that a woman matching Stoeckley's description was seen by MP Kenneth Mica at 4 a.m. in the rain on the night of the murders approximately a half-mile from the murder scene (TT 1453-54);
- the detailed admission made by Stoeckley after trial that was the basis of MacDonald's 1984 new trial motion [JA 956-57];
- the affidavit of Helena Stoeckley's mother, who avers that Stoeckley told her that Stoeckley "lied about it [her presence in the MacDonald home at the time of the murders] at the trial ... because she was afraid of the prosecutor" [JA 1474 at ¶ 11];

- the synthetic blond wig hairs found in the MacDonald home, unmatched to any other fiber in the home, but consistent with Stoeckley's presence that night wearing a long blond wig;

- Stoeckley's admission at trial that she was wearing a blond wig and floppy hat the night of the murders and burned both the wig and the hat shortly after the murders (TT 5603-04);

- the fact that Greg Mitchell, years after the crime and long after he had separated from Stoeckley, confessed his involvement in the murders to three separate persons [JA 991, 1082];

- the black wool fibers found on the mouth and bicep area of Colette MacDonald and on one of the murder weapons that were not matched to any fabric in the MacDonald home [JA 1003] (setting out evidence);

- the numerous statements of witnesses submitted with MacDonald's earlier habeas petition and new trial motions linking Stoeckley and Mitchell to the murders [JA 1261-88].

All of this evidence shows just how tenuous the Government's trial theory was, and none of this evidence was considered by the district court.

The powerful new DNA evidence, in and of itself, supports a claim of actual innocence under Section 2255. Whatever the standard of proof may be for a freestanding claim of innocence, MacDonald submits that it is met by this DNA evidence, which is powerfully exculpatory and directly undercuts the Government's trial theory.

3. Alternatively, MacDonald Should Be Granted a New Trial Under The Innocence Protection Act Because of the DNA Results.

In the alternative, MacDonald submits that the DNA results should result in a new trial under the Innocence Protection Act, 18 U.S.C. § 3600. At the time that this Court granted MacDonald's request for DNA testing in 1997, the Innocence Protection Act (hereinafter "IPA") did not exist -- it was enacted by Congress in 2004. Nonetheless, an examination of the Act shows that MacDonald can meet all of the requirements for relief under the Act, and because he can do so, he should be entitled to relief under the IPA even though the testing he pursued in this Court was not (and could not have been) pursued under the Act, because the IPA was enacted during the 10-year period that the testing was taking place. To the extent that this Court finds that MacDonald's DNA claim is not a cognizable claim in federal habeas law, MacDonald submits that this Court can and should grant relief under the IPA.

All requirements for relief under the IPA are met by MacDonald. MacDonald testified to his innocence at trial, thereby satisfying the requirements of 18 U.S.C. § 3600 (a)(1). The evidence at issue was secured as part of the investigation of this case, and was not previously the subject of DNA testing. 18 U.S.C. § 3600(a)(2) & (3). The Government retained continuous possession of the evidence at issue since it was seized during the investigation of the crime. 18 U.S.C. § 3600(a)(4). The DNA testing was conducted by a government lab, and there is no evidence that its protocols and methods were not sound and consistent

with accepted forensic practice. 18 U.S.C. § 3600(a)(5). MacDonald's theory of defense based on DNA testing is the same as his theory of defense at trial, and would establish his actual innocence of the charges. 18 U.S.C. § 3600(a)(6). The identity of the perpetrators of the murders was at issue in the trial. 18 U.S.C. § 3600 (a) (7). This Court authorized the DNA testing in 1997 because the testing would produce both evidence that would support MacDonald's defense that intruders killed his wife and daughters, and would raise a reasonable probability that MacDonald did not murder his wife and daughters. 18 U.S.C. § 3600 (a)(8). MacDonald requested DNA testing before the IPA was even enacted, so his request for testing must be considered timely under the Act. 18 U.S.C. § 3600(a)(10). In short, the requirements of the IPA are all met by MacDonald.

As to relief, the IPA states the following:

> The court shall grant the motion of the applicant for a new trial or resentencing, as appropriate, if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal of ... in the case of a motion for new trial, the Federal offense for which the applicant is under a sentence of imprisonment or death.

18 U.S.C. § 3600(g)(2). Although MacDonald has not formally filed a motion under the IPA, he could not do so at the time he sought DNA testing from the court, because his request for DNA testing pre-dated the enactment of the Act. Nonetheless, in his request to this Court for DNA testing, MacDonald stated that

he sought DNA testing because the results of the testing would "demonstrate[] my innocence." [Supp. App. 162]. Accordingly, MacDonald submits that his claim for relief based upon the DNA results should also be considered under the IPA.

MacDonald should receive a new trial under the IPA. As set out herein, and in MacDonald's previous filings, the DNA test results provide powerful evidence of the presence of intruders in the MacDonald home at the time of the murder, and directly undercut the Government's dubious trial theory. When considered with all of the other highly exculpatory evidence that has been uncovered through the years that directly contradicts the Government's trial theory, along with the other new evidence supporting the presence of intruders in the MacDonald home, it is plain that the DNA results "establish by compelling evidence that a new trial would result in an acquittal of ... the Federal offense for which the applicant is under a sentence of imprisonment" and therefore support relief under the IPA. 18 U.S.C. § 3600(g)(2).

MacDonald should be granted a new trial under the IPA.

CONCLUSION

For the reasons set out herein, Jeffrey R. MacDonald respectfully requests that this Court enter an order directing the district court to grant MacDonald's Section 2255 motion and order a new trial. In the alternative, MacDonald requests that this Court enter an order directing the district court to release MacDonald on conditions, pending further proceedings in the district court.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), MacDonald respectfully requests oral argument in this appeal, as he submits that the Court's decisional process will be aided by oral argument given the array of factual and legal issues involved in this case.

This the 15th day of June, 2010.

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This the 15th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing BRIEF through the electronic service function of the Court's electronic filing system, as follows:

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