SUPPLEMENTAL BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 08-8525

UNITED STATES OF AMERICA,

Appellee,

vs.

JEFFREY R. MACDONALD,

Appellant.

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

SUPPLEMENTAL BRIEF OF THE UNITED STATES

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STATEMENT REGARDING AMENDMENT OF CERTIFICATE OF APPEALABILITY

The Court has amended the certificate of appealability and directed the submission of supplemental briefs on the following questions:

> (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).

STATEMENT OF ISSUES

1. Whether, in assessing the Britt claim, the district court applied the proper standard when it rejected MacDonald's efforts to expand the record, and it properly excluded evidence proffered after trial and after submission of the instant habeas petition.

2. Whether, absent this Court's issuance of a prefiling authorization, the district court could not consider MacDonald's DNA claim.

3. Whether MacDonald's freestanding claim that the DNA testing establishes his actual innocence is devoid of legal or factual support and therefore provides no basis for relief.

4. Whether the district court's fact-bound rulings concerning the Britt claim were correct.

STATEMENT OF CASE AND FACTS

The procedural history and underlying facts are fully set forth in the government's opening brief (Gov't. Br. 3-16). We elaborate upon the facts that are necessary to provide factual context for the certified issues.

A. MacDonald's Successive Motion For Post-conviction Relief Based Upon the Britt Affidavit

On December 13, 2005, MacDonald filed in this Court a "Motion Under 28 U.S.C. Section 2244 For Order Authorizing [the] District Court to Consider Successive Application for Relief Under 28 U.S.C. § 2255." The Motion was predicated primarily upon the affidavit of now-deceased Deputy U.S. Marshal Jimmy Britt. (See J.A. 981-84).[1] Britt alleged that, while he was transporting Helena Stoeckley from the jail in Greenville County, South Carolina, to Raleigh, North Carolina, Stoeckley stated that she, along with others, were in the MacDonald residence on the night of the murders of the MacDonald family. (J.A. 982, ¶¶ 11, 15). The following day, Britt escorted Stoeckley to the federal courthouse in Raleigh. (Id., ¶ 17). Britt claimed that after he took Stoeckley to the defense team's office on the seventh floor of the courthouse for an interview, he

[1] "J.A." is the abbreviation for the parties' original joint appendix. "S.J.A." is the abbreviation for the supplemental joint appendix filed in 2009. "Supp. App." is the abbreviation for MacDonald's Supplemental Appendix, which he filed with his Supplemental Brief. "G.S.A." is the abbreviation for the Government's Supplemental Appendix, which is being submitted in conjunction with the Supplemental Brief of the United States.

took her to the U.S. Attorney's office, on the eighth floor, where Stoeckley allegedly "told [prosecutor James] Blackburn the same things she had stated to [Britt] on the trip from Greenville to Raleigh." (J.A. 983, ¶¶ 18, 22). According to Britt, Blackburn then told Stoeckley that, if she testified to that effect, he would indict her for murder. (Id., ¶ 24).

MacDonald included as exhibits to his 28 U.S.C. § 2244 motion the affidavits of Everett Morse, Bryant Lane, and Donald Buffkin. (See J.A. 991-98). The Lane affidavit, ostensibly executed in 2005 (J.A. 993-95), reiterated assertions made in 1988 and 1984 declarations that he and his wife knew Greg Mitchell, and that they heard him acknowledge participation in the murder of the MacDonald family (id.; see J.A. 1369-74; United States v. MacDonald, 640 F. Supp. 286, 327 (E.D.N.C. 1985)). The Buffkin and Morse affidavits likewise asserted that they overheard Mitchell acknowledge participation in the murders. (J.A. 996-97, 991-92).

On January, 12, 2006, this Court issued a prefiling authorization ("PFA") granting MacDonald leave to file his proposed successive motion in the district court. (S.J.A. 1675).

B. The Motion to Strike the "Mitchell" Affidavits

After MacDonald submitted his Section 2255 motion to the district court, the government moved to strike the affidavits relating to Greg Mitchell's "admissions" on two grounds: first, that identical claims had been considered and rejected in the

context of two previous habeas petitions involving the statements of Bryant Lane, and were therefore barred by principles of res judicata (J.A. 1346-49); and second, the claims were time-barred under former 28 U.S.C. § 2255 ¶ 6(4)(now Section 2255(f)), because all three affidavits were untimely. (J.A. 1349-50).

C. MacDonald's Additional Submissions

1. The DNA claim

MacDonald subsequently filed in the district court a motion styled, "Petitioner's Motion to Add an Additional Predicate to His Previously Filed Motion . . . ." (See J.A. 1088). It sought to add to his petition an additional claim based, in part, upon "newly-discovered" results of DNA testing authorized by this Court in 1997. (J.A. 1088; see J.A. 889). The claim maintained that the testing established the presence of unsourced hair at the crime scene, including one hair he asserted was found with blood residue under the fingernail of Kristen MacDonald. (J.A. 1088). The government opposed the motion, arguing that the underlying claim was not properly the subject of a PFA issued by this Court. (J.A. 1444, 1449).

2. The "Motion to Expand the Record"

The following day, MacDonald filed a motion to "Expand the Record to Include . . . Itemized . . . Evidence." (See J.A. 1256). It was accompanied by a voluminous compilation of exhibits and an "Itemized Statement of Material Evidence" consisting of 48 numbered

paragraphs of text setting forth MacDonald's version of evidence tending to demonstrate his innocence. (See J.A. 1536-37). The government responded by asserting, *inter alia*, that certain of the enumerated items (the Mitchell affidavits) were time-barred or -- in the case of claims involving the Mitchell confessions and the alleged "exculpatory" hair and fiber evidence -- were foreclosed from consideration as a consequence of adverse rulings in prior habeas litigation. (J.A. 1346-50).

3. The affidavit of Stoeckley's mother

Finally, MacDonald moved to "Supplement [His] Statement of Itemized Material Evidence" by adding the March 31, 2007, affidavit of Helena Stoeckley's now-deceased mother. (J.A. 1468-75). The document asserts that Stoeckley twice confessed to having been present during and having participated in the murders of the MacDonald family. (J.A. 1473-74). The government opposed the motion, inter alia, because it was both untimely and constituted a successive motion for habeas relief under Section 2255. (J.A. 1476).

4. The order of the district court

Judge Fox denied MacDonald's motion to file a successive Section 2255 motion. (J.A. 1517-63). He first granted the government's motion to strike the affidavits concerning Greg Mitchell's admissions. (J.A. 1534). He further observed that, absent a PFA, he "lack[ed] subject matter jurisdiction" over the

DNA claim and the claim based upon the affidavit of Stoeckley's mother. (J.A. 1534-36). Addressing MacDonald's "Motion to Expand the Record," he found that "the record as it presently is constituted [was] more than adequate to permit a thorough and complete understanding of the material facts pertinent to the motions now before it." (J.A. 1537-38). And he also "emphasiz[ed] that MacDonald already has litigated exactly the same basic legal issues he raises herein." (J.A. 1532).

Judge Fox then addressed the issues raised by Britt's affidavit. (See J.A. 1538-62). He found that Stoeckley's alleged admissions to Britt during the trip from Greenville, South Carolina, to Raleigh, North Carolina, were "cumulative evidence of exactly the same nature as the excluded testimony of the Stoeckley Witnesses." (J.A. 1544). He rejected the allegation that Stoeckley had admitted her participation in the murders to Blackburn and that Blackburn had then falsely told the trial judge that she had no recollection of her whereabouts on the night of the murders. (J.A. 1550). In this context, Judge Fox found Britt's 30-year delayed recollection of events could not be squared with the contemporaneous record, including representations by MacDonald's own attorney. (J.A. 1550). As to the "inextricably intertwined" claim that Blackburn had threatened Stoeckley with prosecution if she provided testimony favorable to MacDonald (J.A. 1546), Judge Fox found, inter alia, that, even accepting the

accuracy of Britt's recollections of her admissions to him, it did not necessarily follow (1) that Stoeckley had intended to testify consistently therewith if called as a witness; (2) that, but for Blackburn's alleged threats, she would have done so; or (3) that Britt had accurately construed what Blackburn had said to her. (J.A. 1554-56). Consequently, Judge Fox concluded that, even if Britt's affidavit were considered "'newly-discovered,' it simply cannot establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found MacDonald guilty" of the murders of his wife and daughters. (J.A. 1562).

D. The Government's Motion for Modification

Thereafter, the government filed a motion seeking to modify the factual assumption in Judge Fox's order that Britt had, in fact, arrested Stoeckley in South Carolina and transported Stoeckley from Greenville, South Carolina, to Raleigh, North Carolina. (J.A. 1565). In support, it filed documentary evidence showing that other Deputy U.S. Marshals had transported Stoeckley from Pickens, South Carolina (not from Greenville), to Raleigh. (J.A. 1580-1617; see J.A. 1568-76). Although noting the government's evidence, "including affidavits and official documents, that prove the falsity of Jim Britt's affidavit upon which the Fourth Circuit Court of Appeals' Pre-Filing Authorization primarily was based," Judge Fox denied the motion. (J.A. 1672-73).

E. MacDonald's Appeal and This Court's Orders

MacDonald then sought a certificate of appealability ("COA") authorizing review of the denial of his Section 2255 motion. He also sought review of Judge Fox's rulings precluding consideration of the DNA claim, the evidence relating to Greg Mitchell's "admissions," and the denial of his motion to supplement the record. In opposition to the COA request, the government observed that only MacDonald's Motion to Vacate involved a constitutional claim, as required by 28 U.S.C. § 2253(c). (J.A. 1627-28).

On June 9, 2009, this Court granted the COA on the single issue of "whether the district court's procedural decisions prohibiting expansion of the record to include evidence received after trial and after the filing of the [Section] 2255 . . . motion was erroneous in light of 28 U.S.C.A. § 2244(b)(2)(B)(ii) (2006)." (S.J.A. 1743).

On March, 13, 2010, the government filed a motion to dismiss the appeal because the COA failed to present a constitutional claim, as required by 28 U.S.C. § 2253(c)(3). On May 6, 2010 -- following oral argument on March 23 -- this Court denied the motion, amended the COA, and directed the parties to submit supplemental briefs. This submission responds to that Order.

SUMMARY OF ARGUMENT

1. The Court's first certified issue -- whether Judge Fox should have addressed MacDonald's Britt claim under 28 U.S.C. § 2255(h)(1), rather than under Section 2244(b)(2)(B)(ii) -- is, in the context of this case, academic. The two provisions are virtually identical in every material respect, and Judge Fox at no time expressly predicated his reasoning upon the latter rather than the former.

The district court did not err by prohibiting expansion of the habeas corpus record to include evidence that: (1) is time-barred, (2) is integral to previously litigated claims, and (3) is contained in separate stand alone claims for which a prefiling authorization ("PFA") is required under Section 2255(h). MacDonald's reading of the "evidence as a whole" requirement of Sections 2244(b)(2)(B)(ii) and 2255(h)(1) has the net effect of excising these prohibitions from the habeas statutes. And, although, by its terms, Section 2244(b)(1) forecloses the relitigation in second or subsequent habeas petitions in proceedings brought under Section 2254, the courts of appeals that have considered the issue are in agreement that Section 2255 incorporates that prohibition by reference. These principles support the district court's rulings.

2. The second specified question is whether Judge Fox should have considered MacDonald's acknowledged freestanding claim

involving the results of DNA testing without the issuance of a PFA addressing that claim, as required by Section 2255(h). MacDonald does not seriously argue that no PFA was required as a predicate to consideration of his DNA claim. Instead, he maintains that this Court's order authorizing the testing was itself tantamount to issuance of a PFA. But that order cannot possibly be so construed, because a PFA could be issued on this claim only if MacDonald could establish that the test results would virtually exonerate him by calling into question biological evidence that was central to the prosecution's case at trial. Such a showing could not be made before tests were conducted. Moreover, the ultimate DNA test results were, if anything, inculpatory.

Neither do the test results merit consideration under the Innocence Protection Act ("IPA"), 18 U.S.C. § 3600. The IPA has played no role in this proceeding litigated under Section 2255.

3. Further, MacDonald has no basis to assert that his DNA claim constitutes a "freestanding" claim of actual innocence under Herrera v. Collins, 506 U.S. 390 (1993). First, at least in non-capital cases such as this one, the Supreme Court has never held that a habeas petitioner is entitled to relief on such grounds. In any event, the determination, via DNA testing, that three hairs did not match any other sample tested and therefore had no known source has no probative value in this case, so it plainly cannot constitute the sort of compelling evidence of actual innocence that

the Herrera Court hypothecated could suffice in a capital case as the basis for habeas relief.

Nor is there substance to MacDonald's claim that any of the three unsourced hairs was bloody and/or forcibly removed. That assertion is based upon a misunderstanding or misrepresentation of the forensic evidence.

4. Finally, with respect to the Britt affidavit, even if Judge Fox had considered the items and claims MacDonald improperly proffered, they could not possibly have affected his determination that MacDonald was not entitled to relief as a consequence of assertions in the affidavit. Reduced to its essentials, Judge Fox's order was predicated upon (1) Stoeckley's consistent track record as an unreliable witness and her lack of recollection; (2) inconsistency between Britt's belated recollections and the record of events as reflected in the trial record; and (3) Judge Fox's inability to assess at this late date what Britt thought he heard prosecutor James Blackburn say and how he and Stoeckley construed it, or the impact of Blackburn's alleged threat on Stoeckley's inability to recall her whereabouts.

ARGUMENT

I. IN ASSESSING THE BRITT CLAIM, THE DISTRICT COURT APPLIED THE PROPER STANDARD WHEN IT REJECTED MACDONALD'S EFFORTS TO EXPAND THE RECORD, AND IT PROPERLY EXCLUDED EVIDENCE PROFFERED AFTER TRIAL AND AFTER SUBMISSION OF THE INSTANT HABEAS PETITION.

A. Standard of Review

Whether portions of 28 U.S.C. § 2244(b) govern petitions for habeas relief under 28 U.S.C. § 2255 is a question of law with respect to which the standard of review is de novo. Likewise, the district court's determination that it was legally barred from considering evidence proffered by MacDonald after trial and after submission of the instant habeas petition presents a question of law, subject to de novo review.

B. Discussion of Issue.

The specified issue inquires "[w]hether the district court erred in assessing the Britt claim by applying the standard of 28 U.S.C. § 2244(b)(2)(B)(ii), rather 2255(h)(1); by prohibiting expansion of the record to include evidence received after trial and after the filing of the 18 U.S.C. § 2255 motion; and by excluding, and thus ignoring, relevant evidence and drawing flawed conclusions from the evidence it did consider."

1. Sections 2255(h)(1) and 2244(b)(2)(B)(ii) do not contain material differences.

The question of whether Section 2244(b)(2)(B)(ii) or Section 2255(h)(1) constitutes the proper template for the gatekeeping analysis of a habeas petition under Section 2255 need not long

detain the Court. As one court of appeals has observed, "[t]he language in § 2244(b)(2)(B)(ii)'s exception to permit state prisoners to file a second or successive petition for habeas corpus relief . . . is materially identical to the language in § 2255's exception to permit federal prisoners to file a second or successive motion for habeas corpus relief." In re Dean, 341 F.3d 1247, 1249 n. 4 (11th Cir. 2003). Indeed, the parties are in virtual agreement that, save for the fact that Section 2244(b)(2)(B)(ii) requires a showing of "constitutional error," whereas Section 2255(h)(1) does not, the two coincide. (MacDonald Suppl. Br. 6; Amicus Suppl. Br. 19). As Judge Fox found that MacDonald's petition satisfied the constitutional error requirement, the distinction is academic. (See J.A. 1538 (noting that the Britt claim alleges a violation of MacDonald's Fifth and Sixth Amendment rights)).[2]

2. Judge Fox properly excluded previously considered claims and evidence supporting such claims.

The point of contention between the parties is whether the requirement -- common to both Sections 2244(b)(2)(B)(ii) and 2255(h) -- that a habeas court consider a second or subsequent petition involving newly discovered evidence "in light of the

[2]Further, Judge Fox's order is devoid of reliance upon Section 2244(b)(2)(B)(ii) as the predicate for his rulings. The sole reference in his order to Section 2244(b)(2)(B) is in his summary of the court of appeals' responsibilities in issuing a PFA. (J.A. 1540).

evidence as a whole," includes: (1) claims that have been considered and rejected in previous habeas litigation; (2) claims based upon evidence that is time-barred under Section 2255(f); and (3) claims that, under Section 2255(h), require a PFA from this Court as a jurisdictional prerequisite to consideration by a district court.[3] Because "the evidence as a whole" does not include evidence supporting claims of these types, the district court properly excluded such evidence.

The government moved the district court to strike the affidavits of Morse, Lane, and Buffkin, who each claimed to have heard Greg Mitchell admit participation in the murders of the MacDonald family, on two independent grounds: untimeliness and previous rejection. (J.A. 1534). Similarly, in opposing certain portions of MacDonald's "Motion to Expand the Record," the government observed, inter alia, that MacDonald's claims concerning the allegedly concealed threads, fibers, and other debris found in the MacDonald household had been considered and rejected in prior habeas litigation. (J.A. 1532).

Judge Fox's conduct in refusing to consider the challenged items as part of the "evidence as a whole" was perfectly correct. First, as we previously explained (Gov't. Br. 49-51), all three affidavits supporting MacDonald's claim (e.g., J.A. 959) that Greg Mitchell had admitted participation in the murders of MacDonald's

[3]We address Section 2255(h) in Argument III, below.

family were time-barred under 28 U.S.C. § 2255(f)(4) and could not have been considered by Judge Fox for that reason alone. See Dodd v. U.S., 545 U.S. 353, 359 (2005)(applying the time limitations of Section 2255 to both initial and subsequent petitions).

Further, as we earlier argued (Gov't. Br. 40-44), both the habeas statutes and principles of res judicata and collateral estoppel preclude the recycling of previously-adjudicated claims in successive habeas petitions. As explained below, both constitute additional reasons why Judge Fox properly excluded from consideration claims concerning Mitchell's admissions and alleged government concealment of unsourced hair and fiber evidence found in the MacDonald home. (J.A. 1278-85).

a. Habeas statutes

Section 2255(h) requires in part that "a successive motion" for habeas relief "must be certified as provided in section 2244 by a panel of the appropriate court of appeals . . . ." In turn, Section 2244(b)(3)(C) permits the court of appeals to issue a PFA with respect to a second or successive petition "only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." (emphasis added). That very subsection further provides:

> A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed.

28 U.S.C. § 2244(b)(1). In U.S. v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003), this Court pretermitted the question whether Section 2244(b)(1)'s prohibition against previously rejected claims is confined to habeas petitions originating in state courts or applies to proceedings under Section 2255 as well. But the plain language of these statutes demonstrates that it governs both.

First, by virtue of § 2244(b)(3)(C)'s reference to the requirements of "this subsection," of which Section 2244(b)(1) is a part, the court of appeals must deny a PFA with respect to successive claims. It would be anomalous in the extreme if the same requirement did not extend to the more fulsome review that the district court must conduct once the PFA has issued and the petition filed.[4]

Likewise, 28 U.S.C. § 2244(b)(4) requires that "[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

[4]Throughout this litigation, MacDonald has consistently conceded that para. 2244(b)(2), which likewise refers to "applications under section 2254," governs petitions brought under Section 2255 as well. See, e.g., "Motion Under 28 U.S.C. Section 2244 For Order Authorizing [the] District Court to Consider Successive Applications For Relief Under 28 U.S.C. § 2255"; "Memorandum in Support of the Proposed § 2255 Motion"; "Brief in Support of § 2255 Motion" at 1; Memorandum in Support of Motion to Vacate (J.A. 960, 965); "Application for Certificate of Appealability" at 3; "Informal Opening Brief" at 10, 29 n.11, 34, 36-37; Opp. To Gov't. Motion to Dismiss Appeal at 2; MacDonald Reply Br. 9 n.4.

requirements of this section" (emphasis added). Again, § 2244(b)(1) is a part of "this section," and the district court must therefore comply with its requirements in conducting a gatekeeping assessment.

Moreover, the courts of appeals that have addressed the question are in accord that Section 2244(b)(1) governs habeas petitions filed under Section 2255. See Taylor v. Gilkey, 314 F.3d 832, 836 (7th Cir. 2002) (applying the dismissal requirement of Section 2244(b)(1) to successive petitions brought under Section 2255) (citing Bennett v. U.S., 119 F.3d 468, 469 (7th Cir. 1997) ("in considering an application under Section 2255 for permission to file a second or successive motion we should use the section 2244 standard")); Charles v. Chandler, 180 F.3d 753, 758 (6th Cir. 1999) (holding that "pursuant to § 2244(b)(1), if a [federal] litigant seeks permission to file the same claims that were filed in a previous application, such claims 'shall be dismissed'"); U.S. v. Card, 220 F. App'x 847, 851 (10th Cir. 2007) (unpublished) (denying, on the basis of Section 2244(b)(1), a motion to file a petition under Section 2255 because the petitioner's claim "are indistinguishable" from previously rejected claims); see also U.S. v. Ramsey, 349 F. App'x 692, 693 n.1 (3d Cir. 2009) (unpublished) ("[petitioner's] claims likely could not receive consideration because they have already been raised and rejected in § 2255 proceedings"); 2 J. Liebman & R. Hertz, Federal Habeas Corpus

Practice and Procedure, § 41.7d at 1962 (5th ed. 2005) (Section 2255 "appears to adopt the same procedure for section 2255 cases as applies to successive state-prisoner habeas corpus petitions [under § 2244]").

Indeed, as several courts of appeals have observed, there is no logical reason why different criteria should govern successive petitions originating from the federal courts and those originating in state courts. See U.S. v. Bendolph, 409 F.3d 155, 163 (3d Cir. 2005) ("[W]e have previously held that we should treat § 2255 motions and § 2254 petitions the same absent sound reason to do otherwise."); Reyes-Requena v. U.S., 243 F.3d 893, 898 (5th Cir. 2001) ("Although the legislative history is silent as to the extent of § 2244['s] incorporation into § 2255, we . . . can find no intent to treat federal and state prisoners differently."); accord Triestman v. U.S., 124 F.3d 361, 367 (2d Cir. 1997).

MacDonald has virtually conceded that Section 2244(b)(1) prohibits the religitation of previously rejected claims in Section 2255 proceedings, but has argued that the prohibition does not foreclose a habeas court from considering the evidence underlying such claims as part of the "evidence as a whole." (MacDonald Reply Br. 9 n.4). While this Court has never squarely addressed the matter, it has expressed skepticism with respect to the dichotomy MacDonald has advanced. In In re Fowlkes, 326 F.3d 542, 545 (4th Cir. 2003), it denied a petitioner's successive Section 2254

applications when he attempted to recycle both "evidence and claims" it had previously rejected. On appeal, this Court observed that "[b]ecause the evidence and claims now pressed by [petitioner] have already been raised, considered and rejected on the merits by this court, [petitioner's] attempt to resurrect those claims fails under section 2244(b)(1)."

But whatever merit the distinction between "evidence" and "claims" may have in the abstract, it is inconsequential here. In his submission, MacDonald did not merely request that Judge Fox consider, as part of "the 'evidence as a whole,'" hair and fiber evidence (including synthetic "wig hair") rejected by Judge Dupree during prior habeas litigation, as the basis for relief. (See J.A. 1279-82, ¶ 42). Instead, he employed the granted PFA as a pretext for revisiting Judge Dupree's prior rulings, and even argued for the very first time that two government forensic experts presented false testimony at trial concerning the identity and source of black wool fibers found on the club murder weapon. (See J.A. 1282-84, ¶ 43). But, as this Court explained in Winestock, 340 F.3d at 207, claims seeking review of an alleged defect in a prior habeas adjudication are properly considered under Fed. R. Civ. P. 60(b), and not as part of a subsequent collateral attack on the petitioner's conviction. And, even if that were not so, the allegations in Britt's affidavit would not have had any bearing whatsoever on Judge Dupree's detailed findings that the wool and

saran fibers at issue were not newly-discovered, concealed, or the subject of government misrepresentation. See U.S. v. MacDonald, 778 F. Supp. 1342, 1349-56 (E.D.N.C. 1991); see also U.S. v. MacDonald, 979 F. Supp. 1057, 1061-67 (E.D.N.C. 1997) (rejecting motion to reopen on the ground that an FBI fiber expert testified falsely).

Likewise, MacDonald now seeks to relitigate the Mitchell "confession" claim that Judge Dupree rejected in earlier petitions. See MacDonald, 778 F. Supp. at 1360; U.S. v. McDonald, 640 F. Supp. 286, 328 (E.D.N.C. 1985). He maintains that two additional witnesses, Everett Morse and Donald Buffkin, allegedly overheard Mitchell make admissions similar to those previously reported by Bryant Lane. (See J.A. 1285, ¶ 46). But in In Re Williams, 364 F.3d 235, 242 (4th Cir. 2004), this Court expressly rejected the notion that a petitioner could recycle such previously rejected claims simply by submitting "new" evidence to support them.

b. Principles of res judicata and collateral estoppel

Even if Section 2244(b)(1), standing alone, does not preclude the relitigation of previously-rejected habeas claims brought under Section 2255, habeas case law, from which this limitation is derived, forecloses further entertainment of such claims. As the Court explained in Sanders v. U.S., 373 U.S. 1, 15 (1963), in cases involving successive petitions, "[c]ontrolling weight may be given to denial of a prior application for federal habeas corpus or §

2255 relief . . . if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." See Schlup v. Delo, 513 U.S. 298, 318 (1995) ("the Court [has] held a habeas court may not ordinarily reach the merits of successive claims"); In Re Williams, 364 F.3d 235, 239 (4th Cir. 2004) (AEDPA's prohibition against entertainment of successive petitions "is based on longstanding principles of habeas practice"). That principle of preclusion is, in turn, bottomed upon a qualified application of the doctrines of res judicata and collateral estoppel to habeas review. See McCleskey v. Zant, 499 U.S. 467, 486 (1991); Alexander v. U.S., 121 F.3d 312, 314 (7th Cir. 1997) ("Rejected justifications may not be reiterated in a successive motion for leave to file."). By their own force, those principles, which have been adopted but not superseded by AEDPA, foreclosed Judge Fox from entertaining MacDonald's previously-litigated claims relating to the alleged non-disclosure and misrepresentation of "unsourced" hairs and fibers found in the MacDonald home, and Greg Mitchell's alleged admissions concerning his involvement in the murders.[5]

[5]See MacDonald's "Statement of Itemized Material," J.A. 1278-84, ¶¶ 41-46.

II. ABSENT THIS COURT'S ISSUANCE OF A PFA, THE DISTRICT COURT COULD NOT CONSIDER MACDONALD'S DNA CLAIM.

A. Standard of Review.

Whether the district could consider MacDonald's DNA claim absent issuance of an additional PFA is a question of law with respect to which the standard of review is de novo.

B. Discussion of Issue.

The second question certified by this Court is whether Judge Fox erred in failing to consider MacDonald's DNA claim absent issuance of an additional PFA.

Sections 2255(h)(1) and Section 2244(b)(3) require that, as a condition precedent to the entertainment of a second or subsequent petition for habeas relief under Section 2255, the petitioner must first submit a motion under Section 2244 to the court of appeals for an order authorizing the district court to consider the application. A three-judge panel cannot issue a PFA unless satisfied that the application fulfills the stringent criteria in those Sections. 28 U.S.C. §§ 2244(b)(3)(B), (C), 2255(h)(1). Where alleged newly-discovered evidence constitutes the basis for the application, the panel may issue a PFA only if the new evidence, "if proven and viewed in light of the evidence as a whole, [the evidence] would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h)(1).

This Court has unequivocally held that a district court lacks subject matter jurisdiction to consider a second or subsequent Section 2255 petition unless and until a court of appeals grants a PFA. U.S. v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003) ("In the absence of [a] prefiling authorization, the district court lacks jurisdiction to consider an application containing abusive or repetitive claims.")[6] (emphasis added); In Re Vial, 115 F.3d 1192, 1194 (4th Cir. 1997) (en banc) ("[A]n individual may not file a second or successive . . . § 2255 motion to vacate sentence without first receiving permission to do so from the appropriate circuit court of appeals); see also U.S. v. Downing, No. 09-7477, 2010 WL 1258269 (4th Cir. Apr. 2, 2010) (unpublished). Likewise, the Supreme Court has held that the requirement of obtaining a PFA is jurisdictional and, consequently, failure to do so with respect to a second or successive petition precludes its entertainment by a district court. Burton v. Stewart, 549 U.S. 147, 152-53 (2007) (per curiam).

Nothing in Section 2255(h) or in the case law construing it suggests that the mere pendency of a PFA as to one claim licenses the petitioner to file in the district court other independent claims without first obtaining a PFA with respect to them. Indeed, as Judge Fox observed, were the contrary argument advanced by

[6]The Winestock Court defined "abusive claims" as those presented for the first time in a second or successive application. 340 F.3d at 204. MacDonald's DNA claim plainly so qualifies.

MacDonald to prevail, it would "'permit a petitioner who wins certification on only one ground to use that certification as a means to piggyback in for review a host of other uncertified and unscrutinized claims.'" (J.A. 1536, quoting Hazel v. U.S., 303 F. Supp. 2d. 753, 759 n.6 (E.D. Va. 2004)).[7]

MacDonald does not seriously challenge these governing principles. Instead, he argues (MacDonald Suppl. Br. 16-17) that this Court's October 17, 1997, order authorizing DNA testing and remanding the case to the district court to supervise the process was tantamount to the issuance of a PFA.[8] But nothing in the order suggested that it constituted a PFA, nor could it. First, absent the ultimate results of the court-authorized testing, the subject matter of the order -- the unsourced hairs which had not been subject to DNA testing -- hardly qualifies as "newly-discovered evidence." And, by the same token, this Court could not possibly determine under Section 2255(h)(1) whether those untested items "if proven and viewed in light of the evidence as a whole, would be

[7]Our argument that Judge Fox properly rejected MacDonald's DNA claim because it was not the subject of a PFA also applies to Judge Fox's refusal to consider the affidavit of Stoeckley's now-deceased mother, which was submitted directly to him over a year after issuance of the PFA.

[8]In point of fact, MacDonald had not sought a PFA in the motion that triggered this Court's 1997 order. Instead, he merely sought discovery of various "unsourced" hairs for the purpose of DNA testing pursuant to Rule 6 of the Rules Governing § 2255 motions.

sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." Nor could it make an assessment as required by Section 2244(b)(3) "that the application makes a prima facie showing that it satisfies the requirements of . . . subsection [2244(b)]."[9] In short, the 1997 order simply furnished an avenue for discovery by which MacDonald could later seek a PFA and further habeas review if the DNA testing it authorized demonstrated his factual innocence rather than -- as has proven be the case -- further demonstrated his culpability in the murders of his family.[10] Indeed, the DNA

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[9]MacDonald maintains (MacDonald Suppl. Br. 18-19) that the interests of judicial economy dictate that, having been authorized to conduct DNA testing, he should not be required to first seek a PFA with respect to the results of such testing prior to having it considered by the district court. But the very purpose of a PFA is to promote judicial economy by serving as a mechanism to weed out non-meritorious successive, abusive, or time-barred habeas petitions before they reach a district court. See U.S. v. Key, 205 F.3d 773, 774 (5th Cir. 2006).

Nor should the Court, for the sake of judicial economy, treat the instant appeal as a motion for a PFA with respect to the results of the DNA testing. See Jones v. Braxton, 392 F.3d 683, 689-90 (4th Cir. 2004). Such action would have the practical effect of depriving the government of the opportunity to address the reasons why a PFA is unwarranted under the governing standards, a matter beyond the scope of the instant litigation.

[10]Cooper v. Brown, 510 F.3d 870 (9th Cir. 2007) (en banc), does not suggest that an order issued by a court of appeals directing a district court to supervise DNA testing can, itself, do service for a PFA. In that case, the court issued a PFA with respect to a Brady claim but also authorized DNA testing of stands of hair found in the hand of a victim. The court did so because the request was part of the petitioner's PFA application and, under its prior holdings, a "prima facie showing on one claim in a second or (continued...)

testing yielded evidence inculpating MacDonald. The DNA results show that MacDonald was the source of a previously unidentified bloody hair fragment found in Colette MacDonald's left hand. (J.A. 150, 1107; G.S.A. 139-40).

Nor does Winestock, 340 F.3d at 205, support MacDonald's claim. (MacDonald Suppl. Br. 20-21). It simply holds that, if a court of appeals finds that any claim in an application to file a second or subsequent petition for habeas relief satisfies the requirements for a PFA, "the court should authorize the [petitioner] to file the entire application in the district court, even if some of the claims in the application do not satisfy the applicable standards." Id. Here, as MacDonald concedes, his DNA claim was not included in the PFA application authorized by this Court. Indeed, the test results, upon which the DNA claim was

[10](...continued)
successive application permits an applicant to proceed upon his entire application in the district court." Cooper v. Woodford, 358 F.3d 1117, 1124 (9th Cir. 2004) (internal quotation marks omitted). In this case, in contrast, MacDonald's DNA claim is, by his own acknowledgment, a "Freestanding DNA claim" (MacDonald Suppl. Br. 15) that was never part of PFA application. Moreover, at the time this Court authorized the DNA testing, it denied his motion to file a successive habeas petition in all other respects. The Cooper decision therefore has no bearing upon whether the results of such tests can be considered by a habeas court absent a PFA.

principally based, were not even available when he filed his application.[11]

MacDonald and his amicus further argue (MacDonald Suppl. Br. 32-34; Amicus Suppl. Br. 29-32) that no PFA is required with respect to his DNA claim because the test results merit a new trial under the Innocence Protection Act, 18 U.S.C. § 3600 ("IPA"). But the IPA provides that "[n]othing in this section shall provide a basis for relief in any federal habeas corpus proceeding" (18 U.S.C. § 3600(h)(2)), and throughout this litigation, MacDonald has treated the proceedings in both this Court and in the district court as arising under federal habeas corpus law.

In any event, MacDonald's IPA argument, which is not implicated by the issues certified by this Court, is meritless. Claims under the IPA must be asserted in the first instance in the district court. 18 U.S.C. § 3600 (describing procedures for seeking and utilizing post-conviction DNA testing). MacDonald has never done so here. In this respect, the IPA primarily exists to provide a vehicle by which defendants can obtain DNA testing of certain evidence. See 18 U.S.C. § 3600(a). Thus, it allows a

[11]MacDonald's argument is not assisted by Hazel v. U.S., 303 F. Supp. 2d 753 (E.D. Va. 2004). In that case, a district court, relying upon Winestock, entertained additional claims that were apparently not part of a certified PFA application. Id. at 758-59. But, as Judge Fox observed, such reliance was misplaced because, as in this case and unlike Winestock, the additional claims in Hazel were not part of "the entire application" that the court of appeals permitted the petitioner to file. (J.A. 1535-36).

defendant to seek a new trial only "if DNA test results obtained under this section exclude the applicant as the source of the DNA evidence" (emphasis added). § 3600(g)(1). In this case, the DNA test results, which form part of the basis of MacDonald's claim, were not obtained pursuant to the IPA. The IPA had not even been enacted at the time testing was authorized by this Court. And, rather than excluding MacDonald as the source of the biological evidence used to convict him, the DNA test results identify him as the donor of a previously unidentified limb hair fragment found in Colette MacDonald's left hand. (J.A. 1107).

III. MACDONALD'S FREESTANDING CLAIM THAT THE DNA TESTING ESTABLISHES HIS ACTUAL INNOCENCE IS DEVOID OF LEGAL OR FACTUAL SUPPORT AND THEREFORE PROVIDES NO BASIS FOR RELIEF.

A. Standard of Review.

Whether the constitution and interpretive case law permit a criminal defendant to assert a freestanding claim of actual innocence is a question of law subject to de novo review.

Due to the absence of a PFA on the DNA claim, the district court properly did not address the issue of whether the DNA evidence had exculpatory value. Thus, there is no ruling to review regarding the effect of the DNA test results, or MacDOnald's DNA claim.

B. Discussion of Issue.

MacDonald asserts that the DNA testing yielded evidence establishing his actual innocence, and that Herrera v. Collins, 506

U.S. 390 (1993), provides an avenue for relief under those circumstances. While the Court did not expressly instruct the parties to address this issue, MacDonald has done so in his brief. (MacDonald Suppl. Br. 21-31). We therefore respond to MacDonald's erroneous and misleading claims.

1. Herrera v. Collins does not apply.

MacDonald asserts that the DNA testing purportedly establishing his innocence amounts to a freestanding claim of actual innocence as contemplated by Herrera v. Collins, 506 U.S. 390 (1993), and its progeny. (MacDonald Suppl. Br. 27-31; Amici Suppl. Br. 35-37). He argues that such a claim is cognizable under federal habeas law and that he has made the extraordinary showing that would be required to obtain relief. This Court should reject MacDonald's arguments for a number of reasons.

As an initial matter, assuming that such a freestanding claim of actual innocence could be asserted on habeas review, MacDonald points to no basis for exempting such a claim from the threshold requirements of § 2255(h), which mandate that a petitioner obtain preauthorization from the circuit court before filing a second or successive habeas petition in the district court. Here, no PFA was issued relating to MacDonald's DNA claim, and, thus the issue was not properly before the district court.

More importantly, however, the Supreme Court in Herrera did not recognize a freestanding claim of actual innocence as a basis

for federal habeas relief; rather, it "assume[d] for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U.S. at 417 (emphasis added). The Herrera Court left open the possibility that it might someday acknowledge the existence of a cognizable freestanding claim for actual innocence, but explained that "the threshold showing for such an assumed right would necessarily be extraordinarily high." 506 U.S. at 417; see Buckner v. Polk, 453 F.3d 195, 199 (4th Cir. 2006) (declining to decide whether Herrera "completely foreclose[s] free-standing claims of actual innocence" and noting that even were such claims cognizable on federal habeas review, the petitioner would be required to make an extraordinarily compelling showing).

Indeed, the Supreme Court has yet to be presented with the truly extraordinary case that would require it to confront this question. See, e.g., In re Davis, 130 S. Ct. 1 (2009).[12] For example, the Supreme Court concluded that the exacting Herrera standard was not met in a habeas case where "the central forensic

[12]Contrary to MacDonald's arguments, In re Davis is not an implicit recognition by the Court of a freestanding actual innocence claim cognizable in federal habeas proceeding. If anything, the concurring and dissenting opinions in Davis reaffirm that it is an open question whether a freestanding actual innocence claim may properly be pursued in a federal habeas proceeding.

proof connecting [the petitioner] to the crime -- the blood and semen -- has been called into question, and [the petitioner] has put forward substantial evidence pointing to a different suspect." House v. Bell, 547 U.S. 518, 554–55 (2006). There, the Court explained that "whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it." House, 547 U.S. at 544-55.

Similarly, this Court has not "ever found facts sufficiently compelling to grant the writ for a claim of innocence without the claim of an underlying constitutional violation." Hooks v. Branker, 348 F. App'x 854, 860 (4th Cir. 2009) (unpublished). MacDonald's petition likewise does not present such a case.

2. The Evidence Supporting MacDonald's DNA Claim Does Not Satisfy the Demanding Standard Suggested in Herrera.

The evidence MacDonald has proffered in support of his DNA claim cannot possibly satisfy the extraordinarily high threshold showing required by the Herrera Court. MacDonald does not, and cannot, advance a claim similar to that deemed insufficient in House, 547 U.S. at 544-55, i.e., that the DNA results call into question the "central forensic proof" identifying him as the perpetrator of the murders of his family.

MacDonald's DNA claim does not call into question any forensic evidence introduced by the government at trial. Moreover, the DNA test results do not in any way impugn the compelling forensic

evidence that demonstrated the falsity of MacDonald's version of events on the night of the murders and showed that he was the only possible criminal agent. These circumstances establish that relief is precluded under the standards suggested in Herrera and House.

3. The DNA evidence does not exculpate MacDonald, because his claim that unidentified hairs demonstrate the presence of intruders cannot withstand scrutiny.

Contrary to MacDonald's claims, the DNA evidence lacks exculpatory value. MacDonald's only hope to develop exculpatory evidence from the DNA testing ordered in 1997 was for one or more of the tested hairs to be shown to share the DNA sequence of either Stoeckley or Greg Mitchell, two of the individuals MacDonald has consistently identified as the true perpetrators of the murders. (See, e.g., J.A. 1276-78 (Stoeckley); J.A. 1285-86 (Mitchell)). It is undisputed that they did not. The fact that three of the hairs remained unsourced after the DNA testing is consistent with the fact that similar items of household debris found in the MacDonald home could not be matched to any known source. The government's own forensic expert acknowledged the existence of unsourced debris at trial, and MacDonald argued unsuccessfully that this fact constituted evidence of intruders. (MacDonald, 778 F. Supp. at 1355; J.A. 133-37, 172-75).

MacDonald's claim that the unsourced hairs per se proves the presence of intruders has been previously rejected by this Court.[13] To overcome this ruling, MacDonald has resorted to embellishments and misrepresentations in an attempt to demonstrate that the hairs were either bloody (91A), or forcibly removed (75A & 58A(1)), or both (91A). (J.A. 1095-97). He misrepresents when, where, and by whom 75A was collected, and he fails to mention that numerous seam threads from his pajama top were also found in the same location.[14] Similarly, he fails to disclose that the 58A(1) hair was found with MacDonald's own hair, 58A(2) (G.S.A. 384-85, 1107), as well as his pajama top threads and yarns (G.S.A. 130) on a bedspread that was also contaminated with black dog hair (G.S.A. 280-822 and dozens

[13]Describing unsourced hairs and fibers as "specious evidence" this Court stated: "The most that can be said about the evidence is that it raises speculation concerning its origins. Furthermore, the origins of the hair and fiber evidence have several likely explanations other than intruders." MacDonald, 966 F.2d 854, 861.

[14]Contrary to MacDonald's representation that "Browning collected the specimen" (J.A. 1096), the hair later designated 75A was collected on March 16, 1970 by CID Agents Ivory and Shaw, almost a month after the removal of Colette's body. (G.S.A. 120-21, 1, 2; see also G.S.A. 277-78 ("Fibers and debris from area of the trunk & legs of rug under body, master bedroom")). Specimen 75A was originally described by Browning (who never went to the crime scene (G.S.A. 125-26)) in connection with his examination of the contents of "Exhibit E-303" for the presence of fibers matching MacDonald's pajama top. All Browning says about the hair is, "One human pubic or body hair, no comparison due to lack of knowns." (J.A. 1254). At trial the prosecution offered testimony that 3 yarns and 15 purple sewing threads matching MacDonald's pajama top were also found in the same area of the rug. (G.S.A. 133 (referring to GX 327(E-303, Q79)).

of foreign fibers (G.S.A. 386-93).[15] With respect to 75A, MacDonald argues (J.A. 1096-97) that this pubic hair was forcibly removed, based solely on his own interpretation of bench notes.[16] This is particularly the case in regard to his conclusion that use of the term "intact root" equates with forcible removal.[17] But interpretations of counsel are not evidence, and MacDonald has supplied no evidence -- much less clear and convincing evidence -- from a qualified expert that the presence of follicular tissue, or a follicular "tag," on the root of a hair, proves that the hair was forcibly removed. Nor has he cited to any reference text for this proposition.[18] The fact that the 75A hair was from the pubic

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[15]Specimen 58A(1) is derived from CID Exhibit E-52NB ("Hairs & fibers from Bedspread on the bed in north bedroom") (J.A. 1147), and was later designated "Q87" by the FBI, and GX 362 at trial (G.S.A. 130). Specimen 58A(2) is a second hair from the same slide (58A) which was determined by AFIP to have a mitochondrial DNA sequence matching MacDonald's. (J.A. 1107, 1110; G.S.A. 384-85).

[16]AFIP technician Graham's bench notes of his microscopic evaluation of 75A for DNA testing merely state that "Slide 99C - 0438-75A: Contains 1 human hair with root & follicular tissue. Hair is approximately 132.3γm wide, approximately 63 mm long and medium blond to dark golden brown in color has spots along shaft and buckling." (J.A. 1243).

[17]With respect to Specimen 58A(1) MacDonald states that "according to AFIP laboratory notes, it is a hair with root intact . . . ." (S.J.A. 1097). But examination of the note he cites reveals that what Graham said was that slide 58A "contains two human hairs. Both have roots but no tissue." (J.A. 1243).

[18]These omissions are telling, given the fact that MacDonald's own hair expert, Dr. Peter DeForest, has both testified and written that the presence of follicular tissue does not prove forcible removal. See Delaware v. Fensterer, 474 U.S. 15, 17 (1985) (continued...)

region of the body makes it less likely that the presence of follicular tissue proves forcible removal, because pubic hair roots frequently have follicular tags.[19]

MacDonald has misstated the sequence of various examinations in relation to the 91A hair, as discussed below. Finally, he claims that the presence of unsourced hairs destroys the central theory of the prosecution, namely that the government argued that there were no unsourced hairs or other items found at the crime scene. (MacDonald Suppl. Br. 4). Nothing could be further from the truth. In fact, the "no evidence of intruders" argument was a strawman raised by defense counsel in final argument at trial, and the jury rejected that argument.[20] What was central to the

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[18](...continued)
("According to Doctor DeForest, no adequate scientific study supported that premise ['that the presence of a follicular tag indicates forcible removal'],and a follicular tag could be attached to hairs that naturally fell out."); see also De Forest et. al., The Morphology and Evidential Significance of Human Hair Roots, Journal of Forensic Sciences, Vol. 33, pp. 68, 70 (June 1988) ("Considerable caution regarding interpretations that a hair was been 'forcibly removed' must be observed . . . . There are numerous ways in which in which an anagen [still growing] hair can be removed in normal activities which do not involve a 'struggle.'"

[19]See Deedrick and Koch: Microscopy of Hair Part 1: A practical Guide and Manual for Human Hairs, Forensic Science Communications, Vol. 6, No.1, p. 21, Figure 32 (Jan. 2004).

[20]While not conceding the presence of intruders, the prosecution never told the jury there is no evidence of intruders. (See G.S.A. 143-46, 186-241, 256-75). Also, the prosecution never sought otherwise to convey that there was no item at the crime scene (hairs, fingerprints, fibers, feathers, etc.) that did not originate from the household or its occupants. Rather, it was
(continued...)

prosecution's theory, which certainly did not concede the presence of intruders, was that the collective pajama top evidence (G.S.A. 157, 165-73, 177-86) and MacDonald's bloody footprint in his wife's blood, could not be explained by the actions of intruders. The jury understood that nobody but MacDonald could have stabbed his wife through his pajama top because, according to his own account of the event, he placed the pajama top on his wife's chest after the alleged intruders had departed.

As we demonstrate below, MacDonald's embellished factual assertions about the hairs, and the inferences he draws from those assertions, cannot withstand scrutiny because, neither the documents nor transcripts upon which he relies actually say what he maintains they say. This is particularly the case with respect to the Specimen 91A hair.

MacDonald and his amici make the following claims:

- The hair designated "Specimen 91A" by AFIP, which has a mitochondrial DNA ("mtDNA") sequence that does not match Stoeckley, Mitchell, the victims, or MacDonald, was one of

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[20](...continued)
defense counsel in final argument who told the jury: "[T]he Government says also that there were no intruders in this case. There is no proof of intruders. The list of evidence that supports Jeff's story will surprise you when we pull it all together right now." (G.S.A. 243-44 (emphasis added); see generally G.S.A. 243-55). Defense counsel then listed the following as evidence proving the presence of intruders: "the latex glove," "the fiber on Jeff's eyeglasses in the living room," "fingerprints," "unidentified hair," "candle wax," "the knives,," "the ice pick," and "the club." (G.S.A. 243-55).

three such unsourced hairs "found at the murder scene." (J.A. 1097).

- This specimen was found "lodged" under a fingernail in Kristen's left hand. (MacDonald Suppl. Br. 3, 23).
- It was from her attacker. (Id.).
- It became lodged there when she "struggled" with her attacker. (Id.). This claim is based on the assertion that the pathologist testified at trial that Kristen sustained defensive wounds to her hands while "struggling" with her assailant. (Id.).
- After the hair was discovered in a vial in "February 1970" by CID Chemist Janice Glisson, "the fingernail scrapings from the left hand of Kristen MacDonald were subsequently designated 'D-237' in the Army CID's typewritten reports." (Id. 25-26).
- "[T]he chemical analysis of the hair [by the CID Laboratory] indicated a finding of blood on the hair." (J.A. 1095, 1171).
- According to the AFIP technicians it was "a human hair with the hair root in tact" (sic). (J.A. 1095).

As we demonstrate below, all but one of these contentions is a misrepresentation or a distortion. The exception is that Stoeckley, Mitchell, the victims, and MacDonald can all be eliminated as a source of the Specimen 91A hair.

a. The Crime Scene

MacDonald has not cited any evidence for the contention that a hair was observed at the crime scene underneath Kristen's fingernail, or collected from under her fingernail there. In fact, there is absolutely no evidence to this effect.

b. The Autopsy

Similarly, MacDonald has not cited any evidence that a hair was observed or collected from under Kristen's fingernails at autopsy. In fact, the testimony of Dr. William Franklin Hancock, the pathologist who performed the autopsy on Kristen, does not mention a hair. (J.A. 1252).

MacDonald's counsel told this Court at oral argument that "there was testimony at trial that this young girl struggled with her attackers." (CD of Oral Argument No. 08-8525, March 23, 2010 (2:40-2:47). There is no such testimony. Dr. Hancock said nothing about an assault in which Kristen "struggled" with an attacker. (J.A. 1252-53). Dr. Hancock opined that the wounds to Kristen's right hand could, as a general matter, be characterized as "defensive wounds," or alternatively, could have been incurred "in the process of other . . . wounds happening." (J.A. 1253; see also G.S.A. 10-13).

c. The Initial CID Laboratory Examinations and the Origin of the Designation "Exhibit D-237".

Page "17" of CID Chemist Dillard O. Browning's bench notes, dated "9 March 70," pertaining to his examinations for "Hairs & Fibers," states: "Exhibit # D-237 - Fingernail scrapings from Christine's [sic] left hand - vial contained one microscopic piece of multi strand polyester/cotton fiber identical to the pajama top material Bloodstained but washed." (G.S.A. 10) (emphasis in original). Although Browning's bench note is headed "Hairs & Fibers" he makes no mention of the presence of a hair in "Exhibit D-237." (Id.). This supports the inference that he did not find a hair in Kristen's fingernail scrapings. However, on the same day, and on the same page of his bench notes, Browning recorded the presence of a hair in the next exhibit (E-7): the "Vial contains one long blonde human head hair." (Id.). (emphasis in original). This fact supports the inferences that Browning was examining the vials given to him for the presence of hairs as well as fibers, and had he found a hair in the vial, he would have recorded the presence of a hair in his "Exhibit D-237" notes. Accordingly, when used by Browning in reference to his examination on March 9, 1970, "Exhibit D-237" refers to the presence of a blood stained fiber, matching the fabric of MacDonald's blue pajama top, which he found in the fingernail scrapings from "Christine" MacDonald's left hand, and not to any hair. (G.S.A.

114-15). MacDonald has not included Browning's March 9, 1970 "D-237" bench note in his appendices as part of the evidence as a whole.

On or before March 9, 1970, CID Chemist Janice Glisson performed the benzidine test on a number of exhibits, including one designated only in her notes as "237." (G.S.A. 17). She obtained a positive result for the presence of blood. (Id.). On March 9, 1970, Glisson performed the Crust test (which detects the presence of human antibodies) on a number of exhibits, including one she referred to as "L. Hand Chris." (G.S.A. 19). With respect to the items collected at autopsy from the hands of the three victims, Glisson listed them in the lower left hand column of her March 9, 1970, bench note, and described them by their reported place of origin (e.g. "R. Hand Mother"), rather than by alpha-numeric designation. (Id.). The corresponding designations ("D-233 to D-239") that appear in a column on the extreme lower right hand side of the bench note are in a different handwriting than Glisson's. (Id). Reading Glisson's bench note from left to right for "L. Hand. Chris," the test was negative for the A and B cells, pertained to the "smaller child," and was annotated by another writer to indicate that these results pertained to "D-237." (Id.). Accordingly, the Crust test did not indicate that the stains were human blood, although the benzidine test had

indicated the presence of blood.[21] There is no mention in Glisson's serology bench notes either for March 9, 1970, or before or after that date, of the presence of a hair being found in "237" or "L. Hand Chris," or that "chemical analysis of the hair indicated a finding of blood on the hair," as MacDonald claims. (See J.A. 1095).

d. The Reporting Of The Examination Of "Exhibit D-237" In The April 6, 1970, Preliminary CID Lab Report Has Been Deleted By MacDonald.

The results of both the benzidine test by Glisson, and the pajama top fiber comparison by Browning, are reflected in the April 6, 1970, Preliminary Lab Report. (G.S.A. 21-37). The list of "Evidence Examined" in the Preliminary Lab Report includes: "Exhibit D-237- Fingernail Scrapings from left hand of Christine (sic) MacDonald." At ¶ 20, page 13, the Preliminary Lab Report states: "Examinations of the red-brown stains of Exhibits . . . D-237 . . . indicated the presence of blood. Further examinations were precluded due to the paucity of the stain." (G.S.A. 33). Page 13 of the Preliminary Lab Report has been deleted from the copy which appears in the Joint Appendix. (Compare J.A. 1149-50 with G.S.A. 33).

The results of Browning's examination of "Exhibit D-237" were reported in paragraph 26, at page 14: "Examination of Exhibits

[21]This is hardly remarkable since Kristen's hands were coated in blood. (See G.S.A. 3).

. . . D-237 . . . revealed the presence of fibers identical in type, color, denier, twist, and all other physical characteristics to the fibers of the pajama jacket, Exhibit D-210." (G.S.A. 34).

There is no mention of the presence of a hair in relation to the examinations by Glisson and Browning of "Exhibit D-237" in paragraphs "20" and "26" of the Preliminary Lab Report, or anywhere else in this report or the subsequent Consolidated Lab Report.[22]

The April 6, 1970, date of the CID Preliminary Lab Report reflecting the results of the March 9, 1970, examinations of "Exhibit D-237" by Browning, and "237" by Glisson, are very significant dates, because they demonstrate: (1) that the serology testing of "Exhibit D-237" was completed more than four months before Glisson first documented the presence of a hair in vial # 7, on July 27, 1970 (discussed below); (2) that no hair had been found in the fingernail scrapings either by Browning or Glisson by April 6, 1970, or previously documented in their notes; and (3) the CID used the designation "D-237" in their typewritten Preliminary Lab Report to refer to the fingernail scrapings from Kristen months before, and not "subsequently" (MacDonald Suppl. Br. 26) to Glisson's discovery of the hair in the vial on July 27, 1970. (G.S.A. 39-42).

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[22]The CID's Consolidated Lab Report repeated these results verbatim in ¶ 27, and only corrected "Christine" to "Kristen" in the description of "Exhibit D-237" in the list of evidence examined. (See G.S.A. 96-111).

e. The July 27, 1970, Discovery Of The Hair In Vial # 7

On July 20, 1970, the newly acquired hair exemplars of MacDonald (Exhibits E-305-E-313), and the autopsy vials which previously had been returned to Fort Bragg, North Carolina, were again received at the CID Lab, Fort Gordon, Georgia. (G.S.A. 44).

Glisson's handwritten "R-11" bench notes, which she dated at the top right hand corner "27 July 70," demonstrate that her "R-11" hair examinations took place on July 27, 1970, and not before. (See G.S.A. 39). The copy of these same bench notes found in MacDonald's Supplemental Appendix (S.J.A. 05) has had the "27 July 70" date cut off. It is this bench note, coupled with a general statement in Glisson's 1999 affidavit,[23] upon which MacDonald now relies for the assertion that Glisson found the hair in February 1970, performed chemical analysis on the hair which detected blood at that time, and "subsequently designated 'D-237' in the Army CID's typewritten reports." (MacDonald Suppl. Br. 25-26).[24]

On July 27, 1970, Glisson first inventoried the contents of each vial. Her notes for that date, in pertinent part, state:

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[23]"I first became associated with the analysis of evidence in the Jeffrey MacDonald case on behalf of the Army CID laboratory in February 1970. My primary responsibility in this case included examining and typing the body fluid evidence seized from the MacDonald home; I also performed some hair examinations." (S.J.A. 46).

[24]This assertion by MacDonald's current counsel is also contradicted by the sworn statement in the 1997 Affidavit of Phillip G. Cormier No. 2. (G.S.A. 304).

"#7 fingernail scrapings left hand smaller female McDonald (not labeled by Browning) 1 hair ? 2 fragments." (G.S.A. 39). The results of Glisson's microscopic examination of the contents of this vial state: "# 7 fibers + one light brown narrow hair, no medulla, striated, intact root; tapered end (emphasis in original)." (G.S.A. 40). Glisson mounted these items on a glass microscope slide stating: "[D]id not label all the other vials cont. fibers & hairs (#1, #7, #8) but gave #'s & slides correspond to these #'s, since they are not going to be reported by me." (G.S.A. 42).

Glisson did not use the designations "237" of "D-237" in her notes in reference to vial " #7," its contents, or the slide which she marked with a paper label containing the notation "# 7 fibers Hair." (See G.S.A. 371-74, 366).[25] This same slide would be marked for identification "Q-137" by the FBI in 1999, prior to being provided to AFIP on May 17 1999. (J.A. 1109-11). AFIP then marked the slide "91A." (G.S.A. 376-77). And while it is true the 91A hair later "came off a slide" (J.A. 1095) for DNA testing, it was not a slide marked "D-237" or "237," as MacDonald implies (id.,) but rather one marked "Q 137." (J.A. 1111; G.S.A. 376-77).

[25]The fibers on Glisson's slide #7 are not consistent with the composition of MacDonald's pajama top. Browning's examination involved a different fiber.

There is also no indication in Glisson's July 27, 1970 R-11 bench notes that this hair from vial #7 was bloodstained.[26] (G.S.A. 40). Had her microscopic examination of the hair revealed the presence of blood, Glisson would have recorded that observation in her notes, as she did in the case of the hair from vial # 13, "left hand Mother" (later AFIP 51A(2)), which she noted was "bloody." (G.S.A. 40-41). Similarly, Glisson's July 27, 1970, notes provide no support for the proposition that she performed any chemical analysis which "detected blood on the hair," either at that time or previously. (MacDonald Suppl. Br. 25; G.S.A. 39-42). Nor did Glisson offer any opinion that the hair from vial #7 was forcibly removed. She merely states that the hair had an "intact" root.[27] Whatever that term meant to Glisson, MacDonald has offered

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[26]The absence of blood on the Specimen 91A hair is confirmed by photomicrographs taken by M/Sgt. Graham at AFIP, as well as by his bench notes of his microscopic examination of the hair for, inter alia, the presence of blood. (See G.S.A. 378-80; J.A. 1244). This absence of blood suggests that the hair was never under Kristen's bloody fingernails.

[27]MacDonald initially claimed that it was the AFIP lab technicians who described the 91A hair as having an "in tact" root. (J.A. 1095). MacDonald next combined his assertion that the hair was "mixed with blood residue" and the "with the hair root intact" assertion to support his hypothesis that the hair came to reside under Kristen's fingernail when she grabbed at the intruder who was attacking her. (J.A. 1095-96). The bench notes of AFIP technician Graham, upon which MacDonald relies, do not support his factual assertions. (J.A. 1244). Graham never used the term "intact root." Rather, he wrote, "one human hair with root but no tissue." (J.A. 1244). MacDonald himself must now concede this fact, as his counsel quoted Graham's language verbatim at Oral Argument. (CD of Oral Argument at 9:00).

no evidence from a qualified expert that the physical characteristics of the root of the 91A hair are consistent with forcible removal.

The Government does not dispute that the hair Glisson mounted on slide #7 on July 27, 1970, is the same hair that AFIP tested as Specimen 91A (Q-137). What we dispute is that this hair was previously (or subsequently) subjected to any serological testing that revealed the presence of blood, and was also designated "D-237" by the CID. In the total absence of any evidence as to the provenance of this hair prior to July 27, 1970, when it was discovered at Fort Gordon, Georgia, or that it was forcibly removed, and given the potential for contamination, any objective analysis would question the provenance of this hair before that date. At best, MacDonald can only point to a naturally shed hair, which did not come from MacDonald, Stoeckley, or Mitchell, without any evidence that the hair was ever bloodstained or forcibly removed, that was found in a vial five months after the crime, and which had not been recorded in previous examinations of the contents of the vial. Because the DNA results do nothing to distinguish this hair from various other household debris of which the parties were aware at the time of the trial, MacDonald feels compelled to convey the impression that this hair has been proven to have been collected from under Kristen's fingernail, and to

embellish the characteristics of this hair in an attempt to suggest that it is not a naturally shed hair.

f. The Summary Charts Prepared by the CID

In addition to the typed Preliminary Lab Report, the Chemistry Section of the lab also prepared two undated spreadsheets. The first chart, which was marked as "Incl 5," tabulated the blood test results, and only the blood test results, obtained by chemists: Glisson, Laber, Flinn, and Chamberlain. (J.A. 1154-86). The first page of "Incl. 5" states: "The results of Glisson's comparison of Exhibits E-4 and E-5 [the hairs from Colette's hands] with Exhibits E-305 thru E-313 [MacDonald's known exemplars] are recorded with the results of Browning's analysis [Incl 6], since this deals with hairs." (J.A. 1154).

With respect to "Exhibit D-237," described in Incl.5 as "Fingernail scrapings from left hand of Kristen MacDonald," the "Results" are listed as "indicated blood." (J.A. 1171). As we have demonstrated, these results were obtained by Glisson on or before March 9, 1970, and correspond to those in her bench note reflecting the results of the benzidine test on "237." Although this page makes no mention of the presence of a hair in relation to "Exhibit D-237," MacDonald has cited this specific page for the factual assertion that "it is noted that the chemical analysis of the hair indicated a finding of blood on the hair." (J.A. 1095, 1171).

The second tabulation chart ("Incl.6") reflected the results of Browning's examination of hair, fiber, wood, paint and wax evidence by specific exhibit, and collated those results with an additional column reflecting the results of any blood tests performed on those exhibits by other chemists, as reflected in "Incl.5" (G.S.A. 73). As was the case with Incl.5, Incl.6 originally included explanatory notes on its first page.[28] (G.S.A. 73). In pertinent part note "E" provides that: "Blood results are included in this tabulation to show all the results for one exhibit in one place. (Id.). The space provided for information pertaining to "Exhibit D-237," under the next column -"Hairs"- is blank (G.S.A. 75, but the adjacent space under "Fibers" contains the designation "D-210" (the CID designation for Jeffrey MacDonald's torn, bloodstained, blue pajama top) to reflect the presence of a fiber, matched by Browning with the garment, and found in the fingernail scrapings as reported in paragraph 26 of the Preliminary Lab Report.[29] (Id.). The last column for "(Blood)" contains the entry "ind. Blood," to reflect Glisson's benzidine test results on exhibit "237," as also reported in paragraph 20 of the Preliminary Lab Report. (G.S.A. 33).

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[28] This page was omitted from App. One, Tab 3, and should precede page 1182 (J.A. 1182).

[29] The notation "D-210" has been covered over in the copy of this page filed by MacDonald. (Compare J.A. 1183 with G.S.A. 75).

g. The 1999 Photographic Submissions

MacDonald also claims that in photographs filed with the district court depicting various items of evidence that were being submitted for DNA testing, and in other documents, the Government used the designation "D-237" to refer to the microscope slide on which the 91A hair was mounted. (MacDonald Suppl. Br. 26). This last contention is not properly before this Court because the issue was not before the district court. However, we note that this argument is misleading because the photograph of Vial No. 7 (G.S.A 364; Supp. App. 226) was taken by the FBI to document that the Government was complying with the order of March 26, 1999, by turning over blood debris that Cormier had asked for, using the identifier "D-237."[30] (See J.A. 902-03) (March 26, 1999, order of the district court directing the government to turn over for DNA testing by May 17, 1999, "the existent and known sourced and unsourced hairs, blood stains, blood debris, tissue and body fluids specifically identified in the April 22, 1997, Affidavit of Philip G. Cormier No. 2 . . . accompanied by written explanations.") In this photograph, the card marked "D-237" refers to Vial No. 7, not

[30]This process was made more difficult by the fact that nothing was previously marked "D-237" (G.S.A. 324-25), and the FBI Lab was not permitted to open the vials to inventory their contents unless the defense was present (G.S.A. 323, 357). Previously, Cormier had noted that Glisson described the hair from Vial #7, mounted on slide #7 by Glisson, without reference to "D-237." Rather, he noted that she had used "D-237" in reference only to "un-typed blood debris" which he was also seeking for DNA testing. (G.S.A. 305-07).

the closed brown mailer marked "Q137." Consequently, the Government used the label "D-237 (GX-285)," depicted in photos at G.S.A. 364-65 (Supp. App. 226-27), to show, in compliance with the district court's order, that it was turning over the vial containing any residual blood debris from CID Exhibit "D-237" which had been found in a bag labeled "Government Exhibit 285." (G.S.A. 362-363).

The unsourced hair which MacDonald now emphasizes actually came from the Q137 slide shown in the photograph at G.S.A. 366 (Supp. App. 228). The paper card depicted in this photo, saying "Vial No. 7 Marked For Identification "JSG" and "BJH 2/17/70" "Q137" (but not "D237") was used to demonstrate that the glass microscope slide marked "Q137," and the loose paper label, "#7 fibers Hair," were believed to relate to the items originally found in Vial #7, and subsequently mounted on a correspondingly numbered slide by Glisson. It was only after the evidence was transferred to AFIP, that on May 25, 1999, AFIP assigned the designation "91A" to the "Q137" slide, and so marked it. (G.S.A. 376-77). Therefore, MacDonald's counsel erred when he told this Court at oral argument that one of the photos is "actually a picture of 91A that shows a hair," "and it's D-237" (CD at 9:05-9:50), apparently referring to Photo 156, which counsel subsequently filed as Supp. App. 228. Actually, neither the glass slide, the paper slide label, nor the paper cards are marked "D-237" or "91A." Nor is a

hair visible in the photograph of the slide, due to the reflection of the opaque mounting medium. Id.[31]

IV. THE DISTRICT COURT'S FACT-BOUND RULINGS CONCERNING THE BRITT CLAIM WERE CORRECT.

A. Standard of Review.

The clearly erroneous standard governs a district court's factual determinations. Its conclusions of law, however, warrant de novo review.

B. Discussion of Issue.

The first issue embraced by the supplemental COA inquires whether, as a consequence of Judge Fox's alleged failure to consider the Britt claim in light of the additional items of "evidence" proffered by MacDonald, he drew "flawed conclusions" from the evidence he did consider. This question must be answered in the negative. Even if Judge Fox had considered the excluded

[31]MacDonald's opening brief asserts that "[f]or almost a decade, there was wrangling in the district court over the nature and scope of the DNA testing." (MacDonald Br. 26). At oral argument, this Court inquired of defense counsel about the delay and whether there had been any motions before the district court. (CD of Oral Argument at 6:00-6:32). In fact, in May 1998, the district court had to prod the defense into taking action in response to this Court's Order of October 1997. (G.S.A. 283). After a hearing, on April 14, 1999, the district court designated the Armed Forces Institute of Pathology, MacDonald's first choice, as the independent laboratory, and directed the Government to pay for the testing as MacDonald claimed indigency. (J.A. 903, 905). During the subsequent DNA testing, numerous issues arose as to methodology, suitability, divisibility, and identification, all of which were resolved by mutual agreement between the parties and AFIP. During the period from May 17, 1999 to March 10, 2006, MacDonald filed no motions regarding the DNA testing, despite the district court's invitation. (J.A. 903, G.S.A. 402-04).

evidence, it would not have affected his detailed, fact-bound rulings that resulted in his rejection of MacDonald's habeas petition based primarily on Britt's affidavit. Indeed, MacDonald has not suggested otherwise.[32]

1. The "Confession" Claim

In conducting his gatekeeping analysis, Judge Fox parsed MacDonald's claim, based on Britt's allegations, into three separate components -- a "confession" claim; a "fraud" claim; and a "threat" claim. (J.A. 1542). Judge Fox rejected the "confession claim," which was based on statements Britt claimed Stoeckley made to him while he allegedly drove her from Greenville, South Carolina, to Raleigh, because, even if credited, it was merely cumulative of other evidence about Stoeckley's repetitive, out-of-court admissions to others, excluded by Judge Dupree, in light of her testimony that she had no recollection of her whereabouts on

[32]MacDonald summarizes the evidentiary items he maintains that Judge Fox should have considered in tandem with the DNA evidence and the Britt affidavit to determine whether he was entitled to proceed with his habeas petition. (MacDonald Suppl. Br. 30-31). As we observed in our opening brief, however (Gov't. Br. 52-55), many of these items were properly before the district court (e.g., the Britt affidavit), or were expressly considered in denying his petition (e.g, Stoeckley's repetitive admissions and denials of participation in the murders of the MacDonald family (see J.A. 1545)). The only matters in the enumeration that Judge Fox declined to consider are the time-barred and previously litigated claim involving Greg Mitchell's admissions, the time-barred and unauthorized claim of Stoeckley's mother, and the hair and fiber evidence that, during prior litigation, had been determined not to have been newly-discovered.

the night of the murders. (J.A. 1542). The evidence supporting MacDonald's DNA claim, the admissions of Greg Mitchell (which the habeas court previously considered in tandem with Stoeckley's confessions), and the hair and fiber evidence, rejected as not "newly-discovered" by previous habeas courts, could not possibly have altered Stoeckley's history of "untrustworthy" confessions spanning over a decade. It therefore could not have prompted a different result (J.A. 1544-45).[33] Similarly, Stoeckley's alleged admissions to her mother concerning her involvement in the murders of the MacDonald family were nothing more than additional repetitive admissions of the sort she had made and retracted during a period spanning well over a decade.

2. The "Fraud" Claim

What Judge Fox termed MacDonald's "fraud claim" was based upon Britt's assertion that he overheard Stoeckley admit participation in the murders to prosecutor James Blackburn during an interview in his office, and an allegation that Blackburn then concealed the admission during a colloquy with Judge Dupree. (J.A. 1549). Observing that defense counsel Wade Smith acknowledged to Judge Dupree that, shortly before Stoeckley's interview with Blackburn, she told the defense camp that she had no recollection of her whereabouts on the night of the murders (J.A. 1550), Judge Fox

[33]As the DNA test results failed to demonstrate that Stoeckley or Mitchell was the source of any of the hairs, they added no probative weight to any alleged Stoeckley confessions.

rejected the concealment claim on two grounds. First, "[g]iven the contents of the trial transcript," i.e., Smith's representations to Judge Dupree, he could not "reconcile th[e] contemporaneous record with Britt's thirty-year delayed recollection of what he thought he heard during the government's pre-trial interview of Helena Stoeckley."[34] (J.A. 1550). Second, Judge Fox rejected the "fraud claim" on the additional ground that Judge Dupree's exclusion of Stoeckley's testimony was not predicated upon Blackburn's representations as to what she told him but, rather, on the ground that "MacDonald's own evidence," including long term heavy drug use, "conclusively established the unreliability and lack of trustworthiness of anything Stoeckley said to anyone." (J.A. 1550).

Here again, the DNA results, Stoeckley's admissions to her

[34]In connection with its Motion to Modify Judge Fox's order, the government submitted sworn statements, supported by irrefutable documentary evidence, demonstrating that Britt was in no way involved with transporting Stoeckley from upstate South Carolina to Raleigh, North Carolina, on August 15, 1979. (See J.A. 1568-76). Faced with this evidence, MacDonald has apparently abandoned the claim that Stoeckley's alleged confession to Britt constitutes evidence of his innocence. Because Britt's sworn affidavit states that he later heard Stoeckley tell Blackburn "the same thing she stated to me on the trip from Greenville to Raleigh" (J.A. 983), a trip that MacDonald now appears to concede did not occur, Judge Fox was clearly correct in not crediting Britt's account of what he claimed to have overheard during the Stoeckley/Blackburn meeting. MacDonald offered no evidence in the district court that Stoeckley confessed to Britt during the 5-minute ride in Raleigh to the U.S. Courthouse on August 16, nor can he now. MacDonald has previously claimed that Stoeckley confessed to Britt because the two bonded during "the long (5 hour) journey from Greenville." (G.S.A. 417).

mother, the admissions of Greg Mitchell, and the reasserted hair and fiber claims could not possibly have affected inconsistencies between Britt's account of events and the contemporaneous record of the trial proceedings that put the lie to his "thirty-year delayed recollection" (J.A. 1550) of Stoeckley's alleged colloquy with Blackburn. Neither would they have affected evidence establishing Stoeckley's unreliability based upon her record of drug addiction.

MacDonald's amici seek to demonstrate that the facts upon which Judge Fox allegedly relied in rejecting the Britt claims could not support his conclusions in any event. (Amici Suppl. Br. 7-19). This argument, however, is not within the apparent scope of the certified issues, nor is it addressed in MacDonald's own supplemental brief. It is therefore not properly before this Court and should be disregarded. See Amoco Oil v. United States, 234 F.3d 1374, 1378 (Fed. Cir. 2000) (precluding a party and an amici from splitting the issues and denying review of claims made only in the amici brief).

The argument is also fundamentally flawed because it is entirely predicated upon the assumption that Judge Fox "accepted . . . Britt's account of Blackburn's interview of Stoeckley as true" and that, consequently, Blackburn's response to Judge Dupree's question as to what Stoeckley told him "was flatly contradicted by the judicially-accepted truth of Britt's account

of the interview." (Amici Suppl. Br. at 8). But Judge Fox did no such thing. Instead, even though on the fraud claim Judge Fox "accept[ed] Britt's affidavit as a true representation of what he heard or genuinely thought he heard" (J.A. 1554 n.18), he discounted Britt's delayed recollection of "what he thought he heard" (J.A. 1550) in Blackburn's office as irreconcilable with the "contemporaneous record" (J.A. 1550).

3. The "Threat" Claim.

Finally, Judge Fox rejected MacDonald's "threat" claim because, with the passage of time and Stoeckley's death, it was impossible to reconstruct what Blackburn may have said, how Stoeckley may have construed it, or whether, but for the alleged threat, she would have testified that she had been present during the murders of the MacDonald family.[35] (J.A. 1556).[36] Neither the DNA results nor any of the other allegedly excluded evidence has

[35]The amici further argue (Amici Suppl. Br. 14) that Stoeckley's "contrived" trial testimony, asserting a lack of recollection, would likely not have occurred absent Blackburn's alleged threat. The Government long ago put this claim to rest by demonstrating conclusively that Stoeckley's accounts to investigators and acquaintances of a loss of recollection concerning her whereabouts on the night of the murders began as early as the next day, which was nine years before she was interviewed by Blackburn. See MacDonald, 688 F.2d 224, 231 (regarding Beasley testimony); see also Supplemental Brief of the United States filed in No. 79-5253, at 3-9, summarizing testimony.

[36]Judge Fox observed that the "threat" claim was "inextricably intertwined" (J.A. 1546) with MacDonald's fraud claim, as it was likewise based upon the alleged circumstances of Stoeckley's interview by Blackburn. Judge Fox found that the scenario posited by Britt was inconsistent with the trial record.

any bearing whatsoever on these matters. Nor could any of the items, if considered, possibly have shed any light upon the now-unanswerable questions that prompted Judge Fox to reject the claim.

CONCLUSION

For the foregoing reasons and those set out in our opening brief, the United States respectfully submits that the judgment of the district court should be affirmed.

Respectfully submitted, this 15th day July, 2010.

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I hereby certify that on July 15, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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