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 REPLY BRIEF OF APPELLANT

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

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The Government offers technical arguments in an effort to avoid the result dictated by the Britt evidence and the DNA evidence. It attempts to create artificial procedural barriers to prevent consideration of the merits of MacDonald's claims. It challenges the origin and reliablity of its own physical evidence, and even attacks MacDonald's counsel. Particularly, with respect to MacDonald's DNA-based innocence claim, the Government for the first time in the more than twelve (12) years that this issue has been pending in the courts argues that the exculpatory DNA evidence must be the result of "contamination" in some way, despite there being no affirmative evidence of this occurring, and despite the fact that this evidence has continually been in the Government's possession and could only be tainted by the Government itself. The law and the record provide no grounds for the Government's contentions, and they should be rejected.

I. The District Court Erred in Refusing to Consider the "Evidence as a Whole" When Assessing MacDonald's Claims, As Required by the Plain Language of the Statute.

Under either 28 U.S.C. § 2244(b)(2)(B)(ii) or 2255(h), a district court is required to consider the "evidence as a whole" in conducting its gatekeeping review of claims asserted in a successive Section 2255 motion. Despite this plain statutory directive, the Government contends that the "habeas statutes" and "principles of res judicata and collateral estoppel" somehow overcome this plain

language and mandate that the district court consider much less than the "evidence as a whole" in assessing MacDonald's claims. (Gov't Supp. Br. at 14-22). The law rejects this result.

As set out previously by MacDonald, (Opening Br. at 38-42; Reply Br. at 6-10), the fallacy in the Government's position lies in its failure to recognize the distinction between a habeas claim and the evidence offered in support of that claim. The Government spends much time outlining the law that generally bars the "recycling" of habeas claims in successive petitions. (Gov't Supplemental Br. at 16-19). But nothing in the AEDPA prohibits a district court from considering evidence offered in support of a previously-asserted habeas claim as part of the "evidence as a whole" when the district court considers a later habeas claim.

To the contrary, the plain language of the statute requires the district court to do so, by requiring that it consider the claims in the successive petition "in light of the evidence as a whole." The cases applying this provision so hold. *Lott v. Bagley*, 2007 U.S.Dist.Lexis 91762, *15-17 (N.D. Ohio 2007), *aff'd*, 569 F.3d 547, (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2053 (2009); *see also House v. Bell*, 547 U.S. 518, 537-38 (2006) (in applying pre-AEDPA law, when considering whether habeas petitioner had established his actual innocence necessary to avoid procedural bar, court was required to consider "all of the evidence, old and new,

incriminating and exculpatory, without regard to whether it would necessarily be admitted under rule of admissibility that would govern at trial"); *In re Williams*, 330 F.3d 277, 283 (4th Cir. 2003) ("§2244(b)(2)(B)(ii) substantially incorporates the *Sawyer* test").

Notably, no case supports the Government's tortured approach. The Government's only response to this distinction is to contend that (a) this Court expressed skepticism about MacDonald's position in *In re Fowlkes*, 326 F.3d 542 (4th Cir. 2003), and (b) the merit in this distinction is "inconsequential here," because MacDonald is supposedly attempting to "relitigate" claims from his earlier habeas petition. (Gov't Supp. Br. at 20-21). Neither of these arguments is accurate.

First, nothing in this Court's decision in *Fowlkes* expresses "skepticism" about the distinction drawn by MacDonald. In *Fowlkes*, this Court considered an application under 28 U.S.C. § 2244 for a prefiling authorization to file a successive habeas petition. The defendant sought to assert three claims for relief in his successive petition, all three of which he had asserted in his first habeas petition that was previously denied. This Court rejected the PFA application, on the straightforward ground that Fowlkes' claims had previously been considered and rejected in an earlier habeas petition, and therefore "Fowlkes' attempt to resurrect

those claims fails under section 2244(b)(1)." *Fowlkes*, 326 F.3d at 545 (emphasis added). Nothing in *Fowlkes* discusses in any way the distinction between a habeas claim and the evidence offered in support of a habeas claim under the AEDPA. Nor does anything in *Fowlkes* offer any support for the Government's position here that the phrase "evidence as a whole" in Section 2244(b) and 2255(h) means something less than it says.

Second, the Government's assertion that this distinction is "inconsequential here" is based upon the faulty premise that MacDonald is asking, in his present Section 2255 petition, that the claims he made in his earlier habeas petitions be reconsidered. (Gov't Supp. Br. at 20-21). For example, the Government claims that MacDonald "now seeks to relitigate the Mitchell 'confession' claim that Judge Dupree rejected in earlier petitions." (Gov't Supp. Br. at 21).

The Government is incorrect. MacDonald is not asking that he be granted relief based upon some claim that has, as its basis, the Mitchell affidavits. Instead, MacDonald asserts that the statute requires the district court to consider the Mitchell affidavits as part of the "evidence as a whole" in determining if MacDonald's current claims (i.e., the "threat" and "fraud" claims arising from the Britt affidavit, and the DNA-based actual innocence claim), viewed "in light of the evidence as a whole," entitle him to relief under the "no reasonable juror" standard.

It is for this reason that the Mitchell affidavits should be considered -- not as a separate claim, but as evidence in the case that is part of the "evidence as a whole."

In short, the Government's tortured interpretation of the phrase "evidence as a whole" is contrary to the plain language of the statute and to the cases applying the language. No court has ever accepted the Government's reading. The Government's attempt to create an artificial procedural barrier to the court's review of the evidence establishing MacDonald's innocence should be rejected.

II. The District Court Drew Flawed Conclusions as a Result of its Erroneous Exclusion of Evidence, and MacDonald Should Receive a New Trial Under 28 U.S.C. § 2255 on Both the "Threat" and "Fraud" Claims.

The first issue in the expanded COA addresses whether the district court's factual conclusions underlying its denial of MacDonald's Section 2255 motion were flawed. MacDonald, in his prior filings, set out how the district court's conclusions as to the "threat" and "fraud" claims were flawed by its erroneous reading of the "evidence as a whole" standard, and why MacDonald should receive a new trial when the standard is properly applied. (Opening Br. at 45-54; Supp. Opening Br. at 10-14).

In response, the Government states:

> 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 questions must be answered in the negative. Even if Judge Fox had considered the excluded 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.

(Gov't Supp. Br. at 52-53) (footnote omitted and emphasis added).

The last statement by the Government is as remarkable as it is wrong. Throughout this litigation, MacDonald has continually asserted that he should receive relief on both the "threat" and "fraud" claims arising from the Britt

affidavit, and that the district court erred in refusing to grant relief on these claims. (Opening Br. 45-54); (Supp. Opening Br. 9-15). In light of these plain statements by MacDonald in his filings, how can the Government credibly contend that MacDonald "has not suggested otherwise?"

MacDonald has previously set out in detail the error in the district court's conclusions as to both the "threat" and "fraud" claims arising from the Britt affidavit, and why the Government's arguments otherwise are unpersuasive. (Opening Br. at 45-54; Supp. Opening Br. at 9-15). The threat by then-AUSA Blackburn to Helena Stoeckley acted to deprive MacDonald of Stoeckley's testimony that she was present in the MacDonald home at the time of the murders, as well as the testimony of six (6) other witnesses who would testify to Stoeckley's admissions to them of her presence in the MacDonald home at the time of the murders, further corroborating Stoeckley.

This Court has previously recognized the vital import of the Stoeckley evidence to the jury decision in this wholly circumstantial case. *United States v. MacDonald*, 632 F.2d 258, 264 (4th Cir. 1980), *rev'd on other grounds*, 456 U.S. 1 (1982). The district court specifically found that the Britt affidavit was "a true representation of what [Britt] heard or genuinely thought he heard on August 15-

16, 1979."[1] (JA 1554 at n. 18). A prosecutor's threat to a potential defense witness, causing that witness to change her testimony or refuse to testify, is a violation of the defendant's constitutional rights requiring a new trial. *United States v. Golding*, 168 F.3d 700, 703 (4th Cir. 1999). MacDonald should receive Section 2255 relief, in the form of a new trial, as to both the "threat" and the "fraud" claims arising from the Britt affidavit, and that the district court erred in refusing to grant relief.

[1] The Government refuses to accept this statement in the district court's order, arguing (as it does with other issues in this litigation) that the words of the district court in this regard somehow do not mean what they say. (Gov't Supp. Br. at 56-57). The district court plainly stated, as set out above, that it accepted Britt's account of events as accurate. Notably, though it has had ample opportunity, the Government has never offered an affidavit from then-AUSA Blackburn regarding the events of his interview of Helena Stoeckley.

III. The District Court Erred in Refusing to Consider MacDonald's DNA-Based Innocence Claim, As No Separate PFA is Required for Consideration of This Claim, and *Winestock* Authorizes Consideration of the Claim.

The Government contends that before the district court could consider the DNA testing results in any way, MacDonald was required to file a third motion for prefiling authorization after the results of the DNA testing became available in 2006. This position is contrary to the law and the policy behind the AEDPA.

First, the Government asserts that MacDonald's 1997 motion for a PFA under Section 2244, and this Court's 1997 order, "simply furnished an avenue for discovery by which MacDonald could later seek a PFA and further habeas review." (Gov't Supp. Br. at 26). The Government's position fails to recognize that this Court's 1997 Order did not arise out of some separate motion by MacDonald for DNA testing -- it arose out of a motion filed by MacDonald with this Court under 28 U.S.C. § 2244 for prefiling authorization to file a successive Section 2255 motion, wherein MacDonald asserted that the DNA evidence he sought to obtain would "demonstrate[] my innocence." (MacDonald Supp. App. 162). Based upon MacDonald's motion, this Court ordered that the "motion with respect to DNA testing is granted and this issue is remanded to the district court." (MacDonald Supp. App. 184). Given that the DNA evidence now relied upon by MacDonald to show his actual innocence derived from this Court's order granting MacDonald's

Section 2244 motion, logic dictates that this Court authorized the exculpatory results of the testing to be considered by the district court, or it would not have ordered the testing at all.[2] Moreover, the policy behind the AEDPA of streamlining habeas litigation further supports this conclusion. (MacDonald Supp. Br. at 18). Requiring MacDonald to seek another PFA from this Court, at this point, is directly contrary to these purposes behind the AEDPA.

The Government also misreads *Winestock* in yet another effort to create an artificial procedural barrier to review of MacDonald's claim. In *Winestock*, this Court held that where it considers a motion for PFA and finds that any of the claims in the application would satisfy the Section 2244 standard, "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," and the district court should then consider all of the claims under the gatekeeping standards of Section 2244 or 2255. *Winestock*, 340 F.3d at 205. The Government

[2] The Government's assertion that the DNA testing results are inculpatory because they "show that MacDonald was the source of a previously unidentified bloody hair fragment found in Colette MacDonald's left hand" (Gov't Supp. Br. at 27) borders on the absurd. MacDonald consistently told the Army investigators, the military court, the grand jury, and the trial jury that he administered first aid to his fallen wife when he came to after being assaulted and severely injured by the intruders to his home. Given that he administered first aid to, and moved, his wife in his own home, it can hardly be argued credibly that it is inculpatory that some hair of his wound up on his wife's body.

asserts that "[h]ere, as MacDonald concedes, his DNA claims was not included in the PFA application authorized by this Court," (Gov't Br. at 27), and therefore the district court was not authorized to consider the DNA-based claim.

The Government's position has previously been directly rejected by other courts in this circuit. In *Hazel v. United States*, 303 F.Supp.2d 753 (E.D. Va. 2004), *appeal dismissed*, 102 Fed.Appx. 357 (4th Cir. 2004), *cert. denied*, 544 U.S. 935 (2005), this Court had granted a PFA to the defendant to file a successive petition in the district court alleging a claim of actual innocence based upon newly discovered evidence. After filing his successive petition in the district court, the defendant moved to amend the petition to add two additional claims. The Government in *Hazel* made the same argument that it asserts here -- that because the two additional claims were not in the PFA application, the district court was not permitted to consider the claims. Citing *Winestock*, the district court rejected the Government's position:

> The remaining question in this regard is whether it is proper to address here the two additional claims defendant asserts in his petition -- the *Brady* claim and the ineffective assistance of counsel claim -- given the absence of circuit certification of these claims. It appears that the absence of certification of these claims is not a bar to review of these claims. First, AEDPA itself includes no bar to district court review of claims that did not appear in a request for certification that was granted. And moreover, controlling caselaw makes clear that once the court of appeals finds that the application contains any claim that satisfies § 2255, the court [of appeals] 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. Therefore, defendant may raise the *Brady* and *Strickland* claims here even though he did not receive express certification from the Fourth Circuit to do so.

Hazel, 303 F.Supp.2d at 758 (citations and footnotes omitted and emphasis added).[3]

Identical considerations apply here. MacDonald could not include his DNA-based innocence claim in his PFA application to this Court, because the DNA results did not exist until after he received a PFA from this Court and filed his successive Section 2255 motion in the district court. Both *Winestock* and *Hazel* mandate that when MacDonald promptly added the DNA claim to his motion, the district court should have considered it. The Government can cite to no authority from this Court holding otherwise. Under *Winestock* and *Hazel*, the DNA claim should have been considered.

The Government's efforts to create artificial procedural barriers to consideration of MacDonald's DNA-based claim of actual innocence should be

[3] The *Hazel* court did note that this result was somewhat "anomalous" with a law designed to shield the federal courts "from the flood of successive habeas petitions." *Hazel*, 303 F.Supp.2d at 758 n.6. While this result may be "anomalous" with that one purpose of the AEDPA, it is consistent with the other purpose of the AEDPA, which is to streamline habeas litigation. *See* Supp. Opening Br. at 18 (collecting cases).

rejected. Both sound policy, and this Court's precedent, support MacDonald's position.

IV. MacDonald Should Be Granted a New Trial on his DNA-Based Actual Innocence Claim, As The Law Permits a Freestanding Claim of Actual Innocence, and MacDonald's Claim Meets the Standard for Such a Claim.

Predictably, the Government asserts (a) that the law has never explicitly recognized a freestanding claim of innocence, and (b) that MacDonald's DNA-based claim is not sufficient to meet whatever high standard there may be for such a claim. Neither of these arguments is persuasive.

First, the Government's position refuses to acknowledge the import of the decision of the Supreme Court in *In re Davis*, 130 S.Ct. 1 (2009). (MacDonald Supp. Opening Br. at 27-29). The Government's only response to *Davis* is to limply assert, in a footnote, that the grant of relief by a majority of the Supreme Court cannot mean that a claim for actual innocence is cognizable (without, of course, saying why) and that dissenting opinion somehow "reaffirms" that this is an open question. (Gov't Supp. Br. at 31 n.12). As set out by MacDonald, the Supreme Court in *Davis* could only grant the relief it did if there is some form of freestanding claim of actual innocence cognizable under federal habeas law.

Second, the Government contends that MacDonald's DNA evidence does not meet the standard for relief for a freestanding actual innocence claim. Comparing this case to *House v. Bell*, 547 U.S. 518 (2006), wherein the petitioner's actual innocence claim was denied despite his producing evidence that

contradicted the blood and semen evidence used to convict him at trial, the Government argues that MacDonald's proof in support of his actual innocence claim does not approach the level of that in *House* and likewise should be rejected. (Gov't Supp. Br. at 31-32). A close examination of *House*, however, reveals that it is easily distinguishable on this point.

In *House*, the defendant was convicted of murder and sentenced to death. He thereafter developed newly discovered evidence contradicting the blood and semen evidence used to convict him at trial, and filed a habeas petition asserting that his new evidence established both a gateway under *Schlup* to assert procedurally barred claims, and a claim of actual innocence under *Herrera*. The Supreme Court found that House's evidence did meet the *Schlup* threshold, but refused to reach the *Herrera* issue, because House's evidence did not meet the high threshold for a *Herrera* claim. *House*, 547 U.S. at 553-54. In so holding, the Supreme Court noted that there was direct evidence at trial that supported the finding of House's guilt:

> This is not a case of conclusive exoneration. Some aspects of the State's evidence -- Lora Muncey's memory of a deep voice, House's bizarre evening walk, his lie to law enforcement, his appearance near the body, and the blood on his pants -- still support an inference of guilt.

House, 547 U.S. at 553-54.

Unlike *House*, the Government's proof at trial in this case contained no direct evidence of guilt on the part of MacDonald. The Government's case centered solely on disputing MacDonald's voluntarily-told version of events, and arguing that if his story is false, he must be the killer. (Supp. Opening Br. at 22 n.4). The type of evidence relied on by the Supreme Court in *House* to discount to exculpatory scientific evidence produced by the petitioner after his trial does not exist in this case. The Government's reliance on *House* is therefore inapposite.

Courts in this circuit, relying on this Court's precedent, have endeavored to define the standard for a claim of actual innocence:

> Before proceeding to an analysis of defendant's actual innocence claim, it is necessary to address the threshold question regarding the standard to be applied to such claims. While the Supreme Court in *Herrera* did not explicitly prescribe the standard courts must apply in assessing "freestanding claims of actual innocence," it did make clear that "the threshold showing for such an assumed right would be extraordinarily high." And further in this regard, the *Herrera* opinion suggests, as Justice White makes explicit in his concurrence, that a petitioner asserting actual innocence on habeas review must meet the standard set forth by the Supreme Court in *Jackson v. Virginia*, namely that "[no] rational trier of fact could [find] guilt beyond a reasonable doubt," had it been given access to the newly discovered evidence. It appears that the Fourth Circuit has adopted this standard in analyzing a petitioner's freestanding claim that DNA evidence established his actual innocence. *See Hunt*, 2000 U.S.App.Lexis 2849, at *7.

Hazel, 303 F.Supp.2d 753, 761 (E.D.Va. 2004) (citations omitted).

MacDonald's DNA-based innocence claim meets this standard. The D-237/91A hair is in a location that shows that during Kristen's attempts to defend herself, a hair from her attacker was lodged under her fingernail. The DNA results establish that this hair is not the hair of Jeffrey MacDonald. The presence and location of this hair destroy the Government's argument at trial in support of its bizarre and far-fetched theory. *See* MacDonald Supp. Br. at 29-31.

The Government seeks to avoid this result by arguing that the hair would only be useful to MacDonald if the DNA tests showed it to be the hair of Helena Stoeckley or Greg Mitchell. (Gov't Supp. Br. at 33). This position conveniently overlooks the fact that MacDonald consistently told the investigators, the grand jury, and the trial jury that there were several attackers in the home other than Stoeckley and Mitchell -- they totaled four (4) in number. (Trial Transcript 6581-82).

The Government also makes the remarkable argument that it never really argued at trial that there were no intruders in the MacDonald home at the time of the murders. (Gov't Supp. Br. at 36-37). It is difficult to discern how the Government can credibly make this assertion. The Government in its closing argument at trial stated that the essence of its case was showing that MacDonald's version of events was not true and that he therefore must have been the murderer,

and the trial judge himself, in a bench conference, noted that this was the central issue of the trial. (Supp. Opening Br. at 21-22 and n.4). MacDonald's version of events centered entirely on the presence of intruders that committed the murders. The Government cannot reasonably contend now that newly discovered evidence showing the presence of intruders in the MacDonald home at the time of the murders is somehow not wholly inconsistent with its trial theory. The fact that it attempts to do so speaks volumes about the weakness of its case.

In short, this DNA evidence powerfully establishes MacDonald's innocence, and eviscerates the Government's far-fetched trial theory. Given the entirely circumstantial nature of the Government's case, the other powerful exculpatory evidence supporting MacDonald's innocence, and the total lack of any direct evidence of guilt on the part of MacDonald, the newly discovered DNA evidence meets the standard set out in *Hazel* for innocence claims.

V. The Government's Efforts to Attack the Origin and Nature of the Exculpatory DNA Evidence Are Without Merit.

Recognizing the powerfully exculpatory nature of the unsourced D-237/91A hair, the Government chooses to attack the origin of the evidence. It claims (despite the fact that the evidence was collected by, and in the possession of the Government for the entire period since the killings) that the presence of the hair must somehow be the result of "contamination," though there is no evidence of contamination that can be pointed to by the Government.

The Government's efforts to obfuscate the exculpatory value of this evidence do not stop there, however, as the Government goes on to frenziedly challenge virtually every aspect of anything to do with the exculpatory DNA evidence. The Government argues that MacDonald "has resorted to embellishments and misrepresentations" when setting out the origin and exculpatory value of the DNA evidence. (Gov't Supp. Br. at 34). The Government also spends considerable time disputing peripheral issues that have little or nothing to do with the exculpatory DNA evidence.

The Government's contentions are meritless, and are an attempt to deflect attention from the only rational conclusion that can be reached from the DNA evidence -- that MacDonald is innocent of the murders for which he has been imprisoned for the last thirty (30) years.

A. There is No Evidence of "Contamination," and the Record Establishes That the D-237/91A Hair Was Collected by the Government From Under the Fingernail of Kristen MacDonald at or Around the Time of the Killings.

The Government first attacks the origin of the exculpatory D-237/91A hair, piecing together different documents in an effort to create doubts about from where, and by whom, the hair was collected. (Gov't Supp. Br. at 40-52). At its base, the Government contends that despite the fact that the fingernail scrapings from the left hand of Kristen MacDonald have been in the possession of the Government during the entire period since the autopsy of Kristen in the days after the killings, the exculpatory D-237/91A hair suddenly appeared in these scrapings at some point during its handling by Government investigators. Put plainly, the Government asserts that the Government itself must have contaminated the scrapings with this unsourced hair, and that it should benefit from its own malfeasance by having this Court disregard this highly exculpatory evidence.

The Government's efforts to obfuscate the provenance of this hair fail, for numerous reasons. First, the Government has pointed to no affirmative evidence showing contamination, instead asking this Court to assume that the sample must have been contaminated. Second, as explained previously by MacDonald, the record soundly establishes that the D-237/91A hair was collected by the Government's investigators in the fingernail scrapings of Kristen MacDonald at or

about the time of the killings. Third, the Government fails to recognize the effect of its argument on the totality of the case -- if the Government is correct in urging this Court to find that the Government itself contaminated this piece of physical evidence from the crime scene, then what of the provenance and reliability of all of the Government's physical evidence that it used at trial to argue that MacDonald's version of the events was false and convict MacDonald?

1. There is No Evidence of "Contamination".

Though it is less than clear, the Government argues that the exculpatory D-237/91A hair must not have been in the autopsy sample collected from under the fingernails of Kristen MacDonald at the time of her autopsy, (Gov't Supp. Br. at 40-43), and instead suddenly appeared during a July 1970 examination of the autopsy vial by Army CID Chemist Janet Glisson, (Gov't Supp. Br. at 44), and that therefore, "given the potential for contamination," the court cannot conclude that the hair was in fact under the fingernail of Kristen MacDonald at the time her body was collected by the Government. (Gov't Supp. Br. at 46). Key to the Government's theory is its reliance on a lab note by Army CID Chemist Browning in March 1970 that 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". (Gov't Supp. Br. at 40). According to the Government, because the Browning notation did not list the presence of a hair, and the hair was not noted by CID Chemist Glisson from exhibit D-237 until July 1970, this must mean that the hair's presence is somehow the result of contamination.

The problem with the Government's position is plain --the record contains absolutely no evidence showing contamination. The Government relies exclusively on the CID Agent Browning's notation in March 1970 for its contamination theory, but this note does not in any way establish that the D-237/91A hair was not in the fingernail scrapings of Kristen MacDonald when they were examined by Browning. It could be that Browning failed to note the presence of the hair, or that Browning simply chose to not record the hair because he was focusing on fiber evidence. Importantly, the record establishes that Browning's notations with respect to this evidence are incomplete. When Browning examined the vial #7 evidence in March 1970, the notes relied on by the Government state that he assigned the exhibit a number of "D-237" when he conducted his examination. (Gov't Supp. App. 15). Yet the record establishes that Browning failed to mark the vial itself with the number of "D-237" as he should have, because when CID Chemist Glisson examined the vial at the time she noted the exculpatory hair, she noted that the vial#7 evidence containing the fingernail

scrapings from the left hand of "smaller female MacDonald" was "not labeled by Browning." (MacDonald Supp. App. 5). The combination of these two documents establishes that Browning designated the vial#7 fingernail scraping evidence with the label "D-237," and that Browning failed to write the label "D-237" on the vial as he should have, but nothing more. The documents in no way establish that vial #7 only contained the evidence listed by Browning in his March 1970 notes, yet that erroneous conclusion is the linchpin of the Government's faulty argument.[4]

To the contrary, the record plainly establishes that the scrapings containing the D-237/91A hair were collected at Kristen's autopsy in February 1970 by the autopsy doctor, who provided them to CID Agent William Hancock at Womack Army Hospital, (JA 104), and designated then by CID Chemist Craig Chamberlain on "26 Feb 70" as "D-237" being the "vial c/ fingernail scrapings marked "L. Hand

[4] Moreover, it cannot be overlooked that the Government has never previously, in the twelve (12) years that the DNA issue has been pending in the courts, argued that the hair evidence from the fingernail scrapings of Kristen MacDonald is somehow the result of contamination. To the contrary, throughout this litigation the Government has consistently stated without qualification that the hair evidence originated from the fingernail scrapings of Kristen MacDonald. (MacDonald 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)"); (MacDonald Supp. App. 213) (noting that affidavit submitted by defendant "included bench notes of CID chemist Janice Glisson, which catalogued unidentified human hairs with 'intact roots' found in the hands of Kimberley and Kristen MacDonald").

Chris (sic)". *See* Addendum at 1-3.[5] These same documents establish that the scrapings were in the custody of the Army CID from the time of their collection in February 1970 until July 20, 1970 when they were "hand carry[ied] to CID Lab" at which time CID Chemist Glisson performed her analysis and noted the presence of the exculpatory hair. *Id.*

The point, of course, is that the Government is asking this Court to conclusively presume that contamination must have occurred because of the one page containing Browning's notations, when (a) we know that the exculpatory hair was present when Glisson performed her analysis on the vial#7/D-237 fingernail scrapings because she noted it as so, (b) we know that the vial containing the fingernail scrapings was in the Government's secure custody from the time of its collection in February 1970 until Glisson's analysis as proven by the chain of custody document, *see* Addendum at 1-2, and (c) we know that Browning's other notations with respect to this evidence were incomplete. In short, there simply is no evidence that this hair originated from contamination, yet the Government is asking this Court to find that contamination must have occurred. The burden of

[5] Included as an Addendum to this Brief are documents including (a) the Army CID evidence sheet showing the origination of the fingernail scraping evidence originated by Army CID Agent Hawkins and the chain of custody for the evidence; and (b) handwritten notes of CID Chemist Craig Chamberlain of 26 February 1970.

proving contamination should certainly be borne by the Government in these circumstances, and its exclusive reliance on this one note in no way establishes contamination.[6]

In similar vein, the Government also attacks MacDonald's reliance on the Government's own photographs of this evidence, which establish that the Government itself labeled the 91A exculpatory hair evidence as Exhibit D-237 originating from vial#7 from the autopsy of Kristen MacDonald. (MacDonald

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[6] The Government also attempts to create confusion regarding the numbering of the exhibit containing the exculpatory hair. The Government states:

> 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.

(Gov't Supp. Br. at 47). But there is no question that the hair Glisson mounted on the slide that became AFIP Specimen 91A came from vial#7 from the autopsy of Kristen MacDonald, which contained the scrapings from beneath her fingernails. (MacDonald Supp. App. 5-6). Likewise, there is no question that vial#7 from the autopsy of Kristen, which contained the scrapings from beneath her fingernails, was designated "D-237" by the Army CID, as early as April 1970. (JA 1144; 1171; Addendum at 3). Moreover, the AFIP report, at page 30 of 33, links together all three of these numbers with respect to the exculpatory hair evidence, noting that the "CID No." is D-237, the "FBI No." is "Q-137," and the "AFDIL Sample No." is "91A." (JA 1133). Given these plain facts, it is difficult to discern how the Government can argue that 91A is not D-237 -- the record conclusively establishes that it is.

Supp. Br. at 26). The Government argues that these photographs somehow are not what they say they are, and that MacDonald's counsel at oral argument somehow misrepresented the nature of the photographs. (Gov't Supp. Br. at 50-52).

The Government's position is disingenuous. The photographs created by the Government plainly note the slide at issue as being "#7 fiber hair" -- that is, the fiber and hair from vial#7 from the autopsy of Kristen MacDonald as set out by CID Chemist Glisson in her notes. (MacDonald Supp. App. 226). As set out above, the record conclusively establishes that the contents of vial #7 were designated by Army CID with the label "D-237." Moreover, this Government photograph, below the notation "#7 fiber hair" also contains a separate card with the notation "Vial No. 7" and "Q137". (MacDonald Supp. App. 226). These notations are the Government's own notations. Given these facts, it is difficult to comprehend how the Government can argue that the representation of MacDonald's counsel at oral argument about what is shown in these photographs is somehow false, when that is how the Government labeled the evidence.

In short, there is "actually a picture of 91A that shows a hair" as stated by MacDonald's counsel at oral argument -- it is reflected in the Government photograph at MacDonald Supplemental Appendix page 226, which shows the hair evidence from vial#7 that AFIP designated as 91A. That hair "[is] D-237" as

stated by MacDonald's counsel -- the record as set out above conclusively establishes that the contents of vial #7 were labeled by Army CID as early as April 1970 with the label "D-237". The Government's attempt to say that MacDonald's counsel somehow misled the Court at oral argument is specious.

The Government's "contamination" theory is baseless. The record establishes that the hair originated from vial #7 from the autopsy of Kristen MacDonald, which contained the fingernail scrapings from her left hand, which was labeled by Army CID as Exhibit D-237, and which then was tested by the AFIP as Exhibit 91A, the results of which show that the hair did not originate from Jeffrey MacDonald.

2. If the Government's Position Regarding Contamination Is Correct, Then How Can Any of the Physical Evidence That the Government Used to Convict MacDonald be Considered Reliable?

The Government's position is especially curious, because if it is correct and the Government itself contaminated the physical evidence in the case, then how can this Court trust the integrity of the other physical evidence collected from the crime scene that was used by the Government to convict MacDonald? The Government relied almost exclusively at trial on evidence collected from the crime scene to argue that MacDonald's version of events was false, and that MacDonald was therefore guilty. This physical evidence was the centerpiece of the

Government's efforts to show that MacDonald's version of events was false and he therefore must be guilty -- the pajama thread evidence, the blood evidence, the murder weapons and fibers thereon, among other items. (JA 967-977) (outlining physical evidence relied on by Government in its case at trial).

If the D-237/91A hair sample is contaminated, and the source of that contamination was the Government, then how can this Court have confidence in the reliability of any of the Government's physical evidence that is the basis for this conviction? The Government cannot reasonably be permitted to argue that what it claims is inculpatory physical evidence collected during the investigation is reliable, but any exculpatory physical evidence in its possession must be contaminated or tainted. The Government cannot have it both ways, yet it asks this Court to use its own misconduct to create an inference in its own favor. The law cannot support such a result.

B. MacDonald Has Engaged in No "Embellishments and Misrepresentations" as to Nature and Exculpatory Value of the D-237/91A Hair From the Fingernail Scrapings of Kristen MacDonald.

The Government also spends considerable time attacking the representations made by MacDonald regarding the nature of the D-237/91A hair evidence. (Gov't Supp. Br. at 37-38). An examination of each of the Government's claims shows

that they are meritless, and that the representations of MacDonald as to this evidence are fully supported by the record.

1. Specimen 91A (Hair from Fingernail Scrapings of Kristen MacDonald) Was "Found at the Murder Scene."

The Government contends that it is wrong for MacDonald to assert that the exculpatory D-237/91A hair was "found at the murder scene."

The hair was in the fingernail scrapings from Kristen MacDonald's left hand of her body. Her body was, quite obviously, found at the murder scene by Army CID. Given these facts, it is difficult to discern how this statement could be a "misrepresentation" or "distortion" as claimed by the Government.

2. The D-237/91A Hair was "Lodged" under Kristen's Fingernail When She "Struggled" with her "Attacker."

The Government contends that there is no basis for MacDonald to argue that the D-237/Q91 hair was lodged under Kristen's fingernail when she struggled with her attacker.

The doctor who performed the autopsy on Kristen testified at trial that she had defensive wounds on her hands. (JA 93-94). One can only obtain "defensive" wounds if one is "defending" herself from her attacker. Moreover, the hair was in the fingernail scrapings of Kristen's left hand. The hair could only have been there if it had become "lodged" under her fingernail, or it would not have been "scraped"

out at the autopsy. Again, it is difficult to discern why the Government challenges these statements, and MacDonald's position can hardly be considered a "misrepresentation" or "distortion" as claimed by the Government.

3. The D-237/91A Hair Was Discovered by Janet Glisson in February 1970 and Designated D-237 by Army CID.

MacDonald sets out above the fallacy of the Government's argument in this regard, as the record conclusively establishes that the exculpatory hair came from vial#7 from the autopsy of Kristen MacDonald, which contained the fingernail scrapings from her left hand, which the record establishes was designated as D-237 by Army CID, and which the AFIP lab then designated as 91A. Whether the hair was "discovered" by Glisson in July 1970 or February 1970 is not relevant -- the hair is present in the fingernail scrapings possessed by the Government, was documented by Glisson, and there is no evidence that the fingernail scrapings were tampered with or contaminated.

4. The D-237/91A Hair Had Blood on It, and Had a Root Attached.

The examination of this hair by CID Chemist Glisson in 1970 noted that it was a hair with "intact root." (MacDonald Supp. App. 6). Likewise, the AFIP report notes that this hair is "one human hair with root but no tissue." (JA 1244).

While the Government may choose to quibble over the meaning of the root being present, it is plain that the record establishes the presence of a root.

The record also shows that when the D-237 exhibit was examined for blood, blood was indicated. (JA 1171). While the Government may quibble over which portion of the exhibit contained blood, this is of little consequence -- the key importance of this evidence lies not in whether or not blood or a root was present, but rather that it is a hair in a place where the hair could only come from Kristen's attacker, and that hair is not the hair of Jeffrey MacDonald.

In sum, the Government's efforts to portray MacDonald as engaging in "distortions" or "misrepresentations" is baseless. It does however, emphasize the Government's inability to respond to the clear and powerful exculpatory nature of this DNA evidence.

CONCLUSION

For the reasons set out herein and in MacDonald's other filings, Appellant Jeffrey R. MacDonald respectfully requests that the order of the district court be vacated, and that an order be entered directing the district court to grant MacDonald's Section 2255 Motion and order a new trial.

This the 2d day of August, 2010.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because:

This brief contains 6,991 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii);

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because:

This brief has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

This the 2d day of August, 2010.

/s/ Joseph E. Zeszotarski, Jr.
Counsel for Appellant

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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This the 2d day of August, 2010.

/s/ Joseph E. Zeszotarski, Jr.
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ADDENDUM

RECEIVED MAR 5 1970

MILITARY POLICE RECEIPT FOR PROP... (AR 190-22)

COMPLAINT OR CASE NO. (If any) 70-CID623-10179

UNIT DESIGNATION OF RECEIVING HEADQUARTERS: Detachment B, 3d MP Group (CI)

LOCATION: Fort Bragg, North Carolina

NAME OF PERSON FROM WHOM PROPERTY IS OBTAINED: ☐ OWNER ☒ OTHER CPT HANCOCK, William [redacted]

ADDRESS (Include ZIP Code): Womack Army Hospital, Fort Bragg, North Carolina

LOCATION OF PROPERTY: Received from Pathology Department, Womack Army Hospital, Fort Bragg, North Carolina

PURPOSE FOR WHICH OBTAINED: Evidence

ITEM NR	QUANTITY	DESCRIPTION OF ARTICLES (Include model, serial nr., identifying marks, condition, and value, when appropriate)
1	13	Plastic vials containing fingernail scrapings, hair samples, fibers and vaginal smears taken from victims at Womack Army Hospital by MAJ GASKIL, George E., and CPT HANCOCK, William. Marked BJH, 17 Feb 70
2	1	Plastic container containing hair samples of 3 year old victim, Christine McDONALD, marked BJH, 17 Feb 70.
3	1	Plastic container containing a wedding ring, gold in color, 14K inscribed on indide of ring. Container marked BJH, 17 Feb 70
4	1	Plastic bag containing one pair of pink colored panties; one gown bearing a floral print and a reddish stain which appears to be blood, taken from body of Kim McDONALD.
5	1	Plastic bag containing one pair of floral print panties; one childs undershirt; and one pair of child's pajama's, white with red dots; all articles stained with a reddish stain which appears to be blood, taken from the body of Christine McDONALD.
6	1	Plastic bag containing one pair of pink pajama's bottoms; onepajama's top or jacket; both articles stained with a reddish stain which appears to be blood, taken from body of Collette McDONALD.
		LAST ITEM

WITNESSED BY: James A. King
James A. KING
Det B, 3d MP Gp (CI)
Ft Bragg, NC

RECEIVED FROM: William Hancock
William HANCOCK
[redacted]
Womack Army Hospital

I CERTIFY THAT I HAVE RECEIVED AND HOLD MYSELF RESPONSIBLE FOR THE ARTICLES ENUMERATED

DATE	TYPED NAME, GRADE AND BRANCH	SIGNATURE
17 Feb 70	Bennie J. HAWKINS, Crim Inves	

CHAIN OF CUSTODY

ITEM NR	DATE	RELINQUISHED BY (TYPED NAME, GRADE AND BRANCH / SIGNATURE)	RECEIVED BY (TYPED NAME, GRADE AND BRANCH / SIGNATURE)	PURPOSE OF CHANGE OF CUSTODY
1 thru 6	21 FEB 70	Bennie J. HAWKINS / Bennie J. Hawkins	Craig S. Chamberlain / Craig S Chamberlain	TO CI LAB FOR ANALYSIS
4 thru 6	27 MAR 70	Craig S. CHAMBERLAIN / Craig S. Chamberlain	William F. Ivory, CO / [illegible]	TO AFIP Subcontrol
4 thru 6	16 APR 70	William F. Ivory, CO / [illegible]	Craig S. CHAMBERLAIN / Craig S. Chamberlain	Return to CI Lab
1 thru 6	11 APR 70	Craig S. CHAMBERLAIN / Craig S. Chamberlain	William F. IVORY, CO / [illegible]	Return to Ft. Bragg

DA FORM 19-31 Jun 55

EXHIBIT C (1)

SV-2-57-70

RECEIVED MAR 31 1983

CHAIN OF CUSTODY (Continued)

ITEM NO	DATE	RELINQUISHED BY	RECEIVED BY	PURPOSE OF CHANGE OF CUSTODY
1/6	2 May 70	TYPED NAME, GRADE AND BRANCH: Cpt William F. Terry Jr USA SIGNATURE: [signature]	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock Jr.	Evidence Room
4.5/6	25 MAY 70	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock, Jr.	TYPED NAME, GRADE AND BRANCH: Robert B. Shaw, CID SIGNATURE: Robt B. Shaw	Investigative Activity
4.5/6	27 MAY 70	TYPED NAME, GRADE AND BRANCH: Rbt B. SHAW, CID SIGNATURE: Robt B. Shaw	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock Jr.	Evidence Room
1/6	9 JUN 70	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock, Jr.	TYPED NAME, GRADE AND BRANCH: WILLARD A. SPESSERT SIGNATURE: Willard A Spessert	Change of Custodian
1/6	1 JUL 70	TYPED NAME, GRADE AND BRANCH: Willard A. Spessert SIGNATURE: Willard A Spessert	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock Jr.	Change of Custodian
1	20 JUL 70	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock, Jr.	TYPED NAME, GRADE AND BRANCH: David Lewis SP4 SIGNATURE: [signature]	Hand Carry to CI Lab SV-1
2	4 Aug 70	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock, Jr.	TYPED NAME, GRADE AND BRANCH: Registered Mail SIGNATURE: # 14120	To CI Lab
6	7 Sep 70	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR. CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock, Jr.	TYPED NAME, GRADE AND BRANCH: Franz J. Gaibora, CWO USA SIGNATURE: Franz J. Gaibora	To Article 32 Board
6	10 Sep 70	TYPED NAME, GRADE AND BRANCH: FRANZ J. GAIBORA, CW2 USA SIGNATURE: Franz J. Gaibora	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock, Jr.	Returned to Evidence Room
2/6	25	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock, Jr.	TYPED NAME, GRADE AND BRANCH: Willard A. Spessert SIGNATURE: [signature]	Change of Custodian
2/6	10 Oct 70	TYPED NAME, GRADE AND BRANCH: Willard A. Spessert SIGNATURE: Willard A Spessert	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock, Jr.	Change of Custodian
2/6	25	TYPED NAME, GRADE AND BRANCH: CWO W. W. BLALOCK, JR. CID EVIDENCE CUSTODIAN SIGNATURE: W. W. Blalock, Jr.	TYPED NAME, GRADE AND BRANCH: W. E. FARRISH EVIDENCE CUSTODIAN SIGNATURE: W. E. Farrish	Change of Custodian
1	12	TYPED NAME, GRADE AND BRANCH: Reg Mail SIGNATURE: 27876	TYPED NAME, GRADE AND BRANCH: W. E. FARRISH EVIDENCE CUSTODIAN SIGNATURE: W. E. Farrish	EVIDENCE ROOM
4/5	71 1 18	TYPED NAME, GRADE AND BRANCH: W. E. FARRISH EVIDENCE CUSTODIAN SIGNATURE: W. E. Farrish	TYPED NAME, GRADE AND BRANCH: William F. Ivory, CID SIGNATURE: [signature]	To Investigator

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20 Feb 70
CSC

D-230: one (1) white/peach colored pillow w/ gray/a
D-230 figure (from hospital w/ Cpt McDonald)

D-231: one (1) blue pillowcase w/ reddish-brown stains
D-231 (from hospital w/ Cpt McDonald)

(Exhibits 230 & 231 in same plastic bag)

D-232: Material, blue, appearing to come from pajama top of McDonald (D-210)

D-233: Vial c/ fingernail scrapings marked "Left Hand"

D-234: Vial c/ fingernail scrapings marked "R. Hand mother"

D-235: Vial c/ fingernail scrapings marked "R. Hand Kim"

D-236: Vial c/ fingernail scrapings marked "L. Hand Kim"

D-237: Vial c/ fingernail scrapings marked "L. Hand Chris"

D-238 Vial c/ fingernail scrapings marked "R. Hand Chris"

D-239: Vial c/ fingernail scrapings marked "Jeffrey"