UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
3:75-CR-26-3
5:06-CV-24-F

UNITED STATES OF AMERICA	)
v.	)
JEFFREY R. MacDONALD,	)
Defendant	)

REPLY TO GOVERNMENT'S POST-HEARING MEMORANDUM

NOW COMES defendant, Jeffrey R. MacDonald, by and through his undersigned counsel, and files this reply to the government's post-hearing memorandum. [DE 344] [hereafter Government Memorandum] In overview, the government presents no compelling basis on which this Court should disregard the newly discovered evidence presented in this motion to vacate, particularly (1) the Helena Stoeckley's statements showing she was in the MacDonald house when her three male compatriots committed the crimes where these statements were made under circumstances showing their trustworthiness and reliability, and (2) DNA evidence supporting the defense theory that intruders committed the murders occurred. Furthermore, contrary to the government's lengthy argument, this new evidence, taken in light of the "evidence as a whole," the vast majority of which was also not heard by

the jury,[1] shows no reasonable factfinder would have found MacDonald guilty because this evidence creates more than a reasonable doubt. As MacDonald argued at the close of the evidentiary hearing, this Court must avoid being swept by the tide of public fascination surrounding this case. Instead, it must evaluate this new evidence as if this case were a routine or ordinary murder case. Viewed dispassionately, the new evidence, coupled with the evidence developed since the trial in 1979, shows abundant "reasonable doubt," which means no reasonable juror, following her oath and the jury instructions, would have voted to convict. Accordingly, the motion to vacate must be granted.

I. Introduction: The Newly Discovered Evidence Warrants Relief

As defendant made clear in his Substitute Post-Hearing Memorandum [DE 343] [hereafter Defense Memorandum], the evidence presented in this motion to vacate, especially the testimony of Jerry Leonard and Gene Stoeckley, as well as the statements of deceased USDM Jimmy Britt and the testimony of his former wife, Mary Britt, and the favorable DNA evidence, provokes more than the "strong uneasiness" the late Judge Francis Murnaghan described when he lamented the exclusion of the six witnesses who would have given "the Stoeckley related testimony" at MacDonald's trial in 1979. *United States v. MacDonald*, 688

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[1]This Court should not be confused by descriptions of various items of evidence as "newly discovered." For the purpose of this motion to vacate, the newly discovered evidence includes Helena Stoeckley's statements to Jerry Leonard, to her mother, and to Jimmy Britt, and the DNA evidence showing three unsourced hairs in the MacDonald house. For the purpose of assessing the "evidence as a whole," any evidence not available at the of trial is also "new evidence," that is, evidence the twelve jurors did not hear yet is encompassed within the ambit of the "evidence as a whole."

F.2d 224, 234 (4th Cir. 1982) (Murnaghan, J., concurring). Indeed, the importance of Helena Stoeckley's statements to her attorney and to her mother can hardly be overstated.

When the Fourth Circuit heard the first appeal in this matter, it observed, "Had Stoeckley testified as it was reasonable to suspect she might have testified [and admitted being present during and participating in the crimes], the injury to the government's case would have been incalculably great." *United States v. MacDonald*, 632 F.2d 258, 264 (4th Cir. 1980). The new evidence from Jerry Leonard, Gene Stoeckley, and Jimmy Britt shows she would have so testified. Moreover, every court that has evaluated MacDonald's various post-trial challenges to his convictions did not have her statements to her attorney and to her mother.[2] *See, e.g. United States v. MacDonald*, 161 F.3d 4 (4th Cir. 1998) (alleging fraud on the court); *United States v. MacDonald*, 779 F.2d 962 (4th Cir. 1985) (alleging new hearsay statements and failure to recuse); *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982) (alleging various trial-related errors); *United States v. MacDonald*, 640 F. Supp. 286 (E.D.N.C. 1985) (alleging various constitutional violations and hearsay evidence of confessions by others). Had these courts had this newly discovered evidence then, the results would have been different. MacDonald now has her inculpatory admissions made under

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[2]The government repeatedly urges this Court to reject evidence and information presented in many of these prior proceedings, relying on the earlier court decisions. [Government Memorandum at 147-62] This Court should not be so easily dissuaded from evaluating the current claims based on previously considered evidence and information. First, all of the prior materials are part of the "evidence as a whole." Second, these previous rejections of claims based on this evidence and information were done without knowledge of the statements Stoeckley made to her lawyer in 1979 and to her mother in 1982, both under circumstances indicating trustworthiness. To deny MacDonald's present claims based on earlier judicial rulings would be seriously misguided.

circumstances indicating their inherent trustworthiness.

Nowhere in its memorandum does the government dispute on any sound basis the essential thesis of this motion to vacate: had Helena Stoeckley testified at the 1979 trial in a manner consistent with the statements she made to her attorney (under the protection of confidentiality) and to her mother (when Helena knew she was dying),[3] MacDonald would have been acquitted because no rational juror would have voted to convict him. This new evidence was the missing link, and, indeed, the pivotal link, in the defense theory that intruders killed MacDonald's wife and children.

Both Stoeckley's statements that she was in the MacDonald house and saw the murders and the compelling evidence of three unsourced hairs (constituting positive evidence of intruders, coupled with other circumstantial evidence such as numerous unsourced fingerprints and candle wax, unmatched black and pink fibers, and blonde wig hairs in a hairbrush near the telephone), show by clear and convincing evidence that no reasonable juror would have found Jeffrey MacDonald guilty if she had heard this new evidence. The

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[3]The government mistakenly asserts MacDonald premised the trustworthiness of Stoeckley's statement to her mother because on it being a dying declaration. [Government Memorandum at 133 n.68] *See* Fed. R. Evid. 804(b)(2). On the contrary, MacDonald noted this statement did not fall within the "precise contours" of a dying declaration under Rule 804(b)(2). (HTp. 1273) Likewise, it would not necessarily constitute a statement against interest. *See* Fed. R. Evid. 804(b)(3). MacDonald's point is the statement to her mother, coming when Stoeckley knew she was dying, was imbued with an aura of reliability and trustworthiness because she was confiding in her mother to resolve the lingering question of her involvement in the MacDonald murders when she knew she was dying. Making the statement under these conditions suggested its trustworthiness and reliability. Just because the statement does not fit precisely under the requirements for a dying declaration does not remove the circumstantial guarantees of trustworthiness surrounding it.

new evidence, particularly the testimony from Jerry Leonard as to what Stoeckley told him under the promise of confidentiality, which prompted him to advise her to invoke her constitutional right against self-incrimination if either party recalled her as a witness, is compelling evidence of a reasonable doubt.

Leonard did not disclose it until this Court directed him to do so, observing "innocence trumps other aspects of the privilege." (HTp. 1238) What Stoeckley told Leonard in 1979, while the MacDonald trial was in progress, also has the imprimatur of trustworthiness. She disclosed the information to him without his prodding. She was afraid of incriminating herself. Even the government's own witnesses characterized it as the "holy grail" for the defense. (HTp. 987) Undoubtedly, the jury would have acquitted if it had heard those three words --"I was there" -- along with the circumstantial evidence of intruders that was existing at trial, even before that circumstantial evidence was augmented by other exculpatory evidence amassed in the intervening years, all of which is within the ambit of the "evidence as a whole."

Stoeckley's statements have been additionally augmented by the evidence of three unsourced hairs, which could not be matched to anyone in the MacDonald family, to Stoeckley, or to Greg Mitchell. The most important is a hair found in scrapings from Kristen MacDonald. She had exhibited what could be described as a defensive wound. (Tp. 2577) That an unsourced hair was found on her, whether forcibly removed or naturally shed, is powerful, circumstantial evidence of intruders.

In further reply to the Government's Memorandum, this brief covers several points. First, the legal standard governing this motion leads to the conclusion that the new evidence warrants relief. Second, Helena Stoeckley's statements made to Jerry Leonard, her mother, and Jimmy Britt are reliable and compelling. Third, these statements by Stoeckley are corroborated by other evidence, including her statements to various people (not the least of which are the Stoeckley witnesses who were not allowed to testify at MacDonald's trial), various observations by other people indicating Stoeckley's involvement in the crimes, the confessions of Greg Mitchell, and the physical evidence supporting a theory that intruders committed these crimes. Fourth, the threat by Jim Blackburn against Stoeckley is poignant and demonstrated by the only credible evidence offered about it. Fifth, significant supporting evidence in MacDonald's favor has emerged over the past four and a half decades,[4] some of which was not disclosed to the defense before trial.[5] In summary, the newly discovered evidence, viewed in light of the evidence as a whole, shows, by a preponderance of the evidence, that no rational juror would have voted to convict MacDonald had this evidence been presented.

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[4]Rather than repeat the myriad information in these copious, prior filings over the years, MacDonald incorporates them by reference. All of the materials are part of the evidence as a whole and are contained in the court files, including the motions to vacate, motions for a new trial, and other post-conviction files, along with their attachments and appendices. Most of them are contained in the exhibits proffered at the evidentiary hearing. If the Court desires additional copies of these documents, they will be provided.

[5]*See* Brian M. Murtaugh & Michael P. Malone, "'Fatal vision Revisited: The MacDonald Murder Case," The Police Chief 15, 22-23, 64 (June 1993). [DE 126-6]

II. Applying the Governing Legal Standards Principles Shows Relief is Warranted.

MacDonald has set forth the appropriate legal framework for this issue. [Defense Memorandum at 7-14] The government virtually ignores this analytical paradigm. [Government Memorandum at 180-95] In doing so, the government continues its plea that the new evidence of Helena Stoeckley's admissions to her attorney and to her mother must rise or fall on the credibility of Jimmy Britt. [Government Memorandum at 182-87] This Court should reject the government's position.

The government presumably takes this position because the courts and parties used the shorthand reference of "the Britt claim" in the past. *See, e.g., United States v. MacDonald*, 641 F.3d at 596, 598 (4th Cir. 2011). But this label was adopted before Jerry Leonard revealed what Stoeckley told him while he represented her during the MacDonald trial. The important determination is what Stoeckley would have said if she had been called as a witness, free of any fear of subjecting herself to criminal liability in these homicides. The most believable statements she made were to her attorney under the cloak of confidentiality assured by the attorney-client privilege, which were later corroborated by her identical statement to her mother when Stoeckley knew she was dying.

This new evidence must be evaluated under the appropriate legal standards. For that reason, MacDonald devoted significant attention to this legal framework in his post-hearing memorandum. Yet the government chides MacDonald for "cit[ing] at great length authorities which point out the differences between" 28 U.S.C. § 2255(h)(1) and 28 U.S.C. §

2244(b)(2)(B)(ii) and argues "the Fourth Circuit has already addressed this issue as it pertains to MacDonald's case." [Government Memorandum at 190] *See MacDonald*, 641 F.3d at 614. In doing so, the government completely ignores both the plain language of section 2255(h)(1) compared to section 2244(b)(2)(B)(ii) and the intervening authorities interpreting them. *See Case v. Hatch*, 708 F.3d 1152 (10th Cir. 2013); *see also Ferranti v. United States*, 480 Fed.Appx. 634, 637 (2nd Cir. 2012) (finding district court "mistakenly applied" section 2244(b)(2)(B)(ii) to a movant under section 2255 and erroneously imposed on him "the additional requirement, not applicable to successive petitioners under § 2255, of demonstrating that the exclusion of exculpatory evidence from his trial was the result of constitutional error"); 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure, § 41.7[d] at 2186-87 (6th ed. 2011). Both the plain language of the statute and the current authorities interpreting it support MacDonald's analysis. The government likely avoids these authorities because they enunciate a standard less favorable to the government's position.

In its effort, the government relies on dicta in the Fourth Circuit opinion. [Government Memorandum at 180, 190] *See MacDonald*, 641 F.3d at 614. When this matter was before the Fourth Circuit, the issue was whether this Court erred "by taking an overly restrictive view of what constitutes the 'evidence as a whole.'" *Id.* at 599, 610. The issue was not the proper interpretation of section 2255(h)(1) or section 2244(b)(2)(B)(ii). Rather, the issue before the Fourth Circuit involved the contours of the "evidence as a whole." Indeed, the

Fourth Circuit did not explicate the importance in the distinctions between sections 2255(h)(1) and 2244(b)(2)(B)(ii). *Id.* at 610; *see Case*, 708 F.3d at 1171 (suggesting Fourth Circuit "glosse[d] over critical linguistic distinctions" between these provisions). Thus, this Court must engage in that analysis.

In his post-hearing memorandum, MacDonald noted important distinctions between sections 2255(h)(1) and 2244(b)(2)(B)(ii). [Defense Memorandum at 7-14] Most important, section 2255 does not require MacDonald to demonstrate any constitutional error played a role in producing the conviction. Hertz & Liebman, § 41.7[d] at 2186-87 & nn.31-34 (section 2255 contains no language like "but for constitutional error"). This language means MacDonald need not link his newly discovered evidence to any constitutional violation at his trial and need not show any constitutional violation at his trial to succeed on the motion to vacate.[6]

In addition, section 2255(h)(1) refers to 'newly discovered evidence,' whereas subparagraph (B)(ii) refers to 'the facts underlying the claim.'" *Case*, 708 F.3d at 1171. Thus, the "newly discovered evidence" becomes the focal point of the motion to vacate. The

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[6]As noted in his memorandum, although he need not show a constitutional violation, MacDonald has done so. A preponderance of the credible evidence demonstrates James L. Blackburn, (1) heard Stoeckley admit she was in the MacDonald house and (2) said he would indict her for murder if she testified she was in the MacDonald house. [Defense Memorandum at 9 n.6] Furthermore, the government failed to disclose significant exculpatory or favorable evidence to MacDonald before his trial. *See* Harvey Silvergate, "Reflections on the Jeffrey MacDonald Case," The Champion 52 (May 2013) (specifically noting post-trial discovery of memorandum to trial prosecutors in this case providing a methodology for not disclosing favorable evidence to the defense). [Attached as Defense Exhibit 5114]

plain language of section 2255(h)(1), it permits "newly discovered evidence" to "establish" a movant's innocence, i.e. showing by clear and convincing evidence, in light of the evidence as a whole, "that no reasonable factfinder would have found [him] guilty of the offense," but it "omits any requirement that the new evidence be rooted in constitutional error at trial." *Id.* at 1172.

The government observes the two-step inquiry of a gatekeeping analysis of the newly discovered evidence in the context of the evidence as a whole followed by an evaluation of whether the new evidence would have caused no reasonable juror to vote for a conviction. In doing so, it asks this Court to make the identical determination it made before the Fourth Circuit reversed and remanded. [Government Memorandum at 181-91] But this argument is unavailing. As shown below, MacDonald has now provided compelling new evidence that was not before the Court previously. This compelling new evidence, in light of the evidence as a whole, shows no reasonable juror would have convicted him. Both Stoeckley's statement to her lawyer and to her mother, as well as to Jimmy Britt, and the new DNA evidence showing the presence of intruders shows he would have been acquitted. The government's argument in many ways proceeds as if the September 2013 hearing never happened. MacDonald certainly survives the gatekeeping analysis on both claims.

The question then becomes whether the new evidence would have led to an acquittal. The Court need look no farther than the prosecutor's closing argument at trial for the answer. "[I]t doesn't make any difference if there were 5,000 hippies outside [the MacDonald house]

at 4:00 in the morning . . . because they have not shown that those hippies were inside the house." (Tp. 7114) "It doesn't matter what was going on outside unless they can also tie it to the inside." (Tp. 7114) Aside from the fact that MacDonald never describes the intruders as "hippies," the government's theory at trial was there were no intruders. The new evidence debunks it.

As this Court tacitly acknowledged, the two steps are intertwined and conflated. The determinations are similar if not identical Thus, this Court's gatekeeping determination and its assessment of the merits are virtually identical. *See generally Strickler v. Greene*, 527 U.S. 263, 289-96 (1999) (substantive merits of underlying constitutional claim examined and resolved in context of determining whether constitutional violation established "cause and prejudice" sufficient to overcome procedural default in state-court proceedings). In light of both the reliable and persuasive evidence presented at the evidentiary hearing, especially the revelations of Jerry Leonard and Gene Stoeckley about Helena Stoeckley's unequivocal statements in 1979 and in 1982 that she was in the MacDonald house with three men who committed the crimes,[7] along with DNA evidence substantiating the presence of intruders when the murders occurred, taken in the context of "the evidence as a whole," MacDonald has carried his burden.

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[7]The government continues its plea for this Court to determine the issue based on the credibility of Jimmy Britt. [Government Memorandum at 183-86 & nn120, 123] This position is simply indefensible.

III. Newly Discovered Evidence of Helena Stoeckley's Trustworthy and Reliable Admissions to Her Attorney and Her Mother.

A. Stoeckley's Admission to Jerry Leonard

The key piece of new evidence came from Jerry Leonard. During the MacDonald trial in 1979, he accepted an appointment to represent Stoeckley, who was a material witness. (HTpp. 1108-09) His responsibility was to have Stoeckley at the courthouse court every day. (HTp. 1109) It was a "very unusual" assignment, one a lawyer would not likely forget (HTp. 1117)

At the courthouse, they had a room to themselves. He explained his role to her. He asked her questions. He asked her about her involvement in the crimes at the MacDonald house. He explained their discussions were confidential. (HTp. 1111) He asked what her testimony would be if anyone called her as a witness.[8] Stoeckley told him she did not remember anything about the early morning hours when the crimes occurred at the MacDonald house. (HTpp. 1112-13) Leonard said it seemed odd she could recall the day but not have any recollection of it. But "that was it" as far as Leonard was concerned. (HTp. 1113) [Defense Exhibit 5113]

As explained in Defendant's Memorandum, sometime on Monday afternoon,

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[8]The government takes Leonard to task for not knowing she had testified or ordering a transcript of her testimony. [Government Memorandum at 56-63] But he would have had no reason to know she had testified, as he had not been involved in the trial at that point. His sole focus was looking out for her interests as a potential witness. It is completely reasonable for him not to have considered if she had testified. His failure to make any inquiry about it does not negate his credibility as a witness or impugn his memory of what she told him.

Stoeckley asked him what he would do if she actually had been at the MacDonald house. She came back to him. She initiated further discussion. Unprompted she asked, "What about if I was there? What if it's a little worse that I told you earlier today when I said I couldn't remember?" and his response to her was he could help her; he was still her lawyer. But he insisted she tell him the truth. He made sure she clearly understood what she told him was "just between me and her," and he made sure she knew it was confidential. [Defense Exhibit 5113] He told her should not to talk about the case to anyone except him.

It was a dramatic change from Monday morning to Monday afternoon with regard to what Helena Stoeckley told her lawyer under the ambit of the attorney-client privilege.[9] The government ignores this development, which points to the reliability of Stoeckley's statement and the validity of Leonard's memory about it. She admitted she was there. She talked about being part of a cult that went to rough up MacDonald because they were upset about how handling drug treatment. But things got out of hand and people were killed.

The other important aspect of her statement to Leonard was the phone rang. She answered it, and one of her compatriots told her to hang up. Later information developed, about which Leonard would have no knowledge, regarding a telephone call to the MacDonald residence in the middle of the night. [Defense Exhibit 5021; DE 126-2] The declaration of Jimmy Frier, obtained in 1983, confirmed this critical aspect of Stoeckley's

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[9]The government faults Leonard for not coming forward sooner. [Government Memorandum at 62, 188-89] But he was obliged to remain silent by the attorney-client privilege until it was lifted by this Court.

statement to Leonard.[10] [Defense Exhibit 5021] It is powerful corroboration. The best the government can do is speculate that Leonard must have heard about Frier's affidavit. But this speculation is without any evidentiary basis in evidence.

This evidence from Jerry Leonard is a contemporaneous admission under the protection of the attorney-client privilege that includes a telephone call was made. MacDonald has presented corroborating evidence of the phone call. Again, Stoeckley initiated this statement with Leonard. He did not drag it out of her. She did so only after he assured her he would not tell anyone. Once Stoeckley told him she was involved in the incident at the MacDonald house, he told her to assert her Fifth Amendment privilege against self-incrimination if she was called to testify. (HTp. 1202) Leonard wrote instructions on a card so that she would have it. She was not called by either side to testify. The government does not dispute the legitimacy of this legal advice.

The government suggests Leonard has a faulty memory. [Government Memorandum at 188] That is true of many people, including many government witnesses in this case. But Leonard was certain about Stoeckley's inculpatory statements. "I remember specific things that are really relevant to what I've got to do." (HTp. 1187) As he said, "The bottom line . . . it was not in her best interests to get on the witness stand and say, well, I was there . . . or even to take the witness stand." According to Leonard, "I did not want her to testify,"

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[10]Frier called a number he had been given for MacDonald. A woman answered the phone, laughing. Someone in the background yelled for her to hang up the phone. And the phone was disconnected at that time. [Defense Exhibit 5021]

primarily because telling the truth would incriminate her in the murders. Again, her answers to his questions changed in the afternoon. "It changed from not remembering to telling me that she was there." (HTp. 1186) [Defense Exhibit 5113]

Jerry Leonard believed in the importance of the attorney-client privilege and insisted on this Court removing the privilege before he testified. His testimony before this Court was straightforward. He did not dodge issues. He did not appear to relish testifying. He did not seek the limelight. Importantly, the government has offered no reason whatsoever for him to come forward at the hearing and testify falsely. He candidly admitted when he could not recall certain events. But he was clear about what Stoeckley told him. Under the circumstances, it was something a lawyer in his shoes would never forget. This Court should give it full credit and weight.

B. Stoeckley's Admission to Her Mother

MacDonald set out the compelling facts about the affidavit from Helena Stoeckley, Sr. [Defense Memorandum at 28-31, 33-34] In response to the government's argument that this affidavit should not be deemed reliable, Gene Stoeckley should be viewed as a man of total credibility. He testified before this Court with no stake in the outcome. He appeared to dislike testifying. But he did what the judicial system expects of citizens: he took the witness stand and, from all appearances, endeavored to tell the truth, without pretense. He exhibited a strong emotional attachment to his mother. He was devoted to her. He did not present himself a son who would allow anybody to put words in his mother's mouth. He

would not have allowed anyone to persuade, cajole, or coerce her into making and signing a statement that was anything other than precisely what she wanted to say.[11]

It was entirely reasonable Gene Stoeckley would have this discussion with his mother during her days at the assisted living center when they would talk about important things, such as family holidays, vacations, and other significant events about which people talk to and share with their loved. It made sense he would talk with her about the MacDonald saga because it had such an impact on their family generally and him specificaslly. He explained what it had done to their family. His parents had to change their phone numbers from time to time. He was ridiculed, bullied, and teased at school because of his sister's alleged involvement in the murders. But, as he noted at the end of his testimony, he was testifying to tell the truth, which was what his parents taught him. As he aptly noted, what would be the point of courtrooms and hearings if people did not come in and tell the truth.

The government asks this Court to reject Helena Stoeckley Sr.'s affidavit because of her health and a somewhat contrary later statement to an FBI agent. [Government Memorandum at 188 n.122] But this request flies in the face of all the evidence. Gene Stoeckley explained how his mother felt free to discuss it with him at the assisted living center. She told him Helena came home in October 1982, bringing her young son who was

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[11]The government implies Gene Stoeckley and Kathryn MacDonald caused the elder Helena Stoeckley to sign an affidavit with which she did not agree. [Government Memorandum at 28-29, 36] But this suggestion has no basis in the record and is belied by Gene Stoeckley's sincere testimony and the testimony of other witnesses who saw her sign the affidavit.

only five or six months old to see the family. She knew she was dying.[12]

It was not surprising Gene Stoeckley's mother would not tell anybody about that conversation. It was not discussed in their family. Only after her husband died did she have these discussions with her son.

After thinking about it, and confirming his mother wanted to say something to somebody, Gene Stoeckley contacted Kathryn MacDonald; Kathryn MacDonald did not contact him. He came forward. He initiated the contact that led to the affidavit. The government rebuked him for not going to law enforcement. But the government offers no reason why his decision to seek out Kathryn MacDonald discredits what his mother said in her affidavit.

He set ground rules before anybody talked to his mother. He was protective of his mother. He explained the process of how the affidavit came about. The government does not dispute it. The government hints his brother, Clarence, did not want his mother to talk about the matter. [Government Memorandum at 28] Gene Stoeckley freely acknowledged this fact. But the government makes no explanation of how Clarence's reticence shows the affidavit is unreliable. On the contrary, it would make her affidavit even more trustworthy.

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[12]Sara McMann confirmed how sick Helena, Jr. was; she knew she was dying in the fall of 1982. She had chronic hepatitis. That was when she confided in her mother. She asked Sara McMann to take care of her son when she died. Her son was only five or six months old at that time. Stoeckley would only make such a request if she knew death was coming soon. This condition surrounding her statement to McMann has a strong indicia of reliability. As she did with her mother, Stoeckley also she told Sara McMann she was in the McDonald house when the murders occurred.

Gene Stoeckley talked to his mother. Kathryn MacDonald then met her. They talked about what his mother had said and made arrangements for Hart Miles, who was representing MacDonald at the time, to come. He later arrived with his paralegal, Laura Redd, a notary.

Gene Stoeckley described the process of how they came about to do the affidavit. His mother was lucid, coherent; she knew exactly what she was doing. Gene read the draft affidavit to her word-for-word, line-for-line, paragraph-for-paragraph. They edited the affidavit the way his mother wanted it. Only then was it signed and notarized.

Gene Stoeckley identified the affidavit. [Defense Exhibit 5051] His signature was on the last page. The first signature on the last page was his mother's signature. He saw her sign it. (HTp. 297) Before she signed it, he read the affidavit to her carefully, word for word. (HTp. 297) She would not have signed it if she had not been comfortable with the entire affidavit. (HTp. 297)

As noted above, Laura Redd worked as a paralegal for Hart Miles in March 2007.[13] (HTp. 401) She testified about receiving a telephone call from Miles on a Saturday indicating she would need to go to Fayetteville with him to help obtain an affidavit in the MacDonald investigation. (HTp. 401) When they arrived at an assisted living center, Redd met Gene Stoeckley, Helena Stoeckley, Sr., and Kathryn MacDonald. (HTp. 401)

Redd described Stoeckley, Sr. as "very sharp" and intelligent. She was very "very witty." Redd said she was mentally alert. (HTp. 401) Stoeckley, Sr. was clearheaded at the

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[13]The government has offered no reason to doubt Redd's testimony. [Government Memorandum 36, 63, 133-34]

time. (HTp. 409)

Redd recounted the process in which the affidavit from Stoeckley, Sr. was obtained. She did the primary typing of the affidavit. Kathryn MacDonald helped. After a draft was prepared, Stoeckley, Sr. made changes to it, which Redd made on the computer. Stoeckley, Sr. was very funny. Indeed, she asked her son how many times she was going to have to tell him what she wanted in the affidavit, as she felt she was continuing to repeat herself. (HTp. 407) Redd heard Gene Stoeckley "read the whole thing" to his mother. (HTp. 406) The process of developing the affidavit was "a joint effort." (HTp. 403)

Redd explained Miles made sure Stoeckley, Sr. was not forced to sign the affidavit. He was very careful about how he handled the situation. (HTp. 407) No one forced Stoeckley, Sr. to say any of the information that was contained in the affidavit or to sign the affidavit herself. (HTp. 409)

Redd recalled having problems with the laptop on which they were working. It was not printing on the computer equipment at the assisted living center. Eventually, there were two documents created: the body of the affidavit and the signature page. Redd described the difficulties with the computer equipment as "a big hassle." (HTp. 404).

Redd examined the affidavit signed by Stoeckley, Sr. [Defense Exhibit 5051] This exhibit was the affidavit Redd helped draft and notarized. Redd testified she saw Stoeckley, Sr. sign the affidavit. Redd was certain she saw all of the people place their signatures on the last page of the affidavit. (HTpp. 408-09) Redd was absolutely certain and unequivocal

the words in the affidavit were those of Stoeckley, Sr. Otherwise, she would not have notarized the document.

The affidavit may appear irregular. But the eyewitness testimony, which has not been impeached in any way, shows it is accurate. Miles has confirmed the preparation and signing of the document. [Defense Exhibit 5115, Affidavit of Hart Miles] In this affidavit, Miles corroborates both Gene Stoeckley and Laura Redd, especially regarding Stoeckley, Sr.s agreement with the content of the document, the voluntariness of the affidavit, and her mental awareness at the time. [Defense Exhibit 5115]

Helena Stoeckley, Sr.'s affidavit is important, new evidence. It provides a statement from her daughter under circumstances showing reliability and trustworthiness. It is corroborated by the testimony of Sara McMann (HTpp.420-26) The overwhelming, credible evidence shows the affidavit was made voluntarily and with the affiant's full awareness and understanding. This Court should credit it.

IV. Newly Discovered Evidence from Jimmy Britt.

The motion to vacate was initially based on the disclosure by Jimmy B. Britt, a Deputy United States Marshal who had custody of Helena Stoeckley during the trial. Britt's sworn statement explained why Stoeckley testified as she did during the trial. It explained why Stoeckley testified at trial that she could remember nothing about the four-hour period during which the murders occurred, rather than acknowledging her presence and involvement as she did to her attorney and her mother.

A. Britt Hears Stoeckley Admit She Was In MacDonald's House

Britt came forward in 2005 to Wade Smith.[14] He had worked at the Raleigh courthouse during the MacDonald trial. He was responsible for escorting Stoeckley, who was in custody on a material witness warrant. In his affidavit, Britt set out how Stoeckley made admissions to him, after he took custody of her, that she was present in MacDonald's home on the night of the murders. [Defense Exhibit 5059 at ¶15]

Britt's affidavits and his statements about the situation are, in the main, consistent on the key points. He went to South Carolina to assume custody of Helena Stoeckley. That is consistent in all of his affidavits and statements. While there are inconsistencies, the basic thrust of these statements--that Stoeckley told Britt she was in the MacDonald house and described it "to a T"--are fully corroborated by reliable and believable evidence.

It does not matter if Britt said he went to Charleston or Greenville. The important point is he went to South Carolina to pick up a witness. This statement is compellingly demonstrated by his statement to Mary Britt in 1979. She remembered during MacDonald

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[14]Smith has provided an affidavit in light of several statements made after he testified. [Defense Exhibit 5116, Affidavit of Wade M. Smith] In this affidavit, Smith clarifies that he believed Britt came to him with genuine concerns. He does not believe Britt would have used him to perpetrate a fraud on this Court. He considered Britt to be serious and reliable. Smith did everything he could to verify what Britt told him. He also explained how he advised Blackburn about the contact with Britt and his desire to continue representing MacDonald. Blackburn initially consented. But he changed his mind when he read the proposed motion to vacate. At that point, Smith decide there was a conflict of interest, meaning he could not continue representing MacDonald consistent with the ethics rules governing lawyers. But his withdrawal had nothing to do with Blackburn suggesting Smith has been untruthful in his remarks to the court during the MacDonald trial. In a credibility dispute between Smith and Blackburn, it is difficult to fathom favoring Blackburn.

trial that Jim Britt went to South Carolina to get a witness, and the witness was Helena Stoeckley.

The government offered evidence about Dennis and Janice Meehan handling the transport of Stoeckley to Raleigh. But not a single item of evidence supported it. They claimed they used an official, government vehicle. But there are no records supporting their account of this event. All the Court has is the Meehan account versus the Britt account. Indeed, Government Exhibit 2003 indicates Stoeckley was transported "directly" from Pickens County jail to Raleigh. This document reveals a direct transport, not a two-stage transport from Greenville to Charlotte and then from Charlotte to Raleigh. The Meehans described a two-stage transport, not a direct transport. Vernoy Kennedy said he took Stoeckley South Carolina to Charlotte.[15] The Meehans said they went to Charlotte, pick up Stoeckley, and took her to Raleigh.[16] That is not a direct transport. The only person who described a direct transport was Britt. The only document in evidence supports what he said.

Also, Mary Britt recalled Jimmy Britt going to South Carolina to pick up a witness. The government hypothesized, based on nothing but the sheerest of speculation, that Britt

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[15]Curiously, Kennedy did not recall this incident. He only gave a sworn statement about it after the prosecutors told him what had happened. [DE 152-13, Exhibit 12, Sworn Statement of Vernoy Kennedy at 6]

[16]The Meehans also testified they saw themselves on television after bringing Stoeckley to the local jail. The only photographic evidence of Stoeckley with a marshal involved Britt. [Defense Exhibit 5060]

concocted this trip in 2005.[17] For that to be true, he would need to have divined the plan in 1979 so he could disclose it twenty-six years later in 2005. He would have no other reason to tell Mary Britt in 1979 he was going to South Carolina to pick up Helena Stoeckley–unless it was true.

Mary Britt's testimony is critical to this notion of what Jimmy Britt did. She had no motive to testify for MacDonald. She had no reason to give false or misleading testimony. The government has offered no such motive. She testified directly and forthrightly. She made no effort to shade her answers on direct or cross-examination, which is a watermark of a credible witness. And she gave this testimony even in the face of cross-examination about the circumstances of her divorce and claims of adultery, which were very emotional for her. It more than enhances her credibility, as she would have no reason to verify something Jimmy Britt told her. Surely, she had no idea she might be testifying about it 33 years later. This credible, poignant, and powerful testimony from Mary Britt showed Britt transported Stoeckley in 1979.

She also remembered that when he came back from making the transport he was excited because what Helena Stoeckley had said to him indicated she was in the house. When she testified, she said he said she described the MacDonald house "to a T."

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[17]The government introduced evidence that Britt asked about Gerry Holden shortly before he went to see Smith and learned she was ill. But there is no confirmed basis for his trying to contact her. If he was planning to contact Smith, he may well have been trying to speak with Holden to inform her of his intention. To speculate as to the reason he sought her in 2004 or 2005 is baseless.

B. Britt Hears Blackburn Threaten Stoeckley

Equally, if not more important, given the evidence of Stoeckley's admissions to her attorney and her mother, Britt was present when the government lawyers interviewed Stoeckley the day before she was to testify as a defense witness in the trial. As reflected in his sworn affidavit, Britt said Stoeckley told Blackburn she was present in the MacDonald home on the night of the murders. [Defense Exhibit 5059 at ¶ 20-23] Blackburn responded to this admission by telling her he would indict her for murder if she testified that way. [Defense Exhibits 5056, 5058. 5059] Not surprisingly, then, Stoeckley testified she could remember nothing about the four-hour period during which the murders occurred. Blackburn did nothing to correct this testimony. Because of this testimony, the trial court excluded the testimony of six witnesses who were prepared to testify Stoeckley told them she had been present in the MacDonald house during the murders. This testimony was directly contrary to what Britt specifically heard Stoeckley tell Blackburn.

The government's evidence to the contrary came from two people: Jim Blackburn and Jack Crawley. Blackburn is markedly lacking in credibility. He forged judge's signatures on orders that were fictitious. He falsified court documents and files to show his clients. He embezzled. He stole money. He made promises he did not keep and never intended to keep. These are all indicia of a lack of credibility. His testimony also rang of self-promotion, unlike the testimony of people like Mary Britt and Gene Stoeckley.

With respect to Crawley, his testimony seemed sad. All Crawley could remember

about the interview of Stoeckley was he did not hear anyone threaten her. He did not remember who went for a sandwich for her, if anybody did. He did not remember who took notes. Most importantly, he could not recall for certain if Jim Britt was not in the room. In fact, he said Britt might have been in the room (HTpp.737-38)

The threat is important because it would be a reason Helena Stoeckley would not have said she as in the MacDonald home room to anybody except her lawyer, who promised not to tell anybody what she said.

Blackburn's threat is corroborated further by the polygraph of Britt. [Defense Exhibit 5057] During this polygraph Britt was asked, "Did you hear Helena Stoeckley tell Jim Blackburn she had seen a broken hobby horse while she was inside the MacDonald house?" His answer was yes. "Did you hear Jim Blackburn tell Helena Stoeckley he would have her indicted for murder if she testified she had been inside the MacDonald house?" His answer was yes. "Are you now lying about the conversation between Jim Blackburn and Helena Stoeckley?" His answer was no.

Steve Davenport, who was an experienced polygrapher and worked for the SBI for 20 years as their chief polygrapher. He concluded Britt's physiological reactions when he answered these questions showed no deception. There are affidavits and a polygraph of Britt. There is no affidavit or polygraph of Blackburn. There is no affidavit or polygraph of Crawley.

Mary Britt also testified about seeing the movie version of "Fatal Vision" on

television. (HTpp. 226-27) At that point, she and Jimmy Britt had separated. Sometime after she saw the movie, he came by the house. As he was leaving, she thought about having seen the movie and asked him if he had seen it. According to Mary Britt, he said, "It's not accurate. They had me standing in the hall. I was in the room, I heard every word that was said." (HTp. 227)

Her testimony is important corroboration of the threat. She would have no reason to believe in 1984 or 1985, when she saw the movie and then saw Jimmy Britt at her house later and asked him about it, to believe she would be called to court in 2012 to testify about it. But she had the clear recollection of the encounter and his response, "It's not accurate, I was in the room." It is powerful evidence of what Jimmy Britt said, both that he made the transport to South Carolina and that he was in the room and heard the threat made to Helena Stoeckley. The threat is important because it is evidence of prosecutorial misconduct and explains why Helena Stoeckley would have said the next day on the stand she did not remember the night of the murders.

Further corroboration of Blackburn's threat came from Wendy P. Rouder, PhD. She testified about her recollections of some incidents during the MacDonald trial. (HTp. 344) At the time of the trial, she was a law clerk to MacDonald's lead counsel, Bernard Segal. (HTp. 345) One weekend during the trial, she received a call from Helena Stoeckley who was distraught about her situation. After consulting with Segal, Rouder went to the motel. She found Stoeckley had been beaten by her boyfriend, Ernie Davis. (HTpp. 346-347)

Stoeckley told Rouder she was okay but wanted her to stay for a while. Rouder forced Davis to leave and remained with Stoeckley. (HTpp. 347-48) Eventually, Rouder helped Stoeckley move to a different hotel.

While they were together, Stoeckley and Rouder discussed many things. Eventually, Stoeckley talked about things indicating she was involved in the murders at the MacDonald house. Rouder testified she asked Stoeckley why she would not testify about her being present at the MacDonald house when the murders occurred. Stoeckley told her, "I can't with those damn prosecutors sitting there." (HTpp. 350-51) Rouder testified that Stoeckley indicated the prosecutors would "burn" her or "fry" her. Stoeckley had "expressed in her vernacular" her fear of the prosecutors. (HTp. 358)

Once Rouder learned Britt witnessed a prosecutor threaten Stoeckley, "That was my eureka moment." (HTp. 357) Rouder had asked why Stoeckley was afraid. Stoeckley told her she was afraid of the prosecutors. During the trial in 1979, however, Rouder had no such association with that phrase. (HTp. 354)

Rouder identified an affidavit she had executed.[18] [Defense Exhibit 5080] She explained that she had learned of allegations from Jimmy Britt that the prosecutors had threatened Stoeckley with an indictment if she testified regarding her presence at the MacDonald house. (HTp. 354) Rouder considered this information "absolutely" significant.

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[18]The government cross-examined Rouder about Kathryn MacDonald having possibly drafted the affidavit. [HTpp. 365-70] This point is unimportant. Rouder was unequivocal she read the affidavit carefully before she signed it and reiterated its accuracy. Nothing before this Court suggests Rouder lacks credibility in any way.

According to Rouder, it rang a bell. At that point, many years after the trial, she finally understood why Stoeckley said she could not testify with the prosecutors sitting at the table in the courtroom. (HTp. 354)

This Court should accord great weight to this important, corroborating evidence. Unlike two prosecution witnesses with law degrees, Blackburn and Crawley, Rouder is a member in good standing of both the New York and California bars. Although the government suggests Rouder's affidavit is not trustworthy because it was drafted by someone else, they offer no evidence, and not even any credible speculation, that Rouder did not read the affidavit carefully and agree with it completely when she swore to it. Moreover, in her testimony, Rouder underscored her agreement with the affidavit.

At best, the prosecution suggests that because Rouder's testimony at the September evidentiary hearing was somewhat different from her voir dire testimony during the MacDonald trial, Rouder gave a wholly plausible and believable explanation. At the time of the trial in 1979, she had no knowledge of any possible threat by the prosecutors toward Stoeckley. Moreover, she did not even know the prosecutors had interviewed Stoeckley. There would have been no reason for her to describe Stoeckley's fear in any different way in 1979. It was only after she learned of Britt's statements that Jim Blackburn had threatened Stoeckley, which happened on Thursday or Friday before Rouder talked with Stoeckley over the weekend, why Stoeckley claiming he was afraid the prosecutors would "burn" or "fry" her.

There is positive evidence that the prosecutors threatened Stoeckley. She would have testified consistently with what she told her attorney and her mother. This new evidence supports MacDonald's motion to vacate.

V. Newly Discovered DNA Evidence Supports Defense Theory of Intruders

In many ways, the DNA issue is simple and straightforward. The parties stipulated to the DNA evidence. Analysts examined the specimens. The parties do not dispute what was examined; the parties do not dispute the tests were done correctly.

MacDonald filed a motion to reopen the proceedings, including a request for DNA testing. This Court transferred the request to the Fourth Circuit, treating it as a request for a authorization to proceed on a successor motion under 28 U.S.C. § 2255. The Fourth Circuit granted the request.

The DNA testing was subsequently done by the Armed Forces DNA Identification Laboratory (AFDIL). There were 28 specimens available for testing. These were compared to the known DNA samples of Jeffrey MacDonald, Colette MacDonald, Kimberly MacDonald, and Kristen MacDonald, as well as Helena Stoeckley and Greg Mitchell.

Three of the 28 could not be matched to any relevant person. They are identified by lab numbers that AFDIL assigned to them: 91A, 58A.1, 75A. Those are the three unsourced hairs at issue. Unsourced hairs means they did not belong to anyone in the MacDonald family.

The most important is Specimen 91A. Dr. George Gammel did the autopsy on Colette

MacDonald. He described the process of taking fingernails scrapings at an autopsy and a routine fingernail scraping. (Tp. 2533) He would take a fingernail file and scrape out any material. He thought on the left small finger there might have been a little fragment of skin. He collected it and put it in one of the vials.

Dr. William Hancock did the autopsy on the two children, Kimberly and Kristen. (Tp. 2562) He took fingernail scrapings. He gave those to the CID agents at the autopsy. Bennie Hawkins was one of the agents who attended the autopsy to collect, among other things, the fingernail scrapings. Hawkins picked up some items that had been collected from the bodies of the children. (Tp. 3042) These included fingernail scrapings, as well as hairs and fibers collected from the bodies. Hawkins collected the fingernail scrapings and received the vials with fingernail scrapings and other evidence from the autopsy. (Tpp. 3033, 3050) Hawkins says he marked the vials them with his initials: BJH.

The vials were sent to Janice Glisson, who received them on 27 July 1970. [DE 217, Exhibit 2] Glisson received 13 plastic vials containing fingernail scrapings, hair samples, fibers and vaginal smears taken from the victims marked on the bottom: BJH. She had the vials Hawkins took from the autopsy. She examined fingernail scrapings and anything included in those scrapings from the autopsy. She numbered the vials 1 through 13. Vial number 7 had the fingernail scrapings from the left hand of Kristen MacDonald. This vial contained one hair and two fragments. Glisson conducted a microscopic analysis of the contents of the vials and confirmed it contained fibers and one light brown hair. [DE 217,

Exhibit 2] It becomes hair number seven, which AFDIL numbered 91A. The hair in Specimen 91A did not match MacDonald, or Colette, Kimberly, or Kristen. It did not match Stoeckley or Mitchell. It is an unsourced hair.

Even naturally shed, this hair came from the fingernail scrapings of Kristen MacDonald. It is an unsourced hair. It is a hair that could have come from an intruder.

Dr. Hancock, also testified some of Kristen's wounds could be described as defensive wounds. (Tp. 2577) Thus, there are defensive-like wounds on Kristen MacDonald and a hair that does not match MacDonald or anyone in his family is in the fingernail scrapings taken from Kristen at the autopsy.[19]

Specimen 58A.1 was collected from Kristen's bedspread. It is also unsourced, meaning it did not come from anybody in the MacDonald family. Even if it is naturally shed, as opposed to forcibly removed, it could have been shed by an intruder while that intruder was attacking Kristen in her bedroom. It is positive, circumstantial evidence supporting a defense theory of intruders.

Finally, Specimen 75A is a hair found in the trunk leg areas of the body outline of Colette on the rug in the master bedroom. This hair is in the body outline, in the trunk and leg area of the outline. It is unsourced. It did not come from MacDonald Again, whether naturally shed or forcibly removed, it is a piece of evidence that an intruder could have shed

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[19]The government takes issue with whether MacDonald accurately describes this hair as coming from Kimberly's fingernail or hand. The distinction is unimportant. The significance of the evidence is it is an unsourced hair associated with Kimberly and is circumstantial evidence of intruders.

while attacking Colette MacDonald.

The newly discovered DNA evidence shows three unsourced hairs that could have come from intruders. It is additional evidence, beyond evidence presented at trial, and is circumstantial evidence of intruders. It is additional evidence supporting MacDonald's consistent account of intruders being the ones who perpetrated these crimes.

VI. Conclusion: No Reasonable Juror Would Convict in Light of All the Evidence, Particularly Helena Stoeckley's Credible Admissions to Her Lawyer and Her Mother.

There is a plethora of evidence pertinent to this Court's inquiry. Virtually all of it has been previously submitted in support of motions for a new trial and motions to vacate. Although the government urges this Court to reject any argument based on this evidence, largely on the basis of previous court rulings, this approach would be inappropriate. The earlier court determinations were under different legal standards and guidelines. In this motion, all of the pertinent evidence must be considered.[20] That is the meaning of the

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[20]At the hearing in September, Joe McGinnis testified about a number of issues, including a theory that MacDonald acted under a drug induced psychosis. The government trumpets this testimony, despite the revelation on cross-examination that McGinnis misstated the number of "diet pills" MacDonald allegedly consumed on the night in question. In doing so, the government attributed to McGinnis an opinion from Dr. Robert L. Sadoff that his psychological evaluation of McDonald would have been different if he had been aware of McGinnis' observations about MacDonald's ingestion of diet pills. [Government Memorandum at 56] McGinnis' attribution to Dr, Sadoff is grossly inaccurate. Dr. Sadoff never made this statement to McGinnis. "My opinion has not changed throughout all this time. My testimony has been consistent, and my opinion has always been that Dr. MacDonald did not have psychopathology that would have been consistent with the violent behavior that occurred ion the night his family was killed." [Defense Exhibit 5117, Affidavit of Robert L. Sadoff, M.D.] Aside from confirming MacDonald's lack of a violent psychopathology, Dr. Sadoff provides additional evidence of McGinnis' lack of credibility.

"evidence as a whole."

Some of this evidence includes multiple confessions by Greg Mitchell, many under circumstances showing reliability. MacDonald has proffered those statements in prior submissions and in the exhibits tendered at the hearing in September. Many, many statements from various people documents these confessions. The government has offered no plausible reason why all of these witnesses would sign false affidavits. There is an unusual coincidence, indeed a virtually improbable coincidence for so many people to have heard these confessions by Mitchell as well as Stoeckley. And now the Stoeckley admissions appear reliable based no the testimony of Jerry Leonard and the affidavit of Stoeckley's mother. Had the jury heard Stoeckley's admission from her, as well as Mitchell's admissions, it would undoubtedly have acquitted MacDonald.

Despite the government's contrary claim, there is significant evidence of a disturbed crime scene. The Article 32 hearing testimony[21] and trial testimony of Kenneth Mica,[22] one of the first agents at the house, showed various military police had already entered the house and failed to preserve the evidence. Collete's body was moved, even if only to a small extent. A wallet was taken from the house. A telephone handset was moved from its cradle.

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[21]The government argues the Rock Report, which documented the muddled crime scene and implicated Stoeckley in the crimes, cannot be read as a determination of innocence. Whatever the validity of that position, it is some positive evidence in MacDonald's favor, if for no other reason than indicating the questionable strength of the government's evidence.

[22]Likewise, this Court cannot ignore Mica stating he saw a woman fitting Steockley's description wearing a large floppy hat near the MacDonald house as he proceeded to the crime scene. [Defense Exhibit 5000]

A flower pot was set upright.

There is also evidence in the record of wig hairs,[23] fingerprints, unsourced candle wax, unsourced black and purple fibers, a pink fiber, and the like. All of this evidence must be considered. Critically, when prior courts rejected arguments premised on some of this evidence, they did so in the absence of the important new evidence here: Helena Stoeckley's trustworthy admissions to her attorney and to her mother and new DNA evidence of unsourced hairs at relevant points in the crime scene.

Likewise, this Court cannot lose sight of other favorable information, including the failure to preserve MacDonald's pajama bottoms that a trial witness described as "ripped out from about mid-thigh all the way across (Tp. 2661-62), evidence that MacDonald treated a number of patients with Type O blood at Hamlet Hospital on the afternoon of the killings [Defense Exhibit 5045], and of a syringe found in a halfway closet. [Defense Exhibit 5079]

The new evidence amassed since the trial, previously presented to this Court in voluminous filings in 1984, 1985, 1996, 1999, along with the evidence presented in this motion to vacate filed on 17 January 2006 as well as at the evidentiary hearing, and augmented by other compelling evidence, is remarkable. Because of the detail of this

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[23]The government also criticizes MacDonald's reliance on developments critical of Michael Malone. But the government relied on Malone in its defense of the analysis of blonde wig hairs found at the scene. Indeed, Brian Murtaugh, one of the prosecutors authored an article with Malone. As noted previously, this article acknowledged some evidence had not been disclosed to the defense before trial. Given that the government relief on Malone as an expert in this matter, it is reasonable for this Court to weigh the intervening developments suggesting Malone has engaged in misconduct. Several articles describing this information are attached as Defense Exhibits 5118, 5119, 5120.

evidence and because of the corroboration provided by various witnesses statements, a jury hearing the newly discovered evidence from Jerry Leonard, Gene Stoeckley, Mary Britt, and Wade Smith, as well as the DNA evidence of the unsourced hairs, would undoubtedly acquit MacDonald based on this evidence alone. As the late Judge Dupree observed, "this case is going to rise or fall on one thing and one thing alone and that is whether or not this jury buys the Defendant's story as to what happened." (Tpp. 5256-57) Until now, with the revelations from Jerry Leonard and Helena Stoeckley's mother, MacDonald never had the crucial "Holy Grail" of intruders.

The government goes to great lengths to tout the strength of its circumstantial evidence. [Government Memorandum at 64-132] In the final analysis, however, its case remained circumstantial. As Blackburn argued, nothing mattered unless MacDonald could show an intruder in the house. Now, he can.

Given this new evidence, in light of the evidence as a whole, there was a compelling showing of reasonable doubt as to guilt. No reasonable juror would have convicted. MacDonald is entitled to relief on the motion to vacate.

CONCLUSION

Based on the compelling evidence presented in this motion, no reasonable juror would have been convinced of guilt beyond a reasonable doubt. No reasonable juror would have voted to convict MacDonald had this evidence been presented. Accordingly, the motion to vacate must be granted.

WHEREFORE, Jeffrey R. MacDonald respectfully requests that this Court grant the motion and vacate the judgment.

This the 21st day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on 21 August 2013, I electronically filed the foregoing Reply to Government's Post-Hearing Memorandum with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record in this matter.

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