EXHIBIT NO. 11

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 97-713

UNITED STATES

v.

JEFFREY R. MacDONALD

MEMORANDUM IN SUPPORT OF
JEFFREY R. MacDONALD'S MOTION FOR
AN ORDER AUTHORIZING THE DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA TO CONSIDER
A SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. § 2255

I. INTRODUCTION.

The United States Supreme Court, when it set about the historic and controversial task of procedurally limiting judicial consideration of second and subsequent habeas corpus petitions and new trial motions, promised litigants and the American public that demonstrable actual, factual innocence would be an exception to the imposition of a procedural bar. See McCleskey v. Zant, 499 U.S. 467 (1991). When the Congress voted to follow the Supreme Court's lead and institutionalize such procedural barriers in statutory form, it retained the exception for actual innocence. See Antiterrorism and Effective Death Penalty Act of 1996, as codified in 28 U.S.C. § 2255 (providing for review where "newly discovered evidence, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have

Exhibit 11

found the movant guilty of the offense") (emphasis supplied).

The case at bar, after a long, tortuous and tortured history in which the parties, the lawyers, and to some extent perhaps even the courts have shown signs of exhaustion,[1] is at a point where years and years of revelations, most of which have been laboriously unearthed from government files, collectively add up to a stunningly persuasive demonstration that an innocent man stands convicted and faces spending the rest of his life in prison for a crime that the evidence demonstrates he did not commit. It is not a matter of the evidence raising merely a reasonable doubt. The evidence is far more persuasive than that. If there is any substantive content and meaning to the phrase "actual innocence," this case, in the view of undersigned counsel, meets that standard.

However, no court has ever looked at the cumulated evidence, because procedural barriers have blocked such a proceeding. Government witnesses who hold the key to explaining why certain evidence was withheld, and whether such evidence might possibly carry some explanation or meaning that is not exculpatory, have never been put on the witness stand so that they might be questioned. Evidence that is of the sort which traditionally has been considered to be the most powerful exculpatory evidence

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[1] In its most recent published opinion in this case, this Court noted that at some point in the life of a case finality should be achieved. United States v. MacDonald, 966 F.2d 854, 861 (4th Cir. 1992) ("While we are keenly aware of MacDonald's insistence as to his innocence, at some point, we must accept this case as final.").

imaginable — such as lab notes reporting on the presence of hairs and fibers found under the fingernails of the victims, indicative of a Titanic struggle leading to their deaths, and which hairs and fibers did not match Dr. MacDonald nor any known source in the MacDonald household, or a bloody palm print, not MacDonald's, deposited on the footboard of the master bed — has never been considered on the merits by any court, because of these procedural obstacles.

In the most recent defense effort to re-open this case, the District Judge, now deceased, gave as a very important reason for denying the defendant's petition the Court's reliance upon a government affidavit which now can be shown to be clearly erroneous at best and far more likely knowingly false. Yet because the District Judge who succeeded to this case upon the death of his predecessor believes that the deceased judge would have relied on still other grounds for maintaining the procedural barrier to examination of the case on the merits, the Court has once again refused not only to re-open the case, but even to allow the defense to do scientific DNA testing that holds out the possibility of demonstrating MacDonald's innocence to a virtual scientific certainty. Indeed, the Court has thrown MacDonald out of court even though the FBI agent whom the defense has demonstrated filed a false affidavit tellingly did not file an affidavit in his own defense in these latest proceedings.

There surely must come a time, when the accumulated evidence of innocence is so overwhelming, that the aggressive imposition

of procedural barriers and suppositions must fall in the face of the Supreme Court's and the Congress' promise that actual innocence will trump finality. Exhausted as all of the parties and the courts justifiably may be in this tortured case, the time surely has come to face once and for all the extraordinarily disturbing questions the case raises about whether justice was done or thwarted. Only an examination of all of the available evidence, on the merits, can accomplish this. Surely the Supreme Court and the Congress had cases like this in mind when establishing procedural barriers that would tumble in the face of demonstrated actual innocence. The instant case is in a posture where this can, and should, be done.

II. PROCEDURAL BACKGROUND AND THE DISTRICT COURT'S DECISION TO TRANSFER PORTIONS OF THIS CASE TO THIS COURT FOR CERTIFICATION.

On April 22, 1997, Jeffrey R. MacDonald filed in the Eastern District of North Carolina his "Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery," in which he sought to reopen the § 2255 petition which he previously filed in October 1990 (hereafter the "1990 petition"). The motion to re-open was grounded on MacDonald's assertion that the government had submitted to the District Court affidavits of an FBI agent that were materially false and misleading on an issue that was central to the District Court's dismissal of his 1990 petition[2] and to

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[2] United States v. MacDonald, 778 F.Supp. 1342 (E.D.N.C. 1991).

this Court's affirmance of that dismissal.[3] This central issue was whether certain 22-inch and 24-inch long blond synthetic fibers made from a substance called Saran, which were found at the crime scene and memorialized in laboratory bench notes that were withheld from the defense team prior to and at trial, were or were not used in the manufacture of wigs for human cosmetic purposes prior to date of the crime, February 17, 1970. MacDonald deemed the Saran issue critical to demonstrating his innocence, since if the synthetic fibers were the type that likely came from a long blond wig, it would have powerfully corroborated his testimony and the defense account of who committed the murders — a woman named Helena Stoeckley who regularly wore a long blond wig. Further, if the affiant lied in his affidavits in the 1990 proceedings and thereby misled the Court into believing that the fibers could not have come from a wig because Saran was not used in such wigs, then his fraud on the Court would have been largely responsible for the District Court's refusal to allow his § 2255 motion.

More specifically, the defense argued that statements made by FBI Agent Michael Malone concerning the end-uses for Saran fibers were false and misleading because Malone had informed the District Court via affidavit that he had conducted an investigation from which he had determined that Saran fibers could not be extruded in a physical form (a so-called "tow") that

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[3] United States v. MacDonald, 996 F.2d 854 (4th Cir. 1992).

was essential to the wigmaking process and that the fibers in question therefore had likely come from a doll rather than from a wig for human cosmetic use.

MacDonald's attack on Malone's affidavit was the result of a multi-pronged investigation that followed the District Court's reliance on Malone in dismissing MacDonald's petition on procedural grounds. Through the Freedom of Information Act (FOIA), the defense learned that Malone had available to him in the FBI Laboratory library certain reference texts which put him on notice that his statements about Saran were untrue. The defense also learned that, prior to filing his affidavits, Malone had also conducted an investigation in which he interviewed persons familiar with Saran and its end-uses who informed him that it was highly unlikely that the fibers in question had come from a doll. In addition, MacDonald buttressed his claims of fraud by submitting to the District Court affidavits from persons who had worked in the Saran fiber and wig manufacturing industries during the relevant time period, and who confirmed that (1) Saran fibers were indeed manufactured in a form suitable for commercial wig-making and (2) were in fact used in the manufacture of wigs for human cosmetic use.

Further, MacDonald requested that the District Court order the government to give him access to certain items of physical evidence in the case which, if analyzed properly, would demonstrate his actual innocence. These items, which are documented in the handwritten laboratory bench notes of the Army

and FBI Lab examiners, consist primarily of hairs and blood debris found in extraordinarily telling locations -- namely, under the fingernails of the victims, on their hands, on their bodies, or in their bedding. The lab notes reveal that the government's lab examiners had attempted to source these hairs by comparing them to known hairs taken from the victims and from Dr. MacDonald, but they were never able to match these hairs to any member of the MacDonald family, resulting in the obvious and highly exculpatory conclusion that these strategically-located hairs came from outsiders, thus corroborating MacDonald's account. With respect to certain blood debris found under the fingernails or on the hands of the victims, the government was able to determine the blood type in some instances but not in others. See Affidavit of Philip G. Cormier No. 2 — Request for Access to Evidence to Conduct Laboratory Examinations — in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery (hereafter "Cormier Aff. No. 2") which describes these hairs and blood debris in detail.

MacDonald sought access to this highly specific and crucial category of physical evidence for the purpose of subjecting these unsourced hairs and blood debris to DNA testing in an effort to further establish MacDonald's innocence by demonstrating definitively that these items did not originate from any MacDonald family member nor from MacDonald himself, but instead originated from one or more of the intruders whom MacDonald described seeing in his home on the night of the murders.

In response to MacDonald's motion to reopen, the government filed a motion to dismiss claiming that the District Court lacked the jurisdiction to entertain MacDonald's motion to reopen, and alternatively suggesting that the District Court transfer the matter to this Court. Significantly, the government filed no affidavit from Agent Malone, nor for that matter any affidavits whatsoever, to rebut MacDonald's evidence of fraud-on-the-court. MacDonald filed a reply, and a supplemental affidavit, in which he pointed out, inter alia, the extraordinarily telling absence of any affidavit from the agent being accused of fraud. MacDonald requested an evidentiary hearing.

On September 2, 1997, without holding an evidentiary hearing, the District Court (Fox, C.J.), entered an order in which it denied MacDonald's motion to reopen on fraud grounds and transferred the remainder of the case to this Court for certification:

> MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery is DENIED.[4] His claim that newly gathered evidence that saran fibers were in fact used in the manufacture of human wigs prior to 1970, added to the weight of previously amassed exculpatory evidence, demonstrates his factual innocence is TRANSFERRED to the United States Court of Appeals for the Fourth Circuit. Thus, the Government's Motion to Dismiss 28 U.S.C. § 2255 Petition for Lack of Jurisdiction and Suggestion, in the Alternative, to Transfer to the Court of Appeals, is DENIED IN PART and ALLOWED IN PART. Finally, MacDonald's Motion for Leave to File Supplemental Affidavit is ALLOWED.

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[4] The denial of MacDonald's motion to reopen on fraud grounds is the subject of a separate appeal to this Court. The notice of appeal from that portion of the District Court's Order was filed in the District Court on September 8, 1997.

District Court's Order at p. 29; see also Order at pp. 1-2[5]

With respect to MacDonald's request for access to the physical evidence to conduct DNA tests, the District Court ruled that

> since the court will not reopen the proceedings on the 1990 petition, and, as explained below, has no authority to consider the question of MacDonald's factual innocence based on all of his exculpatory evidence plus his new evidence regarding the possible origin of the Saran fibers,[6] there is no basis on which to allow MacDonald discovery. Moreover, the significance of items other than the saran fibers has been fully litigated in the past, and nothing now impugns the validity of the government's conclusions concerning them. (See Opp'n of the United States to Motion to Reopen at 51-52.)

District Court's Order at p. 24.

III. ARGUMENT.

As described in the papers filed herewith[7] and as outlined below, MacDonald has more than met the factual innocence standard

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[5] The District Court's Order is included with the materials filed herewith.

[6] The District Court held that it was "barred by the Antiterrorism and Effective Death Penalty Act from considering whether [the] new evidence, added to the weight of MacDonald's other exculpatory evidence previously amassed in a trial and two habeas proceedings, finally tips the balance in his favor so as to warrant a new trial." District Court Order at p. 25.

[7] MacDonald's factual innocence argument is set forth in the following documents which are filed herewith: (1) Memorandum of Law in Support of Jeffrey R. MacDonald's Motion to Reopen 18 U.S.C. § 2255 Proceedings and for Discovery, 4/22/97, at pp. 52-65; (2) Jeffrey R. MacDonald's Reply to the Opposition of the United States to Defendant's Motion to "reopen" § 2255 Proceedings and for Discovery, and Response to the Government's Motion to Dismiss 28 U.S.C. § 2255 Petition for Lack of Jurisdiction and in the Alternative to Transfer to the Court of Appeals, 5/27/97, at pp. 19-38.

set forth in 28 U.S.C. § 2255 upon which this Court is required to order lower court consideration of the merits of a successive application for relief.[8]

As this Court is aware from this case's history of prior proceedings, MacDonald was prosecuted and convicted on a circumstantial evidence theory that the physical evidence, analyzed by government forensic experts, demonstrated that his account was a lie because the physical evidence failed to support his claim that intruders had entered his home and attacked him and his family. Since trial, however, a wealth of evidence has surfaced from the government's own files which demonstrates the truth of MacDonald's account. Much of this evidence was not disclosed to the defense at the time of trial, and demonstrates that the government's own lab examiners had documented the existence of physical evidence at the crime scene which indicated the presence of intruders in the MacDonald home. This evidence of the presence of intruders consists of, among other things, the following.

First, notwithstanding the issue of whether or not Agent Malone committed fraud in the last proceeding, there is now more

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[8] Title 28 U.S.C. § 2255 provides in relevant part:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain --
> (1) newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; . . . .

than ample evidence that Saran fibers -- such as the 22 and 24-inch blond fibers found at the crime scene — were in fact used in the manufacture of wigs prior to February 1970.[9] As described in the "Memorandum of Law filed in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery" at pp. 56-65, these fibers are direct evidence of Helena Stoeckley's participation in the murders. Stoeckley owned a long, blond, shoulder-length wig which she burned within days of the murders; she confessed on numerous occasions to having participated in the murders; and a woman meeting her description was seen standing in the rain on a street corner located less than a mile from the MacDonald home by one of the military police officers who responded to MacDonald's telephone call for help on the night of the murders. Id. Had the defense been provided at trial with the handwritten lab notes which documented the existence of these long blond Saran fibers in the MacDonald home, it would have devastated the government's case, especially after Stoeckley herself admitted to the jury that she owned a wig and burned it shortly after the murders.

The government's forensic case would have been further devastated had the defense known at trial that dark purple and bluish-black wool fibers had been found on Colette MacDonald's

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[9] See Memorandum of Law in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and For Discovery at 32-37, and Affidavit of Philip G. Cormier No. 1 (Concerning Saran Fibers) in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and For Discovery at pp. 41-53.

mouth and biceps areas, especially in light of (1) Stoeckley's testimony to the jury that she always wore purple or black clothing and (2) the government's inability to match these fibers to any furnishing or item of clothing belonging to the MacDonald family or household. Id.

Second, the handwritten lab notes reveal that numerous unsourced hairs were found at critical locations at the crime scene (on or near the victims' bodies, or in the bedding) which could not be matched to any known sources, including MacDonald. See Cormier Aff. No. 2 at pp. 21-38. These crucial notations were not included nor mentioned in the final typewritten reports that were disclosed to the defense prior to trial. Without these notations, the typed reports seemed inculpatory in that the forensic findings appeared not to support MacDonald's account; with those notations, however, the forensic reports would have powerfully corroborated MacDonald -- would, indeed, have established his innocence, not simply a reasonable doubt of guilt.

The following is an illustrative, but far from exhaustive, list of some of the unsourced hairs found in critical locations:

(A) The lab notes reveal that Army lab technician Janice Glisson found at least one unsourced hair in the fingernail scrapings taken from the left hand of Kristen MacDonald, and at least one unsourced bloodstained hair in the fingernail scrapings from the left hand of Kimberly MacDonald. In each instance, Glisson determined that these

hairs did not match the known hair exemplars from Jeffrey MacDonald. Cormier Aff. No. 2 at ¶¶ 33-38.

(B) Unmatched hairs found in the bedding (blue top sheet found on the floor of the master bedroom), including a "brown body hair of Caucasian origin" which was "forcibly removed" and which "appears to have a piece of skin tissue attached to the basal area of the hair." Cormier Aff. No. 2 at ¶¶ 17-18(a).

(C) Unmatched hairs found in the left hand of Colette MacDonald which the government is unable to source. Cormier Aff. No. 2 at ¶ 18(c).

(D) Two or more unsourced human body or pubic hairs found in debris removed from the vicinity of Colette MacDonald's left hand and arm. Cormier Aff. No. 2 ¶¶ 45-52.

(E) One or more unsourced human pubic or body hairs, possibly bloodstained, found on the bedspread on the floor of the master bedroom. Cormier Aff. No. 2 at ¶¶ 53-62.

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In addition to these unsourced hairs, there was blood debris found under the fingernails and on the hands of some of the victims which has, at most, only been blood-typed, but which has never been tested utilizing DNA technology to determine whether any of this blood originated from someone other than a member of the MacDonald family. There is also a palm-print, apparently in blood, that was found on the footboard of the master bed which was compared with known palm-print exemplars taken from MacDonald, his wife, and numerous other persons, and which could

not be identified as belonging to any of these people, including MacDonald.

These unsourced hairs and other unsourced items like the palm-print are direct evidence of the presence of intruders in the MacDonald home and corroboration that MacDonald's longstanding and forever consistent account of events is true. The defense seeks access to this and similar unsourced evidence for the purpose of conducting DNA testing to further establish, by modern scientific testing methods not available at the time of MacDonald's trial, that it is without any doubt evidence of intruders and that these items did not originate from MacDonald's body or the bodies of his family members. As far as the defense is aware, none of the hairs, skin and blood debris in this case have ever been subjected to any form of DNA testing, including the recently developed mitochondrial DNA test which can be used to identify hairs that have no follicle or skin attached to them. See Cormier Aff. No. 2 at ¶¶ 23-28.

It is well understood that our criminal justice system is not infallible, and it is also well recognized that DNA and other new forms of forensic technology can be utilized to assure greater accuracy in the search for truth. Indeed, Attorney General Janet Reno herself has advocated the re-examination of old crime scene evidence using new forensic technology to correct miscarriages of justice. In June 1996, the National Institute of Justice ("NIJ") published a report entitled Convicted by Juries, Exonerated by Science, Case Studies in the use of DNA Evidence to

Establish Innocence After Trial, in which it documented 28 case studies where the defendants were exonerated by DNA testing, after they had been convicted by juries. Attorney General Reno, in her opening message at the beginning of this report, stated:

> Our system of criminal justice is best described as a search for truth. Increasingly, the forensic use of DNA technology is an important ally in that search. The development of DNA technology furthers the search for truth by helping police and prosecutors in the fight against violent crime. . . . At the same time, DNA aids in the search for truth by exonerating the innocent. The criminal justice system is not infallible . . . .

In addition, Attorney General Reno gave a keynote address last year before the American Academy of Forensic Sciences, in which she stated:

> Laboratories must also be in a position in cases where evidentiary samples have been appropriately preserved and maintained to re-examine, using modern technology, evidence used years ago to convict someone. Properly conducted scientific tests are accurate and impartial and in the right cases, as I've indicated, can correct a miscarriage of justice. Forensic science can play no more important role than that.

Keynote Address By Janet Reno, Attorney General of the United States of America Before the American Academy of Forensic Sciences, February 21, 1996 at Nashville, TN, Alderson Reporting Co., at 15. See Cormier Aff. No. 2 at ¶ 29.

A number of federal courts have recognized that defendants should be given access to physical evidence to conduct DNA and other forms of testing to establish their innocence. In Toney v. Gammon, 79 F.3d 693, 700 (8th Cir. 1996), the Eighth Circuit Court of Appeals ordered the State of Missouri to give the convicted defendant access to physical evidence in the custody of

the state for the purpose of permitting him to conduct DNA and other testing so that he could prove the prejudice prong of his ineffective assistance of counsel claim. Steven Toney was released from prison a short time later as a result of the DNA tests which exonerated him. Similarly, in Thomas v. Goldsmith, 979 F.2d 746, 749-750 (9th Cir. 1992), the Ninth Circuit, pursuant to Brady v. Maryland, ordered the state to turn over potential exculpatory evidence (a semen sample) so that the defendant could conduct laboratory tests which might further establish his factual innocence so that his procedurally defaulted claims could be heard.

Here, DNA testing could be used very effectively to further demonstrate Jeffrey MacDonald's innocence. One simple illustration makes this point. As noted above, crime scene investigators found in the bedding in the master bedroom of the MacDonald home a "brown body hair of Caucasian origin" which, according to the government's own lab examiners, appears to have been "forcibly removed" and "appears to have a piece of skin tissue attached to the basal area of the hair." If this hair and piece of skin were subjected to DNA testing, and were such testing to result in a determination that this item did not originate from either Jeffrey MacDonald, his wife, or his daughters, it would be highly persuasive evidence of MacDonald's innocence, for there is little, if any, possibility that this hair and skin found their way into the bedding in the master bedroom other than as a result of a struggle between the victims

and the persons who committed the murders.[10]

As noted above, the defense is not aware that any DNA tests have ever been conducted in this case, and it is only within the past few years that forensic laboratories have begun to utilize the newer mitochondrial DNA testing in connection with hair identification. See Cormier Aff. No. 2 at ¶¶ 23-28. Because this DNA technology has only recently come into use and was not available at the time of trial nor when MacDonald brought his two § 2255 petitions in 1984 and 1990, MacDonald should be granted access to the physical evidence to conduct such DNA testing if, as determined by experts in the field of DNA testing, such testing can appropriately be conducted on the unsourced items in question. At the very least, the government should be compelled to file a statement asserting why it would be violative of either law or public policy for the Court to allow the use in this case of sophisticated and highly reliable scientific tests that the government itself relies upon when it suits the government's purposes.

IV. CONCLUSION.

For all the foregoing reasons, this Court should grant

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[10] Another equally potent illustration involves the hairs found in Colette MacDonald's left hand which the government maintains that it cannot identify because they do not possess sufficient characteristics for comparison purposes. See Cormier Aff. No. 2 at ¶ 18(c). Mitochondrial DNA testing might very well be used to identify these hairs. The same goes for blood debris found under the fingernails and on the hands of Colette MacDonald and the MacDonald children.

MacDonald's motion for an order authorizing the District Court to consider the evidence set forth in his motion to reopen which the District Court previously declined to consider. In conjunction therewith, MacDonald further seeks an order from this Court directing the government to give MacDonald access to the items of physical evidence (unsourced hairs, skin and blood debris) which are referenced in his motion to reopen, so that MacDonald can have experts in the field of DNA testing examine the evidence for the purpose of determining whether or not such testing can at this point in time be conducted on the specified items.

DATED: September 17, 1997

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 1997, a true copy of the foregoing memorandum of law was served first class mail upon Janice McKenzie Cole, United States Attorney, Eastern District of North Carolina, New Bern Avenue, Suite 800, Federal Building, Raleigh, NC 27601.

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