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	)

SUPPLEMENTAL MEMORANDUM SUPPORTING MOTION TO ALTER OR AMEND JUDGMENT

NOW COMES defendant, Jeffrey R. MacDonald, by and through his undersigned counsel, and presents this supplemental memorandum in support of his motion to alter or amend its judgment. [DE 358] Despite the government's protestations, this Court should amend its judgment in no small part due to the revelations that the Department of Justice (DoJ) and the Federal Bureau of Investigation (FBI) "have determined that a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in this case." [DE 363-2, Letter of Norman Wong, Special Counsel, DOJ, to Thomas Walker, United States Attorney] Specifically, at least three laboratory examiners involved at various stages of this case–Michael Malone, Paul Stombaugh, and Robert Fram–"exceeded the limits of science by overstating the conclusions that may appropriately be drawn from a positive association between evidentiary hair and a known hair sample." *Id.* This revelation should be more than troubling to this Court. Indeed,

the overall significance of this report, which documents rampant misfeasance and malfeasance within the FBI's hair and fiber section, can hardly be overstated. At some point, this misconduct by government agents, who are responsible for investigating and testifying in criminal cases, and from whom the courts and the public rightly expect honesty, cannot be tolerated. The time has come for this Court to put an end to the unfairness that has occurred in this case.

SCOPE OF REVIEW

A review of "the evidence as a whole" requires an examination of the evidence in a "holistic" way, not a piecemeal approach in which each item of new or old evidence is measured for its reliability and its separate impact on the jury's deliberation, as the , as the government has implicitly argued . While each item of new or old evidence must be individually itemized, this Court should not then ask if each item, alone, would have caused no reasonable juror to find guilt beyond a reasonable doubt. Rather, this Court must ask whether a reasonable juror, charged with weighing the evidence fairly and impartially, would be convinced beyond a reasonable doubt by the government's wholly circumstantial case against Dr. MacDonald (a case in one in which no motive has ever been suggested, much less proved), if it had heard all of the new evidence (including but not limited to Helena Stoeckley's trustworthy confession to her attorney and to her mother, as well as new DNA evidence supporting Dr. MacDonald's theory of intruders) that is now augmented by further new evidence of misfeasance and malfeasance by Stombaugh, Malone, and Fram. The analysis is far more nuanced than the more familiar inquiry into the potentially prejudicial effect caused by the introduction of inadmissible

evidence.

Likewise, this Court is not charged with deciding whether it finds the evidence sufficient to sustain the convictions, as is the situation with a motion to dismiss as the close of the evidence. *See* Fed. R. Cr. P. 29. The task of evaluating all of this new evidence in the context of "the evidence as a whole" does not rise or fall on a determination of whether the evidence is sufficient to sustain the verdict. That inquiry affords the government the benefit of all doubt, resolves credibility questions in the government's favor, and ignores all contrary evidence. *See United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996). This Court has not been asked essentially "to retry the case" for itself. It must attempt to enter the mind of the reasonable juror in 1979. While Dr. MacDonald shoulders a heavy burden, it is not an insurmountable task. Otherwise, there would have been no need for a remand by the Fourth Circuit.

This Court must assess this newest evidence by setting aside the knowledge of prior judicial determinations, both in the district court and in the appellate court, as each of those were done both without the benefit of any of this new evidence and without consideration of "the evidence as a whole," admissible and inadmissible, reliable and unreliable. The new evidence presented in this remand proceedings, especially the revelations about Malone, Stombaugh, and Fram, impugns if not destroys the credibility of three key government agents, most notably the one who both concocted and testified about the pajama top experiment--the very testimony the courts and the government have consistently hailed as the seminal item of proof from the government's arsenal. To say a reasonable juror would not have found this new evidence to be a fatal blow to the

government's case is indefensible.

OVERVIEW OF THE ISSUE

As Dr. MacDonald previously noted [DE 364], the DoJ itself, within and under which the prosecutorial body in this case operates, underscored the importance of the new information when it decreed that, "in the interest of justice," if a defendant seeks post-conviction relief based on it, "the United States is waiving reliance on the statute of limitations under Section 2255(f) and any procedural-default defense in order to permit the resolutions of legal claims arising from the erroneous presentation of microscopic hair examination laboratory reports or testimony." *Id.* This waiver by the DoJ is extraordinary. It confirms the importance of this new information and suggests that this Court fully credit it in its assessment of "the evidence as a whole" in this case.

Indeed, from the beginning of the investigations into the deaths of Dr. MacDonald's wife and children, through the military proceedings and civilian trial, and continuing through the lengthy post-conviction proceedings, the allegations against Dr. MacDonald have been marked by disturbing and troubling questions. The multi-faceted aspects of this protracted process must all be considered in assessing the impact of the new evidence of government misfeasance and malfeasance.

First, the result of the comprehensive Article 32 hearing was a recommendation that all charges be dropped because "the matters set forth in all charges and specifications are not true." [Defense Exhibit 5076] Evidence corroborated Dr. MacDonald's account. "Considering all known facts about the life and previous history of [Dr. MacDonald] up to and including 17 February no logical motive was established for [Dr. MacDonald] to

have committed such brutal murders, either singly or in any combination." There has still been no motive established. The Article 32 hearing resulted in two recommendations: the charges against Dr. MacDonald should be dismissed because they were "not true," and the appropriate civilian authorities should be requested to investigate Helena Stoeckley. Rather than investigate Stoeckley, the government chose to proceed against Dr. MacDonald.

Second, this Court now knows Stoeckley both incriminated herself and exculpated Dr. MacDonald in statements she made under circumstances imbued with trustworthiness–statements the jury did not hear. Jerry Leonard, who was appointed to represent Stoeckley as a witness during Dr. MacDonald's trial in 1979, had privileged conversations with her during the trial. She eventually initiated an additional discussion about the incident at the MacDonald house by asking Leonard, "what would you do if I told you I was there?" After he assured her his role was solely to help and protect her, she then told Leonard she was at the MacDonald house when the crimes occurred and her companions killed the family members. (HTpp. 1114-16); [Defense Exhibit 5113] Leonard's recollection of her account to him was corroborated by Jimmy Friar's affidavit given many years earlier stating that the telephone rang and, when she answered it, someone in the house told her to put the phone down and she hung up.[1] (HTp. 1115) [DE 5021, Affidavit of Jimmy Friar]

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[1]The steps Leonard took when Stoeckley admitted her involvement showed he credited the confession. He told her to assert her Fifth Amendment privilege against self-incrimination if she was called to testify and wrote instructions on a card so that she would know how to do it. (Htp. 1202)

Third, Stoeckley also confessed her involvement to her mother late in her life when Stoeckley knew she was dying. "Helena knew she was dying" and confided in her mother "All that she knew." (HTp. 284) Stoeckley's mother later related this confession to Gene Stoeckley, who came forward with this information and gave very believable testimony about it before this Court. (HTpp. 283-84)

Fourth, DNA evidence from the fingernail scrapings from the left hand of Kristen MacDonald revealed a DNA profile that is not consistent with Dr. MacDonald or any member of his family. In addition, a hair, unmatched to Dr. MacDonald or any other known sample, was found under the body of Colette MacDonald. And a hair, unmatched to Dr. MacDonald or any other known sample, was found on the bedspread where Kristen MacDonald died.

Fifth, voluminous information submitted and catalogued in this litigation over more than three decades supports Dr. MacDonald's claim of innocence. This material includes, but is not limited to (1) Stoeckley admitting her presence in the MacDonald home at the time of the murders to six other individuals, including three law enforcement officers, who were at trial and prepared to testify, as well as her admissions to Wendy Rouder and Lynn Markstein during the trial; (2) Greg Mitchell confessing his involvement in the murders to at least eight people; (3) MP Kenneth Mica seeing a woman matching Stoeckley's description approximately a half-mile from the murder scene as he went to the MacDonald house to investigate the crimes; (4) Stoeckley making other detailed admissions after trial that were documented in Dr. MacDonald's earlier motion for a new trial; (5) Stoeckley admitting at the 1979 trial that she wore a blond wig

and floppy hat the night of the murders, burned the wig shortly after the murders, and never again wore the hat because they connected her to the murders; (6) investigators discovering synthetic blond wig hairs in the MacDonald home, unmatched to any other fibers in the home, but consistent with Stoeckley's presence that night wearing a long blond wig–evidence about which the government later introduced false affidavits from Michael Malone; (7) investigators discovering black wool fibers found on the mouth and bicep area of Colette MacDonald and on one of the murder weapons that could not be matched to any fabric in the MacDonald home; (8) other witnesses making numerous statements that linked Stoeckley and Mitchell to the murders; and (9) an overwhelming amount of evidence suggesting intruders were in the house, such as wool fibers, pink fibers, fingerprints, blood, candle wax, saran fibers, and wig hairs for which there has never been an accounting. [DE 343, 351]

At some point, the cumulative effect of this evidence demands acknowledgment. When combined with the DoJ's determination of misfeasance and malfeasance by FBI agents in this case, no reasonable juror, hearing all of this evidence, would find Dr. MacDonald guilty beyond a reasonable doubt. This Court should alter and amend its judgment.

PROCEDURAL AND FACTUAL STATEMENTS

Dr. MacDonald relies on the procedural and factual statements he included in previous filings.

REASONS TO ALTER THE JUDGMENT

A motion to alter or amend is the vehicle (1) to accommodate an intervening change in the law, (2) to account for new evidence, or (3) to correct a clear error of law or prevent manifest injustice. *Pacific Insurance Co. v. American National Fire Insurance Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Both the second and third bases exist here. The revelations of misfeasance and malfeasance by Michael Malone, Paul Stombaugh, and Robert Fram in this litigation are "new evidence." Moreover, and even more important, their unacceptable behavior in this litigation, under the auspices of the federal government and the Department of Justice, must be rectified to "prevent manifest injustice."

I. This Court Should Amend the Judgment Based on False Evidence From Several Government Analysts and Grant the Motion to Vacate.

Given this new evidence, in tandem with the new evidence developed at the evidentiary hearing regarding statements of Helena Stoeckley to her attorney and her mother, and the new DNA evidence, as well as earlier, comprehensive challenges to various aspects of the case against Jeffrey MacDonald, the motion to vacate should be granted. The misfeasance and malfeasance by Stombaugh, Malone, and Fram compel relief for Dr. MacDonald.

A. The New Information about Malone's Misfeasance and Malfeasance Requires Relief.

The new indictment of Malone, upon whom the government often relied in previous post-trial efforts, and with whom the chief prosecutor wrote an article extolling

the prosecutorial efforts,[2] is stunning and perhaps unprecedented. The report singles out Malone in its rebuke.

> Second, we concluded that the Department should have directed the Task Force to review all cases involving Michael Malone, the FBI Lab examiner who misconduct was identified in the OIG's 1997 report and who was known to the Task Force as early as 1999 to be *consistently problematic*. Malone's faulty analysis and scientifically unsupportable testimony contributed to the conviction of an innocent defendant (Gates), who was exonerated 27 years later, and the reversal of at least five other defendants' convictions because of Malone's unreliable analysis and testimony. Malone retired from the FBI in 1999, but we learned, and the FBI confirmed, in May 2014 that Malone had been performing background investigations as an active contract employee of the FBI since 2002. After we brought Malone's contract employment to the attention of the FBI and the Department, the FBI reported that, effective June 17, 2014, Malone's association with the FBI was terminated.

Executive Summary, An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory, United States Department of Justice, Office of Inspector General at ii (June 2014) (emphasis added).[3] [DE 357, Exhibit 1]

The government has tried to deflect this new evidence about Malone in two ways. First, it notes Malone's misconduct in this case is not new evidence; his misconduct has

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[2]*See* Brian M. Murtagh and Michael P. Malone, "'Fatal Vision' Revisited: The MacDonald Murder Case," **The Police Chief** at 15-24, 64-65 (June 1993). Indeed, a careful reading of this article implies the government did not disclose several items of potentially exculpatory and certainly favorable evidence to the defense before the trial. *Id.* at 23, 64; *see generally Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995) (fifth amendment violation for prosecution to suppress material, exculpatory evidence) *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression of favorable evidence by prosecution violates due process).

[3]Although only a portion of the Executive Summary is quoted here, this Court has the entire report. [DE 357] It should carefully review its scathing review of Malone in its entirety to understand the full extent of this former agent's long-running misconduct in the vast majority of his cases and the myriad ways in which he defied scientific technique, flouted proper procedures, and gave false and misleading testimony in scores of cases. [DE 357 at 49-53]

been know to this Court. Second, it claimed the report of the task force did not deal with Malone's work in the MacDonald case because he "did no pretrial lab work on evidence in this case and did not testify at the trial of Jeffrey MacDonald." [DE 358 at 10] Both defenses are more damaging that helpful. The first statement patently acknowledged Malone gave false information by sworn affidavits in this litigation upon which the government has relied. This admission hardly benefits the government and sidesteps the critical point of how a reasonable juror would have assessed the evidence in this case if it knew of Malone's false statements. The second statement turned out to be incorrect. In fact, the Wong letter to Walker specifically identified Malone as making erroneous statements about microscopic hair comparison in this case and"exceed[ing] the limits of science by overstating the conclusions that may appropriately be drawn from a positive association between evidentiary hair and a known hair sample."[4] [DE 363-2]

Malone's misconduct must not be so cavalierly swept aside. Long after the 1979 trial, Dr. MacDonald learned of the existence of handwritten lab notes by government agents that revealed numerous blond synthetic hairs, up to twenty-two inches in length, had been found in a hairbrush in the kitchen of the MacDonald home following the murders. The government responded, in part, with an affidavit from Malone. The affidavit turned out to be false.

Now the Court has the lengthy report from the Department of Justice itself, along

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[4]In fairness, it does not appear the government had access to the specific findings regarding Malone in this litigation from Wong, which it received after 17 September 2014, when it filed its earlier pleading on 11 September 2014. Nevertheless, its effort to defend Malone, or at least defuse the impact of his misfeasance and malfeasance given what it did know and given how the report singled out Malone for ridicule, is troubling.

with materials in the Wong letter, showing Malone has a lengthy history and practice of overstating the significance of certain evidence and using unacceptable techniques not supported by accepted scientific standards in his work. Neither the lengthy report nor the Wong letter were available when this Court issued its judgment in this matter. [DE 357] It is new evidence.

Specifically, Malone made an "inappropriate statement" that "exceeds the limits of science" in laboratory reports or testimony in this litigation. [DE 363, Exhibits 2-7] Even a cursory review of the material in DE 363 shows these unreliable, if not false, statements concerned a hair allegedly originating from Dr. MacDonald, a hair allegedly originating from Kimberly MacDonald, and the reliability of associating evidentiary hair to a specific person to the exclusion of all others. [DE 363. Exhibit 2] That Malone made these and other false or indefensible statements under oath in this in this case is unfathomable. *See United States v. Fisher*, 711 F.3d 460, 465-68 (4th Cir. 2013) (vacating guilty plea induced, in part, by misconduct of government agent).

The government also argued the findings related to Malone are of little consequence because his lack of credibility has been previously presented and litigated and because he did not actually testify in the MacDonald trial. [DE 358 at 2-9] Again, aside from being a staggering admission of misconduct by a government agent, for which this Court should hold the prosecution accountable, that Malone did not testify at the 1979 trial hardly removes the sting of the new evidence. The government has long relied upon Malone in this litigation. Previous efforts by Dr. MacDonald to challenge evidence were thwarted by Malone's statements–statements upon which the reviewing courts relied. *See*

United States v. MacDonald, 778 F.2d 1342, 1355 (E.D.N.C. 1991), *aff'd in part*, 966 F.2d 852 (4th Cir. 1992) (affirming only as district court's finding of abuse of the writ), *cert. denied*, 506 U.S. 1002 (1992); *United States v. MacDonald*, 640 F. Supp. 286, 312 (E.D.N.C. 1985).[5] At some point, there must be accountability.

The government has argued, and likely will continue to plead, that these new revelations about Malone would not have affected this Court's judgment entered after the September 2012 hearing and the extensive post-hearing briefing by the parties. [DE 358 at 9-10] But this argument ignores the implication of the decision of the Department of Justice to waive expressly any issue as to timeliness or procedural default. [DE 363, Exhibit 1] This position is remarkable not merely for its expression that substantive fairness must trump procedural imperfections, but also for its indication of how disturbingly unacceptable the Department of Justice itself deems the conduct of Malone, as well as Stombaugh and Fram. This newly stated position of the Department of Justice should be taken by this Court as an indication that this new evidence should be given full force and effect in a re-examination of "the evidence as a whole" in this case. This Court must now assess the impact of the new evidence of Helena Stoeckley's inculpatory admissions, which exculpate Dr. MacDonald, to her attorney and to her mother under circumstances showing inherent trustworthiness, as well as the new DNA evidence, with

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[5]This Court should must ask itself whether the previous judicial determinations would have resulted in the government's favor had those tribunals known of Malone's misfeasance and malfeasance, not to mention his false statements under oath. Furthermore, the Fourth Circuit approval of the earlier rejection of Dr. MacDonald's request for a new trial was limited only to approving it based on an abuse of the writ. Had the Fourth Circuit known of Malone's conduct, it likely would not have found Dr. MacDonald abused the writ.

this additional new evidence from the DoJ and FBI. It impugns important government evidence regarding hairs; it shakes the credibility of Malone; it casts serious doubt on a large portion of the government's theory of Dr. MacDonald's guilt. It supports altering the judgment.

B. The New Information about Stombaugh's Misfeasance and Malfeasance Requires Relief.

This new information also discloses that Paul Stombaugh, who gave pivotal testimony at the 1979 trial, acted in a similarly unacceptable way in this litigation that makes the revelations about Malone even more disconcerting. The misfeasance and malfeasance by Stombaugh relates to important evidence in this litigation. [DE 363] Stombaugh gave at least misleading testimony by wrongly asserting the reliability of associating evidentiary hair to a specific person to the exclusion of all others. [DE 363, Exhibit 2, 7] But his credibility as a witness and his professionalism as a scientist run far beyond his unacceptable work with the misleading information about the reliability of identifying a hair as coming from a specific person to the exclusion of all others.

In 1971, Stombaugh examined Dr. MacDonald's blue pajama top. He claimed to have determined it contained 48 puncture holes that could have been made by an ice pick. He stated in a report a number of the holes had the appearance of having been made by a sharp instrument stabbed into the garment from the outside (so-called "entrance holes"), while others had the appearance of having been made from the inside (so-called "exit holes"). He opined the holes had been made while the pajama top was stationary. [Trial Transcript at 3989-4423]

By 1974, when Stombaugh, assisted by laboratory technician Green, again examined the pajama top, the directionality of the holes was no longer evident. Stombaugh and Green were asked to determine if there was some way in which the pajama top could be arranged so that the holes in it aligned with the 21 puncture wounds in Colette's chest. They eventually found what they considered to be one way to so arrange the pajama top. Their effort became known as the "pajama top" demonstration.

But things are not always as they seem or as a government analyst claims they are. Documents obtained by the defense team long after the 1979 trial finally shed important light on the pajama top experiment. Jerry A. Potter & Fred Bost, **Fatal Justice** 154 (1995). These documents revealed Stombaugh examined the pajama top in 1971 to determine the directions in which the fibers were bent by the force of the ice pick. Stombaugh and Green, his assistant, claimed to be able at that time to discern the directionality of the ice pick thrusts through eleven of the holes. A laboratory report sent to the CID by the FBI in 1971 cited the directionality of certain ice pick holes in the pajama top. Stombaugh numbered the holes while making this examination. **Fatal Justice** at 154 & n.11.

Stombaugh reported these findings. Three months after receiving Stombaugh's data, Janice Glisson attempted to fold the pajama top so all of the ice pick holes lined up with the stab wounds in Colette's chest. But after several days of vain effort, Glisson abandoned the testing. She was unable to adjust the folds so that the thrust holes remained compatible with Stombaugh's findings of directionality of the broken fibers. *Id.* at 154. But Glisson's failed experiment was not discovered by defense investigators

until 1990. *Id.* at 154 & n.12. Needless to say, Glisson's failure was not disclosed to the defense before the 1979 trial, despite Glisson being called as a witness albeit not concerning the pajama top experiment, an apparent violation of *Brady* and its progeny.

At Dr. MacDonald's trial, the government relied heavily on its pajama top experiment, in which its experts sought to prove that the holes in the pajama top could be lined up with the puncture marks in Colette's chest. This test was badly flawed. A fair reading of the trial transcript showed the government's experts failed to consider vitally important information in conducting their experiment. They failed to try to line up the holes in the defendant's pajama top with the thirty-odd puncture holes in Colette's pajama top. If Dr. MacDonald had laid his pajama top on top of her, and then stabbed her through it as the government contended, then the holes would have gone through both articles of clothing in the same pattern. They also failed to line up the knife cuts in the pajama top with the knife cuts in Colette's torso. In this regard, if the knife holes were not lined up at the same time as the puncture holes, the experiment is obviously flawed. They did not consider the directionality of the thrusts, which could have been detected from the threads. Stombaugh and Green claimed the pajama top was folded when the stabbing occurred. Under their supposition, the thrusts or directionality would have to match up with the way the garment was folded depending on the folds of the garment. But Stombaugh and Green ignored the directionality of the threads. Even so, they could not say the thrusts were made through the pajama top into Colette as the government contended, only that it was *possible* that this *could* have happened. [Trial Transcript at 4371] Of course, it was equally possible that it did not happen that way. The testimony

was no more than guesswork or speculation. *Id.*

Defense counsel probed Stombaugh and Green. Defense counsel asked Green whether she had made use of the 1971 findings concerning the fiber directionality of exit and entry holes. Although she thought she had, she did not make any notes about it. She merely said her effort "seemed consistent" with them. [Trial Transcript at 4571-72] This testimony was misleading. According to the laboratory notes, the broken fibers over a given wound should have been bent in the same direction. **Fatal Justice** at 155. They were not. Another scientist compared notes from the finished FBI experiment with notes Stombaugh and Green made in 1971. This comparison revealed that, in 1974, Green *reversed* the directions of the broken fibers in six of the eleven holes in which she had claimed to find directionality in 1971. But the jury never heard it. *Id.* Knowing what the DoJ and the FBI have now shown about Stombaugh's willingness to make "erroneous statements" about his work in trial testimony and to "exceed[] the limits of science by overstating the conclusions that may appropriately be drawn" from his work, these revelations are hardly surprising. But they remain exceedingly disconcerting.

The impact of this new evidence on Stombaugh's credibility would have been devastating to the government, as he was the architect of the experiment regarding the pajama top, which the government has consistently touted as the seminal evidence against Dr. MacDonald. *See* Murtaugh & Malone, **The Police Chief** at 20. [DE 126 Appendix 5; Defense Exhibit 5025] Indeed, the materials incorporated into the recent DoJ and FBI report reference three days of trial that encompassed Stombaugh's trial testimony. [DE 363 at 2] This testimony was largely devoted to the pajama top. Had the jury known of

Stombaugh's misfeasance and malfeasance, particularly his proclivity to overstate the reliability of his purportedly scientific findings, including the creation of laboratory reports that exceeded the limits of science, it likely would have disregarded all of his testimony. If so, the pajama top experiment–the lynchpin of the government's circumstantial case–would have crumbled and been disregarded.

This Court should not lose sight of the late Judge Dupree forecasting this development. During a colloquy with counsel about Stombaugh's qualifications, he noted defense counsel claimed the government had "a file full of stuff on old Stombaugh and it shows that he–is a stumble bum." The prosecution denied this information existed. Judge Dupree warned, "I tell you right now, you had better not put him up there and vouch for his expertise, and come back here on a motion six months from now, if you should be lucky enough to get a conviction in this case, and try to sustain it, because there is going to be a record of what you told me this afternoon." [Trial Transcript at 3245-46] Even if the government did not know during the 1979 trial that Stombaugh was, indeed, at least "a stumble bum," and perhaps an analyst who would distort his findings and conclusions, the DoJ and the FBI have now concluded he was not only inept, but was also prone to give scientifically unacceptable testimony.

This information indicates the government introduced an experiment conducted by the FBI without foundational support in the face of defense objections that it had no scientific basis. The oft touted experiment was virtually the only item of "evidence" presented by the government at trial that was not introduced during the Article 32 investigation where Dr. MacDonald was absolved of any wrongdoing. Had the jury

rejected Stombaugh's opinion, or had simply been left with considerable doubt about it, there would have been no conviction.

In its 1985 memorandum opinion, the district court stated, "MacDonald's own pajama top was perhaps the most incriminating evidence offered against him during the trial." *MacDonald,* 640 F. Supp. at 312. Accepting this statement at face-value underscores just how thin the circumstantial evidence was and reveals how the newly discovered evidence, in the context of the evidence as a whole, would have established compelling reasonable doubt. It supports altering the judgment.

C. The New Information about Fram's Misfeasance and Malfeasance Requires Relief.

Finally, the new evidence discredits the statements and laboratory reports of Fram. He made an inappropriate statement and mad an unsupportable positive association of a hair, which he attributed to Kimberly MacDonald. [DE 363, Exhibit 2, 6] The government relied on his lengthy affidavit, with 69 attached exhibits, in its efforts to combat the DNA evidence developed during the post-conviction proceedings in this case. [DE 219] New evidence regarding his malfeasance would have a serious impact on the assessment of the new evidence when considered with "the evidence as a whole."

At first blush, Fram appears to be far less involved in this litigation than either Malone or Stombaugh. It could be easy to overlook the importance of his participation. This Court must not be so easily distracted. Fram's input was critical. He became involved with the examination and DNA testing ordered by the Fourth Circuit in 1997. The DoJ and FBI report, as documented in the Wong letter, reveal he made an

inappropriate statement that a hair originated from Kimberly MacDonald. [DE 363, Exhibit 2, 6]

This hair was a pivotal item from the DNA testing that was before this Court in the 2012 hearing. The DoJ and FBI determined that Fram's report regarding microscopic hair comparison analysis contained erroneous statements that were used in this case. Indeed, his report "exceeded the limits of science by overstating the conclusions that may appropriately be drawn from a positive association between evidentiary hair and a known hair sample." [DE 363-2, 363-3, 363-7] Fram's misfeasance and malfeasance goes to the heart of the new evidence this Court was tasked with reviewing in light of "the evidence as a whole." It supports altering the judgment.

D. The Combined Effect of the New Information about Misfeasance and Malfeasance By Three Government Analysts Requires Relief.

In addition to the new evidence of misfeasance and malfeasance by Malone, Stombaugh, and Fram; new evidence of Stoeckley's trustworthy statements exculpating Dr. MacDonald; and the favorable DNA evidence, other evidence has been uncoved since the trial that is probative of his innocence. Most of this evidence relates to, and greatly discredits, the physical evidence heavily relied upon by the government at trial in its entirely circumstantial case. This evidence includes the presence of unsourced fibers (1) on the murder weapon that were dark purple and black (Stoeckley testified she wore purple and black) and (2) at the murder scene that were inconsistent with the government's representations at trial that there was no evidence of intruders, and the presence of wig hairs in the MacDonald home (Stoeckley testified that she owned a blond

wig that she destroyed because it connected her to the murders) unmatched to any synthetic fiber found in the MacDonald home.

The government's theory at trial was that MacDonald, an army physician with no history of violence and no record of prior arrests, got into a fight with his pregnant wife because his youngest daughter, Kristen, had wet the bed, that he picked up a club to strike his wife and accidentally struck and killed his daughter, Kimberly, who was trying to intervene; and that then, in order to cover up his accidental misdeed, killed his wife and then mutilated and killed his youngest daughter and tried to make it look like a cult slaying. [Trial Transcript at 7138-41] Prosecutors claimed MacDonald either wounded himself to defer suspicion or was wounded when fighting with his wife.

The evidence adduced at trial to support this theory was exclusively circumstantial physical evidence from the crime scene, such as in what rooms certain blood types were found, where the murder weapons were found, where Dr. MacDonald's pajama fibers were and were not found, where a pajama pocket was found and on which side it was bloodied, and evidence of possible ways ice-pick holes were made in Dr. MacDonald's pajama top. Much of the evidence was speculative. It was designed primarily to disprove Dr. MacDonald's version of what happened on the night of the murders, thereby casting suspicion on him as the murderer. The government's strategy depended upon the absence of physical evidence of intruders. Dr. MacDonald has analyzed this evidence in detail and shown that each of these items of evidence is either consistent with his account or has been proven false by newly discovered evidence. [DE-115 at 10-27]

Moreover, some trial evidence supported Dr. MacDonald's description of intruders

committing the murders, including evidence that 44 useable latent fingerprints and 29 useable palm prints were lifted from the scene of the crime, but only 26 fingerprints and 11 palm prints matched family members or investigators. [Trial Transcript at 3116, 3141] There was evidence showing the presence of wax drippings of three different kinds of wax, one taken from a coffee table in the living room, one from a chair in daughter Kimberley's bedroom, and one from the bedspread in Kimberley's bedroom. None of these samples matched any candles found in the MacDonald home. [Trial Transcript at 3116, 3141]

Evidence of two dark purple cotton fibers found on one of the murder weapons, an old wooden board found by police outside the house, were introduced. An expert testified the fibers on the club matched the fibers used to sew Dr. MacDonald's pajama top. [Trial Transcript at 3784] This evidence was not inconsistent with Dr. MacDonald's account. However, the government suppressed the fact that FBI analysts in 1978 reexamined the fibers from the club and determined there were also black wool fibers on it, fibers that did not match any fabric in the MacDonald home. And not only were these inexplicable black wool fibers found on the murder weapon, similar black wool fibers were found on the mouth and body of Colette MacDonald. Without an evidentiary hearing, the district court, relying in part on a now admittedly false affidavit by Malone, denied the motion. This evidence is significant corroboration of Dr. MacDonald's account of intruders that has now been established by Helena Stoeckley's reliable and trustworthy confessions to her attorney and to her mother.

The newly discovered evidence of Stoeckley's inculpatory statements to her

attorney and her mother provide significant evidence of her involvement in the crimes or at least her presence at the scene, making her being an eyewitness to the crimes. Had she so testified in 1979, and also told the jury, as she told Jane Zilloux, that she was concerned about her blond wig the night of the murders, because it was wet from the rain, and had blond wig hairs then been introduced as having been discovered in a hairbrush in the kitchen of the MacDonald home, those hairs would have taken on more importance, as corroboration of Stoeckley's confession and of her presence in the MacDonald home. Hence the discovery of those hairs should now be considered by this court, along with the evidence supporting the fact that they were very likely "wig hairs." [Defense Exhibit 5025, including and particularly Tabs 15-23 containing affidavits of various industry specialists]

This Court must not overlook the new evidence submitted in the 1990 and 1997 proceedings, along with the 22 inch-long blond wig hairs and their import, along with the evidence adduced in the present litigation in the context of the "evidence as a whole." The existence of the 22 inch-long blond synthetic hairs, found in a clear-handled hairbrush in the MacDonald home, is not in dispute, as these subject hairs were the partial basis for Dr. MacDonald's 1990 habeas petition and 1997 motion. The extensive lab notes about the presence of the hairs were included in the Affidavit of John J. Murphy, submitted as part of the 1990 habeas motion.

Also as part of his 1990 motion, Dr. MacDonald submitted various affidavits and lab notes, the fact that other lab notes discovered post-trial as part of a FOIA request demonstrated that government investigators had found "one black wool fiber and one

white wool fiber in the debris taken from the right biceps area of Colette's pajama top, two black wool fibers and one green wool fiber in the debris removed from the wooden club murder weapon, and two black wool fibers in the debris removed from the mouth area of Colette, none of which were matched to any known source in the MacDonald home." *See MacDonald*, 778 F. Supp. 1342, 1347-49 (E.D.N.C 1991). He advanced this new evidence as proof that intruders were in the home and as corroboration of the many Stoeckley confessions.

Throughout the history of this case, new information has emerged that has continually cast doubt on the conviction of Jeffrey MacDonald. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba v. California*, 314 U.S. 219, 236 (1941). It violates due process where gross police misconduct inheres in the heart of the government's case. *Fisher*, 711 F.3d at 466. The new information regarding Malone, Stombaugh, and Fram–developed by the Department of Justice and the Federal Bureau of Investigation–reveals just this sort of misconduct has pervaded this litigation.

Considering the new information from the DoJ and FBI within the ambit of the evidence as a whole, the new evidence of this governmental misfeasance and malfeasance, particularly that of Paul Stombaugh, in tandem with Stoeckley's exculpatory statements and the new DNA evidence, would have swayed the jury. It bears repeating that, "Had Stoeckley testified as it was reasonable to suspect she might have testified [admitting 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), *rev'd*, 456 U.S. 1 (1982). Surely, this observation is even more compelling in light of the revelations about three analysts on whom the government has long relied: Malone, Stombaugh, and Fram. Indeed, Judge Francis Murnaghan's observation that "this case provokes a strong uneasiness in me" because "MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted" rings even more clearly now. This Court should alter its judgment and grant the motion to vacate.

II. This Court Should Amend the Judgment and Grant a Certificate of Appealability.

Dr. MacDonald again requests for a certificate of appealability. He has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). That showing is greatly augmented by the revelations now before this Court. Reasonable jurists could disagree with this Court's determination. This Court must not rely on its adjudication of the merits of a claim in deciding whether to issue a COA. It "should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief." *Id.* at 337.

The government has not shown how reasonable jurists could not disagree both as to the reliability or credibility of the new evidence or its impact on the trial jury, especially given the revelations about Malone, Stombaugh, and Fram. Reasonable jurists could debate whether Dr. MacDonald has carried his burden. Thus, a certificate of appealability is in order.

CONCLUSION

For the reasons stated herein, as well as in his motion to alter or amend the judgment and his previous submissions, Jeffrey R. MacDonald respectfully requests that this Court:

1. Alter and amend its judgment as set forth herein and grant his motion to vacate the judgment; or

2. Grant him a certificate of appealability on the pertinent issues; and

3. For such other relief as the Court deems him justly entitled.

This the 6th day of January, 2015.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on 6 January 2015, I electronically filed the foregoing Supplemental Memorandum Supporting Motion to Alter or Amend Judgment 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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