UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 3:75-CR-26-F
No. 5:06-CV-24-F

UNITED STATES OF AMERICA	)	
	)	GOVERNMENT'S RESPONSE TO
v.	)	MOVANT'S SUPPLEMENTAL
	)	MEMORANDUM SUPPORTING
JEFFREY R. MacDONALD,	)	RULE 59(e) MOTION
Movant	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this Response to Movant's Supplemental Memorandum Supporting Rule 59(e) Motion in accordance with the Court's Order of November 13, 2014 (DE-376), and respectfully shows unto the Court the following:

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I. Procedural Context

This matter is before the Court on MacDonald's motion (DE-357), pursuant to Fed. R. Civ. P. 59(e), to alter or amend the judgment entered on July 24, 2014 (DE-354). In his Rule 59(e) motion, MacDonald argued that the judgment should be altered because of "new evidence" not available at the 2012 hearing, or during the extensive 2013 briefing, namely, a July 2014 Report of the U.S. Department of Justice, Office of Inspector General (DE-357-1). DE-357 at 1, 3-4.[1] MacDonald focused on the questions raised in the report about Michael Malone's work in cases other than MacDonald's. The Government responded that any additional evidence regarding the credibility of Michael Malone, who played no role in the MacDonald case until 1990 (eleven years after the trial), did not change the basis of the Court's judgment. DE-358 at 1-10.

While MacDonald's attorney was preparing a Reply to the Response, on September 22, 2014, the United States Attorney received a letter from Norman Wong, Special Counsel of the Executive Office for United States Attorneys, regarding a review of microscopic hair comparison

[1] MacDonald also argued that the Court should amend the judgment to grant a certificate of appealability. DE-357 at 5-10.

reports and testimony by the FBI. DE-363-2. This resulted from an FBI review of testimony and reports from more than 20,000 cases litigated prior to December 31, 1999.[2] See DE-357-1 at 14 n.12. Enclosed with the Wong letter was a document entitled "Microscopic Hair Comparison Analysis: Result of Review." DE-363-3. This report reflected the conclusions of the FBI lab review team, with the concurrence of the Innocence Project. Based on its review of lab reports and trial testimony in the MacDonald case, the FBI/IP process found three errors:

1) "Inappropriate Statement" in lab report by Michael Malone, dated 2/4/1991 ("consistent with having originated from Jeffrey MacDonald") (hereinafter "Malone report");

2) "Inappropriate Statement" in lab report by Robert Fram, dated 5/19/1999 ("consistent with having originated from KIMBERLY MACDONALD") (hereinafter "Fram Report"); and

3) "Inappropriate Statements" in trial testimony of Paul Stombaugh on August 7-9, 1979 ("Page 4294, ln 1-6"):

> A. Sir, the only conclusion on the hair examination that I was going to make was its origin.
> Q. That is pretty serious about whose hair it is. That is a fundamental question you were being asked.
> A. That is correct.

DE-363-3 at 5-6. The FBI reviewers also reported on their examinations of the November 5, 1974, laboratory report of Paul Stombaugh (DE-363-4), and the December 31, 1990, report of Michael Malone (DE-363-5), in which they found no error. DE-363-3 at 5. On September 23,

[2] The FBI review is wholly separate from the 2014 DOJ OIG inquiry into the follow-up measures taken by the Department of Justice in the aftermath of the 1997 DOJ OIG review. The criticisms therein, regarding the credibility of Michael Malone generally, have been fully discussed in previous filings. See infra at 30; DE-357-1 at 14 n.12, 146, *An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory* by the U.S. Department of Justice, Office of the Inspector General, July 2014.

2014, the Government filed with the Court the Wong letter and the report of the FBI with its attachments,[3] serving the Petitioner by CM/ECF.

MacDonald filed a Reply to Government's Response on September 25, 2014 (DE-364). He argued:

> This new evidence from the DoJ and FBI about Malone, Stombaugh, and Fram has a very significant impact on the evidence as a whole. It impugns important government evidence regarding hairs; it shakes the credibility of three analysts who have given important testimony or statements; it casts serious doubt on a large portion of the government's theory of Dr. MacDonald's guilt. Considering the new information from the DoJ and FBI within the ambit of the evidence as a whole, the new evidence of Stoeckley's exculpatory statements and the DNA evidence would have swayed the jury.

DE-364 at 7-8. He also requested that the parties be given an opportunity to file supplemental briefs on this issue. Id. at 1 n.1, 3, 9. This ultimately led to the Court's order permitting supplemental briefing by the parties. DE-376.

In his supplemental memorandum, filed on January 6, 2015, MacDonald once again argued:

> 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 . . . [T]his 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 . . . if it had heard all of the new evidence [that was presented prior to the Court's order of July 24, 2014] that is now augmented by further new evidence of misfeasance and malfeasance by Stombaugh, Malone, and Fram.

[3] Because of the length of the transcript of Stombaugh's trial testimony and the fact that it was already in the record of the case, the Government only attached the page on which the "Inappropriate Statements" were set forth. The Malone and Fram lab reports cited by the FBI as containing errors were also already in the record. See DE-363-1.

DE-379 at 2. MacDonald further argued that amending the July 24 judgment was necessary (1) to account for this new evidence and (2) prevent manifest injustice. DE-379 at 8.

The purpose of this memorandum, filed by the Government pursuant to the Court's November 13 Order, is to address the points raised in MacDonald's Reply (DE-364) and his Supplemental Memorandum (DE-379).

II. Statement of Facts

The hair at issue in the Malone report was identified as a pubic hair, Q79, which had previously been collected from within the body outline of Colette MacDonald. DE-363-6 at 2. This same hair would later be identified as AFDIL specimen 75A[4]. See DE-119-3 at 3; DE-344 at 179. The hair at issue in the Fram report was identified as "[a] forcibly removed Caucasian head hair found on one of the Q96 resubmitted glass microscope slides, (labeled "19 1/2"" on the slide)." DE-363-7 at 7. The root end of this hair, found adhering to the bedspread inside the sheet on the floor of the master bedroom, would later be identified as Q96.5 and AFDIL specimen 112A(5), and found to have the same mtDNA sequence as Colette, Kimberly and Kristen. See DE-119-3 at 3; DE-219, Ex. 63; DE-344 at 173, 181. The hair at issue in the cited portions of the Stombaugh testimony was identified by the FBI as "Q96 H(from thread)," and also collected from the bedspread, but later was given an AFDIL designation of 113A. See DE-292-3 at 24. This hair was discovered by Shirley Green in 1974, entangled with a purple cotton thread matching those of MacDonald's pajama top (Q12). See DE-10, Attachment 5, Appendix at 221; DE-219, Ex. 46; GX 3062 at 102. The 2006 DNA results for AFDIL 113A were found to be

[4] AFDIL specimen 75A is one of the three "unsourced hairs" at issue in the 2255 petition at bar. The hairs discussed in this memorandum have been given various numbers during the investigation and prosecution of this case. To assist in tracing the relevant history of the three hairs as to which the FBI review found error in an analyst's report or testimony, an explanatory chart is attached hereto as Exhibit 1.

"inconclusive," and this hair was not included in MacDonald's "unsourced hairs" claim. DE-119-3 at 4.; DE-122; DE-123.

Although these hairs played no role or a very minor one in the trial, in order to fully respond to MacDonald's most recent contentions, it is necessary to discuss the history of the hairs at issue. The Government has previously set forth the evidence adduced at trial, the facts regarding Malone's involvement in this case, and the evidence regarding the "unsourced hairs," incorporated herein by reference, and this statement of facts will supplement that exposition only as necessary to respond to MacDonald's arguments in his reply (DE-364) and Supplemental Memorandum (DE-379). See DE-344 at 67-136, 159-164, 166-183.

A. The Stombaugh Testimony and AFDIL Specimen 113(A)

1. The October 17, 1974, FBI Lab Report

On September 24, 1974, many vials of evidence were delivered to Paul M. Stombaugh ("PMS") at the FBI Lab for further examination. GX 3060. According to standard FBI procedure, the vials were turned over to Stombaugh's Physical Science Technician, Shirley S. Green ("SSG"), who assigned the FBI "Q-96" number to a "[v]ial containing debris from bedspread (D229)." GX 3060 at 2. Green inventoried the contents of the Q96 (D229) vial and found, inter alia, "2 long pcs purp cot 2 ply Z sew thr…(bloodsoaked, one twisted w/a hair)." DE-10, Attachment 5, Appendix at 221; GX 3062 at 102. Green's Q96 bench note further reflects that she soaked the twisted thread in water to remove the hair, which she then mounted on a slide marked "Q96 H (from thread)." Id., DE-219, Ex. 46; DE-306-2 at 24. Green did not photograph the hair twisted around the purple cotton thread, but drew a diagram in her notes. Id. Green also mounted hairs from the D229 vial on another slide which she marked "19 ½ L2082 Q96."

Stombaugh then compared the contents of Q96 H (from thread) to Q12 (MacDonald's pajama top), and found that two pieces of purple cotton sewing thread like that of the pajama top were present. GX 3060 at 6. He then stated that subsequent to this report dated October 17, 1974, a further report would be issued regarding the hair comparisons. Id.

2. The November 5, 1974, FBI Lab Report

On November 5, 1974, Stombaugh issued a follow-up to the October 17, 1974, report that included a hair comparison of Q96 H(from thread). It stated, "[l]ight brown to blond head hairs that microscopically matched the K1 head hairs of COLETTE MAC DONALD were found in specimens … Q96…The Q96 hair was found entangled around a purple cotton sewing thread like that used in the construction of the Q12 pajama top. Further this hair had bloodlike deposits along its shaft." GX 3061 at 2; DE-363-4. In 2014, The FBI 2014 reviewers examined the November 5, 1974, laboratory report and found no error. DE-363-3 at 5.

3. Larry Flinn Trial Testimony

At trial, CID Chemist Larry Flinn was called to testify regarding the collection of evidence from items retrieved at the crime scene and sent to him at the CID lab. TTr. 3526. Flinn identified GX 104 as the bedspread found on the master bedroom floor, and the vial marked "Hairs, Fibers, Et Cetera, D-229" was received into evidence as GX 107. TTr. 3538. Flinn was not cross-examined regarding his collection of the debris from the bedspread. Id. at 3545-52.

4. Dillard Browning Trial Testimony

On August 6, 1979, CID Chemist Dillard Browning was called by the Government to testify about his examinations of items other than hair. TTr. 3754-3831. On cross-examination, MacDonald defense counsel Bernard Segal chose to examine Browning as his own witness in an

attempt to undermine Stombaugh's anticipated testimony. TTr. 3831-3888. The following colloquy between Segal and Browning occurred before the jury concerning the limits of hair comparison testimony:

> Q. While we're talking about hair, it would be correct to say, would it not, Mr. Browning, that human hairs do not have unique individual characteristics the same way as fingerprints have unique individual characteristics?
>
> A. They have unique individual characteristics, but not sufficient unique individual characteristics that you can give a specific determination, like fingerprints.
>
> Q. When you say 'specific determination,' you mean with fingerprints you find a fingerprint and it matches that which comes from a given individual. You know there is no one else in the world that is going to have that print?
>
> A. That's right, yes.
>
> Q. When it comes to hair, what is the most you can say when you find a sample of hair that you compare with one known to come from a person?
>
> A. Once again, we use the could have opinion.
>
> Q. You could say it generally resembles the hair of a known person; is that right?
>
> A. Well, I never used that term generally. I would say 'grossly similar' or microscopically identical. In that case, I would give the report that they could have originated from a common source.
>
> Q. But you're not able, from such a gross examination, to make a specific identification of whose hair it actually is as you are looking at it?
>
> A. No, there would have to be many unique abnormalities or something very unique to the two samples to say definitely that one hair originated from the head of a certain individual.

TTr. 3846-47. Although Segal was in possession of the CID lab reports and Article 32 testimony (GX 3057 at 9) indicating that Browning had examined the debris collected from the bedspread in the master bedroom (D229, later Q96), he did not question Browning about the D229/Q96 H(from thread)/GX 107 hair entangled with the purple cotton sewing thread which Stombaugh had reported microscopically matched Colette MacDonald. See TTr. 3831-3888, 3898-3899. In fact, Segal did not ask Browning about his examination of D229/Q96/GX 107 at all. Id.

5. Paul Stombaugh Trial Testimony

On August 8, 1979, two days after Dillard Browning's testimony, Paul M. Stombaugh testified about his examination of 18 vials of debris collected from the crime scene and from items seized as a result of the crime scene search. See GX 654. The location of each of these items, as well as the results of Stombaugh's comparisons of threads and yarns with known exemplars from MacDonald's pajama top have been previously discussed and will only be repeated as necessary to address Macdonald's current claims. See DE-344 at 70-73.

With respect to D229/Q96/GX 107, the debris removed by Flinn from the bedspread found in the pile of bedding on the master bedroom floor, Stombaugh testified that that he found one yarn fragment and two purple sewing threads, which he compared with Macdonald's pajama top. TTr. 4103-4104. Stombaugh rendered the opinion that the threads and yarns could have originated from the pajama top. Id. Stombaugh was then asked about the hair present in D229/Q96 H(from thread)/GX 107. He testified that there was "one head hair wrapped around the sewing thread-tangled" which thread he had previously testified could have come from MacDonald's pajama top. TTr. 4109-4110. He further explained that the hair, which had blood-like deposits

on the shaft, microscopically matched Colette MacDonald, and wrote the words "one hair" on the trial exhibit chart (GXP 654). Id.; TTr. 4156. The FBI reviewers, in 2014, examined the full trial testimony of Paul Stombaugh and found no error in any statements from his direct examination. DE-363-3 at 6.

During cross-examination, Segal questioned Stombaugh extensively in front of the jury to determine how the Q96 hair had come to be entangled with a thread from MacDonald's pajama top. TTr. 4290-4293. Stombaugh testified that he had no knowledge of whether Army CID at Fort Gordon had previously examined the entangled hair and thread, why they were still entangled after the passage of so much time, or under what conditions they had been maintained before coming to him to examine. Id. He stated that he "was curious about why they were wrapped entwined around each other, but as to how it took place, you can only report the condition of items as they are received in the laboratory. You have no control over what happened to them before." Id. at 4293. Segal then asked, "Mr. Stombaugh, the question was: weren't you concerned with what might have been done to that hair that might possibly lead you to a wrong conclusion unless you found out what they had done with it?" Id. The answer, and follow-up question, are found in the six lines that the 2014 FBI review has identified as error:

1	A.	Sir, the only conclusion on the hair
2		examination that I was going to make was its origin.
3	Q.	That is pretty serious about whose hair it
4		is. That is a fundamental question you were being
5		asked.
6	A.	That is correct.

TTr. 4294. Segal continued his cross-examination in an effort to cast doubt on the handling of the Q96 vial before Stombaugh received it, and also attempted to discredit the validity of the known

hair exemplars of Colette, Kimberly, and Kristen because they had been taken posthumously in 1974. TTr. 4294-4304. Segal never questioned Stombaugh about the actual comparison of the D229/Q96 H(from thread)/GX 107 hair to Colette's exemplar or his conclusions regarding such, nor did he ask Stombaugh about the limits of hair comparison science, as he had done with Dillard Browning. See TTr. 4198-4303, 4310-4409, 4418-4419.

6. Stipulation to Browning's Testimony regarding D229/Q96/GX 107

On August 16, 1979, at the conclusion of the testimony of Shirley Green, several stipulations were presented to the jury. The defense agreed to the following stipulation:

> It is also stipulated between counsel that in regard to Government Exhibit Q-96 which I believe has the Government Exhibit number of Exhibit 107, which was described by Mr. Flinn as the debris which he removed from the multicolored bedspread found inside the sheet on the floor of the master bedroom, that Mr. Browning, if called to testify, would testify that, after examining a blue yarn or a purple thread found in that vial, when he returned the contents of that vial to the vial, he did not knot or in any way entangle hair which was also found in that vial and has been identified by Mr. Stombaugh as microscopically matching the head hair of Colette MacDonald.

TTr. 4612-4613.

7. AFDIL Examination of Q96

When it was received at the FBI Lab in 1974, the Q96 vial originally contained multiple items of evidence. FBI Technician Shirley Green mounted the hairs and fibers (but not the purple threads) on four separate slides. When these were received by AFDIL, each slide was given a different number. The Q96 "H (from thread)" slide prepared by Shirley Green was given a designation of AFDIL specimen number 113A. DE-292-3 at 24. The DNA results for AFDIL 113A were found to be "inconclusive," and MacDonald did not include this hair in his "unsourced hairs" claim. DE-122; DE-123; DE-306 at 7, ¶23(e). Thus, the examination of the Q96 H(from

thread) hair conducted by Stombaugh has since been augmented by stipulated post-conviction DNA results, and the DNA results did not contradict Stombaugh's findings. See DE-119-3; DE-306 at 7, ¶23(e).

B. The Pajama Top Reconstruction

On June 10, 1971, CID Agent William F. Ivory delivered thirteen items of evidence to the FBI Laboratory pursuant to a request for additional laboratory examination from Colonel Henry H. Tufts, the Commanding Officer of the U.S. Army CID Agency. See Exhibit 2, attached.[5] The CID's request letter was not accompanied by crime scene photos and did not reflect that the pajama top was found, right sleeve inside out, on Colette's chest. Id. Agent Examiner Paul M. Stombaugh was assigned to conduct the examinations. He conducted all the 1971 examinations without any assistance from Technician Shirley S. Green, who had no involvement in the MacDonald Case before 1974. TTr. 4483; see also DE-10, Attachment 5, Affidavit of Shirley Green at 1.

In pertinent part, the July 2, 1971, Stombaugh report concluded that 48 puncture holes were located in the pajama top (not necessarily from 48 different thrusts), made by "a sharp pointed object such as an ice pick like specimen Q3." See Exhibit 3 at 2-3, attached. Stombaugh noted that the holes did "not contain enough individual characteristics to be associated with a particular instrument." Id. at 3. Further, Stombaugh concluded that the frequent handling of these garments caused "the yarns surrounding the holes to return … to their original positions thus

[5] The items consisted of the two paring knives (Q1 and Q2), the ice pick (Q3), the clothing removed from Kristen's body (Q4, Q5, Q6 and Q7), the clothing removed from Colette's body (Q8 and Q9), the clothing removed from Kimberly's body (Q10, Q11), the Q-12 torn blue pajama top, and the Q13 pocket allegedly from the Q12 pajama top. All of these items had previously been examined by the CID, and all would eventually be the subject of testimony at trial and ultimately entered into evidence. In the interest of clarity, both the laboratory numbers and the trial exhibit numbers will be used in this document.

preventing a definite conclusion to be made as to whether each hole is an "entry" or "exit" hole." Id. He did go on to state, however, that in the present condition, six of the holes had the general appearance of "entry" holes and five had the general appearance of "exit" holes. Id. The specific holes to which he attributed these characteristics were not listed in the report.

On September 24, 1974, during the grand jury investigation, additional specimens were submitted to the FBI for testing. GX 3060. In addition to the new items to be examined, both knives, the ice pick, Colette's pajama bottoms and top, and MacDonald's pajama top and its torn pocket (Q1-3, 8, 9, 12, and 13 respectively) were re-submitted to Stombaugh. In his report dated October 17, 1974, Stombaugh described the process by which, using crime scene photographs depicting the Q12/GX 101 pajama top on the body of Colette MacDonald, it was refolded in the same manner—right sleeve inside out—and the 48 puncture holes were aligned with 21 probes to produce a pattern of 5 and 16 thrusts. GX 3060 at 4-6. [6]

The July 2, 1971, Lab Report (Exhibit 3), October 17, 1974, FBI Lab Report (GX 3060), and a subsequent report dated November 5, 1974 (GX 3061, DE-363-4), all prepared by Stombaugh, were furnished to defense counsel Bernie Segal in 1975, in the normal course of post-indictment discovery. See DE-1, Vol. IV at 13, ¶27.

The trial in this matter commenced on July 16, 1979, and on or about July 30, 1979, a defense subpoena was served upon the FBI for the personnel records of Paul Stombaugh. See DE-117-4 at 15. The afternoon of July 31, 1979, the Court excused the jury to take up motions, including those related to the pending subpoena. TTr. 3246(10).[7] In explaining the rationale for

[6] This demonstration was referred to at trial as "the reconstruction."

[7] As the Reporter's Note reflects, the afternoon proceedings were not transcribed with the testimony at the time on a daily copy basis, and the pages were later inserted using the last number of the morning transcript with a series of numbers in parentheses. TTr. 3246(1).

subpoenaing Stombaugh's personnel records, Segal stated, "[w]e seriously doubt, Your Honor, that he is qualified to do what he says he did. But we have no way of knowing until after he has testified." TTr. 3246(12). Judge Dupree noted that Stombaugh would be present and would be able to be cross-examined about his qualifications, and denied Segal's fishing expedition regarding the personnel records. TTr. 3246(12)-3246(14). Segal persisted, stating that "[w]hat I am concerned, Your Honor, is the fact that I doubt very much … that the Bureau stands behind the experiments in this case. I think that his supervisors do not concur that what he did was scientific, supported with scientific methodology, or worth a damn." TTr.3246(15). Judge Dupree pointed out that the defense could subpoena Stombaugh's supervisors to testify at trial, but Segal complained that the Government had all of the information that he could use to impeach Stombaugh and that they should be forced to turn it over. TTr. 3246(16)-3246(17). The Court noted that Brady applied to the situation at hand, to which the Government agreed. TTr. 3246(17). The following colloquy then ensued:

> THE COURT: …if you have anything–he says that you have a file full of stuff on old Stombaugh and it shows that he is a stumble bum.
>
> MR. MURTAGH: No.
>
> THE COURT: And so, if you have, I will 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.
>
> MR. MURTAGH: Well, in that case, Your Honor, let me make the record as clear as I possibly can: one, we have no files on Mr. Stombaugh. I assume he has a personnel file, like every other past and present employee of the FBI. I have never seen it. I have no reason to believe that he was other than an examiner in the FBI Laboratory for some years 16 years. Prior to that, he was a street agent in St. Louis. Prior to that, I believe he was in the United States Navy. I know he has a bachelor's

> Degree in chemistry from, I believe, the University of South Carolina. He is a qualified examiner.

TTr. 3246(18)-3246(19). The Court went on to deny the issuance of the subpoena, stating:

> Gentlemen, I do not feel that at the end of the 12th day of a trial of this case that the Court ought to uphold a subpoena for materials which, at best, are speculative as to what they show–some of them of questionable admissibility. And I think that if the Defendant has shown anything at all in this case, he has succeeded admirably and in depth in showing that there were just hundreds of things that these investigators could have done which they didn't do. So, from that standpoint, I think they're all right.

Ttr. 3246(21).

1. Stombaugh's Direct Examination Regarding the Pajama Top

On August 7, 1979, the Government called Paul Stombaugh, who had retired from the FBI in 1976, and was then employed by the Greenville, South Carolina, Police Department as the Director of the Police Services Bureau. TTr. 3989-3990. Stombaugh testified about a wide range of items he had examined at the FBI Lab in 1971 and 1974. Since the Government has discussed those examinations supra, and in other filings, at this time we will address only the examination of Stombaugh regarding the pajama top reconstruction.

Following a lengthy voir dire, which included questions regarding his personnel file, the defense informed the Court that they had no objection to Stombaugh's qualifications regarding hair and fiber examination, but that they would still challenge his expertise in the area of fabric damage or fabric impressions, and renewed their request for his personnel file. TTr. 3994-4026. The Court ruled that Stombaugh would "be qualified as an expert in hair fibers, fabric damage, stains and fabric impressions. The credibility and the probative force of his testimony will be for this jury to say." TTr. 4029.

In preparation for Stombaugh's testimony regarding the pajama top reconstruction, the Government had laid a foundation for much of the relevant evidence through independent sources. CID Agent Bill Ivory testified to his observation of MacDonald's torn pajama top, found on Colette's chest, as depicted in the crime scene photos. TTr. 1612-13, 1693-94; GXP 40-45. Dr. George Gammel, MD, the pathologist who performed the autopsy on Colette, testified regarding the sixteen deep penetrating stab wounds to her neck and chest, and twenty-one puncture wounds to her chest, all of which had been inflicted in a perpendicular manner. TTr. 2500-2504; GXP 763, 2362. The stab wounds were "very consistent" with the Old Hickory paring knife, and the puncture wounds were consistent with those that would be caused by an ice pick. Id. The twenty-one ice pick wounds were in two distinct groups on Colette's chest: sixteen on the left side and five on the right side. TTr. 2520; GXP 763. On cross-examination, Dr. Gammel testified that the absence of tearing of the skin in the areas where the punctures were found indicated that Colette's body was not moving at the time the ice pick wounds were inflicted. TTr. 2545. Emergency Room Senior Clinical Technician Michael Newman testified that MacDonald had no ice pick injuries and no injuries to his back. See DE-344 at 80.

The Government had also introduced the prior statements of Jeffrey MacDonald, including the tape-recorded, non-custodial CID interview of April 6, 1970, in which he claimed to have placed his pajama top on Colette's chest after the alleged assailants had left the house. See DE-344 at 89**.** Further, the Government produced MacDonald's testimony before the grand jury, in which he stated that he did not claim to have sustained any injuries to his body, including any from an ice pick. DE-132-21 at 37; DE-344 at 93; GX 1022.

The foundation for the pajama top reconstruction also included the results of Stombaugh's 1971 examination of the weapons and clothing, pre-dating the reconstruction. With respect to the examination of Colette's pajama top (Q9/GX 270), Stombaugh noted that it had sustained 30 punctures which could have been made with the ice pick (Q3/GX 312). TTr. 4052. In addition, the front of Colette's pajama top sustained 18 cuts "made by a very sharp cutting instrument with a single cutting edge." TTr. 4052-53. Stombaugh conducted test cuts using the Old Hickory knife (Q2/GX 313), and concluded that it could have made the cuts to Colette's pajama top. TTr. 4053. In contrast, Stombaugh found that it was "extremely doubtful" that the cuts could have been made with the Geneva Forge knife (Q1/GX 311), the duller of the two knives, which had been found on the floor of the master bedroom. TTr. 4054; GXP 49-50. MacDonald's contention was that, upon entering the master bedroom, after the "intruders" had left, he pulled a knife out of Colette's chest and threw it somewhere. GX 1135 at 13.[8]

With respect to his 1971 examination of MacDonald's pajama top (Q12/GX 101), Stombaugh testified that he found a total of 48 puncture holes in the pajama top which he numbered with a white pencil, and indicated that they could have been caused by the ice pick. TTr. 4058. "The holes varied slightly in size. The biggest measuring 1/8 of an inch across, which conformed to the width of the ice pick blade at the hilt." Id. With respect to the front panel of the pajama top, Stombaugh found one 5/8 inch long tearing cut. TTr. 4060-61. On the left sleeve, Stombaugh found an additional cut. TTr. 4062. "From the test cuts made in the laboratory, the two cuts on [MacDonald's] pajama top could have been made by the Geneva Forge knife, the dull

[8] The Old Hickory knife was found just outside the utility room door of the MacDonald household along with the ice pick and the wooden club. TTr. 2342-2343; HTr. 802-803; GXP 79, 80, 81, 262, 1162. As the sharper of the two knives, the Old Hickory knife was determined to be consistent with the cuts inflicted on Colette's chest as well as with the cuts to her pajama top. See supra at 16.

knife." TTr. 4063. When asked about the sharp Old Hickory knife, Stombaugh responded, "[w]ell, here again it could have, but it is doubtful because these cuts aren't clean; they are more or less tearing cuts." Id. Stombaugh next identified a series of laboratory photographs for the jury, depicting the circled and numbered puncture holes in the pajama top. See GXP 600, 600(b), 600(a), 602(a); TTr. 4066. Stombaugh further stated that, "[h]ad the garment been in motion when a sharp instrument was struck into it, the holes would not be perfectly symmetrical like they are. There would be tearing of the yarns in the area from the force of the garment being moved. I found no such tearing and therefore concluded that the garment itself was stationary at the time the punctures were made." TTr. 4075.

Stombaugh went on to testify about his conclusions regarding how the pajama top pocket could have been torn off, when certain blood stains got on the pajama top, how bloody fabric impressions found on the sheet could have come from the cuffs of each of the pajama tops, the comparison of numerous threads and yarns with known exemplars from MacDonald's pajama top, as well as the comparison of questioned hairs with known exemplars from the MacDonald family. See TTr. 4086-4161.

Before Stombaugh was asked to testify about the pajama top reconstruction, the Government requested a bench conference to determine whether there would be additional voir dire outside the presence of the jury. TTr. 4161. At the bench, the Government was candid that Stombaugh did not conduct the pajama top reconstruction, rather, that it was conducted by Shirley Green, who would testify later. Id. It was the Government's contention, however, that Stombaugh could testify as to his knowledge of the reconstruction, given that he was present while Green was conducting the reconstruction and that he was her supervisor. TTr. 4161-4162. Segal

vehemently objected, stating, "[m]y information is not that Mr. Stombaugh supervised Ms. Green. He was a supervisor, but our information is that she worked three weeks on this and he was almost never in the room. She did this by herself and as a foundation. And he simply talked about what she was doing periodically. He didn't supervise her in any of the known scientific senses of the word." TTr. 4163. Judge Dupree denied the motion for additional voir dire and allowed Stombaugh's testimony about the pajama top reconstruction to proceed, noting, "I verily anticipate that your witness will be subjected to a most searching cross-examination and possibly a destruction of his testimony." TTr. 4178-4179.

Stombaugh testified that when he examined the blue pajama top in 1971, he had no knowledge of where it had been found. TTr. 4181. When he was asked to re-examine it in 1974, he was supplied at that time with many crime scene photos, including ones which depicted the blue pajama top in situ on Colette's chest. He was also supplied with the autopsy report of Colette MacDonald, which reflected that she had sustained 21 puncture wounds in her chest. TTr. 4182-83. Stombaugh identified for the jury an autopsy photograph taken of Colette MacDonald's chest, after the blood had been washed off, and which he had annotated by circling and numbering all 21 puncture wounds, and encasing each stab wound with a rectangle and an alphabetical designation "A" through "G." TTr. 4182-83; GXP 786. Stombaugh also identified the photographs depicting MacDonald's pajama top on Colette's body that he and Shirley Green had used to identify the various seams, determine that the right shoulder seam was inside out, and that the torn left panel was trailing off the body. TTr. 4185-4187; GX 1137-1139; GXP 41, 43, 44.

Stombaugh explained that the purpose of this new examination was "to ascertain whether or not the … puncture wounds, to Colette could have been made through this pajama top—if it

were in fact on top of her body. So, the purpose of using the photographs was to fold the pajama top as near as possible to the way it was folded on top of the body at the time these photographs were taken." TTr. 4187-4188. He then went on to describe the process of folding the pajama top so that the two separate groups of puncture wounds in Colette's chest—five holes in the right chest area and sixteen in the left chest area—aligned with the twenty-one holes visible in the top layer of the folded pajama top. TTr. 4191-4193. When asked whether the twenty-one holes visible in the top layer of the pajama top were ever able to be aligned with the grouping of puncture wounds in Colette's chest, he stated that, "[a]fter a lengthy period of time, Ms. Green succeeded in lining up all the holes." TTr. 4193. The Government asked Stombaugh to identify and explain Government Exhibit 787, a photograph taken in 1974 depicting the completed pajama top reconstruction, and further how he and Shirley Green came to the conclusion that twenty-one thrusts could have created forty-eight holes in the pajama top. TTr. 4194-4196. Stombaugh clarified that while "the puncture damage to [Colette's] chest could have been made through this pajama top while it was on her body…[i]n the photographs the pajama top is lower down on the chest and it appears to have been moved. If it was in the exact location, then you would be a little more assured that this happened. The pajama top is not—it appeared from the photographs to have been moved more down towards the abdomen." TTr. 4197.

2. Stombaugh's Cross-Examination Regarding the Pajama Top

The cross-examination of Paul Stombaugh was extensive, lasting for the better part of two days. See TTr. 4198-4303, 4310-4409, 4418-4419.[9] Segal spent a great deal of time attempting

[9] During this time, the defense requested a copy of the notes that Stombaugh had been using to testify, and was provided with them after court recessed on the first day of Stombaugh's testimony. TTr. 4254-4255. The defense expert, Dr. Thornton, acknowledged that these notes were primarily focused on the pajama top reconstruction. DE-1, Vol. V, Exhibit 16, ¶17. Stombaugh's bench notes were, therefore, available to Segal for use during his

to discredit the pajama top reconstruction. Stombaugh explained that he did not attempt to line up the stab wounds in Colette's chest with the two cuts in MacDonald's pajama top, and that he had counted eighteen cuts in Colette's pajama top in addition to the thirty puncture holes. TTr. 4357-4361. He readily admitted that there were likely other combinations by which the forty-eight puncture holes in the pajama top could be lined up with the twenty-one puncture wounds in Colette's chest, but that he did not know how many possibilities existed. TTr. 4371. He told Segal, "[s]ir, I have no idea. All I'm saying is that we used up all 48 holes with 21 thrusts, and we're just saying that it can be done. We are not saying this actually took place. We are saying this can be done. It could have taken place, and that's all this demonstration represents." Id. Segal fully explored how, in 1971, Stombaugh recorded the location of the puncture holes on a diagram of the pajama top shown in his notes, and the fact that some of the holes appeared to be deep "up to the hilt type holes," but at no time did he ask Stombaugh about the conclusions in the July 2, 1971, lab report regarding the "general appearance" of some holes as "entry" or "exit" holes, as recorded in his 1971 bench notes. TTr. 4375. Segal spent a great deal of time focusing on the size of the holes in the pajama top versus the size of the holes in Colette's chest with which they were paired in the reconstruction. Stombaugh informed the jury that Shirley Green was the one who had lined up the holes in the folded pajama top with the pattern of puncture wounds in Colette's chest, and stated, "[i]t is a very time-consuming job. We both worked on it for a while, and then Ms. Green took over; and it took her a very long length of time to see if it could be done." TTr. 4379-4380. Segal was unrelenting in his examination of Stombaugh regarding the difference in hole sizes between the pajama top and wounds in Colette's chest. See TTr. 4380-4384. Finally Stombaugh told him:

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cross-examination.

> [W]e were not trying to line up holes with particular damage to the body itself. We were just trying to determine if the 21—or the 48 holes could have been made by 21 thrusts, and if so what the pattern would be. And we did get a pattern of five holes and 16 holes, and accounted for all 48 holes. As I say, again, we are not saying this is actually what took place. We made this demonstration to see if it could have taken place.

TTr. 4381. The gist of Segal's cross-examination was to try to show that Stombaugh's testimony before the grand jury was different than his statement in the October 17, 1974, lab report and trial testimony, but Stombaugh stood by his statements. TTr. 4393. At the conclusion of cross-examination, Segal asked Stombaugh if he had prepared the re-make of the pajama top reconstruction that the Government subsequently marked as GX 789-796 and used during the examination of Shirley Green. TTr. 4461-4474. Stombaugh indicated that he had not. Id.

3. Shirley Green's Direct Examination

Shirley Green testified immediately after Paul Stombaugh. TTr. 4423. Green was not offered as an expert witness, but testified that she was a Physical Science Technician, employed by the FBI Lab in the Microscopic Analysis Unit. Id. She had been employed by the FBI for 28 years, 25 of them in the Microscopic Analysis Unit, but had never previously testified in court. TTr. 4424. She testified that, in the fall of 1974, she was working in the "attic of the old building" which she further identified as Department of Justice Building, and there came a time when Paul Stombaugh moved into her office space and she began assisting him in conducting laboratory examinations in this case. TTr. 4429-4430.

Green identified a photo enlargement, GX 787(a), depicting the 1974 pajama top reconstruction with the probes, and GX 1140, the actual probes themselves. Id. She further identified the numbers on the paper tabs affixed to the probes as being her own, and stated that she

had done the reconstruction herself. TTr. 4431. Green then walked the jury through the pajama top reconstruction process, indicating which holes corresponded to a single thrust, and how she color-coded them to reflect as much when the pajama top was unfolded. TTr. 4431-4435; See GX 787, 1142. She did not force any of the probes through the holes in the pajama top. TTr. 4438.

Green further testified that she was never able to align the twenty-one probes through the pajama top in any other way, and that it had taken her over a week to find this one solution. TTr. 4458.[10] She went on to explain a series of photographs taken in 1978-1979 of the grouping patterns reflected on graph paper of the holes in both the pajama top reconstruction and the autopsy photo, created by inserting push pins into each that resulted in groupings of holes on graph paper, demonstrating the similarity between the left and right grouping patterns in both the pajama top and the body. TTr. 4461-4474; GX 789-798, 1070, 1143. All of these items of evidence were admitted and published to the jury. Id.

4. Shirley Green's Cross-Examination

During Green's cross-examination, she informed the jury that she did not attempt to line up the two cuts in MacDonald's pajama top with any cuts to Colette's body because she was not asked to do so as a part of her examination. TTr. 4476-4477, 4483. She testified that she had not seen the pajama top in 1971, and that in 1974, she did not examine the pajama top holes before she began the reconstruction process because Stombaugh had done that, but that the holes all seemed to be approximately the same size. TTr. 4491-4493. Further, Green explained how she and Stombaugh determined the positioning of the pajama top on Colette's body, and that she believed

[10] As used in this memorandum the term "the solution" refers exclusively to the numbering of the 48 holes in GX 101(Q12), and the sequence of holes through which the 21 probes were inserted by Shirley Green in order to produce the pattern of two groups of 5 and 16 thrusts. See GX 1076, Exhibit 5.

that it had likely been moved as a result of MacDonald lying on Colette's body. TTr. 4495. Green was asked about alternative arrangements for fitting the forty-eight holes into twenty-one thrusts and she acknowledged that that there "could possibly be more; it could possibly be less; but it can be 21 holes exactly and come out into the same pattern as the pattern of the punctures on the victim." TTr. 4498. Green also acknowledged that she could not tell which were entry and which were exit holes, and that although Stombaugh had noted that he had identified what appeared to be some of each, she did not have a copy of any report indicating as much. TTr. 4568-4570. She recalled that there were "possibly five exit and six entrance [holes] or vice versa." TTr. 4570. Although she did not have any notes to that effect, she recalled that holes 6, 14, and 20 were exit holes, but had not tried to accommodate the reconstruction to any of the other holes that she could not remember. TTr. 4572. Segal never asked Green about her own notes regarding the solution to the pajama reconstruction (Exhibit 5), nor about Stombaugh's notes (Exhibit 4).

5. Dr. John Thornton's Testimony

On direct examination, Dr. John I. Thornton, a Professor of Forensic Science at the University of California at Berkley and witness for the defense,[11] challenged a number of Stombaugh's conclusions regarding the bloody fabric impressions on the bed sheet. Thornton did not address any of Stombaugh's conclusions based on his comparison of questioned threads or yarns with known exemplars from MacDonald's pajama top, or his comparison of questioned hairs with known hair exemplars. TTr. 5128-5218. The only challenge from Thornton relating to Stombaugh's testimony about the reconstruction was to Stombaugh's 1971 conclusion that the

[11] MacDonald had several experts assisting his defense team during the trial. TTr. 5147, 5149-5151, 5313-5314.

absence of torn areas surrounding the 48 puncture holes indicated to Stombaugh the pajama top was stationary when the puncture holes were made in the garment.[12]

On re-direct examination, Thornton rendered the opinion that Shirley Green's reconstruction was "impossible." TTr. 5310-5311. He elaborated that, because Green had failed to follow Stombaugh's 1971 notes regarding the directionality of five of the pajama top holes, the validity of the reconstruction was negated.[13] TTr. 5312-5318.

On re-cross-examination, Thornton conceded that whether the pajama top had been right side out or inside out when the holes were inflicted would affect the determination as to which way the threads pointed. TTr. 5322-5324. Thornton further agreed that, by 1974, the yarns in the pajama top would have returned to their normal position, and thus any determination as to directionality made by Stombaugh in 1971 could not be confirmed in 1974. Id. at 5325.

6. Segal's Final Argument

In his final argument, Segal vehemently attacked the pajama top reconstruction as "not scientific evidence" and "sheer fakery." TTr. 7240. He took Shirley Green to task for disregarding Stombaugh's directionality analysis, and her alleged failure to determine whether the

[12] The challenge was in the form of an "experiment" in which Thornton used slides to illustrate his testimony. He described how a 3/4 inch piece of plywood or "sled" had a "screw eye" at either end of the sled. "By whipping the loose end of the cord...the sled can be placed into motion to and fro." TTr. 5158. "On the sled is affixed a target. Over the target is placed a piece of cloth which is 65% polyester and 35% cotton. The whipping to and fro produced "a harmonic oscillation" which approximated 'the maximum motion of a human ...thrashing around on the floor or some hard surface." TTr.5159. Thornton made 50 test punctures with an ice pick into the "target material." Id. When the fabric was removed from the target material and the punctures examined, circular puncture marks, as opposed to elongated tears were revealed and photographed. TTr. 5159-5160. Thornton compared his test punctures with the results of his own examination of MacDonald's pajama top and found them similar. TTr. 5165. On cross-examination, Thornton admitted that the "target material" was a ham. TTr. 5251.

[13] Thornton testified that he used a 1971 "worksheet" of Stombaugh as well as a "worksheet" of Shirley Green, identified as GX 1076(a), to make his assessment. The 1971 "worksheet" of Stombaugh apparently refers to the same documents as DE-1, Vol V, Exhibit 16 at 82-85, also attached as Exhibit 4 hereto. GX 1076(a) is a photographic enlargement of GX 1076, a single page prepared by Shirley Green in which the "Victim Ice Pick Hole #'s" are juxtaposed to "Hole #'s in Q12 Shirt," and bears the Lab No, L2082, indicating that was prepared in connection with the October 17, 1974, FBI Laboratory Report in which the pajama top reconstruction was described. See GX 3060, 3060.4 (Shirley Green's "solution"). A copy of GX 1076 is attached as Exhibit 5 hereto.

sizes of the various holes matched in finding her solution. TTr. 7241. Segal argued, "[o]n every basis you can think of, it is a fake." TTr. 7242.

7. The Notes From the Jury

On August 29, 1979, at 9:47 a.m., following Judge Dupree's charge, the jury retired to deliberate. See DE-9 at 12. The Jury's first note requesting exhibits, preserved by the Clerk's Office, was received at 10:40 a.m., and included "PJ Tops." See Exhibit 6 at 1, attached. Judge Dupree annotated this note, writing, "[a]ssembled all counsel + sent to jury room. 10:50 a.m." Id. Judge Dupree then had MacDonald's pajama top sent back along with another note, "To the jury– If these are not all of the exhibits or the exact ones you want, send another note. 8/29/79 10:55 a.m." Exhibit 6 at 2. The jury foreman annotated this note, "Can we have the other PJ Top." Id. The demonstration pajama top (GX 1081), was then sent back to the jury. At 12:30 p.m., the final request by the jury for exhibits was received:

> Chart of PJ Top with grafth [sic] paper (Mrs Green)
> Fiber Chart
> Picture of Colette in Bedroom
> Colette PJ Top

Exhibit 6 at 4. These items exhibits were assembled and sent back to the jury.[14] At 4:24 p.m., on August 29, 1979, the jury returned with verdicts of guilty on all three counts. See DE-9 at 4.

8. Fourth Circuit Rejects MacDonald's Challenge to Reconstruction on Direct Appeal

Following his conviction, MacDonald appealed on numerous grounds, including that the introduction of the evidence of the pajama top reconstruction was reversible error. MacDonald's 1979 Brief of the Appellant devoted thirty-three pages to the alleged errors involving the reconstruction. Brief of the Appellant, No. 79-5253 at 178-210 (1979). Following remand from

[14] GX 1070, 654, 39-45, and 270, respectively.

the Supreme Court, [15] on June 9, 1982, Judge Albert V. Bryan, Sr., writing for a panel which included Judges Murnaghan and Sprouse, described the circumstances leading to the reconstruction. United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982). In pertinent part, Judge Bryan noted,

> When the police first arrived at the MacDonald home, the defendant was lying across his wife's body. To administer first aid, an officer rolled him off his wife and onto the floor. This process, the defense argued, inevitably disturbed the positioning of the pajama top before the photographs of the scene were taken. Although some variation of the posture of the shirt may have been occasioned by this act, we think it unlikely that the most crucial aspect of the shirt's configuration—that is, the right sleeve being turned inside out—would be affected noticeably by this movement.

Id. at n.8.

> Further, counsel poses the possibility that the shirt was moved before it was photographed at the crime scene, the potentially infinite ways to align the 48 holes into a pattern of 21, and a variety of plausible shortcomings in the methods employed by the Government investigators. Each of these points merits scrutiny, and each was advanced, without limitation, before the jury.

Id. at 229. The Fourth Circuit found no abuse of discretion in the admission of this evidence. Id.

C. The Malone Report and AFDIL Specimen 75A

1. The 1990 Suppression Claim

Michael Malone first became involved in the MacDonald case during the 1990 litigation of MacDonald's Petition For Post Conviction Relief Pursuant to 28 U.S.C. Section 2255, alleging government suppression of exculpatory evidence in the form of laboratory "bench notes," obtained from the FBI and CID laboratories under FOIA, which he claimed constituted "newly discovered

[15] The Supreme Court held that MacDonald's speedy trial rights had not been violated. United States v. MacDonald, 456 U.S. 1 (1982).

evidence." DE-1.[16] The primary evidence offered in support of MacDonald's claim was the "Affidavit of John J. Murphy," a paralegal employed by the law firm of Siverglate & Good. The affidavit included numerous laboratory "bench notes" obtained under FOIA and analyzed by Murphy. DE-1,Vol. III. In ¶¶ 47-65, Murphy recounted his comparison of CID and FBI bench notes with the corresponding typed lab reports, and concluded that the bench notes revealed the presence of unsourced hairs and fibers, which were not reported in the typed lab reports.[17] MacDonald also alleged that these bench notes were not provided to the defense prior to or during trial, and therefore constituted exculpatory information that had been withheld. Id. One of the unsourced hairs that Murphy identified was the Q79/E303 hair from within the body outline of Colette MacDonald, which would later come to be known as AFDIL specimen 75A. DE-292-3 at 18; DE-306-2 at 18.

The Government argued that the bench notes were not suppressed, were not exculpatory, and that the claim constituted an abuse of the writ, given that the bench notes had been released to MacDonald's first habeas attorney pursuant to a FOIA request prior to the filing of his first habeas in 1984, and had not been included in that filing. See DE-10. As an alternative basis for denying relief on the merits, the Government offered evidence from a 1990-91 examination of the actual hairs and fibers by the FBI Lab to refute MacDonald's claims based upon the bench notes. Id. Agent Examiner Michael Malone was assigned to the case.[18] In that capacity, Malone examined

[16] In the 40 years of litigation of this case there have been several re-numberings of docket entries. For purposes of the current litigation, the DE-1 referenced here is MacDonald's 1990 §2255 petition. Since that filing, all docket entries have been numbered consecutively without resetting. See DE-117 (handwritten docket sheet).

[17] Not included in Murphy's affidavit were any bench notes of Janice Glisson reflecting an attempt to "fold the garment so all the icepick holes would align over the stab wounds in Colette's chest" (See DE-379 at 14-16, citing *Fatal Justice*, 154), nor any reference to such an attempt. See DE-1, Vol. III.

[18] Malone had no previous involvement in the case, and did not testify at, or otherwise participate in MacDonald's 1979 trial.

a number of items, including the Q79 pubic hair which had not been previously examined by Stombaugh or testified about at the 1979 trial.

Malone prepared a report of his findings, dated February 4, 1991, stating "this hair exhibits the same individual microscopic characteristics as the pubic hairs of JEFFREY MACDONALD, and accordingly, is consistent with having originated from Jeffrey MacDonald."[19] DE-218-2, DE-363-6 at 3. He further qualified that statement in the next sentence; "[i]t is pointed out that hair comparisons do not constitute a basis for absolute personal identification." Id. According to standard FBI protocol, Malone's examination was confirmed by another examiner, Dr. Joseph A. DiZinno, who also compared these items and filled out a confirmation form. See DE-218 at 7-8. DE-218-1.[20]

Claiming that there were "no material issues of fact in the record," MacDonald sought to argue before the district court instead of requesting an evidentiary hearing. DE-23 at 19. MacDonald did not raise the issue of the Q79 hair during this time. He chose to address only the fibers found at the Q79 location. DE-1 at ¶¶ 46-50. MacDonald's 2255 claim was denied, United States v. MacDonald, 778 F.Supp.1342 (EDNC 1991), and the Fourth Circuit affirmed. United States v. MacDonald, 966 F.2d 854, 856 (4th Cir. 1992) (finding abuse of the writ and no fundamental miscarriage of justice).

[19] This report is the one at issue in the 2014 FBI review. It should be noted that the FBI review also considered Malone's initial report, dated December 31, 1990, and found no error. DE-363-3 at 5, DE-363-5.

[20] Because the Government filed an affidavit from Malone (DE-10-8) in 1991, Malone's report and DiZinno's confirmation were not filed with the court or provided to defense counsel until December 12, 2011, when the Government filed its response to MacDonald's Request for Hearing (DE-175), attaching them to DiZinno's 2011 affidavit. Malone's report conformed to all extant FBI protocols in 1991. "[T]he wording of the conclusion in the Report … with respect to the Q79 pubic hair, is in accord with standard FBI protocols then, and at the time of my [Assistant Director DiZinno's] retirement. Particularly in light of the next sentence in the report: 'It is pointed out that hair comparisons do not constitute a basis for absolute personal identification.'" DE-218 at 8.

2. Subsequent Litigation Involving Malone

In his 1997 motion to reopen the denial of his 1990 habeas petition, MacDonald began a series of attacks on the validity of Michael Malone's examinations, as well as his credibility, which have continued until the present. The Government has previously discussed these attacks in detail, and hereby incorporates them by reference. See DE-344 at 159-164; DE-358 at 3-10.

As the Court is well aware, this litigation led to the DNA testing of any hair specifically identified in MacDonald's Affidavit of Philip G. Cormier No. 2. DE-86, DE-99. Notably, all three hairs that are the subject of the 2014 FBI review were included in this testing order.[21] In light of the DNA test results in this case (DE-119), specifically indicating that AFDIL 75A was "not consistent with any other sample tested," and therefore did not belong to Jeffrey MacDonald, the Malone microscopic analysis has been superseded by the DNA results. The Government stipulated to this fact, and it was discussed by Government counsel during the 2012 evidentiary hearing before this Court. DE-306 at 8, ¶ 28; HTr. 1325.

Finally, in preparation for the 2012 evidentiary hearing, the Court gave MacDonald the opportunity to depose certain witnesses, but he did not ask to depose Malone. DE-266 at 4; DE-269 at 1.

D. The Fram Report and AFDIL Specimen 112A(5)

On December 10, 1998, this Court ordered the Government to make the biological evidence described in Cormier Affidavit No. 2 available to the defense experts to conduct "any

[21] As discussed supra, the Q79/AFDIL 75A Malone hair, found underneath the body of Colette MacDonald, is one of the "unsourced hairs" at issue in the instant claim; the Q96/19 ½" hair with root/AFDIL 112A(5) Fram Hair, collected from debris in the bedspread in the master bedroom (D229) was found to have the same mtDNA sequence as Colette, Kimberly and Kristen; and the Q96/H (from thread)/AFDIL 113A Stombaugh hair, also collected from debris in the bedspread in the master bedroom (D229), had DNA test results of "inconclusive," and was not included in the "unsourced hairs" claim. See DE-119-3; DE-122; DE-123; DE-306.

appropriate non-destructive DNA examinations thereof." DE-219-2 at 3. A hearing was held on March 23, 1999, where the procedures for conducting such testing were established. DE-219-3 at 1. In preparation for the DNA testing, the Government was directed to "generate still photographs … (of) the entire inventory, unpackaging and mounting process." Id. at 2. Examiner Robert "Bob" Fram (who died in 2014) of the FBI Lab Hairs and Fibers Unit, was assigned to this task. DE-219 at 3. Fram had no involvement in the MacDonald case before this date. Id. at 2-3. In preparing the evidence for transfer to the AFDIL lab, Fram documented the contents of the slides, including whether hair was present and, if it was, what the observable characteristics of the hairs were. Id. at 4. During this process, Fram examined a glass microscope slide marked for identification "19 ½ L2082 Q96 PMS," which contained four hairs. Id. at 15. One of the hairs was a Caucasian head hair with a forcibly removed root (hereinafter Q96 "19 ½"" hair with root), which Fram compared to the known sample from Kimberly MacDonald. Id. Fram documented the results of this examination in a report dated May 19, 1999, by stating:

> A forcibly removed Caucasian head hair found on one of the Q96 resubmitted glass microscope slides, (labeled "19 ½"" on the slide), exhibits the same microscopic characteristics as the K2 specimen. Accordingly, this hair is consistent with having originated from KIMBERLY MACDONALD, the identified source of the K2 specimen … Hair comparisons are not a basis for absolute personal identification.

DE-225-19; DE-363-7 at 7; see also DE-219, Ex. 63; DE-225-19. This is the statement at issue in the 2014 FBI review of Fram's report. See DE-363-3 at 6.

After Fram's examination, the Q96 "19 ½"" slide was submitted to AFDIL for DNA testing. AFDIL designated this slide as 112A. DE-123-2 at 13; DE-292-3 at 24. In the process

of removing the slip cover from the 112A slide, the four hairs therein were broken into nine fragments and had to be remounted at AFDIL as 112A(1) through 112A(9). See DE-219 at 17-18; DE-225-11, 225-12, 225-13; DE-123-2 at 18. Before these samples were tested for DNA, they were resubmitted to Fram to determine if he could tell if any of the nine hair fragments could be associated with the Q96 "19 ½"" hair with root.[22] DE-225-14, 225-15. Fram issued a second report on November 1, 2001, regarding this re-examination in which he concluded that Q96.5 (AFDIL 112A(5)), contained a light brown Caucasian head hair with a forcibly removed root, and is the same hair as the original Q96 "19 ½"" hair with root that he had previously examined. DE-219 at 18; DE-225-18; DE-306 at 5, ¶15. AFDIL testing of specimen 112A(5) confirmed that this hair with root had the same mtDNA sequence as Colette, Kimberly and Kristen. See DE-119-3.

On March 22, 2006, MacDonald filed a Motion to Add an Additional Predicate to his existing § 2255 based upon the AFDIL DNA results. DE-122. He noted that AFDIL 112A(5) was a specimen "consistent with slain MacDonald family members," and did not include it in his "unsourced hairs" claim. Id. at 3 n.4.

Fram's report of May 19, 1999, played no role in this case until 2011, when it was attached as an exhibit to his affidavit, filed as a part of Government's Response To Motion For A New Trial Pursuant to 18 U.S.C. § 3600, addressing whether the "unsourced hairs[23]" were bloody or forcibly removed. See DE-212; DE-219; DE-225-19.[24]

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[22] Fram referred to these specimens as Q96.1 through Q96.9.

[23] The three "unsourced hairs" were AFDIL specimens 91A, 75A, and 58A(1). See DE-119-3.

[24] In this affidavit, Fram clarified the limits of hair analysis, stating, "[t]he comparison of the microscopic characteristics in hairs does not constitute a basis for absolute personal identification. The probative value of hair comparisons may be affected by the results of mitochondrial (mtDNA) analysis. Two hairs can exhibit the same microscopic characteristics and be shown to be different in mtDNA sequence. Conversely, two hairs that have the same mtDNA sequence can have very different microscopic characteristics, as in the case of two children with the

In preparation for the 2012 evidentiary hearing, MacDonald stipulated that the Q96 "19 ½"" hair with root was the same as that later designated Q96.5 by Fram and 112A(5) by AFDIL, having the mtDNA sequence of Colette, Kimberly and Kristen. See DE-306 at 4-5. Additionally, MacDonald was given the opportunity by this Court to depose Fram, but chose not to do so. DE-226 at 4; DE-269 at 1. The Q96 "19 ½"" hair with root was not one of the "unsourced hairs" at issue during the 2012 evidentiary hearing and subsequent filings, and any microscopic analysis by Fram of this hair has since been superseded by the DNA results for 112A(5).

Finally, Fram was not mentioned in either the 1997 or 2014 DOJ OIG reports. See DE-357-1.

III. Legal Argument

A. Legal standard for motions under Fed. R. Civ. P. 59(e)

The parties are in agreement on the legal standard for a motion to alter or amend a judgment, pursuant to Fed. R. Civ. P. 59(e). Compare DE-358 at 1-2 with DE-379 at 8. "A Rule 59(e) motion may only be granted in three situations: '(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.'" Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 378 (4th Cir. 2012), citing Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007). MacDonald claims that both the second and third grounds apply.

MacDonald cites as "new evidence" "[t]he revelations of misfeasance and malfeasance by Michael Malone, Paul Stombaugh, and Robert Fram in this litigation." DE-379 at 8. Although the government agrees that the conclusions of the FBI in its September 2014 "Microscopic Hair Comparison Analysis: Result of Review" (DE-363-3) and the Inspector General in its July 2014

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same mother." DE-219 at 15-16 n.4.

Report (DE-357-1) are "new," in the sense that they were not known to the parties at the time of the September 2012 evidentiary hearing or during the 2013 post-hearing briefing, they do not undermine proof of MacDonald's guilt, and therefore they do not entitle him to relief.

As discussed infra at 41-42, the July 2014 OIG Report contains nothing substantive regarding the MacDonald case. Moreover, the information in this report regarding Malone's mistakes as a forensics expert in other cases are cumulative of that contained in the 1997 OIG report, which was well known to the Court as of 1997 and part of the evidence as a whole considered by the Court in reaching its decision on July 24, 2014. See DE-354 at 70-71; supra at 30, infra at 41-42. Therefore, although the Government has no objection to this Court considering the July 2014 OIG Report as part of the "evidence as a whole," its contents do not constitute new evidence that would meet the second alternative ground for Rule 59 relief.

As to the September 2014 FBI review of hair comparisons, again, the Government does not object to the Court considering this as part of the evidence as a whole. But only the FBI's finding as to the three errors (one in Stombaugh's testimony and one each in lab reports of Malone and Fram) is "new." The underlying evidence is not. Stombaugh's testimony, given in open court in 1979, has always been known to MacDonald and his defense team. Moreover, MacDonald had access prior to trial to the hair underlying Stombaugh's testimony, as well as the other physical evidence. Malone's and Fram's lab reports have been in the record of the case since 2011. Defense-requested DNA testing of the hairs was completed in 2006.

The third alternative ground for Rule 59(e) is not applicable here. MacDonald has not pointed to any error of law in the July 2014 order, let alone a "clear error of law." Regarding "manifest injustice," MacDonald suggests that Stombaugh's, Malone's, and Fram's "unacceptable

behavior, under the auspices of the federal government and the Department of Justice, must be rectified to prevent 'manifest injustice.'" DE-379 at 8. Here again, MacDonald is exaggerating the import of the OIG report and the FBI review as to this case. Moreover, there is no support for MacDonald's contention that the phrase "to prevent manifest injustice," as used by the courts applying Rule 59(e), includes altering the judgment as a punitive remedy. Manifest injustice in the context of Rule 59(e) is defined as:

> …an error in the trial court that is direct, obvious, and observable … A party may only be granted reconsideration based on manifest injustice if the error is apparent to the point of being indisputable. In order for a court to reconsider a decision due to 'manifest injustice,' the record presented must be so patently unfair and tainted that the error is manifestly clear to all who view it.

Teri Woods Pub., L.L.C. v. Williams, 2013 WL 6388560, at *2 (E.D.Pa. December 6, 2013) (internal quotations and citations omitted); Cf. Hutchinson v. Staton, 994 F.2d 1076, 1081-82 (4th Cir. 1993) ("Far from being clear error, the district court's [decision] was factually supported and legally justified.").[25]

B. The "new evidence" does not affect the July 2014 Order.

Neither the contents of the July 2014 OIG Report nor the September 2014 results of the FBI review of microscopic hair comparisons has any effect on this Court's July 2014 Order, either as to gatekeeping or as to the Court's alternative merits ruling on MacDonald's § 2255 claims.

Though MacDonald sometimes imprecisely restates it, the standard for surviving gatekeeping under 28 U.S.C. § 2255(h)(1) is beyond dispute: whether MacDonald "has

[25] Because the grounds for a motion to alter or amend a judgment are so narrow, the Government did not file a Rule 59(e) motion to correct what it believes to be isolated clerical errors in the Court's 169-page Order, e.g., (1) on page 18, line 2, "staining occurred **after** the pocket was torn off" should be "staining occurred **before** the pocket was torn off" (see DE-344 at 68-69); and (2) on page 18, line 10, "two bloody bare footprints on the **door** exiting Kristen's room" should be "two bloody bare footprints on the **floor** exiting Kristen's room" (see DE-344 at 65-66).

demonstrated that the newly-discovered evidence, viewed in the light of the evidence as a whole, is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty of the murders of his wife and children." Order, DE-354 at 130-31. It is an objective standard and does not allow for speculation as to whether the new evidence "would have swayed [the MacDonald trial] jury." DE-364 at 8.

This Court painstakingly examined all the evidence in the record of the trial and numerous post-conviction proceedings, as well as that presented at the September 2012 hearing and in the voluminous post-hearing briefs of the parties. At MacDonald's urging, the Court agreed to consider the evidence pertaining to all his claims together to see whether MacDonald had met the gatekeeping standard. Order, DE-354 at 132. The Court, as required by the Fourth Circuit's enunciated standard, gave "due regard for the likely credibility and the probable reliability" of "the proffered evidence." United States v. MacDonald, 641 F.3d 596, 614 (4th Cir. 2011) (internal citations and quotations omitted); see also Order, DE-354 at 15. After this searching inquiry, this Court concluded:

> Against this trial evidence, and considered against the entire record of this long-running case, the court cannot find that any of the new evidence, given its unreliability and incredibility, is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty of the murder of his wife and daughters.

Order, DE-354 at 152.

In his Rule 59 filings, MacDonald contends that this careful analysis is demolished by "new evidence" that emerged in 2014. The "new evidence" consists of: (1) criticisms of Malone's work on other cases contained in the July 2014 OIG report; and (2) the FBI's September

2014 conclusions regarding a snippet in the trial testimony of Stombaugh and the wording of post-trial lab reports prepared by Malone and Fram.

As with everything that MacDonald has offered to the Court since the 2011 remand, the Government does not object to the Court considering these things as part of the evidence as a whole. But the Government submits that these latest offerings should be accorded little weight. Moreover, while the conclusions drawn in these reports were made in 2014 and thus might be regarded as "new," the evidence itself has been known to the defense and to the Court for years, even decades.

In its July 2014 Order, this Court summarized the inculpatory evidence which persuaded the jury to convict MacDonald (DE-354 at 32-34) and cited Judge Dupree's published opinion denying relief on MacDonald's first collateral attack. DE-354 at 32 n.11, citing United States v. MacDonald, 640 F.Supp. 286, 289-90 (EDNC 1985). It is not necessary to repeat that here. But it is telling the these summaries discuss, inter alia, (1) that the evidence showed the murder weapons came from the MacDonald home; (2) that a bloody latex glove fragment at the scene was similar to a box of such gloves stored in the home; (3) that physical evidence, including blood stains and spattering in the four distinct blood types of the four MacDonald family members, threads and yarns from the scene and on the club, and absence of threads, yarns, splinters, or blood in the living room, all contradicted MacDonald's account of the murders; (4) that there was an absence of evidence that intruders took anything from the home (including drugs that were there) or ransacked the home searching for valuables; and (5) that MacDonald suffered very limited injuries compared to the numerous savage and deadly wounds inflicted on his wife and daughters. Also cited in these summaries as compelling evidence is the pajama top reconstruction and

demonstration, which established that MacDonald likely stabbed his wife 21 times in the chest with an ice pick through his torn pajama top, thus contradicting MacDonald's story that the damage to his pajama top was done while he was fighting off "the attackers" in the living room and that he placed his pajama top on Colette's chest after the assailants left.

The summaries have scarcely any mention of hair. Specifically, they do not cite as inculpatory the fact that the hair identified has D229/Q96 H(from thread)/GX 107 (later AFDIL 113A) was microscopically matched to Colette MacDonald by Stombaugh, because this comparison played a tiny role in the trial.

MacDonald tries to seize on the opportunity of the 2014 FBI review to argue that if the jury had known of "Stombaugh's misfeasance and malfeasance, particularly his proclivity to overstate 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." DE-379 at 17. Aside from the fact that the 2014 FBI review did not find any errors in Stombaugh's lab reports, there are many flaws in this argument, which are discussed in more detail in Section III.D.5, infra. However, the appropriate question is whether the FBI's 2014 finding that assertions in six lines of Stombaugh's 301 pages of testimony constituted error should affect this Court's July 2014 ruling on gatekeeping and the merits of MacDonald's § 2255 claims (the Britt claim, the unsourced hair claim, and the Footnote Claim.).

When the Court ruled in July 2014, it was fully aware of Stombaugh's 1979 trial testimony about his microscopic comparison of D229/Q96 H(from thread)/GX 107 to a known exemplar of Colette's hair. It was also fully aware that this same hair was subjected to DNA testing by AFDIL as 113A, which found in 2006 that the mtDNA sequence information on this hair was

inconclusive. DE-306 at 7, ¶ 23(e). MacDonald advanced no arguments regarding this hair in the 2012 hearing or the 2013 briefing, despite that fact that his defense team has known of the results of Stombaugh's comparison of this hair since 1975,[26] has known about his trial testimony since it was given in 1979, and has known about the DNA results as to this hair since 2006.[27] The fact that the FBI found in 2014 that the six lines of testimony on cross-examination was in error regarding the degree of certitude attached to the microscopic comparison of this hair has no effect on the Court's finding that MacDonald did not meet the gatekeeping standard based on a comprehensive review of the evidence as whole.

As to the Court's alternative merits findings, it is clear that the FBI's 2014 finding about this snippet of Stombaugh's testimony does nothing to alter the Court's finding that all of Jimmy Britt's statements regarding his supposed interaction with Helena Stoeckley in 1979 were "incredible and unreliable" (DE-354 at 139), and that MacDonald failed to prove by a preponderance of the evidence his allegations of constitutional violations that were based on Britt's story. DE-354 at 158. Likewise, the FBI's 2014 conclusion about a tiny portion of Stombaugh's testimony would not affect this Court's ruling adopting Judge Dupree's 1991 ruling that there was no Brady violation with respect to Janice Glisson's forensic bench notes ("the Footnote Claim"). DE-354 at 162.

Regarding MacDonald's "unsourced hairs claim" based on the 2006 DNA results, again, the 2014 FBI finding on six lines from Stombaugh's testimony does not affect the Court's alternative ruling on this actual innocence claim. In pressing this claim, MacDonald focused on

[26] See supra at 13.

[27] The Government is not arguing that MacDonald is procedurally defaulted or barred by the statute of limitations of 28 U.S.C. § 2255(f) from making arguments based on the FBI's 2014 conclusion about Stombaugh's testimony. The Government submits, however, that the fact MacDonald has never made any arguments in his habeas litigation about this particular hair identification demonstrates its lack of importance in the case.

three naturally shed unsourced hairs (i.e., hairs with no DNA match to any member of the MacDonald family, Helena Stoeckley, or Greg Mitchell) as evidence of intruders. He did not make the same argument with respect to Q96/113A H(from thread). If he is doing so now, it is unpersuasive. The DNA results on this hair (inconclusive) tell us nothing new. They neither contradict nor support Stombaugh's microscopic match to Colette's hair. The fact the FBI determined in 2014 that Stombaugh erred in a small portion of his testimony with respect to this hair means little. If, as this Court correctly concluded, the presence of the three unsourced hairs on which MacDonald built his entire actual innocence claim, was "of minimal additional probative value" (DE-354 at 166), then the new information about the Q96/113A H(from thread) (i.e., that the FBI found in 2014 that Stombaugh used inappropriate language in testifying about his comparison of it to Colette's hair) has even less probative value.

As to the FBI's 2014 finding that Malone erred in his 1991 lab report when he stated the findings of his microscopic comparison of Q79/75A to Jeffrey MacDonald's known hair, this too adds nothing to the Court's July 2014 analysis. This lab report has been in the record of this case since 2011. DE-218-2. The Court was well aware that the 2006 DNA results superseded Malone's 1991 microscopic comparison, and that the parties acknowledged that this hair did not come from Jeffrey MacDonald. See HTr. 1325-1326; DE-218; DE-306. It was one of the unsourced hairs on which MacDonald built his actual innocence claim. This Court found that the presence of these unsourced hairs was of minimal probative value. DE-354 at 166. The new information from the FBI 2014 review (its finding of error in the wording of Malone's now-superseded 1991 lab report) does not affect this Court's finding as to the lack of probative

value of the unsourced hairs, and it therefore does not affect the Court's ruling on gatekeeping or the alternative ruling on the merits of MacDonald's claims.

Similarly, the FBI's 2014 finding that Fram's 1999 lab report erred in the wording of his conclusion that Q96 "19 ½"" hair with root was consistent with the hair of Kimberly MacDonald does not affect the Court's gatekeeping or merits rulings. This lab report has been in the record of the case since 2011. DE-225-19. Well known to the Court at the time of its July 2014 ruling was the stipulated fact that the 2006 DNA results showed that the mtDNA of the root end of this hair was consistent with the three MacDonald females (Colette, Kimberly, Kristen). See supra 32. Of course, MacDonald did not focus his arguments on this hair because it was not unsourced and therefore could not be "evidence of intruders."

As noted in the Government's Response to MacDonald's Rule 59 motion (DE-358), the July 2014 OIG report (DE-357-1) should have no effect on the Court's already completed review of the evidence as a whole. The OIG's conclusions regarding Malone's credibility and usefulness in criminal trials is cumulative of its 1997 report, which has been known to the parties and the Court for years. See Order DE-354 at 70-71 (discussing 1997 OIG report in context of Court's consideration of 1997 motion). None of the analysis in the 1997 report or the 2014 report has anything to do with the MacDonald case.[28] See DE-358 at 2 n.3 This Court fully considered all issues related to Malone in disposing of MacDonald's 1997 motion to reopen his unsuccessful 1990 § 2255 petition, and then considered them anew in reviewing the evidence as a whole in

[28] An examination of Appendix H of the 2014 OIG Report, a 24-page spreadsheet identifying the FBI Examiner in each of the 402 cases of "DEFENDANTS WHOSE CASES WERE REVIEWED BY INDEPENDENT SCIENTISTS," after selection by the Task Force, does not reflect the name "Jeffrey MacDonald," although Malone's name appears as an examiner in 215 of the cases. See DE-357-1 at 111-135. The OIG report did not state, as claimed in MacDonald's Rule 59 motion, that "Malone gained fame through his work in helping to secure Dr. MacDonald's conviction." DE-357 at 4-5 (emphasis added). Malone did no work on the MacDonald case until 1990, eleven years after the trial.

reaching its decision on MacDonald's current § 2255 claims, as reflected in the Court's July 2014 Order. See DE-354 at 65-71. The July 2014 OIG report does not affect in any way the analysis in the Court's Order with respect to gatekeeping or the merits of MacDonald's pending claims.[29]

C. Summary of Other Arguments

In his Supplemental Memorandum Supporting Motion To Alter Or Amend Judgment, MacDonald revives many topics that have been covered extensively in other filings, hearings, and court Orders. DE-379 at 4-7, 19-23. The Government does not object to the Court considering these things again as part of the "evidence as a whole." However, a Rule 59(e) motion "should not be used to 'rehash' arguments previously presented." Moore v. United States, 2006 WL 763656, at *1 (E.D.Va. Mar. 23, 2006). The Court has already considered these arguments in reaching its decision on gatekeeping and the merits, see DE-354 at 133, and the "new evidence" touted in MacDonald's recent Rule 59(e) filings does not affect that decision. Rather than repeat the Government's earlier refutation of MacDonald's contentions on these topics, the Government refers the Court to its arguments at the evidentiary hearing, in its Post-Hearing Memorandum (DE-344), Post-Hearing Sur-Reply (DE-352), and Response to Defendant's Motion Pursuant to Fed. R. Civ. P. 59(e) (DE-358). These topics include the confessions of Helena Stoeckley (see generally DE-344 at 9-23, 137-140, 142-143; DE-352 at 31 n.38, 32 at n.39; to mother, DE-344 at 136 n.68, 188 n.122; DE-352 at 39-42; to Jerry Leonard, DE-344 at 18 n.11, 191-192; DE-352 at 18-42), the statements of Gene Stoeckley (see DE-344 at 30-33, 38-40, 189; DE-352 at 39-42), the statements of Greg Mitchell (see DE-344 at 143-150), the statement of Jimmy Friar (see DE-352 at

[29] The OIG's investigation described in DE-357-1 is a completely separate issue from the FBI's review of all cases involving microscopic hair comparisons prior to 1999. "Our review [the July 2014 OIG report] was separate from a currently ongoing effort by the Department of Justice and the FBI, begun in the summer of 2012, to identify and review thousands of cases where testimony about the results of microscope hair examinations conducted by the FBI Lab was included as evidence in cases that resulted in conviction." See supra at 3 n.2; DE-357-1 at 14.

27-39), the statements of Wendy Rouder (see DE-344 at 16-18, 20, 29 n.24, 40-41, 63, 141; DE-358 at 13), the statement of Lynn Markstein (see DE-344 at 17-18), the statement of Kenneth Mica (see DE-344 at 67, 102-104, 130 n.66; DE-352 at 12 n.14), the blond wig and floppy hat allegedly worn by Helena Stoeckley (see DE-344 at 9,13,15,19,67,103-104, 160, 162; DE-358 at 10 n.8); the blond synthetic saran fibers (see DE-344 at 159-164; DE-352 at 12 n.14; DE-358 at 4, 7-10), the pajama top yarn and thread evidence (see generally DE-344 at 72-77, 105-106, 120-122), the "black wool" fibers (see DE-344 at 153-159), the pink fiber found on MacDonald's eyeglasses (see DE-344 at 109-110), the unidentified fingerprints (see DE-344 at 110-113, 196), the unsourced wax (see DE-344 at 116-117, 196), the blood evidence (see DE-344 at 50-52, 68-80, 89, 91, 95-98, 106-116, 124, 134-135, 159, 165-166), and the three "unsourced hairs" (regarding AFDIL specimen 91A, see DE-344 at 169-170, 172-179, 182 n.116, 186, 194-198; DE-352 at 42-51; regarding AFDIL specimen 75A, see DE-344 at 170-173, 179, 194-198; DE-352 at 49, 51; DE-358 at 6-7; regarding AFDIL specimen 58A(1), see DE-344 at 74 n.45, 171-173, 178, 194-198; DE-352 at 49, 51).

D. Other authorities cited

In addition to arguing that the information touted in MacDonald's Rule 59 filings should alter the Court's gatekeeping analysis or its alternative finding on the merits of his pending § 2255 claims, MacDonald cites four cases, none of which supports his claims. We address each of them.

1. United States v. Fisher, 711 F.3d 460 (4th Cir. 2013) (DE-364 at 4; DE-379 at 11, 23.)

In Fisher, a DEA task force officer averred in an affidavit in support of a search warrant application that a confidential informant, whom he described as reliable, told him that the

defendant distributed narcotics from his residence and vehicle and had a handgun in his residence. Based on this warrant, officers searched defendant's residence and found crack cocaine and a loaded handgun. Defendant was charged with, and pleaded guilty to, possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g). 711 F.3d at 462-63. Over a year later, the officer pleaded guilty to fraud and theft related to his duties and admitted, inter alia, that he had falsified the search warrant affidavit in Fisher and that the confidential informant he identified in the affidavit "had no connection to the case." Id. at 463. The Fourth Circuit concluded:

> Given the totality of the circumstances of this case—a law enforcement officer intentionally lying in an affidavit that formed the sole basis for searching the defendant's home, where evidence forming the basis of the charge to which he pled guilty was found—Defendant's plea was involuntary and violated his due process rights. Under these egregious circumstances, "Defendant was deceived into making the plea, and the deception prevents his act from being a true act of volition."

Id. at 469, quoting Lassiter v. Turner, 423 F.2d 897, 900 (4th Cir. 1970).

The facts of Fisher could hardly be more dissimilar from this case. Fisher is about the voluntariness of a guilty plea. MacDonald has never tendered a guilty plea. Moreover, Stombaugh's six lines of testimony were not critical to his conviction and did not violate MacDonald's right to due process. .

2. Kyles v Whitley, 514 U.S. 430 (1995) (DE 364 at 4)

Kyles v. Whitley, mentioned in passing in MacDonald's reply (DE-364 at 4) and not at all in his supplemental memorandum (DE-379), stands for the proposition that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Id. at 437. In Kyles, the prosecution in a state court death penalty case failed to disclose seven categories of exculpatory evidence, one of

the categories being six contemporaneous eyewitness statements taken by the police following the murder. Id. at 428-29. The Supreme Court found that the cumulative effect of the non-disclosure made the suppression of the evidence material, "regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." Id. at 421.

With regard to the errors in language identified by the FBI's recent review, there is nothing that MacDonald can cite that the prosecution failed to disclose to the defense prior to trial. The Malone and Fram lab report errors were made years after the trial and therefore could not have been disclosed pretrial. As to the six lines in Stombaugh's testimony flagged in the FBI review, there was nothing hidden from the defense, intentionally or unintentionally. Stombaugh testified to his microscopic hair comparisons, in this instance regarding Q96 H(from thread)/113A, and was cross-examined vigorously. In Browning's testimony, which preceded Stombaugh's, it was made clear that microscopic hair identifications could not be the basis of an absolute identification. The defense had been given the opportunity to examine the hair and other physical evidence prior to trial. The defense team had competent experts available to them, and they chose to focus on other physical evidence in the case rather than challenging the unremarkable fact that a hair found in bedding used by Colette could have come from Colette.

3. Napue v. Illinois, 360 U.S. 264 (1959) (DE-364 at 4)

Like Kyles v. Whitley, Napue is mentioned in passing in MacDonald's reply (DE-364 at 4) and not at all in his supplemental memorandum (DE-379). In Napue's murder trial, "the principal state witness, then serving a 199-year sentence for the same murder, testified in response to a question from the prosecutor that he had received no promise of consideration in return for his testimony." 360 U.S. at 265. In fact, the prosecutor had promised him consideration, but did

nothing to correct the false testimony. Sometime after the trial, the prosecutor admitted that he had promised this star witness, prior to the witness's testimony in the Napue trial, that he would recommend a reduction in the witness's sentence. The Supreme Court held that the prosecutor violated Napue's due process rights by failing to correct testimony he knew was false. Id. at 268-69, 271. In applying Napue, federal courts have developed a three-part test: "To establish a Napue claim, the petitioner must show that '(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) . . . the false testimony is material.'" Towery v. Schriro, 641 F.3d 300, 308 (9th Cir. 2010) (internal quotations omitted).

MacDonald does not explain how Napue is to be applied to the case at bar. As noted previously, Napue could not possibly relate to the lab reports of Malone and Fram, which were written long after the trial. As to the error in Stombaugh's testimony, the FBI found only that the testimony was "inappropriate" because it suggested that hair comparisons could lead to a positive identification. The FBI did not find perjury, it did not consider the context, namely, that defense counsel's questions were intended to suggest that the purple thread may have become entangled with the hair as a result of contamination at the CID lab, and it did not determine that the testimony was material. Even assuming arguendo that MacDonald could demonstrate that the six lines identified as error in Stombaugh's testimony were actually false and that the prosecution knew or should have known that the testimony was actually false, he could not establish materiality. See Section III.D.5, infra. He therefore cannot show Napue error.

4. Lisenba v. California, 314 U.S. 219 (1941) (DE-364 at 8-9; DE-379 at 23)

This case is cited in both of MacDonald's recent filings, with the following quotation: "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." Id. at 236. See DE-364 at 8-9; DE-379 at 23. The evidence referred to in this quote is a confession extracted from a murder suspect who, after his arrest on related charges, was "repeatedly and persistently questioned at intervals during the period from Sunday night until Tuesday morning." Id. at 230. He was deprived of sleep and slapped by a police officer, and perhaps was beaten. Id. at 229-30. In this pre-Miranda case, the admissibility of the confession was analyzed on the voluntariness standard. Comparing what the defendant endured to "torture," the Supreme Court, not surprisingly, held that a defendant's Fourteenth Amendment due process rights are violated "when a coerced confession is used as a means of obtaining a verdict of guilty." Id. at 236-37. But see Arizona v. Fulminante, 499 U.S. 279, 307-311 (1991) (Rehnquist, C.J., writing for the majority) (constitutional harmless error rule applies to admission of coerced confessions).

It hardly needs to be said that this case has no relevance to the MacDonald case. Although many non-custodial statements of MacDonald were admitted as evidence in the trial, including portions of his grand jury testimony, none of these statements could be characterized as a confession, and there was never any allegation that these statements were coerced.

5. Import of cited cases

The gatekeeping provisions of 28 U.S.C. 2255(h)(1) are jurisdictional. See United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003); United States v. Reyes-Requena, 243 F.3d 893, 899 (5th Cir. 2001); Bennett v United States, 119 F.3d 468, 470 (7th Cir. 1997); see also United

States v. MacDonald, 641 F.3d 596, 604, 614-15 (4th Cir. 2011) (even after prefiling authorization by circuit court, only "rare" and "extraordinary case" will "pass muster under § 2255(h)(1)" in district court). Any new constitutional claims or arguments that MacDonald is making in his Rule 59 filings must be subjected to the same gatekeeping analysis that was applied to his other claims that were ruled on in the July 2014, Order: whether the newly discovered evidence (the July 2014 OIG report re Malone and the FBI's September 2014 finding as to the wording in the testimony excerpt (Stombaugh) and in the two lab reports (Malone and Fram)), 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. 28 U.S.C. § 2255(h)(1).

For the reasons discussed in Section III.B, supra, this "new evidence" does not call into question in any way the Court's meticulous gatekeeping analysis set forth in its July 2014 Order.

If the Court wishes to make an alternative ruling on the merits of the new constitutional argument that MacDonald is apparently making in this Rule 59 litigation, as it did with respect to MacDonald's previous § 2255 claims (the Britt claim, the unsourced hairs claim, and the Footnote Claim), the analysis might be a bit different than the one this Court employed on those claims, but the new argument will still fail on the merits.

As noted in Section III.D.3, supra, the Government urges to the Court, in this alternative merits examination, to proceed to the issue of materiality: Was the erroneous testimony reflected in the six lines of the transcript specified in the FBI review material to the guilty verdict? The most favorable materiality test to MacDonald on this issue is the one set forth in United States v. Agurs, 427 U.S. 97, 103 (1976), that is, a conviction is to be set aside if there is any reasonable likelihood the erroneous testimony could have affected the judgment of the jury. See id. But the

materiality inquiry would turn strictly on the evidence adduced at trial. Neither the defendant nor the government may rely on later discovered evidence in this materiality inquiry. See Apanovich v. Bobby, 648 F.3d 434, 437 (6th Cir. 2011) (DNA testing conducted years after the trial was not relevant to materiality inquiry). Thus, the proper inquiry would be whether, in the absence of these six lines of testimony[30], the remaining evidence at trial is sufficiently strong that there is no reasonable likelihood that the outcome would have been different. The question almost answers itself. In light of the persuasive evidence of MacDonald's guilt adduced at the trial, only a portion of which is reviewed in this memorandum, and considering the minuscule role that Stombaugh's response in these six lines of cross-examination testimony played in the trial, there is no likelihood that the outcome would have been different. This is especially so, considering that the jury had received Browning's testimony that microscopic comparison of hairs could not definitively identify the source of the hair.

MacDonald argues that the FBI's classification as error of the six lines of transcript in Stombaugh's trial testimony leads to an inference in hindsight that Stombaugh's credibility with the jury would have been destroyed, and thus it would have disregarded the rest of his testimony. The argument misunderstands the FBI's limited role. The FBI identified a snippet of testimony that overstated the conclusiveness of hair comparisons. It drew no conclusions as to the materiality of that testimony.

As noted above, the proper materiality inquiry is whether, in the absence of the erroneous testimony, the remaining evidence at trial is sufficiently strong that there is no reasonable likelihood that the outcome would have been different. The FBI review concluded that

[30] It is important to remember that the FBI review did not conclude that all of Stombaugh's testimony about the microscopic comparison of D229/Q96 H(from thread)/GX 107 to Colette's hair was erroneous. Only Stombaugh's responses in the six lines of cross-examination were flagged as "inappropriate."

Stombaugh erred when he indicated on cross-examination that his objective in doing the microscopic hair comparison of D229/Q96 H(from thread)/GX 107 with known samples was to determine "its [the questioned hair's] origin" or "whose hair it was."[31] TTr. 4294, Ln. 106; see also DE-363-8 at 2. But Stombaugh did not overstate the conclusiveness of his comparison elsewhere, and Browning testified that no such positive identification could be made. See supra at 8, 10-11. Therefore, there is no reasonable likelihood that the jury was confused or that the outcome would have been different if defense counsel had not elicited this one remark. The government adduced compelling evidence of MacDonald's guilt in the seven-week trial, and had the exchange with Stombaugh never occurred, the result would have been the same: a guilty verdict for each murder.

Even if the jury had received the FBI's 2014 review classifying Stombaugh's assertion in the six lines as error, there is no reasonable likelihood that it would have affected its view of Stombaugh's credibility. This was a tiny and not particularly important part of Stombaugh's testimony. The thrust of Segal's cross-examination on this hair was to question how it became entangled with the pajama top thread prior to examination in the lab, not the results of the microscopic comparison to a known sample of Colette's hair. Given that the FBI's review establishes that there were no other errors in Stombaugh's testimony about this or any other hair comparison, it is not reasonable to conclude that the jury would have found that the erroneous wording in this particular snippet of cross-examination rendered all of Stombaugh's testimony worthless.

[31] The latter wording was really that of defense attorney Segal in the question he posed, but Stombaugh responded "That is correct." TTr. 4294, Ln. 4-6.

In a futile attempt to make the results of the FBI's review of Stombaugh's testimony meaningful to the motion now before the Court, MacDonald attacks the pajama top reconstruction. DE-379 at 13-17. Unlike Stombaugh's testimony about hair D229/Q96 H(from thread)/GX 107, the pajama top evidence was important and highly inculpatory of MacDonald. It helped prove that MacDonald, and not some unknown "intruder," thrust an ice pick into his wife's chest 21 times through his own pajama top, and it contradicted his account that the 48 round holes in his pajama top resulted from his struggle with the "intruders" in the living room while his wife was being killed in the master bedroom.

In fact, as detailed supra at 22-23, the painstaking reconstruction that showed that the 48 holes in the pajama top could be matched up with the pattern of 21 ice pick wounds in Colette's chest, was done by Shirley Green, not Paul Stombaugh. It was Green, and not Stombaugh, who testified to this reconstruction. The demonstration by the prosecutors showing that the round holes could not have been made while the pajama top was in motion (as MacDonald supposedly used it as a shield to ward off the stabs of the assailants in the living room) was done during cross-examination of defense expert Thornton. See DE-344 at 126-127. No critique of Stombaugh's wording regarding the purpose of his microscopic hair comparison of D229/Q96 H(from thread)/GX 107 could possibly undermine the pajama top evidence.

E. Certificate of Appealability

For the reasons stated in the Government's earlier-filed response (DE-358 at 10-14), nothing MacDonald has argued in his Rule 59(e) pleadings should disturb this Court's denial of a Certificate of Appealability. See DE-354 at 168-69.

IV. Conclusion

For all of the foregoing reasons, the Government respectfully requests that the Movant's motion be denied.

Respectfully submitted, this the 12th day of February, 2015.

Thomas G. Walker
United States Attorney

BY: /s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant U.S. Attorney
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601
Ph. (919)856-4530; Fax:(919)856-4487
E-mail: john.bruce@usdoj.gov
North Carolina Bar No. 8200

BY: /s/ Brian M. Murtagh
BRIAN M. MURTAGH
Special Assistant U.S. Attorney
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601
Ph. (919)856-4530; Fax:(919) 856-4487
E-mail: brian.murtagh2@usdoj.gov
D.C. Bar No. 108480

BY: /s/ Leslie K. Cooley
LESLIE K. COOLEY
Assistant U.S. Attorney
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601
Ph. (919) 856-4530; Fax:(919)856-4487
E-mail: leslie.cooley@usdoj.gov
North Carolina Bar No. 33871

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the defendant in this action by electronic service VIA CM/ECF FILING to:

M. Gordon Widenhouse, Jr.
Attorney at Law
312 W. Franklin Street
Chapel Hill, N.C. 27516
Phone: (919) 967-4900
FAX: 919-967-4953
Email: mgwidenhouse&rwf-law.com
N.C. Bar No. 10107

Keith Williams
Attorney at Law
321 South Evans Street, Ste. 103
Greenville, N.C. 27835
Phone: (252) 931-9362
FAX: 252-830-5155
Email:keith@williamslawonline.com
N.C. Bar No. 19333

This, the 12th day of February, 2015.

BY: /s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant U.S. Attorney
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601
Ph. (919) 856-4530;
Fax: (919) 856-4487
E-mail: john.bruce@usdoj.gov
North Carolina Bar No. 8200

BY: /s/ Brian M. Murtagh
BRIAN M. MURTAGH
Special Assistant U.S. Attorney
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601
Ph. (919) 856-4530;
Fax: (919) 856-4487
E-mail: brian.murtagh2@usdoj.gov
D.C. Bar No. 108480

BY: /s/ Leslie K. Cooley
LESLIE K. COOLEY
Assistant U.S. Attorney
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601
Ph. (919) 856-4530;
Fax: (919) 856-4487
E-mail: leslie.cooley@usdoj.gov
North Carolina Bar No. 33871