IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 15-7136

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY R. MACDONALD,

Defendant-Appellant.

APPELLANT'S PAGE-PROOF OPENING BRIEF

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

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INTRODUCTION

Dr. Jeffrey MacDonald ("MacDonald") was a 26-year old Army captain and doctor stationed at Fort Bragg when his pregnant wife and two young daughters were brutally murdered on 17 February 1970 in their home. MacDonald was severely wounded and found unconscious by military police. Ever since his first statement to the responders to his emergency call on that date, MacDonald has consistently maintained that the murders of his family were committed by a group of intruders. MacDonald described a woman with long blond hair wearing a floppy hat, who along with at least three others entered his home in the middle of the night and attacked him and killed his family. Now 72 years old, MacDonald has never wavered from his initial account of the events, nor his assertion that he is innocent. He has now been imprisoned for more than 35 years.

MacDonald was convicted at a trial in the district court in 1979 -- nine years after the murders, and after he had been cleared of the crimes by a military tribunal. The Government's case at trial was entirely circumstantial, offering no direct proof of MacDonald's alleged involvement in the murders. In fact, the trial judge wrote a letter to one of the lawyers involved in the trial shortly after the

verdict, noting that during the trial he had "confidently expected that the jury would return a not guilty verdict in the case." (DEHX 5115).[1]

Since the 1979 trial, a steady flow of exculpatory evidence has come to light demonstrating that MacDonald did not commit the murders. A significant amount of this evidence relates to the key defense witness at trial, Helena Stoeckley, who almost immediately was identified by police as a suspect. She was a woman local to the area, heavy into the drug scene, who routinely wore a blonde wig and a floppy hat. Between the murders in 1970 and the 1979 trial, Stoeckley made incriminating statements to numerous persons implicating herself, her boyfriend Greg Mitchell, and others in the killings.

At trial, however, Stoeckley testified when called as a defense witness that she could remember nothing about the four-hour period during which the murders occurred, despite her many statements otherwise, and despite her ability to remember events before and after those four hours. After this occurred, the trial judge refused to permit MacDonald to call seven witnesses that he had present, who would have testified to Stoeckley's specific admissions made to each of them, prior to trial, of being present in the MacDonald home at the time of the murders with the killers. (TT 5508-5799).

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[1] Filings in the district court are cited as follows: docket entries as (DE-); trial transcript as (TT-); transcript of the 2012 evidentiary hearing as (EHT-); Government and Defendant exhibits introduced at the 2012 evidentiary hearing as (GEHX-) or (DEHX-).

After the trial, Stoeckley continued to make admissions contrary to her trial testimony, implicating herself as present during the murders, and implicating Greg Mitchell as one of the killers. MacDonald also uncovered other physical evidence, such as the presence of unsourced fibers on a murder weapon and in the home, discrediting the Government's case. MacDonald submitted this evidence to the courts in an effort to obtain a new trial, but was denied relief.

This appeal involves the denial of a successive Section 2255 Motion filed by MacDonald in 2006 seeking to vacate his convictions, based on newly discovered evidence. This new evidence shows that Stoeckley, during MacDonald's 1979 trial, confessed her involvement in the murders to a deputy U.S. Marshal (Jimmy Britt), a young lawyer working for the defense team (Wendy Rouder), and her own lawyer appointed by the trial judge (Jerry Leonard), contrary to her sworn trial testimony at trial. The newly discovered evidence shows that Stoeckley also subsequently confessed her involvement in the murders to her own mother and to the caretaker of her child, shortly before her death in 1983. And the newly discovered evidence shows why Stoeckley would not make these admissions at MacDonald's trial and instead testify falsely -- because she had been threatened by one of the prosecutors (who has since been prosecuted, imprisoned, and disbarred for unrelated fraudulent criminal conduct) in violation of MacDonald's

constitutional rights, when she confessed to him during an out-of-court interview during the trial.

Were this not enough, the newly discovered evidence also includes DNA evidence showing that unsourced hairs that indisputably do not belong to MacDonald were found in places on the victims of the murders where they could only have been left by the real murderers. No reasonable juror, upon hearing the new evidence on which MacDonald's motion is based, would convict him of any crime in this case, and in light of the constitutional violations proven by this new evidence, MacDonald should be granted Section 2255 relief.

ISSUE PRESENTED FOR APPEAL

I. DID THE DISTRICT COURT ERR IN DENYING MACDONALD'S § 2255 MOTION BY FINDING THAT MACDONALD FAILED TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT NO REASONABLE FACTFINDER WOULD HAVE FOUND HIM GUILTY OF THE MURDERS OF HIS FAMILY?

STATEMENT OF THE CASE

MacDonald filed this Motion under 28 U.S.C. § 2255 on 17 January 2006, after this Court granted MacDonald pre-filing authorization under 28 U.S.C. § 2244. The district court in 2008 denied the Motion without a hearing. This Court reversed on appeal, and on remand instructed the district court to first evaluate MacDonald's Motion under the § 2255(h)(1) gatekeeping standard, and if it found

that standard met, to then consider the constitutional claims set out in the Motion on the merits. *United States v. MacDonald*, 641 F.3d 596, 614 (4th Cir. 2011).

This is an appeal from the district court's order on 24 July 2014 denying MacDonald's Motion under the procedural "gatekeeping" provision of 28 U.S.C. § 2255(h)(1) and alternatively on the merits, (DE-354), and from the district court's 18 May 2015 order denying MacDonald's Rule 59 Motion. (DE-383). These orders were entered after a seven day evidentiary hearing held in September 2012. Notice of appeal was filed on 16 July 2015. The lengthy procedural history of this case is summarized in the district court's order. (DE-354 at 2-13). This Court granted a certificate of appealability by order dated 4 April 2016.

STATEMENT OF FACTS

In the early morning hours of 17 February 1970, the pregnant wife and two young daughters of MacDonald were murdered in their home located on Fort Bragg. MacDonald was severely wounded at the time, suffering a collapsed lung and multiple wounds. From the very beginning, MacDonald told investigators that the murders had been committed by a group of intruders, including a blond-haired woman wearing a floppy hat, who had attacked him and his family, knocking him unconscious and severely wounding him in the attack.

Initially, the investigation was handled by military authorities. The Army brought murder charges against MacDonald and a Uniform Code of Military

Justice Article 32 hearing commenced on 15 May 1970, and lasted six weeks. On 13 October 1970, the presiding officer filed a report recommending that all charges be dropped, concluding that "the matters set forth in all charges and specifications are not true." (DE-115 at 8). The presiding officer further urged the civilian authorities to investigate the alibi of Helena Stoeckley. *Id.* All military charges against MacDonald were dropped, and he was subsequently honorably discharged.

Approximately nine years later, in August 1979, MacDonald went on trial after being indicted in the district court for three counts of murder. The trial lasted twenty-nine days. On 29 August 1979, MacDonald was convicted and was sentenced to three consecutive terms of life imprisonment.

I. The Government's Evidence at Trial

At approximately 3:30 a.m. on 17 February 1970, military police were summoned to MacDonald's home at Fort Bragg. Upon arrival, the police found that MacDonald's wife, Colette, and his two young daughters, Kristen age two, and Kimberly age five, had been brutally murdered, and found MacDonald unconscious and seriously wounded. Upon being revived, MacDonald told the military police that his family had been attacked by at least four intruders, three men and a woman. The woman he described as having long blond hair, wearing a floppy hat and boots, and bearing a flickering light such as a candle.

The Government's theory at trial was that MacDonald, an army physician with no history of violence and no prior record, got into a fight with his pregnant wife because his youngest daughter, Kristen, had wet the bed; that he picked up a club to strike his wife and accidentally struck and killed his daughter, Kimberly, who was trying to intervene; and that then, in order to cover up his accidental misdeed, killed his wife and then mutilated and killed his youngest daughter and tried to make it look like a cult slaying. (TT 7138-7141). The Government further argued that MacDonald either wounded himself to defer suspicion or was wounded when fighting with his wife.

The evidence the Government adduced at trial to support this bizarre theory was exclusively circumstantial evidence from the crime scene. It included evidence such as in what rooms certain blood types were found, where the murder weapons were found, where MacDonald's pajama fibers were and were not found, where a pajama pocket was found and on which side it was bloodied, and an experiment involving the possible ways the holes were made in MacDonald's pajama top. Much of the evidence was speculative. The Government presentation was designed to attempt to disprove the version of events given by MacDonald as to what happened on the night of the murders, thereby casting suspicion on him as the murderer. This Government strategy was interwoven with its repeated theme that, given MacDonald's version of events, there should have been ample physical

evidence of intruders, and the lack of such evidence of intruders proved MacDonald's guilt.

There was, however, some evidence at trial from the crime scene supporting MacDonald's account that intruders committed the murders. Numerous fingerprints and palm prints were collected at the crime scene that did not match the MacDonald family members or other investigators or individuals whose prints were available for comparison. (TT 3116, 3141). There was evidence showing the presence of wax drippings of three different kinds of wax in three different areas of the home. None of these samples matched any candles found in the MacDonald home. (TT 3837-43).

There were no eyewitnesses to the murders other than the perpetrators. There was no evidence of MacDonald's fingerprints or blood on the murder weapons. The Government's case was entirely circumstantial, and primarily focused on attempting to disprove MacDonald's version of events.

II. The Defense Case at Trial

MacDonald testified in his own defense at trial. MacDonald testified that he awoke in the early morning hours of 17 February 1970 in his living room to the screams of his wife and one of his daughters, saw four strangers in his house, and was immediately set upon, attacked, and knocked down. (TT 6581-82).

As he was trying to get up, MacDonald heard a female saying "Acid is groovy; kill the pigs." MacDonald testified in detail about how he fought with the attackers, and was assaulted and stabbed in the process. (TT 6513-14; 6587-88). During the struggle, his hands became bound up in his pajama top, and he used it as a "shield" to attempt to ward off blows from the attackers. (TT 6586; 6808-13).

MacDonald testified that the woman intruder had blond hair, was wearing a floppy hat, appeared to be carrying a candle, and was with several men. (TT 6588-92). At some point during the struggle, MacDonald was knocked unconscious. Upon coming to, MacDonald testified in detail to finding his family members bloodied and dead, his efforts to revive them, and his phone call for help. (TT 6595-6605). He was unconscious when help finally arrived.

MacDonald remembered describing the group of intruders to one of the MPs[2] before being taken out of the house on a stretcher. (TT 6518-20). MacDonald was taken to the intensive care unit at Womack Army Hospital, where he was treated for more than a week for a punctured lung and other wounds. (TT 5367). MacDonald gave much thought to what had occurred to his family, and

[2] Kenneth Mica, one of the first MP's to arrive at the scene, was the person to whom MacDonald gave this description. (TT 1414). Mica testified at trial that enroute to the MacDonald house at approximately 4 a.m. he saw a woman with shoulder-length hair, wearing a "wide-brimmed....somewhat 'floppy'" hat. (TT 1453-54). Mica saw this woman "something in excess of a half mile" from the MacDonald home, thinking it strange that she would be out at that hour on a rainy night. (TT 1401, 1454).

concluded that either someone held a grudge against him, or it was a random crime. (TT 6648). MacDonald had treated many patients with drug problems in both his position as medical officer at Fort Bragg and in private practice, and he and other doctors who had provided drug counseling were suspected of being "finks" for turning in troops for drug abuse. (TT 6649, 6657).

MacDonald's lawyers sought to underscore through cross-examination how equivocal and speculative the physical evidence put forth by the Government was, and to expose the lack of any real evidence of guilt on MacDonald's part. In addition to MacDonald's testimony, the defense called numerous character witnesses to testify about MacDonald's good character, and experts to rebut parts of the Government presentation.

The most important facet of the defense strategy, however, was to bring before the jury the significant evidence pointing to Helena Stoeckley's involvement in the crime. This included evidence of:

- her possession of a blond wig, which she burned shortly after the crime (TT 5602-04);
- the clothes she routinely wore, which matched the clothes of the woman MacDonald described seeing in his house the night of the murders (a blond wig, floppy hat, and boots) (TT 5583-90);
- her participation in a drug cult that ingested LSD, worshipped the devil, and used candles (TT 5525, 5542-43);
- her obsession with the MacDonald murders, such that she had hung wreaths all along her fence the day of the burials (TT 5633-34);

- a woman matching her description being seen by several unbiased witnesses near the crime scene at or around the time of the murders (TT 1453-54; 5454-56);

- and of critical importance, evidence that she had actually admitted to her participation in the crime to numerous people. (TT 5508-5799).

Based on all of this, it was the defense belief she would come to court and actually admit her involvement in the murders. *See United States v. MacDonald*, 632 F.2d 258, 264 (4th Cir. 1980) (noting the "substantial possibility that she [Stoeckley] would have testified to being present in the MacDonald home" during the murders).

Regarding the many prior admissions that Stoeckley had made to her involvement in the murders, MacDonald had subpoenaed to trial seven different individuals to whom Stoeckley had made statements incriminating her in the MacDonald killings. Three of these were individuals involved in law enforcement. (TT 5508-5799). The defense intended to call Stoeckley (who had been detained on a material witness warrant) as a witness, obtain from her admissions to the crime, and then call the other seven witnesses to whom Stoeckley had also confessed.

When called by the defense to testify, however, Stoeckley denied any memory of the four hour period during which the murders occurred. (TT. 5513-5671). Stoeckley did testify that she had a floppy hat, wore a shoulder-length

blond wig, and that her appearance at the time of the murders was similar to the description MacDonald had given of the female intruder.

After Stoeckley denied memory of the time period of the murders, the defense intended to call the seven witnesses to whom Stoeckley had made incriminating statements prior to trial. The Government objected to these witnesses, and after a voir dire hearing the trial court ruled that Stoeckley's out-of-court admissions to the seven defense witnesses were inadmissible under Rule 804 (b)(3) because the admissions were not trustworthy or corroborated. *See United States v. MacDonald*, 688 F.2d 224, 231 (4th Cir. 1982) (summarizing voir dire testimony of the seven witnesses).

Left without this key defense evidence, the jury convicted MacDonald of all three murders, and he was sentenced to three consecutive terms of life imprisonment.

III. Evidence Discovered Post-Trial Before the Instant § 2255 Motion

After the trial, MacDonald discovered evidence that was suppressed at trial that showed the presence of intruders in the home that night, and further implicated Stoeckley as one of the assailants. In 1984, and again in 1990, MacDonald filed motions to vacate his convictions based on the discovery of evidence of this nature. This evidence includes the presence of (1) unsourced fibers on the murder weapon that were dark purple and black (Stoeckley testified that she wore purple and

black); (2) other unsourced fibers at the murder scene that were inconsistent with the Government's representations at trial that there was no evidence of intruders; and (3) wig hairs in the MacDonald home (Stoeckley testified that she owned a blond wig that she destroyed) unmatched to any synthetic fiber found in the MacDonald home. *See* (DE-115 at 21-26) (outlining new evidence underlying 1984 and 1990 motions). In each instance, relief was denied. *MacDonald*, 640 F. Supp. 286 (E.D.N.C. 1985), *aff'd*, 779 F.2d 962 (4th Cir. 1985); *MacDonald*, 778 F.Supp. 1342 (E.D.N.C. 1991), *aff'd*, 966 F.2d 854 (4th Cir. 1992).

IV. The Instant Section 2255 Motion

A. Claims

1. The Jimmy Britt Evidence

The instant Motion is based first upon a disclosure by Jimmy Britt, a now-deceased Deputy U.S. Marshal who had custody of Stoeckley during the 1979 trial. DUSM Britt came forward in 2005 to MacDonald's trial counsel. Britt, by that time retired, worked at the Raleigh courthouse during the 1979 trial. In his affidavit, Britt sets out how he went to South Carolina to transport Stoeckley, who was in custody on a material witness warrant, back to North Carolina, and that he then maintained custody of her at several times during the trial in Raleigh until she was released from the warrant. In his affidavit, Britt sets out how Stoeckley made

admissions to him that she was present in MacDonald's home on the night of the murders. (DE-115, Ex. 1, ¶15).

Britt also explains that he was present when the lead prosecutor, AUSA Jim Blackburn, interviewed Stoeckley before she was to testify at trial. Britt avers that during that meeting in the prosecutor's office during the 1979 trial, Stoeckley told the prosecutor that she was in fact present in the MacDonald home on the night of the murders. (DE-115, Ex. 1, ¶ 20-23). Britt avers further that AUSA Blackburn responded to this admission by telling Stoeckley that if she testified in court to that fact, he would indict her for murder. Britt states in his affidavit that he is absolutely certain that these words were spoken. (DE-115, Ex. 1, ¶ 24-25).

In support of Britt's recitation of events and the constitutional error shown thereby, MacDonald has presented new evidence showing that Stoeckley was present during the murders, and that MacDonald did not kill his family. This evidence includes:

- affidavits from three individuals testifying that Greg Mitchell (a boyfriend of Helena Stoeckley continually linked to the murders) confessed involvement to them in the murders of MacDonald's family prior to his own death (DE-115, Ex. 7);

- an affidavit from Lee Tart, a former Deputy United States Marshal who worked with Britt, testifying that Britt told him in 2002 the things that Britt has brought forward in this Motion relating to Stoeckley's confession to AUSA Blackburn and Blackburn's threat in response, and the fact that Britt was troubled greatly by carrying the burden of his knowledge of those matters (DE-115, Ex. 3);

- an affidavit from Wendy Rouder, who at the time of trial was a young lawyer assisting MacDonald's lawyers, testifying that she had interaction with Stoeckley the weekend after Stoeckley's interview with AUSA Blackburn and subsequent appearance in court, and testifying that during that contact Stoeckley told her that she (Stoeckley) had been present in MacDonald's home during the murders and could name the murderers, but did not testify to those facts in court because she was "afraid ... of those damn prosecutors sitting there," adding that "they'll fry me" (DE-115, Ex. 5);

- an affidavit from Helena Stoeckley's mother, averring that Stoeckley had told her on two occasions that Stoeckley was present in the MacDonald home during the murders, and providing details from Stoeckley that corroborated both MacDonald's account of the murders and Rouder's account of Stoeckley's statements to her (DEHX 5051).

This evidence was buttressed by further evidence adduced at the evidentiary hearing, set out *infra*¸ showing that Stoeckley confessed, **<u>during MacDonald's trial</u>**, her presence at the murders **<u>to her own lawyer</u>**.

2. The DNA Evidence

In 1997, MacDonald obtained permission from this Court to conduct DNA testing on the physical evidence from the crime scene. The DNA testing was performed by the Armed Forces Identification Laboratory. There was much procedural haggling over the testing, resulting in it taking nine years to complete. There were 28 specimens for testing, three of which could not be matched to any relevant person.[3]

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[3] In addition to samples from MacDonald and his family, known DNA samples from Helena Stoeckley and Greg Mitchell were also submitted for comparison in this testing.

a. Specimen 91A

Specimen 91A is noted in the DNA report as a human hair that the chain of custody describes as found in "fingernail scrapings from the left hand of Kristen MacDonald." (DE-123 at 2). It is a human hair with hair root intact, measuring approximately 1/4" in length. The DNA testing of this hair produced a profile that is not consistent with MacDonald or the other comparison samples. (DE-123 at 3).

Kristen MacDonald, by all accounts, was killed in her bed where she was found. The doctor who performed her autopsy testified at trial that she had numerous defensive wounds on and around her fingers. (TT 2576-77). Thus, the presence of a hair belonging to a person who is not MacDonald, underneath one of Kristen's fingernails, is strong evidence that while Kristen was defending herself from her killer, a hair from her killer came to reside under her fingernail, and that killer is not MacDonald. Given the entirely circumstantial case presented by the Government at trial, the exculpatory effect of this evidence cannot be overstated.

b. Specimen 75A

Specimen 75A is a human hair, approximately 2 1/4 inches in length, that the chain of custody describes as found under the body of Colette MacDonald at the crime scene. (DE-123 at 3). The DNA testing of this hair produced a profile that is not consistent with MacDonald or the other comparison samples. (DE-123 at 3). The presence of this unmatched human hair under the body of Colette

MacDonald at the murder scene is strong proof of the presence of unknown intruders in the MacDonald home.

c. Specimen 58A1

Specimen 58A1 is a hair approximately 1/4 inch in length, with root intact, that the chain of custody describes as recovered from the bedspread on the bed in the bedroom occupied by Kristen MacDonald. (DE-123 at 4). As with the previous two samples, the DNA testing of this hair produced a profile that is not consistent with MacDonald or the other comparison samples. (DE-123 at 4).

Thus, a hair belonging to an unidentified individual was found on the bedspread on the bed where Kristen MacDonald was murdered. The fact that this hair was on Kristen's bed -- not a common area of the home and not a place some casual visitor to the home would be -- is further evidence showing the presence of intruders who committed the murders.

B. Evidence at the September 2012 Evidentiary Hearing.

MacDonald called six witnesses initially at the hearing. The Government called twelve witness, and MacDonald then called one additional witness. The evidence from MacDonald's witnesses is as follows:[4]

[4] A full recitation of the hearing testimony of all witnesses is set out in the parties' pleadings below. (DE-343 at 15-31; DE-344 at 32-64). MacDonald's recitation of the testimony of the Government witnesses at the 2012 hearing is set out in his Informal Brief, filed 12 November 2015, at pages 24-29. The majority of the evidence offered by the Government centered on attacking Britt's credibility, and

1. Wade Smith

Wade Smith is a Raleigh lawyer who, with Bernard Segal of the Pennsylvania bar, represented MacDonald in the 1979 trial. (EHT 21). Smith described how in January 2005, Jimmy Britt contacted Smith "and told me that something had worried him and had been heavy on his mind and heart for all the years since the MacDonald case and he needed to talk to me about it and sort of unload his soul." (EHT 24). They met at Smith's office, and Britt told Smith about the events set out in Britt's affidavit underlying the Motion. Smith testified about obtaining a sworn statement and two affidavits from Britt, including the one that is attached to the Motion. (EHT 43-53; DEHX 5058-59) Smith also arranged for a polygraph examination of Britt, which was conducted and showed no deception on the part of Britt. (EHT 37-42; DEHX 5057).

2. Mary Britt

Mary Britt was Jimmy Britt's wife at the time of the MacDonald trial in 1979. They were married in 1957, and divorced in 1989. (EHT 222; 241).

During the 1979 trial, Jimmy Britt told Mary that he was going to South Carolina to pick up a witness, and "when he got home that evening, when he came

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attempting to show that Marshal Service personnel other than Britt picked up Stoeckley in South Carolina, and that Stoeckley was only in Britt's custody at times during the trial in Raleigh.

By the time the evidentiary hearing was held in 2012, Britt was not available to testify. Britt passed away in 2008.

in the door, he was very excited, and that's the only word I know to describe it, because he felt the woman talked in the car coming back about her involvement, that he said, his words, she described the inside of the apartment where the MacDonalds lived, and he used the term that she described it to a T even to the fact of a child's hobby horse that was broken." (EHT 223). Mary was absolutely certain that during the 1979 trial Jimmy Britt told her these things. (EHT 239-40).

Jimmy Britt returned home the next day from the trial, and "as soon as he walked in that night, of course, I asked him and I know very well the words that he used to tell me. He said they say they can't use her testimony because her brain is fried from the use of drugs." (EHT 225).

3. Eugene Stoeckley

Eugene Stoeckley is the younger brother of Helena Stoeckley. (EHT 267). After the murders of the MacDonald family, there were rumors of Helena's involvement that caused stress in the family. (EHT 269). As he grew up, the issues continued until one day he confronted Helena about the allegations of her involvement, and Helena "told me to be careful because she had certain friends and she told me she also had an ice pick." (EHT 271). The topic became taboo at their family home and was not discussed, through Helena's death in 1983. (EHT 273-74).

In the mid 2000s, Eugene's mother's physical health deteriorated, and she lived in an assisted living facility in Fayetteville. (EHT 279-80). Eugene was in charge of her care and close to her. (EHT 280-81). As her health deteriorated and they understood that "her time was drawing short," Eugene and his mother "would have some intimate discussions about our family." (EHT 283). Eugene started questioning his mother about Helena's involvement in the MacDonald murders, because he wanted to know the truth, and "she said that Helena was there that night." (EHT 283). Eugene's mother told him that Helena had confided that in her when Helena came to visit her with Helena's newborn child in October 1982, because at that time Helena knew she was dying. (EHT 282-83). Eugene testified: "My mother said that Helena was there and that Dr. MacDonald was not guilty of the crimes." (EHT 284).

This information weighed heavily on Eugene. Eventually, he contacted Kathryn MacDonald (MacDonald's wife), which led ultimately to his mother executing an affidavit setting out the events of Helena's confession to her, which his mother approved before signing as accurate. (EHT 284-97; DEHX 5051).

Eugene also testified that his mother told him that Helena wanted to testify at trial, but was threatened with prosecution for murder: "What my mother would say along those lines was that they wouldn't let her testify, she wanted to testify, but she was threatened with prosecution for murder." (EHT 331).

4. Wendy Rouder

During the 1979 trial, Wendy Rouder worked for the defense team as an assistant attorney after just having passed the bar. (EHT 345). She was present in Raleigh for the entire trial.

On the weekend of 18 August 1979 during the trial, a call came into their office asking that Helena Stoeckley be removed from the motel where she was staying. (EHT 346). Rouder went to the motel and assisted in Stoeckley getting moved to another location. (EHT 347-49). Rouder spent several hours with Stoeckley, and during this time Stoeckley would make references to her involvement in the murders of the MacDonald family, by saying things like "she thinks she was there, she feels guilty," and other statements to that effect. (EHT 348-49); (DEHX 5080).

Rouder "eventually said to her at some point in time, Helena, why are you telling me all this, why don't you testify that way on the stand, or something to that effect." (EHT 350). Stoeckley's response was that "she said I can't with those damn prosecutors sitting there," adding "I believe she added they'll burn me, fry me, hang me, you know, those words are not specific." (EHT 350-51).

Rouder testified that she executed an affidavit in 2005 regarding these events. (EHT 351-53; DEHX 5080). Rouder was informed around that time by Kathryn MacDonald that there was a deputy U.S. Marshal to whom Stoeckley had

made "remarkably similar statements," and that the marshal "had sworn that also in his presence one of the prosecutors, James Blackburn, had threatened to indict Ms. Stoeckley for murder if she were to make the same admissions regarding her involvement in the MacDonald murders in the courtroom." (EHT 353-54).

Rouder testified that this information "rang a bell for me ... a-ha, that's why she said she can't testify with those damn prosecutors sitting there. In '79, I had no such association with that phrase." (EHT 354). Rouder testified that hearing the information from the Britt affidavit was her "eureka moment" in explaining Stoeckley's statements to her in 1979 about "those damn prosecutors" who want to "fry me." (EHT 357).

Rouder testified on cross-examination that during her interaction with Stoeckley that weekend, she received a phone call at Stoeckley's motel room from the trial judge instructing her to not ask Stoeckley any questions. (EHT 394-95; DEHX 5080 at ¶ 13). In addition, Rouder testified that after trial, she received a letter from the trial judge wherein the judge told her that he could not offer her employment as a law clerk due to the appeal on the MacDonald case pending. In the letter, the trial judge makes the statement that he "confidently expected that the jury would return a not guilty verdict in the case." (DEHX 5115).

5. **Sara McCann**

In 1982, Sara McCann lived in South Carolina with her husband, and befriended Helena Stoeckley through a church. (EHT 418-19). Stoeckley had a newborn child that they assisted Stoeckley with, and Stoeckley moved in with them during the period October through December 1982. (EHT 421). When Stoeckley told her that she was from Fayetteville and involved in an "FBI case," they realized her connection to the MacDonald case. (EHT 422).

McCann asked about the case, and Stoeckley told her that "the men that did the murdering, okay, Jeffrey's wife, children, and almost killed Jeffrey, that they were going to rough Jeffrey MacDonald up and that she would become a wizard in the occult group." (EHT 423). Stoeckley told her that she ran out screaming and continued to have nightmares about the events. (EHT 423-24). Based on her conversations with Stoeckley, McCann testified that "I know as well as I know that I'm sitting here today that Jeffrey MacDonald is innocent." (EHT 424).

6. **Jerry Leonard**

During the 2012 evidentiary hearing, MacDonald requested permission to call Jerry Leonard, the attorney appointed by the trial judge to represent Stoeckley during the 1979 trial, to testify about his communications with Stoeckley. The district court ordered Leonard to submit an affidavit of his communications with Stoeckley under seal to the Court for a determination as to whether the privilege should be set aside under the principles of *Swidler & Berlin v. United States*, 524

U.S. 399 (1998). (EHT 708). The district court found that the privilege should be set aside, and unsealed Leonard's affidavit and ordered him to testify. (EHT 1238).

Leonard is a lawyer in Raleigh and in 1979 was in private practice. He had previously worked in 1971 as a law clerk to Judge Dupree. (EHT 1107). During the MacDonald trial, he received a call to represent Stoeckley from Judge Dupree's office, (EHT 1108), which he believed occurred on Sunday, 19 August 1979. (EHT 1139). Leonard picked up Stoeckley and took her to his house to talk with her and try to build trust with her. (EHT 1110). Stoeckley fell asleep in a chair at his home, and the next morning he took her to court. (EHT 1111). They were given a room in the courthouse in which to wait. That morning, Leonard asked Stoeckley about the murders of MacDonald's family, and she told Leonard that she did not remember anything about the night of the killings. (EHT 1112-13).

In later conversations that afternoon, Stoeckley asked Leonard "what would you do if I told you I was there." (EHT 1114). Leonard told Stoeckley that he would continue to represent her, but needed to know the truth. Stoeckley then told Leonard that she was present during the murders. (EHT 1114-15). Leonard's affidavit sets out the particulars of Stoeckley's confession to him, including that she was present at the murders with the men who did it, at least one of whom had a grudge against MacDonald. Importantly, Stoeckley also told Leonard that during

the murders, the phone rang, she answered it, and quickly hung up when instructed to do so by the other men. (DEHX 5113). This statement is corroborated by other evidence showing that such a phone call did take place. (DEHX 5021). Leonard testified unequivocally that the matters in his affidavit regarding the statements made to him by Stoeckley were true and accurate, and he was willing to testify to them under oath. (EHT 1231).

C. The District Court's Order Denying the Motion.

On 24 July 2014, the district court entered an order denying MacDonald's Motion, under the gatekeeping provision of 28 U.S.C. § 2255(h) and alternatively on the merits. After a recitation of the record evidence, (DE-354 at 1-128), the district court first addressed the legal standard involved. With respect to the gatekeeping standard in § 2255(h), the district court adopted MacDonald's position that all of the newly discovered evidence, viewed in light of the evidence as a whole, must be considered in assessing the § 2255(h) standard:

> The court, accordingly, will assess whether all the newly discovered evidence, viewed in light of the evidence as a whole, is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the murders of his wife and daughters.

(DE-354 at 132-33).

The district court then held that MacDonald did not meet this standard. First, with respect to the "unsourced hairs evidence," the district court dismissed

this evidence because a juror could find that the unsourced hairs were "mere artifacts or debris, and not indicative of intruders" and were similar to other unsourced hair evidence previously offered by MacDonald that had been rejected by the courts. (DE-354 at 134-35).

Next, the district court addressed the Britt evidence, finding that Britt's statements were internally inconsistent, contradicted by other evidence, and highly unlikely to have occurred, and therefore that Britt's statements were "neither probably reliable nor likely credible." (DE-354 at 137-38). The district court placed great weight on the Government's hearing evidence tending to show that Marshal Service personnel other than Britt transported Stoeckley from South Carolina to Raleigh, and that Stoeckley came into Britt's custody in Raleigh. *Id.*

Next, the district court addressed Stoeckley's confession to her attorney, Jerry Leonard. The district court dismissed Leonard's testimony as "unreliable" because Leonard's poor memory of certain events occurring in 1979 "is contradicted by other matters in the record" and shows that he is likely "'remembering' information he learned at a later date." (DE-354 at 139-43).

The district court then, adopting the conclusions of the trial judge in excluding the seven Stoeckley witnesses at trial, further held that no relief could be based on the evidence from Leonard or Britt or Stoeckley's mother because of the inherent unreliability of Helena Stoeckley herself. (DE-354 at 144-146).

The district court then addressed the threat to Stoeckley as testified to by Britt, and the resulting fraud on the court. The district court found Britt's assertions to be unreliable in light of the testimony of the prosecutors, then-AUSAs Blackburn and Crawley, and in light of other evidence refuting Britt's recitation of events occurring during the trial. (DE-354 at 146-47).

Finally, the district court considered the evidence as a whole, concluded that it supported rejection of MacDonald's claims under the § 2255(h) procedural gatekeeping bar. (DE-354 at 152),

In the alternative, the district court then considered MacDonald's motion on the merits. The district court reviewed the Britt and DNA claims and found that they did not establish a constitutional violation, essentially for the same reasons it found they did not meet the § 2255(h) gatekeeping standard. (DE-354 at 154-68).

D. MacDonald's Rule 59 Motion.

On 21 August 2014, MacDonald filed a Rule 59 Motion to alter judgment, in light of new evidence relating to several of the Government's expert witnesses. (DE-357). Specifically, the motion is based on (1) a DOJ Inspector General report issued in July 2014 finding that former FBI Analyst Michael Malone "repeatedly created scientifically unsupportable lab reports and provided false, misleading, or

inaccurate testimony at criminal trials." (DE-357-1 at 45);[5] and (2) a letter from DOJ Special Counsel to the prosecutors in this case, informing them that at least three laboratory examiners involved in this case -- Malone, Paul Stombaugh, and Robert Fram -- had "exceeded the limits of science by overstating the conclusions that may appropriately be drawn from a positive association between evidentiary hair and a known hair sample," (DE-363-2), and identifying three items in MacDonald's case were such errors had occurred: (a) a report from Malone identifying a hair as belonging to MacDonald; (b) a report from Fram identifying a hair as originating from Kristen MacDonald; and (c) Stombaugh's trial testimony regarding the origin of a hair. (DE-383 at 4) (summarizing issue).

MacDonald argued that this new evidence showed the propensity of the Government's experts to offer incorrect opinions, and stressed that Stombaugh's reliability especially was at issue, because he was the chief architect of the

[5] MacDonald's 1990 motions were based in part on the post-trial discovery of handwritten lab notes that revealed numerous long blond synthetic hairs had been found in a hairbrush in the kitchen of the MacDonald home after the murders. These hairs were not matched to any item in the MacDonald home, and the analyst who was the author of the notes did not mention the synthetic hairs when she testified at trial. These suppressed hairs were powerful corroborative evidence of MacDonald's defense -- Stoeckley was known to wear a blond wig at the time of the murders. The Government countered the 1990 motions with an affidavit from Malone, opining the blond synthetic hairs were not wig hairs, but were made of a saran fiber used only in doll's hair. Malone's opinion figured prominently in the denial of MacDonald's habeas petition. *MacDonald*, 778 F.Supp. at 1350-51 (citing Malone report). As set out in the report on which the Rule 59 Motion is based, we now know that Malone routinely testified falsely in criminal trials.

Government's pajama top experiment at trial that the Government has consistently touted as its best evidence, as recently as the arguments on the instant Motion in September 2012. (EHT 1338). The district court denied MacDonald's Rule 59 motion. (DE-383).

STANDARD OF REVIEW

In an appeal from the denial of a Section 2255 Motion, this Court reviews the district court's legal determinations *de novo*. *United States v. Linder*, 552 F.3d 391, 395 (4th Cir. 2009).

ARGUMENT

I. The District Court Erred in Finding That MacDonald Did Not Establish by Clear and Convincing Evidence That No Reasonable Factfinder Would Have Found Him Guilty of the Murders of His Family.

The district court concluded that the evidence offered by MacDonald failed to meet the Section 2255(h)(1) gatekeeping bar for the filing of a successive Section 2255 motion. To overcome the procedural bar present in Section 2255(h), a movant must present:

> Newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.

28 U.S.C. § 2255(h)(1). In conducting this inquiry, the district court must consider the proffered evidence "with due regard for the likely credibility and the probable reliability thereof." *Macdonald*, 641 F.3d at 610. "Simply put, the 'evidence as a

whole' is exactly that: all the evidence put before the court at the time of its ... § 2255(h)(1) evaluation." *Id.*[6]

The district court correctly found that it must consider all of the newly discovered evidence offered by MacDonald in assessing this standard. (DE-354 at 132-33). But the district court grossly misapplied this standard in finding it not met, because (a) the trial evidence of guilt was weak, and (b) the newly discovered evidence is strong evidence of innocence.

A. Application of the § 2255(h) Standard Must Account for the Weakness of the Trial Evidence.

By its very terms, Section 2255(h)(1) requires a district court to assess the newly discovered evidence in light of the strength of the trial evidence, because it requires the court to consider the new evidence "in light of the evidence as a whole" and consider its effect on a "reasonable factfinder" in assessing guilt for the charged offense. The district court's order erroneously fails entirely to consider the weakness of the trial evidence.

Any Government contention that there exists some mountain of evidence in support of the verdicts is myth. Most tellingly, in a letter to Wendy Rouder shortly after the trial, the trial judge noted that he "confidently expected that the jury

[6] Presumably due to the rarity of application of this standard, there is no specific guidance in the caselaw as to how a district court should conduct the § 2255(h)(1) procedural gatekeeping analysis, beyond the instructions of this Court in the 2011 opinion.

would return a not guilty verdict in the case." (DEHX 5115). There can be no more clear evidence of the weakness of the Government's evidence at trial than these words of the trial judge himself.

The Government offered no direct evidence of guilt. There were no eyewitnesses to the crimes other than the perpetrators. Both the trial judge and the Government have contended that the most "incriminating" or "compelling" evidence against MacDonald was his pajama top and the pajama top "experiment." *See MacDonald*, 640 F.Supp. at 312; (EHT 1338). But a brief examination of this evidence reveals the weakness of the Government's proof.

MacDonald told the police that he had used his pajama top as a shield. During his struggle, it was pulled over his head, torn, and wound up wrapped at his wrists. He later placed it on his wife's chest. The Government introduced threads allegedly matching the pajama top that were found in the master bedroom, the children's bedrooms, and on the club outside. Yet the Government contended no threads were found in the living room where MacDonald was attacked. This was considered by the Government to be strong evidence that MacDonald's version was fabricated.

But overlooked in this conclusion is the fact that MacDonald was wearing at all times in his home his matching pajama bottoms as well, which were ripped from ankle to crotch, thereby exposing threads. (TT 2661-62). When MacDonald

frantically tried to revive his wife and children, threads from his ripped pajama bottom could have been scattered wherever he went. It is therefore not surprising, given MacDonald's account, that threads from his torn pajama bottoms were all around the house. Moreover, the basic premise of the Government's position is that threads from MacDonald's pajamas must have been deposited in every room in which he moved -- but there is no scientific, or even common-sense, basis for this premise.

The Government also relied heavily on its pajama top "experiment," whereby its "experts" sought to show that the holes in the pajama top could be lined up with the puncture marks in Colette's chest.[7] This test was badly flawed. The Government "experts" failed to consider vitally important information in conducting the experiment. The Government "experts" admitted they could not account for the difference between the size of the holes in the pajama top and the size of the wounds in Colette's chest. (TT 4378). They failed to even try to line up the holes in MacDonald's pajama top with the thirty-odd holes in Colette's pajama top (TT 4501-02) -- if MacDonald had laid his pajama top on top of her,

[7] The Government's theory underlying this "experiment" is summarized in this Court's opinion on direct appeal. *MacDonald*, 688 F.2d at 227-28. The Government, in an effort to overcome MacDonald's statement that he laid his pajama top on his wife while trying to revive her, contended that this "experiment" proved that MacDonald actually stabbed her repeatedly after laying the pajama top on her in an effort to cover up his crimes.

and then stabbed her through it as the Government contended, then the holes would have gone through both articles of clothing in the same pattern. The experiment also failed to account for the directionality of the thrusts or threads in any way, and the Government's two experts themselves reached different conclusions regarding the directionality of holes in the experiment. (TT 5312-18).

There were numerous other problems with the pajama top experiment explained by the defense. (DE-383 at 13-18) (summarizing defense showing at trial of inaccuracy of experiment). Indeed, in the end, the Government "experts" could not even opine that the thrusts were made through MacDonald's pajama top as the Government contended -- they could state only that in their opinion it was *possible* that it *could* have happened. (TT 4371). The fact that the Government even now clings to this guesswork evidence as its best proof of guilt is itself strong proof of the *weakness* of the Government's case.[8]

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[8] In the district court's 1985 order denying MacDonald's habeas motions, the trial judge enumerated the following as the most significant evidence offered against MacDonald at trial: 1) the murder weapons, 2) the pajama top and pajama top experiment, 3) the pajama top pocket, 4) MacDonald's eyeglasses, 5) the bloody footprint, 6) the latex gloves, 7) the blood spatterings and the Government's reconstruction of the crime scene, 8) the absence of physical evidence consistent with MacDonald's account. *See MacDonald*, 640 F. Supp. at 310-315. In the instant Motion, MacDonald explains how each of these items of evidence is actually either consistent with the account given by MacDonald of the murders, or has been proven false by newly discovered evidence. (DE-155 at 34-41).

In the end, this was a weak Government case that turned entirely, as observed by the district judge during trial,[9] on the Government's attempts to disprove MacDonald's version of events, rather than prove what actually happened.

B. The Newly Discovered Evidence, In Light of the Evidence as a Whole, Establishes by Clear and Convincing Evidence That No Reasonable Factfinder Would Convict MacDonald.

This Court, in 1980, recognized the vital importance of Stoeckley's testimony to the decision of the jury in MacDonald's trial:

> Had Stoeckley testified as it was reasonable to expect she might have testified [admitting to presence at and participation in the crime], the injury to the government's case would have been incalculably great.

MacDonald, 632 F.2d at 264. The newly discovered evidence in MacDonald's Motion directly relates to this key point identified by this Court in 1980. Had the jury heard this new evidence -- in combination with the vast array of other evidence uncovered since trial showing Stoeckley's admissions to being present to be accurate and establishing the presence of intruders at the murder scene -- no reasonable juror would have convicted MacDonald.

[9] At a bench conference late in the trial, the trial judge stated: "I think this case is going to rise or fall on one thing and one thing only and this is whether or not the jury buys the Defendant's story as to what happened. That is all there is in this case. We have been here five weeks, and that is still all there is in this case." (TT 5256-57).

To accept the Government's theory of guilt, one must accept that MacDonald created a story about a woman with a floppy hat being with intruders who killed his family, and that by coincidence such a woman did exist in the community *on that very night*, and that by coincidence that woman would then falsely *confess repeatedly* (both before, during, and after the 1979 trial) to being present during the murders with the murderers in a way that was *entirely consistent* with the story that MacDonald supposedly made up from whole cloth. In addition, one would have to accept that one of the men identified by Stoeckley as one of the killers in her many confessions, Greg Mitchell, would *by coincidence himself falsely confess repeatedly* to taking part in the killings, in a way that is *entirely consistent* with the story supposedly created by MacDonald. What are the chances of this occurring?

MacDonald has presented substantial new evidence from Stoeckley and others showing that Stoeckley lied during her trial testimony and was in fact present with the persons who actually killed the MacDonald family (DE-343 at 15-38); (DE-351 at 29), including:

- Britt's account of Stoeckley's admission to him and to AUSA Blackburn, and AUSA Blackburn's threat to Stoeckley in response (DEHX 5059);
- Leonard's account of Stoeckley's admissions to him during his representation of her during MacDonald's trial (DEHX 5113);

- Stoeckley's mother's account of Stoeckley's admissions to her in 1982, at a time that Stoeckley knew she was dying, as corroborated by the testimony of Eugene Stoeckley (DEHX 5051);

- Sarah McCann's account of Stoeckley's 1982 confession to her (EHT 418-24);

- the testimony of Rouder, explaining that she had interaction with Stoeckley the weekend after Stoeckley's interview with AUSA Blackburn and subsequent appearance in court, and that Stoeckley told her that she (Stoeckley) had been present in MacDonald's home during the murders and could name the murderers, but did not testify to those facts in court because she was "afraid ... of those damn prosecutors sitting there," adding that "they'll fry me", thereby corroborating the threat to Stoeckley by AUSA Blackburn (DEHX 5080).

MacDonald has also presented new (and previous) evidence that corroborates Stoeckley's confessions to her lawyer Leonard, DUSM Britt, AUSA Blackburn, and her own mother, including:

- an affidavit from Jimmy Frier, which confirmed that a phone call was placed to the MacDonald home during the murders which was answered by a woman (DEHX 5021) -- and corroborated precisely the admission of Stoeckley to Jerry Leonard, wherein Stoeckley told Leonard that while she was in the MacDonald home she answered the ringing phone but quickly hung up when told to do so by one of the men she was with;

- affidavits from three individuals testifying that Greg Mitchell (a boyfriend of Helena Stoeckley continually linked to the murders) confessed involvement to them in the murders of MacDonald's family prior to his own death (DE-115, Ex. 7);

- an affidavit from Lee Tart, a former Deputy United States Marshal who worked with Britt, testifying that Britt told him in 2002 the things that Britt has brought forward in this Motion relating to Stoeckley's confession to AUSA Blackburn and Blackburn's threat in response,

and the fact that Britt was troubled greatly by carrying the burden of his knowledge of those matters (DE-115, Ex. 3; DEHX 5069);

- the voir dire testimony at trial of the seven excluded witnesses who testified to Stoeckley's confessions to them (TT 5508-5799);

- the evidence presented at the Article 32 hearing in military court showing Stoeckley's presence in the area of the crime scene and the lack of physical evidence tying MacDonald to the crimes (DE-343 at 71-80);

- the numerous statements of witnesses submitted with MacDonald's earlier habeas petitions and new trial motions linking Stoeckley and Mitchell to the murders (DE-115 at 21-26);

- the trial testimony of MP Mica, who enroute to the call from the murder scene at 4 a.m. saw a woman in a floppy hat close to the MacDonald home, thinking it strange she was there at that hour (TT 1401-54).

There exists also voluminous evidence showing the presence of intruders in the MacDonald home from prior habeas motions and the trial, (DE-343 at 37-50), including:

- the synthetic blond wig hairs found in a hairbrush next to the phone in the MacDonald home, unmatched to any other item in the home but consistent with Stoeckley's presence that night wearing a blond wig, which were suppressed at trial and were the subject of MacDonald's 1990 motions (DE-115 at 21-26);

- the black wool fibers found on the mouth and bicep area of Colette MacDonald and on one of the murder weapons, that were unmatched to any fabric in the MacDonald home, and which the Government was aware of prior to trial but failed to disclose, which were the subject of MacDonald's 1990 motions (DEHX 5027);

- laboratory reports released after the trial showing that blood of MacDonald's blood type was present in the home exactly where

MacDonald testified he was struggling with his attackers (DE-126 at 23) -- directly refuting the Government's claim at trial that no blood of MacDonald's type was found where he testified he struggled with his attackers (TT 6881-930; 7123);

- the fact that numerous weapons were used in the killings, yet only one of these items could be conclusively identified as coming from the MacDonald home;

- the presence of a bloody syringe half-filled with fluid in a hall closet of the MacDonald home that was lost in the uncontrolled crime scene, which is probative of the presence of drug-seeking intruders (DE-115 at 21-26);

- the presence of wax drippings of three different types in three different areas of the MacDonald home which did not match any other candles or wax in the home (TT 3837-43; DEHX 5004);

- the presence of numerous unidentified fingerprints, palm prints, and footprints in the crime scene that did not match MacDonald, a MacDonald family member, or any other exemplar tested (TT 3116-41; EHT 859-61);

- the evidence that was lost or destroyed as a result of the Government's inept handling of the crime scene, including MacDonald's pajama bottoms, the bloody half-filled syringe in the hall closet, skin recovered from under Colette's fingernail that could have been subjected to DNA testing, and seven fingerprints recovered from the hallway of the MacDonald home (DE-115 at 21-26; DE-343 at 48-50).

Finally, the new DNA evidence further proves the presence of intruders in the home who committed the murders. An unsourced hair was found in the fingernail scrapings of MacDonald's daughter, in a place where the hair would belong to her attacker. The hair did not belong to MacDonald. Two other

unsourced hairs were present in the murder scene -- one in a bedroom where visitors to the home would not be. (DE-123 at 2-4).

On direct appeal, Judge Murnaghan of this Court, in concurring, stated:

> I conclude with the observation that this case provokes a strong uneasiness in me. ... [T]he way in which a finding of guilt is reached is, in our enduring system of law, at least as important as the finding of guilt itself. I believe MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted.

MacDonald, 688 F.2d at 236.

Had all of this newly discovered evidence been available at trial, it would not only have been presented to the jury, but would have caused the trial judge to also admit the seven Stoeckley witnesses who were excluded. As this Court signaled in its 1980 opinion on direct appeal, *MacDonald*, 632 F.2d at 264, this evidence would have established beyond all question that reasonable doubt existed, and in fact that MacDonald is innocent.

C. The District Court's Rejection of the Newly Discovered Evidence is Error.

In finding that this newly discovered evidence did not meet the Section 2255(h) standard, the district court overlooked material facts and failed to consider the exculpatory nature of both the new evidence and the evidence as a whole.

1. Jerry Leonard

The district court found Leonard's testimony about his client Stoeckley's confession to him during his 1979 representation of her to be unreliable. The district court's conclusion is error, for two reasons.

First, the district court found that Leonard was unreliable because his recitation of certain events during the week that he represented Stoeckley in August 1979 conflicted with other evidence. (DE-354 at 141-43). But this position overlooks the fact that while Leonard candidly admitted that while there were parts of the events (that occurred more than 30 years ago at the time he testified) on which he was unclear, his "memory is clear" as to the important matters set out in his affidavit regarding Stoeckley's confession to him. (EHT 1231-32). This makes perfect sense -- <u>Stoeckley's confession is something that a lawyer in Leonard's shoes would never forget</u>. To accept the district court's rejection of this testimony, one must be willing to accept that Leonard made the confession up out of whole cloth, for no apparent reason (as he has no interest in the litigation), and managed to make up the confession in a way that was <u>consistent</u> with the other Stoeckley evidence. This did not occur.

Second, the district court's conclusion minimizes the corroboration for Stoeckley's confession to Leonard that is shown by the phone call testified to by Jimmy Frier. (DEHX 5021). The district court rejected Frier's evidence as unreliable because of the credibility issues raised by the Government. (DE 354 at

142). Again, however, to accept the district court's reasoning, one would have to accept that Frier made up his account in a way that was consistent with how Leonard chose to supposedly conjure up his account of Stoeckley's confession. Such a conclusion is not reasonable. Instead, the fact that Frier's declaration corroborates Stoeckley's statement to Leonard is strong proof that (a) Leonard is telling the truth, and (b) Stoeckley was telling Leonard the truth.

Leonard has no motive to make up Stoeckley's confession to him. While he understandably may have confused some details of events occurring more than thirty years ago, he was clear in stating that he accurately recalled Stoeckley's confession to him. And Stoeckley's confession is just the type of thing that a lawyer would remember thirty years later. The district court's conclusions regarding Leonard are error.

2. Jimmy Britt

The district court found Britt to be unreliable because his statements were contradicted by other evidence introduced by the Government, specifically the evidence tending to show that Marshal Service personnel other than Britt transported Stoeckley from South Carolina to Raleigh. (DE-354 at 137-39).

But the district court's conclusion overlooks the fact that the key portions of Britt's affidavit are strongly corroborated by other facts. While the Government offered much evidence to attempt to show that Britt did not pick up Stoeckley in

South Carolina, and only had custody of Stoeckley in Raleigh while transporting her to court and at the courthouse, the Government cannot deny that Stoeckley was in Britt's custody in Raleigh during the trial. Whatever the result of the evidentiary dispute on the point of where Stoeckley came into Britt's custody,[10] what is undeniable is that Stoeckley was in Britt's custody for significant periods of time during the 1979 trial.

This fact is proven conclusively in several ways. First, a local newspaper photograph introduced into evidence shows Stoeckley in Britt's custody during the trial at the Raleigh courthouse. (DEHX 5060). Second, video footage earlier entered into the record shows Britt and a female escorting Stoeckley in Raleigh -- exactly as Britt avers in his affidavit. (DE-126, Appendix 2, Tab 13, at 52:10 and

[10] Britt's statement that he went to South Carolina to pick up Stoeckley is strongly corroborated by the testimony of his ex-wife Mary Britt, who recalled that during the 1979 trial Britt told her that he was going to South Carolina to pick up a witness, who turned out to be Helena Stoeckley. If Britt made up this trip in his 2005 affidavit, he would have had to divine the plan in 1979 so he could disclose it twenty-six years later in 2005. He had no reason to tell Mary Britt of his trip to SC in 1979 -- unless it were true. Does the Government seriously contend that Mary Britt is intentionally lying?

Moreover, Britt's account is corroborated by the affidavit of DUSM Lee Tart. Tart stated that in 2002, Britt told him the things that Britt has brought forward in this Motion relating to his trip to South Carolina, Stoeckley's confession to AUSA Blackburn and Blackburn's threat in response, and the fact that Britt was troubled greatly by carrying the burden of his knowledge of those matters. (DE-115, Ex. 3; DEHX 5069). Tart further states that "Jim Britt would tell nothing but the truth." *Id.* Again, Britt would have no reason to make these statements to Tart in 2002, unless they were true.

52:30). Third, the Government's own witnesses at the evidentiary hearing concede that Stoeckley was with Britt in Raleigh during the trial. (EHT 526). Given this evidence, it is undeniable that Britt was with Stoeckley to hear her confession to him, and to witness AUSA Blackburn's threat to Stoeckley after her confession to him, during the 1979 trial. The district court's order does not consider this documentary evidence in any way.

As to Britt's account of AUSA Blackburn's threat to Stoeckley during the interview at the Raleigh courthouse, the Government's evidence disputing the threat came from only two persons: AUSAs Blackburn and Crawley.

Blackburn is markedly lacking in any credibility. He has been convicted of felony criminal offenses, imprisoned, and disbarred, as a result of his forging judge's names to fake pleadings and to stealing money from his law firm. He has continued to engage in fraudulent conduct since his disbarment, taking a $50,000 advance for book he never wrote. His testimony rang of self-promotion, in marked contrast to that of Mary Britt, Eugene Stoeckley, and Jerry Leonard. Sadly, Blackburn has shown himself to be a person who will not tell the truth when it suits his interests.

Crawley's memory of the events was understandably limited. Crawley's law license was placed in disability status in the 1990s because of a "mental condition" from which he continues to suffer. (EHT 731-32). Though he testified to a

meeting with Stoeckley where he, Blackburn and other prosecutors were present, he could not rule out that Britt was present also. (EHT 738). And, most importantly, he does not know if Blackburn ever met Stoeckley alone with Britt, away from the other prosecutors. Britt's affidavit describes Blackburn and Stoeckley as being alone at the time of the threat, with no one else present except Britt. (DEHX 5059 at ¶ 26). Nothing in the district court's order considers whether a meeting or portion of a meeting took place between Blackburn and Stoeckley out of the presence of Crawley and the other prosecutors.[11]

The district court's order also fails to consider that Britt's account of AUSA Blackburn's threat to Stoeckley is strongly corroborated -- by the uncontradicted testimony of Wendy Rouder. On the weekend after Stoeckley's interaction with Blackburn and her trial testimony, Stoeckley admitted to Rouder that she was present during the murders with the murderers. When Rouder confronted her about why should would testify contrary at trial, Stoeckley told Rouder it was because of "those damn prosecutors" who would "fry me." When Rouder later in 2005 learned of Britt's affidavit about Blackburn's threat to Stoeckley, it was a "eureka moment" to Rouder because it explained why Stoeckley made those

[11] Notably, the Government did not call the other Government prosecutor who was present during the 1979 trial (DOJ Attorney Brian Murtagh) on this point, despite his being available to testify at the September 2012 evidentiary hearing.

comments to Rouder in August 1979. (EHT 345-57; DEHX 5080). It was a "eureka moment" because it made perfect sense.

Rouder's testimony is strong proof that the threat did in fact occur. There is no way to explain Rouder's testimony other than to conclude that Stoeckley was telling her the truth, and that Stoeckley was threatened by "those damn prosecutors." Rouder has no motive to testify falsely, and even produced a letter from the trial judge attesting to her good work and qualifications. (DEHX 5115). As compared to Blackburn, her credibility is far superior and her qualifications impeccable. The district court's order rejecting Britt's testimony fails to take Rouder's testimony into account in any way. [12]

In short, the district court's order rejecting Britt's evidence fails to account for the strong corroboration that exists for Britt's recitation of Blackburn's threat to Stoeckley, and Stoeckley's subsequent refusal to tell the truth. Britt had no motive to lie. It is undisputed that Stoeckley was in his custody during the 1979 trial. His account is corroborated by Mary Britt, Tart, Rouder, Stoeckley's mother, and

[12] Britt's evidence regarding the threat is further corroborated by three other items: (1) the affidavit of Stoeckley's mother and the testimony of Eugene Stoeckley, showing that Stoeckley told her mother she could not tell the truth because she was "afraid of the prosecutor" (DEHX 5051) and "was threatened with prosecution for murder" (EHT 331); (2) Britt's passing a polygraph on the issue from a respected polygraph analyst (DEHX 5057); and (3) the testimony of Mary Britt regarding Britt's reaction to seeing the inaccurate portrayal of the interview of Stoeckley by the prosecutor in the movie version of Fatal Vision. (EHT 226-28).

several others. The evidence proves that the threat from Blackburn to Stoeckley did take place, and that Britt is telling the truth about it.

3. Helena Stoeckley

The district court also rejected the evidence from Stoeckley's mother, Leonard, and Britt because it found that Stoeckley herself was so unreliable that her confessions could not be considered credible. (DE-354 at 144).

The district court's approach puts MacDonald in the proverbial *Catch 22*. Having stated from the outset that his family was attacked by intruders later shown to be drug addicts, the multiple confessions of one of these intruders has never been considered on its merits for the principal reason that she was drug-addled. If the tables had been turned, and if Stoeckley had been indicted and tried for this crime, it is unlikely that any court would have excluded her many confessions because she was drug-addled, or simply because she sometimes repudiated her admissions of guilt. Many defendants only confess once, and repudiate their confessions thereafter -- the confessions are nonetheless admissible, and it is for the jury to consider the question of reliability. So it should be in this case as to Stoeckley's many confessions to this crime.[13]

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[13] This new evidence also affects this Court's determination, on direct appeal, to affirm the exclusion of the seven defense witnesses MacDonald sought to call to testify to Stoeckley's confessions. *MacDonald*, 688 F.2d at 232-33. MacDonald respectfully submits that this Court's analysis of this issue would have been much different had this newly discovered evidence been available.

The district court failed to consider that Stoeckley's confession to her mother has strong indicia of trustworthiness. It was made at a time when Stoeckley knew she was dying and wanted to set the record straight. Likewise, Stoeckley's confession to Rouder during the 1979 trial carries strong indicia of credibility, given the corroboration that exists (DEHX 5051; EHT 331) and the circumstances in which it was made. Stoeckley was also considered reliable by the local police -- she was a regular informant described by one detective as "[t]he most reliable informant I ever had." (TT 5739).

With respect to Stoeckley's confession to her attorney Leonard, the district court failed to consider in any way the context of how it occurred -- within the confines of the attorney-client relationship. The Government will undoubtedly argue that clients sometimes lie to their lawyers. But how often do clients lie to the lawyers in a way that <u>inculpates</u>, rather than <u>exculpates</u>, themselves? The fact that Stoeckley confessed to Leonard in an effort to obtain legal advice from Leonard gives that confession great reliability, because she wanted Leonard's help. The district court's order fails to consider this point in any way.

4. The DNA Evidence

At trial, the Government argued that MacDonald was guilty -- and argued against the admission of the Stoeckley evidence -- on the ground that there was no physical proof of any intruders to the MacDonald home. The new DNA evidence

answers the Government's position directly. The 91A hair found in Kristen's fingernail scrapings is the hair of someone foreign to home, found in a place where it would be lodged when Kristen was defending herself from her attacker. This evidence directly undercuts the Government's chief argument at trial. The other two unsourced hairs, 75A and 58A, likewise strongly support MacDonald's version of events, by establishing the presence of strangers to the home in the murder scene. Given the weak nature of the Government's case against MacDonald, the exculpatory nature of this evidence is overwhelming.

The district court's rejection of this evidence finds it as cumulative of other evidence of unsourced items found in the MacDonald home. But this position fails to acknowledge the import of the location of where the 91A hair was found -- under Kristen's fingernail. The fact that this unsourced hair was found where it was provides powerful proof of MacDonald's version of events. Its location also defeats any effort to paint it as cumulative of other unsourced items in the home.

The Government's retort to this evidence below was to argue that the court cannot be sure of the origin of the 91A hair because of alleged contamination of the exhibits ***by the Government itself***. (DE-354 at 123). Notably, the Government never once raised the issue of contamination during the nine years the DNA testing was pending -- only after the results were exculpatory did the Government claim

that it somehow mishandled the evidence. The district court did not adopt the Government's baseless arguments in this regard, and neither should this Court.

5. The Section 2255(h) Standard is Met

All of the new evidence offered by MacDonald goes to prove the point at the heart of this appeal -- that Stoeckley's confessions to being present during the murder with the murderers are true, because they are corroborated in ways that could not exist if Stoeckley were not telling the truth. To accept the Government's position, one must accept that Jimmy Britt chose to affirmatively concoct a story out of whole cloth, and that attorney Jerry Leonard, attorney Wendy Rouder, Eugene Stoeckley, and Mary Britt also independently and intentionally chose to lie, and to do so in a way that is consistent with the other supposed lies of the other witnesses. This simply did not -- and could not -- happen.

Moreover, the truth of Stoeckley's confessions is proven by their interlocking nature. Stoeckley told her mother about Blackburn's threat to her in the same way that it is reflected in the content of her statement to Rouder during the 1979 trial. Stoeckley told her attorney Leonard about her presence during the murders in the same way that she told it to Britt, Rouder, and her mother. Stoeckley made these confessions to her lawyer and mother under circumstances that the law views as having trustworthiness -- in the attorney-client relationship (as to Leonard) and at a time when Stoeckley believed she was dying (as to her

mother). And her confessions are further corroborated by the newly discovered physical evidence showing the presence of intruders in the home. The volume of this evidence cannot be discounted as the fanciful musings of a drug-addled adolescent -- it consistently and repeatedly points to MacDonald's innocence.

No reasonable juror, upon hearing the volume of evidence of Stoeckley's confessions, buttressed by the newly discovered physical evidence showing the presence of intruders in the home, would have convicted MacDonald. This Court effectively said as much on direct appeal in 1980. *MacDonald*, 632 F.2d at 264 ("Had Stoeckley testified as it was reasonable to expect ... the damage to the government's case would have been incalculably great").

Section 2255(h)'s "no reasonable factfinder" standard is not impossible to meet, and the type of evidence offered by MacDonald here is of the type that traditionally has been found to meet this standard. *See, e.g. United States v. Williams*, 790 F.3d 1059, 1081-82 (10th Cir. 2015) (finding § 2255(h)(1) standard met where evidence showed defendant's firearm conviction resulted from false evidence caused by police coercion); *Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005) (pre-AEDPA no reasonable juror standard met with "documentary, biological (DNA), or other powerful evidence" of innocence); *Watkins v. Miller*, 92 F.Supp.2d 824, 836-40 (S.D.Ind. 2000) (pre-AEDPA no reasonable juror standard met with DNA evidence showing crime likely committed by person other

than defendant). The district court erred in finding that MacDonald failed to meet the § 2255(h) standard.

D. MacDonald's Motion Should Be Granted on the Merits.

For the same reasons, the newly discovered evidence outlined herein shows that MacDonald's Motion should be granted on the merits. The burden of proof is on the petitioner in a Section 2255 Motion to establish his claim by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958). The Motion asserts two claims for relief: (1) the "Britt evidence" proving Stoeckley's confessions and the threat to Stoeckley by Blackburn, and (2) the DNA claim. The evidence establishes constitutional violations requiring a new trial on both claims.

A. The Britt Claims

In his Motion, MacDonald sets out how the evidence relating to AUSA Blackburn's interview with and threat to Stoeckley shows (a) that AUSA Blackburn concealed exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; (b) that AUSA Blackburn threatened Stoeckley, causing her to change her testimony in violation of MacDonald's constitutional rights, see *United States v. Golding*, 168 F.3d 700 (4th Cir. 1999); and (c) that AUSA Blackburn misled the district court in his representations as to what he was told by Stoeckley, in violation of MacDonald's constitutional rights, see *Alcorta v.*

Texas, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959). (DE-115 at 30-31).

The evidence of record establishes violations of these constitutional standards by more than a preponderance of the evidence. First, the failure of Blackburn to disclose Stoeckley's confession to him as averred to by Britt is a plain violation of *Brady* under any interpretation of the standard. *See, e.g. United States v. Bartko*, 728 F.3d 327, 340 (4th Cir. 2013) (when "the net effect of the evidence withheld by the government ... raises a reasonable probability that its disclosure would have produced a different result, ... a new trial" is required). Second, the uncontradicted testimony of Rouder establishes why Stoeckley refused to admit her presence during the murders when she testified at trial -- because "those damn prosecutors" would "fry" her. (EHT 350-51). The fact of this threat alone violates the Constitution and requires a new trial. *See Golding*, 168 F.3d at 703-04. Finally, Blackburn's lack of candor with the trial court during the discussions of the Stoeckley issue directly violates the constitutional standards set out in *Alcorta* and *Napue*.

The district court did not dispute the legal bases raised by MacDonald -- rather it found that MacDonald had failed to prove the factual predicate for these violations by a preponderance of evidence. But, as set out *supra*, the district court improperly cherry-picked facts and overlooked others in concluding that

MacDonald failed to meet his burden of proof. While the Government may contest where Stoeckley came to be in Britt's custody during the 1979 trial, photographic and videotape evidence conclusively establishes that Stoeckley was in Britt's custody at the courthouse during the 1979 trial, showing that Britt was present as he avers to hear Blackburn's threat to Stoeckley and Stoeckley's confession. Britt avers that the threat occurred at the Raleigh courthouse during a time when only he, Blackburn, and Stoeckley were present. (DEHX 5059 at ¶ 26). The issue of credibility is that of Britt vis-a-vis Blackburn as to whether the threat actually occurred -- and even putting aside Blackburn's plain credibility issues, Britt's version is corroborated by the uncontroverted testimony of Rouder and Eugene Stoeckley. No evidence corroborates Blackburn's version, and it is contradicted by Rouder and Eugene's testimony.

In the end, the sheer volume of exculpatory evidence presented by MacDonald in support of his Motion is overwhelming. The Government's theory only works if everyone -- Britt, Mary Britt, Rouder, Leonard, Stoeckley's mother, Sarah McCann, Jimmy Friar, Lee Tart, the Greg Mitchell witnesses, and Stoeckley herself -- are *all affirmatively choosing to lie.* This did not happen. The evidence establishes that Stoeckley admitted her presence at the murders to Blackburn, was threatened by Blackburn, and refused to admit her presence at the MacDonald

murder scene on the witness stand as a result. This is a violation of MacDonald's constitutional rights, and he should receive Section 2255 relief.

B. The DNA Evidence Claim

The United States Supreme Court has assumed, without deciding, that a freestanding claim of actual innocence is cognizable under federal law. *Herrera v. Collins*, 506 U.S. 390, 417 (1993); *House v. Bell*, 547 U.S. 518, 554-55 (2006); *Teleguz v. Pearson*, 689 F.3d 322, 328 n.2 (4th Cir. 2012).[14] Though the Supreme Court has never articulated the standard for such a claim, other circuits have held the standard for such a claim to be that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 474 (9th Cir. 1997) (en banc).

The new DNA evidence in this case does just that -- it "affirmatively prove[s] that [MacDonald] is probably innocent." The linchpin to the Government's theory at trial, and its arguments against MacDonald's habeas motions through the years, has been the lack of any physical evidence to corroborate the presence of intruders in the MacDonald home on the night of the

[14] While the majority opinion in *Herrera* assumed without deciding that a freestanding claim of actual innocence was recognized by federal law, a majority of the members of the Court would have explicitly so held. *Compare* 506 U.S. at 417 (majority opinion) *with id.* at 419 (O'Connor, J., joined by Kennedy, J., concurring) *and id.* at 430-37 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting).

murders. The new DNA findings now provide this evidence, in the strongest terms -- the presence of an unmatched human hair under Kristen's fingernail, in a location that shows that during Kristen's attempts to defend herself, a hair from her attacker was lodged under her fingernail, and that hair is not the hair of MacDonald.

MacDonald recognizes the high standard for proof of a freestanding claim of innocence. But the DNA evidence in this case directly undercuts the Government's central theme at trial -- that the physical evidence in the MacDonald home was not consistent with, and in fact contradicted, the account of intruders given by MacDonald, and therefore the murders must have been committed by MacDonald.[15] In considering the exculpatory effect of newly discovered evidence, the strength or weakness of the Government's case at trial must be considered. *House*, 547 U.S. at 539 (analysis of actual innocence claim "requires a holistic judgment about 'all the evidence' and its likely effect on reasonable jurors applying the reasonable-doubt standard"). Here, the Government case at trial was weak, and the DNA evidence directly undercuts the Government's chief argument.

[15] In its closing argument at trial, the Government stated: "The Government's case, stripped to the essentials, consists of the crime, the physical evidence, the defendant's story voluntarily told, the conflict between that story and the physical evidence, from which we submit that it was a fabrication of the evidence, and from that we infer and ask you to find his guilt." (TT 7059).

Had this DNA evidence been available at trial, MacDonald would have been in a position to point out that there exists DNA evidence under the fingernail of his daughter, in a place where it is logical that the DNA of his daughter's attacker would be, and that DNA did not match him, but rather some unknown person. In short, because of *where* this unsourced DNA was located, this DNA evidence would have provided the exact corroboration demanded by the Government at trial as necessary to prove MacDonald's innocence to the jury. [16]

Unique cases call for unique remedies. Section 2255 relief based on actual innocence is a novel issue. But the circumstances before the Court here are unique and unprecedented. This litigation has continued for more than thirty-five years, because new evidence of MacDonald's innocence keeps coming to light. The new DNA evidence adduced by MacDonald meets the standard for Section 2255 relief, because it shows that no reasonable factfinder would find him guilty, when making "a holistic judgment about 'all the evidence.'" *House*, 547 U.S. at 539. We respectfully ask this Court to so find.

CONCLUSION

The newly discovered evidence offered by MacDonald proves (1) that Stoeckley's confessions to which she was expected to testify are credible and true;

[16] The juxtaposition of this statement with what the law says the burden of proof is in a criminal trial is not lost on MacDonald. But that is the burden that the Government sought to place on MacDonald at trial, through its theory.

and (2) the reason for Stoeckley's sudden refusal to so testify -- the threat she received from one of the prosecutors. Just as in 1980, "the injury to the government's case [is] incalculably great," *MacDonald*, 632 F.2d at 264, and no reasonable juror would convict MacDonald in light of this evidence.

For the reasons stated herein, Appellant Jeffrey MacDonald respectfully requests that the district court's order denying his Section 2255 Motion be reversed, and that the case be remanded for entry of an order granting his motion and vacating his convictions.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), MacDonald respectfully requests oral argument in this appeal, as he submits that the Court's decisional process will be aided by oral argument given the issues involved.

This the 7th day of June, 2016.

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DATED: June 7, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing BRIEF through the electronic service function of the Court's electronic filing website, as follows:

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This the 7th day of June, 2016.

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