No. 05-548

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
v.	)	OPPOSITION OF THE UNITED STATES
	)	TO MOTION FOR LEAVE TO FILE A
JEFFREY R. MacDONALD,	)	SECOND OR SUBSEQUENT MOTION
Movant	)	FOR RELIEF UNDER 28 U.S.C. § 2255
	)	
	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina and the undersigned attorneys of the Department of Justice, Criminal Division, hereby opposes the application of Jeffrey R. MacDonald for leave to file in the Eastern District of North Carolina a second or subsequent petition for federal habeas relief under 28 U.S.C. § 2255. In support of our opposition we aver the following:

STATEMENT

1. Procedural History

Jeffrey R. MacDonald ("MacDonald") was indicted on three counts of murder, in violation of 18 U.S.C. § 1111, by a grand jury of the Eastern District of North Carolina on January 24, 1975. He moved to dismiss the indictment upon claims of denial of his right to speedy trial, based on the period of time between the dismissal of military charges in 1970 and the federal indictment. He also claimed that his protection against double jeopardy was violated because he had been "exonerated" as the result of a military pretrial investigation pursuant to

Article 32 U.C.M J., 10 U.S.C. § 832. The district court denied the motion, and MacDonald filed an interlocutory appeal. In August 1975, this Court stayed the trial and ultimately ordered the indictment dismissed on speedy trial grounds. United States v. MacDonald 632 F.2d 258 (4th Cir. 1980) (Opp'n App. Vol. I, Tab 1).[1] The Supreme Court reversed. United States v. MacDonald , 456 U.S. 1(1982) (Opp'n App. Vol. I, Tab 2). MacDonald then appealed the district court's double jeopardy ruling, which this Court rejected. United States v. MacDonald 585 F.2d 258 (4th Cir. 1978) (Opp'n App Vol. I, Tab 3). On August 29, 1979, a jury convicted MacDonald on all counts of murder, in violation of 18 U.S.C. § 1111. On appeal, this Court reversed his conviction on speedy trial grounds. United States v. MacDonald, 632 F.2d 258 (4th Cir. 1980)(Opp'n App. Vol I, Tab 5). The Supreme Court reversed and remanded the case to the court of appeals for disposition of the remaining issues. United States v. MacDonald, 456 U.S. 1 (1982) (Opp'n App. Vol I, Tab 6). This Court affirmed, rejecting MacDonald's remaining claims. United States v. MacDonald, 688 F.2d 224 (4th Cir. 1983) (Opp'n App. Vol I, Tab 7).[2]

In 1984, MacDonald filed a motion for a new trial, pursuant to Fed. R. Crim. P. 33, on the basis of "newly-discovered" evidence, as well as two motions for post conviction relief under 28 U.S.C. § 2255. Following an evidentiary hearing, the district court denied the motions. United States v. MacDonald, 640 F. Supp. 286 (E.D.N.C. 1985) (Opp'n App. Vol. I, Tab 10).

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[1] "Opp'n App." is the abbreviation for the Government's four volume Appendix. "Tr." is the abbreviation for the trial transcript, excerpts of which are contained in our Appendix.

[2] The principal issue on remand was the district court's exclusion at trial of Helena Stoeckley's out-of-court statements under Fed. R. Evid. 804 (b)(3).

In 1983, MacDonald filed a motion to re-examine the crime scene. The district court denied the motion (Opp'n App. Vol. I, Tab 9) and this Court dismissed his appeal as " without merit".

This Court affirmed. United States v. MacDonald, 779 F. 2d 962 (4th Cir. 1985) (Opp'n App. Vol. I, Tab 11). In October 1990, MacDonald, through a new team of lawyers, filed a second collateral attack alleging, once again, newly discovered evidence as well as the concealment of such evidence by the prosecution. The district court denied relief. United States v. MacDonald, 778 F. Supp. 1342 (E.D.N.C. 1991) (Opp'n App. Vol. I, Tab 12). This Court affirmed. United States v. MacDonald, 966 F.2d 854 (4th Cir. 1992) (Opp'n App. Vol. I, Tab 13). [3]

On April 22, 1997, MacDonald filed a third petition for habeas relief captioned "Motion To Reopen 28 U.S.C. Proceedings And For Discovery." The district court denied the motion insofar as it was based upon a "fraud on the court" claim. It transferred to this Court the motion for a new trial, once again based upon alleged newly-discovered evidence for certification as a successive petition. United States v. MacDonald, 979 F. Supp. 1057 (E.D.N.C. 1997) (Opp'n App. Vol. I, Tab 14). This Court then entered an order granting MacDonald's motion insofar as it authorized DNA testing and remanded that matter to the district court (Opp'n App. Vol. I, Tab 14). It denied the motion to file a successive habeas petition in all other respects. MacDonald then appealed the district court's ruling on the fraud on the court claim. This Court affirmed (Opp'n App. Vol. I, Tab 16). Pursuant to orders issued by the district court, the DNA testing proceeded and was recently completed.[4] On December 13, 2005, MacDonald, through a fourth

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[3] This Court affirmed the denial of MacDonald's Section 2255 motion relying solely on the "abuse of the writ" doctrine. It observed that the alleged "newly-discovered" laboratory bench notes had, in fact, been received by MacDonald's preceding set of lawyers prior to the filing of his first habeas petition. Upon evaluation, those attorneys dismissed as inconsequential the "newly-discovered" evidence. See MacDonald, 966 F.2d at 858.

[4] On December 14, 2005, both parties were informed by letter from the Armed Forces DNA Laboratory that it has completed all laboratory work associated with this case, and that the final report will be ready in February, 2006.

set of lawyers, filed the instant motion, once again alleging "newly-discovered evidence," which he now claims demonstrates that prosecutor James L. Blackburn made factual misrepresentations to the trial judge and thwarted his ability to obtain testimony from Helena Stoeckley, a prospective defense witness.[5]

2. The Crime and Events Leading to the Trial

In the early morning of February 17, 1970, while MacDonald was stationed at Fort Bragg as an Army Medical Corps Captain, his pregnant wife, Colette, and two daughters, Kimberly (age 5 ½) and Kristen (age 2 ½), were murdered in the military quarters that they shared with him. MacDonald summoned the Military Police.

When the Military Police arrived, they found MacDonald lying across his wife's body in the master bedroom. His children's bodies were found in their bedrooms. All three victims suffered multiple stab wounds; Colette and Kimberly also suffered blunt trauma injuries caused by a club (Tr. 2494-2520, 2567-67, 2577-89). Although MacDonald was treated for a number of wounds, he required only brief hospitalization (MacDonald, 640 F. Supp. 289). The word "PIG" had been written in Colette's blood on the headboard in petitioner's bedroom (GX 43). The weapons used in the killings – a bloodstained club, an "Old Hickory" brand paring knife, and an icepick – were discovered outside the rear door (Tr. 2342-44).

During subsequent interviews with Army Criminal Investigation Division (CID)

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[5] We discuss the claims relating to prosecutor Blackburn, *infra*. Mr. Blackburn left the United States Attorney's Office in 1980 to engage in the private practice of law. In 1993, he entered guilty pleas to charges relating to that practice. He was represented in those proceedings by Wade M. Smith, who was local defense counsel at MacDonald's trial. Due to his subsequent representation of Blackburn, Mr. Smith has withdrawn from representation of MacDonald in the instant matter.

investigators, MacDonald recounted his version of what occurred on the night of the murders. He stated that he had fallen asleep on a living room sofa at approximately 2:30 a.m. and was awakened by the screams of family members. He claimed to observe a blond woman wearing a floppy hat, muddy boots, and a short skirt, carrying a lighted candle and chanting "acid is groovy, kill the pigs." Allegedly, three men standing near the couch attacked MacDonald, pulling or tearing his pajama top over his head, which petitioner used to ward off their blows until he lost consciousness. MacDonald stated that when he regained consciousness he went to the master bedroom where he found his wife dead. After removing a "Geneva Forge" knife from her chest, he covered her body with his pajama top and a bath mat. He then went to his children's bedrooms and discovered that they were also dead. (MacDonald, 640 F. Supp. 289).

The Army charged MacDonald with the murders in May 1970 and a formal pretrial investigation, pursuant to Article 32 of the Uniform Code of Military Justice, 10 U.S.C. § 832, was convened. At the recommendation of the Article 32 investigating officer, however, the charges were dismissed and MacDonald was discharged from the Army. Nonetheless, the investigation of the murders by both civilian and military authorities continued. On January 24, 1975, MacDonald was indicted on three counts of murder, in violation of 18 U.S.C. § 1111.

3. The Government's Case At Trial

The government introduced a wealth of physical and other circumstantial evidence which affirmatively established that MacDonald was the murderer. 640 F. Supp. 310-15. Additionally, that evidence demonstrated that MacDonald's version of the events of February 17, 1970, was false. MacDonald's pajama top was, perhaps, the single most inculpatory piece of evidence. He claimed it was torn in the living room during his efforts to ward off the attackers and that he later

placed it over his wife's body to keep her warm. The garment had two cuts and 48 puncture holes in it, whereas Colette's chest area sustained 21 puncture wounds in all; five on the right side, 16 on the left. When a forensic technician experimented with the top by folding it in the same manner in which it had been found on Colette's body, the garment's 48 puncture holes aligned in a pattern corresponding to the 21 puncture holes on Colette's chest (Tr. 4192-96). This showed that MacDonald had placed the garment on Colette's chest and then stabbed her through his pajama, in order to make his account of the murders more believable (see 640 F. Supp. 311-12). The fact that the holes in the pajama top were clean and showed no tearing indicated to a forensic expert that the pajama top was not moving when the punctures were made, flatly contradicting petitioner's claim that he used it to ward off his attackers (Tr. 4074-75).

Threads and yarns from petitioner's pajama top were found underneath Colette's body in the master bedroom, in the bedding in which Kimberly was wrapped, and in Kristen's bedroom. No threads from the pajama top, however, were found in the living room where MacDonald claimed he was assaulted (Tr. 1689-90, 1727, 3790-3811). Additionally, the pajama top's pocket was found on a throw rug at Colette's feet (Tr. 1683). A forensic expert testified that the pocket was stained with blood of Colette's blood type before it was torn from the pajama top and that the staining was the result of smearing and soaking caused by direct contact. In addition, Colette's blood was found in numerous places on the pajama top. Some of the stains were bisected by tears in the garment indicating to the expert that the top had been stained before it was torn. Blood in Kimberly's type was also found on the garment (Tr. 3648-54, 4076-79).

This evidence refuted MacDonald's story that his pajama top was torn when unknown intruders attacked him in the living room, and that after they left he went directly into the master

bedroom where he placed the torn garment over Colette. Instead, it showed that the pocket had been torn off the pajama top while MacDonald struggled with Colette in the master bedroom, that MacDonald had gone to other rooms still clad in the pajama top, that he later returned to the bedroom and placed it - minus the pocket - over Colette's body, and then stabbed her (subsequent to the infliction of the fatal knife wounds) with the icepick to make her death appear as the work of crazed intruders.

In addition, blood splatterings throughout the apartment demonstrated that, contrary to MacDonald's story that he found Colette in the master bedroom and Kimberly in her own bed, he had moved the bodies of Colette and Kimberly, rearranging the crime scene to conform to his story. Spattered blood, as well as large stains resulting from direct contact, and blood stained splinters from the wooden club demonstrated that MacDonald had assaulted Colette and Kimberly in the master bedroom and subsequently moved Kimberly's body to her own bedroom where he again assaulted her[6]. Further, the blood evidence demonstrated that, at some point, MacDonald's attack on Colette resumed in Kristen's bedroom as large amounts of Colette's blood were found on Kristen's bedding as well as on the wall above Kristen's bed (Tr. 3662-67; GX 982). MacDonald's bare footprint, stained in Colette's blood, was discovered leading out of Kristen's bedroom (Tr. 1616), but no such footprints leading in were found, nor were there any stains in Colette's blood found on the floor of Kristen's room. This suggested that MacDonald had stepped on some object soaked with Colette's blood, which was not present when the investigators arrived.

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[6] A large stain in Kimberly's blood was soaked into shag rug on the master bedroom floor.

The sheet and bedspread from the master bed were found on the floor of the master bedroom. The sheet was heavily stained with Colette's blood and bore bloody imprints from Colette's pajama top and the sleeves of petitioner's pajama top (Tr. 3662-66, 4133-39, 4146-52). The bedspread was also heavily stained with Colette's blood (Tr. 3667, 4103-10). Adhered to the bedspread was a bloody hair from Colette which was entwined with a thread from petitioner's pajama top. This further demonstrated that MacDonald carried Colette's body back to the master bedroom. In addition, sixty threads and yarns from MacDonald's pajama top were found in the master bedroom, many of them underneath Colette's body (Tr. 3790-3811, GX 654). Taken together, this evidence showed that MacDonald attacked Colette, not only in the master bedroom but also in Kristen's bedroom, and carried her heavily bleeding body, wrapped in the bedding, back to the master bedroom. He then deposited Colette's body over pajama top threads resulting from their earlier struggle. The presence of MacDonald's footprint in Colette's blood leading out of Kristen's room also refuted his story that Colette was in the master bedroom when he first discovered her, and that he was neither present when she was attacked, nor had he moved her bloody body.

Similarly, Kimberly's blood was found on a rug and bedding in the master bedroom, on the bath mat used both to cover Colette's body and to wipe off the murder weapons, in the hallway leading to Kimberly's bedroom, on the wall of her bedroom, on the club, and on MacDonald's pajama top (Tr. 3615-17). Threads and yarns from MacDonald's pajama top were found within the bedding in which Kimberly was wrapped. Collectively considered, this evidence demonstrated that Kimberly, who sustained blunt trauma injuries inflicted by the club, was struck in the master bedroom and then carried by MacDonald -- still wearing his pajama top -- to her own bedroom

where he continued to assault her in order to support his story that his wife and children were attacked in their own bedrooms while they slept (Tr. 3615-17, 3639-46; 640 F. Supp. 312-13). It also refuted his claim that he was not wearing his pajama top when he entered Kimberly's room.[7]

Kristen's blood was found on MacDonald's eyeglasses. This suggested that it had gotten there when he stabbed Kristen. It also contradicted MacDonald's story that he was not wearing his eyeglasses either during or after the attack. MacDonald, 640 F. Supp. 313.

The murder weapons implicated MacDonald in the murders and discredited his statements to investigators. Although MacDonald denied that he had ever seen the wooden board which was used as a club to assault Colette and Kimberly (Tr. Vol. I, April 6, 1970 CID Interview at pp. 45-46; GX 1135),[8] the weapon was shown to have been used to support Kimberly's bed when it was painted and testimony established that MacDonald had used other pieces from the same board to build closet shelf supports (Tr. 3812-19). MacDonald also denied that the family ever owned an icepick like the one that had been used to stab his family (Tr. Vol. I, April 6, 1970 CID Interview at pp. 46-47; GX 1135). However, both his mother-in-law and the baby sitter recalled using one

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[7] Expert testimony established that Kimberly would not have been ambulatory after sustaining blunt trauma injuries from the initial club attack in the master bedroom (Tr. 2571).

[8] The club had Colette's and Kimberly's blood on it as well as seam threads from MacDonald's pajamas and fibers from a throw rug in the master bedroom. This demonstrated that MacDonald's story to investigators was false and that the club had contact with the throw rug after MacDonald's pajama top had been torn in the master bedroom and before the club was removed from the house by the murderer. A splinter from the club with Colette's blood was found in the master bedroom. Splinters from the club were also found close to seam threads from MacDonald's pajama top in the childrens' rooms. And an impression corresponding to the end of the club was found on Colette's chest (Tr. 1700-01, 2340, 3404-05, 3425-27, 3804-12). The fact that, even though splinters from the club were found in Kristen's bedroom, Kristen bore no blunt trauma injuries, further demonstrates that MacDonald, whose pajama top yarns were found there, assaulted Colette in Kristen's bedroom.

in his home. 286 F. Supp. at 311.

A copy of Esquire magazine found in the living room contained an article describing the Charles Manson murders. It also bore MacDonald's latent fingerprints, and was stained with Colette's and Kimberly's blood. This suggested that MacDonald had consulted the article about the Manson murders and used it to invent a similarly bizarre story. 640 F. Supp. at 314.

The word "PIG" was written in Colette's blood on the master bed headboard. But there were no ridge lines in the writing as there would have been if it had been written with a bare finger (610 F. Supp. at 313). A finger section of a latex surgical glove stained with Colette's blood was found in bedding at the foot of the master bed and had apparently been used to paint the word "PIG" on the headboard (Tr. 1730-31). The chemical composition of the glove was similar to that of other surgical gloves found in a kitchen sink cabinet and MacDonald's blood was found near the cabinet (Tr. 1760-61). This showed that MacDonald had obtained a glove from the cabinet following his attacks on his family and then written on the headboard with the glove to reinforce his story that the murders had been committed by drug-crazed hippies. 640 F. Supp. at 313.

As the district court recognized (640 F. Supp. at 314), almost no physical evidence supported MacDonald's version of events on the night of the murders. For example, he claimed that he was attacked with a club and stabbed in the living room and that his pajama top was torn there by one of his assailants. But no bloodstains, threads, yarns, or fibers from the pajama top, or splinters from the club were found there. MacDonald testified that he had been stabbed with an icepick. However, he sustained no wounds on his arms, hands, or body consistent with wounds inflicted by an icepick. Moreover, his injuries were superficial and could easily have been self—inflicted with the disposable scalpel blades he was known to have kept in a linen closet. 640

F. Supp. at 314. In fact, his blood was found on the door of the linen closet which contained scalpel blades and in a sink beneath a mirror in the master bedroom.[9]

4. The Pretrial Statements of Helena Stoeckley

Shortly after the murders, MacDonald told the Military Police that a band of four hippies had broken into his house and stabbed him. He described the intruders as two white males, a Negro male, who wore an army field jacket with staff sergeant's stripes, and a blonde female who wore muddy boots, a floppy hat, carried a candle and chanted "acid is groovy, kill the pigs." (Tr. 1262, 1270). Within hours news reports described the crimes as well as MacDonald's descriptions of the four alleged intruders (Tr. 5653-54; 6106-07).

The following day, P.E. Beasley, a Fayetteville, North Carolina, policeman, visited Helena Stoeckley, a drug addict and sometime police informer.[10] Beasley told her that she and several of her male companions fit MacDonald's description of the murderers, and asked whether she had any information concerning the crimes. Stoeckley responded, "in my mind, it seems that I saw this thing happen"; but she also explained that she was "heavy on mescaline" and did not recall anything that occurred on the night of the murders (Tr. 5741-42; 5747-48). Shortly thereafter, Beasley visited Stoeckley's apartment, noticed several wreaths hanging in the front yard, and

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[9] Shortly before the murders, MacDonald observed another physician treat a pneumothorax (collapsed lung) by making an incision in the chest wall and inserting a chest tube (Tr. 2866-67). At trial, that physician testified that a doctor can readily control the depth of an incision (Tr. 3037).

[10] Stoeckley died of natural causes in January 1983. See The Philadelphia Inquirer (Jan. 15, 1983, 1983 WLNR 147592)

observed that she was wearing black. When he questioned her about these displays, she responded that she was in mourning because of the murders of MacDonald's family (Tr. 5743).

Because many aspects of his story were inconsistent with the physical evidence, MacDonald was informed on April 6, 1970, that he was a suspect, relieved of his medical duties, and restricted to quarters. On May 1, 1970, he was formally charged with murder and an officer was appointed to conduct a formal investigation of the charges in accordance with Article 32 of the UCMJ. During the Article 32 hearing, evidence was presented suggesting that Stoeckley was a possible suspect in the murders.

William Posey, a former neighbor of Stoeckley's, testified that he had seen her arrive home in the early morning of February 17, 1970, in a car occupied by several males, and that she sometimes wore a blonde wig and a floppy hat although she was not wearing them on that occasion. (J.A. 5-10; Art. 32 Tr. 1298-1302). He further stated that, about a week after the murders, Stoeckley told him that she had been questioned by the police but did not know where she was during the morning of February 17 or what she had done because "she was stoned out" (J.A. 12; Art. 32 H. Tr. 1304). On or about August 11, Posey asked Stoeckley whether she had committed the murders. She again responded that she did not know as she was "stoned out" and did not remember what she had done during the night in question but that she did not think that she could kill anyone. When Posey suggested that she could have been the female intruder holding the candle, Stoeckley nodded her head in a noncommittal manner (J.A. 21-22; Art. 32 H. Tr. 1328-1329).

William Ivory, an Army CID Agent, also testified that he had twice interviewed Stoeckley concerning her whereabouts on the night of the murders but that she was unable to recall them

because, as she explained, "she had been out on marijuana" (J.A. 23; Art. 32 H. Tr. 1513).[11]

Kenneth Mica, a military policeman, testified that, while en route to the crime scene at approximately 4:00 a.m., he observed a white female with shoulder length hair standing on a street corner near a shopping center. Although unable to discern the woman's facial characteristics, he noticed that she was wearing a dark hooded raincoat and a wide brimmed hat (Art. 32 H. Tr. 1007, 1023, 1026).

Finally, MacDonald repeated the story which he had told to investigators following the crime. However, when shown Stoeckley's photograph (GX-952), he stated that he had never previously seen the person portrayed. (see Tr. 6829-31). Upon completion of the Article 32 hearing, the investigating officer recommended that the charges against appellant be dismissed but that law enforcement authorities continue their investigation of Stoeckley's activities on the night of the murders. On October 23, 1970, after review of the report, the general court-martial convening authority dismissed the charges.

Following the recommendation of the Article 32 officer, the CID investigated Stoeckley. On April 23 and 24, 1971, CID Agent Robert Brisentine interviewed Stoeckley at her new residence in Nashville, Tennessee. During the first interview, while visibly under the influence of narcotics, Stoeckley told Brisentine that she could not recall her activities on the night of February 16-17, 1970, due to a "mental block"; that shortly before midnight she and a male companion consumed LSD and mescaline; and that both prior to and immediately following the homicides "she was using all types of drugs -- opiates, heroin, marijuana, depressants, stimulants, and

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[11] Ivory stated that Stoeckley told him that the last event she could recall on that night of February 16-17 was getting into a car with a male companion shortly after midnight and driving aimlessly (J.A. 33-34; Art. 32 H. Tr. 1521-1522).

hallucinogenics". (Tr. 5717-18). She stated, however, that she may have been present at the murders, explaining that in her dreams she had visions of Mrs. MacDonald's bed with the word "pig" written in blood on the headboard, and of herself on a couch in the MacDonald home with MacDonald holding a bloody icepick (Tr. 5719-20). But she immediately retracted the statement, explaining that she only thought she heard of MacDonald before the murders (Tr. 5718). Finally, she informed Brisentine that she knew the identity of the persons who murdered the MacDonald family and that she would furnish the identity of the murderers in exchange for immunity (Tr. 5721).

The following day, Stoeckley again recanted her statement concerning participation in the murders. Asserting that she had "said too much," she admitted that she had been lying when she told Bristentine she knew the identities of the killers; in fact, she only suspected some people of committing the homicides (Tr. 5721-22).

During her stay in Nashville, Stoeckley made statements to several acquaintances concerning her possible involvement in the murders of the MacDonald family. In November 1970, while ill with hepatitis, "incoherent", and in a state of hysteria, she told Jane Zillioux, a neighbor, that she could not return to her home in Fayetteville, North Carolina because she had been involved in some murders with three boys whose identities she did not know. When Zillioux pressed her for additional details, Stoeckley admitted that she did not know whether or not she had participated in the murders, explaining, "I've been a heavy drug user and . . . drugs make you

–when you are on drugs, you do things that you don't think you did, . . . I don't know. . . . I can't remember." (Tr. 5693-94)[12]

During this same period, Stoeckley also made statements to James Gaddis, a Nashville police officer, for whom she acted as an informant. On one occasion she told Gaddis that, on the night of the murders, she had "tripped out" on LSD and mescaline but she thought that she had been present when the murders took place. On another occasion, she denied involvement in the murders, stated that she could not recall her whereabouts on the night in question, but asserted she knew who had committed the crimes (Tr. 5704-08). And on a third occasion, she admitted that she only had suspicions as to the identity of the killers and believed that the killer was MacDonald (Tr. 5708).

In December 1970, Stoeckley appeared in a highly agitated state at the door of Charles Underhill, another neighbor. When Underhill inquired what was wrong, she stated, referring to an otherwise unexplained event in an unnamed North Carolina city, "they killed her and the two children." (Tr. 5711-14).

5. Events At Trial Relating to Stoeckley

Prior to trial, the prosecution provided a list of possible witnesses to the defense, which included Stoeckley's name and last known address. The prosecution did not call Helena Stoeckley during its case-in-chief, and the defense did not subpoena her. On the sixteenth day of the trial Bernard Segal, the lead defense counsel, raised the issue of Stoeckley's appearance for the first time at a bench conference (Tr. 4845-50, Opp'n App. Vol II, at Tab 2). After consulting

[12] Zillioux described Stoeckley's condition when she made these statements as "hysterical," "out of control,""blubbering" and "incoherent" (Tr. 5699).

defense counsel, Wade M. Smith, prosecutor James Blackburn asked the FBI to locate Stoeckley for the defense. Id. at 4849. Later that same day, the court issued a material witness warrant for Stoeckley. Id. The FBI located Stoeckley in South Carolina, arrested her, and had her lodged in a local jail. On August 15, the trial judge inquired of the defense whether it wished to call Stoeckley. Segal requested that she be brought to the site of the trial, stating that, as soon as they had a chance to interview her, the defense intended to call her as a witness (Tr. 5258-59). The trial judge then directed that she be brought to the Courthouse and made available to the defense.[13]

Upon Stoeckley's arrival in Raleigh, counsel for the defendant asked for a recess to interview her, which stretched into almost an entire day of conferences between defense counsel, Stoeckley, and a number of witnesses to whom she had allegedly made statements in which she would indicate some possibility of her own involvement in the crimes. See United States v. MacDonald, 485 F. Supp. 1087, 1091 (E.D.N.C. 1979) (Opp'n App. Vol I, Tab 4).

Thereafter, the trial judge requested a status report from the defense on their interview of Stoeckley and further inquired whether it was ready to proceed (Tr. 5496). Smith advised the court that they had almost concluded their discussions with the witness and would soon be in a position to turn her over to the government. Id. Upon inquiry by prosecutor Blackburn, Smith stated that Blackburn could expect them to be through with Stoeckley in about two hours, which the defense later clarified to mean less than an hour (Tr. 5505-06).

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[13] Apparently Stoeckley was then transported to Raleigh by the U.S. Marshals Service. No record, however, remains concerning the identities of the Marshals who actually drove Stoeckley to Raleigh and lodged her at the local jail.

Trial resumed the following morning (Tr. 5512, Opp'n App. Vol. III). In response to an inquiry by Blackburn whether an attorney should be present to represent Stoeckley's interests should she testify, Smith stated, "we will do whatever your honor wishes to do – but I feel that we will just go ahead with her and see what happens." (Tr. 5513). Segal then examined Stoeckley in the presence of the jury. She admitted that during 1970, she was addicted to heroin, used other drugs, and participated in witchcraft ceremonies that involved the ritual killing of animals and the use of a candle (Tr. 5522, 5542-46). She then repeated her previous statements that she had no recollection concerning her whereabouts between midnight and 4:30 a.m. on February 17, 1970 (Tr. 5548, 5556-57, 5646). Explaining that during February 16, she had six or seven intravenous injections of a mixture of heroin and opium, had used marijuana all day, and had taken a "hit" of mescaline shortly before midnight, she stated that the last event she recalled was conversing with a soldier from Fort Bragg in her driveway (Tr. 5552, 54). Thereafter, she remembered returning to her house in a car driven by other soldiers at approximately 4:30 a.m. (Tr. 5555-57).

Stoeckley also denied any involvement in the murders of MacDonald's family and admitted that her knowledge of the killings was the result of what she heard on a radio news bulletin and what others had told her (Tr. 5652-5654).

On further questioning, Stoeckley acknowledged that, at the time of the murders, she owned a floppy hat, a blonde wig, and white boots and that she got rid of the hat and wig after they were returned to her by Officer Beasley because they connected her with the murders (Tr. 5583, 5588-90, 5602-03). She also said that, on the day of the MacDonald family funeral, she dressed in black and hung funeral wreaths outside her home (Tr. 5633). When asked whether she

had made statements to acquaintances and to police officers concerning her involvement in the murders, she responded that, with the exception of telling Posey that she did not recall her whereabouts on the night of the murders and advising him to tell his wife to keep her door locked, she did not recall the specifics of any of the conversations (Tr. 5557-60 (Posey); Tr. 5562-64 (Zillioux); Tr. 5564-66 (Underhill); Tr. 5567-68 (Gaddis); Tr. 5568-69 (Brisentine); Tr. 5573-74 (Beasley).

Segal then attempted to get Stoeckley to admit that she had, in fact, recalled these prior statements during the previous day's interview (Tr. 5568). He further asked Stoeckley if she recalled looking at various crime scene photos (Tr. 5578, 5584). When asked: "does anything in that group of photos I have just shown you seem familiar to you?" She answered: "No, sir." When shown Government Exhibits which depicted a hobby horse in Kristen's bedroom, and asked "does that seem familiar to you in any way," Stoeckley responded: "No." "It does not." (Tr. 5582-5583). Upon being shown photographs depicting the MacDonald living room, Stoeckley was asked, "do you have any reason to believe that you have seen that scene before prior to being shown the photo yesterday and today?" Stoeckley answered : "No sir. " "Do you have any reason to believe that you were ever standing in that place"? She responded, "No sir." (Tr. 5643).

Following this testimony, Segal claimed surprise and sought leave to examine Stoeckley as a hostile witness (Tr. 5614). He maintained that, during preceding interviews, Stoeckley had made statements suggesting familiarity with the crime scene and recalled standing over a body holding a candle (Tr. 5617-18). At this, Blackburn represented that, during his interview with Stoeckley, she had no recollection of ever having been in the MacDonald home and did not recognize any of the scenes depicted in the crime scene photos. To this, Blackburn added, "I told

Mr. Smith last night what she told us. I was under the impression to this very moment that what she told us was essentially what she told them." (Tr. 5617). At this, Smith interjected, "Judge, here I think is where we are. Generally, she said to us the same thing and that is 'I don't remember.' But in two or three or four instances, – whatever the list would reveal – she says something which would give an interesting insight into her mind." (Tr. 5617-18). The trial judge then questioned Stoeckley, who informed him that on the preceding day, she was interviewed by the defense for approximately three and a half hours and was thereafter interviewed by the prosecutors. In response to the court's question whether she told both sides the same story, Stoeckley responded, "[a]s far as I know, yes sir." The court denied the defense motion to proceed with Stoeckley as a hostile witness (Tr. 5617-18).[14] Upon further questioning by Segal, Stoeckley, confirmed that she could not recognize the crime scene photos, denied making statements concerning a broken rocking horse in the MacDonald household or discussing its presence with defense counsel (Tr. 5621-27).

Defense counsel then moved to introduce Stoeckley's out-of-court statements concerning her possible involvement in the murders (Tr. 5775-84). During a proceeding out of the presence

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[14] Although the record shows, that, during its interview of Stoeckley, a member of the defense team took notes (Tr. 5575), the defense has neglected to present any evidence in support of the instant motion tending to establish what occurred during the interview or to controvert Smith's admission at trial that she had no recollection of participating in the murders of the MacDonald family. We also note that the defense permitted Joe McGinnis, author of the book, Fatal Vision, (Putnam & Sons, 1983), to attend the interview of Stoeckley. According to his account of the interview, Stoeckley responded to Segal's inquiries concerning crime scene photos, "I can't help you, I wasn't in the house. I didn't have anything to do with any of this". Fatal Vision, at 528 (Opp'n App. Vol II). Responding to additional questioning, she added, "I don't know what you want me to know. I was never in the house." When Segal assured her that she would not be prosecuted, she responded, "I can't help you, I can't tell you things I can't remember." Id.

of the jury, the court entertained the testimony of the persons to whom the statements were allegedly made.[15] In addition, Wendy Rouder, a member of the defense team, testified that two days after Stoeckley testified, she interviewed her. During the interview, Stoeckley remarked that she still thought she could have been in the MacDonald home at the time of the murders because the pictures of the MacDonald children and the rocking horse seemed familiar (Tr. 5931-33). During a second interview, Stoeckley again stated that she thought she might have been in the MacDonald home, explaining, "I remember standing at the couch, holding a candle only it wasn't dripping wax. It was dripping blood." (Tr. 5936-37, 5945). The trial judge denied MacDonald's motion to introduce Stoeckley's out-of-court statements, finding them not worthy of belief, notwithstanding the additional testimony of Rouder offered by defense (Tr. 5806-07).

6. Stoeckley's Post-Trial "Confessions"

Following MacDonald's conviction and while his case was on appeal, the defense camp enlisted retired FBI Special Agent Ted Gunderson, aided by Prince Beasley, to conduct further investigation and, in particular, to further interview Stoeckley. See United States v. MacDonald, 640 F. Supp. 286, 318 (E.D.N.C. 1985) (Opp'n App. Vol I. Tab 10). On October 21, 1980, Stoeckley provided Beasley what was to be the first of a series of "confessions" to having been present during the MacDonald murders. Id. at 319. Beasley then flew Stoeckley to California

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[15] The testimony of the witnesses during this hearing is summarized at p. 4-10, supra. During the August 1970, Article 32 hearing, Posey testified that when he suggested to Stoeckley that she could have been the female intruder who held the candle, Stoeckley nodded her head in a noncommittal manner. During the trial, however, he stated that Stoeckley told him that she could have held the candle during the murders, explaining that, when she made the statement, "it was like one minute she was there . . . then the next minute she was drifting back" (Tr. 5759-60). Posey also testified that Stoeckley had told him that, while in the MacDonald home, she observed a hobby horse in Kristen's room that was broken and would not roll (Tr. 5760).

where, upon being confronted by Gunderson, she initially stated that she could not recall what happened on the night of the murders. The following day, however, Stoeckley experienced a "miraculous recovery of her memory" (id.) and gave a detailed confession to the MacDonald murders. Id. She again "confessed" to Gunderson and Beasley on December 4-5, 1980 and gave incriminating statements to the author of a book during February 1981. However, in July 1981, she wrote a letter to Gunderson accusing him of coercing her into signing a false confession and misconstruing and distorting the statements she made to him. In September 1981, FBI agents interviewed Stoeckley. She provided them a statement disclaiming her preceding "confessions" to Gunderson, stated that her admissions to them were the result of dreams, and concluded: "I do not know if I was present or participated in the MacDonald murders." Id. at 320.

Distressed with this turn of events, Gunderson and Beasley re-interviewed Stoeckley during May 1982. On that occasion, she restated her confession, asserted that she had been in the MacDonald home on several different occasions, that she had stolen a bracelet from it, and that, several weeks prior to the murders, one of the cult members visited MacDonald at his home in an effort to convince him to cooperate in treating drug addicts. None of these alleged occurrences meshed with any information that MacDonald had furnished investigators. Finally, on May 27, 1982, Stoeckley accompanied Gunderson and Beasley to a taping of the television show, "60 Minutes." Once again, she confessed to being in the MacDonald home on the night of the murders but refused to name the persons actually responsible for killing the members of the MacDonald family. Id. at 321.

Stoeckley's "confessions" provided the defense the predicate for a motion for a new trial on the basis of "newly-discovered evidence" – Stoeckley's alleged perjury in testifying that she

lacked any recollection of her whereabouts on the night of the murders. In addressing the motion, the trial judge observed that following the trial Stoeckley "has since alternated between lack of memory and almost total recall, on at least ten occasions . . . " The motion was therefore denied for reasons we discuss in greater detail, infra. Id. at 332-34.

7. MacDonald's Instant Claim of "Newly-Discovered Evidence" Relating to Stoeckley

MacDonald's most recent effort to obtain further review of this case is based primarily upon the affidavit of Jimmy B. Britt, a former Deputy United States Marshal who retired from the Marshal's Service in November 1990. According to Britt, during the MacDonald trial he and Ms. Jerry Holden were assigned to travel to Greenville, South Carolina for the purpose of assuming custody of Helena Stoeckley, who was then lodged at the county jail. During the trip from Greenville to Raleigh, Stoeckley allegedly made statements to the effect that she was in the MacDonald home on the night of the murders of the MacDonald family and recalled the presence of a hobby horse in the home. The following day, Britt was assigned to bring Stoeckley to the federal courthouse. He first took her to an office provided to MacDonald's defense team and left her with attorneys Bernard Segal and Wade Smith. When they had finished interviewing her, Britt took her to the U.S. Attorney's office where, in his presence, she was interviewed by prosecutor James Blackburn. During that interview, Stoeckley made the same admissions concerning her presence in the MacDonald home on the night of the murders as she had made to him on the previous day. Blackburn then told her that, if she testified to that effect before the jury, he would indict her for murder. Britt does not now recall whether the incumbent United States Attorney, George Anderson, and prosecutor Brian Murtagh were present during portions of the interview but asserts that neither was present at the time Blackburn allegedly threatened Stoeckley. These

events, according to Britt, were inconsistent with Blackburn's subsequent statement to the trial judge that, during his interview with Stoeckley, she had no recollection of her whereabouts on the night of the murders.

ARGUMENT

MacDONALD HAS FAILED TO SATISFY EITHER OF THE GATEKEEPING REQUIREMENTS GOVERNING SECOND OR SUBSEQUENT PETITIONS UNDER SECTION 2255

A. Introduction – Governing Principles

As our rendition of the procedural history demonstrates, this marks the fourth occasion that MacDonald has filed (or has sought leave to file) a petition in the district court seeking post-conviction relief under Section 2255 following his 1979 convictions for the brutal murders of his pregnant wife and two young daughters. On each of those preceding occasions, the district court has found MacDonald's claims of "newly-discovered evidence" to be without merit and has denied relief. On each of those occasions, this Court has affirmed that determination.

MacDonald's instant motion, which employs yet another claim of "newly-discovered" evidence as the catalyst for seeking reexamination of those repackaged determinations, merits similar summary disposition. His claim of "newly-discovered evidence" relating to Stoeckley's pretrial statements and Blackburn's alleged efforts to suppress her testimony is virtually indistinguishable from his claim, made over 20 years ago, that Stoeckley's post-trial "confessions" should warrant a retrial. As in that case, when Britt's new revelations – made over 26 years after the alleged occurrences – are considered in light of the totality of the evidence, particularly the indisputable sequence of events surrounding Helena Stoeckley's inability to recall her

whereabouts on the night of the murders, it is manifest that they could not possibly have affected either the result of the district court's rulings concerning the admissibility of her prior statements or the outcome of the trial. Accordingly, the instant motion should be summarily denied.

Because the instant motion for collateral relief constitutes a "second or successive motion" for habeas relief under Section 2255, a condition precedent to its submission to the district court for consideration is the submission of a pre-filing authorization motion ("PFA") to this Court, and fulfillment of the "gatekeeping" procedures contained in 28 U.S.C. § 2244(b)(2) and 28 U.S.C. § 2255 para. 8, which were enacted in their present form as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-134, tit VIII, 110 Stat. 1321, 1321-66 (1996). In order to prevail on a PFA alleging newly-discovered evidence, the movant must demonstrate (1) "the existence of facts that could not have been discovered previously through the exercise of due diligence" and (2) that "the facts of the underlying claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the [movant] guilty of the offense." 28 U.S.C. § 2244(b)(2)(B). See United States v. Winestock, 340 F.3d 200, 208 (4th Cir. 2003), citing 28 U.S.C. § 2255 para. 8(1). MacDonald has not come close to satisfying either of them.

B. MacDonald Has Failed to Demonstrate the Exercise Of "Due Diligence"

The "due diligence" component of Section 2244(b)(2)(B)(I) requires that the movant demonstrate that the factual predicate for his claim was unavailable prior to the filing of the last federal habeas proceeding. See e.g., In Re Williams, 364 F.3d 235, 238 (4th Cir. 2004); In Re Magwood, 113 F.3d 1544, 1551 (11th Cir. 1997). The requirement originated in the decision of the Supreme Court in McCleskey v. Zant, 499 U.S. 467 (1991), and was then codified as part of the AEDPA. See United States v. Winestock, 340 F.3d 200, 202 (4th Cir. 2003)(discussing genesis of AEDPA limitations). As the McCleskey Court explained:

> The requirement . . . is based on the principle that the petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. If what petitioner knows *or could discover* upon reasonable investigation supports a claim of relief in a federal habeas petition, what he does not know is irrelevant.

Id. at 498 (emphasis added). See, e.g., Holleman v. Cotton, 301 F.3d 737, 745 (7th Cir. 2003)(adopting McCleskey standard). Thus, following McCleskey, "in evaluating an application under § 2244(b)(2)(B)(I) [the courts] inquire whether a reasonable investigation undertaken before the [previous] habeas motion was litigated would have uncovered the facts the applicant alleges are newly-discovered." In Re Boshears, 110 F.3d 1538, 1540 (11th Cir. 1997).

MacDonald has not even made a pretense of summarizing the efforts he undertook to determine why Helena Stoeckley, when she appeared as a defense witness, had developed a memory lapse concerning her whereabouts on the night of the murders of the MacDonald family. Instead, he blithely dismisses the requirement of demonstrating "due diligence" by asserting that any such investigation would have been futile, *i.e.,* in the case of prosecutor Blackburn and former

Deputy U.S. Marshal Jimmy Britt, "there is no way the . . . defense could have forced Blackburn or Britt, both government officials, to reveal the information known to them of Blackburn's conduct." Mot. 32.

First , this argument misperceives the governing test: whether "some objective factor external to the defense impeded counsel's efforts to raise the claim . . ." McCleskey, 499 U.S. at 493. Objective factors that constitute cause include "interference by officials" that makes compliance [with the requirement] impossible." Id. at 494. Thus, in the context of a case such as this one, "[a] petitioner could show that an inquiry would be futile if he would not have been able to discover the factual predicate . . . even if he had inquired." Holleman, 301 F.3d at 746.[16] In this respect, MacDonald presented no evidence tending to demonstrate that the government did (or would have) thwarted post-conviction efforts to inquire of either Blackburn or of Britt concerning statements Stoeckley may have made to the prosecutors concerning her recollection of events on the night of the MacDonald family murder or the dialogue that occurred immediately thereafter. Furthermore, assuming for the sake of this argument that prosecutor Blackburn would, upon timely inquiry, have concealed the threats and misrepresentations now attributed to him and thereby prevented the defense from obtaining such information from him, there is no basis whatsoever for believing that a similar inquiry, if made to Britt, would have been futile. Indeed,

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[16] The authorities upon which MacDonald relies to justify his failure to conduct a post-conviction investigation are similarly inapposite. For the most part, they involve the affirmative concealment of documentary evidence or active obstruction by the government. See, e.g., Kirkpartick v. Whitley, 992 F.2d 491, 496 (5th Cir. 1993) (non-disclosure of a police report in the face of a Brady request). MacDonald's assumption that such non-disclosure would occur if he launched an inquiry relating to the information at issue simply because it was, in one instance, known to a government employee, is plainly no substitute for a showing that such "exculpatory" evidence had been concealed from the defense, making further post-trial inquiry an apparently futile gesture.

Britt acknowledges that in November of 1990, when MacDonald's third petition for habeas relief was underway, he had retired from the Marshal's Service. Thus, any employment-based obligation to the government that he previously may have perceived as a basis for withholding the "facts" he has now revealed would no longer have existed. And if a timely inquiry had been made, it is entirely possible that Britt would have experienced the same epiphany of conscience that has apparently prompted such revelations now. Thus, any excuse that MacDonald might present to justify his failure to make an earlier inquiry of Britt cannot withstand scrutiny.[17]

With respect to Stoeckley, MacDonald's claim of futility is based upon the assumption that she was so thoroughly cowed by Blackburn's alleged threats during the 1979 mid-trial interview that any further inquiry of her concerning her memory lapse at that time would have been unavailing. See Mot. at 32. This assertion likewise cannot withstand scrutiny. As we have explained previously (Opp'n p. 20-21, supra), after MacDonald's 1979 trial the defense retained Ted Gunderson and Prince Beasley to further investigate the case and, in particular the possible role of Stoeckley and her known associates as participants in the MacDonald murders. On October 21, 1981 – more than two years after Blackburn's alleged threats – Stoeckley gave Beasley what was to be the first of a series of new confessions purporting to acknowledge participation in the murders of the MacDonald family. Thereafter, Stoeckley was taken to California where, between October 24 and 25, 1981, she "gave fairly detailed confessions to the MacDonald murders" to Ted Gunderson. United States v. MacDonald, 640 F. Supp. 286, 319

[17] In Britt's affidavit, he asserts that his loyalty to the Marshal's Service and respect for Judge Franklin Dupree, the trial judge (who died in 1995) prevented him from volunteering such information earlier. This assertion of reluctance on the part of a potential witness to volunteer information, however, in no way relieves the defense of its responsibility to exercise due diligence by making a timely inquiry of that witness.

(E.D.N.C. 1985). After repudiating these statements, she was again interviewed by Gunderson and Beasley between May 20 and 24, 1982, when she restated her confessions. Id. at 320. These developments belie MacDonald's instant excuse for neglecting to inquire of Stoeckley the reason for her memory loss at trial. If Stoeckley was willing at that time to make repeated admissions concerning her alleged involvement in the offense despite Blackburn's alleged threats to indict her, there is no reason to believe that she would not also have revealed the threats themselves and the circumstances of the interview during which they were allegedly made. Furthermore, these developments also demonstrate that the defense team had ample opportunity to make such inquiries if it had desired to do so.[18]

Finally, MacDonald protests that he was under no obligation to make an inquiry of Stoeckley because any information she might have revealed would not have been believed by the trial court. Mot. 32. In the first place, under the governing principles of habeas law, such an assumption provides no excuse for neglecting to inquire. Cf. Boshears, 110 F.3d at 1541 (finding absence of due diligence where defense counsel had an opportunity to question a known potential witness, a doctor, about involvement in the case and there was no reason to believe that he would not have responded to questioning). Moreover, it is utterly illogical to assume that simply because the trial court dismissed Stoeckley's inconsistent assertions concerning events that

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[18] We note that such a post-trial inquiry concerning possible threats by members of the prosecution team, in anticipation of a motion for habeas relief, would plainly have been warranted in this case. Several days after Stoeckley's court appearance, she told Wendy Rouder, a member of the defense team that she then thought she had been in the MacDonald home on the night of the murders and recalled holding a candle that was dripping blood. Tr. 5932-37. When Rouder inquired why Stoeckley would not testify to that effect, Stoeckley responded that she was fearful of the prosecutors. Tr. 5937. Surely, such a statement imposed a duty to conduct a "reasonable and diligent investigation" of such a relevant claim. Holleman, 301 F.3d at 746.

allegedly occurred some nine years previously, it would likewise have summarily dismissed more recent claims alleging, without further inquiry, fraud on the court by a prosecutor. Indeed, if the defense camp truly believed that Stoeckley's credibility was beyond redemption, it would not have repeatedly sought to extract from her additional admissions for use as the centerpiece of a motions for post-conviction relief that would be entertained by the very same judge.

C. MacDonald Has Also Failed To Demonstrate, By Clear and Convincing Evidence, That, But For Constitutional Error, No Reasonable Fact-Finder Would Have Convicted Him.

Having demonstrated that MacDonald has failed to exercise due diligence in seeking to uncover his claimed "newly-discovered evidence", our analysis (and this Court's review) of MacDonald's gatekeeping motion could properly terminate. See In Re Williams, 364 F.3d at 241. Nonetheless, for the sake of completeness, we also address the second gatekeeping requirement – that the significance of the newly-discovered evidence is so substantial that, in light of such evidence as a whole, no reasonable factfinder would have returned a judgment of conviction – or differently stated – whether the information now furnished by Britt would, if revealed at trial, have resulted in MacDonald's acquittal. E.g., Boshears, 110 F.3d at 1540.[19]

1. The Record "Conclusively Forecloses" Consideration of MacDonald's "Newly-Discovered" Evidence.

As a general proposition in evaluating a PFA application, the courts accept as true the facts underlying the applicant's claim. See Boshears, 110 F.3d at 1541. Nonetheless, as the Boshears court explained (id. 1541 n.1), "[i]f the record before [the court] conclusively forecloses

[19] In addressing this claim we assume for the purpose of argument that Blackburn's supposed false statement to the district court that Stoeckley had no recollection of her whereabouts on the night of the murders, when in fact she had just acknowledged such participation to him, would, if proven, constitute an error of constitutional magnitude as required by 28 U.S.C. § 2244 (b)(2)(B)(ii). See, e.g., Napue v. Illinois, 360 U.S. 264, 269 (1959).

the existence of the facts underlying the applicant's claim, it would be futile to accept them as true in evaluating the application. Granting the application in such a case would be a mere formality because the district court would dismiss the successive petition, as soon as it read the record." See Williams, 330 F.3d at 282 n. 2 (noting, with favor, the reasoning in Boshears.) We believe this to be such a case, because, when considered in the context of the pertinent portion of the trial record, it is almost inconceivable that Britt's belated recollection of events was accurate.

As we understand it, the gravamen of MacDonald's claim of fraud on the court is that, shortly after being interviewed by the defense, when Stoeckley was interviewed by Blackburn, she was overheard by Britt acknowledging that she, along with others, was in the MacDonald home on the night of the murders. Thereafter, when Stoeckley testified that she could not recall her whereabouts on the night of the murders, Blackburn falsely represented at a sidebar conference that, during the interview (which Britt now claims to have witnessed), she denied ever being in the MacDonald home, did not recognize the scenes in the photographs of the crime scene, and had no knowledge concerning the perpetrators of the murders (Tr. 5617). What MacDonald's fraud-on -the-court claim fails to acknowledge, however, is that, upon the court's inquiry, Blackburn also represented that he had relayed the gist of the interview to defense counsel Wade Smith. At that point, attorney Smith volunteered, "Judge, here I think is where we are. Generally, she said to us the same thing and that is, 'I don't remember.'" (Tr. 5618.)[20] And when the trial judge then inquired of Stoeckley whether she had told both sides the same story, she responded that she had (Tr. 5619). Thus, it is highly implausible that Stoeckley would have provided prosecutor

[20] As we noted in our Statement of Facts, essentially the same information concerning defense counsel's efforts to obtain admissions from Stoeckley during a mid-trial conference with her was reported by author Joe McGinnis in his book Fatal Vision.

Blackburn with a detailed statement concerning her participation in the MacDonald family murders when shortly before that interview occurred, she informed defense counsel that she had no recollection of events. Under such circumstances, it is simply not logical to credit Britt's recollection of events some 26 years after the trial and discredit Blackburn's representations to the court, which the defense then conceded were identical to its own experience in attempting to interview Stoeckley shortly before.

2. Even If Taken As Factually Correct, Britt's Assertions Would Not Have Resulted in the Admission of Stoeckley's Out-of-Court Statements.

Even if, however, Britt's present assertions concerning prosecutor Blackburn's conduct relating to Stoeckley were credited, MacDonald has failed to demonstrate that, if considered in light of the evidence as a whole, no reasonable fact-finder would have convicted MacDonald of the murders. As we understand his argument in this respect, MacDonald first speculates that, but for Blackburn's false testimony concerning Stoeckley's loss of recollection, the district court would likely have admitted her out-of-court statement and the testimony of witnesses who heard her out-of-court admissions. See Mot. at 35. Putting to one side for a moment the voluminous forensic evidence demonstrating MacDonald's guilt – which would not have changed in the least – these assumptions cannot withstand scrutiny.

At the time the district court made the ruling at issue and after entertaining the testimony of Stoeckley and the witnesses who allegedly heard Stoeckley' pretrial admissions, it explained its reasons therefor at length. In particular, the court observed:

I have studied the transcript of the witnesses' testimony Stoeckley's and the six witnesses whose out-of-court statements are proposed to be offered . . . .

> I will rule that these proposed statements do not comply with the trustworth[iness] requisites of [Fed. R. Evid.] 804(b)(3) or (b)(5):that, far from being clearly corroborated and trustworthy, that they are about as unclearly trustworthy . . . as any statement that I have ever seen or heard.
>
> . . . .
>
> This witness, in her examination here in court – and cross-examination has been, to use the Government's counsel's terminology, "all over the lot." *The statements which she made out of court were "all over the lot" so it can't really be said that the hearing of those statements would lead to any different conclusion than what the jurors got while she was in open court.*
>
> As I stated, this testimony, I think has no trustworthiness at all. Here, you have a girl who, when she made the statements, was in most instances, heavily drugged. if not hallucinating. And she told us all that herself.

(Tr. 5807-08 (emphasis added).)[21] Thus, the record belies MacDonald's initial premise that, if Blackburn had acknowledged Stoeckley's alleged admissions to him, implicating herself in the murders, the trial judge would likely have admitted her out-of-court admissions to others. Instead, it demonstrates that his decision was *not* predicated upon Blackburn's allegedly false representations, but, rather on the totality of the facts presented to him, particularly the inconsistent and contradictory nature of her pretrial statements to which the court had just been exposed, her inconsistent testimony, and the fact that her pretrial admissions were made while in a state of drug-induced hallucinations. At the very most, an *arguendo* false representation by prosecutor Blackburn that Stoeckley had acknowledged participation in the murders while being interviewed by him would simply have been an example of another inconsistent statement, which – particularly in light of her immediately preceding denial of recollection to defense counsel – would only have bolstered the district court's ruling excluding her statements as untrustworthy.

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[21] Stoeckley's statements to others, which the defense sought to introduce are summarized in the decision of this Court affirming the convictions. United States v. MacDonald, 688 F.2d 224, 230 (4th Cir. 1982).

In affirming the ruling of the trial judge excluding such evidence, this Court likewise placed no weight upon Blackburn's *arguendo* false representations. It reasoned that Stoeckley's "apparent longstanding drug habits made her an inherently unreliable witness." Moreover, her vacillation about whether she remembered anything at all about the night of the crime lends force to the view that everything that she had said and done in this regard was the product of her drug addiction. MacDonald, 688 F.2d at 233. Nothing that Blackburn allegedly said would have altered that evaluation in the least.

Moreover, viewing the record of this case in its entirety – including developments following MacDonald's convictions,[22] this Court can be doubly sure that, even if the trial judge had had the benefit of additional information demonstrating that Stoeckley had "recalled" her whereabouts on the night of the murders during the prosecutor's interview, he would not have altered his evidentiary ruling excluding her out-of-court statements and the testimony of those who overheard them. As explained, following MacDonald's convictions, two defense investigators succeeded in extracting from Stoeckley yet additional statements acknowledging participation in the murders of the MacDonald family– which she thereafter retracted or told government investigators were the product of a dream. United States v. MacDonald, 640 F. Supp. at 319-321. These subsequent admissions constituted part of the predicate for a motion for a new trial, based – as is presently the case – on the premise that Stoeckley's asserted lack of recollection at trial was false and the product of efforts to avoid prosecution. Id. at 322. After thoroughly reviewing Stoeckley's new admissions in the context of her in-court testimony and the

[22] See Def. Mot. at 35-36, quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995) ("the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial").

totality of her statements to others acknowledging possible participation in the MacDonald family murders, the trial judge denied the new trial motion. With respect to the Stoeckley admissions, he observed:

> the court has reviewed [Stoeckley's] statements, the affidavits relating to her, and the videotape supplied by MacDonald of a television program featuring her, all of which lead the court to the conclusion that this woman is not reliable.
>
> The court's conclusion that Stoeckley is not a reliable confessor should not be construed to mean that she was not telling what she believed to be the truth when she confessed to the MacDonald murders. From the very beginning, she said that she could not remember what she had done on th[e] night [of the murders] because she had taken so many drugs . . . . .
>
> What is clear is that considering all of the circumstances, neither Stoeckley nor her "confessions" are reliable. Thus, although the inconsistencies in Stoeckley's confessions and contradictions of the statements by the facts of the case and the affidavits of other witnesses would be more than enough to lead the court to conclude that the confessions are untrue, Stoeckley's unreliability adds even greater force to this conclusion.

MacDonald, 640 F. Supp. at 324. The court of appeals affirmed that ruling. It observed that Stoeckley's pretrial statements admitting possible involvement in the murders (and made before prosecutor Blackburn had any opportunity to intimidate her or to make misrepresentations to the trial judge) "contained internal suggestions that they were the product of a fantasy," in particular, that on one occasion, she stated that a candle she was holding at the time of the murder "was not dripping wax; it was dripping blood." United States v. MacDonald, 779 F.2d 962, 964 (4th Cir. 1985). Opp'n App. Vol. I, Tab 11. Given the district court's reasoning in disposing of these claims in the context of a motion for a new trial alleging that Stoeckley had actually contradicted her trial testimony and admitted to others participation in the murders, there is no possibility that the trial judge would have admitted Stoeckley's out-of-court statements even if he had known that Stoeckley acknowledged participation in the murders to prosecutor Blackburn, or that he

would have granted post-trial relief had this information been provided to him later. And, likewise, the factors that counseled this Court to affirm the district court's ruling also compel rejection of such an assertion as the basis for further habeas review.[23]

3. Even If Stoeckley's Statements and Those of Her Auditors Had Been Admitted, Such Evidence Would Not have Affected the Outcome of the Proceedings.

MacDonald further argues (Mot. 35) that, absent Blackburn's threat to indict Stoeckley, she would have testified to her involvement in the murders at trial and that such testimony, coupled with that of other witnesses to her out-of-court admissions (which the argument presumes would have been admitted), "would have changed the outcome of the trial."

First, even if it were assumed that Blackburn had made the threat now attributed to him, it simply does not follow that Stoeckley would have acknowledged involvement in the murders. She did not do so when interviewed by the defense shortly *before* her meeting with Blackburn and subsequently taking the stand and, as recounted earlier, the trial judge who heard her testimony and observed her demeanor concluded that her inability to recall her whereabouts on the night of

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[23] MacDonald makes much of the fact that, in his decision reversing his conviction on speedy trial grounds, Judge Murnaghan observed that Stoeckley's lack of recollection when called as a defense witness "had great potential for prejudice to MacDonald, given the substantial possibility that she would have testified to being present in the MacDonald home during the dreadful massacre." United States v. MacDonald, 632 F.2d 258, 264 (4th Cir. 1980) (Opp'n App. Vol I, Tab 5.) cited at Mot. 2, 47. In making this assertion to bolster the basis of his subsequently reversed speedy trial ruling, Judge Murnaghan also conceded that a "likely [reason for Stoeckley's memory lapse] is that she was not on the scene of the crimes at all." Id. at n. 5. More importantly, however, Judge Murnaghan subsequently sat on the panel of this Court that affirmed the district court's denial of MacDonald's new trial motion, based upon Stoeckley's new admissions. He joined in its decision that Stoeckley's hearsay statements concerning her participation in the murders would not have been afforded any credence by the jury. United States v. MacDonald, 779 F.2d 962, 964 (4th Cir. 1985) (Opp'n App. Vol I, Tab 11).

the murders was the result of "a drug-induced state of confusion." 640 F.Supp. at 324. None of these facts is altered in the least by Britt's new revelations.

More importantly, in addressing MacDonald's motion for a new trial, based upon the premise that Stoeckley's "confessions" and the testimony of her auditors would have resulted in a favorable verdict, the district court, conducting an analysis similar to the second prong of this Court's gatekeeping review, meticulously reviewed the totality of the evidence admitted against MacDonald and the impact of of Stoeckley's confessions in light of that evidence had they been presented at a hypothetical new trial.[24] It observed:

> [w]ere a second trial held, the government would again be able to introduce such damaging evidence against MacDonald as his pajama top, the location of fibers from the pajama top in parts of the house which would be inconsistent with MacDonald's story, the bloody footprint leaving Kimberly MacDonald's bedroom, the pajama top demonstration whereby it was shown that holes in the top matched icepick wounds on the body of Colette MacDonald and other evidence which proved, apparently conclusively so, that MacDonald murdered his family. The government's case has not been materially enhanced since the first trial, founded as it was from evidence from a static crime scene, but the court is unable to conclude that the evidence would not again be persuasive to a new jury.

640 F. Supp. at 332. Addressing the impact of Stoeckley's confessions (and those who seemingly made statements supporting them), in light of such evidence, the trial judge continued:

> the court is certain that Stoeckley was telling the truth when she testified that she could not recall her whereabouts on the night of the murders. This is what she said for over ten years following the crimes and MacDonald has failed to convince the court that her "confessions" show otherwise. These statements are factually erroneous and inconsistent not only with MacDonald's story but with the physical evidence gathered from the crime scene . . . .
>
> Even were the court to assume Stoeckley lied on the witness stand, it could not conclude '[t]hat without Stoeckley's testimony, the jury *might* have reached a different conclusion. It

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[24] We note, however, that the standard the district court adopted to govern MacDonald's motion for a new trial – whether "the evidence [at issue] would probably produce a new result" – is significantly more lenient than that governing a gatekeeping motion seeking leave to file a second or successive petition for habeas relief. See MacDonald, 640 F. Supp. at 331.

might well be that Stoeckley's trial testimony took the defense by surprise, but if the jury had not heard that testimony but instead had heard her so-called confessions, *in the court's opinion the jury would not have reached a different verdict, for the government's cross-examination would surely have developed the glaring inconsistencies in her story . . . and that, because of her drug-crazed condition she was a totally unreliable, untrustworthy witness.*

640 F. Supp. at 333 (emphasis added).[25]

In a hypothetical retrial, in which the government would possess the benefit of "all relevant evidence [including] that . . . unavailable at trial," (Schlup, 513 U.S. at 328), the prosecution would not only be able to present the very same forensic evidence that the trial judge deemed more than sufficient to trump Stoeckley's "confessions," it would also be able to impeach Stoeckley's "admissions" not only with her pretrial contradictions, but also with the many bizarre and inconsistent statements admitting and then contradicting her presence at the crime scene which she made to investigators for both sides following MacDonald's conviction. And it would also be able to demonstrate both the falsity of such "admissions" with additional, independent facts, as well as their inconsistency with MacDonald's own story.[26] Thus, in our view, the district court's analysis of Stoeckley-related claims, which this Court characterized as "meticulous" (779 F. 2d at 966) should be virtually dispositive of MacDonald's instant claim that,

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[25] After meticulously examining the statements of persons who claimed to have heard Stoeckley's "confessions," or participated with her in the murders, the court further observed that such statements are inaccurate (Beasley), inconsistent with other accounts (Boushey), "speculative and circumstantial" (evidence relating to Greg Mitchell as a possible participant), and the product of persons who repeatedly exhibited bizarre behavior. 640 F. Supp. at 323-29.

[26] For example, in observing that "the summary of Stoeckley's 'confessions' does not fully reveal the contradictions and inaccuracies that predominate the statements," the district court observed, in one of her confessions, Stoeckley implicated Allen Mazerolle as a member of the hippie band that participated in the murders. However, prison records indicated that he was in jail from January 29, 1970 until March 10, 1970 and therefore could not possibly have been a participant. 640 F. Supp. at 322.

but for Blackburn's perjury, Stoeckley's confessions would have been admitted and that, had such evidence been presented, no reasonable factfinder would have voted to convict.

D. MacDonald's Claims of Additional "Newly-Discovered" Evidence Have Been Reviewed and Rejected.

Apparently to circumvent the courts'earlier rulings denying him post-conviction relief on the basis of alleged newly-discovered evidence, MacDonald further argues that an assessment of the impact of his present claims relating to Stoeckley's testimony upon the outcome of a trial should also embrace consideration of that previously rejected evidence. See. Mot. 23-29, 36 & n. 20. Although, under Schlup, a court reviewing a gatekeeping motion is enjoined to consider the probative force of "relevant evidence that was either excluded or unavailable at trial," including "evidence tenably claimed to have . . . become available only after trial," we are aware of no principle of law that would license a defendant to relitigate the saliency of such evidence – in the guise of a "gatekeeping" motion – after a court has already reviewed it and found it to have been either not "newly-discovered" or utterly lacking in probative value. Indeed, a different rule would effectively thwart the objectives of both Congress and the courts to "curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process . . . . [and] undermine the orderly administration of justice." McCleskey, 499 U.S. at 496. See Williams, 330 F.3d at 282 (holding, in the context of a PFA review, that claims "recycled" from a previous § 2254 application cannot form the basis for prefiling authorization). In view of the fact this Court and the trial court have repeatedly rejected as "without merit" previous motions for collateral relief, this case is truly a poster child for the stringent application of principles formulated to curtail abuse of the writ.

Aside from that, however, this Court and the court below properly concluded that such evidence was utterly lacking in probative value and absent any indication that such determinations were erroneous, they should be fully credited now.[27] We briefly recount those rulings below.

In connection with his 1984 motion for a new trial based upon Stoeckley's new confessions,[28] MacDonald also filed a petition for habeas relief under Section 2255 claiming that the government suppressed evidence in the form of: (1) a "half-filled bloody syringe" allegedly found in the linen closet of the MacDonald household; (2) evidence that, following the murders, investigators allegedly came into possession of bloody clothing allegedly belonging to Stoeckley or Kathy Perry, a female friend; (3) lost skin fragments taken from underneath Colette MacDonald's fingernail; (4) a photograph of the letter "G" from the wall of Stoeckley's apartment that was allegedly similar to the letter "G" in the word "Pig" written in blood on the wall of MacDonald's residence by the intruders. The trial judge found that that evidence was not suppressed; would have been cumulative if introduced at trial; "in all probability would have been

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[27] In this respect, MacDonald protests that the district court's earlier rulings relating to "newly-discovered" evidence addressed it piecemeal and therefore did not consider the totality of that evidence. See Mot. 43 n. 20. The fallacy of that argument, however, is that, in evaluating each item of such evidence, the court determined that not a single item was exculpatory in any material way. Stated in mathematical terms, the sum of zero plus zero cannot exceed zero. Thus, even if permissible, consideration of that evidence does not advance MacDonald's cause in the least.

[28] MacDonald also resuscitates evidence relating to Stoeckley'post-trial confessions and statements to others concerning her possible participation in the murders as additional newly-discovered evidence. Mot. 25-27. We have earlier addressed the trial judge's determinations concerning the potential impact of such evidence on a hypothetical new trial.

of no exculpatory value to [MacDonald]" and, in any event, would not have affected the outcome of the trial.[29]

In 1990, MacDonald claimed that "newly-discovered evidence" in the form of handwritten lab notes demonstrating the presence of synthetic "wig fibers" in a hair brush located in the MacDonald bedroom demonstrated the presence of a wig-wearing Stoeckley in the household, and that unsourced black wool fibers had been discovered in strategic locations at the MacDonald household, also indicia of intruders. See Mot. 28. The district court found that such evidence was neither newly-discovered nor exculpatory. With respect to the former, it found that MacDonald's failure to include these claims – of which he had ample notice – in his 1984 application for habeas relief constituted an abuse of the writ under McCleskey, supra; (see MacDonald, 778 F. Supp. at 1356-57).[30] With respect to the latter, it determined after thorough analysis that, in any event, the wool yarns and synthetic fibers mentioned in the lab reports "afford[] little, if any support for MacDonald's account of the crimes." Id. at 1350-51[31].

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[29] The court also determined that there was insufficient evidence to support the conclusion that the bloody syringe ever existed; that there was no evidence that the boots and clothing allegedly belonging to Stoeckley were blood-stained (and did not match the white boots that MacDonald said had been worn by the female intruder in any event); that the chances are extremely low that the allegedly lost piece of skin was exculpatory and may have been MacDonald's; and that the "G" from Stoeckley's apartment wall lacked sufficient distinguishing characteristics to permit its comparison to the "G" allegedly written by an intruder in blood. 640 F. Supp. at 302-09.

[30] This Court affirmed, applying abuse of the writ principles. United States v. MacDonald, 966 F.2d 854, 861 (1992). It observed that the case presented "precisely the type of collateral appeal the Court, through McCleskey, intended to obstruct and deter," in which some 20 years after his convictions, MacDonald attempted to reopen with "specious evidence." Id. at 860.

[31] In the case of the black wool fibers, the court observed that one of the reasons they could not be traced to any item of clothing in the MacDonald home was that it had been disposed

Accordingly, even if, contrary to our contention that the Court should not revisit such evidence, if it determines appropriate to do so that evidence would not bolster MacDonald's claim of innocence in the least.

Finally, as part of his 1984 motion to reopen on the ground that Stoeckley had falsely testified that she had no recollection of participating in the MacDonald murders, the defense filed declarations asserting that Greg Mitchell, a companion of Stoeckley's whom she had implicated as a possible participant in the murders, had made statements acknowledging participation in the murders.[32] After thoroughly reviewing the content of these disclosures and the circumstances under which they were made, the trial court found that evidence suggesting Mitchell's participation in the murders to be "speculative and circumstantial" and insufficient to demonstrate any real likelihood that he was involved. 640 F. Supp. at 328.

In an attempt to resuscitate his claim that Mitchell was a confessing participant in the murders of the MacDonald family, defense counsel has included in the materials supporting the

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of after the Army charges were dismissed and that, in any event, "there is no likelihood the jury would have reached a different verdict had it known about the existence of these few wool fibers." Id. at 1351. In the case of the three synthetic fibers found in the hairbrush, the court observed that one of the fibers had been traced by an FBI expert to Colette's wig, and that the others – two saran fibers – were, according to the expert, made of a substance not suitable for the manufacture of human cosmetic wigs. Id. at 1350-51. MacDonald now claims that the latter determination was based upon testimony that was subsequently shown to have been false. Mot. 28 n.18. The district court, however, found that the evidence proffered by the defense did not support the inference that the expert had committed any wrongdoing in presenting an opinion concerning the uses of Saran. United States v. MacDonald, 979 F. Supp. 1057, 1068-69 (E.D.N.C. 1997) (Opp'n App. I, Tab 14).

[32] For example, in early 1971 one of the auditors overheard a person resembling Mitchell state that "he had murdered people." Others allegedly saw the phrase "I killed MacDonald's wife and children" written on the wall of the room he had occupied during the same period. Yet another witness recalled his statements that he had done something too horrible to talk about while in the service. See MacDonald, 640 F. Supp. at 327.

instant gatekeeping motion three additional affidavits attesting to the fact that Mitchell, who died of alcohol-induced liver disease in 1982, had acknowledged participation in the murders to others. See Mot. At 29 & Def. Exh. 7. It is our submission that, because these documents relate to claims that were fully litigated and rejected in a previous motion for collateral relief, the standards governing second or successive petitions should separately apply to them. In that respect, MacDonald has not even attempted to explain why these "revelations" could not have been discovered at the time of his preceding motion for collateral relief, which included the Mitchell "confessions."[33] Moreover, a reading of these affidavits demonstrates that either by virtue of the date of execution or the information contained therein, they are time barred, and therefore, consideration of such material as "newly-discovered evidence" under 28 U.S.C. § 2255, para. 6 is precluded. But, even if these procedural impediments to the further consideration of Mitchell's confession as part of the reevaluation of the evidence did not exist, the district court properly determined that any statements that Mitchell may have made concerning his possible participation in the murders were likely the product of torment resulting from the accusations of others that he was involved. MacDonald, 640 F. Supp. at 328. None of this "new" evidence affects that determination in the least.

CONCLUSION

As this Court has previously observed, "[e]very habeas appeal MacDonald brings consumes untold government and judicial resources. Furthermore, successive appeals of little merit must cruelly raise and disappoint the hopes of one, like MacDonald, faced with a long term

[33] As MacDonald concedes (Mot. 29), the affidavit of Bryant Lane is simply "an amplification" of his statement submitted in connection with MacDonald's 1984 petition.

of incarceration." MacDonald, 966 F.2d at 861. As the instant motion for leave to file a successive habeas petition is a prelude to yet another abuse of the writ through the presentation of "specious evidence," (id.), the motion should be denied.

Respectfully submitted,

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