IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Docket No.

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UNITED STATES

v.

JEFFREY R. MacDONALD

BRIEF IN SUPPORT OF JEFFREY R. MacDONALD'S MOTION UNDER 28 U.S.C. SECTIONS 2244 AND 2255 FOR AN ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER THE ATTACHED SUCCESSIVE *MOTION PURSUANT TO 28 USC SECTION 2255 TO VACATE THE SENTENCE OF JEFFREY R. MacDONALD BASED ON NEWLY DISCOVERED EVIDENCE*

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I. INTRODUCTION

Pursuant to 28 U.S.C. Sections 2255 and 2244, applicant, Jeffrey R. MacDonald [hereinafter "MacDonald"] through undersigned counsel, respectfully requests an Order authorizing the United States District Court for the Eastern District of North Carolina to accept for filing the attached *Motion Under 28 USC 2255 to Vacate the Sentence of Jeffrey MacDonald Based on Newly Discovered Evidence*.[1] MacDonald bases this motion on the fact that he has newly discovered evidence of an egregious constitutional deprivation that could not have been discovered previously through the exercise of due diligence, and that this new evidence, when taken in view of the evidence as a whole, is sufficient to establish by clear and convincing evidence that Jeffrey MacDonald is factually innocent of the three murders for which he was convicted in 1979, and for which he is serving three consecutive life sentences.

In 1980, in its opinion on MacDonald's first appeal, this Court wrote that, **"Had [key defense witness Helena] Stoeckley testified as it was reasonable to expect she might have testified, [admitting to participating in the crime] the injury to the government's case would have been incalculably great."** *United States v. MacDonald*, 632 F.2d 258, 264 (4th Cir. 1980) [bracketed language added]. MacDonald now has newly discovered evidence from a most reliable source, a former government official, that

[1] Pursuant to this Court's Order of October 17, 1997, in appeal No. 97-713, CR-75-26, this case was remanded to the United States District Court for the Eastern District of North Carolina, specifically and exclusively for the DNA testing of forensic crime-scene evidence. The testing has been ongoing since then, and the case remains open for those purposes before the district court. Because additional newly discovered evidence has recently surfaced, and cognizant of the one year statute of limitations to bring such evidence in a *habeas* petition (*see*, 28 U.S.C. Section 2255), MacDonald requests that this Court authorize the district court to consider this new evidence, notwithstanding whatever results are produced by the DNA testing.

Helena Stoeckley, in fact, was prepared to testify at MacDonald's trial that she and other accomplices were responsible for the murders of MacDonald's wife and two children, but that the lead prosecutor, James Blackburn, when told by her of her involvement in the crime, threatened Stoeckley into changing her testimony, and then misrepresented to the court and to the defense attorneys what Stoeckley had told him. Justice demands that the trial court review this important, newly discovered evidence, and remedy the egregious constitutional violations that wrongfully sent Jeffrey MacDonald to prison for three consecutive life sentences.

Procedurally, as described below, the attached motion constitutes a successive *habeas corpus* petition. Consequently, as required by 28 U.S.C. sections 2255 and 2244, before the applicant is entitled to file his new petition in district court, he is required to obtain an order from this Court authorizing such filing. In order to obtain such an order from this Court the applicant is required to make out a *prima facie* case that 1) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and 2) that the facts underlying the 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 the constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense. 28 U.S.C. Section 2244; *Felker v. Turpin*, 518 U.S. 651 (1996).

As set forth below, MacDonald's lawyers have come upon newly discovered evidence that meets these criteria:

In January of 2005, then counsel for Jeffrey MacDonald, Wade Smith, Esq., was first contacted by a former deputy United States Marshal, Jim Britt, with information, previously concealed, about prosecutorial misconduct during the MacDonald trial. Britt, for twenty-two years was a deputy United States Marshal entrusted with the security of the federal courts and judges in North Carolina. Britt was working at the Raleigh courthouse during the 1979 MacDonald trial and was responsible for escorting the key defense witness, Helena Stoeckley, who was in custody on a material witness warrant. Jim Britt was present in the prosecutor's office when the lead prosecutor, James Blackburn, interviewed Helena Stoeckley, the day before she was to be called as a witness. As reflected in his sworn affidavit (attached to petitioner's Memorandum in support of his Motion Under 28 U.S.C Section 2255 to Vacate, as Exhibit 1), Jim Britt avers that he personally witnessed Helena Stoeckley state to James Blackburn that she and others were present in the MacDonald home on the night of the MacDonald murders, and that they had gone there to acquire drugs; Jim Britt further avers that he witnessed and heard James Blackburn, upon hearing this, directly threaten Helena Stoeckley, telling her that if she so testified in court he would indict her for murder. This threat caused her to change her testimony, as the next day, when called to the witness stand by the defense, Stoeckley claimed to have amnesia as to her whereabouts from midnight until 5 a.m. on the night of the MacDonald murders, the precise timeframe during which the crime occurred. James Blackburn never disclosed to the court or defense counsel what Helena Stoeckley admitted to him in Jim Britt's presence. On the contrary, Blackburn, at a critical juncture in the trial, advised the court that Stoeckley, when he interviewed her, denied having any

knowledge of the MacDonald family, the MacDonald home, or the MacDonald murders. Blackburn even went so far as to elicit from Stoeckley, through leading questions before the jury, testimony that was contrary to what she had told him during his interview of her the day before in the presence of Jim Britt.

James Blackburn, the prosecutor involved, was later convicted in 1993 in the Superior Court of Wake County, North Carolina, in an unrelated matter following a guilty plea, of obstruction of justice and embezzlement. [See, Judgment and Commitment Order of James L. Blackburn, attached as Exhibit 10 to Petitioner's Memorandum in Support of his Motion, under 28 U.S.C. Section 2255 to Vacate, filed herewith.]

Jim Britt is a witness of high character, with over twenty-five years of law enforcement experience. For twenty-two years he served with distinction as a deputy United States Marshal, and was entrusted with the safety and security of the federal judges under his protection. The words and actions of James Blackburn that he witnessed in August 1979 disturbed him at the time. He understood well their import. And as he states in his affidavit, they were words that he remembers clearly. He has only come forward now as his conscience has required it.[2]

[2] Jim Britt, at the request of undersigned counsel, agreed to undergo a polygraph examination, which was conducted by Steve Davenport on May 24, 2005. Britt was found to be truthful. A copy of Davenport's resume and polygraph results are attached to Petitioner's Memorandum in Support of his Motion Under 28 U.S.C. Section 2255 to Vacate, as Exhibit 2. The friend and former deputy U.S. Marshal that Britt first confided this information to several years ago, Lee Tart, has provided his own sworn affidavit confirming that what Jim Britt told him years ago is precisely what Jim Britt is saying now. (Lee Tart's affidavit is attached to Petitioner's Memorandum in Support of his Motion to Vacate as Exhibit 3.) (All exhibits referred to herein are attached to such Memorandum.) Importantly, Jim Britt, in his affidavit, declares that he knew at the time the import of Blackburn's words and actions. He states that what he witnessed has gnawed at him for twenty-five years. He was reluctant to come forward out of a sense of loyalty to the government he served, but the burden of what he knew and has suppressed simply became too great.

The defendant, Jeffrey MacDonald, since the early morning hours of February 17, 1970, when his pregnant wife and two young daughters were brutally murdered, has consistently maintained that a group of strangers, including a woman with long blond hair and wearing a floppy hat, had invaded his home and attacked him and his family on the night of the crime. Within days of the murders, Helena Stoeckley was identified by police as a woman local to the area, heavy into the drug scene, who routinely wore a long blond wig, a floppy hat, and was very likely to be the person MacDonald described. Stoeckley, in fact, from the time of the murders developed a morbid fascination with the killings. She wore black and bought wreaths and hung them on a fence on the day the MacDonald family members were buried. She burned her blond wig, claiming she was afraid it might connect her to the crime. And over the nine years that passed between the murders and Jeffrey MacDonald's trial, she made numerous incriminating statements to many neighbors, implicating her and her boyfriend at the time, Greg Mitchell, in the killings.

Nine years after the murders, in August, 1979, Jeff MacDonald went on trial for the crime. Six weeks into such trial, the defense convinced the trial judge to order that the government, which had learned where Stoeckley was living, produce her on a material witness warrant. Deputy U.S. Marshal Jim Britt traveled to Greenville, South Carolina to pick her up, and drove her back to Raleigh in his car. Britt specifically recalls that during the ride to Raleigh Helena Stoeckley told him that she had been in the MacDonald house the night of the MacDonald murders with others. She told him other details that convinced him that she had, indeed, been there during the crime, such as describing the hobbyhorse

in the MacDonald home. The next day, Stoeckley was interviewed in the courthouse first by the defense attorneys. After her meeting with the defense lawyers, Deputy Marshal Britt escorted Stoeckley to an office used by James Blackburn to be interviewed. Blackburn invited Britt into the office with Stoeckley. Jim Britt witnessed Helena Stoeckley admit to James Blackburn that she had been in the MacDonald home with others on the night of the MacDonald murders, and that they had gone there to steal drugs. Britt then specifically heard James Blackburn threaten Helena Stoeckley. He heard James Blackburn tell her that if she so testified in court, he would indict her for murder. Jim Britt declares in his affidavit that they are words he heard clearly. The next morning in court, before the jury, called as a defense witness, Stoeckley denied knowing anything about the MacDonald murders or the MacDonald house, claiming to have no memory of her whereabouts during the five hours in which the crime occurred. Bernard Segal went to the bench and claimed surprise. He told the court that Stoeckley's testimony was contrary to what she had told him the day before when he interviewed her. The transcript of the trial contains the detailed proffer of what Segal told the judge that Stoeckley had told him the day before. [The transcript of that entire day of trial is attached as Exhibit 4 to Petitioner's Memorandum in Support of his Motion to Vacate; see Ex. 4, 5614-5618]. The court then inquired of prosecutor James Blackburn as to what Stoeckley had told him the day before. Blackburn represented to the court that in his office Stoeckley had denied having any knowledge of the MacDonalds or of her involvement in the crime. [Ex. 4, 5617]. These statements are contrary to what Jim Britt had witnessed Stoeckley tell Blackburn. Blackburn, then on cross-examination, using leading questions, had Stoeckley affirm

before the jury that she knew nothing of the MacDonald murders or the MacDonald house or family. [Ex. 4, 5642-5674].[3]

This newly discovered evidence, because it was concealed by government officials, could not have been discovered previously through due diligence. It consists of facts that unquestionably demonstrate egregious government misconduct of the most disturbing sort, actions that amount to a clear constitutional violation. Finally, and particularly when viewed in the context of the whole of the evidence, that which was produced at trial and that which has come to light since the trial—evidence such as blond synthetic wig hairs found inside the MacDonald house the night of the murders, black wool fibers found on Colette MacDonald and on the murder weapon that did not match any fabric in the MacDonald home, and the direct confessions, before he died, of Greg Mitchell to the MacDonald murders which have never before been submitted to the court for consideration (*see*, section III (D) *infra*)—these new facts, when taken in light of all of the evidence now known, unquestionably establish by clear and convincing evidence not just that there is a reasonable doubt as to MacDonald's guilt, not just that no reasonable fact-finder would find him guilty, but that Jeffrey MacDonald is actually innocent. Clearly,

[3] Over the ensuing weekend, Helena Stoeckley, at the request of trial counsel, remained in Raleigh at a hotel. During that time she was chaperoned by a young attorney assisting with MacDonald's defense, Wendy Rouder. Helena Stoeckley told Rouder that she had been afraid to tell the truth to the jury. She told Rouder that she remembered being in the MacDonald home during the MacDonald murders but was afraid to so testify. When Rouder inquired what it was that she was afraid of, Stoeckley answered that she was afraid of the prosecutor. Rouder described this at trial, Tr. 5928-5945, and more recently in her affidavit. See, Affidavit of Wendy Rouder, attached as Exhibit 5 to Petitioner's Memorandum in Support of his Motion to Vacate. Over the years that followed, Stoeckley repeatedly affirmed that she was involved in the crime and that she had lied because she was afraid. *See, e.g.* "Woman in MacDonald Case Claims He Was Victim Not Murderer," *The Register*, (Fayetteville, N.C.) 10 Jan. 1981, A20 (attached as Exhibit 6 to Petitioner's Memorandum).

had Helena Stoeckley not been threatened and intimidated by James Blackburn, had she freely told the truth to the jury—that she had been inside the MacDonald house with others during the murders—there would never have been a verdict finding Jeffrey MacDonald guilty.

The newly discovered evidence outlined herein is sufficient to make out the *prima facie* case required by 28 U.S.C. Section 2244 for an order from the court of appeals authorizing the filing of a successive *habeas corpus* motion in federal district court.

II. RELEVANT PROCEDURAL HISTORY

In the early morning hours of February 17, 1970, the pregnant wife and two young daughters of Jeffrey MacDonald were brutally murdered in their home located at Fort Bragg, North Carolina. Jeff MacDonald was severely wounded at the time suffering a collapsed lung, multiple stab and puncture wounds, and blunt force head and body wounds. MacDonald, from the very beginning, contended that a group of intruders had attacked him and his family while they were asleep, knocking him unconscious in the struggle that ensued.

Initially, the investigation was handled by the U.S. Army Criminal Investigation Division (CID). The army brought charges against MacDonald on May 1, 1970 and a Uniform Code of Military Justice Article 32 hearing commenced on May 15th. Witnesses were heard and evidence received for six weeks. On October 13, 1970, the presiding officer, Col. Warren V. Rock, filed his report recommending that all charges be dropped because as he wrote, "[T]he matters set forth in all charges and specifications are not true." (*Report and Conclusions: Proceedings Under Article 32 Uniform Code of Military Justice*

by Colonel Warren V. Rock, October 13, 1970). Based on evidence presented at the hearing, Col. Rock in his report, also urged the civilian authorities to investigate the alibi of Helena Stoeckley of Fayettville, N.C. All military charges were dismissed against MacDonald on October 23, 1970, and he was honorably discharged.

Approximately nine years later, in August 1979, Jeffrey MacDonald went on trial in the United States District Court for the Eastern District of North Carolina for the murders of his wife and daughters. The trial lasted twenty-nine days. MacDonald took the witness stand in his own defense. Also the defense sought to call, and eventually did call, Helena Stoeckley as a witness, believing that she would admit to the jury, as she had to others, her involvement in the crime. Before the jury, though, Stoeckley denied any knowledge of the MacDonald murders. On August 29, 1979, MacDonald was convicted. He was sentenced to three consecutive life sentences.

MacDonald appealed. This Court reversed the conviction on speedy trial grounds, recognizing the unfair prejudice caused to MacDonald's defense as a result of the nine year interval between the crime and his trial. *U.S. v. MacDonald*, 632 F.2d 258 (4th Cir. 1980); the Supreme Court reversed and remanded the case, *U.S. v. MacDonald*, 456 U.S. 1 (1982); this Court affirmed the conviction, *U.S. v. MacDonald*, 688 F.2d 224 (4th Cir. 1983), *cert. denied*, 459 U.S. 1103 (1983).

In 1984, MacDonald filed post-trial motions to vacate his conviction and for a new trial based on newly discovered evidence and government misconduct. These were denied by the trial court after an evidentiary hearing. *U.S. v. MacDonald*, 640 F. Supp. 286

(E.D.N.C. 1985). This Court affirmed. *U.S. v. MacDonald*, 779 F.2d 962 (4th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986).

In 1990, MacDonald filed a second *habeas corpus* petition based on newly discovered evidence and government misconduct. The district court, without an evidentiary hearing, denied relief. *U.S. v. MacDonald*, 778 F.Supp. 1342 (E.D.N.C. 1991). This Court affirmed. *U.S. v. MacDonald*, 966 F.2d 854 (4th Cir. 1992), *cert. denied*, 506 U.S. 1002 (1992).

In April 1997, MacDonald filed a motion to reopen his previous 1990 *habeas corpus* petition based on government fraud. The motion also contained a request to have DNA tests run on certain evidence taken from the crime scene. On September 2, 1997, the district court denied the motion to reopen the *habeas* proceeding and transferred the remaining matters to this Court as a petition for leave to file a successive *habeas corpus* petition. *U.S. v. MacDonald*, 979 F.Supp. 1057 (E.D.N.C. 1997).

This Court denied leave to file a successive *habeas* petition, but granted defendant's motion for DNA testing. *In Re MacDonald*, No. 97-713 (4th Cir. October 17, 1997.) On appeal of the lower court's refusal to reopen the 1990 *habeas* motion, this Court affirmed the lower court. *U.S. v. MacDonald*, 161 F.3d 4 (4th Cir. 1998, *unpublished*). Per this Court's order regarding DNA testing, the case was remanded to the United States District Court for the Eastern District of North Carolina, which has been supervising such DNA testing. The remanded issue regarding DNA testing remains open and pending before that court. It is expected that the DNA testing will be complete by year-end 2005.

By this Motion, defendant requests authorization from this Court for the district court to consider (notwithstanding whatever results the DNA testing produces) the newly discovered evidence, the constitutional violations, and the overwhelming evidence of the defendant's innocence as described in the attached *Motion Under 28 USC 2255 to Vacate the Sentence of Jeffrey R. MacDonald Based on Newly Discovered Evidence* and accompanying Memorandum. Applicant requests that the arguments of fact and law set forth therein be incorporated herein by reference.

III. STATEMENT OF FACTS AND EVIDENCE

A. The Government's Evidence At Trial

At approximately 3:30 a.m. on February 17, 1990, military police were summoned to the apartment of Dr. Jeffrey R. MacDonald, a twenty-six-year-old army captain serving as a medical officer at Fort Bragg, North Carolina. Upon arrival, the police found that MacDonald's pregnant wife, Colette, and his two young daughters, Kristen age two, and Kimberley age five, had been brutally murdered, and found Jeff MacDonald semi-conscious, seriously wounded, and in shock. 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 Jeff MacDonald, an army physician with no history of violence and no record of prior arrests, got into a fight with his pregnant wife because his youngest daughter, Kristen, had wet the bed, that he picked up a club to strike his wife and accidentally struck and killed his daughter, Kimberley, who was trying to

intervene, and that then, in order to cover up his accidental misdeed, Dr. MacDonald killed his wife and then mutilated and killed his youngest daughter and tried to make it look like a cult slaying. [Tr. 7138-7141].[4] The government prosecutors 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 physical 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 Jeffrey MacDonald's pajama fibers were and were not found, where a pajama pocket of the defendant was found and on which side it was bloodied, and evidence of possible ways the ice-pick holes were made in MacDonald's pajama top. Much of the evidence was speculative.[5] The evidence adduced by the government was designed primarily to disprove the version of events given by Jeffrey 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

[4] MacDonald's daughters were stabbed and clubbed dozens of times, their small bodies physically destroyed.

[5] Two government experts, for example, testified about an analysis they had been asked by the prosecutors to conduct of the pajama top of MacDonald and the 48 various puncture or ice-pick holes in it. They apparently sought to align the MacDonald pajama top with the 21 ice-pick wounds in Mrs. MacDonald's chest, (using photographs of her taken at autopsy) folding the pajama top this way and that to accomplish their goal. Their testimony, over two days during the trial, was to support the prosecutors' theory that MacDonald stabbed his wife through his pajama top. By their own admission, their tests failed to consider the directionality of the thrusts or threads, or the knife wounds in both the pajama top and Colette MacDonald's chest. And at the end of all of this effort all they could say was that their efforts showed that it was *possible* to line up the holes. Their key expert admitted that he was not opining that it happened as speculated, only *that it could have happened*. [Tr. 4371].

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.[6]

Importantly, included in the physical evidence from the crime scene were wax drippings of three different kinds of wax, one taken from a coffee table in the living room, one from a chair in daughter Kimberley's bedroom, and one sample actually retrieved from the bedspread in Kimberley's bedroom. None of these samples matched any candles found in the MacDonald home. [Tr. 3837-43]. This evidence, of course, could have been seen as corroboration for MacDonald's contention that the intruder with the long blond hair appeared to be carrying one or more lit and dripping candles.

While the parties quarreled repeatedly at trial over whether the crime scene had been properly handled, and whether fingerprint evidence was properly obtained and tested, the government did adduce testimony at trial, through its expert, Hilyard Medlin, that 44 useable latent fingerprints and 29 useable palm prints had been lifted from the scene of the crime, but of these, only 26 fingerprints and 11 palm prints were matched with MacDonald family members or other investigators or individuals whose prints were available for comparison. [Tr. 3116, 3141]. Again, these many strange unaccounted for finger and palm prints could have been viewed as corroboration of intruders.

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[6] In the district court's *Memorandum Decision of March 1, 1985*, denying MacDonald's initial post-trial Motions to Vacate and for a New Trial, the trial judge enumerated what he considered to be the most significant items of evidence against MacDonald at trial. The court listed the following as significant: 1) the murder weapons, 2) the pajama top and pajama top demonstration, 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*, *U.S. v. MacDonald*, 640 F. Supp. 286, 310-315.) This evidence is analyzed in detail in section IV (b) *infra*, however, and as discussed therein, each of these items of evidence is either consistent with the account given by MacDonald of the murders, or has been proven false by newly discovered evidence.

Also, it is critically important to note that the government introduced evidence of two purple cotton fibers found on one of the murder weapons (an old wood board found by police outside the house.) The government introduced expert testimony that the fibers on the club matched the fibers used to sew MacDonald's pajama top. [Tr. 3784]. While this is in no way inconsistent with MacDonald's story, as he claimed to have been repeatedly struck by a club or clubs and his pajama fibers could have stuck to the club while he was being struck, what is noteworthy, as set forth in section III D (2) *infra*, is that the government suppressed at trial the fact that FBI analysts in 1978 had reexamined the fibers from the club and determined that in addition to the purple cotton fibers there were black wool fibers—fibers that did not match any fabric in the MacDonald home. And not only were these inexplicable black wool fibers found on the murder weapon, similar black wool fibers were found on the mouth and body of Colette MacDonald. The government also did not disclose at trial that synthetic blond wig hairs of up to 22 inches in length were found in the MacDonald home. Again, had all of this evidence been known to the court and jury it likely would have been seen as significant corroboration of MacDonald's account.[7]

There were, of course, no living eyewitnesses to the occurrence other than the perpetrators. There was no evidence of MacDonald's fingerprints or blood on the murder weapons. Repeatedly, during their closing arguments, the prosecutors asked the jurors to

[7] These two items of newly discovered evidence were the predicate for MacDonald's 1990 *habeas* petition. Without an evidentiary hearing, the district court, relying in part on an affidavit by FBI agent Michael Malone that the synthetic blond hairs were not used in wigs but only in dolls, denied the motion. *U.S. v. MacDonald, supra,* 778 F.2d 1342. This Court affirmed, solely on the basis that the petition was barred by the abuse of the writ doctrine. *U.S. v. MacDonald, supra*, 966 F.2d 854. In 1997, MacDonald sought to reopen the matter after learning that Malone's affidavit was false. The lower court ruled that MacDonald failed to show fraud by clear and convincing evidence. *U.S. v. MacDonald, supra*, 979 F.Supp. 1057. This Court affirmed. *U.S. v. MacDonald, supra*, 161 F.3d 4.

draw inferences of guilt from the ambiguous array of physical evidence, as opposed to inferences of innocence that were equally plausible. The government's case was entirely comprised of circumstantial evidence directed less at proving Jeff MacDonald's guilt, than at proving that MacDonald's version of events was flawed. Nonetheless, he was convicted.

B. The Contentions of Jeffrey R. MacDonald

Since the moment Jeff MacDonald was first revived by medics in the early morning hours of February 17, 1970, wounded and in shock, he has contended that intruders attacked his family. At his trial he testified that he awoke 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. [Tr. 6581-82].

As he was trying to get up again, MacDonald heard a female voice saying "Acid is groovy; kill the pigs." He attempted to fend off the next blow and grab the arm of the person using the club, which he did do at some point in the struggle; the man's sleeve had military E-6 sergeant stripes on what appeared to be an Army field jacket. While he was receiving what he thought were punches, MacDonald also heard the words "acid and rain." [Tr. 6513-14].

MacDonald testified that he continued to struggle with the intruders as he held onto the man's arm. At some point his hands became bound up in his pajama top. He did not know how this happened, although he thought it was either pulled over his head or ripped from around his back. [Tr. 6586]. MacDonald presumed that the holes in his pajama top got there when he was fending off blows from the assailants. [Tr. 6808]. The blows came

straight at him, and he recalls using the pajama top "more or less as a shield." [Tr. 6811-13]. He felt a sharp pain in his right chest as he held onto the club, and he saw a blade, and realized that he had probably felt a stab, not a punch. [Tr. 6588].

MacDonald stated that the woman intruder had blond hair and was wearing a floppy hat. [Tr. 6588]. He only saw her for a second or two, standing between the two white men at the end of the couch. The only other thing MacDonald remembered about her was seeing a bare knee and the top of a boot. [Tr. 6588-89]. He testified that he remembered seeing a "wavering or flickering" light on the face of the woman with the blond hair and floppy hat, which appeared to be a light such as from a candle. [Tr. 6592].

At some point during the struggle, MacDonald believed he was knocked unconscious because his next memory was of awakening on the landing leading from the living room into the hall. The house was quiet when he awoke; his teeth were chattering, and he thought he was going into shock. He remembered walking into the master bedroom, where he found his wife, Colette, on the floor, and a lot of blood. He pulled a knife out of her chest, throwing it aside. Her right shoulder was leaning against a green chair. He took the pajama top off his wrists and frantically tried to give aid to his wife. He thought he probably moved her away from the chair before giving mouth-to-mouth resuscitation. Air came out of Colette's chest through the stab wounds; Jeff MacDonald observed no signs of life. [Tr. 6595-99].

MacDonald then recalled going through the house to check on his two daughters. He went first to Kimberley's room, then to Kristen's. MacDonald found them both in their beds, covered in blood, and he desperately attempted to revive each of them without

success. [Tr. 6599-6603]. MacDonald testified that he was unsure of what he did next. At some point he went into the bathroom to check his head, which was hurting, and thought he rinsed his hands in the sink. [Tr. 6606-08]. He went back to Colette a second time and remembered covering her with his pajama top. [Tr. 6605]. Eventually he dialed the operator from the master bedroom telephone and asked for medics and MPs. He was unconscious when help finally came. Once it did arrive, he recalled being given mouth-to-mouth resuscitation by an MP while lying on the master bedroom floor next to Colette. There was confusion all around him, and numerous MPs were inside the apartment. [Tr. 6615-17]. He remembered trying to push away the MP giving him mouth-to-mouth—telling him to go check his wife and kids, that he didn't need any help—and falling back onto Colette's body. MacDonald remembered describing the group of intruders to one of the MPs[8] before being taken out of the house on a stretcher. [Tr. 6518-20].

MacDonald was taken to the intensive care unit at Womack Army Hospital, where he was treated for a punctured lung and other life-threatening knife and puncture wounds. [Tr. 5367]. He remained in the intensive care unit for nine days. After he recovered and was released, MacDonald said he had given a lot of thought to trying to figure out what happened to his family and why. He testified that he thought that either someone held a grudge against him or that it was a chance occurrence. [Tr. 6648]. He saw patients with drug problems in both his position as preventive medical officer at Fort Bragg and his

[8] Kenneth Mica, one of the first MP's to arrive at the scene, was the person to whom MacDonald gave this description. [Tr. 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. [Tr. 1453-54]. Mica saw this woman at the corner of Honeycutt and South Lucas Road, "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. [Tr. 1401, 1454].

work at the Cape Fear Valley Emergency Department. [Tr. 6649]. At times, MacDonald's responsibilities to the soldier he was counseling and to the soldier's commanding officer conflicted, and MacDonald had to decide whether to notify the officer about the soldier's drug problem. [Tr. 6652-53]. Some of the doctors providing drug counseling, himself included, where suspected of being "finks" for turning in troops for drug abuse. [Tr. 6657].

C. The Defense Case and the Recent Revelations of Jim Britt

In countering the government case, MacDonald's defense lawyers sought throughout the government's case-in-chief to underscore through cross-examination how equivocal and speculative the physical evidence put forth by the government was, and to expose how no real evidence of MacDonald's guilt actually existed. The defense presentation of evidence also sought to reinforce these themes. Character witnesses were called, and the defendant, himself, testified. The key and most important facet of the defense strategy, however, was to bring before the jury the significant evidence pointing to Helena Stoeckley's likely involvement in the crime. This included evidence of her possession of a blond wig, which she burned shortly after the crime [Ex. 4, Tr. 5602-04]; evidence of 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, white floppy hat, and boots) [Ex. 4, Tr. 5583-90]; evidence that she routinely wore black [Ex. 4, Tr. 5634]; evidence of her participation in an illegal drug cult that ingested LSD, worshipped the devil, used candles, and killed cats [Ex. 4, Tr. 5525, 5542-43]; evidence of her obsession with the MacDonald murders, such that she had bought and hung wreaths all along her

fence the day of the burials [Ex. 4, Tr. 5633-34]; evidence that a woman matching her description had been seen by several people near the crime scene at or around the time of the murders [testimony of MP Kenneth Mica, Tr. 1453-54, testimony of James Milne, Tr. 5454-56]; and of critical importance, evidence that she had actually admitted to her participation in the crime to numerous people [Ex. 4]. Based on all of this, on her prior behavior, and on her obvious psychological connection to the crime, it was the belief of the defense that she would come to court and actually admit her involvement in the murders.

Regarding the many admissions that she had made concerning her involvement in the crime, the defense had placed under subpoena, and had present at the trial, six different individuals to whom Helena Stoeckley had made statements incriminating her in the MacDonald slayings. These included Jane Zilloux, James Gaddis, Charles Underhill, Robert Brisentine, P.E. Beasley, and William Posey. [Ex. 4]. Three of these were individuals involved in law enforcement. The defense intended to call Stoeckley as a witness, obtain from her admissions to the crime, and then call the other six witnesses to whom Stoeckley had also confessed.

It is apparent from the new evidence recently provided by former U.S. Deputy Marshal Jim Britt, that Helena Stoeckley was, in fact, prepared to admit to her involvement in the MacDonald crime to the court and jury. However, as witnessed by Jim Britt, she was intimidated and threatened by the lead prosecutor into not doing so. After James Blackburn heard what Stoeckley planned to testify to—that she was, indeed, in the MacDonald home the night of the MacDonald murders, with others, to steal drugs—he

secretly threatened to indict Stoeckley for first-degree murder if she went forward. Jim Britt witnessed this and has never forgotten it.[9] The next day, Stoeckley, not surprisingly, capitulated to this intimidation and on the witness stand denied knowing anything about the MacDonald case. [Ex. 4].[10] This was not the end of the damage that Blackburn's perfidy did to the MacDonald defense, however. For even though Stoeckley denied knowing anything about the MacDonald murders, the defense intended to call the six witnesses to whom Stoeckley had made incriminating statements.[11] The government, however, objected to these witnesses, and argued that their testimony was inadmissible because Stoeckley's admissions were not worthy of belief. The court during a bench conference had specifically asked James Blackburn what Helena Stoeckley had told him about the MacDonald murders when Blackburn interviewed her the prior day in his office. Blackburn told the court that Stoeckley had denied to him having any knowledge of the MacDonald crime or the MacDonald home. [Ex. 4, Tr. 5617]. This, of course, was directly contrary to what Jim Britt claims he specifically heard Stoeckley tell Blackburn. Based certainly in part on the Blackburn misrepresentations, the court ruled that her out-

[9] As his affidavit indicates, Britt has been guilt-ridden for twenty-five years over what he observed. He remained silent out of a sense of loyalty and duty to the government, but confided in his wife and two closest colleagues at the U.S. Marshals Service. He came forward because the burden of carrying such important truths became too great.

[10] The very next day Stoeckley confided to Wendy Rouder, Esq. that she had been in the MacDonald home the night of the murders, and that she had not told the truth to the jury because she was afraid. When Rouder pressed her as to whom she was afraid of, she said she was afraid of the prosecutor. (Exhibit 5).

[11] While Stoeckley at trial denied having any knowledge about the MacDonald murders, she did testify that she had a floppy hat, wore a shoulder-length blond wig, owned a pair of boots, and that her appearance at the time of the murders was similar to the description MacDonald had given of one of the intruders. She also testified that she had ingested or injected multiple drugs the night of the crime and had no memory of events between midnight and 4 a.m. on the morning of the murders. [Ex. 4, 5513-5671].

of-court admissions to the six defense witnesses would not be heard by the jury because under Rule 804 (b)(3) of the Federal Rules of Evidence they were not trustworthy and not corroborated.[12]

It is only logical to conclude that had James Blackburn not threatened and intimidated Helena Stoeckley, she would have told the jury the truth—the same truth that she told Jim Britt on the way to Raleigh, Wendy Rouder over the weekend, and that she told James Blackburn in his office—admitting that she, indeed, had been present during the MacDonald murders. Had she done so, the outcome of the trial would most definitely have been different. Moreover, had James Blackburn admitted to the trial judge that in his office the day before Helena Stoeckley had admitted that she had been in the MacDonald home on the night of the MacDonald murders with others, seeking out drugs, the judge would have been hard pressed to rule that she was inherently inconsistent and untrustworthy. He would have known that she had made incriminating statements to the prosecutor, consistent with the many incriminating statements that she had made to the six witnesses prepared to testify.[13] The court never learned this because, as Jim Britt bears witness, James Blackburn was not truthful. As a result of the fraud on the court perpetrated by Blackburn, the court was denied critically important information necessary to make a just decision on the admissibility of Stoeckley's admissions. Consequently, the

[12] The government also argued in this regard that the admissions were not reliable because there was no physical evidence to corroborate that any intruders had been in the house. This was a particularly specious and sinister argument given the items that were suppressed by the government that indeed would have tended to corroborate the presence of intruders—the blond wig hairs and the unmatched black wool fibers, particularly, which only came to light years later through numerous Freedom of Information Act requests.

[13] Assuming she had not been threatened by the prosecutor, these statements all would have also been consistent with her trial testimony.

jury never heard the truth from Stoeckley herself, or from these other witnesses as to Stoeckley's involvement in the crime. Had such evidence come to the attention of the jury, as it unquestionably would have but for Blackburn's misconduct, it is clear that the jury would never have convicted Jeffrey MacDonald. As this Court so pointedly wrote in *United States v. MacDonald*, 632 F.2d at 264 (4th Cir. 1980):

> Stoeckley's statement on the stand at trial that she had no recollection of her whereabouts or activities during the critical period of midnight to 4:30 a.m. on the night of the crimes (although she remembered in detail events immediately prior and immediately subsequent to that crucial interval) had a 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.
> . . . .
> Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great.

D. Evidence Discovered Post-Trial[14]

The MacDonald defense has discovered over the years since the trial that the government had suppressed at trial many additional key pieces of evidence that would have supported the fact that there were intruders in the home that night, proved that the government's theory was inaccurate, and would have further implicated Helena Stoeckley as one of the intruders. Additionally, before Jim Britt ever came forward, the MacDonald defense had also obtained since the trial significant additional items of new evidence proving that Helena Stoeckley and her boyfriend, Greg Mitchell, were the killers of the MacDonald family. These items of evidence are described below:

[14] In considering petitioner's claim of factual innocence, all of the evidence, even that which became available after the trial, is to be considered. *Schlup v. Delo*, 513 U.S. 298 (1995); 28 U.S.C. Section 2244.

1. Items Described in MacDonald's 1984 Post-Trial Motions

In 1984, MacDonald filed a *Motion to Set Aside His Conviction*, and a *Motion For A New Trial*. These motions were based on numerous items of new evidence discovered since the trial.

In his *Motion to Set Aside His Conviction*, Jeff MacDonald claimed the government suppressed exculpatory evidence including 1) a bloody syringe half-filled with liquid found in a hall closet in the MacDonald house by a CID investigator which was destroyed and never tested; 2) photographs taken by police of the letter *G* written on the wall of Helena Stoeckley's apartment in 1970, the handwriting of which one government investigator believed matched the handwriting of the letter *G* in the word *PIG* found written in blood on the MacDonald headboard the night of the murders; 3) evidence that a Stoeckley friend, Cathy Perry, was given blood-stained clothing and boots by Stoeckley shortly after the murders which were destroyed; and, 4) skin found under Colette MacDonald's fingernail. The same judge who tried MacDonald held an evidentiary hearing on these matters in 1985.

Regarding the syringe, the court was presented with a statement made by a CID investigator, Hilyard O. Medlin, on February 21, 1970 (four days after the crime) that "a half-filled syringe that contained an as yet unknown fluid was located in a hall closet, which also contained some evidence of blood." Presented with contrary affidavits of other investigators by the government at the time of the hearing, (affidavits prepared in 1984,

fourteen years after the investigation), the court ruled that the evidence of the existence of a bloody syringe was insufficient, and its exculpatory value was thus unproven.

Regarding the photographs of the letter *G,* the defense claim rested on a note written by a CID photographer, Frank Toledo, that the letter *G* in words written on Stoeckley's apartment walls resembled the letter *G* written in blood on the MacDonald headboard. Presented with evidence from an FBI analysis that the letters did not bear enough individual characteristics for a meaningful comparison, the court ruled that the evidence was insufficient and thus not exculpatory.

Regarding the blood-stained clothes and boots, the government denied that any clothes ever came into the possession of the government, and denied that the boots turned over to the CID ever had any blood on them. The court agreed with the government and ruled that these items were thus not exculpatory.

Regarding the skin found under Colette's fingernail, the court found that based on the evidence produced against MacDonald at trial, the skin was probably his, and was not likely to exculpate him. *United States v. MacDonald*, 640 F. Supp. 286 (E.D.N.C. 1985).

In MacDonald's 1984 *Motion for A New Trial*, he asked the court to consider additional new evidence discovered post-trial. This evidence included, 1) an extensive detailed confession given by Helena Stoeckley to two law enforcement officers; 2) affidavits presented to the court of various witnesses, each who saw a group of people matching the description MacDonald had given of the intruders in close proximity to the MacDonald house either late the night of and just before the crime, or in the early morning

hours just after the crime had occurred;[15] 3) the statement of a witness, Jimmy Friar, who telephoned the MacDonald home at 2 a.m. the night of the murders and spoke with an hysterical woman and also heard someone in the background ordering the woman to hang up the phone; (Stoeckley, during her many confessions admitted to having answered a ringing phone in the MacDonald home that night); 4) a declaration by Reverend Randy Phillips that a man he identified from a photo array as Greg Mitchell had confessed to the murders; 5) a declaration by Ann Cannaday who also identified Greg Mitchell from a photo array as the man who told her he had been part of a cult in Fayetteville, North Carolina and had murdered people; and, 6) statements Greg Mitchell made to Bryant and Norma Lane that he had done something too horrible to talk about. (Greg Mitchell was Helena Stoeckley's boyfriend at the time of the murders and was implicated by Stoeckley in the crime).[16]

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[15] One of these was from Joan Sonderson, a waitress, who arriving at work the morning following the murders saw a vehicle occupied by three sleeping people, including a white woman with blond hair and wearing a floppy hat and beige boots that were muddy, and a man wearing an army fatigue jacket. The woman in the floppy hat asked Sonderson if she knew that members of the MacDonald family had been murdered that night. Sonderson, of course, had no way of knowing about the murders. How, one must ask, would the woman in the floppy hat have known about the murders?

[16] Since 1984, additional witnesses have come forward to whom Greg Mitchell directly confessed. Affidavits from three of these witnesses are attached hereto as Exhibit 7 to petitioner's Memorandum in Support of his Motion to Vacate. These include affidavits from Donald Buffkin, Everett Morse, and a new affidavit from Bryant Lane. (Bryant Lane's previously submitted affidavit was found to be vague. Bryant Lane has clarified in the attached 2005 affidavit that Greg Mitchell directly confessed to him that he committed the MacDonald murders, and that he so confessed within two weeks of his death, and that he did so while aware of the fact that he was dying.) These affidavits are powerful corroboration of the Stoeckley confessions and of MacDonald's actual innocence. **Unless they were actually the murderers of MacDonald's family, that from this small group of four suspects matching the description given by MacDonald—suspects who lived close to the murder scene and were involved in drugs and cult-like activities—the fact that two of them directly and specifically have confessed to numerous people of committing such a heinous crime, confessed independently of each other,**

The trial judge, in regard to the new Stoeckley detailed confession, again found that even if believed by her to be true, her confession was unreliable as it was the product of a drug-addled mind. In so ruling, he stressed the importance of the fact that "no physical evidence was uncovered at the crime scene which would support Stoeckley's confessions."[17]

Regarding the statements of the various corroborating witnesses, the judge ruled that the statements were no more than weak circumstantial evidence that Stoeckley and her cohorts were in the area of crime which was also the area where they lived.

As to the Greg Mitchell admissions, the judge ruled that they were "speculative and circumstantial." He ruled that there was insufficient proof that it was, in fact, Greg Mitchell who confessed to Reverend Phillips and Ann Cannaday and that the statements Mitchell made to the Lanes were unpersuasive because Mitchell made no specific reference to being involved in the MacDonald slayings. Not persuaded by this evidence, the court denied the motion. *Id.*

On appeal, the denial of these motions was affirmed by this Court. *United States v. MacDonald*, 779 F.2d 962 (4th Cir. 1985).

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years after they knew each other, and while geographically separated by several states, is an astonishing coincidence.

[17] MacDonald seems to have been caught in the proverbial *Catch 22*. Having claimed from the outset that his family was attacked by intruders later shown to be drug addicts, the multiple confessions of one of these has never been considered on its merits for the principal reason that she was drug-addled. If the tables had been turned, if Helena 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 unreliable, or simply because she often repudiated her admissions of guilt. Many defendants only confess once, and repudiate their confessions thereafter. The confessions are nonetheless admitted.

2. Items Described in MacDonald's 1990 Habeas Petition

In 1990, MacDonald filed a second post-trial motion seeking a reversal of his conviction based on newly developed evidence, gleaned from the over 10,000 documents obtained through numerous FOIA requests. Within these documents, the defendant found the following, never before turned over by the government: 1) Handwritten lab notes of CID investigator Janice Glisson (who testified at trial) which revealed that numerous blond synthetic hairs, up to 22 inches in length, had been found in a hairbrush in the dining room of the MacDonald home, and the hairs could not be matched to any known items in the MacDonald home;[18] 2) The results of a 1978 reexamination of critical fibers found on the body of Colette MacDonald and on a wooden club believed to be a murder weapon. At the request of the prosecutor, in 1978 three FBI investigators had re-examined certain crime-scene evidence and found black wool fibers in the debris taken from around the mouth area of Colette MacDonald, on the bicep area of her pajama top, and on the club that the government believed was the murder weapon and which was found outside the home. FBI investigator Kathy Bond, in her hand-written notes, reported that at least some of the purple cotton fibers previously identified on the murder weapon as matching the sewing threads on MacDonald's pajama top were not such, in fact, but were black wool

[18] The government countered the 1991 motion by submitting an affidavit from an FBI agent, Michael P. Malone, that the blond synthetic hairs were not wig hairs. Later, defense lawyers learned that the affidavit was incorrect.

fibers. These black wool fibers were never matched to any known fabric in the MacDonald home.[19] (*See* footnote 7, *infra*.).

3. Additional New Evidence

Additional witnesses have come forward to whom Greg Mitchell confessed to murdering the MacDonald family. Attached as Exhibit 7 to Petitioner's Memorandum in Support of his Motion to Vacate are the affidavits of Everett Morse, Bryant Lane, and Donald Buffkin. Morse swears that he was told by Greg Mitchell that Mitchell murdered the MacDonald family. Lane, in an amplification of his earlier deposition, swears that he was told by Mitchell that Mitchell murdered the MacDonald family. And Buffkin swears that he was told by Mitchell that Mitchell murdered the MacDonald family. Mitchell died in 1982. Taken in conjunction with the Stoeckley confessions, the record now contains direct admissions made by two of the people identified as those most likely to have been the intruders that killed MacDonald's family. *Two of the four have confessed!* The statistical probability that each of these two somehow suffered independently from the same psychotic delusion—that they murdered the MacDonald family—is not believable. To argue such is patently ridiculous. They both confessed, independently, and long after their association ended, because they both were involved. Moreover, these statements of Greg Mitchell were declarations against interest and would be admissible in any future trial. *See*, Federal Rules of Evidence, 803, 804.

[19] Despite this reexamination in 1978, prosecutor's elicited testimony from selected experts at the 1979 trial that the murder weapon had on it the blue cotton fibers of MacDonald's pajama top without also disclosing the presence of unmatched black wool fibers.

IV. ARGUMENT

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) as set out in 28 U.S.C. Sections 2255 and 2244, and as interpreted by the federal courts, this motion is to be assigned to a three-judge panel of this Court, for a determination of whether it makes out a *prima facie* case of satisfying the substantive standard for filing a successive *habeas corpus* petition. *Felker v. Turpin*, *supra*; *U.S. v. Winestock*, 340 F.3d 200 (4th Cir. 2003). This Court, in this regard, is to perform what has been referred to as a *gate-keeping function*, i.e., not to render an opinion on the merits of the successive petition, but solely to determine whether it makes out a *prima facie* case of meeting the requirements of the statute. *See, e.g., Felker v. Turpin, supra; U.S. v. Winestock, supra; Sustache-Rivera v. U.S.*, 221 F.3d 8,15 (1st Cir. 2000), *cert. denied*, 121 S.Ct. 1364 (2001); *Nevius v. Sumner*, 105 F. 3d 453, 462 (9th Cir. 1996); *Hatch v. Oklahoma*, 92 F. 3d 1012 (10th Cir. 1996). The two substantive requirements are 1) that the newly discovered evidence, or factual predicate for the claim, could not have been discovered previously through the exercise of due diligence, and 2) that the new facts underlying the 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 the constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense. 28 U.S.C. Section 2244. MacDonald submits that the newly discovered evidence outlined herein and in his attached Motion unquestionably meets the criteria required for leave to file his successive petition with the district court.

A. The Newly Discovered Evidence Could Not Have Been Discovered Previously Through the Exercise of Due Diligence

The only people who had knowledge about the newly discovered evidence which is the predicate for MacDonald's new *habeas corpus* petition, are James Blackburn, a former prosecutor and government official, former Deputy United States Marshal Jim Britt, a former government official, and Helena Stoeckley, the intimidated witness, who was silenced by the threats of Jim Blackburn and who died in 1982. The revelations of Jim Britt constitute new evidence that could not have been discovered previously through the exercise of due diligence.

Our federal courts have consistently held that evidence within the purview of government officials, secreted by them, withheld by them, or concealed by government conduct, is evidence that could not have been discovered through the exercise of due diligence. *See, e.g.*, *Dobbs v. Zant*, 506 U.S. 357 (1993) (*per curiam*) (transcript not discovered based on defendant's reliance on the State's assertions that it had not been transcribed); *Price v. Johnston*, 334 U.S. 266, 289 (1948) (prosecutor's knowing use of perjured testimony); *Kirkpatrick v. Whitley*, 992 F. 2d 491, 495-96 (5th Cir. 1993) (information hidden in undisclosed police report); *Fairchild v. Lockhart*, 979 F.2d 636 (8th Cir. 1992) (prosecutor did not turn over sheriff's file containing exculpatory information); *United States v. Biberfield*, 957 F.2d 98, 104-5 (3rd Cir. 1991) (government withheld information that testimony of witness was false); *Hamilton v. McCotter*, 772 F.2d 171, 182-83 (5th Cir. 1985) (newspaper report that prosecutor had forged indictment); *Paradis v. Arave*, 130 F. 3d 385, 394 (9th Cir. 1997) (prosecutor withheld exculpatory information at the time of the criminal trial and successfully quashed a subpoena for documents at the

time of the first *habeas* petition.) *See, also, Strickler v. Greene*, 527 U.S. 263, 282, 289 (1999) (conduct by state in impeding access to exculpatory information provided cause for filing a successive petition.) *Strickler, supra*, stands for the proposition that any extraordinary obstructive circumstance beyond the control of the petitioner and his attorney, in which both were faultless, amounts to justification for a successive petition. Obviously, here, there is no way that the MacDonald defense could have forced Blackburn or Britt, both government officials, to reveal the information known to them of Blackburn's misconduct.

Regarding Helena Stoeckley, it is only logical to conclude that the threats made to her by prosecutor Blackburn not only caused her to testify falsely at the trial, but caused her to remain silent about Blackburn's threats thereafter. She apparently was too frightened thereafter to ever disclose what had occurred in James Blackburn's office. Moreover, during the trial the court ruled, based on the misrepresentations of James Blackburn, that Stoeckley was a witness with no credibility and not worthy of belief. Hence, even if the MacDonald defense team had learned post-trial from Stoeckley that she was threatened and intimidated by the prosecutor, and that she lied to the jury as a result of such threats and intimidation, such information would have been of no practical value or use given the court's ruling that she was not a credible or believable person.

Now, however, that this new information has been revealed by a former United States government court official, one with unimpeachable credibility, and with no reason whatsoever to prevaricate or embellish, it demands to be addressed and redressed by the district court.

The information known to Jim Britt is new evidence that could never have been discovered by the defense through the exercise of due diligence.

B. The Newly Discovered Facts, If Proven, and in Light of the Evidence as a Whole, Are Sufficient to Establish by Clear and Convincing Evidence That, But For the Constitutional Error, No Reasonable Fact-finder Would Have Found the Applicant Guilty of the Underlying Offenses

First, it is manifestly clear that if the allegations made by former U.S. Deputy Marshal Jim Britt are proven, then James Blackburn denied Jeffrey MacDonald his constitutional right to due process and a fair trial. Blackburn, according to Jim Britt, was told by Helena Stoeckley that she and others were in the MacDonald home on the night of the murders. Blackburn secreted this critical exculpatory evidence from the defense and falsely denied having heard it to the court. This was a clear constitutional violation denying the defendant due process of law under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. The prosecutor's failure to disclose material exculpatory evidence violated MacDonald's right to a fair trial. *Brady v. Maryland, supra*; *U.S. v. Bagley*, 473 U.S. 667 (1985). Blackburn then, as Jim Britt attests, threatened the witness with a first-degree murder indictment if she testified to what she told him, causing her to change her testimony, and then Blackburn hid her confession and his threats from the court and the defense. Under the circumstances, this also was a clear constitutional violation. It is axiomatic that the right of a criminal defendant to offer the testimony of witnesses is a fundamental element of due process of law. *Washington v. Texas*, 388 U.S. 14 (1967); *Webb v. Texas*, 409 U.S. 95 (1972). Where through the acts of government agents, a defense witness is threatened or intimidated into declining to truthfully testify, a defendant is deprived of due process. *Webb v. Texas, supra*. Where prosecutorial misconduct

prevents a defense witness from giving relevant testimony, and thereby distorts the fact-finding process, a defendant is entitled to have his conviction vacated. *U.S. v. Lord*, 711 F.2d 887 (9th Cir. 1983). Prosecutorial actions that are aimed at discouraging a defense witness from testifying on a defendant's behalf deprive a defendant of the right of due process. *U.S. v. Pierce*, 62 F.3d 818, 832 (6th Cir. 1995). Moreover, Blackburn's conduct the next day in court amounted to a continuing constitutional violation. After Helena Stoeckley's direct testimony, during which she claimed to have had amnesia concerning her whereabouts and actions during the entire night that the MacDonald family was murdered, Blackburn never corrected this false testimony, but in fact, reinforced it during his cross-examination of her. Blackburn never advised the court of what she had told him during his interview of her the day before. And, when directly asked by the court if Helena Stoeckley had disclosed to Blackburn any involvement in the MacDonald crime, Blackburn falsely stated to the court that she had not. [Ex. 4, Tr. 5617]. These actions of Blackburn, individually and taken in concert with what he had done the day before, violated the defendant's constitutional right to due process and a fair trial. As made clear in *Alcorta v. Texas*, 355 U.S. 28 (1957), when the government knowingly presents a false picture of the evidence to the court and jury a new trial is warranted. And it is axiomatic that a conviction obtained through false testimony is obtained in violation of due process. *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1967). When the prosecution misleads the court, the verdict should be invalidated, and when, as here, the government's fraud presents a deliberate scheme to directly subvert the judicial process, a reversal is mandated. *Alcorta v. Texas*, *supra*.

Here, prosecutor James Blackburn's threat to Helena Stoeckley, that he would indict her for murder if she testified to what she had told him, in fact intimidated her into testifying falsely, and denied Jeff MacDonald his constitutional right to due process. Blackburn's subsequent misrepresentations to the court about what she had told him during his interview of her further prejudiced the defendant as it is reasonable to assume that these misrepresentations were considered by the court in its important evidentiary ruling holding inadmissible the many confessions made by Stoeckley to others, on the grounds that she was not credible or trustworthy. In this regard the trial court stated, while announcing its ruling, that the statements she had made out of court "were all over the lot." [Tr. 5808]. Importantly, had the trial judge known that Helena Stoeckley had come to the courthouse, and during her interview with the prosecutor admitted that she had been inside the MacDonald home on the night of the murders, he would have had very little basis for finding her many admissions to the other defense witnesses who were present and prepared to testify untrustworthy or "all over the lot." Not only would Helena Stoeckley have directly admitted her involvement in the crime to the jury, but the many other witnesses to whom she had made incriminating statements would probably have been heard by the jury as well. This undoubtedly would have changed the outcome of the trial.

Our Supreme Court has opined that credible claims of constitutional error that have caused the conviction of an innocent person are rare, but that when they are substantiated by new evidence not presented at trial, that is, when the evidence taken as a whole demonstrates that it is more likely than not that no reasonable juror would have found guilt beyond a reasonable doubt, a petitioner should be granted relief from his conviction.

Schlup v. Delo, 513 U.S. 298, (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Murray v. Carrier*, 477 U.S. 478 (1986). Such a determination requires a court to perform a complete review of the entire panoply of evidence, even that which was previously excluded from the trial. As the Court stated in *Schlup*, *supra* at 867:

> [T]he *habeas* court must make its determination concerning the prisoner's innocence in light of all the evidence, including that … tenably claimed to have been wrongly excluded or to have become available only after trial.

An analysis of innocence under AEDPA also requires that all of the evidence be considered in a successive *habeas* claim. As set forth in 28 U.S.C. Section 2244, any analysis of new evidence and innocence must occur in the light of the *evidence as a whole*.

Importantly, Jeff MacDonald has never had the entire panoply of evidence supporting his innocence evaluated as a whole before.[20] Indeed, in light of the new evidence revealed by Jim Britt, this now must be done, and if it is fairly done, will lead to only one conclusion, i.e. that no reasonable juror could find Jeff MacDonald guilty beyond a reasonable doubt. The secret threats to Helena Stoeckley, the evidence that was suppressed by Blackburn, and the perjured and false picture that Blackburn presented to the jury and court through the witness Helena Stoeckley, amount to a corruption of the trial process at the most basic and fundamental level. The key defense witness, who was apparently prepared to confess before the jury to her role in a heinous multiple murder, and thereafter would have been forced to divulge the details of the crime and the names of

[20] As is manifest in the written opinion of Judge Dupree following MacDonald's 1990 habeas petition, even then the trial court only evaluated the post 1984 new evidence piecemeal, not the evidence as a whole, ruling that each piece of evidence was "separately insufficient." The court, of course, also discounted the value of the evidence based on the misleading affidavit of FBI agent Malone. *U.S. v. MacDonald*, 778 F. Supp. 1342, 1350-51 (E.D.N.C. 1991).

her co-murderers, was secretly threatened by the prosecutor, intimidated away from telling the jury the truth, and that same prosecutor then misrepresented to the judge about what the witness had said to him in his office, and then went even further and elicited testimony from the witness that the prosecutor knew to be contrary to what she had told him just the day before.

Had Helena Stoeckley told the jury that she had been inside the MacDonald house with others during the night of the murders, and that she had seen the hobbyhorse in the MacDonald house, and described it to the jury, MacDonald would never have been convicted. This is an obvious truth. It is also the conclusion arrived at and forcefully stated by this Court in its initial appellate opinion in this matter:

> **Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great.**

United States v. MacDonald, 632 F.2d at 264 (4th Cir. 1980). Moreover, had that testimony been given and considered in context along with the evidence as a whole, no reasonable juror could have found MacDonald guilty beyond a reasonable doubt.

There have been many myths that have grown up around this case over the past twenty-five years. One of these is that the government's circumstantial case proving guilt was overwhelming. To put this myth to the test, each of the significant pieces of evidence of guilt, as listed by the trial judge in his 1985 Memorandum Opinion [*U.S. v. MacDonald*, 640 F. Supp. 286 at 310-315 (E.D.N.C. 1985)] denying MacDonald's original post-trial motions, is examined below. As shown, not one piece of such evidence retains persuasive power when placed under close scrutiny.

1. The Murder Weapons: As the lower court pointed out, the government investigators found a blood-stained piece of wood, a steel paring knife, and an ice-pick in the backyard, and another steel paring knife in the master bedroom. It sought to prove that these were the murder weapons. It also offered evidence that the weapons came from the MacDonald home. MacDonald denied any recollection of having an ice-pick in his home, and was contradicted by two government witnesses. All of this, however, proves little. Four intruders, relying on their numbers alone, may have entered the home without weapons and used what they found in the MacDonald home as weapons. Or, equally likely, they may have come with a weapon, such as a baseball bat, and then used, in addition to what they brought, items from inside the home that were clearly at hand. They could have then taken what they came with when they left, discarding the weapons they found in the house. The fact that MacDonald had no recollection of an ice-pick proves nothing. In fact, had MacDonald committed the crime, and tried to cover it up, and had he thrown the ice-pick and other weapons into the backyard, why would he be so unwise as to deny having an ice-pick in the house? The fact that at least some of the weapons originated from the MacDonald home does not in any way tend to prove who committed the crime.

2. The Pajama Top and Pajama Top Demonstration: MacDonald claimed that he had used the pajama top at one point, as a shield. During his struggle, it had been pulled or ripped over his head and was partially bound around his wrists. Later, he put it on his wife's chest to keep her warm. The government introduced threads matching the pajama top that were found in the master bedroom, in the children's bedrooms, and on the club

found outside, arguing that these proved the lie to his account. Similar threads were also found under Colette's body. Yet, the government contended, no threads were found in the living room where MacDonald was attacked. This, the trial court considered as strong evidence that MacDonald's story was fabricated. Perhaps overlooked in this conclusion, however, was the fact that MacDonald was wearing at all times in his home his pajama *bottoms* that were ripped from ankle to crotch. (*See*, trial testimony of medic Michael Douglas Newman, Tr. 2661-62.) The pajama bottoms were lost when MacDonald was being treated at the hospital. Certainly, it is reasonable to assume, and very likely, that the pajama bottoms were made of the same material (similar threads) as the top. When MacDonald was trying to revive his wife, and moved her from against a chair and onto the floor, and gave her mouth-to-mouth resuscitation, and when he was frantically trying to breathe life back into his children, threads from his ripped pajama bottoms would likely have been scattered wherever he went. It is not surprising, thus, given MacDonald's account, that threads from his torn pajama bottoms would be in the children's beds, all around the house, and even under his wife. MacDonald moved his wife. So did Dr. Neal, who rolled her over to examine her. [Tr. 6921]. Moreover, his pajama threads could easily have been on the murder club because he was clubbed with it.

As to the trial court's conclusion that no pajama threads were found in the living room where MacDonald was attacked, this is contrary to the testimony of CID investigator Robert B. Shaw, who testified that he found a "tangled bunch or ball" of blue fibers in the hallway where it intersected the living room. [Tr. 2480, 2411-12]. The couch on which MacDonald was attacked was in the living room right where it abutted the hallway

entrance. These fibers were found, thus, within a foot or two of where MacDonald said he struggled with the intruders, and precisely where he fell unconscious.

The government also relied heavily on its pajama top experiment, where government experts sought to prove that the holes in the pajama top could be lined up with the puncture marks in Colette's chest. This test was badly flawed. Any fair reading of the transcript shows that the experts failed to consider vitally important information in conducting their experiment. They failed to even try to line up the holes in the defendant's pajama top with the thirty-odd puncture holes in Colette MacDonald's pajama top. If MacDonald had laid his pajama top on top of her, and then stabbed her through it as the government contended, then the holes would have gone through both articles of clothing in the same pattern. The government experts also failed to line up the knife cuts in the pajama top with the knife cuts in Colette's torso. In this regard, if the knife holes were not lined up at the same time as the puncture holes, the experiment obviously was flawed. These same experts also failed to consider the *directionality* of the thrusts, which could have been detected from the threads. Given that the experts claimed that the pajama top was folded when the stabbing occurred, according to their theory, depending on the folds of the garment, the thrusts or directionality would have to match up with the way the garment was folded. But they ignored the directionality of the threads. Even with all this, as mentioned earlier, the experts could not offer an opinion that the thrusts were made through the pajama top into Colette as the government contended. Their opinions were only that it was *possible* that this *could* have happened. Of course, it was equally possible that it did not happen that way. The testimony was no better than guesswork or

speculation. Interestingly, the district judge, in his 1985 written memorandum opinion, stated that "MacDonald's own pajama top was perhaps the most incriminating evidence offered against him during the trial." *Id*. at 312. If this statement is accepted as true, it underscores just how incredibly weak the government evidence actually was.

3. The Pajama Top Pocket: MacDonald's pajama top pocket was found at the feet of Colette MacDonald. Government expert testimony was offered to prove that the pocket was stained with Colette's blood *prior* to the pocket being torn from the top. This evidence was offered to refute MacDonald's version of events—that he placed the top on her torso--and to suggest that the pocket was torn during a struggle with his wife. Again, these deductions are speculative at best. It is no more or less likely that MacDonald, in a wounded state, stricken with unspeakable grief and emotion over the horror that had occurred, in shock, and frantically trying to save his family as a doctor might, used the pajama top while it was still bound around his wrists to staunch her bleeding, or try to aid her, hence the blood on the pocket. At precisely what moment he removed the pajama top from around his wrists was never clear. Nor was it clear how the pocket got torn. He might very well have torn it off when frantically trying to remove the garment that was binding his hands. All of this is conjecture. None of it is probative of anything. The pajama top, simply, is not evidence of guilt.

4. MacDonald's Eyeglasses: The government adduced evidence that MacDonald's eyeglasses, which he was not wearing and which were found in the living room, had a speck of dried blood on them of the same blood type as that of his daughter, Kristen, blood Type O. MacDonald was an emergency room doctor. He treated wounded patients daily

with various blood types. It is entirely plausible that the speck was blood from an earlier hospital patient.[21] Moreover, it is also possible that the intruders attacking MacDonald had already attacked and bloodied Kristen and their weapons, and a blood speck flew from their weapons to his glasses as they were swinging clubs and knives at him—weapons which had previously been used on her. Moreover, if MacDonald was wearing the glasses while struggling with and repeatedly stabbing his wife as the government suggested, why wouldn't Colette's blood be on the glasses? There are many explanations for that blood speck that are consistent with innocence. Again, the evidence is hardly probative of guilt.

5. The Bloody Footprint: One of MacDonald's footprints, stained with Colette's blood type, was found leaving Kristen's bedroom, but no footprint was found entering the room. No other bloody footprints, in fact, were found anywhere, a rather strange phenomenon. [Tr. 3103, 3117]. This, the government argued, was evidence that MacDonald assaulted his wife in Kristen's bedroom, and stepped in her blood while carrying her back out and into the master bedroom. [Tr. 7133-34]. But what kind of selective logic is being employed here? Kristen's bedroom had puddles of blood in it and the CID investigators first on the crime scene were constantly asking people to watch where they stepped. [Tr. 2333]. Moreover, Colette's blood type, Type A, was found in Kristen's bedroom. Rather than MacDonald assaulting Colette in Kristen's bedroom, why isn't it equally plausible that the intruders assaulted Colette in Kristen's bedroom? Either way, Colette would have

[21] Attached as Exhibit 8 to Petitioner's Memorandum in Support of his Motion to Vacate, is an FBI report, discovered as part of a FOIA request post-trial, indicating that the FBI had investigated the patients MacDonald had treated the day before the murders and discovered that several had Type O blood, including one patient treated for a puncture wound to his foot who would have been bleeding.

bled in that bedroom leaving the blood, and MacDonald could have gotten the blood of Colette on his foot on his way out of that bedroom. Another, equally plausible explanation, is that Jeff MacDonald stepped in Colette's blood before being placed on the stretcher and gurney, and that when he was struggling at the entrance of Kristen's bedroom to get off the gurney to go to his child, he stepped once on the floor. This is consistent with the testimony at trial of CID officer Mica and is the only explanation of how just one bloody footprint would have been made. [Tr. 1419-21]. Once again, though, this evidence concerning a bloody footprint is no more probative of guilt than it is of innocence. It is equally consistent with both MacDonald's account and with the government's postulations. But it does not tend to prove either.

6. The Pieces of Latex Gloves: Four different torn pieces of rubber were found in the master bedroom. (Tr. 3911-12.) Government experts testified that they were "similar" in material to latex gloves found in packages under the kitchen sink in the MacDonald home. The government argued that this was proof that MacDonald used the latex gloves in covering up the crime by making it look like a cult slaying. The prosecutors suggested that he put the gloves on when he repeatedly stabbed his already dead family, and when he wrote words in their blood on the headboard of the bed in the master bedroom. This evidence, however, was specious. First, when pressed on cross-examination, the government expert on this issue, Charles Michael Hoffman, acknowledged that his testing showed only that it was *possible* that the rubber pieces found in the master bedroom were made of the same material or made by the same manufacturer as the latex gloves found under the sink. He could not even say that a match was *probable*. (Tr. 3927-28.)

Moreover, the government argument ignored the fact that latex gloves were prevalent at the time, and could easily have been acquired in drug stores. The intruders, concerned about fingerprints, might have brought them with them. Or, since latex gloves were there in the MacDonald house for the intruders to find and use if they became concerned about fingerprints, they might have made use of what was readily available. Finally, the government theory is nonsensical. Why would an educated man like Dr. MacDonald, had he intended to cover up this terrible crime, left pieces of latex gloves lying around? Why, if his family was already dead, would he have cut or torn up the latex gloves he used to cover up the crime, leaving pieces behind? Or why would he have left his own bloody footprint, for that matter? Or a pajama top where the holes could be lined up with the holes in Colette's chest? Whoever used the gloves must have had them on when struggling with Colette, which is why they were torn. This, of course, is contrary to the government's theory which posited that MacDonald only put on the gloves after killing Colette in order to cover up the crime. The pieces of rubber found in the master bedroom, if probative of anything, are probative of innocence.

7. The Blood Spatterings and the Government's Reconstruction of the Crime Scene:

The government relied on the fact that blood spatterings of Kimberley were found in the master bedroom, on the bathmat MacDonald had put on top of Colette's body, on the murder weapon, and on the defendant's pajama top. This was used by the government to support its theory that Kimberley had been killed in the master bedroom by MacDonald. But, again, Kimberley could have come into the master bedroom while intruders were fighting with Colette. Kimberley's blood was all over. It could easily have gotten on

MacDonald's pajama top when he took it from around his wrists and discarded it while trying to revive his wife. All of the blood evidence, in fact, and all of the physical evidence, as shown herein, was susceptible to an explanation consistent with the defendant's innocence.

8. The Absence of Physical Evidence Consistent with MacDonald's Account of the Murders: Lastly, the court relied, as apparently did the jury, on the government's recurrent theme that there was no physical evidence corroborating MacDonald's account of the murders. This, it turns out, was simply untrue. We know now that critical evidence of this sort was suppressed at the trial. There were, of course, the wax drippings, unmatched to any candles in the MacDonald home. There were unaccounted for fingerprints and palm prints. There were also the long blond synthetic fibers that did not match any fibers in the MacDonald home and that were suppressed by the government. Given the Stoeckley confessions, what more likely source could there be for these than her blond wig? There were the unmatched black wool fibers on Colette and on the murder weapon, also suppressed by the government. These constitute hard physical evidence of intruders.

The evidence presented against Jeffrey MacDonald was not just circumstantial but was, in fact, weak. The jurors who heard it, moreover, were deprived of critically important testimony and evidence. The trial judge, himself, who was faced with difficult but profoundly important evidentiary rulings was deprived of critically important information. Had this not been case, the outcome would have been an acquittal.

No reasonable juror, hearing Helena Stoeckley's confession from the witness stand, and then hearing the abundant evidence corroborating the fact that she and other intruders

were responsible for the murders, could possibly find Jeffrey MacDonald guilty beyond a reasonable doubt. Just a sampling of the other evidence that has been developed that supports MacDonald's innocence, and that would have corroborated Stoeckley's confessions, would have included:

1. The admissions made by Stoeckley to the six other individuals who were at the trial and prepared to testify [Ex.4];

2. The detailed admission made by Stoeckley to two law enforcement officials after the trial [Section III (D) (1) *infra*];

3. The synthetic blond wig hairs found in the MacDonald home and unmatched to any other fiber in the home, but consistent with Stoeckley's presence that night, wearing a long blond wig in the MacDonald home [Section III (D) (2) *infra*];

4. The fact that Stoeckley was wearing a blond wig and floppy hat the night of the murders and burned both the wig and the hat shortly after the murders [Ex. 4];

5. The fact that a woman matching Stoeckley's description was seen by MP Kenneth Mica at 4 a.m. in the rain the night of the murders a half-mile from the murder scene [Tr. 1453-54];

6. The fact that Stoeckley was fixated on the crimes and bought wreaths that she hung all along her fence during the funerals [Ex. 4, Tr. 5633-34];

7. The three different kind of wax drippings found on the coffee table where MacDonald saw the blond woman standing, and in Kimberley's bedroom that did not match any candles found in the home [Tr. 3837-43], taken in the context of Stoeckley's admitted use of candles in her LSD induced withcraft rituals [Ex. 4];

8. The statement of a witness (Jimmy Friar) who telephoned the MacDonald home at 2 a.m. the night of the murders and spoke with an hysterical woman and also heard someone in the background ordering the woman to hang up the phone, taken in the context of Stoeckley's admission that she answered the phone while in the MacDonald home [Section III (D) (1) *infra*];

9. The statement, under oath, of Joan Sonderson, who saw a blond-haired woman in a floppy hat early the morning after the crime who asked her directly about the MacDonald murders, and who would have had no way of knowing about them unless she was involved [footnote 15 *infra*];

10. The black wool fibers found on the mouth and bicep of Colette MacDonald and on the murder weapon that were not matched to any fabric in the MacDonald home [Section III (D) (2) *infra*];

11. The fact that Greg Mitchell, years after the crime, and long after he had separated from Helena Stoeckley, confessed to committing the MacDonald murders to numerous different individuals [Ex. 7];

12. The testimony of the many witnesses, each who saw a group of people matching the description MacDonald had given of Helena Stoeckley and the intruders in close proximity to the MacDonald house either late the night of and just before the crime, or in the early morning hours just after the crime had occurred [Section III (D) (1) *infra*];

13. The 17 unmatched fingerprints and 11 unmatched palm prints [Tr. 3116, 3141].

At the risk of being repetitive, even as early as 1980, in its ruling on MacDonald's direct appeal, this Court stated that **had evidence of Stoeckley's involvement been admitted, the government's case would have been incalculably damaged.** *United States v. MacDonald*, 632 F.2d at 264. With this new evidence from Jim Britt, it is clear that but for the prosecutor's misconduct, the evidence of Helena Stoeckley's involvement would have come to the jury from her own testimony. And as this Court has opined, this would have destroyed the government's case. Moreover, as set forth above, the admissions of Helena Stoeckley have now been corroborated by additional facts. Taken together, these facts show egregious prejudice to MacDonald resulting in a fundamental miscarriage of justice. *See, McCleskey v. Zant*, 499 U.S. 467 (1991).[22]

[22] An exhaustive critique of the evidence with citations to the record was prepared by MacDonald's attorneys and submitted with his 1991 habeas pleadings. This document, captioned *Addendum to MacDonald's Reply Brief: Compilation and Analysis of Case Evidence*, is attached to Petitioner's Memorandum in support of his Motion to Vacate as Exhibit 9.

V. CONCLUSION

It would be an understatement to point out that this case has had an overlong history in the courts. Jeff MacDonald, who has now served over 25 years in federal prison with dignity and without one incident of violence, continues to maintain and fight for his innocence. Perhaps it is worth keeping in mind that due to DNA testing, we as a society have learned over the last decade that there are many more innocent people wrongfully convicted and languishing in our prisons than we ever would have thought.[23]

If a life is evidence, is it not reasonable to juxtapose Jeffrey MacDonald's sixty-two years of living with no discernable mental instability or act of violence against the theory of the government that on one out-of-character night he pathologically and in cold blood not just murdered, but mutilated the bodies of his two-year-old daughter, five-year-old daughter, and wife who was pregnant with his unborn son? Jeff MacDonald was tried by the government on a totally circumstantial case. We know that he was convicted pursuant to a trial in which important evidence was suppressed by the government. Now it has come to light that the government prosecutor threatened the key defense witness into not telling the jury of her involvement in the crime, and then misinformed the court about it.

It is time for Jeffrey MacDonald's case to be reviewed in its entirety. This new evidence meets all of the criteria of the gate keeping provisions of AEDPA. And importantly, justice and decency demand it.

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[23] *See*, *generally*, Innocence Project Home Page, http://www.innocenceproject.org (documenting over 150 recently exonerated individuals who were wrongfully convicted); and New York State Defenders Ass'n. *Wrongful New York State Homicide Convictions Since 1965* (May 30, 1990) (documenting 59 homicide cases in New York state between 1965 and 1988, in which a defendant was wrongfully convicted of homicide).

WHEREFORE, FOR THESE AND OTHER REASONS CONSIDERED BY THIS COURT, PETITIONER RESPECTFULLY REQUESTS THAT THIS MOTION BE GRANTED AND THAT THIS MATTER BE CERTIFIED FOR FILING IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of this motion and accompanying brief were mailed by me, first class mail, postage pre-paid, on the _____ day of _____, 2005, to the United States Attorney for the Eastern District of North Carolina, at the following address:

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