UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 75-CR-26-3
No. 5:06-CV-24-F

UNITED STATES OF AMERICA	)	
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	)	
v.	)	RESPONSE OF THE UNITED STATES
	)	TO SUCCESSIVE MOTION
JEFFREY R. MacDONALD,	)	FOR RELIEF UNDER 28 U.S.C. § 2255.
Movant	)	
	)	
	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby opposes the successive motion of Jeffrey R. MacDonald to vacate his sentence under 28 U.S.C. § 2255, on the ground that it is barred under the "gatekeeping" rules governing that statute.

Should this Court not agree with our submission that the instant motion should be denied on these grounds or on any other grounds**,** we anticipate contesting the factual allegations MacDonald has made in support of the motion. In that event, we request an evidentiary hearing, an opportunity to cross-examine the affiants supporting the relief, and an opportunity to present evidence in rebuttal. Finally, should the Court determine that an evidentiary hearing is warranted, we request that the Court delay any such hearing until any other preliminary or jurisdictional matters have been resolved, and the Government has had sufficient time to complete our ongoing investigation.

In support of our submission that the instant petition should be dismissed, we present the following pertinent facts and legal argument:

STATEMENT

1. Procedural History

Jeffrey R. MacDonald ("MacDonald") was indicted on three counts of murder, in violation of 18 U.S.C. § 1111, by a grand jury of this District on January 24, 1975. He moved to dismiss the indictment upon claims of denial of his right to speedy trial, citing the period of time between the dismissal of military charges in 1970 and the federal indictment. He also claimed that his protection against double jeopardy had been violated because he had been "exonerated" as the result of a military pretrial investigation pursuant to Article 32 U.C.M.J., 10 U.S.C. § 832. This Court denied the motion, and MacDonald filed an interlocutory appeal. In August 1975, the court of appeals stayed the trial and ultimately ordered the indictment dismissed on speedy trial grounds. United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976) (App. Vol. I, Tab 1).[1] The Supreme Court reversed. United States v. MacDonald, 435 U.S. 850 (1978) (App. Vol. I, Tab 2). MacDonald then appealed the district court's double jeopardy ruling, which the court of appeals rejected. United States v. MacDonald, 585 F.2d 258 (4th Cir. 1978) (App Vol. I, Tab 3). On August 29, 1979, a jury convicted MacDonald on all counts of murder, in violation of 18 U.S.C. § 1111. On appeal, the court of appeals reversed his conviction on speedy trial grounds. United States v. MacDonald, 632 F.2d 258 (4th Cir. 1980) (App. Vol I, Tab 5). The Supreme Court reversed and remanded the case to the court of appeals for disposition of the remaining issues. United States v. MacDonald, 456 U.S.

[1] "App." is the abbreviation for the Government's Appendix filed herewith. "Tr." is the abbreviation for the trial transcript, unless otherwise indicated, excerpts of which are contained in our Appendix. "GX" is the abbreviation for the Government exhibits introduced at trial.

1 (1982) (App. Vol. I, Tab 6). The court of appeals affirmed, rejecting MacDonald's remaining claims. United States v. MacDonald, 688 F.2d 224 (4th Cir. 1983) (App. Vol I, Tab 7).[2]

In 1984, MacDonald filed in this Court a motion for a new trial, pursuant to Fed. R. Crim. P. 33, on the basis of "newly-discovered" evidence, and two motions for post-conviction relief under 28 U.S.C. § 2255. After an evidentiary hearing, it denied the motions. United States v. MacDonald, 640 F. Supp. 286 (E.D.N.C. 1985) (App. Vol. I, Tab 10).[3] The court of appeals affirmed. United States v. MacDonald, 779 F. 2d 962 (4th Cir. 1985) (App. Vol. I, Tab 11). In October 1990, MacDonald, through a new team of lawyers, filed a second collateral attack alleging, once again, newly-discovered evidence and the concealment of such evidence by the prosecution.[4] Once again, this Court denied relief. United States v. MacDonald, 778 F. Supp. 1342 (E.D.N.C. 1991) (App. Vol. I, Tab 12). The court of appeals affirmed. United States v. MacDonald, 966 F.2d 854 (4th Cir. 1992) (App. Vol. I, Tab 13).[5]

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

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

[3] The transcript of this hearing is at App. Vol. V, Tab 1.

[4] Commenting upon these proceedings, MacDonald now notes (Mot. at 11) that the district court denied relief without first conducting an evidentiary hearing. The district court did so, however, on the basis of representations by a previous team of lawyers that "the facts critical to the decision in this case are undisputed," and that an evidentiary hearing was therefore unnecessary. See May 14, 1991 Reply Brief in Support of 28 U.S.C.C. § 2255 Petition, pp. 89-90; Memorandum Order of the district court dated May 28, 1991. App. Vol. V, Tab 2.

[5] The court of appeals affirmed the denial of MacDonald's Section 2255 motion relying solely on the "abuse of the writ" doctrine. It observed that the alleged "newly-discovered" laboratory bench notes had, in fact, been received by MacDonald's preceding set of lawyers prior

On April 22, 1997, MacDonald filed a third petition for habeas relief captioned "Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery." This Court denied the motion insofar as it was based upon a "fraud on the court" claim. It transferred to the court of appeals the motion for a new trial, once again based upon alleged newly-discovered evidence, for certification as a successive petition. United States v. MacDonald, 979 F. Supp. 1057 (E.D.N.C. 1997) (App. Vol. I, Tab 14). The court of appeals then entered an order granting MacDonald's motion insofar as it authorized DNA testing and remanded that matter to this Court (App. Vol. I, Tab 14). It denied the motion to file a successive habeas petition in all other respects. MacDonald then appealed this Court's ruling on the fraud on the court claim. The court of appeals affirmed (App. Vol. I, Tab 16). Pursuant to orders issued by this Court, the DNA testing proceeded and was recently completed. A report concerning the results of such testing was filed with this Court on March 10, 2006. (App. Vol. V, Tab 3).

On December 13, 2005, MacDonald, through a fourth set of lawyers, filed a "gatekeeping motion" in the Fourth Circuit seeking leave to file yet another motion to set aside his sentence under 28 U.S.C. § 2255. Once again, the motion was predicated on "newly-discovered evidence," i.e., that MacDonald claims demonstrates prosecutor James L. Blackburn made factual misrepresentations to the trial judge and thwarted his ability to obtain testimony from Helena Stoeckley, a prospective defense witness.[6] On January 17, 2006, the court of appeals granted the gatekeeping motion, thereby

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to the filing of his first habeas petition. Upon evaluation, those attorneys dismissed as inconsequential the "newly-discovered" evidence. See MacDonald, 966 F.2d at 858 (App. Vol. I, Tab 13).

[6]We discuss the claims relating to prosecutor Blackburn, *infra*. Mr. Blackburn left the United States Attorney's Office in 1980 to engage in the private practice of law. In 1993, he entered guilty pleas to charges relating to that practice. He was represented in those proceedings

authorizing this Court to review MacDonald's claims. On January 17, 2006, the instant motion was filed in this Court and on January 27, 2006, this Court directed the government to file a response.

2. The Government's Case At Trial

It is unnecessary to repeat in detail the events of the crime, the military and civilian investigations that led to MacDonald's federal indictment, or the numerous interlocutory appeals that preceded his trial. Those events have been described in detail in the prior decisions of this Court. See, e.g., MacDonald, 979 F. Supp. 1057 (App. Vol. I, Tab 14). Accordingly, we repeat only so much of the procedural and factual history as is necessary to understand the instant motion.

At trial, the government introduced a wealth of physical and other circumstantial evidence which affirmatively established that MacDonald was the murderer. 640 F. Supp. 310-15. That evidence also demonstrated that MacDonald's version of the events of February 17, 1970, was false. MacDonald's pajama top was, perhaps, the single most inculpatory piece of evidence. He claimed it was torn and punctured by an ice pick in the living room during his efforts to ward off the attackers and that he later placed it over his wife's body to keep her warm. The garment had two cuts and 48 puncture holes in it, whereas Colette's chest area sustained 21 puncture wounds in all; five on the right side, 16 on the left.[7] When a forensic technician folded the top in the same manner in which it had been found on Colette's body (right sleeve inside-out), and inserted 21 probes in the garment's

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by Wade M. Smith, Esq., who had been MacDonald's local defense counsel during his trial and in all the subsequent litigation. At Mr. Smith's request on November 29, 2005, Mr. Blackburn signed a waiver permitting Mr. Smith to represent MacDonald in the instant motion. Notwithstanding this waiver, Mr. Smith did not sign the pleadings filed in the court of appeals or this Court, and although he does not appear to be taking an active part in this phase of the litigation, he has not formally withdrawn.

[7] See Gt. 600, 602, 604, 607, 610 and 612. (App. Vol. VI, Tab 12).

48 puncture holes, they aligned in a pattern matching the pattern of the 21 puncture wounds on Colette's chest (Tr. 4192-96). This showed that MacDonald had placed the garment on Colette's chest and then stabbed her through his pajama top, in order to make his account of the murders more believable (see 640 F. Supp. 311-12).[8] The fact that the holes in the pajama top were clean and showed no tearing indicated to a forensic expert that the pajama top was not moving when the punctures were made, flatly contradicting MacDonald's claim that he used it to ward off his attackers (Tr. 4074-75).

Threads and yarns from MacDonald's pajama top were found underneath Colette's body in the master bedroom, in the bedding in which Kimberly was wrapped, and in Kristen's bedroom.[9] No threads from the pajama top, however, were found in the living room where MacDonald claimed he was assaulted (Tr. 1689-90, 1727, 3790-3811). Also, the pajama top's pocket was found on a throw rug at Colette's feet (Tr. 1683). A forensic expert testified that the pocket was stained with blood of Colette's blood type before it was torn from the pajama top and that the staining was the result of smearing and soaking caused by direct contact. In addition, Colette's blood was found in numerous places on the pajama top. Some of the stains were bisected by tears in the garment indicating to the expert that the top had been stained before it was torn. Blood in Kimberly's type was also found on the front of the garment (Tr. 3648-54, 4076-79).

This evidence refuted MacDonald's story that his pajama top was torn when unknown intruders attacked him in the living room, and that, after they left, he went directly into the master bedroom where he placed the torn garment over Colette. Instead, it showed that: (1) the pocket had

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[8] See GX 41, 787, 791, 794-196. (App.Vol. VI, Tab.13)

[9] See GX 653-54, 978, 982-985. (App. Vol. VI, Tabs 4-8)

been torn off the pajama top while MacDonald struggled with Colette in the master bedroom; (2) MacDonald had gone to other rooms still clad in the pajama top; (3) he later returned to the bedroom and placed it--minus the pocket--over Colette's body, and (4) he then stabbed her (subsequent to the infliction of the fatal knife wounds) with the icepick to make her death appear the work of crazed intruders.

In addition, blood splatterings throughout the apartment demonstrated that, contrary to MacDonald's story that he found Colette in the master bedroom and Kimberly in her own bed, he had moved the bodies of Colette and Kimberly, rearranging the crime scene to conform to his story.[10] Spattered blood, as well as large stains resulting from direct contact, and blood stained splinters from the wooden club, demonstrated that MacDonald had assaulted Colette and Kimberly in the master bedroom and then moved Kimberly's body to her own bedroom where he again assaulted her. Further, the blood evidence demonstrated that, at some point, MacDonald's attack on Colette resumed in Kristen's bedroom, as large amounts of Colette's blood were found on Kristen's bedding, as well as on the wall above Kristen's bed (Tr. 3662-67; GX 982). MacDonald's bare footprint, stained in Colette's blood, was discovered leading out of Kristen's bedroom (Tr. 1616), but no such footprints leading in were found, nor were there any stains in Colette's blood found on the floor of Kristen's room.[11] This suggested that MacDonald had stepped on some object soaked with Colette's blood, which was not present when the investigators arrived.

The sheet and bedspread from the master bed were found on the floor of the master bedroom. The sheet was heavily stained with Colette's blood and bore bloody imprints from Colette's pajama

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[10]See Summary Chart GX 983 (App. Vol. VI, Tab 7)

[11]See Summary Chart GX 982 (App. Vol. VI, Tab 8)

top and the sleeves of petitioner's pajama top (Tr. 3662-66, 4133-39, 4146-52).[12] The bedspread was also heavily stained with Colette's blood (Tr. 3667, 4103-10). Adhered to the bedspread was a bloody hair from Colette, which was entwined with a thread from petitioner's pajama top. This further demonstrated that MacDonald carried Colette's body back to the master bedroom.[13] In addition, sixty threads and yarns from MacDonald's pajama top were found in the master bedroom, many of them underneath Colette's body (Tr. 3790-3811, GX 654, GX 984-85). Taken together, this evidence showed that MacDonald attacked Colette, initially in the master bedroom, and subsequently in Kristen's bedroom, and carried her heavily bleeding body, wrapped in the bedding, back to the master bedroom. He then deposited Colette's body over pajama top threads resulting from their earlier struggle, and any additional household debris already present on the bedroom rug. The presence of MacDonald's footprint in Colette's blood leading out of Kristen's room also refuted his story that Colette was in the master bedroom when he first discovered her, and that he was neither present when she was attacked, nor had he moved her bloody body.

Similarly, Kimberly's blood was found on the shag rug and bedding in the master bedroom, on the bath mat used both to cover Colette's body and to wipe off the murder weapons, in the hallway leading to Kimberly's bedroom, on the wall of her bedroom, on the club, and on the front of MacDonald's pajama top (Tr. 3615-17).[14] Threads and yarns from MacDonald's pajama top were found within the bedding in which Kimberly was wrapped.[15] Collectively considered, this evidence

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[12] See Summary Charts GX 825, 978**.** (App. Vol. VI, Tab 6)

[13] Id.

[14] See Summary Charts GX , 978, 981, 983, and 984. (App. Vol. VI, Tabs 4, 6, 7, and 10)

[15]See Summary Chart GX 983.(App. Vol. VI, Tab 7)

demonstrated that Kimberly, who sustained blunt trauma injuries inflicted by the club, was struck in the master bedroom and then carried by MacDonald--still wearing his pajama top--to her own bedroom where he continued to assault her in order to support his story that his wife and children were attacked in their own bedrooms while they slept (Tr. 3615-17, 3639-46; 640 F. Supp. 312-13). It also refuted his claim that he was not wearing his pajama top when he entered Kimberly's room.[16]

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

The murder weapons implicated MacDonald in the murders and discredited his statements to investigators. Although MacDonald denied that he had ever seen the wooden board used as a club to assault Colette and Kimberly (Tr. Vol. I, April 6, 1970 CID Interview at pp. 45-46; GX 1135),[17] the weapon was shown to have been used to support Kimberly's bed when it was painted and testimony established that MacDonald had used other pieces from the same board to build closet shelf supports (Tr. 3812-19). MacDonald also denied that the family ever owned an icepick like the

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

[17] The club had Colette's and Kimberly's blood on it as well as seam threads from MacDonald's pajamas and fibers from a throw rug in the master bedroom. This demonstrated that MacDonald's story to investigators was false and that the club had contact with the throw rug after MacDonald's pajama top had been torn in the master bedroom and before the club was removed from the house by the murderer. A splinter from the club with Colette's blood was found in the master bedroom. Splinters from the club were also found close to seam threads from MacDonald's pajama top in the children's rooms. And an impression corresponding to the end of the club was found on Colette's chest (Tr. 1700-01, 2340, 3404-05, 3425-27, 3804-12). The fact that, even though splinters from the club were found in Kristen's bedroom, Kristen bore no blunt trauma injuries, further demonstrates that MacDonald, whose pajama top yarns were found there, assaulted Colette in Kristen's bedroom. See Summary Charts GX 981 & GX 437. (App. Vol IV, Tabs 10-11).

one that had been used to stab his family (Tr. Vol. I, April 6, 1970 CID Interview at pp. 46-47; GX 1135). However, both his mother-in-law and the babysitter recalled using one in his home. 286 F. Supp. at 311.

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

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

As the district court recognized (640 F. Supp. at 314), almost no physical evidence supported MacDonald's version of events on the night of the murders.[18] For example, he claimed that he was

[18] Although this statement is correct, the prosecution never argued, as defense counsel maintains, that "there was no evidence of intruders," in view of the numerous unidentified fingerprints, hairs, fibers and wax found in the crime scene. Instead the prosecution argued that the footprint and the pajama top evidence, coupled with his false exculpatory statements, identified MacDonald as the only possible criminal agent. See Gov't. opening argument (Tr. 7053-7147) and summation (Tr. 7293-7310).

attacked with a club and stabbed in the living room and that his pajama top was torn there by one of his assailants. But no bloodstains, threads, yarns, or fibers from the pajama top, or splinters from the club were found there. MacDonald testified that he had been stabbed with an icepick. However, he sustained no wounds on his arms, hands, or body consistent with wounds inflicted by an icepick. Moreover, his injuries were superficial and could easily have been self-inflicted with the disposable scalpel blades he was known to have kept in a linen closet. 640 F. Supp. at 314. In fact, his blood was found on the door of the linen closet which contained scalpel blades and in a sink beneath a mirror in the master bedroom.[19]

Finally, the government offered expert testimony concerning the source of the hairs found in Colette MacDonald's hands. The hair found in Colette's right hand (GX 280, E-4 Q118) was microscopically identical to her known head hairs, samples of which had been obtained following exhumation of her body. Tr. 4157 . The hair found in Colette's left hand (GX 281, E-5 Q119) was determined to be the tip portion of a Caucasian limb hair that did not have enough points to be of value for comparison purposes. Tr. 4157.

3. The Pretrial Statements of Helena Stoeckley

Shortly after the murders, MacDonald told the Military Police that a band of four hippies had entered his house and stabbed him. He described the intruders as two white males, a Negro male, who wore an army field jacket with staff sergeant's stripes, and a blonde female who wore muddy boots, a floppy hat, carried a candle and chanted "acid is groovy, kill the pigs." (Tr. 1262, 1270).

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

Within hours, news reports described the crimes as well as MacDonald's descriptions of the four alleged intruders (Tr. 5653-54; 6106-07).

The following day, P.E. Beasley, a Cumberland County Detective (now deceased), visited Helena Stoeckley (also deceased), a drug addict, and sometime police informer.[20] Beasley told her that she and several of her male companions fit MacDonald's description of the murderers, and asked whether she had any information concerning the crimes. Stoeckley responded, "in my mind, it seems that I saw this thing happen;" but she also explained that she was "heavy on mescaline" and did not recall anything that occurred on the night of the murders (Tr. 5741-42; 5747-48). Shortly thereafter, Beasley visited Stoeckley's apartment, noticed several wreaths hanging in the front yard, and observed that she was wearing black. When he questioned her about these displays, she responded that she was in mourning because of the murders of MacDonald's family (Tr. 5743).

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

William Posey, a former neighbor of Stoeckley's, testified that he had seen her arrive home in the early morning of February 17, 1970, in a car occupied by several males, and that she sometimes wore a blonde wig and a floppy hat although she was not wearing them on that occasion. (Art. 32 Tr.

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[20] Stoeckley died the week of January 10, 1983, of acute bronchopneumonia, complicated by cirrhosis of the liver. See Affidavit of Raymond Madden, Jr., #13, with attached autopsy report of Dr. Sandra Conradi. (App. Vol. V. Tab 4)

1298-1302).[21] He further stated that, about a week after the murders, Stoeckley told him that she had been questioned by the police but did not know where she was during the morning of February 17 or what she had done because "she was stoned out" (J.A. 12; Art. 32 H. Tr. 1304). On or about August 11, Posey asked Stoeckley whether she had committed the murders. She again responded that she did not know because she was "stoned out", and did not remember what she had done during the night in question, but that she did not think that she could kill anyone. When Posey suggested that she could have been the female intruder holding the candle, Stoeckley nodded her head in a noncommittal manner (J.A. 21-22; Art. 32 H. Tr. 1328-1329).

William Ivory, an Army CID Agent, also testified that he had twice interviewed Stoeckley concerning her whereabouts on the night of the murders. He stated that Stoeckley was unable to recall them because, as she explained, "she had been out on marijuana" (J.A. 23; Art. 32 H. Tr. 1513).[22]

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

Finally, MacDonald repeated the story he had told to investigators following the crime. However, when shown Stoeckley's photograph (GX-952), he stated that he had never previously seen

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[21] Posey's testimony at the Article 32 Hearing is found at App. Vol. V, Tab 5)

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

the person portrayed. (SeeUTr. 6829-31). Upon completion of the Article 32 hearing, the investigating officer recommended that the charges against MacDonald be dismissed, but that law enforcement authorities continue their investigation of Stoeckley's activities on the night of the murders. On October 23, 1970, after review of the report, the general court-martial convening authority dismissed the charges against MacDonald.

Following the recommendation of the Article 32 officer, the CID investigated Stoeckley. On April 23 and 24, 1971, CID Agent Robert Brisentine interviewed Stoeckley at her new residence in Nashville, Tennessee. During the first interview, while visibly under the influence of narcotics, Stoeckley told Brisentine that:(1) she could not recall her activities on the night of February 16-17, 1970, due to a "mental block"; (2) shortly before midnight she and a male companion consumed LSD and mescaline; and (3) both prior to and immediately following the homicides "she was using all types of drugs -- opiates, heroin, marijuana, depressants, stimulants, and hallucinogenics". (Tr. 5717-18). She stated, however, that she may have been present at the murders, explaining that in her dreams she had visions of Mrs. MacDonald's bed with the word "pig" written in blood on the headboard, and of herself on a couch in the MacDonald home with MacDonald holding a bloody icepick (Tr. 5719-20). But she immediately retracted the statement, explaining that she only thought she heard of MacDonald before the murders (Tr. 5718). Finally, she informed Brisentine that she knew the identity of the persons who murdered the MacDonald family and that she would furnish the identity of the murderers in exchange for immunity (Tr. 5721).

The following day, Stoeckley again recanted her statement concerning participation in the murders. Asserting that she had "said too much," she admitted that she had been lying when she told

Bristentine she knew the identities of the killers; in fact, she only suspected some people of committing the homicides (Tr. 5721-22).

During her stay in Nashville, Stoeckley made statements to several acquaintances concerning her possible involvement in the murders of the MacDonald family. In November 1970, while ill with hepatitis, "incoherent", and in a state of hysteria, she told Jane Zillioux, a neighbor, that she could not return to her home in Fayetteville, North Carolina because she had been involved in some murders with three boys whose identities she did not know. When Zillioux pressed her for additional details, Stoeckley admitted that she did not know whether or not she had participated in the murders, explaining, "I've been a heavy drug user and . . . drugs make you--when you are on drugs, you do things that you don't think you did, . . . I don't know. . . I can't remember." (Tr. 5693-94).[23]

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

In December 1970, Stoeckley appeared in a highly agitated state at the door of Charles Underhill, another neighbor. When Underhill inquired what was wrong, she stated, referring to an

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

otherwise unexplained event in an unnamed North Carolina city, "they killed her and the two children" (Tr. 5711-14).

4. Events At Trial Relating to Stoeckley

Prior to trial, the prosecution provided a list of possible witnesses to the defense, which included Stoeckley's name and last known address. The prosecution did not call Helena Stoeckley during its case-in-chief, and the defense did not subpoena her. On August 13, 1979, the sixteenth day of the trial, lead defense counsel Bernard Segal raised the issue of Stoeckley's appearance for the first time at a bench conference (Tr. 4845-50, App. Vol II, at Tab 2). After consulting Wade M. Smith, MacDonald's local counsel, prosecutor James Blackburn asked the FBI to locate Stoeckley for the defense. Id. at 4849. Later that same day, the court issued a material witness warrant for Stoeckley. Id. The FBI located Stoeckley in South Carolina, arrested her, and lodged her in a local jail. On August 15, the trial judge inquired of the defense whether it wished to call Stoeckley. Segal requested that she be brought to the site of the trial, stating that, as soon as they had a chance to interview her, the defense intended to call her as a witness (Tr. 5258-59). The trial judge then directed that she be brought to the courthouse and made available to the defense.

Upon Stoeckley's arrival in Raleigh, defense counsel asked for a recess to interview her, which ultimately consumed almost the entire day of August 16, and involved conferences between defense counsel, Stoeckley, and a number of witnesses to whom she had allegedly made statements indicating knowledge of or participation in the murders. See United States v. MacDonald, 485 F. Supp. 1087, 1091(E.D.N.C. 1979) (App. Vol I, Tab 4). Author Joe McGinnis, who was then in the

process of writing the book Fatal Vision, witnessed the interview of Stoeckley.[24] According to McGinnis, Segal initiated the interview by showing her an album of pictures of the crime scene, which included one depicting a child's rocking horse in the MacDonald home (e.g., Tr. 5624). In response to Segal's query concerning a photo of the kitchen, Stoeckley responded, " I can't help you. . . . I wasn't in that house. I didn't have anything to do with any of this." App. Vol. II Tab 4 at 528. When Segal advised Stoeckley that the statute of limitations had expired and she could therefore not be prosecuted for her involvement in the murders if she confessed, she simply reiterated her denials of her involvement in the murders and denied possessing any recollection of events on the night of the murders, stating: "I don't know what you want to know. I was never in that house." Id. And even after Segal threatened Stoeckley and had the persons (including Posey) to whom she had previously "admitted" involvement in the murders confront her with the statements she made to them, she persisted in denying any recollection of involvement in the murders. Id. at 530.

In the early afternoon, the trial judge held a bench conference and inquired whether the defense was ready to proceed (Tr. 5496). Smith advised the court that they had almost concluded their discussions with Stoeckley and would soon be in a position to turn her over to the government. Id. Upon inquiry by prosecutor Blackburn, Smith stated that Blackburn could expect them to be through with Stoeckley by approximately 2:00 p.m., which the defense later qualified to mean less than an hour (Tr. 5505-06).

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[24]See Fatal Vision, at 527-31 (Putnam & Sons, 1983) (App. Vol. II, Tab 4). Although the record shows that, during its interview of Stoeckley, a member of the defense team (Wade Smith) took notes (Tr. 5575), the defense has not attached the notes as an exhibit to its Motion nor presented any other evidence in to establish what occurred during the interview.

Trial resumed the following morning (Tr. 5512, App. Vol. III). In response to an inquiry by Blackburn whether an attorney should be present to represent Stoeckley's interests should she testify, Smith stated, "we will do whatever your honor wishes to do–but I feel that we will just go ahead with her and see what happens" (Tr. 5513). Segal then examined Stoeckley in the presence of the jury. She admitted that during 1970 she was addicted to heroin, used other drugs, and participated in witchcraft ceremonies that involved the ritual killing of animals and the use of a candle (Tr. 5522, 5542-46). She then repeated her previous statements that she had no recollection concerning her whereabouts between midnight and 4:30 a.m. on February 17, 1970 (Tr. 5548, 5556-57, 5646). Explaining that during February 16th she had six or seven intravenous injections of a mixture of heroin and opium, had used marijuana all day, and had taken a "hit" of mescaline shortly before midnight, she stated that the last event she recalled was conversing with a soldier from Fort Bragg in her driveway (Tr. 5552, 54). Thereafter, she remembered returning to her house in a car driven by other soldiers at approximately 4:30 a.m. (Tr. 5555-57). Stoeckley also denied any involvement in the murders of MacDonald's family and stated that her knowledge of the killings was the result of what she heard on a radio news bulletin and what others had told her (Tr. 5652-5654).

On further questioning, Stoeckley acknowledged that, at the time of the murders, she owned a floppy hat, a blonde wig, and white boots, and that she got rid of the hat and wig after they were returned to her by Officer Beasley because they connected her with the murders (Tr. 5583, 5588-90, 5602-03). She also said that, on the day of the MacDonald family funeral, she dressed in black and hung funeral wreaths outside her home (Tr. 5633). When asked whether she had made statements to acquaintances and to police officers concerning her involvement in the murders, she responded that, with the exception of telling Posey that she did not recall her whereabouts on the night of the

murders and advising him to tell his wife to keep her door locked, she did not recall the specifics of the conversations (Tr. 5557-60 (Posey); Tr. 5562-64 (Zillioux); Tr. 5564-66 (Underhill); Tr. 5567-68 (Gaddis); Tr. 5568-69 (Brisentine); Tr. 5573-74 (Beasley).

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

Following this testimony, Segal claimed surprise and sought leave to examine Stoeckley as a hostile witness (Tr. 5614). He maintained that, during preceding interviews, Stoeckley had made statements suggesting familiarity with the crime scene and recalled standing over a body holding a candle (Tr. 5617-18). At this, Blackburn represented that, although he was not present during the defense interview, during his own interview with Stoeckley (which followed the interview by Segal), she had no recollection of ever having been in the MacDonald home and did not recognize any of the scenes depicted in the crime scene photos he had shown to her. Blackburn added, "I told Mr. Smith last night what she told us. I was under the impression to this very moment that what she told us was essentially what she told them" (Tr. 5617). At this, Smith interjected, "Judge, here I think

is where we are. Generally, she said to us the same thing and that is 'I don't remember.' But in two or three or four instances, --whatever the list would reveal--she says something which would give an interesting insight into her mind." (Tr. 5617-18). The trial judge then questioned Stoeckley, who informed him that on the preceding day, she was interviewed by the defense for approximately three and a half hours and was thereafter interviewed by the prosecutors. In response to the court's question whether she told both sides the same story, Stoeckley responded, "[a]s far as I know, yes sir." The court denied the defense motion to proceed with Stoeckley as a hostile witness (Tr. 5617-18). Upon further questioning by Segal, Stoeckley confirmed that she could not recognize the crime scene photos, denied making statements concerning having touched or used a rocking horse depicted in one of the pictures, commenting that it appeared to have been broken, or discussing its apparent condition or its presence with defense counsel (Tr. 5621-27).

Defense counsel then moved to introduce Stoeckley's out-of-court statements concerning her possible involvement in the murders (Tr. 5775-84). During a hearing out of the presence of the jury, the court entertained the testimony of the persons to whom the statements were allegedly made.[25] On Monday, August 20, 1979, having considered the matter over the weekend, the trial judge denied

[25] The testimony of the witnesses during this hearing is summarized at p.12-15, supra and at 688 F.2d at 230. During the Article 32 Hearing, Posey testified on August 13, 1970 that, two days earlier, when he suggested to Stoeckley that she could have been the female intruder who held the candle, Stoeckley simply nodded her head in a noncommittal manner (Art. 32 Hr. Tr. at 1328-29). During the trial, however, he stated that Stoeckley told him that she could have held the candle during the murders, explaining that, when she made the statement, "it was like one minute she was there . . . then the next minute she was drifting back" (Tr. 5759-60). Posey also testified in 1979 that Stoeckley had told him that, while in the MacDonald home, she observed a hobby horse in Kristen's room that was broken and would not roll (Tr. 5760). The hobby horse in the MacDonald home, however, was suspended from a metal frame by four springs, rather than wheels and was not broken in any manner. See App. Vol. V, Tabs 6 and 7. Moreover, Posey made no reference to Stoeckley recalling the presence of a hobby horse in the MacDonald household when he testified in 1970 two days after this conversation with Stoeckley.

MacDonald's motion to introduce Stoeckley's out-of-court statements, finding them not worthy of belief, notwithstanding the additional testimony of Wendy Rouder offered that day by the defense (Tr. 5806-07). Wendy Rouder, a member of the defense team, testified that two days after Stoeckley testified, she talked with her. During the conversation, Stoeckley remarked that she still thought she could have been in the MacDonald home at the time of the murders because the pictures of the MacDonald children and the rocking horse seemed familiar (Tr. 5931-33). During a second interview, Stoeckley again stated that she thought she might have been in the MacDonald home, explaining, "I remember standing at the couch, holding a candle only it wasn't dripping wax. It was dripping blood." (Tr. 5936-37, 5945). When Rouder asked Stoeckley why she did not testify to that effect in court, Stoeckley responded, "I can't with those damn prosecutors sitting there" (Tr. 5937). The defense also presented in the presence of the jury the testimony of several of the persons to whom Stoeckley had made incriminating statements. [26] Beasley testified that on the night following the murders he confronted Stoeckley on the street while she was in the company of three males who matched MacDonald's description of his assailants. He also identified an artist's sketch made in 1979 of one of the assailants MacDonald had first described in 1970 (DX -90) as being that of "Allen P. Mazzerolle," who Beasley had previously arrested for drug possession (Tr. 5856-62.)[27]

[26] Beasley (Tr. 5822-5866); Zillioux (Tr. 5867- 5887); Underhill (Tr. 5890-5928); Posey (Tr.5983-6031); Gaddis (Tr. 6068-6077). App. Vol. IV, *passim.*

[27] MacDonald had two sets of artist composite drawings made: one in 1970, and another in 1979, long after Stoeckley and her associates had surfaced.

Finally, as part of its rebuttal case, the government introduced into evidence a certified copy of a newspaper photo from the February 18, 1970, Fayetteville Observer, taken through the window of Krisetin's bedroom. It depicted a rocking horse in the room. (Tr. 7042 GX 1153).

5. Stoeckley's Post-Trial "Confessions"

Following MacDonald's conviction and while his case was on appeal, the defense camp enlisted retired FBI Special Agent Ted Gunderson, aided by Prince Beasley, to conduct further investigation and, in particular, to further interview Stoeckley. See United States v. MacDonald, 640 F. Supp. 286, 318 (E.D.N.C. 1985) (App. Vol I. Tab 10). On October 21, 1980, Stoeckley provided Beasley with what was to be the first of a series of "confessions" to having been present during the MacDonald murders. Id. at 319. Beasley then flew Stoeckley to California where, upon being confronted by Gunderson, she initially stated that she could not recall what happened on the night of the murders. The following day, however, Stoeckley experienced a "miraculous recovery of her memory" (id.) and gave a detailed confession to the MacDonald murders. Id. She again "confessed" to Gunderson and Beasley on December 4-5, 1980, and gave incriminating statements to the author of a book during February 1981. However, in July 1981, she wrote a letter to Gunderson accusing him of coercing her into signing a false confession and misconstruing and distorting the statements she made to him. In September 1981, FBI agents interviewed Stoeckley. She provided them a statement disclaiming her preceding "confessions" to Gunderson, stated that her admissions to them were the result of dreams, and concluded: "I do not know if I was present or participated in the MacDonald murders." Id. at 320.

Distressed with this turn of events, Gunderson and Beasley re-interviewed Stoeckley during May 1982. On that occasion, she restated her confession, and asserted that: (1) she had been in the

MacDonald home on several different occasions; (2) that she had stolen a bracelet from it; and (3), several weeks prior to the murders, one of the cult members visited MacDonald at his home in an effort to convince him to cooperate in treating drug addicts. None of these alleged occurrences meshed with any information that MacDonald had furnished investigators. Finally, on May 27, 1982, Stoeckley accompanied Gunderson and Beasley to a taping of the television show, "60 Minutes." Once again, she confessed to being in the MacDonald home on the night of the murders but refused to name the persons actually responsible for killing the members of the MacDonald family. Id. at 321.

Stoeckley's "confessions" provided the defense the predicate for a motion for a new trial on the basis of "newly-discovered evidence"–Stoeckley's alleged perjury in testifying that she lacked any recollection of her whereabouts on the night of the murders. In addressing the motion, the trial judge observed that following the trial Stoeckley "has since alternated between lack of memory and almost total recall, on at least ten occasions . . . ." The motion was therefore denied for reasons we discuss in greater detail, infra. Id. at 332-34.

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

MacDonald's most recent effort to obtain further review of this case is based primarily upon the affidavit of Jimmy B. Britt, a former Deputy United States Marshal who retired from the Marshal's Service in November 1990. According to Britt, during the MacDonald trial he and Ms. Jerry Holden, now deceased, were assigned to travel to Greenville, South Carolina, to take custody of Helena Stoeckley, then lodged at the county jail. According to Britt, during the course of the trip from Greenville, South Carolina to Raleigh, without any prompting from Britt whatsoever, Ms. Stoeckley brought up the matter of the trial of MacDonald. She told Britt, in the presence of Jerry

Holden, about a hobby horse in the MacDonald home, and that she, in fact, along with others, was in Jeffrey Macdonald's home on the night of the murders. The following day, Britt was assigned to bring Stoeckley to the federal courthouse. He first took her to an office provided to MacDonald's defense team and left her with attorneys Segal and Smith.

When they finished interviewing her, Britt took her to the U.S. Attorney's office where, in his presence, she was interviewed by prosecutor Blackburn. According to Britt, Blackburn asked him to remain in the room. Britt further stated that this was not an "unusual occurrence" and that "[he] had been asked sit in the room by government attorneys many times in [his] career." During that interview, "Ms. Stoeckley told Mr. Blackburn the same things she had stated to me on the trip from Greenville to Raleigh," and "made the same admissions concerning her presence in the MacDonald home on the night of the murders as she made to him on the previous day on the trip from Greenville to Raleigh." Blackburn then told her that if she testified to that effect before the jury, he would indict her for murder. Britt does not now recall whether the incumbent United States Attorney, George Anderson, and prosecutor Brian Murtagh were present during portions of the interview, but asserts that neither was present at the time Blackburn allegedly threatened Stoeckley. These events, according to Britt, were inconsistent with Blackburn's subsequent statement to the trial judge that, during his interview with Stoeckley, she had no recollection of her whereabouts on the night of the murders.

ARGUMENT

MACDONALD'S MOTION FAILS TO SATISFY THE "GATEKEEPING" REQUIREMENTS FOR SUCCESSIVE HABEAS PETITIONS

A. Introduction – Governing Principles

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

MacDonald's instant motion, which employs yet another claim of "newly-discovered" evidence as the catalyst for seeking re-examination of those determinations, merits summary disposition. His claim of "newly-discovered evidence" relating to Stoeckley's pretrial statements and Blackburn's alleged efforts to suppress her testimony is virtually indistinguishable from his claim, made over 20 years ago, when MacDonald contended that Stoeckley's post-trial "confessions" should warrant a retrial. As in that case, when Britt's new "revelations"–made over 26 years after the alleged occurrences–are considered in light of the totality of the evidence, particularly the events surrounding Helena Stoeckley's inability to recall her whereabouts on the night of the murders, it is clear that they could not possibly have affected either the result of the district court's ruling excluding her prior statements or the outcome of the trial. Accordingly, the instant motion should be summarily denied.

2. Because the instant motion for collateral relief constitutes a "second or successive motion" for habeas relief under Section 2255, MacDonald must first pass through two "gates" before the merits of his claim can be entertained. See Bennett v. United States, 119 F.3d 468, 470 (7th Cir. 1997). Under 28 U.S.C. § 2255 para. 8 and 28 U.S.C. § 2244(b)(3), a federal prisoner seeking to file a successive habeas applications in the district court must first submit a "pre-filing authorization

motion" (PFA) in the court of appeals and obtain certification from that court under Section 2244(b)(3) authorizing him to file the motion.[28]

In order to satisfy these gatekeeping requirements in the context of a claim of newly-discovered evidence, the movant must demonstrate: (1) "the existence of facts that could not have been discovered previously through the exercise of due diligence" and (2) that "the facts of the underlying claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the [movant] guilty of the offense." 28 U.S.C. § 2244(b)(2)(B). See United States v. Winestock, 340 F.3d 200, 208 (4th Cir. 2003), citing 28 U.S.C. § 2255 para. 8. The court of appeals, having now issued a PFA, MacDonald has succeeded in passing through that initial "gate."

The issuance of a PFA by the court of appeals however neither constitutes an indication that the moving party has succeeded in satisfying the preliminary requirements of Section 2244(b)(2)(B), nor a preliminary determination that his claims are factually meritorious. Under Section 2244(b)(2)(C), a movant need merely "make a prima facie showing [in the court of appeals] that the application satisfies [the foregoing] requirements . . . ." As the Fourth Circuit explained in In re Williams, 330 F.3d 277 (2003):

> By "prima facie showing" we understand . . . simply a sufficient showing of possible merit to warrant a fuller exploration by the district court . . . . If in light of the documents submitted with the [PFA motion] it appears reasonably likely that the [motion] satisfies the stringent requirements for the filing of a second or successive petition, [the court of appeals] shall grant the motion.

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[28] The pertinent "gatekeeping" provisions of Section 2244 and Section 2255 were enacted in their present form as part of the Antiterrorism and Effective Death Penalty Act of 1999 (AEDPA), Pub. L. No. 104-134, tit VIII, 110 Stat. 1321, 1321-66 (1996).

Id. at 281, quoting Bennett, 119 F.3d at 469. In other words, the "prima facie" standard governing the disposition of a PFA application in the court of appeals merely "relates to the *possibility* that the claims will satisfy the 'stringent requirements for the filing of a second or successive petition,' . . . not the possibility that the claim will ultimately warrant a favorable decision in favor of the applicant." Id.[29]

Consequently, as the Bennett court explained, the grant of a PFA is "tentative in the following sense: [as a second preliminary gatekeeping step] the district court must dismiss the motion that [the court of appeals] has allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion." Bennett, 119 F.3d at 470 citing 28 U.S.C. § 2244(b)(4).[30] Accordingly, "[w]hen the [successive] application is thereafter submitted to the district court, that court must examine each claim and dismiss those that are barred under § 2244(b) or § 2255 para. 8." United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003), citing Reyes-Requena v. United States, 243 F.3d 893, 899 (5th Cir. 2001) (following grant of PFA, the district court is obligated to conduct its own gatekeeping review under § 2255 to determine whether the movant had satisfied its requirements). And, in contrast to the cursory gatekeeping review conducted by the court of appeals employing a

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[29]The reasons for this low threshold for granting a PFA are obvious. First, a court of appeals has a tight deadline within which to dispose of a PFA application. See 28 U.S.C. § 2244(b)(3)(D). Further (although not the case here), "courts usually do not have a response from the government." Bennett, 119 F.3d at 469.

[30] 28 U.S.C. § 2244(b)(4) provides:

> A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

"prima facie" standard, "under section 2244(b)(4), the district court must conduct *a thorough review* of all allegations and evidence presented by the prisoner to determine whether the motion meets the statutory requirements for the filing of a second or successive motion." United States v. Villa-Gonzalez, 208 F.3d 1160, 1165 (9th Cir. 2000) (emphasis added). In this case, "a thorough review" (id.) of MacDonald's motion from the perspective of the trial record and the prior decisions in this case demonstrates that he has not come close to fulfilling either of Section 2244(b)(2)(B)'s gatekeeping requirements. Accordingly, the instant motion should be denied without further fact-finding.

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

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

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

Id. at 498 (emphasis added). See, e.g., Holleman v. Cotton, 301 F.3d 737, 745 (7th Cir. 2003)(adopting McCleskey standard). Thus, following McCleskey, "in evaluating an application under § 2244(b)(2)(B)(i) [the courts] inquire whether a reasonable investigation undertaken before

the [previous] habeas motion was litigated would have uncovered the facts the applicant alleges are newly-discovered." In Re Boshears, 110 F.3d 1538, 1540 (11th Cir. 1997).

MacDonald has not summarized any efforts he undertook to determine why Helena Stoeckley, when she appeared as a defense witness in 1979, had developed a memory lapse concerning her whereabouts on the night of the murders of the MacDonald family. Instead, he blithely dismisses the requirement of demonstrating "due diligence" by asserting that any such investigation would have been futile, *i.e.,* in the case of prosecutor Blackburn and Britt, "there is no way the . . . defense could have forced . . . both government officials, to reveal the information known to them of Blackburn's conduct." Mot. 27-28.

First, this argument misperceives the governing test: whether "some objective factor external to the defense impeded counsel's efforts to raise the claim . . . ." McCleskey, 499 U.S. at 493. Objective factors that constitute cause include "interference by officials" that makes compliance [with the requirement] impossible." Id. at 494. Thus, in the context of a case such as this one, "[a] petitioner could show that an inquiry would be futile if he would not have been able to discover the factual predicate . . . even if he had inquired." Holleman, 301 F.3d at 746.[31] In this respect, MacDonald has presented no evidence tending to demonstrate that the government did (or would have) thwarted post-conviction efforts to inquire of either Blackburn or of Britt concerning statements

[31] The authorities upon which MacDonald relies (Mot. 28) to justify his failure to conduct a post-conviction investigation are similarly inapposite. For the most part, they involve the affirmative concealment of documentary evidence or active obstruction by the government. See, e.g., Kirkpartick v. Whitley, 992 F.2d 491, 496 (5th Cir. 1993) (non-disclosure of a police report in the face of a Brady request). MacDonald's assumption that such non-disclosure would occur if he launched an inquiry relating to the information at issue simply because it was, in one instance, known to a government employee, is plainly no substitute for a showing that such "exculpatory" evidence had been concealed from the defense, making further post-trial inquiry an apparently futile gesture.

Stoeckley may have made to Britt during the trip from Greenville, or to Blackburn, in Britt's presence, in the courthouse, concerning her recollection of events on the night of the MacDonald family murder or the dialogue that occurred immediately thereafter. Furthermore, assuming for the sake of this argument that prosecutor Blackburn would, upon timely inquiry, have concealed the threats and misrepresentations MacDonald now attributes to him and thereby prevented the defense from obtaining such information from him, there is no basis whatsoever for believing that a similar inquiry, if made to Britt, would have been futile. Indeed, Britt acknowledges that in November of 1990, while MacDonald's third petition for habeas relief was underway, he had retired from the Marshal's Service. Thus, any employment-based obligation to the government that he previously may have perceived as a basis for withholding the "facts" he has now revealed would no longer have existed. And if a timely inquiry had been made, it is entirely possible that Britt would have experienced the same epiphany of conscience that he claims has prompted such revelations now. Consequently, any excuse that MacDonald might present to justify his failure to make an earlier inquiry of Britt cannot withstand scrutiny and must therefore be rejected.[32]

With respect to Stoeckley–the most obvious source of such information–MacDonald's claim of futility is based upon the assumption that she was so thoroughly cowed by Blackburn's alleged threats during the 1979 mid-trial interview that *any* further inquiry of her concerning her memory

[32] In Britt's affidavit, he asserts that his loyalty to the Marshal's Service, from which he retired on November 30, 1990, and respect for Judge Franklin Dupree, the trial judge (who died in December, 1995), prevented him from volunteering such information earlier. This assertion of reluctance on the part of a potential witness to volunteer information, however, in no way relieves the defense of its responsibility to exercise due diligence by making a timely inquiry of that witness.

lapse at that time would also have been unavailing. See Mot. at 28-29. This assertion likewise cannot withstand scrutiny.

As we have explained previously (p. 22-23, supra), after MacDonald's 1979 trial, the defense retained Ted Gunderson and Prince Beasley to further investigate the case, in particular the possible role of Stoeckley and her known associates as participants in the MacDonald murders. On October 21, 1981–more than two years after Blackburn's alleged threats–Stoeckley gave Beasley what was to be the first of a series of new "confessions" purporting to acknowledge participation in the murders of the MacDonald family. Thereafter, Stoeckley was taken to California where, between October 24 and 25, 1981, she "gave fairly detailed confessions to the MacDonald murders" to Ted Gunderson. United States v. MacDonald, 640 F. Supp. 286, 319 (E.D.N.C. 1985). After repudiating these statements, she was again interviewed by Gunderson and Beasley between May 20 and 24, 1982, at which time she restated her confessions. Id. at 320.

These developments belie MacDonald's instant excuse for neglecting to inquire of Stoeckley the reason for her memory loss at trial. If Stoeckley was then willing to make repeated admissions concerning her alleged involvement in the offense, despite Blackburn's alleged threats to indict her, there is no reason to believe that she would not also have revealed the threats themselves and the circumstances of the interview during which they were allegedly made. Furthermore, these developments also demonstrate that the defense team had ample opportunity to make such inquiries had it desired to do so.

Indeed, in this case, the requirement of "due diligence" placed a particular obligation upon the defense to ask Stoeckley whether the prosecution had threatened her or otherwise inhibited her from testifying. As MacDonald now acknowledges (see MacDonald Mot. Exh. 5), Wendy Rouder,

a member of the defense team, testified at trial that, several days after Stoeckley's court appearance, Stoeckley told her (Rouder) that she thought she had been in the MacDonald home on the night of the murders and recalled holding a candle that was dripping blood. Tr. 5932-37. When Rouder asked why Stoeckley would not testify to that effect, she responded that she was fearful of what the prosecutors would do to her if she so testified (Tr. 5937). Such information surely imposed a duty upon the defense to conduct a "reasonable and diligent investigation" (Holleman, 301 F.3d at 745) as to her reasons for such fear which (in view of Stoeckley's other subsequent "admissions") would likely have resulted in the disclosure of the alleged threats and the events preceding them, had they in fact occurred. Yet it appears that none of Stoeckley's post trial "confessions" to defense investigators make any reference to threats by Blackburn or contain any other indication that she was questioned concerning her memory lapse at trial.

Finally, MacDonald protests that he was under no obligation to make an inquiry of Stoeckley because any information she might have revealed would not have been believed by the trial court. Mot. 29. In the first place, under the governing principles of habeas law, such an assumption provides no excuse for neglecting to inquire. Cf. Boshears, 110 F.3d at 1541 (finding absence of due diligence where defense counsel had an opportunity to question a known potential witness, a doctor, about involvement in the case and there was no reason to believe that he would not have responded to questioning). Moreover, it is utterly illogical to assume that simply because the trial court excluded Stoeckley's inconsistent out-of-court assertions concerning events that allegedly occurred some nine years previously, it would likewise have dismissed without further inquiry, more recent claims alleging fraud on the court by a prosecutor. Indeed, if the defense camp truly believed that it was futile to rehabilitate Stoeckley's credibility in Judge Dupree's court, it would not have repeatedly

sought to extract from her additional admissions for use as the centerpiece of a motion for post-conviction relief that would be entertained by the very same judge.

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

Having demonstrated that MacDonald failed to exercise due diligence in seeking to uncover his claimed "newly-discovered evidence," our analysis (and this Court's review) of MacDonald's gatekeeping motion could properly terminate. See In Re Williams, 364 F.3d at 241. Nonetheless, for the sake of completeness, we also address the second gatekeeping requirement–that the significance of the newly-discovered evidence is so substantial that, in light of such evidence as a whole, no reasonable fact finder would have returned a judgment of conviction.[33] That standard is a highly demanding one. As the court of appeals explained in Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004):

> [A] petitioner does not pass through the [innocence] gateway . . . if the district court believes it more likely than not there is *any* juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt.

Id. at 163, quoting Schlup v. Delo, 513 U.S. 298, 333 (1995) (O'Conner, J. dissenting).

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

In making such a determination for gatekeeping purposes, courts generally accept as true the facts underlying the applicant's claim. See Boshears, 110 F.3d at 1541. Nonetheless, as the Boshears court explained (id. 1541 n.1), "[i]f the record before [the court] conclusively forecloses the existence

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

of the facts underlying the applicant's claim, it would be futile to accept them as true in evaluating the application. Granting the application in such a case would be a mere formality because the district court would dismiss the successive petition, as soon as it read the record." See Williams, 330 F.3d at 282 n. 2 (noting, with favor, the reasoning in Boshears.); see also Bennett, 119 F.3d at 469 (noting that defendant's claim of newly-discovered evidence purporting to demonstrate that he had been drugged by prison doctors during his trial lacked "sufficient plausibility to satisfy the statutory standard"). We believe this to be such a case because, when considered in the context of the pertinent portion of the trial record, it is almost inconceivable that Britt's belated recollection of events was accurate.

As we understand it, the gravamen of MacDonald's claim of "fraud on the court" is that, shortly after being interviewed by the defense, when Stoeckley was interviewed by Blackburn, she was overheard by Britt to acknowledge that she, along with others, was in the MacDonald home on the night of the murders. Thereafter, when Stoeckley testified that she could not recall her whereabouts on the night of the murders, Blackburn falsely represented at a sidebar conference that during the interview (which Britt claims to have witnessed), she denied ever being in the MacDonald home, did not recognize the scenes in the photographs of the crime scene, and had no knowledge concerning the perpetrators of the murders (Tr. 5617).

What MacDonald's fraud-on-the-court claim ignores, however, is that, upon the court's inquiry, Blackburn also represented that he had relayed the gist of the interview to defense counsel Wade Smith. At that point, attorney Smith, whose interview of Stoeckley immediately *preceded* Blackburn's, volunteered, "Judge, here I think is where we are. Generally, she said to us the same

thing and that is, 'I don't remember.'" (Tr. 5618.)[34] And, when the trial judge then inquired of Stoeckley whether she had told both sides the same story, she responded that she had (Tr. 5619). Thus, it is highly implausible that Stoeckley would have provided prosecutor Blackburn with a detailed statement concerning her participation in the MacDonald family murders when shortly before that interview (and the occurrence of the alleged witness intimidation by the prosecution), she informed defense counsel that she had no recollection of events despite Segal's prolonged efforts, aided by pictures of the crime scene, to extract a confession from her. Under such circumstances, it is simply not logical to give any credence to Britt's recollection of events some 26 years after the trial and to discredit Blackburn's representations to the court, which the defense conceded were identical to its own preceding experience in questioning Stoeckley.

It is likewise not logical to credit Britt's assertion that, during the drive from Greenville, South Carolina, to the federal courthouse in Raleigh, Stoeckley spontaneously admitted being present in the MacDonald household and recalling seeing a child's rocking horse in Kristen's bedroom–which, according to MacDonald, demonstrates that Stoeckley possessed "insider" knowledge of the crime scene. (Mot. 5, 33). As explained, during Segal's prolonged interrogation of Stoeckley on the following day, he was apparently unable–even with the aid of photographs of the crime scene–to elicit from her any recollection of having observed the rocking horse on the night of the murders. Moreover, it appears from Segal's in-court examination of Stoeckley that it was he who injected the matter of the rocking horse into the proceedings for the first time by showing her photos of it during the questioning session, and then unsuccessfully attempting to extract an admission that, during the preceding

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

interrogation, she commented that it looked to have been broken. Such developments are flatly inconsistent with Britt's assertion that, just a day earlier, Stoeckley spontaneously referred to the rocking horse.[35]

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

Even if, however, Britt's present assertions concerning prosecutor Blackburn's conduct relating to Stoeckley were credited, MacDonald has failed to demonstrate that, if considered in light of the evidence as a whole, no reasonable fact-finder would have convicted MacDonald of the murders. MacDonald speculates that, but for Blackburn's false assertion concerning Stoeckley's loss of recollection, the district court would likely have admitted her out-of-court statements and the testimony of witnesses who heard her out-of-court admissions. See Mot. at 31. Putting to one side for a

[35] References by Stoeckley to the rocking horse in the MacDonald household would not have demonstrated that she was present at the crime scene in any event. The day after the murders, a picture of the MacDonald household, taken through Kristen's bedroom window, was published in the The Fayetteville Observer. It clearly depicted the rocking horse. See GX 1153 Tr. 7042. Similarly, as disclosed during the cross--examination of defense team member Wendy Rouder, the August 1970 edition of Front Page Detective published an account of the MacDonald murders, including a photo at page 19, in which Rouder acknowledged she could "clearly see a rocking horse." The photo was captioned "Dramatic photo through window of slain children's room keynoted tragedy initially..."Tr. 5939-5940.See . App. Vol. IV. (Copies of both photographs appear at App. Vol. V, Tabs 6 and 7.)

Further embellishing the "rocking horse" tale, polygrapher Steve Danvenport, who allegedly polygraphed Britt now asserts that, during the examination, Britt told him that, while traveling to Raleigh, Stoeckley had mentioned seeing a *broken* hobby horse in the MacDonald household on the night of the murder. Def. Exh. 2. Not only does it appear that it was Segal who first injected the broken rocking horse sighting into Stoeckley's "recollections" the day after the ride to Raleigh, but crime scene photos show that the rocking horse was not, in fact, broken, further undermining the value of such "insider corroboration" to Stoeckley's previous renditions of her whereabouts at the time of the murders. See also the photo depicting the attached rear springs of the rocking horse. App. Vol. V, Tab 8.

moment the voluminous forensic evidence demonstrating MacDonald's guilt–which would not have changed in the least–these assumptions cannot withstand scrutiny.

At the time the trial judge entertained the testimony of Stoeckley and the witnesses who allegedly heard Stoeckley' pretrial admissions, and ruled that her out-of-court statements should be excluded, it explained its reasons therefor at length. In particular, the court observed:

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

(Tr. 5807-08 (emphasis added).) Thus, the record belies MacDonald's initial premise that, if Blackburn had acknowledged Stoeckley's alleged admissions to him, implicating herself in the murders, the trial judge would likely have admitted her out-of-court admissions to others. Instead, it demonstrates that his decision was *not* predicated upon Blackburn's allegedly false representations, but, rather on the totality of the facts presented to him, particularly the inconsistent and contradictory nature of her pretrial statements to which the court had just been exposed, her inconsistent testimony, and the fact that her pretrial admissions were made while in a state of drug-induced hallucinations. At the very most, a representation by prosecutor Blackburn that Stoeckley had acknowledged

participation in the murders while being interviewed by him would simply have been an example of another inconsistent statement, which–particularly in light of her immediately preceding denial of recollection to defense counsel–would only have bolstered the district court's ruling excluding her statements as untrustworthy.[36]

Moreover, viewing the record of this case in its entirety, including developments following MacDonald's convictions,[37] this Court can be doubly sure that, even if the trial judge had the benefit of additional information demonstrating that Stoeckley had "recalled" her whereabouts on the night of the murders during the prosecutor's interview, the court would not have altered its evidentiary ruling excluding her out-of-court statements and the testimony of those who overheard them. As explained, following MacDonald's convictions, two defense investigators succeeded in extracting from Stoeckley yet additional statements acknowledging participation in the murders of the MacDonald family–which she thereafter retracted or told government investigators were the product of a dream. United States v. MacDonald, 640 F. Supp. at 319-321. These subsequent admissions constituted part of the predicate for a motion for a new trial, based–as is presently the case–on the premise that Stoeckley's asserted lack of recollection at trial was false and the product of efforts to avoid prosecution. Id. at 322. After thoroughly reviewing Stoeckley's new admissions in the context of her in-court testimony and the totality of her statements to others acknowledging possible participation in the MacDonald

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

[37] See Def. Mot. at 32, quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995).

family murders, the trial judge denied the new trial motion. With respect to the Stoeckley admissions, he observed:

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

MacDonald, 640 F. Supp. at 324. The court of appeals affirmed that ruling. It observed that Stoeckley's pretrial statements admitting possible involvement in the murders "contained internal suggestions that they were the product of a fantasy," in particular, that on one occasion, she stated that a candle she was holding at the time of the murder "was not dripping wax; it was dripping blood." United States v. MacDonald, 779 F.2d 962, 964 (4th Cir. 1985). App. Vol. I, Tab 11.

In view of this Court's reasoning in disposing of claims alleging that Stoeckley had subsequently contradicted her trial testimony and admitted participation in the murders to others, there is no possibility that it would have admitted Stoeckley's out-of-court statements even if it had known that Stoeckley acknowledged participation in the murders to prosecutor Blackburn, or that it would have granted post-trial relief had this information been provided to him later. And, likewise, the

factors that counseled the court of appeals to affirm the district court's ruling also compel rejection of such an assertion as the basis for further habeas review.[38]

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

MacDonald further argues (Mot. 32) that, absent Blackburn's threat to indict Stoeckley, she would have testified to her involvement in the murders at trial and that such testimony, coupled with that of other witnesses to her out-of-court admissions (which the argument presumes would have been admitted), "would have changed the outcome of the trial."

First, even if it were assumed that Blackburn had made the threat Britt now attributes to him, it simply does not follow–as MacDonald now assumes–that, absent such threat, Stoeckley would have acknowledged her involvement in the murders and testified favorably to the defense. According to MacDonald's own attorney, she did not do so during a lengthy interrogation by the defense shortly *before* her meeting with Blackburn and subsequently taking the stand. Moreover, as recounted earlier, the trial judge who heard her testimony and observed her demeanor concluded that her inability to recall her whereabouts on the night of the murders was the result of "a drug-induced state of

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

confusion." 640 F.Supp. at 324. None of these facts is altered in the least by Britt's new "revelations" concerning prosecutor Bladkburn's alleged threats.

More importantly, in addressing MacDonald's motion for a new trial, based upon the premise that Stoeckley's "confessions" and the testimony of her auditors would have resulted in a favorable verdict, the district court, conducting an analysis similar to the second prong of this Court's gatekeeping review, meticulously reviewed the totality of the evidence admitted against MacDonald and the impact of Stoeckley's confessions in light of that evidence had they been presented at a hypothetical new trial.[39] It observed:

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

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

> The court is certain that Stoeckley was telling the truth when she testified that she could not recall her whereabouts on the night of the murders. This is what she said for over ten years following the crimes and MacDonald has failed to convince the court that her "confessions" show otherwise. These statements are factually erroneous and inconsistent not only with MacDonald's story but with the physical evidence gathered from the crime scene . . . .

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[39] We note, however, that the standard this Court then used to govern MacDonald's motion for a new trial–whether "the evidence [at issue] would probably produce a new result" (MacDonald, 640 F. Supp. at 331)–is significantly more lenient than that governing a gatekeeping motion seeking leave to file a second or successive petition for habeas relief. In contrast, that standard requires proof that *no* reasonable juror would have voted to convict.

> Even were the court to assume Stoeckley lied on the witness stand, it could not conclude '[t]hat without Stoeckley's testimony, the jury *might* have reached a different conclusion.' It might well be that Stoeckley's trial testimony took the defense by surprise, but if the jury had not heard that testimony but instead had heard her so-called confessions, *in the court's opinion the jury would not have reached a different verdict, for the government's cross-examination would surely have developed the glaring inconsistencies in her story . . . and that, because of her drug-crazed condition she was a totally unreliable, untrustworthy witness.*

640 F. Supp. at 333 (emphasis added).[40]

In a hypothetical retrial, in which the government would possess the benefit of "all relevant evidence [including] that . . . unavailable at trial," (Schlup, 513 U.S. at 328), the prosecution would be able to present not only the very same forensic evidence that the trial judge deemed more than sufficient to trump Stoeckley's "confessions," it would it would also be able to present forensic evidence in the form of recently released results of DNA analysis, as to which, for purposes of this discussion, we note that MacDonald has acknowledged in his Motion To Add An Additional Predicate based upon the AFIP Report, that none of the samples tested matched the DNA of Stoeckley or Mitchell.[41] Accordingly, the Government would argue that these results eliminate both Stoeckley and Mitchell as the source of any of the questioned blood or hairs.[42]

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

[41]See Motion at pp. 2-3, and Appendix 1, Tab 1. Although MacDonald tries to camouflage this fact, only mentioning that Stoeckely and Mitchell's DNA did not match that of specimens 58A1, 75A, and 91A (thereby acknowledging that they are eliminated as possible sources of these specimens) the AFIP report clearly reflects that "based upon mitochondrial DNA analysis the following specimens [05A-Helena Stoeckley Reference and 198A--Gregory Mitchell Reference] were not consistent with any other sample tested..."

[42] We note that on March 22, 2006, MacDonald filed under the docket number in the instant habeas a pleading seeking to expand the instant §2255 petition to include consideration of

Finally, the government would be able to impeach Stoeckley's "admissions" not only with her pretrial contradictions, but also with the many bizarre and inconsistent statements admitting and then contradicting her presence at the crime scene which she made to investigators for both sides following MacDonald's conviction. And it would also be able to demonstrate both the falsity of such "admissions" with additional, independent facts, as well as their inconsistency with MacDonald's own story.[43] Thus, in our view, this Court's preceding analysis of Stoeckley-related claims, which the court of appeals characterized as "meticulous" (779 F. 2d at 966), should be virtually dispositive of MacDonald's instant claim that, but for Blackburn's alleged misrepresentations, Stoeckley's out-of-court confessions would have been admitted and that, had such evidence been presented, no reasonable fact finder would have voted to convict.

D. Evidence That Has Been Reviewed and Rejected By This Court In Preceding Habeas Proceedings Cannot Be Revisited In Connection With the Instant Motion.

Relying principally upon Schlup v. Delo, 513 U.S. 298 (1995), MacDonald further argues that a gatekeeping assessment of the impact of his present claim of "newly discovered" evidence upon the outcome of a hypothetical retrial, affords him a license to seek consideration of other items of "newly-discovered" evidence proffered and rejected in the course of his preceding three habeas petitions. See

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the DNA testing as newly discovered evidence. The United States will respond to this latest motion, and to the jurisdictional issues it raises, as provided by Local Civil Rule 7.1(e)(1). Accordingly, we respectfully reserve the right to address at the appropriate time, the results of the DNA testing, which inculpate MacDonald in the murders of his family, and therefore should be included in the evaluation of the previously filed motion under 28 U.S.C.§ 2255.

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

Section 2255 Mot. at 21-26, 32-33; Motion To Expand the Record To Include Itemized Authenticated Evidence (filed March 23, 2006).[44] Schlup, however, provides no escape hatch to circumvent judicial bars to repetitive habeas litigation.

In Schlup, supra, the Supreme Court held that, in assessing the adequacy of a habeas petitioner's showing with respect to the second gatekeeping requirement–that of "actual innocence,"–the reviewing tribunal's consideration of the evidence should include "relevant evidence that was either excluded or unavailable at trial," such as "evidence tenably claimed to have . . . become available only after trial." 513 U.S. at 327. Thus, under Schlup, this Court's assessment of whether the impact of MacDonald's "newly-discovered" evidence is so significant that no reasonable juror would have voted to convict, could properly include favorable evidence elicited at trial (see "Statement of Itemized Material Evidence" paras. 1-30), Stoeckley's excluded pretrial admissions to others suggesting that she participated in the murders of the MacDonald family (id. para. 31), as well as the "newly-discovered" evidence relating to her alleged admissions to Deputy Marshal Jim Britt (id. para. 32).

Nothing in Schlup, however, suggests that, in the guise of a "gatekeeping motion," a habeas petitioner has license to revisit "evidence" that a prior habeas court has already reviewed and found not to have been "newly-discovered," foreclosed under abuse-of-the-writ principles, or utterly lacking in probative value. As we show below, much of the material that MacDonald claims should be considered in tandem with his "newly-discovered" evidence simply does not fall within the scope of evidence that was–in the language of Schlup–excluded or unavailable at trial. To the contrary, as we

[44] MacDonald's "Motion to Expand the Record" was accompanied by a "Statement of Itemized Material Evidence" which contained 48 paragraphs itemizing matters that MacDonald claims should be considered in assessing the sufficiency of his instant Section 2255 motion.

show below, virtually all of the previously rejected evidence upon which MacDonald now relies was introduced in evidence at trial, or was available at trial but simply not exploited by the defense. See United States v. MacDonald, 778 F. Supp. 1342, 1353 (E.D.N.C. 1991).[45]

Moreover, as the Schlup Court recognized, even before the enactment of the AEDPA, the Supreme Court adopted "a qualified application of the doctrine of res judicata" (Schlup, 513 U.S. at 319, quoting McCleskey v. Zant, 499 U.S. 467, 490-91 (1991)) in habeas cases which precluded the use of Section 2255 as a mechanism to raise claims that were litigated and rejected in prior habeas petitions. See Sanders v. United States, 373 U.S. 1, 15 (1963) ("controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief, . . . (1) if the same ground [is] presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; (3) the ends of justice would not be served by reaching the merits of the subsequent application.") See also Cabrera v. United States, 972 F.2d 23, 25 (2d Cir. 1992) (rejecting claim in a second Section 2255 petition because it encompassed a claim raised in a previously-rejected petition); cf. Williams, 330 F.3d at 282 (holding, in the context of a PFA review, that claims "recycled" from a previous § 2254 application cannot form the basis for

[45] The only paragraphs which contain "new" evidence not previously litigated are paragraphs "32" (describing Britt's transportation of Stoeckley to Raleigh), "33" (Blackburn's alleged threat to Stoeckley), "37" (Blackburn's 1993 conviction), "41, n 6" (affidavits of Lane, Buffkin and Morse) and "46" (DNA results). The assertions in paragraphs "32", "33", "37" and "41, n 6" are already in the record by virtue of the Court of Appeals having authorized the instant petition, consequently there is no legitimate need to "expand" the record for their inclusion, but MacDonald does not get to relitigate these issues. Paragraph "47" is already the subject of a separate motion to add some of the results of the DNA testing as an additional predicate to which the United States will respond separately.

a pre-filing authorization).[46] A construction of the language from Schlup, which would permit a habeas petitioner to rely anew upon evidence previously considered and rejected by a preceding decision, would effectively thwart the objectives of the Supreme Court in seeking to "curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process . . . [and] undermine the orderly administration of justice." McCleskey, 499 U.S. at 496. We briefly recount those decisions below.

In 1984, MacDonald filed a petition under 28 USC § 2255, claiming that various items of physical evidence allegedly linking Stoeckley to the crime–including a bloody syringe partly filled with liquid, a photograph of the letter "G," blood-stained clothing and boots, and skin allegedly from underneath Colette's fingernail–had been suppressed and had only come to light after trial. After a painstaking review of those claims, this Court determined that there had been no suppression;[47] the evidence would have been cumulative if introduced at trial; "in all probability would have been of no exculpatory value to [MacDonald];" and, in any event, would not have affected the outcome of the trial. 640 F.Supp. at 300. That disposition forecloses MacDonald's instant claim (see Section 2255

[46] We note that 28 U.S.C. § 2244(b)(1) expressly provides that "[a] claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application shall be dismissed."

[47] This Court determined that the defense knew or had notice as to the existence of several of the items at issue. See 640 F. Supp. at 304 (the boots); id. at 308 (photographs of the letter "G"). It questioned whether several other items ever existed. Id. at 301-02 (the syringe). And it found that the alleged bloody clothing was never in the possession of the government. Id. at 305. Thus, it can hardly be said that any of these items was either *excluded* at trial or newly-discovered after trial.

Motion at 21-24) that these items should again be considered to support his claim that the murders of his family was the work of Stoeckley and other intruders.[48]

As part of his 1984 litigation, MacDonald also filed a "Motion to Reopen" alleging that, following the trial, Stoeckley had "confessed" to her participation in the murders to defense investigators, and that Greg Mitchell,[49] a companion of Stoeckley's whom she had implicated as a possible participant in the murders, had also made statements to others acknowledging participation in the murders.[50] After thoroughly reviewing the content of these disclosures and the circumstances under which they were made, the habeas court found that Stoeckley's post-trial admissions were false (640 F. Supp. at 333), and that evidence suggesting Mitchell's participation in the murders was "speculative and circumstantial" and therefore insufficient to demonstrate any real likelihood that he was involved. Id at 328.[51] These determinations foreclose MacDonald's invitation to include such

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[48] In this respect, MacDonald protests that this Court's earlier rulings relating to "newly-discovered" evidence addressed it piecemeal and therefore did not consider the totality of that evidence. See Mot. 33 n.20. The fallacy of that argument, however, is that, in evaluating each item of such evidence, the court determined that not a single item was exculpatory in any material way. Stated in mathematical terms, the sum of zero plus zero cannot exceed zero. Thus, even if permissible, consideration of that evidence does not advance MacDonald's cause in the least.

[49] Mitchell died of alcohol-related liver disease in 1982.

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

[51] In attempting to resuscitate his claim that Mitchell was a confessing participant in the murders of the MacDonald family, MacDonald has inserted into the materials supporting the instant motion (which addresses an entirely unrelated claim) three affidavits attesting to the fact that Mitchell acknowledged participation in the murders to others. See Mot. at 26 & Def. Exh. 7**.** It is our contention that these items are untimely under 28 U.S.C. § 2255 para. 6(4), and that they

evidence in the determination whether he has fulfilled the "no reasonable jury" gatekeeping requirement. See MacDonald's "Statement of Itemized Material Evidence" para. 38-41.

Finally, in 1990, MacDonald claimed that "newly-discovered evidence" in the form of handwritten lab notes demonstrating the presence of synthetic "wig fibers" in a hair brush located in the MacDonald bedroom demonstrated the presence of a wig-wearing Stoeckley in the household, and that unsourced black wool fibers had been discovered in strategic locations at the MacDonald household, also indicia of intruders. This Court found that such evidence was neither newly-discovered nor exculpatory. With respect to the former, it determined first that "MacDonald was given unfettered access to the physical evidence" prior to trial and that it was made available to his forensic expert who made no effort to examine it. MacDonald, 778 F. Supp. at 1353. Thus, such evidence was neither unavailable nor excluded at trial.

Moreover, this Court held that MacDonald's failure to include claims relating to such evidence–of which he had ample notice–in his 1984 application for habeas relief constituted an abuse of the writ under McCleskey, supra; (see id. at 1356-57).[52] Finally, with respect to the requirement of

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should be summarily rejected under principles of law governing repetitive Section 2255 proceedings involving the assertion of similar factual claims. We are therefore moving to strike these submissions by separate motion. However, even if procedural impediments to consideration of Mitchell's "confessions"did not exist, this Court has properly determined that any statements Mitchell may have made concerning his possible participation in the murders were likely the product of mental torment resulting from the accusations of others that he was involved. MacDonald, 640 F. Supp. at 328. None of the newly-submitted affidavits affects that determination in the least.

[52] The court of appeals affirmed, applying abuse of the writ principles. United States v. MacDonald, 966 F.2d 854, 861 (4th Cir.1992). It observed that the case presented "precisely the type of collateral appeal the Court, through McCleskey, intended to obstruct and deter," in which some 20 years after his convictions, MacDonald attempted to reopen with "specious evidence." Id. at 860.

exculpatory value, this Court determined, after thorough analysis that, in any event, the wool yarns and synthetic fibers mentioned in the lab reports "afford[] little, if any support for MacDonald's account of the crimes." Id. at 1350-51.[53]

In 1997, MacDonald sought to reopen these determinations and proffered additional evidence which he claimed showed (contrary to the government's earlier assertions) that the blond fibers at issue in the 1990 petition could have come from a human cosmetic wig. Treating the claim as "akin to a third habeas petition," this Court transferred the claim to the court of appeals for a gatekeeping determination. United States v. MacDonald, 979 F. Supp. 1057, 1068-69 (E.D.N.C. 1997) (App. Vol. I, Tab 16). Although that court granted his motion for DNA testing, it denied the motion to file a successive habeas application in all other respects. MacDonald then appealed this Court's ruling on the fraud on the court claim. The Court of Appeals affirmed, thereby foreclosing further consideration of the saran fiber claim. (App. Vol. I, Tab 14). Once again, these dispositions foreclose MacDonald from claiming in these proceedings that the fibers at issue are exculpatory. See MacDonald's "Statement of Itemized Material Evidence" paras. 42-43.

CONCLUSION

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[53] In the case of the black wool fibers, this Court observed that one of the reasons they could not be traced to any item of clothing in the MacDonald home was that most of the family's clothing was returned to MacDonald and had been disposed of by MacDonald after the Army charges were dismissed and that, in any event, "there is no likelihood the jury would have reached a different verdict had it known about the existence of these few wool fibers." Id. at 1351. In the case of the three synthetic fibers found in the hairbrush, this Court observed that one of the fibers had been traced by an FBI expert to Colette's wig, and that the others–two saran fibers–were, according to an expert, made of a substance not suitable for the manufacture of human cosmetic wigs. Id. at 1350-51. MacDonald now claims that the latter determination was based upon expert witness testimony that was subsequently shown to have been false. Mot. 25 n.18. This Court, however, found that the evidence proffered by the defense did not support the inference that the expert had committed any wrongdoing in presenting an opinion concerning the uses of saran. MacDonald, 979 F. Supp. at 1068-69.

As the court of appeals has previously observed, "[e]very habeas appeal MacDonald brings consumes untold government and judicial resources." MacDonald, 966 F.2d at 861. The instant motion, which resuscitates claims that have been essentially rejected by this Court and the court of appeals on prior occasions, constitutes yet another abuse of the writ through the presentation of "specious evidence." Id. It therefore merits the same disposition.

Respectfully submitted this 30th day of March, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the defendant in this action either electronically or by placing a copy of same in the United States mail, postage prepaid, and addressed to counsel for defendant as follows:

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