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September 17, 1997

(VIA OVERNIGHT DELIVERY)

Clerk of the Court
Clerk's Office
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street
Room 501
Richmond, VA 23219-3538

Re: United States v. Jeffrey R. MacDonald
Docket No. 97-413 (Transfer from the Eastern District of
North Carolina)

Dear Sir or Madam:

In connection with the above-captioned proceeding which was recently transferred to the Court of Appeals from the United States District Court for the Eastern District of North Carolina (Fox, C.J.), please find enclosed for filing the following in four boxes:

(1) Fourth Circuit form -- Motion Under 28 U.S.C. 2244 for Order Authorizing the District Court to Consider Second or Successive Application for Relief Under 28 U.S.C. § 2255, with attached certificate of service (please note that the original signed copy of this form motion will be filed with the Court and served on opposing counsel as soon as it is returned to undersigned counsel via mail by Dr. MacDonald who is incarcerated in Sheridan, Oregon);

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(2) Memorandum of Law in Support Jeffrey R. MacDonald's Motion to the United States Court of Appeals for the Fourth Circuit for Order Authorizing District Court for the Eastern District of North Carolina to Consider a Successive Application for Relief Pursuant to 28 U.S.C. § 2255;

(3) Order entered in the United States District Court for the Eastern District of North Carolina (Fox, C.J.) on September 2, 1997, transferring portions of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and For Discovery to the United States Court of Appeals for the Fourth Circuit;

(4) Motion to Reopen filed in the Eastern District of North Carolina on April 22, 1997, consisting of:

- (a) Jeffrey MacDonald's Motion to Reopen 28 U.S.C. §2255 Proceedings and for Discovery;
- (b) Memorandum of Law in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery;
- (c) Affidavit of Philip G. Cormier No. 1 (Concerning Saran Fibers) in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery;
- (d) Affidavit of Philip G. Cormier No. 2 -- Request for Access to Evidence to Conduct Laboratory Examinations -- in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery; and,
- (e) Exhibits to Affidavit of Philip G. Cormier No. 2 - - Request for Access to Evidence to Conduct Laboratory Examinations -- in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery;
- (f) Jeffrey R. MacDonald's Reply to the Opposition of the United States to Defendant's Motion to "Reopen" § 2255 Proceedings and for Discovery, and Response to the Government's Motion to Dismiss 28 U.S.C. § 2255 Petition for Lack of Jurisdiction and Suggestion in the Alternative to Transfer to the Court of Appeals; and,

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- (g) Motion for Leave to File Supplemental Affidavit of Philip G. Cormier and Supplemental Affidavit of Philip G. Cormier.

(5) Dr. MacDonald's 1990 Petition for 28 U.S.C. § 2255 Relief, filed in the Eastern District of North Carolina on October 19, 1990, consisting of:

- (a) Form motion for relief under 28 U.S.C. § 2255.
- (b) Jeffrey R. MacDonald's Brief in Support of 28 U.S.C. Section 2255 Petition Seeking Relief From Conviction Obtained by the Suppression of Exculpatory Evidence.
- (c) Appendix of Excerpts from the Record (appendix to item (b)).
- (d) Affidavit of John J. Murphy in Support of Jeffrey R. MacDonald's 28 U.S.C. § 2255 Petition Seeking Relief from Conviction Obtained by the Suppression of Exculpatory Evidence.
- (e) Affidavits of Anthony P. Bisceglie, Fred H. Bost, Ellen Dannelly, James F. Douthat, Dennis H. Eisman, Orrin L. Grover, Ted L. Gunderson, Michael J. Malley, Wendy P. Rouder, Sara A. Simmons, Wade M. Smith, and John I. Thornton in Support of Jeffrey R. MacDonald's 28 U.S.C. § 2255 Petition Seeking Relief from Conviction Obtained by the Suppression of Exculpatory Evidence.
- (f) Affidavit of Bernard Segal in Support of Jeffrey R. MacDonald's 28 U.S.C. § 2255 Petition Seeking Relief from Conviction Obtained by the Suppression of Exculpatory Evidence.
- (g) Opinions of the District Court and the Fourth Circuit denying the 1990 petition.

(6) Dr. MacDonald's 1984 application for relief pursuant to 28 U.S.C. § 2255 filed in the Eastern District of North Carolina on April 5, 1984.

- (a) Motion for New Trial.
- (b) Motion to Set Aside Judgment of Conviction Pursuant to 28 U.S.C. Section 2255.

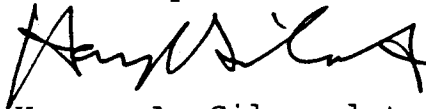
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- (c) Motion to Vacate Sentence.
- (d) Opinions of the District court and the Fourth Circuit denying relief on items (a) - (c).

In the event that you have any questions about the enclosed materials, or there are additional materials which the Court believes would be helpful to consideration of this motion, please feel free to contact me or attorney Philip Cormier in my office.

Thank you for your cooperation in this matter.

Sincerely,



Harvey A. Silverglate

PGC/ps

Enclosures: 1 original package and 3 copies.

cc: Janice McKenzie Cole, United States Attorney, EDNC,
via first class mail
John F. DePue, Attorney, United States
Department of Justice
Wade Smith, Esq., Raleigh, NC (w/out enclosures)

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MOTION UNDER 28 U.S.C. § 2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER SECOND OR SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. §§ 2254 OR 2255

United States Court of Appeals for the Fourth Circuit

Name of Movant JEFFREY R. MacDONALD	Prisoner Number 00131-177	Case Number (leave blank)
Place of Confinement F.C.I. SHERIDAN - UNIT 4A, P.O. Box 5000 Sheridan, OR 97378-5000		

IN RE: JEFFREY R. MacDONALD, **MOVANT**

1. Name and location of court which entered the judgment of conviction from which relief is sought: UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

2. Parties' Names: UNITED STATES vs. JEFFREY R. MacDONALD
75-26-CR-3 Indictment filed 1/24/75

3. Docket Number: _____ 4. Date Filed: 8/29/79

5. Date of judgment of conviction: _____ 6. Length of sentence: 3 consecutive life

7. Nature of offense(s) involved (all counts): Count 1-Murder- 18 U.S.C. sec. 1111 - guilty 2nd degree
Count 2-Murder - 18 U.S.C. sec. 1111 - guilty - 2nd degree
Count 3-murder - 18 U.S.C. sec. 1111 - guilty- 1st degree

8. What was your plea? (Check one) Not Guilty Guilty Nolo Contendere

9. If you pleaded not guilty, what kind of trial did you have? (Check one) Jury Judge only

10. Did you testify at your trial? (Check one) Yes No

11. Did you appeal from the judgment of conviction? (Check one) Yes No

12. If you did appeal, what was the

Name of court appealed to: United States Court of Appeals for the Fourth Circuit
United States Jeffrey R. MacDonald

Parties' names on appeal: _____ vs. _____

Docket number of appeal: 79-5253 Date of decision: 8/16/82

Result of appeal: Conviction affirmed

13. Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, applications for relief, or other motions regarding this judgment in any federal court? Yes No

14. If you answered "Yes" to question 13, answer the following questions:

U.S. District Court
Eastern Dist. of North Carolina

A. FIRST PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? _____

(2) What were the parties' names? UNITED STATES vs. JEFFREY R. MacDONALD

(3) What was the docket number of the case? 75-26-CR-3

(4) What relief did you seek? (See attached sheets)

(5) What grounds for relief did you state in your petition, application, or motion? _____

(See attached sheets)

(6) Did the court hold an evidentiary hearing on your petition, application or motion? Yes No

(7) What was the result? Relief granted Relief denied on the merits

Relief denied for failure to exhaust Relief denied for procedural default

(8) Date of court's decision: 3/1/85

U.S. District Court
Eastern District of North Carolina

B. SECOND PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? _____

(2) What were the parties' names? UNITED STATES vs. JEFFREY R. MacDONALD

(3) What was the docket number of the case? Nos. 75-26-CR-3 and 90-104-CIV-3-D

(4) What relief did you seek? (See attached sheets)

(5) What grounds for relief did you state in your petition, application, or motion? _____

(SEE ATTACHED SHEETS)

(6) Did the court hold an evidentiary hearing on your petition, application or motion? Yes No

(7) What was the result? Relief granted Relief denied on the merits

Relief denied for failure to exhaust Relief denied for procedural default

(8) Date of court's decision: 7/8/91

C. THIRD AND SUBSEQUENT PETITIONS, APPLICATIONS, OR MOTIONS (See attached)

For any third or subsequent petition, application, or motion, attach a separate page providing the information required in items (1) through (8) above for first and second petitions, applications, or motions.

D. PRIOR APPELLATE REVIEW(S)

Did you appeal the results of your petitions, applications, or motions to a federal court of appeals having jurisdiction over your case? If so, list the docket numbers and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals.

Appeals to the 4th Circuit.

First petition, application, or motion	<input checked="" type="checkbox"/> Yes	Appeal No. 85-6208	12/17/85	<input type="checkbox"/> No
Second petition, application, or motion	<input checked="" type="checkbox"/> Yes	Appeal No. 91-6613	6/2/92	<input type="checkbox"/> No
Subsequent petitions, applications or motions	<input checked="" type="checkbox"/> Yes	Appeal No. <u>not docketed yet</u>		<input type="checkbox"/> No
Subsequent petitions, applications or motions	<input type="checkbox"/> Yes	Appeal No. _____		<input type="checkbox"/> No
Subsequent petitions, applications or motions	<input type="checkbox"/> Yes	Appeal No. _____		<input type="checkbox"/> No
Subsequent petitions, applications or motions	<input type="checkbox"/> Yes	Appeal No. _____		<input type="checkbox"/> No

If you did not appeal from the denial of relief on any of your prior petitions, applications, or motions, state which denials you did not appeal and explain why you did not.

15. Did you present any of the claims in this application in any previous petition, application, or motion for relief under 28 U.S.C. § 2254 or § 2255? (Check one) Yes No
(SEE ATTACHED)

16. If your answer to question 15 is "Yes," give the docket number(s) and court(s) in which such claims were raised and state the basis on which relief was denied.

(SEE ATTACHED)

17. If your answer to question 15 is "No," why not? This Court will grant you authority to file in the district court only if you show that you could not have presented your present claims in your previous § 2254 or § 2255 application because . . .

A. (For § 2255 motions only) the claims involve "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [you] guilty"; or,

B. (For § 2254 petitions only) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [you] guilty of the offense"; or,

C. (For both § 2254 and § 2255 applicants) the claims involve "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court [of the United States], that was previously unavailable."

I did not present the following claims in any previous petition, application, or motion for relief under 28 U.S.C. § 2254:

I did not present the claims listed above in any previous petition, application, or motion because

Movant prays that the United States Court of Appeals for the Fourth Circuit grant an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255.

Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct.

Executed on _____
[date]

Movant's Signature

PROOF OF SERVICE

A copy of this motion and all attachments must be sent to the state attorney general (§ 2254 cases) or the United States Attorney for the United States judicial district in which you were convicted (§ 2255 cases).

I certify that on _____ I mailed a copy of this motion and all attachments
[date]

to _____ at the following address:

Movant's Signature

UNITED STATES COURT OF APPEALS for the FOURTH CIRCUIT

Attachment to Jeffrey R. MacDonald's Motion for Order Authorizing District Court to Consider Successive Application for Relief under 28 U.S.C. § 2255.

Question 14.

A. First Petition.

With respect to motions for relief regarding the judgment in this case, on April 5, 1984, I filed the following motions in one consolidated action in the United States District Court for the Eastern District of North Carolina (Dupree, J.): (1) Motion for a New Trial, (2) Motion to Set Aside Judgment of Conviction Pursuant to 28 U.S.C. § 2255, (3) Motion to Vacate Sentence (pursuant to 28 U.S.C. § 2255), and (4) Motion to Recuse.

The parties' names in this proceeding were United States v. MacDonald, and the Docket No. was 75-26-CR-3.

The relief I sought via these motions was an order setting aside the judgment, vacation of sentence and discharge from custody, or in the alternative, a new trial.

The grounds for relief were as follows: newly discovered evidence in the form of witness statements; Brady violations arising from the suppression of exculpatory evidence, interference with my right to counsel, and recusal of the district court trial judge.

B. Second Petition.

On October 19, 1990, I filed a 28 U.S.C. § 2255 Petition Seeking Relief From Conviction Obtained by the Suppression of Exculpatory Evidence in the Eastern District of North Carolina (Dupree, J.).

The parties' names in this proceeding were United States v. MacDonald, and the Docket Nos. were 75-26-CR-3 and 90-104-CIV-3-D.

The relief I sought was a new trial.

The grounds for relief were that (1) my conviction obtained by the government was unconstitutional because the government had withheld exculpatory evidence (different from the evidence undergirding my first petition) favorable to my defense; (2) my conviction was the result of the prosecution's unconstitutional conduct in presenting false evidence to the Court and to the trial jury, (3) the prosecution's failure to fulfill duties under the Constitution and 18 U.S.C. § 3500 to disclose prior

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statements of witnesses.

C. Motion to Reopen Second Petition.

On April 22, 1997, I filed a Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery in the Eastern District of North Carolina, seeking a reopening of my second petition because of fraud on the court based on the grounds that a government agent had made false and misleading statements in affidavits filed in connection with my second petition which were central to the District Court's dismissal of my second petition and this Court's affirmance of that dismissal.

The parties' names in this proceeding were United States v. MacDonald, and the Docket Nos. were 75-26-CR-3 and 90-104-CIV-3-D.

The relief sought was the same as that described in subsection B above.

The District Court did not hold an evidentiary hearing on my motion to reopen notwithstanding my request for such a hearing.

On September 2, 1997, the District Court entered an order on my motion to reopen in which it (1) denied my motion to reopen upon a finding that I had not sufficiently demonstrated that the government had committed fraud upon the Court in connection with my second petition, and (2) transferred to this Court my claims that newly gathered evidence demonstrated my factual innocence. (A copy of this Order is filed herewith.)

Questions 15, 16 and 17:

Regarding, questions 15, 16, and 17, I have not answered either "Yes" or "No" to question 15 because neither a "yes" nor a "no" answer would be an appropriate response.

The aforesaid motion to reopen which was filed in the District Court on April 22, 1997 contained the following:

First, the motion sought to reopen the second petition which I filed in the District Court in October 1990 because of fraud on the court committed by the government during the litigation involving that petition. Thus, new facts undergirded my motion to re-open the claims made in my October 1990 petition. My motion to reopen argued that the government defrauded the District Court and this Court by withholding exculpatory evidence and making a false factual presentation which was clearly material to the District Court's and this Court's consideration of my second petition. More specifically, my motion to reopen presented evidence obtained by the defense after my second

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petition was denied which demonstrated that the government had acquired certain evidence which contradicted its claims that the long blond Saran fibers found at the crime scene could not, and were not, used in the manufacture of human wigs, and also contradicted its claims that these Saran fibers had originated from a doll. The District Court's order denying the aforesaid motion to reopen because of fraud on the court is presently the subject of a separate appeal to this Court. The notice of appeal was filed in the District Court on September 8, 1997.

Second, in addition to my fraud on the court claims, I presented evidence in my motion to re-open that was discovered by the defense post-trial which demonstrates my innocence. This evidence, the existence of which is documented in laboratory notes that were not disclosed to the defense at the time of trial, consists of unsourced hairs and blood evidence which was found under the victims' fingernails, in their hands, at other critical locations on their bodies, or in their bedding. The present motion seeks access to these items of physical evidence for the purpose of examining this evidence further by utilizing a new form of DNA technology (mitochondrial DNA testing) which has only recently begun to be utilized by forensic scientists. The District Court denied my request for discovery and access to this evidence for mitochondrial DNA testing.

Third, in addition, I also presented evidence in my motion to reopen my second petition which was obtained by the defense after proceedings on my second petition had concluded which further demonstrates that Saran fibers could be made in a form suitable for the manufacture of human wigs, and were in fact used in human wigs. The District Court did not review any of this new evidence concerning the use of Saran in human wigs prior to 1970.

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct.

Executed on _____
[date]

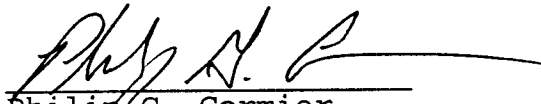
Jeffrey R. MacDonald

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CERTIFICATE OF SERVICE

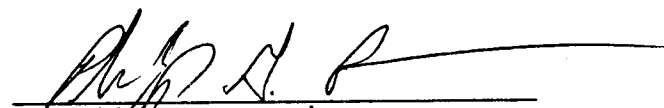
I hereby certify that on this 17th day of September 1997, a true copy of the foregoing motion and all attachments were served by first class mail upon Janice McKenzie Cole, United States Attorney, Eastern District of North Carolina, New Bern Avenue, Suite 800, Federal Building, Raleigh, NC 27601.



Philip G. Cormier
SILVERGLATE & GOOD
83 Atlantic Avenue
Boston, MA 02110
Tel. (617) 523-5933
Fax. (617) 523-7554

I hereby certify that on this 17th day of September 1997, a true copy of the foregoing motion and all attachments was served via first class mail upon

John F. DePue, Attorney
United States Department of Justice
Room 2521
Main Justice Building
10th and Pennsylvania Avenue, NW
Washington, D.C. 20530



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