

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	)		MEMORANDUM IN SUPPORT OF
v.	)		RESPONSE OF THE UNITED STATES
	)		TO PETITIONER’S MOTION TO ADD
	)		AN ADDITIONAL PREDICATE TO HIS
JEFFREY R. MacDONALD,	)		PREVIOUSLY FILED MOTION FOR
	)		RELIEF UNDER 28 U.S.C. § 2255
	)		

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby presents the following memorandum of law in support of its response, filed on this date, to petitioner’s motion to add an additional predicate to his previously filed motion for relief under 28 U.S.C. § 2255, and shows unto the Court the following:

**SUMMARY OF ARGUMENT**

For the fifth time, the applicant/defendant MacDonald seeks from this Court habeas relief from his convictions for the February 17, 1970, murders of his wife and children. For the second time he has deliberately failed to seek a pre-filing authorization (PFA) from the court of appeals as required by 28 U.S.C. §§ 2244 and 2255, and has therefore again asked this Court to entertain and adjudicate a matter over which it does not currently have jurisdiction. On this occasion, his claim is based upon the recent results of the DNA testing of some of the hairs, which he contends demonstrate the presence of intruders and proves his innocence.<sup>1</sup> In support of our submission that the instant

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<sup>1</sup>At the outset we reject the false premise that MacDonald urges this Court to accept, namely, that hairs which do not originate from a member of the MacDonald family could only have be left by an intruder during the commission of the crime. Similarly, we reject the assertion that such alleged evidence of “intruders” negates the evidence which actually convicted

motion is tantamount to a successive application for relief under 28 U.S.C. § 2255, and therefore must be dismissed for lack of jurisdiction, or, alternatively, transferred to the court of appeals, we present the following pertinent facts and legal argument.

## STATEMENT

### 1. Procedural History

The procedural history of this litigation has been chronicled in the Government's Response to the pending 28 U.S.C. § 2255 petition; accordingly we repeat only so much of it as is necessary to an understanding of the instant DNA motion.

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. 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).<sup>2</sup>

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." The Motion to Reopen sought ". . . to have the 1990 petition reopened on the grounds that the government submitted to this Court affidavits

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MacDonald, such as that pertaining to MacDonald's pajama top which he placed on his wife chest, by his own account, after the "hippies" had allegedly fled into the night. Stated another way, unidentified hairs do not change the fact that he stabbed his wife through his pajama top.

<sup>2</sup> 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 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).

of FBI Special Agent Michael P. Malone which were materially false and which were central to this Court's dismissal of his 1990 petition and to the Fourth Circuit Court of Appeals' affirmance of that dismissal, namely, whether or not certain long blond fibers made from a substance called saran, found at the crime scene, were used in the manufacture of wigs for human cosmetic purposes prior to the time of the crime."<sup>3</sup> The Motion to Reopen sought "... the following relief from this Court:

- (1) An order to the government directing it to respond to this motion.
- (2) In the event contested factual issues remain after the government's response to this motion, the Court should (a) grant MacDonald discovery, including access to various items of physical evidence which were examined by the FBI in connection with the 1990 petition, *as well as other items such as unsourced hairs which were found in critical locations at the crime scene, and which, if subjected to testing using new DNA technology, may very well permit Dr. MacDonald to further demonstrate his factual innocence*, and then (b) convene an evidentiary hearing on the motion to reopen and (c) an evidentiary hearing on the underlying 1990 petition, if needed, or (d), if no evidentiary hearing is required, by allowance of the petition."

Id. (emphasis added).

Other than informing this Court that the items to which MacDonald sought access for the purpose of conducting his own independent laboratory examinations were detailed in the Affidavit of Philip G. Cormier No.2 , the Motion to Reopen did not enumerate any other form of relief sought.

Id.

MacDonald also filed with this Court a 75-page Memorandum in Support of his motion to reopen.<sup>4</sup> The first 65 pages of the Memorandum in Support are devoted exclusively to the saran fiber cosmetic wig issue. Essentially, MacDonald contended that newly discovered evidence in the form

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<sup>3</sup>See Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings And For Discovery, at p. 1. ( App. Vol. VII, Tab 1).

<sup>4</sup>See Memorandum of Law In Support of Jeffrey R. MacDonald's Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery (App. Vol. VII, Tab 2).

of government documents received under the Freedom of Information Act, coupled with the results of their own investigative efforts, constituted newly discovered evidence that Malone had perpetrated a fraud on the court in his 1990 affidavits when he stated that saran fibers were used for manikin and doll wigs, and were not suitable for use in the manufacture of human cosmetic wigs.<sup>5</sup> MacDonald further contended that “. . . these blond Saran hair like fibers corroborate MacDonald’s account of events that he and his family were attacked by a group of intruders that consisted of three men and a blond-haired woman with a floppy hat, and is direct evidence that Stoeckley was actually present in the MacDonald home during the murders.” (Memo at 58-59).

MacDonald sought access to two categories of physical evidence for the purpose of conducting his own independent laboratory examination. After cataloging Malone’s alleged transgressions in other cases (Memo at pp. 65-68) the defense sought “. . . access to all items of physical evidence on which Malone conducted laboratory examination—including, but not limited to, the blond fibers found in the clear handled hairbrush, the black wool fibers found on Colette MacDonald and on the wooden club murder weapon, and any natural hairs examined by Malone—for the purpose of conducting its own independent laboratory examinations to verify the accuracy and truthfulness of his conclusions. Cormier Aff. No. 2 at ¶¶ 17-20 lists a series of exhibits which the defense seeks to test.” Id. at 68-69.<sup>6</sup> It is appropriate at this point to note that only the latter category of exhibits examined by Malone--the natural hairs--would be potential candidates for DNA testing.

MacDonald also identified a second category of exhibits he sought to have subjected to DNA

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<sup>5</sup>The underlying documentation offered in support of this claim, including the discovery of the manikin in the Mexican Museum of Anthropology wearing a wig made of saran, is found contained exclusively in Affidavit of Philip G. Cormier No.1.

<sup>6</sup> Cormier Affidavit No. 2 is found at App. Vol. VII, Tab 3.

testing. “In addition Cormier Aff. No. 2 lists a series of exhibits which Malone did not examine,

*but which contain unsourced hairs, debris and fibers, found in critical locations such as underneath the fingernails of the victims, which may very well contribute toward a demonstration of his Dr. MacDonald’s factual innocence. [Footnote 41 omitted.] The defense seeks access to these exhibits, as well, for the purpose of conducting independent laboratory examinations on these items, including, if appropriate, DNA testing. Cormier Aff. No.2 at ¶ 21. As far as the defense is aware, none of the hairs, skin and blood debris in this case have ever been subjected to any form of DNA testing, including the recently developed mitochondrial DNA testing which can, in appropriate circumstances, be used to identify hairs more accurately than can be achieved through microscopic examinations.*

Cormier Aff, No.2 at ¶¶ 22-29. *Id.* pp. 69-70. (Emphasis added.) MacDonald contended that this Court had “good cause” to grant this discovery under Rule 6(a) of the Rules Governing Section 2255 Proceedings. *Id.* pp. 70-71.

In conclusion, MacDonald’s Memo in Support repeated the same prayer for relief found in the Motion To Reopen, including that this Court should “. . . also grant MacDonald’s discovery requests in support of his motion and petition,” but did not otherwise seek any additional form of relief. *Id.* pp 72-73.

On May 12, 1997, the government moved to dismiss the Motion to Reopen for lack of jurisdiction, and suggested in the alternative that this Court transfer the matter to the court of appeals.<sup>7</sup> MacDonald then filed a Reply to the Opposition of the United States.<sup>8</sup> Therein MacDonald asserted,

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<sup>7</sup>See 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 (App. Vol. VII, Tab 4).

<sup>8</sup>See 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. (“Reply Memo”) (App. Vol. VII, Tab 5).

*inter alia*, that “. . . the unmatched hairs and fibers demonstrate the presence of intruders because of (1) the critical locations where these items were found, and (2) the way in which they interlock with other evidence to demonstrate Helena Stoeckley’s presence at the crime scene” [footnote 20 omitted]. (Reply Memo, p.35.)

Of the 43 pages comprising the Reply Memo, only one paragraph addresses MacDonald’s discovery request:

“Because of Malone’s false and misleading Saran fiber presentation in this case, and his pattern of deception in other cases, the accuracy and reliability of all examinations he conducted in the MacDonald case, and any conclusions he drew from such examinations, must be viewed as highly suspect. Therefore, MacDonald should be given access to the physical evidence for the purpose of subjecting it to laboratory examinations, including mitochondrial DNA testing which was not available in 1990. FN 23.”

FN 23. As noted in the Cormier Aff. No. 2, there are two categories of evidence which MacDonald seeks to test. The first category consists of all items which were examined by agent Malone, including the Saran fibers, the “bluish-black” wool fibers, and natural hairs. The second category consists of evidence Malone may not have tested, but which may assist MacDonald in establishing his “factual innocence” using new technology that was not available in 1990.

Id. at 39.

The “Conclusion” section of the Reply Memo stated:

For all the foregoing reasons, this Court should deny the government’s motion to dismiss, and grant MacDonald’s motion to reopen by (1) ordering that the government grant MacDonald access to the physical evidence, and (2) ordering an evidentiary hearing into Agent Malone’s actions and for the purpose of considering the substantial body of evidence which has surfaced from the government’s own files which corroborate MacDonald’s account by demonstrating the presence of intruders in the MacDonald home.

Id. at 41. This Court, after a detailed review of the record, denied the motion to reopen insofar as it was based upon a “fraud on the court” claim. United States v. MacDonald, 979 F. Supp. 1057

(E.D.N.C. 1997). This Court also addressed its lack of jurisdiction to grant MacDonald's discovery request:

On the basis of Malone's "suspect" conduct, MacDonald also seeks access to all items of physical evidence on which Malone conducted laboratory examinations, and other items of physical evidence not examined by Malone, "but which contain unsourced hairs, blood debris and fibers, found in critical locations such as underneath the fingernails of the victims, which may very well contribute toward a demonstration of Dr. MacDonald's factual innocence." (Mem. In Supp. of Mot. To Reopen at 69.) MacDonald seeks access to these exhibits to conduct independent laboratory analyses, including new DNA tests not previously available. *However, since the court will not reopen the proceedings on the 1990 petition and, as explained below, has no authority to consider the question of MacDonald's factual innocence based on all of his exculpatory evidence plus his new evidence regarding the possible origin of the saran fibers, there is no basis on which to allow MacDonald discovery.* Moreover, the significance of the items other than the saran fibers has been fully litigated in the past, and nothing now presented impugns the validity of the Government conclusions concerning them.

(See Opp'n of the United States to Mot. To Reopen at 51-52.) *Id.* At 1067.

Finally, this Court rejected MacDonald's assertion that it consider as new evidence of MacDonald innocence the affidavits of several individuals obtained since the conclusion of the litigation of the 1990 petition, who averred that saran fibers were manufactured in "tow form", and were used in wigs prior to February 1970.<sup>9</sup> This Court noted that even if true this contention, is "inappropriate to the court's limited area of concern on the motion to reopen—which is simply whether to reopen proceedings on the 1990 petition due to fraud on the court." *Id.* "As the Government cogently explains, the court is barred by the Antiterrorism and Effective Death Penalty Act of 1996 [citation omitted] from considering whether this new evidence, added to the weight of the previously amassed in a trial and two habeas proceedings, finally tips the balance in his favor so

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<sup>9</sup> See Appendix Three to Petitioners Statement Of itemized Material Evidence - With Citations To the Record Or To Authenticated Proofs- In Support of His Motion Under 28 U.S.C. Section 2255 To Vacate His Sentence

as to warrant a new trial . . . . In that respect, the motion to reopen is, as the Government argues, akin to a third habeas petition.” Id.

As this Court noted:

Following the amendment of 28 U.S.C. § 2255 by the Antiterrorism and Effective Death Penalty Act, the court cannot consider MacDonald’s presentation of such evidence now, but must transfer this matter to the Court of Appeals for the Fourth Circuit for consideration of certification of MacDonald’s argument as a successive habeas petition pursuant to 28 U.S.C. §§ 2244 and 2255. *If that court remands the matter for consideration of the merits, only then could this court address the weight of the evidence.*

Id. at 1068 (emphasis added).

This Court ruled as follows:

Thus MacDonald’s Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery is DENIED. His claim that newly gathered evidence that saran fibers were in fact used in the manufacture of human wigs prior to 1970, added to the weight of previously amassed exculpatory evidence, demonstrates his factual innocence and that he is entitled to a new trial, is TRANSFERRED to the United States Court of Appeals for the Fourth Circuit . . . .

Id. at 1069. (App. Vol. I, Tab 14).

As required by the Fourth Circuit, on September 17, 1997, MacDonald filed a 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. § 2255. (App. Vol. VII, Tab 6). In addition to reiterating his claims that Malone had committed fraud on the court, and that newly discovered evidence demonstrated his innocence, MacDonald told the court of appeals:

The present motion seeks access to these items of physical evidence [unsourced hairs and blood] 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 testing.



Id. at 3.

MacDonald also filed a pleading captioned: Memorandum In Support of Jeffrey R. MacDonald's Motion for An Order Authorizing the District Court for the Eastern District of North Carolina To Consider a Successive Application for Relief Under 28 U.S.C. § 2255 ("Memo In Support"). ( App. Vol. V, Tab 9). The Memo in Support concluded with the prayer that the court of appeals grant his motion to reopen, and:

In conjunction therewith, MacDonald further seeks an order from this Court directing the government to give MacDonald access to the items of physical evidence (unsourced hairs, skin and blood debris) which are referenced in his motion to reopen, so that MacDonald can have experts in the field of DNA testing examine the evidence for the purpose of determining whether or not such testing can at this point in time be conducted on the specified items.

Id. at 18.

On October 17, 1997, the Clerk of the Fourth Circuit entered an order which states:

Upon consideration of the motion of Jeffrey R. MacDonald filed pursuant to 28 U.S.C. Section 2244,

IT IS ADJUDGED AND ORDERED that the motion with respect to DNA testing is granted and this issue is remanded to the district court.

*In all other respects, the motion to file a successive application is denied.*

(Emphasis added.) (App. Vol. I, Tab15). MacDonald then appealed this Court's ruling on the fraud-on-the-court claim. The court of appeals affirmed (App. Vol. I, Tab 16).

After the DNA testing matter was remanded to this Court, MacDonald filed a motion to compel the government to produce the universe of physical evidence for evaluation for DNA testing.<sup>10</sup> The government opposed this request contending that the appellate court's mandate limited MacDonald's access to only those items of biological evidence specifically identified in his motion

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<sup>10</sup>See Jeffrey R. MacDonald's Motion For an Order To Compel The Government To Provide Access to All Biological Evidence For Examination And DNA Testing By His Experts

before the Fourth Circuit. This Court, after carefully examining the parties' respective arguments in light of the context of the appellate court's order, concluded ". . . that the Fourth Circuit Court of Appeals has mandated that the Government provide to MacDonald's experts access to the existent and known unsourced hairs, blood stains, blood debris, tissue and body fluids specifically identified in the April 22, 1997, 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 . . . for DNA testing . . ." (App.Vol. I, Tab 17). MacDonald did not seek appellate review of this Court's determination of the scope of the court of appeals Order of October 17,1997.

On December 13, 2005, MacDonald 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. MacDonald requested that his conviction be vacated and set aside "(notwithstanding whatever results the DNA testing produces)" based upon the newly discovered evidence.<sup>11</sup> On January 17, 2006, the court of appeals granted MacDonald's motion filed pursuant 28 U.S.C.§ 2244 ("Britt motion"), expressly stating that ". . . *that the motion is granted insofar as MacDonald may file in the district court the proposed 28 U.S.C. § 2255 motion now attached to his § 2244 motion.*" (Emphasis added.)<sup>12</sup> By its

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<sup>11</sup>See Memorandum In Support of Jeffrey . MacDonald's Motion Under 28 U.S.C. Section 2255 To Vacate His Sentence, at 10.

<sup>12</sup>See In Re; Jeffrey R. MacDonald. No. 05-548, Order filed 1/12/06.

order, the court of appeals authorized MacDonald to file the draft petition attached to his *application*. However, this Court is required by 28 U.S.C § 2244(b)(4) to dismiss any *claim* presented in a second or successive *application* that does not satisfy applicable standards.<sup>13</sup> On January 17, 2006, the habeas motion was filed in this Court, which then directed the government to file a response by March 30, 2006.

On March 10, 2006, the Armed Forces DNA Identification Laboratory (AFDIL) simultaneously provided the parties with a report detailing the results of the DNA testing. In compliance with this Court's Order of March 26, 1999, a copy of the DNA report was filed with the Court. (App. Vol. V, Tab 3).<sup>14</sup> On March 22, 2006, MacDonald filed the instant motion to add an additional predicate to the pending § 2255 motion, based upon the assertion that the three of the hairs, out of the 28 biological specimens tested, do not match any member of the MacDonald household. MacDonald also submits that “. . . since these DNA tests were previously ordered by the U.S. Court of Appeals for the 4th Circuit, and since the matter was remanded to this Court to oversee and manage such testing, it is implicit in the 1997 Order from the 4th Circuit that this Court has been authorized

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<sup>13</sup> 28 U.S.C. § 2244(b)(4) states: “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 requirement of this section.”; See United States v. Winestock, 340F.3d 200, 205 (4th Cir. 2003); see also Reyes-Requena v. United States, 243 F.3d 893, 899 (5th Cir. 2001) (holding that § 2244(b)(4) applies in § 2255 cases).

<sup>14</sup> Prior to filing the instant motion, MacDonald had one year from March 10, 2006, under 28 U.S.C. 2255 §§ 7(4), 8, to file a successive motion based upon the DNA testing results. Barely 12 days after the issuance of the AFDIL report reflecting the results of years of laboratory analysis, MacDonald filed the instant motion based on 3 of the 28 specimens tested. In the event MacDonald were to file a second DNA motion, based upon the results of the testing of other hairs, which the exercise of due diligence would have enabled him to include in the instant motion, the second motion would constitute an abuse of the writ. See McClesky v. Zant, 499 U.S. 467, 490-91(1991); United States v. MacDonald, 966 F.2d 854, 860-61 (4th Cir. 1992).

to consider the effect of the results of such testing.” (Mot. p. 2, ¶ 3.) “Further, [MacDonald] contends that this new evidence, irrespective of the new evidence submitted through witness Jim Britt, entitles the petitioner to have the entire panoply of evidence reviewed (both evidence adduced at trial, and developed post-trial), and to have a determination now made of whether this evidence, analyzed in its entirety, proves the petitioner’s innocence.” Id. at 4, ¶ 6.<sup>15</sup> In Petitioner’s Opposition To The Government’s Motion To Strike Exhibits Submitted In Connection With The Petition For Relief Under 28 U.S.C. Section 2255, filed April 6, 2006, he treats his motion to add the DNA predicate as if it had already been granted.

The petitioner has filed herein a new habeas attack on his conviction. The predicate for this new motion is twofold: 1) the new evidence supplied by retired deputy U.S. Marshal Jim Britt; and, 2) the new evidence supplied by the results of the DNA testing. Both of these predicates for the petitioner’s motion, the petitioner submits, meet the requirement in 28 U.S.C. Section 2255, that they comprise newly discovered evidence . . . . Having submitted this new evidence, the petitioner submits that this court is required to conduct an analysis of the evidence as a whole.

Id. at 4.<sup>16</sup>

## 2. The Government's Case At Trial

\_\_\_\_\_ It is unnecessary to repeat again the events of the crime and the evidence upon which the jury verdict was based that are set forth in detail in the government’s Response at pages 5- 11, and hereby incorporated by reference.

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<sup>15</sup>While MacDonald motion is captioned in terms of an “additional predicate,” we take this language and the scope of the relief sought to mean that the DNA predicate is to be considered a freestanding claim, that is in no way dependent, for purposes of the Court’s jurisdiction, on the viability of the Britt motion. For reasons we set forth in more detail, *infra*, the instant motion, however he captions it, is tantamount to a new and successive habeas petition.

<sup>16</sup> MacDonald focuses on the newly discovered component of the evidence, to the exclusion of the requirement that, newly discovered or not, the application must be first submitted in the court of appeals.

### 3. The Defendant's Case At Trial, On Direct Appeal, And Collateral Attack

No citation is necessary for the proposition that MacDonald has always maintained that he was attacked and his wife and daughters murdered by a band of "hippie" intruders including a female, and the defense team has contended that Helena Stoeckley was that female. The Britt motion is essentially more of the same, and to the extent that the Court considers the results of the DNA testing, it need only be pointed out that none of the questioned hairs tested, including the three upon which MacDonald now relies match Stoeckley's (or Mitchell's) mitochondrial DNA sequence.<sup>17</sup>

#### ARGUMENT

- \_\_\_\_\_ 1. There is nothing "implicit" in the 1997 order of the court of appeals granting MacDonald's motion for DNA testing, and in all other respects denying his motion to file a successive application, which obviates the requirement to obtain certification from the court of appeals before filing a successive petition based upon the results of the DNA testing

\_\_\_\_\_ As our detailed canvas of the procedural history of MacDonald's motion for DNA testing demonstrates, MacDonald only sought access to specific items of evidence for the purpose of DNA testing by his experts, using the newly available mitochondrial DNA technology. MacDonald further asserted that this new DNA technology could identify Helena Stoeckley as the source of the previously unsourced hairs, which the government had never been able to identify. Ironically, the DNA testing actually eliminates Stoeckley as the source of any of the hairs.

Nowhere in the reams of paper filed by MacDonald does he ever suggest that the court of appeals should also give him carte blanche to file yet another successive petition based upon the future results of the DNA testing. It is absurd to suggest that the same order which expressly and "in all other respects" denied his motion to file a successive application, implicitly gave him authorization

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<sup>17</sup>See AFDIL report, at p. 4, ¶ 4. (App. Vol. V, Tab 3).

to file a successive motion, when he had not asked to do so. MacDonald only asked the court of appeals for access to specific items of evidence for DNA testing, and that is all that he got: access. The same sentence in which the court of appeals ordered “. . . the motion with respect to DNA testing is granted” also said “and this issue is remanded to the district court.” The clear meaning of this phrase is “this issue” which is remanded relates only to its antecedent, “the DNA testing,” and not to any future authorization for a successive petition involving the unknown results of the testing.

MacDonald’s use of the terms “Applicant/Defendant” in his motion further underscores the flaw in his argument. If the court of appeals had actually authorized the filing of a future § 2255 petition, then MacDonald would not be required to ask this Court’s permission to include the DNA results as a predicate for relief.

\_\_\_\_\_ 2. The court of appeals was precluded by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) from ordering the relief MacDonald claims is implicit in the 1997 Order.

\_\_\_\_\_ As noted above, there is not so much as a word in the order of the court of appeals which can be read as explicitly or implicitly providing future authorization for the filing of a successive petition. However, assuming for the sake of argument that such authorization was its unspoken intention, the court of appeals would have been precluded by law from providing MacDonald authorization in advance of his filing pursuant to 28 U.S.C. § 2244, or any knowledge of the DNA results, without subjecting them to the requirements of § 2244 (2)(B)(I) and (ii).

Because the instant motion to add an additional predicate to his pending 2255 petition constitutes “a successive motion” for habeas relief under Section 2255, a condition precedent to its submission to the district court for consideration is the submission of a pre-filing authorization motion (“PFA”) to the court of appeals, as well as fulfillment of the “gatekeeping” procedures

contained in 28 U.S.C. § 2244(b)(2) and 28 U.S.C. § 2255 para. 8, which were enacted in their present form as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-134, tit VIII, 110 Stat. 1321, 1321-66 (1996). In order to prevail on a PFA alleging newly-discovered evidence, the movant must demonstrate (1) “the existence of facts that could not have been discovered previously through the exercise of due diligence” and (2) that “the facts of the underlying claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the [movant] guilty of the offense.” 28 U.S.C. § 2244(b)(2)(B). See United States v. Winestock, 340 F.3d 200, 208 (4th Cir. 2003), citing 28 U.S.C. § 2255 para. 8(1).

It is respectfully submitted that in 1997 the court of appeals could not have performed the requisite analysis of the “newly discovered DNA evidence” required by AEDPA because the testing had yet to be performed, and the results were not known by the court.

3. MacDonald has failed to seek a pre-filing authorization from the court of appeals as required by 28 U.S.C. §§ 2244, 2255.

\_\_\_\_\_As this Court instructed MacDonald in 1997 (979 F. Supp. at 1067-68 n. 6), the Court is barred from considering new evidence unless MacDonald complies with the requirements of the Antiterrorism and Effective Death Penalty Act of 1996:

FN 6. The Antiterrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. §2255 to add the following:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-

(1) 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 fact finder would have found the movant guilty of the offense . . .

104 Stat. 1220, Title I, § 105. In turn, as amended by the 1996 Act, 28 U.S.C. § 2244 provides in pertinent part as follows:

(3) (A) Before a second or successive application permitted by this section is filed

in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three judge panel of the court of appeals.

110 Stat. 1221, § 106.

MacDonald's continued inability to comprehend that this requirement applies to him, is demonstrated by the fact that he has again failed to seek, much less obtain, the necessary PFA. The fact that he refers to himself in the caption as the Applicant/Defendant does not alter the fact that this "application" was filed in the wrong court. Accordingly, this Court is without jurisdiction to grant him the relief he seeks.

4. Under the "Gatekeeping Provisions of AEDPA, The DNA Motion should be transferred to the court of appeals or dismissed.

As the United States Court of Appeals for the Fourth Circuit has stated in United States v. Winestock, *supra*, "[i]n order for these limitations [involving successive applications for collateral relief] to be effective, courts must not allow prisoners to circumvent them by attaching labels other than 'successive application' to their pleadings. See Calderon v. Thompson, 523 U.S. 538, 553, 118 S.Ct. 1489, 140 L Ed.2d 728 (1998). Notwithstanding the length and sensational language of the label in the instant motion, it is for all intents and purposes a successive application for habeas relief which is subject to the restrictions of the AEDPA.

The Fourth Circuit has ruled, in the analogous context of Rule 60(b) motions, that:

In light of the tighter restrictions imposed by the AEDPA, including most notably the jurisdictional constraint on review of successive applications filed without authorization, we now hold that district courts *must* [emphasis in original] treat Rule 60(b) motions as successive collateral review applications when failing to do so would allow the applicant to 'evade. . . the bar against litigation of claims not presented in a prior application,' (citation omitted).



See Winestock, *supra*, at 206.

The Fourth Circuit has provided further guidance to the district courts on the handling of motions which seek to evade the requirements applicable to successive applications:

To comply with the standards set forth above, district courts must examine the Rule 60(b) motions received in collateral review cases to determine whether such motions are tantamount to successive applications. If so, the court must either dismiss the motion for lack of jurisdiction or transfer it to this court so that we may perform our gatekeeping function under § 2244(b)(3).

Id. at 207.

### CONCLUSION

For all the foregoing reasons the Petition of the Applicant/Defendant Jeffrey R. MacDonald to add an additional predicate to his previously filed motion under 28 U.S.C. § 2255 to vacate his conviction--namely newly discovered DNA evidence--should be treated as a successive application for habeas relief, and dismissed for lack of jurisdiction for deliberate failure to seek a pre-filing authorization from the court of appeals as required by 28 U.S.C. §§ 2244 and 2255, or alternatively, transferred to the United States Court of Appeals for the Fourth Circuit for such determination.

It is respectfully submitted that neither dismissal nor transfer to the court of appeals of the DNA motion need delay the Court from ruling on the motion based on statements of Jim Britt.

Should the Court not agree with our legal argument that the instant motion be dismissed or transferred, we respectfully request an opportunity to reply on the merits, an evidentiary hearing, and an opportunity to present evidence in rebuttal. It is further respectfully requested that the Court not require the United States respond on the merits until it has had an opportunity to have its experts review the voluminous data generated during the course of the DNA testing, and the United States

Supreme Court has handed down its decision in House v. Bell, No. 04-8990, certiorari granted, June 28, 2005, 125 S. Ct.2991.<sup>18</sup>

Respectfully submitted, this 13th day of April, 2006.

FRANK D. WHITNEY  
United States Attorney

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/s/ Brian M. Murtagh

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<sup>18</sup>The Supreme Court granted *certioari* in House V. Bell, *supra*, to review the *en banc* decision of the U.S. Court of Appeals for the Sixth Circuit (386 F.3d 668) rejecting House's claim of colorable innocence under Schlup v. Delo, 513 U.S. 298 (1995) and his freestanding claim of innocence under Herrera v. Collins, 503 U.S. 390(1993), notwithstanding the results of post trial DNA testing that negated or called into question semen and blood evidence introduced at trial by the prosecution the case was argued January 11, 2006, and a decision could come down at any time before the end of the term.

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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This, the 13th day of April, 2006.

By: /s/ Brian M. Murtagh  
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