UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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| UNITED STATES OF AMERICA, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| vs. | ) | Crim. No. 75-26-CR-3 |
| | ) | No. 5:06-CV-24-F |
| JEFFREY R. MacDONALD, | ) | Judge James C. Fox |
| | ) | |
| Applicant/Defendant, | ) | |

**PETITIONER'S 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**

Comes now, the petitioner/defendant, Jeffrey R. MacDonald, through undersigned counsel, and respectfully moves this court, in support of his Motion Pursuant to 28 U.S.C. Section 2255 to Vacate His Sentence, to accept for consideration this Statement of Itemized Material Evidence, each item supported with either citations to the record, to the authenticated exhibits previously filed in this matter, or to the authenticated documentary proofs contained in the appendices filed in this matter.

## I. INTRODUCTION: SUMMARY OF LEGAL AUTHORITY TO SUPPORT PETITIONER'S REQUEST THAT THIS STATEMENT OF ITEMIZED MATERIAL EVIDENCE BE CONSIDERED BY THIS COURT

Pursuant to his Motion to Vacate, the petitioner has averred that he has newly discovered evidence that could not have been discovered previously through the exercise of due diligence which proves the existence of a constitutional error. Applicant also contends that such newly discovered evidence, viewed in light of the evidence taken as a whole, is

sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the petitioner guilty of the underlying offenses. In reviewing such a claim of innocence, which is concomitant to a claim of "manifest injustice," this Court is required to conduct an analysis of the evidence "as a whole," including evidence developed post-trial. 28 U.S.C. Section 2255; *see, also*, *Herrera v. Collins*, 506 U.S. 390 at 442 (1992), (Blackmun, J., *dissenting*) (collecting various versions of Court's "probability of innocence" test for miscarriage of justice); *Sawyer v. Whitley,* 506 U.S. 333 at 339 & n.5: (The prisoner must show "that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of fact would have entertained a reasonable doubt of his guilt." (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n.17 (1986) ((quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142, 160 (1970))); *Schlup v. Delo*, 513, U.S. 298 (1995).

Given the extensive time period over which this ongoing legal dispute has continued (36 years since the crime), the many previous collateral attacks on the verdict brought by the petitioner, and the unusually complex matrix of evidence and factual allegations that must be considered in evaluating the petitioner's claim of factual innocence, the petitioner submits this Statement of Material Itemized Evidence to assist this Court in its task of evaluating the evidence "as a whole," and in support of his claim of actual innocence.[1]

[1] To the extent that post-trial factual claims have been previously raised, fully considered, and resolved adversely to the petitioner by this Court, those factual claims are either omitted from this Statement, or included with an explanation as to why the newly discovered evidence which is the predicate for the petitioner's claim would likely affect and change the prior court ruling. Each itemized statement of the evidence is referenced to either the trial record, or to

## II. ITEMIZED STATEMENT OF MATERIAL EVIDENCE:

### A. Evidence Elicited at Trial

1. At approximately 3:30 a.m. on February 17, 1970 military police were summoned to the apartment of Dr. Jeffrey R. MacDonald, a twenty-six-year-old army captain serving as a medical officer at Fort Bragg, North Carolina. Upon arrival, the police found that MacDonald's pregnant wife, Colette, and his two young daughters, Kristen age two, and Kimberley age five, had been brutally murdered. [See, i.e., testimony of govt. witness Richard D. Tevere at trial, *U.S. v. MacDonald,* Trial Transcript, July 19 – August 3, 1979 {hereinafter "Trial Tr."} 1251-1290].[2]

2. At the scene, Jeff MacDonald was found lying next to his wife, Colette, in their master bedroom. He was unconscious or semi-conscious, and initially one of the military police on the scene thought he was dead. [Testimony of govt. witness Kenneth Mica, Trial Tr. 1481]. Jeff MacDonald was wounded, was cold, went in and out of consciousness, his teeth were chattering, and he required mouth to mouth resuscitation [Testimony of govt. witness Mica, Trial Tr. 1407-08, 1506]. Upon being revived, though MacDonald was saying a lot of things that were disconnected, and was continually asking about his family, was having difficulty breathing, and at one point passed out, he told the military police that he and his

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other authenticated proofs contained in the appendices attached hereto, or has previously been submitted as part of the petitioner's Memorandum in Support of his Motion Under U.S.C. 28 Section 2255 to Vacate his Sentence. Petitioner is filing concomitantly with this Statement, a Motion to Expand the Record to include each item listed herein that was not part of the trial record.

[2] The portions of the trial transcript cited herein have been copied and included in Appendix 2, tab 14, attached hereto, with the exception of those portions contained in the trial transcript volume for Aug. 17, 1979 (pp. 5508-5800) which were previously provided to this Court as Exhibit 4 attached to the petitioner's Memorandum in Support of His Motion to Vacate.

family had been attacked by at least four intruders, three men and a woman. [Testimony of govt. witness Mica, Trial Tr. 1499-1504; testimony of govt. witness Tevere, Trial Tr. 1270].

3. There, on the scene, Jeff MacDonald described the woman intruder as having long blond hair, wearing a floppy hat and muddy boots, and bearing a flickering light such as a candle. [Govt. witness Tevere, Trial Tr. 1270; govt. witness Mica, Trial Tr. 1414, 1504-05]. Jeff MacDonald said he had heard the female say, "Acid is groovy, kill the pigs." [Tevere, Trial Tr. at 1323; Mica, Trial Tr. at 1504]. As to the male assailants, MacDonald indicated that two were white and one was a Negro with an army field jacket with sergeant's stripes. [Tevere, Trial Tr. at 1270; Mica, Trial Tr. at 1503.]

4. One of the military police officers, Kenneth Mica, driving his Jeep to the crime scene (within 5 minutes of receiving the emergency call and at approximately 3:30 a.m.) had seen a woman who bore a striking resemblance to the woman described by MacDonald (in that she was young, with long hair, and was wearing a wide-brimmed or floppy hat) standing outside in the rain or mist on a street corner within blocks of the MacDonald residence. Mica testified that it was unusual to see someone out on a street corner on a rainy night at that very late hour as everything around her was closed and said he would have stopped to investigate had he not been responding to an emergency. [Govt. witness Kenneth Mica, Trial Tr. 1450-54, 1403]. At the crime scene, when Officer Mica heard the description given by Jeff MacDonald of his assailants, he advised his supervisors of the woman he had seen and requested that a patrol be sent to find her. [Govt. witness Mica, Trial Tr. 1596, 1598].

5. At the scene, Jeff MacDonald, when found, was dressed in only his pajama bottoms. His pajama bottoms were ripped from knees to crotch. [Trial Tr. of medic Michael Douglas Newman, 2661-62). The pajama bottoms were lost when MacDonald was being

treated at the hospital. His pajama top was draped over the chest of his wife, Colette. [Testimony of govt. witness Tevere, Trial Tr. at 1274].

6. At the scene, investigators found each of Jeff MacDonald's children, in their own respective beds, dead, and there were two bloody footprints leading out of the bedroom of Kristen MacDonald to the hallway. [Testimony of govt. witness William Ivory, Trial Tr. at 1616].

7. The word "PIG" was written sideways in blood on the headboard of the bed in the master bedroom. [Id. at 1627].

8. At trial Jeff MacDonald testified that he awoke while asleep on the couch in his living room to the screams of his wife and one of his daughters, saw four strangers in his house, and was immediately set upon, attacked, punched repeatedly, and knocked down with a club. [Trial Tr. 6581-82].

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

10. MacDonald testified that he continued to struggle with the intruders as he held onto the man's arm. At some point his hands became bound up in his pajama top. He did not know how this happened, although he thought it was either pulled over his head or ripped from around his back. [Trial Tr. 6586].

11. MacDonald presumed that the holes in his pajama top got there when he was fending off blows from the assailants. [Trial Tr. 6808]. The blows came straight at him, and he recalls using the pajama top "more or less as a shield." [Trial Tr. 6811-13]. He felt a sharp pain in his right chest as he held onto the club, and he saw a blade, and realized that he had probably felt a stab, not a punch. [Trial Tr. 6588].

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

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

14. MacDonald testified that he then went through the house to check on his two daughters. He went first to Kimberley's room, then to Kristen's. MacDonald found them both in their beds, covered in blood, and he desperately attempted to revive each of them without success. [Trial Tr. 6599-6603]. (It is not disputed that he was wearing his ripped pajama bottoms when this occurred.)

15. MacDonald testified that he was unsure of what he did next. At some point he went into the bathroom to check his head, which was hurting, and thought he rinsed his hands in the sink. [Tr. 6606-08]. He went back to Colette a second time and remembered covering her with his pajama top. [Tr. 6605]. He also dialed the operator from the master bedroom telephone and asked for medics and MPs. He was unconscious when help finally came.

16. In addition to MacDonald testifying that he moved his wife from against a chair when he was trying to administer help to her, the doctor who first examined her, Dr. Neal, said he rolled her over on the scene to examine her. [Trial Tr. 6921].

17. CID investigator Robert B. Shaw testified at trial that he found a bunch of tangled blue fibers at the west entrance of the hallway landing where it intersected the living room, [Tr. 2480, 2411-12], which was where Jeffrey MacDonald testified that he struggled with the intruders.

18. Included in the physical evidence discovered at the crime scene were wax drippings of three different kinds of wax, one taken from a coffee table in the living room (where MacDonald said he saw the woman with the flickering light), one from a chair in daughter Kimberley's bedroom, and one sample actually retrieved from the bedspread in Kimberley's bedroom. None of these samples matched any of the candles or other wax found in the MacDonald home and submitted by investigators for comparison. [Trial Tr. 3837-44].

The wax samples were brittle and flaky indicating to Hilyard Medlin, the government examiner, that they were several weeks old, though it was not until precisely several weeks after the crime, that the examiner received them for analysis. [Trial Tr. 3888-90, 3899].

19. According to a government expert witness, Hilyard Medlin, 44 useable latent fingerprints and 29 useable palm prints were lifted from the scene of the crime, but of these, only 26 fingerprints and 11 palm prints were matched with MacDonald family members or other investigators or individuals whose prints were available for comparison. [Trial Tr. 3116, 3141]. These included, *inter alia*, one fingerprint on a drinking glass located on a table directly at the head of the sofa where MacDonald said he struggled before being knocked unconscious. That fingerprint on the drinking glass could not be matched with any known comparison print. [Trial Tr. 3132-33].

20. The government introduced expert testimony that the fibers on the club that was believed to be one of the weapons used, which was found outside the back door, matched the fibers used to sew MacDonald's pajama top. [Tr. 3784]. (But see *contra*, pp. 43, *infra.)*

21. MacDonald was taken to the intensive care unit at Womack Army Hospital, where he was treated for a punctured lung and other life-threatening knife and puncture wounds. [Trial Tr. 5367]. He remained in the intensive care unit for several days and the hospital for nine days.

22. At trial, MacDonald testified that he had given a lot of thought to trying to figure out what happened to his family and why. He testified that he thought that either someone held a grudge against him or that it was a chance occurrence. [Trial Tr. 6648]. He saw patients with drug problems in both his position as preventive medical officer at Fort Bragg and his work at the Cape Fear Valley Emergency Department. [Trial Tr. 6649]. At times,

MacDonald's responsibilities to the soldier he was counseling and to the soldier's commanding officer conflicted, and MacDonald had to decide whether to notify the officer about the soldier's drug problem. [Trial Tr. 6652-53]. Some of the doctors providing drug counseling, himself included, were suspected of being "finks" for turning in troops for drug abuse. [Trial Tr. 6657].

23. A man who resided across the street from the MacDonald family at the time of the crime, James W. Milne, Jr., testified that on the night of the murders, just after midnight, he heard noises, and opening his door he saw two males and a female who were wearing white sheets and all carrying candles walking in a direction that would have taken them directly into the side door of the MacDonald home. They were only about 40 yards from the MacDonald home when he last saw them. He recalled that the woman he witnessed had long blond hair. [Trial Tr. 5445-57].

24. A police detective in Fayetteville, North Carolina, P.E. Beasley, on the day following the murders, upon hearing of the descriptions of the assailants given by MacDonald, thought he knew a young woman, a drug user and drug informant he had worked with, who fit the description of the female intruder. Beasley went searching for her that evening and during the following day. Her name was Helena Stoeckley. When he located her and first asked her about the crime, she responded, "In my mind it seems that I saw this thing happen. I was heavy on mescaline." [Trial Tr. 5738-42].

25. During the nine years that passed between the murders and the trial, a significant amount of evidence had been amassed connecting Helena Stoeckley to the murders. It was undisputed and proved at trial that at the time of killings, for example, she possessed a blond wig, which she burned shortly after the crime [Trial Tr. 5602-04].

26. Trial testimony established that the clothes she routinely wore around the time of the crime matched the clothes of the woman MacDonald described seeing in his house the night of the murders (a blond wig, floppy hat, and boots) [Trial Tr. 5583-90].

27. Trial testimony established that she routinely wore black [Trial Tr. 5634].

28. Trial testimony established that around the time of the murders she was involved in an illegal drug cult that ingested LSD, worshipped the devil, used candles, and ritualistically killed cats [Trial Tr. 5525, 5542-43].

29. Trial testimony established her obsession with the MacDonald murders, such that she had bought and hung wreaths all along her fence the day of the burials [Trial Tr. 5633-34].

30. Trial testimony established that a woman matching her description had been seen by several people near the crime scene at or around the time of the murders [testimony of govt. witness, MP Kenneth Mica, Trial Tr. 1453-54; testimony of James Milne, Trial Tr. 5454-56].

31. Prior to the trial, Helena Stoeckley had admitted to her participation in the crime to numerous people including six different individuals whom the defense had subpoened to the trial, and who were prepared to testify to the incriminating admissions that Stoeckley had made to them. These included Jane Zilloux, James Gaddis, Charles Underhill, Robert Brisentine, P.E. Beasley, and William Posey. These individuals did testify to the incriminating admissions Stoeckley had made to them concerning her involvement in the MacDonald murders, but only outside of the presence of the jury. [See, Ex. 4 to Petitioner's Memorandum in Support of his Motion to Vacate, Trial Transcript for August 17, 1979, 5508-5800]. Witness Jane Zilloux testified, for example, that Stoeckley told her that she was

wearing her blond wig and white boots when she committed the crime, and Zilloux had, in fact, seen Stoeckley's white plastic boots. Stoeckley also told Zilloux that it had been raining and that Stoeckley was worried that the rain might ruin her blond wig. [Trial Tr. 5698]. Witness William Edward Posey, who was a next-door neighbor from Stoeckley at the time of the murders, testified that Stoeckley routinely wore the white boots, a blond shoulder length wig, and purple clothing. [Trial Tr. 5751-55]. Posey also testified that during the U.S. Army Article 32 hearing (July 1970), he talked to Stoeckley and that she told him "that all she did was hold the light." He testified that she told him that she had seen "a hobby horse that wouldn't roll," that was broken, inside the MacDonald's home in one of the children's bedrooms. [Trial Tr. 5758-60]. The government objected to the admission of the testimony of all of these witnesses, arguing that Stoeckley's confessions to these six different third parties were not corroborated, and were not reliable.

32. During the 1979 trial, the defense had sought to locate and subpoena Helena Stoeckley to testify. When she was located by the government in Greenville, S.C., the court issued a material witness warrant requiring her to be brought to Raleigh. An experienced deputy U.S. Marshal, Jim Britt, was assigned to pick Stoeckley up in Greenville, and transport her to Raleigh, under the custody of the material witness warrant. Jim Britt traveled to Greenville, South Carolina to pick her up, and drove her back to Raleigh in his car. Britt specifically recalls that during the ride to Raleigh, Helena Stoeckley told Britt that she had been in the MacDonald house with others the night of the MacDonald murders. She told him other details that convinced him that she had, indeed, been there such as describing the hobby horse in the MacDonald home. Britt had no doubt that she was telling him the truth. The next day, Stoeckley was interviewed in the courthouse first by the defense attorneys. After her

meeting with the defense lawyers, Deputy Marshal Britt escorted Stoeckley to the office of James Blackburn to be interviewed. Blackburn invited Britt into his office with Stoeckley. Jim Britt witnessed Helena Stoeckley admit to James Blackburn that she had been in the MacDonald home with others on the night of the MacDonald murders and that they had gone there to steal drugs. Britt then specifically heard James Blackburn threaten Helena Stoeckley. He heard James Blackburn tell her that if she so testified in court, he would indict her for first-degree murder. Jim Britt declares in his affidavit that he is absolutely certain that these words were spoken. [Affidavit of former Deputy U.S. Marshall Jim Britt, attached as Exhibit 1 to Petitioner's Memorandum in Support of his Motion to Vacate, filed therewith].[3]

33. The next morning following Jim Blackburn's threat, in court, before the jury, called as a defense witness, Stoeckley denied knowing anything about the MacDonald murders or the MacDonald house. She, in fact, claimed to have amnesia concerning her whereabouts and activities during the specific five-hour time-frame in which the crime

[3] Jim Britt first mentioned the details of what he witnessed to a colleague, former deputy U.S. Marshall Lee Tart, approximately two years ago. The affidavit of Lee Tart, confirming this, is attached as Exhibit 3 to Petitioner's Memorandum in Support of his Motion to Vacate. Jim Britt also willingly took and passed a polygraph test, which indicated that he was truthful concerning the revelations he makes in his affidavit. The polygraph exam, and the curriculum vitae of the polygraph operator, Steve Davenport, are attached as Exhibit 2 to Petitioner's Memorandum. Additional corroboration for what Jim Britt says can be found in the Affidavit of Wendy Rouder, Esq., attached as Exhibit 5 to Petitioner's Memorandum. Rouder, who was a lawyer working with the defense team in 1979, recalls that the day after Jim Britt witnessed prosecutor James Blackburn threaten Helena Stoeckley, Stoeckley told Rouder that she was afraid to tell the truth in court, and when pressed by Rouder as to what she was afraid of, Stoeckley said that she was afraid of "those damn prosecutors." Over the years that followed, Stoeckley repeatedly affirmed that she was involved in the crime and that she had lied because she was afraid. *See, e.g.* "Woman in MacDonald Case Claims He Was Victim Not Murderer," *The Register*, (Fayetteville, N.C.) 10 Jan. 1981, A20 (attached as Exhibit 6 to Petitioner's Memorandum). Additional corroboration for Jim Britt's claim that he was the deputy marshal assigned to accompany Helena Stoeckley can be found in the video footage contained in the documentary *False Witness,* which has actual news footage of Stoeckley appearing at the Raleigh courthouse during the trial, and shows that she is accompanied by a much younger Jim Britt. [The video, *False Witness*, is submitted herewith in Appendix 2, Tab 13.]

occurred. [Ex. 4 to Petitioner's Memorandum in Support of his Motion to Vacate, Trial Tr. 5513-5676].

34. During her testimony, the trial court inquired at a bench conference of the lead prosecutor, Jim Blackburn, as to what Helena Stoeckley had told him during his interview of her in his office the day before. Blackburn represented to the court that in his office Stoeckley had denied having any knowledge of the MacDonalds or any involvement in the crimes. [Trial Tr. 5617]. This was contrary to what Jim Britt had witnessed. Blackburn, on cross-examination, using leading questions, had Stoeckley affirm before the jury that she knew nothing of the MacDonald murders or the MacDonald house or family. [Trial Tr. 5642-5674].

35. The trial court, after hearing Stoeckley's testimony, after hearing from the six witnesses to whom Stoeckley had made incriminating statements (out of the jury's presence), and after listening to the representations and arguments of the lawyers, ruled that the various incriminating statements made by Helena Stoeckley to these six witnesses would not be admissible because they were not corroborated, and were inherently unreliable pursuant to Fed. Rule of Evidence 803(b)(3). In so ruling, the lower court presumably relied, at least to some extent, on the representations that James Blackburn had made (that Stoeckley never said anything incriminating to him) for the court explicitly stated as part of its reasoning for its ruling that Stoeckley's statements were "all over the lot." [Trial Tr. 5808].[4]

36. Having never heard a word from Helena Stoeckley incriminating herself, nor a word from the six different third parties to whom Helena Stoeckley had confessed, the jury

[4] Had the court not been presented with that misinformation from James Blackburn, it may very well have admitted those six confessional statements into evidence. Consequently, Petitioner requests that they be considered in the analysis innocence that is to be done in view of the evidence "as a whole."

deliberated on the circumstantial evidence and found Jeffrey MacDonald guilty of the charged murders.

**B. James Blackburn's Conviction**

37. James Blackburn, the lead prosecutor who tried Jeffrey MacDonald, was convicted in 1993 in the Superior Court of Wake County, North Carolina, following a guilty plea, of obstruction of justice and embezzlement. [See, Judgment and Commitment Order of James L. Blackburn, attached as Exhibit 10 to Petitioner's Memorandum in Support of his Motion to Vacate.]

**C. Post-Trial Evidence – Set Forth in 1984 Motion For A New Trial**

38. In 1984, MacDonald filed a *Motion for A New Trial*, which included in it numerous detailed and direct post-trial confessions made by Helena Stoeckley. In these confessions she repeatedly named Greg Mitchell as her boyfriend at the time, and as the man who murdered Colette MacDonald.[5] These post-trial confessions include the following, with citations:

a) Declaration of Ted Gunderson, 1984 [Appendix 2, tab 1].

b) Declaration of Richard Comisky, February 6, 1984 [Appendix 2, tab 2].

c) Declaration of Lynn Markstein, August 12, 1983 [Appendix 2, tab 3].

[5] While the trial court denied the *Motion for a New Trial*, and found that generally, Stoeckley was not a "reliable confessor," the court based its finding, to some extent, on the fact that their existed no corroborating evidence which would support Stoeckley's confessions. (This, of course, has now changed, with the discovery of the synthetic long blond wig hair fibers, discussed below, as well as the new clear and unambiguous additional confessions of Greg Mitchell presented herewith and discussed below. It is also changed by the revelations of Jim Britt, for had Helena Stoeckley not been threatened by the prosecutor, she would have told the jury, herself, of her involvement in the crime, and as our court of appeals has held, in that instance, "the injury to the government's case would have been incalculably great." *U.S. v. MacDonald*, 632 F.2d 258 at 264 (1980).) Stoeckley's post-trial confessions, thus, should be considered as part of the panoply of evidence supporting innocence that needs to be considered in the analysis *sub judice*.

d) Declaration of Ernest Leroy Davis, July 25, 1983 [Appendix 2, tab 4].

e) Declaration of Officer Prince Beasley, March 27, 1984 [Appendix 2, tab 5].

39. As part of MacDonald's 1984 *Motion for a New Trial*, sworn declarations were presented to the court of various witnesses, each who saw a group of people matching the description MacDonald had given of the intruders in close proximity to the MacDonald house either late the night of and just before the crime, or in the early morning hours just after the crime had occurred. Regarding the statements of these various corroborating witnesses, the trial judge ruled that the statements were weak circumstantial evidence that Stoeckley and her cohorts were in the area of the crime when it occurred. Nonetheless, one of these seems particularly probative, and to the extent it supports MacDonald's claim of innocence in any respect, it should be considered as part of the "whole" of the evidence. This declaration is set forth below:

a) Declaration of Joan Sonderson, a waitress, who arriving at work the morning following the murders between 8 a.m. and 9 a.m. saw a vehicle occupied by three sleeping people, including a white woman with blond hair and wearing a floppy hat and beige boots that were muddy, and a man wearing an army fatigue jacket. The woman in the floppy hat asked Sonderson if she knew that members of the MacDonald family had been murdered that night. [Appendix 3, tab 6].

40. As part of the MacDonald's Motion for a New Trial, he submitted the sworn statement of Jimmy Friar, who telephoned the MacDonald home at 2 a.m. the night of the murders and spoke with an hysterical woman and also heard someone in the background ordering the woman to hang up the phone. [Attached at Appendix 2, tab 7]. The Friar declaration was not specifically referred to in the lower court's opinion resolving the *Motion for a New Trial.* This declaration is particularly probative because Stoeckley, during her many confessions, repeatedly admitted to having answered a ringing phone in the MacDonald home that night (see sworn declaration of Ted Gunderson above).

41. As part of the 1984 *Motion for a New Trial*, MacDonald submitted sworn declarations from several individuals, who witnessed Greg Mitchell, who was the boyfriend of Helena Stoeckley at the time of the MacDonald murders, confess to the MacDonald murders. These include:

a. The sworn declaration of Reverend Randy Phillips that a man he identified from a photo array as Greg Mitchell had confessed to the murders. [Appendix 2, tab 8];

b. The sworn declaration of Ann Cannaday, who was a member of Reverend Phillips's church group, and who also identified Greg Mitchell from a photo array as the man who told her he had been part of a cult in Fayetteville, North Carolina and had murdered people. Cannaday also saw Greg Mitchell run from out of the back of a farmhouse used as a counseling center, and when she went inside, there was written in bright red paint on the wall, "I killed MacDonald's wife and children." [Appendix 2, tab 9];

c. The sworn declarations of Bryant Lane and his wife, Norma Lane, that Greg Mitchell, who was a friend of theirs, had told them that he had been involved in "a terrible crime" at Fort Bragg, N.C. [Appendix 2, tab 10].

Regarding these sworn declarations, the trial court ruled that they were "speculative and circumstantial." *U.S. v. MacDonald*, 640 F. Supp. 286 at 328 (E.D.N.C. 1985). The court found the one statement made to Ann Cannaday, made fourteen years previous, as not to be evidence of any substance, and the fact that she saw Mitchell run from the farmhouse that had those words written on the wall, to be only weakly connected to Mitchell. The court found the Lane affidavits also to be unpersuasive because Mitchell made no specific reference to the MacDonald slayings. The court ruled that "absent a stronger showing, these affidavits are insufficient to prove Mitchell was in the MacDonald apartment on February 17, 1970."[6]

[6] Importantly, in its Memorandum Opinion, the court also ruled regarding the Mitchell statements, that they "were made under circumstances which would accord them a degree of

As set forth below, however, the Petitioner has submitted as Exhibit 7 to his Memorandum in Support of his Motion to Vacate, three additional and new affidavits of individuals who knew Greg Mitchell well, and to whom he unambiguously confessed to having participated in the killing of MacDonald's wife and children. Consequently, the above affidavits are now bolstered and corroborated by others, and deserve consideration as part of this court's analysis of the evidence of Petitioner's innocence, taken as a whole.

**D. Post-Trial Evidence Set Forth in 1990 Motion to Vacate, and 1997 Motion to Reopen**

42. Through FOIA requests, post-trial, the defense first learned of the existence of handwritten lab notes of CID investigator Janice Glisson which revealed that numerous blond synthetic hairs, up to 22 inches in length, had been found in a hairbrush in the dining room of the MacDonald home following the murders, and the hairs could not be matched to any known items in the MacDonald home. (Glisson had testified as a government witness at the petitioner's trial but had never mentioned finding these long blond synthetic hairs.) See, Memorandum Opinion of Judge Franklin Dupree, *U.S. v. MacDonald*, 778 F. Supp. 1342 at 1347-49 (E.D.N.C. 1991).

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trustworthiness but there is not enough evidence to show that he actually made them or that they were in reference to the MacDonald murders for them to be of evidentiary value to MacDonald at a second trial." *Id.* at 330. As part of the petitioner's present motion to vacate his sentence, the defense has presented three new and additional affidavits herewith, however, of Greg Mitchell confessing to the MacDonald murders. These affidavits are clear and unambiguous, and all are made by people who knew Greg Mitchell well. The Buffkin affidavit relates a confession are akin to a deathbed confession. These, taken together with the affidavits submitted in 1984, demonstrate unequivocally that Greg Mitchell directly confessed on numerous occasions to participating with others in the murder of the MacDonald family. Taken in conjunction with the many Stoeckley confessions, and the substantial amount of circumstantial evidence corroborating their direct involvement in the crimes, as well as the substantial amount of circumstantial evidence corroborating the presence of intruders on the night of the crime, this new evidence proves Petitioner's claim that he is, in fact, innocent, and was wrongly convicted.

This new evidence was part of the predicate for MacDonald's 1990 habeas motion. The government countered the 1990 motion by submitting an affidavit from an FBI agent, Michael P. Malone, who opined that the blond synthetic hairs were not wig hairs, but were made of a saran fiber only used in doll's hair. Based to some extent on the Malone affidavit, and analyzing the evidence to determine if it, by itself would have yielded a different verdict from the jury, (see, pp. 43, *below*) the trial court denied the motion. *Id.* at 1350-51. Over the ensuing years, defense lawyers discovered information leading them to believe that the affidavit of Agent Malone was incorrect and false. MacDonald's lawyers in 1997 filed a Motion to Reopen the 1990 habeas proceeding arguing that Malone had committed a fraud on the court, and in that motion set forth substantial additional evidence refuting the claim of Malone, and probative of the fact that the synthetic saran fibers found in the hairbrush, were, in fact, routinely used in the manufacture of wigs at the time of the murders. The trial court, in resolving the Motion to Reopen, found that the defense had not proved by clear and convincing evidence that the FBI agent, Malone, had committed a fraud. It declined, as a result, to reach the question of whether the new evidence submitted by MacDonald, in fact, established that the blond saran synthetic hair was the type of hair routinely used in wigs at the time of the murder. The issue of whether the 22 inch-long fibers were wig hairs, or doll hairs, thus, was never resolved by this court. *U.S. v. MacDonald*, 979 F. Supp. 1057 at 1067-68 (E.D.N.C. 1997). The Court of Appeals for the 4th Circuit, in ruling on the appeal from this court's ruling on the Motion to Reopen, moreover, found that the issue of the blond hairs was not material to the question of MacDonald's innocence. *U.S. v. MacDonald*, 161 F.3d 4 (4th Cir. 1998). The fact, however, that Jim Britt now provides evidence that Helena Stoeckley was prepared to directly admit her involvement to the jury could very well change

the prior analysis and conclusion on this issue. For, had Helena Stoeckley directly admitted her involvement to the jury, and told them as she told Jane Zilloux (pp. 31 *infra*) that she was concerned about her blond wig the night of the murders, because it was wet from the rain, and had blond wig hairs then been introduced as having been discovered in a hairbrush in the living room of the MacDonald home, those hairs would have taken on more importance, as corroboration of Stoeckley's confession and of her presence in the MacDonald home. Hence the discovery of those hairs should now be considered by this court, along with the evidence supporting the fact that they were very likely "wig hairs." This evidence should be considered as part of the "evidence as a whole" in support of MacDonald's innocence. Such evidence is set forth in the Cormier affidavit cited below [Appendix 3], and particularly in tabs 15-23 thereof (affidavits of various industry specialists.)

Consequently, in this regard, Petitioner requests that the following items of new evidence, submitted in the 1990 and 1997 proceedings be considered by this Court in connection with the 22 inch-long blond wig hairs and their import:[7]

a. Affidavit of Philip G. Cormier No. 1 (concerning saran fibers) In Support of Jeffrey R. MacDonald's 1997 "Motion to Reopen 28 U.S.C. Section 2255 Proceedings and For Discovery," (with attachments) (particularly directing this Court's attention to the

[7] The existence of the 22 inch-long blond synthetic hairs, found in a clear-handled hair brush on a table in the MacDonald home does not seem to be in dispute, as these subject hairs were the partial basis for MacDonald's 1990 habeas motion, and 1997 Motion to Reopen, and the government in responses to these motions admitted to the existence of the hairs, and had attached to its various responses affidavits concerning these hairs. Consequently, the extensive lab notes of Janice Glisson, the CID technician who first noted the presence of the hairs, which were included in the Affidavit of John J. Murphy, submitted by Petitioner as part of his 1990 habeas motion, are not recopied in any appendix herein, but Petitioner requests that these lab notes be included in the record herein by reference.

attached affidavits of the various industry experts (tabs 15-23), [attached as Appendix 3 hereto];

b. Affidavit of Janice Glisson, Feb. 5, 1991 [attached in Appendix 2, tab 11 hereto].

43. Also as part of the petitioner's 1990 habeas attack, he brought before this Court through various affidavits and lab notes, the fact that other lab notes discovered post-trial as part of a FOIA request demonstrated that government investigators had found "one black wool fiber and one white wool fiber in the debris taken from the right biceps area of Colette's pajama top, two black wool fibers and one green wool fiber in the debris removed from the wooden club murder weapon, and two black wool fibers in the debris removed from the mouth area of Colette, none of which were matched to any known source in the MacDonald home." See, Memorandum Opinion of Judge Franklin Dupree, *U.S. v. MacDonald*, 778 F. Supp. 1342 at 1347-49 (E.D.N.C. 1991). The petitioner advanced this new evidence as proof that intruders were in the home and as corroboration of the many Stoeckley confessions. The trial court analyzed this new evidence (as well as the blond wig hair evidence discussed in the pp. above) considering whether it would have changed the outcome of the trial. ("[T]he ultimate question that the court must address… is whether the jury's verdict would have been different had the defense been aware of the allegedly suppressed evidence at the time of trial.") *Id.* at 1349; ("With these various standards of materiality in mind, the court turns to the effect that the allegedly suppressed evidence would have on the trial and the jury's verdict.") *Id.* at 1350. In analyzing the evidence this way, the court found that the new fiber evidence was "insufficient to warrant habeas relief." *Id.* at 22. The present analysis before this Court is a different one, however. For the

petitioner, if he is able to establish to this Court's satisfaction that the new evidence he puts forward from U.S. deputy marshal Jim Britt is reliable, or if this Court agrees that the DNA testing results are reliable and probative of innocence, is entitled to have *all of the evidence* considered *as a whole*, that which was adduced at trial, and that which has been discovered since the trial. And the question then becomes, *not whether any one new piece of evidence would have altered the result of the trial, but whether all of the new evidence, taken cumulatively, would have altered the jury's decision.* Consequently, the petitioner requests that this Court, in analyzing the evidence as a whole, consider the black wool fibers that were found on critical parts of Colette MacDonald's body, and on one of the murder weapons itself.

Consequently, in this regard, Petitioner requests that the following items of new evidence, submitted in the 1990 proceeding be considered by this Court in connection with the discovery of the wool fibers and their import:

a. Affidavit of Ellen Dannelly, with exhibits, and FBI Laboratory Notes dated Oct. 17, 1974, [attached in Appendix 2, tab 12 hereto].

As part of its analysis of the black wool fiber impact, this Court might consider the following facts, never before submitted. First, during the direct examination of government witness Dillard Browning at the trial, prosecutor Murtaugh elicited the following testimony:

> Q. Mr. Browning, with respect to Government Exhibit 306—what has been described as the club, and government Exhibit 307—which has been described as the fibers removed from the club—let me ask you if you have conducted an examination of the items in that vial with respect to the pajama top?
>
> A. Yes; I have.
>
> Q. And would you tell us, please, sir, the results of that examination?

A. Yes; I found in this vial two purple cotton fibers that were identical in all aspects to the purple cotton threads used to sew the pajama top.

[Trial Tr. 3784].

To emphasize the importance of this during his closing argument, prosecutor James Blackburn told the jury that the blue cotton pajama fibers found on the murder weapon outside of the MacDonald home, was one of the most critical pieces of evidence of guilt. Blackburn, to be precise, argued as follows:

> "Perhaps the most telling thing of all, ladies and gentleman, you come back to two pieces—you could throw the whole shooting match away except for two pieces of evidence… The club… He didn't go outside the door…if the pajama top was not taken off his body in the hall or in the living room until this club was out the door, how in the name of all that is reasonable did they [the pajama top fibers] walk out the door and get on the club and stick to it? [Trial Tr. 7136-37].

However, as the laboratory notes attached to Ellen Dannelly's affidavit so cogently demonstrate, specimen Q89 contained the debris from the murder club. [FBI Report Oct. 17, 1974, p. 173.] On February 2, 1979, (six months before the trial), prosecutor Brian Murtaugh had delivered specimen Q89 to the FBI for further testing. [Dannelly affidavit exhibit, p. 25.] The FBI determined that specimen Q89 contained 2 black wool fibers of unknown origin, one green woolen fiber of unknown origin, and blue, green and gold fibers matching the rayon rug in MacDonald home. [Dannelly affidavit exhibit, p. 37.] The FBI found no fibers matching Jeff MacDonald's pajama top. The defense was not aware of this FBI report at the time of trial, and had no way to dispute or call into question the inaccurate testimony regarding the fibers found on the murder weapon outside the MacDonald home.

**E. Additional Post-Trial Evidence**

44. During the trial the prosecution introduced blood evidence from various places within the MacDonald home. It claimed that no blood of Jeff MacDonald's blood type was found where MacDonald claimed he struggled and was stabbed by intruders. During closing argument the prosecutor argued vociferously that no blue pajama fibers and no trace of MacDonald's blood was found in the area where MacDonald claimed he struggled, suggesting that this proved the lie to his account. [Trial Tr. 7123]. Yet in addition to the bunch of blue fibers found by government witness Shaw at where the living room and hallway joined (which was exactly where MacDonald said he struggled) (see pp. 17 *infra*), laboratory reports obtained through FOIA requests since the trial show that "Type B" blood was found precisely where MacDonald said he struggled. In Appendix 1, tab 2 (filed previously herein), Exhibit D-144 is set forth as containing red-brown stains found at the west entrance of the hallway. And in Appendix 1, tab 3, D-144 is examined as made up of B or O type blood.

46. Additional witnesses have come forward to whom Greg Mitchell directly and unambiguously confessed to murdering the MacDonald family. Attached as Exhibit 7 to Petitioner's Memorandum in Support of his Motion to Vacate, filed previously, are the affidavits of Everett Morse, Bryant Lane, and Donald Buffkin. Morse swears that he was told by Greg Mitchell that Mitchell murdered the MacDonald family. Lane, in an amplification of his earlier deposition, swears that he was told by Mitchell that Mitchell murdered the MacDonald family. And Buffkin swears that he was told by Mitchell that Mitchell murdered the MacDonald family. Mitchell died in 1982. These statements of

Greg Mitchell were declarations against interest and should be admissible in this proceeding and in any future trial. *See*, Federal Rules of Evidence, 803, 804.

47. Petitioner has recently learned of additional new exculpatory evidence, namely DNA results from tests ordered to be conducted by the U.S. Court of Appeals for the 4th Circuit, and conducted under the supervision of this Court. The DNA report from the Department of Defense Armed Forces Institute of Pathology [hereinafter "AFIP"] was issued on March 10, 2006. As the report sets forth, 28 biological specimens were deemed by the AFIP laboratory sufficient for testing for DNA results to be matched against known exemplars from the MacDonald family members, as well as Helena Stoeckley and Greg Mitchell. Of these 28 specimens tested, 9 specimens either produced no useable result or produced an inconclusive result. Of the remaining 19 useable specimens, 13 specimens were consistent with members of the MacDonald family who were killed. Of the 6 specimens remaining, three were consistent with the DNA of Jeffrey MacDonald. The three remaining specimens, specimens 58A1, 75A, and 91A, provided DNA results that did not match any of the MacDonald family members or Helena Stoeckley or Greg Mitchell, but were of unknown origin.

Regarding the unidentified specimens, specimen 58A1 was a hair found at the crime scene on the bedspread in Kristen MacDonald's room. Specimen 75A was a 2 ¼ in. body or pubic hair with root and follicle intact retrieved at the crime scene from off or under the body of Colette MacDonald. And also tellingly, specimen 91A was a hair with the root intact, found along with blood residue, underneath the fingernail of three-year-old Kristen MacDonald, who at crime scene was found murdered in her bed, and who had suffered defensive type wounds on her hands. [The genesis of these biological specimens, the

documentation supporting where they were found at the crime scene, and the DNA report analyzing them are set forth in the petitioner's memorandum in support of his motion to add an additional predicate to his previously filed Motion Under 28 U.S.C. Section 2255 to Vacate his Conviction, and the Appendix #1 filed therewith. The petitioner hereby respectfully incorporates those filings herein by reference.]

48. Jeffrey MacDonald, was a distinguished Green Beret army officer, and an accomplished physician before the crime. He had never been arrested for anything, had no criminal convictions, and no history of violence, and numerous character witnesses appeared on his behalf at his trial. During the nine years between the crime and his trial he was a model citizen, practicing medicine in California. He has been incarcerated now for over 26 years since his 1979 conviction in medium security institutions, housed among inmates with violent records, and during that extensive period of time Jeffrey MacDonald has been a model prisoner, and has never displayed a penchant for violence, or been cited for a violent incident.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of this Petitioner's Statement of Itemized Material Evidence was mailed by me, first class mail, postage pre-paid, on the 23 day of March, 2006, to the United States Attorney for the Eastern District of North Carolina, at the following address:

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