UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA v. JEFFREY R. MacDONALD	Nos. 75-26-CR-3 90-104-CIV-3-D

MEMORANDUM OF LAW IN SUPPORT OF
JEFFREY R. MacDONALD'S MOTION TO REOPEN
28 U.S.C. § 2255 PROCEEDINGS AND FOR DISCOVERY

I. INTRODUCTION

This is a motion to reopen the proceedings which led this Court to dismiss Jeffrey R. MacDonald's 1990 petition to set aside the judgment of conviction and sentence, and for a new trial. This motion is made upon the ground that the sworn affidavits of an FBI Laboratory Hair and Fibers Analyst, Special Agent Michael P. Malone, relied upon by this Court to dismiss MacDonald's 1990 petition, were knowingly false and misleading when made. Such false testimony, particularly by a government agent, has always prompted reconsideration of decisions based on such testimony. This case should be no exception.

MacDonald's 1990 petition was filed in this Court because, years after trial, the defense discovered previously withheld evidence in the government's files (handwritten lab notes by government forensic examiners that identified long blond wig hairs, as well as bluish-black and dark purple wool fibers found at the crime scene and, in particular, on the body of one of the

victims and on the murder weapon) which substantially corroborated MacDonald's account of the events which occurred on the night his wife and two children were murdered at their home on Fort Bragg. MacDonald's defense at trial (and his unaltered explanation during the twenty-seven-year period since the crimes were committed) was that a group of intruders, one of whom was a woman with blond shoulder-length hair and a floppy hat, had entered his house, grievously wounded him and knocked him unconscious, and killed his family. Indeed, within days after the murders, a woman named Helena Stoeckley confessed to numerous individuals that she and a group of friends had carried out the murders. Stoeckley testified at trial, and, while refusing to repeat her confessions before the jury, she acknowledged that she wore a blond wig and black and dark purple clothing, and that she burned the wig shortly after the murders occurred because she was afraid it might link her to the crimes.

The government refuted MacDonald's defense at trial by repeatedly arguing to the jury that MacDonald's account was a lie, because FBI Laboratory analyses demonstrated that none of the physical evidence found at the crime scene supported his statement that he and his family had been attacked by intruders present inside his home. The government also convinced the Court not to permit the jury to hear testimony from the witnesses to whom Stoeckley had confessed, on the grounds that there was no physical evidence linking Stoeckley to the crime scene which would corroborate her confessions. This made Stoeckley

inherently unreliable, agreed the trial judge, and so her confessions, he ruled, were likewise unreliable.

However, the suppressed evidence from the government's own files -- consisting of lab notes which identified long blond wig hairs at the murder scene and the purple and bluish-black wool fibers found in the mouth and on the arm of Colette MacDonald, and on the wooden club murder weapon found outside the MacDonald home -- was just such support for MacDonald's account.

There is no question but that this newly discovered (but previously withheld) evidence was exculpatory. The late Honorable Franklin T. Dupree, Jr. so found in his order summarily denying the 1990 petition without an evidentiary hearing. Having so found, however, Judge Dupree relied upon the affidavits of Michael P. Malone -- now shown to have been fraudulent -- to conclude that the long blond synthetic fibers described by the suppressed laboratory notes were not wig hairs. Thus, Judge Dupree's reliance on the Malone affidavits led him to dismiss MacDonald's 1990 petition because those affidavits from the FBI Laboratory assured this Court that the questioned fibers were not and could not have been hairs from a wig worn by Helena Stoeckley. The 1990 dismissal reasoned that fibers that were not and could not have been from a wig worn by Helena Stoeckley would not have affected the admissibility of the excluded Stoeckley confessions, nor the jury's view of the evidence.

II. THE DECISION SOUGHT TO BE RECONSIDERED

When the decision affirming this Court's summary denial of MacDonald's 1990 petition was reviewed by the Fourth Circuit, the reviewing panel concluded its affirmance of the lower court's summary denial of the petition with the following comment:

> Any evidence truly pointing to MacDonald's innocence would have prompted a review on the merits by this court.

United State v. MacDonald, 966 F.2d 854, 861 (4th Cir. 1992).

The point of this motion to reopen is that there was evidence pointing to MacDonald's innocence. This evidence was covered up by the false affidavits submitted by the government which were accepted as true by this Court and by the Court of Appeals upon appellate review.

The language of both this Court and the Circuit Court clearly shows that each court relied upon the truth of the government affidavits in reaching the conclusion that the newly-discovered evidence was not supportive of MacDonald's innocence and hence did not entitle him to relief, nor even to an evidentiary hearing. MacDonald's 1990 habeas petition had been based upon the suppression by the government at and before his trial of certain lab notes identifying fibers found at the crime scene as blond wig hairs and purple and black fibers. Had the lab notes been disclosed, they would have corroborated MacDonald's testimony that intruders, not he, had murdered his family. This lack of corroboration during the trial is the

reason why this Court and the Court of Appeals ruled that MacDonald, a successful young doctor with no motive to murder his family, no history of violence, no criminal record and everything to live for, was fairly tried and properly convicted. This Court highlighted the lack of corroboration and its effect on the jury:

> MacDonald asserts that the fibers discussed in the lab notes provide evidence which could have corroborated his testimony that drug-crazed hippies, and not MacDonald, were responsible for the crimes. In the absence of forensic evidence supporting MacDonald's account of intruders killing his family, the jury had no alternative but to conclude that MacDonald was lying and that he himself had committed the murders. During closing arguments, the government argued that there was no physical evidence of any intruders in the MacDonald home on the night of the murders and suggested that MacDonald was lying. The court in fact instructed the jurors that if they found that MacDonald had offered an exculpatory statement which proved to be false, they were permitted to consider whether the discrepancy pointed to a consciousness of guilt.

United States v. MacDonald, 778 F.Supp. 1342, 1350 (E.D.N.C. 1991).

The post-trial discovery of the government's forensic examiners' own identification of wig hairs and other exculpatory fibers and hairs was exactly what MacDonald needed at trial to remedy the "absence of forensic evidence" referred to by this Court. Thus, this Court, in considering the 1990 petition, had no trouble concluding "that the handwritten lab notes were exculpatory." Id. at page 1354. What doomed MacDonald's petition was that this Court also found that the physical materials referred to in the lab notes were not, and thus could not have been seen by the jury as being, what MacDonald claimed they were,

namely synthetic fibers made to look like human hairs and used in wigs for human cosmetic purposes:

> Without any evidence that saran is used in the production of human wig hair, the presence of blond saran fibers in a hairbrush in the MacDonald home would have done little to corroborate MacDonald's account of an intruder with blond hair or a blond wig.

Id.

The above-quoted conclusion was based on the affidavits of the government agent, Michael P. Malone, whose affidavits are at issue in this motion to reopen. This Court wrote:

> However, close analysis of the actual fiber evidence at issue reveals that the fibers provide little, if any, support for MacDonald's account of the crimes. In order to formulate a response in this action, the government submitted the fibers and hair at issue to an FBI examiner, Michael P. Malone, for re-examination. According to Malone, the blond synthetic fibers found in Colette's clear-handled hairbrush and discussed in the lab notes were not consistent with blond wig hairs from any known wig fibers currently in the FBI laboratory reference collection. Of the four synthetic fibers . . . three are composed primarily of "saran", a substance which is not suitable for human wigs, but is used to make mannequin and doll hair, dust mops and patio screens. MacDonald has presented no evidence that blond saran fibers have ever been used in the manufacture of human wigs.

Id. at 1350.

This motion, and the evidence supporting it, will show that the "facts" referred to above 1) were sworn to by FBI Agent Malone in two affidavits submitted by the government and (2) were knowingly false and misleading when made.

There can be no question that this Court relied on the Malone affidavits. The above-quoted portion of the decision so shows, as does the rest of this Court's decision. The Fourth

Circuit placed equal reliance on the affidavits:

> In reply, the government dismisses the evidence as inconsequential, just as it had during the trial. According to one of its forensic experts, the three blond synthetic hairs found in the brush were made of saran, an inexpensive substance generally used only in doll hair and mannequin wigs.

United States v. MacDonald, supra, 966 F.2d at 857.

The affidavits of the government forensic expert, Michael P. Malone, which were likewise relied upon by the Court of Appeals, fraudulently rejected MacDonald's contention that the questioned saran fibers were wig hairs. Malone falsely asserted that the FBI's investigation showed that saran fibers could not be manufactured in "tow" form, a necessary process to the use of such fibers as wig hairs. Malone swore that his investigation included a search of the references to Saran fibers in the FBI's collection of textile industry texts, and that these texts excluded Saran fiber from those materials that could be manufactured in tow form and hence as a wig component. FOIA releases now show that the textile texts in the FBI's library showed exactly the opposite to be true -- Saran fiber is manufactured in tow form and was used in the manufacture of wigs during the relevant time period.

Through FOIA releases which, in turn, led to defense interviews of several textile and doll industry experts interviewed by Malone and the FBI, MacDonald can now prove that Malone attempted unsuccessfully to find a textile or doll industry expert who would attest to his false assertion that the

very long saran fibers found at the crime scene were from a doll and not used to manufacture wigs. In fact, Malone's text reference research at the FBI laboratory and his field investigation of doll and textile industry experts generated evidence which proved exactly the opposite of what his affidavits said: (1) Saran fiber is indeed manufactured in tow form, making it useable in the manufacture of wigs; (2) Saran fiber was in fact used in the manufacture of wigs, and (3) there is no doll known to the doll experts that included Saran fibers as long as those found at the crime scene. In addition to the witnesses interviewed by Malone, this motion to reopen also presents other evidence to prove that Saran fibers are manufactured in tow form and were used in the manufacture of wigs for human cosmetic use prior to the commission of the MacDonald family murders.

In addition, this motion to reopen includes evidence generated by the FBI's Inspector General and by an investigation conducted by The Wall Street Journal that show how Special Agent Malone's falsifications in this case are part of a larger pattern of his falsifications in several other cases, including false sworn statements he made in the impeachment proceedings concerning former Judge Alcee Hastings. Malone's falsifications in that case caused the Inspector General to recommend that Malone be disciplined by the FBI.

Importantly, false or suppressed forensic evidence infected not only the proceedings on the 1990 petition, but infected as well the entire trial, since, as is universally recognized,

MacDonald was convicted because of the absence of forensic support for his account (support that is now available) and the presence of forensic evidence that appeared to contradict his account (evidence now known to be false or manipulated). Evidence prepared and supplied by Agent Malone in the 1990 petition proceedings should be carefully reviewed, as well as other forensic evidence given by the FBI Laboratory at those proceedings as well as at trial, since, after all, Agent Malone is not the only member of that laboratory whose work and credibility are now subject to question. This motion therefore seeks access to certain physical evidence for re-testing.

Indeed, as the 1990 petition shows, the forensic evidence identified to date actually demonstrates MacDonald's innocence rather than his guilt, and without the barrier erected by Agent Malone's two false affidavits that derailed the 1990 petition, all of the available evidence could have been, and now may still be, examined. No case, however old, can be safely put to rest if the decisions of the courts to do so were based upon a government agency's submission of knowingly falsified evidence. That is what has happened in this case.

III. STATEMENT OF FACTS

A. MacDonald's 1990 § 2255 Petition.

On October 19, 1990, MacDonald filed in this Court his second petition for relief pursuant to 28 U.S.C. § 2255

(hereinafter referred to as the "1990 petition").[1] In this petition,[2] MacDonald argued, inter alia, that he had been denied a fair trial in violation of his due process rights under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and their progeny, because

> (1) the government had failed to disclose pre-trial certain exculpatory evidence consisting of handwritten laboratory benchnotes which revealed that the government's forensic lab examiners had found various pieces of forensic evidence in the MacDonald home which indicated that a group of intruders had in fact been in the apartment on the night of the

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[1] MacDonald's first § 2255 petition was filed in April 1984. This Court (Dupree, J.) denied all of his claims. United States v. MacDonald, 640 F.Supp. 186 (E.D.N.C. 1985). The Court of Appeals affirmed. United States v. MacDonald, 779 F.2d 962 (4th Cir. 1985), cert. denied, 479 U.S. 813 (1986).

[2] The facts which undergird this motion to reopen are set forth in two omnibus affidavits which are filed herewith: (1) 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 (hereinafter "Cormier Aff. No. 1"); and 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 (hereinafter "Cormier Aff. No.2"). A detailed history of the prior proceedings involving MacDonald's 1990 petition is set forth in the Cormier Aff. No. 1 at ¶¶ 4-22. Also, attached as exhibits to the Cormier Aff. No. 1, and filed herewith, are additional affidavits which undergird the claims made in this motion to reopen. Any court filings and affidavits which are already part of the record in this case are referred to herein using the designation "(Rec.)" to distinguish them from items filed with and in support of the instant motion.

murders,[3] and

(2) the government had presented a false picture to the trial jury by arguing that there was no evidence to support MacDonald's account that a group of intruders had attacked him and his family in his home.

More specifically, MacDonald's 1990 petition was grounded on two sets of handwritten laboratory benchnotes which were obtained from the government, post-trial, under the Freedom of Information Act ("FOIA"). The first set of these handwritten notes revealed that in the spring of 1971, Janice Glisson, an Army forensic examiner, had found blond synthetic hairs, up to 22 inches in length, on a clear-handled hairbrush found on a table in the living room/dining area of the MacDonald apartment. A second set of benchnotes revealed that FBI forensic examiner James Frier had discovered in the spring of 1979, just a few months before trial,

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[3] There has never been any question that MacDonald made numerous specific requests for these handwritten notes in his pre-trial discovery requests. Notwithstanding these clear requests, the notes were not disclosed to the defense. Instead, the defense was given only typewritten reports which omitted these crucial exculpatory findings. Judge Dupree, in ruling on MacDonald's 1990 petition, found these handwritten notes to be exculpatory, see 778 F.Supp. 1342, 1354 (E.D.N.C. 1991); however, he ultimately ruled against MacDonald by concluding that they would not have changed the outcome of the case. It is this latter point with which MacDonald takes issue in this motion to reopen, in light of the fact that he can now demonstrate that Judge Dupree's decision as to the materiality of certain of these handwritten notes was based on a false and misleading presentation made by the government in its response to MacDonald's 1990 petition. As demonstrated infra, this false presentation consisted of (1) both affirmative false statements and (2) the withholding of exculpatory evidence obtained by the government in the course of an investigation it conducted as part of its response to MacDonald's 1990 petition.

the existence of black wool fibers on the mouth and biceps area of Colette MacDonald and on the wooden club murder weapon that the government claimed was used on Mrs. MacDonald, and which was found outside the MacDonald home. The government was unable to match these black wool fibers with any known clothing sources in the MacDonald apartment.

MacDonald argued that the findings contained in these handwritten benchnotes were highly exculpatory and material to the outcome of his trial in that they demonstrated the presence of intruders in the MacDonald home, thereby corroborating his account of events -- that he and his family had been attacked by a group of intruders consisting of three men and a blond-haired woman wearing a floppy hat. More pointedly, MacDonald argued that these laboratory findings were direct evidence that a woman named Helena Stoeckley, who owned a blond, shoulder-length wig, and who confessed to having participated in the murders, had in fact been present in the MacDonald home,[4] and that had this

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[4] As set forth in greater detail in Section IV-C infra, there is overwhelming evidence that Stoeckley, who testified at MacDonald's trial to owning a blond, shoulder-length wig and to wearing black and dark purple clothing, was involved in the murders and was present in the MacDonald home on the night of the murders. Stoeckley made a number of pre- and post-trial confessions to involvement in the murders. However, the trial jury never heard these confessions, as they were excluded at trial largely on the basis that there was no evidence to corroborate them. MacDonald asserted in his 1990 petition that the blond synthetic fibers discovered by lab examiner Glisson in 1971 were direct evidence that Stoeckley had been present in the MacDonald home, and were the corroboration that would have resulted in the admission of her out-of-court confessions at trial, which, in turn, would have devastated the prosecution's case.

evidence been made available to the defense at the time of trial, the government would never have been able to argue to the jury that there was no physical evidence to support his account of events. See Jeffrey MacDonald's Brief in Support of 28 U.S.C. § 2255 Petition (10/19/90) (Rec.) at pp. 49-77; Jeffrey R. MacDonald's Reply Brief in Support of 28 U.S.C. § 2255 Petition (5/14/91) (Rec.) at 5-12; Addendum to MacDonald's Reply Brief — Compilation and Analysis of Case Evidence (5/14/91) (Rec.) at A-2 - A-46.

The government responded to MacDonald's claims by asserting, inter alia, that (1) the 22-inch blond synthetic hair-like fibers and the black wool fibers were not exculpatory and did not demonstrate MacDonald's factual innocence, arguing that the blond synthetic fibers were not used to make wigs and instead came from a doll, see Response of the United States to Defendant's Petition for Post-Conviction Relief Pursuant to 28 U.S.C., Section 2255 (2/22/91) at 28-29; Supplemental Memorandum of the United States (5/21/91) (Rec.) at 13-14; Motion Hearing before the District Court (6/26/91) (Rec.) Tr. at 44-45, and (2) the black wool fibers were merely household debris, despite the fact that these fibers could not be matched to any known clothing sources taken from the MacDonald home. See Response of the United States to Defendant's Petition for Post-Conviction Relief Pursuant to 28 U.S.C., Section 2255 (2/22/91)(Rec.) at 32-34.

As the basis for its argument that the blond synthetic hair-

like fibers did not support MacDonald's account, the government submitted, in its successful effort to procure the dismissal of MacDonald's 1990 petition, two affidavits from FBI Special Agent Michael P. Malone,[5] who conducted a laboratory re-examination of the blond synthetic hair-like fibers found on the clear-handled hairbrush taken from the crime scene. Based on this re-examination and a field investigation, Malone stated that (1) these blond synthetic hairs were made from a substance called "Saran";[6] (2) these Saran fibers were consistent with the type of fibers normally used in the production of doll hair; (3) Saran fibers could not be made in a form suitable for use in the manufacture of wigs for human use; and therefore (4) the Saran fibers in question could not have come from a wig worn by Helena Stoeckley. Malone wrote in his Supplemental Affidavit:

> In addition to performing physical examinations in this case, I have consulted numerous standard references (see Exhibits 1-6 attached to this affidavit) which are routinely used in the textile industry and as source material in the FBI Laboratory, concerning the industrial applications for fibers, including Saran. None of these standard references reflect the use of Saran fibers in cosmetic wigs; however, they do reflect the use of Saran fibers for wigs for dolls and

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[5] See Affidavit of Michael P. Malone (2/14/91)(Rec.) and Supplemental Affidavit of Michael P. Malone (5/21/91)(Rec.), reproduced and attached to the Cormier Aff. No. 1 as Exhibits 1 and 2, respectively.

[6] Based on this re-examination, Malone states that he found a total of five blond Saran fibers on the clear-handled hairbrush. One was 24 inches long, another 22 inches, a third nine inches, and the remaining two fibers were of unspecified length. See Cormier Aff. No. 1 at ¶ 10.

> manikins, in addition to such uses as dust mops and patio screens.

Malone Supp. Aff. at p. 3, ¶ 6 (footnote omitted; emphasis added).

> Further, based on my own investigation and research in this case, I can state that Saran has the following physical characteristics which make it unsuitable for use in cosmetic wigs, in which the objective is to have the wig hair appear indistinguishable from natural human hair. Saran is very straight, is only manufactured as a continuous monofilament, does not lay or drape like human hair, and is also too shiny to resemble human hair. Lastly, Saran can not be manufactured as a "tow" fiber [footnote 3], which is essential to the cosmetic wig manufacturing process.
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> [Footnote 3] A "tow" is a large group of continuous filaments, without any definite twist, which is cut into definite lengths.

Malone Supp. Aff. at pp. 3-4, ¶ 7 (emphasis added).

> Based on these factors described above, and in the absence of any evidence to the contrary, I conclude that the 22 and 24 inch blond Saran fibers in this case are not cosmetic wig fibers.

Malone Supp. Aff. at p. 4, ¶ 8 (emphasis added).

Based on Agent Malone's supplemental affidavit, the government argued in its supplemental memorandum:

> [MacDonald] further maintains that the government mischaracterized the remaining fibers discovered by Glisson by identifying them as doll hair.
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> To definitively resolve this issue, FBI forensic expert Michael P. Malone has executed a supplemental affidavit which directly addresses such contentions. [footnote 7 omitted] In particular, Agent Malone avers that each of the striated synthetic fibers "made to look like hairs" that he had examined were identified by Glisson as those she removed from the clear handled hair brush and referenced in her laboratory bench notes. One microscopic slide on which these fibers were mounted (Q-46), contained two blond saran fibers, 24 inches and nine inches long respectively. A second slide (Q-49) contained a single 22 inch blond saran

> fiber 22 inches in length. A third slide (Q-48) contained a single grey delustered five inch modacrylic fiber, which matched a fall owned by Colette MacDonald. None of the saran fibers matched any wig exemplar in the FBI's reference collection; one of the saran fibers, however, matched known saran doll hair in the reference collection. Moreover, no standard reference concerning the uses of synthetic fibers, known to Agent Malone, reflects the use of saran fibers in wigs worn by humans. Instead, the standard references show that saran fibers are used to simulate hair in dolls and manikins, as well as the in [sic] manufacture of mops and patio screens. Indeed due to its physical characteristics and appearance, saran is totally unsuited for use in cosmetic wigs, the use to which petitioner speculates it was put in this case. [footnote 8] Consequently, the discovery of the long saran fibers in the clear handled hairbrush cannot conceivably assist petitioner's theory that the murder of the MacDonald family was committed by intruders -- one of whom wore a blond wig.
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> [Footnote 8]
> The theory that the synthetic fibers at issue in this case originated in a wig is nothing more than sheer speculation. Petitioner has not attempted to refute the government's assertion, first presented in its opening brief (Br. 28-29) that saran fibers are totally unsuited for the manufacture of human wigs.

Supplemental Memorandum of the United States (5/21/91) (Rec.) at 13-14 (emphasis added).

At the oral argument before this Court (Dupree, J.) on June 26, 1991, the government argued that (1) it knew from its expert Malone that "Saran . . . is totally unsuited for the manufacture of wigs," and (2) Saran had never been known to have been used in the manufacture of wigs. Motion Hearing (6/26/91) (Rec.) Tr. at 44-45. In addition, in response to the Court's questioning, the government went on to address MacDonald's contention that the length of the Saran fibers in question (22 and 24 inches) made it

highly unlikely that they came from a doll:

> [W]e know from working with this case and working with our forensic specialists, it's one that when dolls are made the hair is typically looped or woven inside the skull of the doll, accounting for or explaining the length of the hair . . . .
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> * * *
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> So one explanation for the length of this fiber is that it was very likely doubled in the skull of the doll, the type of dolls we know to have been owned by the MacDonald children and to have been in the MacDonald household at the time.

Id.

On July 8, 1991, this Court (Dupree, J.) denied MacDonald's 1990 petition, relying heavily on Malone's affidavits:

> [C]lose analysis of the actual fiber evidence at issue reveals that the fibers provide little, if any, support for MacDonald's account of the crimes. In order to formulate its response in this action, the government submitted the fibers and hair at issue to an FBI forensic examiner, Michael P. Malone, for reexamination. According to Malone, the blond synthetic fibers found in Colette's clear-handled hairbrush and discussed in the lab notes were not consistent with blond wig hairs from any known wig fibers currently in the FBI laboratory reference collection. Of the four synthetic fibers from the brush which have been analyzed . . . three are composed primarily of "Saran," a substance which is not suitable for human wigs, but is used to make mannequin and doll hair, dust mops, and patio screens. MacDonald has presented no evidence that blond Saran fibers have ever been used in the manufacture of human wigs. While MacDonald argues that Stoeckley's blond wig which was described by one witness as "stringy", may have been a mannequin wig, such speculation is unsupported by any evidence in the record.
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> Given that the synthetic blond fibers appear not to be wig hair and that the other fibers at issue are unmatched to each other and to known sources, the allegedly suppressed evidence would simply mirror other

evidence of unexplained household debris that was presented to the jury.

U.S. v. MacDonald, 778 F.Supp. 1342, 1350-51 (E.D.N.C. 1991) (emphasis added).

Subsequent to this Court's ruling, the defense began an investigation into the reference texts cited by Malone in his affidavit, and determined that Malone had selectively cited in his affidavit only textile reference works which did not state that Saran was used to make wigs. On its own, the defense located two textile reference works by authors Dembeck and Stout which documented the use of Saran in human wigs at the time of the murders. On appeal to the Fourth Circuit, MacDonald cited these reference works and noted Malone's selective citation to the reference works which did not state that Saran was used for wigs:

> Further, the government's contention that Saran was not used in wigs for human use, is based on the government's selective citation to what it calls "standard references". There are other "standard references" not cited, which document the contemporary use of Saran for human wigs. See e.g., A. Dembeck, Guidebook to Man-Made Textile Fibers and Textured Yarns of the World (United Piece Dye Works, 3d ed., 1969) ("Saran: Fil. yarn, tow for dolls hair, wigs, ENJAY; monofil, SPARK-L-ITE, USA licensees: Enjay Fibers: [emphasis supplied]); E. Stout, Introduction to Textiles (John Wiley & Sons, Inc. 3d Ed., 1970) ("In its various forms, [Saran] is used for auto upholstery and seat covers, . . . wigs and doll hair, . . . and numerous other things" [emphasis supplied].)

MacDonald's Fourth Circuit Reply Brief (11/25/91) (Rec.) at 14, n. 16.

At the oral argument before the Fourth Circuit on February

5, 1992, counsel for Dr. MacDonald again pointed out that Malone's conclusion -- that Saran was not used, and could not be used, in the manufacture of wigs -- was erroneous and that the Dembeck and Stout textile reference works unequivocally stated that Saran was used in "wigs". Cormier Aff. No. 1 at ¶ 19; Transcript of Oral Argument before the United States Court of Appeals, Feb. 5, 1992, at 48. The government responded by telling the Court of Appeals:

> First, with respect to the sources that are not cited in the records of law. If you take a look at them, none of them suggest that wig, that these fibers are used in human wigs. The records are purely in the context of dolls and we have copies of the books here if Your Honor wishes to examine them.

Transcript of Oral Argument before the United States Court of Appeals, Feb. 5, 1992, at p. 49.[7] (Attached to Cormier Aff. No. 1 as Exhibit 3 are copies of these pages from the transcript of oral argument.)

On February 6, 1992, the defense filed a post-argument letter with the Court of Appeals to bring to that Court's attention once again the Dembeck and Stout reference works that state that Saran was used in "wigs." Copies of the Dembeck and Stout texts were also enclosed for the Court's review. Cormier

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[7] Contrary to the government's assertion, these references to "wigs" in the Stout and Dembeck texts were not made in the context of a discussion concerning doll hair. First, both the Dembeck and Stout books are textile reference works, not doll reference works. Second, neither text, in discussing Saran fibers, limits the term "wigs" to dolls, doll hair, or doll wigs. Rather, "wigs" is simply one of a number of end-uses listed for Saran fibers.

Aff. No. 1 at ¶ 20, Ex. 4.[8] The government responded with its own letter in which it re-emphasized that (1) one of its "principal arguments" concerning the Saran fibers was that Saran was consistent with the types of fibers normally used in doll hair; (2) Agent Malone had cited "standard reference" works which did not reflect the use of Saran in wigs; (3) his investigation had determined that Saran "was unsuitable for use in cosmetic wigs;" and, (4) the Court should not take judicial notice of the Dembeck and Stout texts because they were not formally part of the record in the District Court. Cormier Aff. No. 1 at ¶ 21, Ex. 5.

On June 2, 1992, the Court of Appeals issued its opinion upholding the District Court's denial of MacDonald's habeas petition. Such was the power of the FBI Lab's long-standing reputation for probity and accuracy, that the Court of Appeals did not even mention the Dembeck and Stout texts which MacDonald had attempted to bring to its attention. Instead, relying on agent Malone's "expertise," it stated that "[a]ccording to one of [the government's] forensic experts, the three blond synthetic hairs found in the brush were made of Saran, an inexpensive substance generally used only in doll hair and mannequin wigs," United States v. MacDonald, 966 F.2d 854, 857 (4th Cir. 1992), and it concluded near the end of its opinion that "the origins of

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[8] Attached to the Cormier Aff. No. 1 as Exhibit 4 are copies of the pages from the Dembeck and Stout texts that were appended to the defense's letter.

the hair and fiber evidence have several likely explanations other than intruders." Id. at 860.

Hence, it is clear that the Fourth Circuit, like the District Court, fully credited Agent Malone's explanation over and above any standard texts, as to the provenance of the blond Saran fibers, when it concluded that these fibers did not support MacDonald's account because they did not corroborate the presence of a blond-wigged Helena Stoeckley at the crime scene. Because of the extensive evidence which now demonstrates that the government's presentation on the Saran fiber issue was false and misleading, the Fourth Circuit's assurance that "[a]ny evidence truly pointing to MacDonald's innocence would have prompted a review on the merits by this Court," id., at 861, must now be taken seriously. The only fair and rational conclusion is that an evidentiary hearing should be convened on the merits of MacDonald's 1990 habeas petition or, if the government were to withdraw Agent Malone's affidavits, that the 1990 petition should be forthwith allowed and a new trial granted.

B. The Government, Relying on FBI Agent Michael Malone, Made a False Presentation to This Court Asserting That the Saran Fibers Found in the MacDonald Home Could Not Have Originated From a Wig, and It Withheld From MacDonald Exculpatory Evidence Which Put Malone and Others in the Government On Notice That Its Presentation Was False.

After the Fourth Circuit upheld the dismissal of MacDonald's 1990 petition without an evidentiary hearing, the defense continued its investigation into the government's claims that the

long blond Saran fibers found in the MacDonald home could not have originated from a wig, and that these long Saran fibers likely came, as Agent Malone suggested, from a doll owned by the MacDonald children. As a result of this investigation, the defense learned that the government had acquired, as early as the end of January 1991, information which directly contradicted (1) Malone's subsequent claims that Saran was not, and could not be, manufactured in a form suitable for use in wigs for human cosmetic purposes, and (2) the government's repeated assertions that the Saran fibers had likely come from a doll.[9]

1. **There Is Evidence That at the Time MacDonald's 1990 Petition Was Being Litigated, the FBI Laboratory Had In Its Reference Collection Its Own Copies of the Dembeck Reference Text (And Quite Possibly the Stout Reference Text), Which the Government Did Not Disclose to the District Court, the Court of Appeals, or the Defense, and Which Agent Malone Selectively Ignored in Making His Sworn Statements Concerning the Saran Fibers.**

After the Court of Appeals affirmed the summary dismissal of MacDonald's 1990 petition, the defense submitted FOIA requests to the Department of Justice ("DOJ") and the Federal Bureau of

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[9] This information, which is described in detail below, was known to Agent Malone and others in the government before the government filed its first response to MacDonald's 1990 petition in this Court on February 21, 1991. Agent Malone's first affidavit is dated February 14, 1991, and was filed with the aforementioned government response. Malone's supplemental affidavit, dated May 21, 1991, was filed with the government's supplemental memorandum on May 21, 1991.

Investigation ("FBI") seeking, among other things, information in the possession of the DOJ and FBI concerning the Saran fiber investigation that was conducted by the government in connection with this case, including any reference texts concerning Saran fibers which the government reviewed. Cormier Aff. No. 1 at ¶¶ 28-30. As a result, the DOJ FOIA Unit released information which indicates that the FBI Laboratory where Agent Malone worked has in its own reference library at least two copies of the Dembeck textile reference text (which states, contrary to Malone's affidavits, that Saran is made in "tow" form and is used in "wigs"). This is the very same Dembeck reference text which the defense attempted to bring to the attention of the Court of Appeals, and which the government convinced that Court to disregard. Further, it appears that the FBI Laboratory was in possession of the Dembeck reference work before Malone filed his supplemental affidavit in this Court in which he made the statements that "[n]one of these standard references reflect the use of Saran fibers in cosmetic wigs[,]" and that "Saran cannot be manufactured as a 'tow' fiber which is essential to the cosmetic wig manufacturing process."[10] Cormier Aff. No. 1 at ¶¶

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[10] The FBI Laboratory identification stamp on the cover page of the FOIA-released Dembeck excerpt indicates that there were at least two copies of the Dembeck text in the FBI Laboratory. The stamp reads:

F.B.I. LABORATORY
M.A. UNI. -- 3931
COPY NO:2

In addition, there is a handwritten notation on the cover page

31-34. Finally, this same FOIA release also included an excerpt from the Stout reference text which is clearly not simply the government's copy of the papers that the defense submitted to the Court of Appeals (which of course had been served upon the government); it thus suggests that the FBI (or at least the DOJ) had its own copy of the Stout reference text, and may have been in possession of this text before Malone filed either of his affidavits. Cormier Aff. No. 1 at ¶¶ 35-36. At no point in the litigation involving MacDonald's 1990 petition did the government disclose to defense counsel, the District Court, or the Court of Appeals that it possessed its own copies of the Dembeck and Stout texts, and in particular that the FBI Laboratory had at least two copies of the Dembeck text in its reference collection. Instead, Agent Malone proceeded to execute, and caused the government to file, an affidavit belied by those texts, causing this Court and the Court of Appeals to rely on Malone's "expert" assertions as to the end uses of Saran.

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which suggests that this copy of the Dembeck text has been in the possession of the FBI laboratory since at least May 1979, a month before MacDonald's trial began. Finally, the FBI Laboratory identification stamp which appears on the FOIA-released Dembeck excerpt is the same FBI Laboratory identification stamp which appears on exhibit six to Agent Malone's supplemental affidavit, which is an excerpt from Matthews, Textile Fibers, John Wiley & Sons, Inc. (6th ed.). See Cormier Aff. No. 1 at ¶¶ 33-34.

2. The Government's Field Investigation Into the End-Uses for Saran Fibers Unearthed Exculpatory Information Which Contradicted Malone's Claims that Saran Fibers were not Used, and Could not be Used, in Wigs, And This Evidence Corroborated MacDonald's Claim that the Saran Fibers Came from a Wig, Rather than from a Doll as the Government Asserted.

During its investigation, the defense also discovered that in December 1990, shortly after MacDonald filed his petition, Agent Malone and other government investigators conducted a field investigation into the commercial end-uses for Saran fibers. During this field investigation, the government attempted to locate an independent expert who would swear that Saran fibers were not used, and were not suitable for use, in wigs. Unable to find a reputable, independent expert to so state, the government turned to Agent Malone as its "expert" of last resort. Furthermore, during its field investigation, the government acquired, but never disclosed, exculpatory information which directly contradicted Malone's claims and corroborated MacDonald's claims that the Saran fibers came from a wig rather than a doll. This exculpatory information is described below.

(a) A. Edward Oberhaus, Jr.

The defense has learned that on December 4, 1990, shortly after MacDonald had filed his petition, Agent Malone, Assistant United States Attorney Eric Evenson, and FBI Agent Raymond "Butch" Madden contacted A. Edward Oberhaus, Jr., an executive at Kaneka America Corporation, which produces "modacrylic" fibers

(non-Saran fibers) under the tradename "Kanekalon," for use in wigs and doll hair. Cormier Aff. No. 1 at ¶¶ 37-51. Oberhaus has told defense counsel that they came seeking information about Saran fibers, his advice on how they could trace certain fibers that they thought were probably made of Saran, and an expert affidavit. Oberhaus told the government investigators that, based on his limited knowledge, Saran fibers were used in the doll industry, but that this did not mean that Saran was not used in the wig industry as well. Id. at ¶¶ 39-45. Oberhaus told defense counsel that the government investigators were interested in getting an affidavit from him to the effect that Saran was not used to make wigs worn by humans, but that he told them that he could not attest to such a statement since his company did not produce Saran fibers and hence he was not an expert on that question. Id. at ¶ 45. Nonetheless, subsequent to Agent Malone's interview with Oberhaus, the government drafted an affidavit for Oberhaus in which it sought to have him attest to, among other things, the following:

> Wigs, both then and now, have been manufactured from human hair, modacrylic fiber, or a combination of both. Modacrylic fibers are the only synthetic fibers now used in the production of wigs. ¶8
>
> This is due to both the nature of the modacrylic fiber itself, as well as the methods used to manufacture both the modacrylic fibers and wigs. ¶8
>
> Modacrylic fibers can be manufactured as "tow" fibers, which are the only type of fibers that can be used in the manufacture of hair goods (wigs and hairpieces). ¶9
>
> I am familiar with the production and use of Saran

> fiber, both now and prior to 1969-70. Saran is a synthetic fiber that cannot be produced as a "tow" fiber, and for that reason, cannot be used in the hairgoods industry. Saran can only be made as a continuous filament fiber, which is not suitable for the manufacture of wigs. ¶11
>
> The primary use of Saran fiber is in the manufacture of doll hair. Prior to and including 1969-70, it was the only fiber used to make doll hair. Currently both Saran fibers and nylon fibers are being used for this purpose. In recent years, a method has been devised to produce Kanekalon fiber as a continuous filament fiber, and this fiber is now being used in the production of doll hair. ¶12

Cormier Aff. No. 1 at ¶ 49.

Oberhaus properly refused to sign the affidavit that had been drafted for him by the government. Instead, on January 24, 1991, he provided the United States Attorney's Office for the Eastern District of North Carolina with a signed affidavit of his own drafting, in which he expressly stated, among other things: "Wigs and hairpieces during the period 1960 to date have most often been manufactured with human hair, modacrylic fibers, other fibers or a combination of any of these filaments." (emphasis added). Cormier Aff. No. 1 at ¶ 50.

The government never disclosed that it had engaged in an unsuccessful search for an independent expert, and that instead Agent Malone submitted his own supplemental affidavit in which he, posing as an expert, made the very statements that Oberhaus had refused to make. Cormier Aff. No. 1 at ¶ 25.

Furthermore, as is detailed below, during its field investigation, the government did encounter experts who indeed had information to offer about Saran, but because this

information was not what the government had hoped to hear and learn, it submitted Agent Malone's affidavit instead — an affidavit belied by what was learned in the undisclosed field investigation.

(b) Mattel Toys, Inc.

In addition to interviewing Oberhaus, the defense learned, from FOIA materials received in May 1996, that on or about December 5, 1990, Agent Malone, AUSA Evenson and another agent (perhaps Agent Madden) went to California and interviewed Judith Schizas and Mellie Phillips, two employees of Mattel Toys, Inc. This FOIA release included, among other things, the FBI 302s for both Schizas and Phillips. Cormier Aff. No. 1 at ¶¶ 51-52. During these interviews, Schizas and Phillips provided Malone, Evenson and the other agent with the following information which directly contradicted the subsequent sworn claims by Malone, filed by the government, as to the provenance of the 22 inch and 24 inch Saran fibers found at the crime scene. (Affidavit of Judith Schizas and Declaration of Mellie Phillips are attached to Cormier Aff. No. 1 as Exhibits 13 and 14 respectively.)

(1) Phillips told the three government interviewers that Saran was made in "tow" form. Cormier Aff. No. 1 at ¶ 53(a).

(2) According to the FBI 302s of their interviews, both Schizas and Phillips told the government that they were not aware that Mattel had ever made a doll with Saran hair

fibers as long as 24 inches, and Phillips told them that she was not aware that any other manufacturer was using Saran in the making of dolls in the late 1960s and early 1970s.[11]

(3) Schizas, who has a personal collection of approximately 4,000 dolls, provided the defense with an affidavit in which she states that she recalls the following concerning her interview by Malone:

> During this interview, we discussed my background and my extensive doll collection. At some point during the interview, after I had told them about my extensive doll collection, we went to my home in Hawthorne, California, where the interview continued. We discussed generally the different types of synthetic fibers used to make doll hair, including Saran, nylon

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[11] According to Phillips' 302, she told them that

> It was her recollection that during the 1960's and early 1970's, MATEL [sic] used SARAN material in the manufacture of doll hair, particularly for the 7 ½ inch "Barbie Doll". The length of the hair (SARAN) for the Barbie was approximately three and one half to four inches in length. It was her best recollection that MATEL [sic] never made any other doll using SARAN type material. Also during this same time frame, it was her recollection that no other doll manufacturers used SARAN in the making of dolls.

Cormier Aff. No. 1 at ¶ 53(b). According to Schizas' 302, she told the government that

> She was of the opinion that the longest SARAN fiber used for doll hair by MATEL [sic] was approximately 18 inches in length. This would have been used on the doll, "DANCER ELLA", manufactured in approximately 1973. Prior to 1970, the longest length Saran used by MATEL [sic] was in the manufacture of "CHARMIN CHATTY" and was 16-17 inches in length and was manufactured between 1964-1966.

Cormier Aff. No. 1 at ¶ 53(b).

and Kanekalon. The agents told me that they were interested in any doll or dolls, made by Mattel or any other manufacturer, which might have had hair 22 or 24 inches long. I replied that, to my knowledge, no Mattel doll had ever been made with synthetic fibers that long, and that one might possibly find a doll hair fiber that long if the fiber were doubled over in the hair rooting process to produce two 11-12 inch hairs, but that I did not know of such a doll.

The agents told me that they were looking for a "ballerina" doll on a pedestal, but initially they gave me little information to go on. I gave them several doll collectors' books to look through to see if they could find the doll that they were looking for, but they told me that they did not really know what they were looking for. Finally, after telling them that I needed more information, they told me that they were looking for a blond-haired, ballerina doll, approximately 24 inches in height, which they believed played music and stood on a pedestal and which would have been on the market in December 1969. I then retrieved from my collection a doll called "Dancerina," which was manufactured and sold by Mattel in 1969. Dancerina is a blond-haired "ballerina" doll, which does not stand on a pedestal, but which does play music. I also retrieved a doll called "Pollyanna."

The agents asked whether or not they could have some of the hair fibers from my Pollyanna and Dancerina dolls. I assented to this request and had to use a pair of tweezers to carefully pull the fibers out of the dolls so that they would not break while being pulled out.[12]

During the course of the interview, the agents told me that the defense was contending that the 22 or 24 inch Saran fibers had come from a wig, and the agents told me that they simply wanted to show that it was "possible" for such a long fiber to come from a doll. I told the agents that while it was "possible," it was

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[12] In his first affidavit filed with this Court on February 14, 1991, Agent Malone stated that he examined fibers from a "Dancerina" and a "Pollyanna" doll which were dissimilar to the long blond Saran fibers taken from the crime scene, but Malone did not disclose that he obtained these Dancerina and Pollyanna fibers from Schizas. See Malone Aff. (Rec.) at ¶ 12. In addition, as discussed below, Schizas learned after her interview that the Dancerina and Pollyanna dolls had hair made from "nylon" fibers.

> "not probable," because even if fibers of that length were used in a doll, it would be very difficult to pull out an entirely intact fiber because of the way that the fibers are rooted, and they had witnessed how I had to use tweezers to carefully extract the intact fibers from the Pollyanna and Dancerina dolls.

Schizas Aff. at ¶¶ 7-10, attached to the Cormier Aff. No. 1 as Exhibit 13.

(4) Schizas further states in her affidavit that after her interview by Malone and the others, she learned that the Pollyanna and Dancerina dolls both had hair made from "nylon" fibers, and that the fibers were not longer than 18 inches in total length. Schizas Aff. at ¶ 11. (Ex. 13 to Cormier Aff. No. 1) In addition, she also undertook her own survey of her doll collection to determine whether any of her dolls could possibly have synthetic fibers as long as 24 inches. In her examination of 30-40 dolls which might possibly fit into this category, Schizas states that she found none which appeared to have fibers this long. Schizas Aff. at ¶ 12. (Id.)

None of the information which Phillips and Schizas state they imparted to Malone and the other government investigators, including Schizas' and Phillips' FBI 302s, was ever disclosed to the defense nor included in any government filing with this Court. The defense never knew that the government had even spoken with Schizas and Phillips, let alone that they had provided the government with exculpatory information which put the lie to the government's claims that the source of the long

blond Saran fibers found at the crime scene was a doll. Cormier Aff. No. 1 at ¶ 54.

3. The Defense Has Located Numerous Persons in the Saran Fiber Manufacturing Industry and the Wig Manufacturing Business Who Aver That Saran Fibers Were Made in "Tow" Form and Were Used in the Manufacture of Human Wigs.

In his Supplemental Affidavit, Agent Malone informed this Court that Saran did not have physical properties that made it suitable for use in wigs:

> Saran . . . is only manufactured as a continuous monofilament, [and] Saran can not be manufactured as a "tow" fiber [footnote omitted], which is essential to the cosmetic wig manufacturing process.

Malone Supp. Aff. at pp. 3-4, ¶ 7 (emphasis added). This statement conveyed that Saran fibers could not be manufactured in a physical form which would permit their use in the manufacture of wigs for human cosmetic use, and hence produced the conclusion that the blond Saran fibers found in the MacDonald home did not come from a wig such as was worn by Helena Stoeckley.

Investigation by the defense into the Saran fiber manufacturing and wigmaking industries has revealed that the sworn claims made by Agent Malone are false.[13] According to Sue

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[13] Conducting such an investigation has been extremely difficult, due to limited resources, the passage of time and the difficulty in locating witnesses in an industry which was comprised of many relatively unorganized, marginal businesses, and the fact that much wig manufacturing during the relevant time period took place outside the United States. This being said, at this late date, it is the government which should bear the burden of proving definitively that the long blond Saran hair-like fibers found at the crime scene did not come from a wig, as it is the government which withheld from MacDonald during the pre-trial

P. Greco, a chemist and former 28-year employee of National Plastics Products ("National Plastics"), a fiber manufacturing company located in Odenton, Maryland, Saran fibers are not "only manufactured as continuous monofilament." Contrary to Malone's unsupported claim, Greco has told the defense that National Plastics manufactured Saran fibers "in both monofilament and 'continuous multifilament' ('tow') form," and that these Saran fibers were sold to wig manufacturers who made wigs for human use. Cormier Aff. No. 1 at ¶ 58. (Affidavit of Sue P. Greco is attached to the Cormier Aff. No. 1 as Ex. 15). Indeed, as further proof that Saran fibers were made in "tow" form, Greco has provided defense counsel with an actual "tow," many feet in length, consisting of blond, curled Saran fibers, that was manufactured by National Plastics. Cormier Aff. No. 1 at ¶ 59(e).[14] (Attached to Greco's Affidavit as Exhibit 6 is a photo of this blond "tow.")

Further, Greco is experienced with the method by which the FBI claims to have identified the Saran fibers at issue in this case.[15] She states that the slight difference in color and

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stages of this case, the exculpatory handwritten laboratory notes which documented Janice Glisson's initial discovery of the long blond Saran fibers.

[14] This "tow" of Saran fibers, which agent Malone claimed could not exist because "Saran can not be manufactured as a 'tow' fiber," is in the possession of undersigned counsel, who will gladly make it available for the Court's or the government's inspection upon request.

[15] According to Malone and the Affidavit of FBI Special Agent Robert Webb which was filed in this Court (attached to the

chemical composition between the 22 inch and 24 inch blond Saran fibers found at the crime scene is an indication that these fibers may have originated from a wig, as opposed to having originated from a doll, because human wigs often contain a blend of different colored fibers for the purpose of making the wig appear more realistic and natural. Cormier Aff. No. 1 at ¶ 59(e). Further, Greco knows of no reason why the Stout and Dembeck texts are not reliable and authoritative reference works on the subject of Saran fibers and the uses for such fibers, and notes that they are more accurate than the texts cited by Agent Malone in his supplemental affidavit, because they both state that Saran is used in wigs, and the Dembeck text states that Saran is manufactured in "tow" form. Cormier Aff. No. 1 at ¶ 59(d). Finally, Greco has informed the defense that during the 1980s and 1990s, the FBI regularly took tours of the National Plastics fiber manufacturing facility in Odenton, Maryland, and that the FBI was routinely given samples of a variety of fibers manufactured by her company, including Saran fibers. Greco notes that on one of these tours in which she participated, she recalled the agents' being interested in the types of fibers that might be used in disguises. Greco states that no one from the FBI ever contacted her concerning the MacDonald case. Cormier Aff. No. 1 at ¶ 60.

Greco's statement that National Plastics manufactured Saran

Greco Aff. as Ex. 3), the FBI used Fourier Transform Infrared Spectroscopy ("FTIR") to identify the long blond fibers as Saran.

fibers in "tow" form, and that these "tow" fibers were used in the manufacture of wigs made for human use, is confirmed by Samuel Umansky and Frank Applebaum, both of whom also worked for National Plastics. Cormier Aff. No. 1 at ¶¶ 71-75; Affidavit of Samuel Walter Umansky ("Umansky Aff.") and Affidavit of Frank Applebaum ("Applebaum Aff."), attached to the Cormier Aff. No. 1 as Exhibits 22 and 23 respectively.[16]

In addition to Greco and her fellow workers at National Plastics, the defense has located a number of other witnesses, including persons who owned or were employed in wig manufacturing businesses, who have told the defense that Saran fibers were used before and after 1970 to manufacture wigs for human use.

Norman Reich and Jerry Pollak, both of whom were involved in wigmaking, have told the defense that they recall manufacturing wigs for human use with Saran fibers during the 1960s into the 1970s. See Affidavit of Marie Schembri ("Schembri Aff.") and Affidavit of Jerry Pollak ("Pollak Aff."), attached to the Cormier Aff. No. 1 as Exhibits 16 and 17, respectively. Reich,

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[16] Umansky, who was employed as a technical sales associate, recalls that National Plastics sold Saran fibers in "tow" form, in a variety of colors, including blond, to a number of different manufacturers for use in human wigs during the period he worked there (1950-1958) Umansky Aff. at ¶ 7. Umansky also recalls having seen wigs made with Saran fibers. Id. at ¶ 11(a). The wigmakers whom he recalls making such wigs were Grand Wigs, Ben Wigs, Artistic Wig, Myer Jacoby, the Dawbarn Brothers, and A & B Wig Company. Id. at ¶ 7. Applebaum similarly recalls that National Plastics manufactured Saran fibers in a variety of colors, including blond, to be used in the manufacture of wigs for human use, and he also recalls having seen such wigs. Applebaum Aff. at ¶ 8.

who was president and a director of A & B Wig Company (also known as "A & B Artistic Wig") in New York, stated that in the 1960s and 1970s, his company manufactured thousands of human cosmetic wigs using Saran fibers purchased from a company located in Maryland. Cormier Aff. No. 1 at ¶ 62. He recalls that these Saran wigs were available in blond and black, and were manufactured in a variety of styles, including some with Saran fibers that were at least 22 inches or longer. Cormier Aff. No. 1 at ¶ 62. These wigs were sold by A & B Wig Company to a variety of wholesale distributors in the United States. Schembri Aff. at ¶ 4(e). Pollak, who was employed in a family-owned company called Artistic Wig and Novelty Company, and was later employed as vice president and a director of A & B Artistic Wig, states that during the 1960s and 1970s, both of these companies "manufactured hundreds of thousands of masquerade and costume wigs to be worn by humans," and that "a small percentage of the wigs manufactured for human use . . . were made with Saran fibers." Cormier Aff. No. 1 at ¶ 63. Pollak recalls that these Saran wigs were "shoulder length or longer," had "`straight' hair," and "were produced in a variety of colors, including blond." Id. In addition, Robert Oumano, who owns a wholesale novelty business which sells all types of novelty items, including wigs, recalls purchasing Saran fiber wigs from A&B Wig Company during the 1960s and 1970s, and distributing these wigs to retailers. Cormier Aff. No. 1 at ¶ 64.

In addition to Reich and Pollak, the defense located Jaume

Ribas, the former chief executive officer of Fibras Omni, S.A., in Mexico City. Cormier Aff. No. 1 at ¶ 65. (Affidavit of Lucia Bartoli ("Bartoli Aff.") attached to Cormier Aff. No. 1 as Ex. 19) Ribas informed the defense that while he considered Saran too hard and coarse a fiber to have been used extensively in commercial wig-making, he knew that Saran fibers had been used to make wigs for human use, and that such wigs had been made for theatrical productions. Cormier Aff. No. 1 at ¶ 67. Ribas said that in 1967, he assisted the Museum of Anthropology in Mexico City by having approximately 100 wigs made for life-size "dummies" for a diorama exhibit. Cormier Aff. No. 1 at ¶ 66. Ribas even gave the defense one of these Saran wigs from the diorama exhibit.[17] Testing conducted by an independent laboratory has confirmed that the fibers are Saran. Cormier Aff. No. 1 at ¶ 69.

IV. ARGUMENT

In defending against MacDonald's 1990 petition, the government misled this Court, the Court of Appeals, and the defense by (1) withholding critical exculpatory evidence which was clearly material to the outcome of the proceedings, and (2) painting a false picture by claiming that the source of the blond Saran fibers found at the crime scene could not have been a wig

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[17] A photograph of this wig is attached to the Cormier Aff. No. 1 as Exhibit 20. The wig itself is in the possession of the defense, which will make it available for the Court's or the government's inspection, upon request.

for human use, as opposed to a doll. Had the truth about these Saran fibers been known when the 1990 petition was being litigated, the District Court and the Court of Appeals would have examined the Saran fiber evidence, and all of the other evidence of MacDonald's innocence, in a completely different light. Indeed, given the determinative importance assigned by both the District Court and the Court of Appeals to their finding, based upon Malone's expert assurances, that the blond fibers could not have come from a wig, it is evident that the outcome of the 1990 habeas would have been different had the courts reached the conclusion that the blond fibers might well have come from a wig. MacDonald's petition would not have been summarily dismissed, an evidentiary hearing would have been held, and the web of government deceit and suppression from the start of the MacDonald prosecution through the 1990 habeas would have emerged.

This Court has the power to (1) re-open MacDonald's 1990 petition, (2) order a hearing into the government's fraudulent actions in the prior proceedings before this Court and the Court of Appeals, and (3) consider in full context all of the voluminous, persuasive and admissible evidence pointing to MacDonald's innocence that has come to light since the trial, including MacDonald's request, filed herewith, for access to the physical evidence for the purpose of conducting laboratory examinations, including DNA testing. Under the egregious and extraordinary circumstances present here, this Court should exercise this power in order to conduct the kind of searching

evidentiary inquiry calculated to address, once and for all, the judicially-acknowledged "unease"[18] that is presented by this case. Once an evidentiary hearing is held, it will become evident that the only correct conclusion that can be reached is that MacDonald is entitled to a new trial, because the totality of the evidence overwhelmingly demonstrates his innocence. Indeed, if the government withdraws Malone's two affidavits, that alone would leave the record in a state such that, taking seriously what the District Court and Court of Appeals wrote in summarily dismissing MacDonald's claims earlier, the 1990 habeas petition would have to be allowed and a new trial granted without a need for an evidentiary hearing.

A. This Court Has The Authority To Reopen The 1990 § 2255 Proceedings For "Fraud on the Court."

There is no specific procedure set forth in 28 U.S.C. § 2255 or in the Rules Governing Proceedings in the United States District Courts Under Section 2255 (hereinafter "Section 2255 Rules") for reopening a § 2255 proceeding. However, Rule 12 of the Section 2255 Rules provides:

> If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate to motions filed under these rules.

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[18] See United States v. MacDonald, supra, 966 F.2d at 860. See also, United States v. MacDonald, 688 F.2d 225, 236 (4th Cir. 1982) (Murnaghan, J., concurring).

Accordingly, this Court has the power to reopen the 1990 § 2255 proceedings by invoking its inherent power to grant equitable relief against a judgment obtained by fraud. This equitable power to grant relief from a fraudulently obtained judgment has been described by the Supreme Court as a power which

> is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.

Hazel-Atlas Glass v. Hartford Empire Co., 322 U.S. 238, 248, 64 S.Ct. 997, 1002, 88 L.Ed. 1250 (1944).[19] See also, Universal Oil Products v. Root Ref. Co., 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447 (1946) ("The power to unearth such fraud is the power to unearth it effectively. Accordingly a federal court may bring before it by appropriate means all those who may be

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[19] While the Supreme Court recognized the "salutary" purpose behind the rule of finality of judgments, the Court stated:

> This has not meant, however, that a judgment finally entered has ever been regarded as completely immune . . . From the beginning there has existed . . . a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments . . . .

322 U.S. at 244, 64 S.Ct. at 1000.