nothing to do with the saran controversy -- that were fully litigated and resolved during these earlier proceedings. And he uses Agent Malone's alleged "fraud" as a pretext to seek a wholesale reexamination of the evidence, including laboratory procedures that did not even exist at the time of trial.

What is more, the defendant totally disregards the fact that the question whether saran was suitable for the manufacture of human cosmetic wigs had virtually no bearing on the outcome of this proceeding. As explained earlier, this Court denied relief for three independent reasons: not only because of the insignificance of the proffered "newly-discovered" evidence, but also because of its determination that the government had not concealed that evidence, and because the defense possessed the evidence at the time of the first habeas proceeding but determined not to use it. Similarly, the court of appeals denied relief exclusively on abuse of the writ grounds, pretermitting reexamination of the saran controversy despite the fact that, by then, the matter had been brought to its attention.

Because of these factors alone, the defendant is entitled to no relief and this Court would have an abundant basis to dismiss this matter on its merits. Under the habeas "gatekeeping" provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 (hereafter "AEDPA"), however, this Court is obligated to dismiss this "second or subsequent" petition for habeas relief for want of jurisdiction or, alternatively, refer it to the court of appeals for a determination whether certification

is warranted. See, e.g., Benton v. Washington, 106 F.3d 162, 165 (7th Cir. 1997). As we show below, that statute extends to cases such as this one where claims of "fraud on the court" or Brady violations are alleged in a successive petition. And, even if some "fraud on the court" exception to the AEDPA could be implied, the defendant has not demonstrated such fraud here. Therefore, the instant petition must be dismissed for want of jurisdiction.

b. Under the "Gatekeeping Provisions of the Antiterrorism and Effective Death Penalty Act of 1996, This Case Should Be Transferred to the Court of Appeals.

1. The Governing Statute

As part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1217, 28 U.S.C. § 2255 was amended as follows:

> A second or successive motion [for habeas corpus relief] must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain --
>
> > (1) newly-discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense;
> >
> > (2) a new rule of constitutional law, made retroactive to causes on collateral review by the Supreme Court, that was previously unavailable.

See 104 Stat. 1220, tit, 1, § 105. In turn, as amended by the 1996 Act, 28 U.S.C. § 2244 provides in part as follows:

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

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

See 110 Stat. 1221 § 106. Thus, as explained in Felker v. Turpin, 116 S.Ct. 2333, 2340 (1996), "[t]he Act requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court." If a habeas petitioner disregards this requirement, "the district court has no option other than to deny the petition." Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

The defendant has not sought much less obtained such leave from the court of appeals.[15] Moreover, he cannot circumvent this requirement by labeling the instant submission a "Motion To Reopen," or by invoking this Court's "inherent power to grant equitable relief against a judgment obtained by fraud." See Def. Mem. at 39-48.[16]

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[15] We note that, on the day after the defendant filed the instant motion, he also filed in the Court of Appeals a "provisional" motion for certification under 28 U.S.C. § 2244" in the event that this Court determines that the "motion to reopen" should have been filed in that court. He subsequently withdrew the motion.

[16] While not expressly arguing that the AEDPA should not be applied to him on retroactivity grounds, the defendant suggests as much by claiming that "any reevaluation of his claims * * * should be conducted under the standards in existence in 1990." Def. Memo. at 53 n.27. It is, however, now well established that the gatekeeping rule applies to any habeas-related submission after April 24, 1996. See, e.g., Smith v. Gilmore, No. 96-1397 WL 164007 (7th Cir., Apr. 8, 1997); Felker v. Turpin, 101 F.3d 657, 661 (11th Cir. 1996) applying AEDPA gatekeeping rule even though first habeas, which "motion to reopen" challenged, was filed before its effective date); Nunez v. United States, 96 F.3d 990 (7th Cir. 1996); Hatch v. Oklahoma, 92 F.3d 1012 (10th Cir. 1996).

2. Motion to Reopen Under Fed. R. Civ. P. 60(b)

As one basis to support his "Motion to Reopen" the defendant relies upon Fed. R. Civ. P. 60(b). See Memo. at 45-48. That Rule (which applies to civil and not criminal cases) authorizes a court to "relieve a party * * * from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly-discovered evidence which by due diligence could not have been discovered in time to move for a new trial * * * (3) fraud * * *, misrepresentation or other misconduct of an adverse party * * * ." [17]

Even before enactment of the AEDPA, however, the courts have held that Rule 60(b) cannot be used to circumvent constraints upon the submission of successive habeas petitions such as the new gatekeeping requirements of § 2255. See, e.g., Scott v. Singletary, 38 F.3d 1547, 1553 (11th Cir. 1994); Clark v. Lewis, 1 F.3d 814, 825-826 (9th Cir. 1993); Kyles v. Whitley, 5 F.3d 806, 808 (5th Cir. 1993), rev'd. on other grounds, 115 S.Ct 1555 (1995). The AEDPA has resulted in embedding that principle even more firmly in habeas jurisprudence. In Felker v. Turpin, 101 F.3d 657 (11th Cir. 1996) (decision on remand), the defendant moved to reopen a preceding habeas judgment, alleging -- as in this case -- fraud, newly-discovered evidence and Brady violations. Viewing the motion

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[17] The Rule requires that a motion on any of the foregoing bases "shall be made not more than one year after the judgment, order, or proceeding was taken." The defendant concedes (Def. Memo. at 46) that, even if the Rule were otherwise applicable, his motion would be time-barred under this provision. See Felker v. Turpin, 101 F.3d 657, 660 (11th Cir., 1996).

as "tantamount to a second or successive petition," the district court denied relief because the petitioner had failed to obtain an authorization from the court of appeals. The court of appeals affirmed, rejecting the argument that a Rule 60(b) motion "'does not implicate any considerations of successive petitions.'" It held that:

> Rule 60(b) cannot be used to circumvent restraints on successive habeas petitions. That was true before the Antiterrorism and Effective Death Penalty Act was enacted, and it is equally true, if not more so, under the new act.

101 F.3d at 660-661. See also Zeitvogel v. Bowersox, 103 F. 3d 54, 56 (8th Cir. 1995) (rejecting "disguise" of successive habeas petition to avoid rules governing them).

3. Inherent Authority

As an additional basis for "reopening" the judgment, the defendant relies upon the Court's inherent power to grant equitable relief against a judgment "obtained by fraud." Memorandum 39-44. However, in Carlisle v. United States, 116 S.Ct. 1460 (1996), the Supreme Court rejected a closely analogous argument. In Carlisle, the defendant argued that, despite the plain language of Fed. R. Crim. P.29(c), establishing a seven day time limit for filing post-judgment motions for findings of not guilty, the district courts possess the "inherent supervisory power," to entertain untimely motions. The Court explained that, "[w]hatever the scope of this 'inherent power' * * * it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure. * * * Whether the action of the District Court

here is described as the granting of an untimely motion, or the sua sponte entry of a judgment of acquittal, it contradicted the plain language of Rule 29 * * * ." Id. at 1466. See also Bank of Nova Scotia v. United States, 487 U.S. 250, 254-255 (1988) (holding that a federal court cannot invoke "supervisory power" to circumvent Fed. R. Crim. P. 52(a)). Here, likewise, asserting jurisdiction over this third habeas submission under the banner of "inherent" or "supervisory" authority "would contradict the plain language" (ibid.) of the gatekeeping provisions of the AEDPA, a federal statute that was specifically devised to govern such situations.[18]

c. In Any Event, The Government Did Not Perpetrate Fraud On The Court Which Infected Its Prior Judgment.

1. Even if, contrary to the foregoing argument, an exception to the "gatekeeping" statute existed, which permitted habeas courts to "reopen" prior judgments on the basis of evidence that it was

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[18] The authorities upon which the defendant relies (Memo. 38-44), Hazel-Atlas Glass v. Hartford Empire Co., 322 U.S. 238 (1944); Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), cert. denied, 115 S.Ct 295 (1994); and United States v. Shaffer Equip. Co., 11 F.3d 450 (4th Cir. 1993), are not to the contrary. While, in each case, the court recognized inherent judicial authority to reopen a judgment in the event of evidence of fraud, none of the cases involved a successive habeas petition or a similar matter in which a federal statute expressly imposed a jurisdictional prerequisite -- such as certification -- for entertainment of the claim.

The defendant's reliance upon Rule 12 of the Rules governing Section 2255 petitions, which permits a habeas court to "proceed in any lawful manner not inconsistent with these rules "[i]f no procedure is [otherwise] prescribed," also lends no support to his "inherent authority" argument. In Carlisle, the petitioner made a similar argument, based upon the broad precatory language of Fed. R. Crim. P. 2. The Court explained that Rule 2 "sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives." 116 S.Ct. at 1465.

"obtained by fraud," this is plainly not such a case. In the first place, even if one were to view Agent Malone's statements concerning the saran fibers as tantamount to "fraud," they had no bearing upon the ultimate disposition of this proceeding. As explained, that outcome resulted from the defendant's abuse of the writ in bringing that proceeding in the first place and not because, upon analysis, it was determined to lack merit. See MacDonald, 778 F. Supp. at 1356-1360; MacDonald, 966 F.2d 858-861. Thus, in no event was the judgment in this case "obtained by fraud."

2. In any event, the record is devoid of evidence supporting the defendant's accusation that Agent Malone (and, thereby the government) made averments that were "intentionally false" or evidenced "reckless disregard for the truth." See Demjanjuk v. Petrovsky, 10 F.3d at 348, 352-353.

Malone's conclusions concerning the properties and uses of saran were based both upon his microscopic comparisons of the fibers at issue and "[his] own investigation and research." See Cormier Aff. No. 1 Tab 2 (Malone Supp. Aff.) at 3. The portion of his professional opinion that is now subject to challenge is his conclusion that saran cannot be manufactured as a "tow" fiber and that, because of saran's appearance, "it [is] unsuitable for use in cosmetic wigs, in which the objective is to have the wig hair appear indistinguishable from natural human hair."[19] Rather, the

[19] In his Supplemental Affidavit, Agent Malone carefully defined the manner in which he used the term "wig" to mean a "head covering made of synthetic fibers or human hair and which

standard references, which he consulted, reflected that saran is instead used for wigs for dolls and mannequins as well as dust mops and patio screens. Id. at 4.

First, to support his claim that Malone knew better, the defendant notes that two texts from the FBI's own resources contain passages stating that the uses of saran includes the manufacture of wigs. But there is no evidence whatsoever to support the defendant's apparent assumption that, after consulting six sources that are devoid of evidence that saran is used for cosmetic wigs, Malone went on to consult either the Dembeck or Stout texts which, in any event, do not indicate that saran is used in cosmetic wigs worn by humans.[20]

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is worn by a human being, usually a female, for cosmetic purposes." Cormier Aff. No. 1. Tab 2 at 1.

[20] The defendant's investigation of the reference in Dembeck, which states (at page 210) "Trademark: saran Mexican monofil; doll's hair, wigs. Fibras Omni [sic]," led defense investigator Lucia Bartoli to interview Jaume Ribas, former chief executive officer of FibrasOmni. According to Bartoli's affidavit, Ribas stated "that FibrasOmni made saran fibers and then sold them to a variety of concerns, including artisans who made wigs for human use and also to toy and doll manufacturers." Cormier Aff. No. 1 Tab 19 at 2. He further explained to her that "the saran wigs made by these artisans were made for actors in various pageants, known as 'pastorelas'." He told the interviewer that the saran wigs were made in various colors, including blond, for actors who played the part of angels in Christmas pageants. Id. at 3. Finally, he stated that he had arranged for saran wigs to be made for the "lifesized human figures" in The Hall Of Man Diorama in the Museum of Anthropology and History in Mexico City. These, he added, were similar to the saran wigs made for the actors in the pageants. He provided a sample of a black braided wig from a museum mannequin to illustrate their appearance. Id. at 3. Thus, considered in its proper context, the reference in Dembeck is consistent with Agent Malone's conclusion that saran is used in mannequin wigs, and is unsuitable for cosmetic wigs intended to substitute for the wearer's own hair.

The second basis upon which the defendant predicates his claim of fraud is that Agent Malone supposedly obtained information from other authorities during field interviews that were not consistent with his own opinions and conclusions. According to the FBI interview summary of Mr. Oberhaus, he told the investigators that, based upon his knowledge, "[s]aran is a synthetic fiber that cannot be produced as a 'tow' fiber and, for that reason, it cannot be used in the hair goods industry." He advised that, saran can only be made as a continuous filament fiber, which is not suitable for the manufacture of wigs [and that] to the best of his knowledge has never been used in the manufacture of wigs." Although the affidavit which Oberhaus subsequently executed and furnished the government does not contain these assertions concerning saran, it also does not contain anything inconsistent with either the information he furnished the investigators or the contents of Malone's affidavit. Cormier Aff. No. 1, Tabs 11, 12. In fact, it supports Malone's conclusion that modacrylic fiber and not saran is suitable for human cosmetic wigs because of its resemblance to human hair. Cormier Aff. No. 1, Tab 2 at 3.[21]

The information that Schizas furnished to the investigators

Likewise, in addition to enumerating many industrial uses of saran, the Stout text (at 238) states that the substance is used for "wigs and doll hair." Cormier Aff. No. 1, at TAb 4. Exh. A. Again, the reference does not further delineate the term in a manner that contradicts Agent Malone's regarding human cosmetic wigs.

[21] When shown his prior FBI 302 by the defense, Oberhaus apparently did not repudiate the accuracy of its contents or his prior statements to Malone.

and the Assistant U.S. Attorney also coincided with Agent Malone's opinion that saran was used in the manufacture of doll wigs and toys. Cormier Aff. No. 11, Tab 13 Exh. 1. Although Schizas expressed the opinion that Mattel had never manufactured a doll with hair longer than approximately 18 inches in length, she explained that doll hairs could be "doubled" in length because of the weaving process used by manufacturers. According to her subsequent interview by the defense, she also informed the investigators that, although, in her opinion it was unlikely a 24 inch saran fiber was used in manufacture of a doll, "one might possibly find a doll hair fiber that long." In view of the fact that Agent Malone had microscopically compared the 24 inch saran fiber and found it "similar to a known sample of saran doll hair from the FBI laboratory reference collection," and "not like any of the known wig fibers currently in the FBI laboratory collection" (Cormier Aff. No. 1, Tab 1 at 1), the fact that he may have discounted Schizas' tentative conclusion, that the strand was too long for a doll's hair made by Mattel, is surely not tantamount to reckless disregard for the truth.[22]

Finally, while Mattel employee Mellie Phillips now states that, in addition to telling the investigators that Mattel did not manufacture dolls with saran wig fibers as long as 22 or 24 inches,

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[22] The fact that, subsequent to her interview by Agent Malone and other government officials, Schizas allegedly conducted a partial survey of her own doll collection and did not find any with 24 inch hair, (Cormier Aff. No. 1, Tab 13 at 4), in no way reflects on Agent Malone's knowledge or intent to deceive at the time of thepreparation of his affidavit.

she informed them that saran was made in "tow" form, that information was flatly inconsistent with information furnished to the investigators by Edward Oberhaus, an authority in the manufacture of cosmetic wigs. See Cormier Aff. No. 1, Tab 12 at 3. Assuming that Phillips conveyed the information concerning "tow" fiber to Agent Malone as she now claims, his apparent decision to credit the contrary information furnished by Oberhaus in forming his conclusions likewise cannot be viewed as fraud.[23]

4. In addition to the persons interviewed by the government during the preceding habeas litigation, the defense has located and interviewed other individuals formerly involved in the synthetic hair industry who they maintain possess evidence that, during the

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[23] The defendant makes the related argument (Def. Memo. at 48-52) that, by Malone's "false" affidavit "concealing information" that the saran fibers could have come from a wig, the government violated its obligations under Brady v. Maryland, 373 U.S. 83 (1963), and Alcorta v. Texas, 355 U.S. 28 (1957). Even assuming that the Brady doctrine applied to the context of post-conviction relief, there was no such violation here. As explained, at the time of the submission, neither Malone nor anyone else affiliated with the prosecution possessed information that, contrary to Malone's affidavit, the saran fibers could have come from a human cosmetic wig. To the contrary, an authority on cosmetic wigs had informed Malone that saran was not suitable for that purpose and neither Schizas or Phillips has informed him differently. The texts that the defense now claims demonstrate this to be incorrect were discovered by them in a public library, establishing its capability "to take advantage of any exculpatory evidence," see 778 F. Supp. at 1353 (collecting cases), without the aid of the government. Moreover, even if evidence had been presented to this court that wigs could be made of saran, there is no "reasonable possibility" that it could have changed the result of the habeas proceeding. See United States v. Bagley, 473 U.S. 667-682-683 (1985). The petition was dismissed, inter alia, due to abuse of the writ. Indeed, despite the fact that, by the time the case reached the court of appeals, that court was fully aware of the defense submissions controverting Malone's affidavit, it affirmed dismissal of the petition exclusively due to abuse of the writ.

late 1960s and early 1970s, saran was used in the manufacture of wigs. But, in the absence of evidence that Malone also interviewed these individuals or possessed the same information, it is impossible to understand how such material can support their claim that he fraudulently concealed it.

Moreover, when considered in their totality, even the statements of these individuals do not undermine Malone's conclusion that saran was not suitable for use in the manufacture of cosmetic wigs designed and intended as a substitute for human hair. Susan P. Greco, a former employee of National Plastics Products, a manufacturer of saran, took Malone to task for relying on the six standard references he consulted in concluding that saran was not employed in the manufacture of wigs on the ground that the texts were "incomplete and inaccurate." Cormier Aff. No. 1, Tab 15 at 9. She added that, "while * * * not employed in the sales or marketing departments, it was common knowledge within the company that * * * National Plastics and its successors were selling saran fibers to entities which used the fibers to manufacture wigs for human cosmetic use." Id. at 5. While she did not identify any such manufacturer, two other former National Plastics employees identified a number of wig manufacturers who they also claimed made saran wigs for human use. See Cormier Aff. No. 1, Tab 22 at 3; Tab 23 at 2. A defense investigator averred that she interviewed Norman Reich, a former principal of A & B Wig Company, one of the firms identified by the National Plastics

employees.[24] Reich allegedly informed her that A & B sold human cosmetic wigs made from saran to a variety of wholesalers in the United States, including Franco-America Novelty Co. and Gordon Novelty Co. Cormier Aff. No. 1, Tab 16. However, Jerry Pollak, the former vice president of A & B, averred that the firm "manufactured hundreds of thousands of masquerade and costume wigs to be worn by humans," and that "a small percentage of the wigs manufactured by them for human use were made with Saran fibers." He added that these wigs were sold to wholesalers and distributors, who, in turn, sold them to costume, masquerade and novelty shops, and occasionally to department stores." Cormier Aff. No. 1 Tab 17 (emphasis added). Finally, Robert Oumano, the President of Franco-American Novelty Co., which was allegedly identified by Reich as a wholesaler of the human wigs manufactured by A & B Wig Company, stated that these wigs were sold to "retailers such as novelty and joke shops," particularly "around Halloween." Cormier Aff. Tab 18 at 2-3. Thus, it is apparent from the defendant's own submissions that, while, unbeknownst to Malone, saran may have been employed in the manufacture of wigs worn by humans, the wigs were, in fact, distributed and sold for costume, theatrical and novelty use, or employment on department store mannequins and not designed "as a substitute for the wearer's own hair * * * for cosmetic purposes." (Malone Supp. Aff. at 1 (Cormier Aff. No. 1, Tab 2).

5. The final basis and probable catalyst for the instant

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[24] The defense did not submit affidavits from any of the other manufacturers named by the National Plastics employees as users of saran for wigs.

fraud-based challenge of Agent Malone's affidavit is the DOJ Inspector General's findings concerning Malone's testimony relating to the judicial removal proceedings involving Judge Alcee Hastings. In particular, the Inspector General concluded that, in 1985, Malone inaccurately testified before the removal panel in the Hastings case that, in the course of his examination of a purse strap belonging to Judge Hastings to determine whether it had been cut or broken, he had performed a tensile test when, in fact, he had simply observed the test being performed by another examiner. The IG further concluded that Malone had testified outside his expertise in describing how the tensile test was performed and in characterizing the significance of its results. See Cormier Aff. No. 2 Exh. at 73-74.

However, the IG Report also stated: "Malone examined the strap microscopically and found indications that it had been deliberately cut." And it further concluded "[t]hese various misstatements did not affect [Malone's] conclusion that the strap had been partially cut." Id. at 81, citing IG Report at 457.

Of course, none of these findings has any direct bearing on whether Malone made misrepresentations some six years later when he presented opinion evidence in this case. Indeed, upon examination of the record, there is absolutely no basis for concluding either that Malone misrepresented his involvement in this case, or that he lacked the necessary expertise to form the conclusions that he

reached.[25]

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[25] As part of his effort to vilify Agent Malone, the defendant also cites a Wall Street Journal article in which the accuracy of his expert testimony in cases in Pennsylvania and Florida was questioned. See Def. Memo. at 66-68. In the first place, these cases -- like the Hastings judicial inquiry -- have no bearing whatsoever upon Malone's veracity in this case or the accuracy of his conclusions here. In any event, the sensationalist expose is highly inaccurate and, when considered in their proper context, the cases upon which it relies present no basis whatsoever for impugning Malone's integrity. In Jackson v. State, 511 So.2d 1047 (Fla. Dist. Ct. App., 1987), the court reversed a conviction, based largely on Malone's hair comparisons, because, in its view, that evidence was not sufficiently probative under Florida law to "exclude every reasonable hypothesis of the defendant's innocence." Id. at 1050. Its holding was based, in part, on Malone's own testimony that hair comparisons are not as reliable as fingerprints and that "[he] cannot say that [the] hair came from John Jackson and nobody else." Id. at 1049. Similarly, in Horstman v. State, 530 So. 2d 368 (Fla. Dist. Ct. App. 1988), the court, relying upon its observation in Jackson that "hair comparison testimony does not establish certain identification as do fingerprints," again reversed a conviction based almost exclusively upon such evidence. See also Long v. State, No. 83,539 (Fla. S.Ct., March 6, 1997) slip op. 3 (holding, in reliance on Horstman and Jackson, that"[h]air comparisons cannot constitute a basis for positive personal identification because hairs from two different people may have precisely the same characteristics"). Thus, these cases simply stand for the proposition that, in Florida, hair comparison evidence is insufficient without more to support a conviction -- they have nothing whatsoever to do with Malone's veracity.

In the case of James A. Duckett, a former policeman convicted of sexual battery and first degree murder, the Journal article states that, despite Malone's testimony that he matched the defendant's pubic hair to a pubic hair found in the victim's underpants, "the defense has since won the right to have the hair retested". The writer, however, is incorrect; the relief the defendant obtained to date has nothing to do with the veracity of Malone's testimony. Rather, following affirmance of Duckett's conviction, he pursued a motion for post-conviction relief on the ground of ineffective assistance of counsel. While the motion was pending, an account of the DOJ IG's FBI laboratory investigation appeared in the press. At that time, the defense obtained a continuance of a previously scheduled evidentiary hearing on the ineffective assistance claim to permit possible inclusion of the IG's determination in his argument.

II. THE DEFENDANT IS NOT ENTITLED TO THE RELIEF HE SEEKS

Even if, contrary to our foregoing submissions, the defendant could establish that Agent Malone concealed from the court that saran could be employed in human cosmetic wigs or averred to the contrary with reckless disregard for the truth, the defendant would be entitled to no relief and, in particular, his demand that the case be reopened to permit the de novo examination of physical evidence would still have to be denied. See Def. Memo. at 69-72.[26]

As to the fibers found in the clear handled hairbrush, the defendant had the opportunity in this Court to challenge the factual basis of Agent Malone's conclusion that saran was unsuitable for use in human cosmetic wigs as well as his other determinations. Instead, he waived the opportunity, advising this

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In the Buckley case referred to in the Journal article, the writer implies that Malone falsely identified a hair from a blanket as coming from the victim. The author omitted the fact that the hair evidence in question was collected by the New York State Crime Lab and mounted on slides before being forwarded to the Pennsylvania State Police. That authority sent evidence which it had collected at the crime scene, from the accomplice's van used to transport the victim, as well as the slides received from New York, to the FBI. Based upon the origin of the items as described by the Pennsylvania State Police, Malone matched head hairs from the victim to those found on a board and a rug (Q-54), and in vacuum sweepings (Q-60) from the accomplice's van, as well as hair (Q-89) from a blanket purportedly used by Buckley. Malone also matched a head hair (Q-5) found in the victim's van, with the known head hair of Buckley. All of these hair identifications were confirmed by another senior examiner in accordance with standard FBI Laboratory practice. If a breakdown in the chain of identification occurred with respect to the origin of Q-89 between its collection and its submission to the FBI Laboratory, this in no way effects the accuracy of Malone's conclusion that the hairs match.

[26] Of course, if we are correct in our submission that the Court lacks jurisdiction over this successive habeas petition, it cannot grant the defendant the relief he seeks in any event.

Court that there was no factual conflict; that an evidentiary hearing was not warranted; and that, in any event, his claim focused upon the exculpatory value of the bench notes discussing the fibers, rather than upon the fibers themselves. See Gov't. Opp. supra, at 23-24. Moreover, as the defendant's belated averments in the court of appeals concerning the uses of saran were based upon sources he obtained in the Boston Public Library, and his present arguments are based upon information he obtained through independent investigative efforts, he surely cannot maintain that the waiver was induced by government misrepresentation and concealment and that, but for such "fraudulent conduct," he could not have challenged Agent Malone's conclusion.[27] In any event, he cannot evade the fact that he was

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[27] Of course, Malone did nothing to conceal the factual basis for his conclusions; he expressly cited the authorities upon which he relied and appended to his report enlarged color photographs of the fibers he compared. Yet, the defendant made no effort to impugn these conclusions until he reached the court of appeals.

Significantly, a recent FBI inquiry at the Boston Public Library revealed that, on June 18, 1991 -- a week prior to the June 26, 1991 oral argument in this Court -- the Stout text was checked out of the Copley Square Branch. The copy has never been returned, and the library will not disclose the patron's identity without a subpoena. If the defense had, in fact, consulted this source prior to the oral argument, it would then have been aware of the passage showing that the uses of saran include "wigs and doll hair" and would have been situated to make precisely the challenge to
Malone's averments that they made for the first time in the court of appeals and are repeating now.

The very copy of Dembeck, which the defense consulted and thereafter attached to the Reply in the court of appeals, is in the non-circulating reference collection of the Copley Square Branch. That text would, likewise, have furnished the defendant the factual basis for making in this Court a timely challenge to

barred from relying upon the saran to support his second petition because he neglected to address it in his earlier 1985 petition, a matter that Malone's alleged misrepresentation concerning its uses could not possibly have altered.

The defendant also alleges (Def. Memo at 69) that he should be permitted to examine other physical evidence on which Agent Malone conducted laboratory examinations, such as the black wool fibers found on Colette MacDonald and on the wooden club murder weapon, and unmatched human hairs found on the bedding. The significance of these items, however, was fully litigated earlier, see 778 F. Supp. at 1351; the defendant waived the opportunity for an evidentiary hearing; and nothing now presented impugns the validity of Malone's conclusions concerning them.

The defendant further identifies items of physical evidence, identified in laboratory bench notes, particularly uncompared hair found underneath the victims' fingernails, that he maintains for the first time should be forensically examined. But, as his own exhibits demonstrate, he was furnished the laboratory bench notes upon which to predicate such possible claims in 1983 -- prior to submission of his 1985 habeas petition.[28] As he failed to do so not

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Malone's opinion which he now maintains is inconsistent with this text.

[28] See Affidavit of G.M. Andersen in Support of Government Opposition to 1990 habeas petition at 13; affidavit of Janice Barkley in Support of Government Opposition to 1990 habeas petition at 12.

A comparison of the relevant exhibits to the Affidavit of defense investigator John J. Murphy, filed in support of the 1990 habeas petition, with the corresponding exhibits to Cormier

only in that year but in 1990 as well, as in the case of the saran fibers, he is plainly barred under McCleskey, supra, from doing so now.[29]

In any event, although Rule 6 of the Rules Governing § 2255 proceedings permits the district court to order discovery on good cause shown, "it does not authorize fishing expeditions." See Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994). Instead, "[a] federal habeas court must allow discovery * * * only where a factual dispute, if resolved in the petitioner's favor, would entitle him to relief and the state has not afforded the petitioner a full and fair evidentiary hearing." Id. In this case, petitioner was not only afforded the opportunity for an evidentiary hearing in 1991, but his demands for the discovery of physical

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Affidavit No. 2, reveals that they are identical documents but with different Bates stamp numbers. For example, Murphy Aff. Ex. 1, page 3 = Cormier Aff. ¶¶ 32, 37, Ex. 9, page 135; Murphy Aff. Ex. 1, pages 3-4 = Cormier Aff.¶¶ 33,37, Ex. 9, pages 135-136; Murphy Aff. Ex. 1, page 4 = Cormier Aff. ¶¶ 34, 37, Ex. 9, page 136; Murphy Aff. Ex. 1, page 6 = Cormier Aff. ¶¶ 34,37, Ex. 9, page 159(sic) 138.

[29] In particular, citing, DOJ Office of Justice Programs, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (June 1996), the defendant seeks DNA testing of "unsourced hairs, blood debris and fibers, found in critical locations such as underneath the fingernails of the victims, which may very well contribute toward a demonstration of [his] factual innocence." Def. Memo. at 69; Cormier Aff. No. 2, Exh., Tab 7. But, as that document explains, each case where such testing exonerated the defendant "invariably involved analysis of sexual assault evidence (sperm),* * * that proved the existence of mistaken eyewitness identification." Id. at xxxi; see id. at 22. In this case, in contrast, the conviction was not based upon any biological evidence found in or on the victims that was claimed to have originated with the defendant, or eyewitness identification, that could be definitively refuted by DNA examination.

evidence are based upon nothing more than rank speculation that evaluation might result in some expert's conclusion that contravenes Malone's or supports defendant's story concerning the presence of intruders.[30]

III. PETITIONER IS NOT ENTITLED TO RELIEF UNDER 28 U.S.C. 2255

In the event that this Court decides to transfer this case to the court of appeals for a determination whether it should be certified under 28 U.S.C. §§ 2244, 2255, as amended by the AEDPA, the defendant plainly would not be entitled to such relief. As explained, under that statute, a second or successive habeas petition cannot be entertained unless a panel of the court of appeals certifies that "newly-discovered evidence * * * viewed in light of the evidence as a whole, would be sufficient to establish

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[30] The authorities upon which the defendant relies lend no support to his claim that he should be afforded the broad discovery that he demands now. In Toney v. Gammon, 79 F.3d 693, 700 (8th Cir. 1996), the court held that a state habeas petitioner, who had been convicted of sexual assault, was entitled to obtain state evidence for the purpose of conducting DNA examinations in order to prove the prejudice prong of an ineffective assistance of counsel claim. In that case, such a test would have been virtually dispositive not only of the ineffective assistance claim but also of his contention that he did not rape and sodomize a female victim. See also Thomas v. Goldsmith, 979 F.2d 746, 749 (9th Cir. 1992) where the court authorized a DNA analysis of semen, which, likewise, would have definitively resolved the defendant's claim of factual innocence of a sexual assault conviction and supported a claim of ineffective assistance. In this case, by contrast, the defendant was never denied the opportunity to seek a timely examination of physical evidence through ineffective representation or otherwise. Moreover, there is no similar basis for contending that the examinations sought by the defendant would be likely to exonerate him or justify a procedural default; indeed, he makes no claim to the contrary. At the very best, they would simply demonstrate the existence of yet additional debris evidence whose presence could not be definitively linked to any member of the MacDonald household at this late date.

by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense."

In the first place, we are uncertain what constitutes the "newly-discovered" evidence. The defense had the opportunity to examine the saran fibers prior to trial but elected not to avail themselves of that opportunity. See 778 F. Supp. at 1353-54. The defendant's attorneys were aware of the contents of Glisson's allegedly "exculpatory" bench notes, which noted the presence of the "blond synthetic fiber made to look like hair," as early as 1983. And, while the defendant might maintain that the "newly-discovered" evidence consists of revelations contrary to Agent Malone's averments, that saran was used for the manufacture of some types of wigs, defendant demonstrated that he had acquired such information during the preceding cycle of habeas litigation but he did not seek to exploit it or to challenge Malone's conclusions until the case reached the court of appeals.[31]

But even if it were assumed that evidence that saran fibers were once used for costume or mannequin wigs constitutes "newly-discovered" evidence within the meaning of the gatekeeping provision of § 2255, the defendant cannot possibly fulfill the second prong of the certification test that such evidence, "viewed in the light of the evidence as a whole, would * * * establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" (emphasis supplied).

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[31] In fact, this inforamtion may well have been known to the defendant's attorneys when the case was still in the district court. See p. 50, n.27 supra.

In the first place, as both this Court (778 F.Supp. 1351) and the court of appeals have observed (966 F.2d at 857), MacDonald introduced abundant evidence at trial, including unidentified fibers, hair, fingerprints and candle wax, tending to support his claim that the murders of his family had been committed by intruders; yet the jury rejected the argument that such debris undermined the physical evidence supporting his guilt. If the saran fibers had been introduced at trial, even with the explanation that they likely came from a wig, they would merely have been cumulative with such other evidence. Indeed, it is certain that the government would have presented evidence of its own demonstrating the multitude of sources -- including dolls and other toys that were known to have been in the MacDonald household -- from which the fibers would more likely have originated, and the unlikelihood that they originated in a human cosmetic wig in any event. It would also have shown that blond synthetic fibers, known to have originated in Colette's own wig, were also discovered in the clear handled hairbrush, suggesting that the saran fibers, likewise, originated in the MacDonald household.[32]

In addition, such evidence, if presented at trial, would not have materially assisted the defense in placing Stoeckley at the crime scene. Although Stoeckley testified at trial that she owned

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[32] Agent Malone also found black PVC cosmetic wig hairs in a blue handled hairbrush found near Colette's body. Cormier. Aff. No. 1, Tab 1. The fact that the defendant has not elected to attempt to exploit them because they do not support his theory, further demonstrates the insignificance of such debris evidence.

a blond, shoulder length wig, she also stated that she was not wearing a wig on the early morning hours of February 17, (see 778 F. Supp. at 1347), an admission supported by a neighbor who saw her return home at that time. See Gov't. Opp., supra, at 13 n.6. Further, evidence available to the government would have controverted her testimony that she owned or wore such a wig at all.[33] And, contrary to the defendant's instant claims that such evidence would have resulted in the admission of Stoeckley's out-of-court admissions suggesting her involvement in the murders (Def. Memo at 65), it would not have changed in the least the trial judge's decision to exclude such evidence, as the ruling was based on "Stoeckley's utter unreliability as evidenced by her demeanor on the stand and her history of drug abuse." 778 F. Supp. at 1352.

Finally, as we argued in the earlier rounds of habeas litigation, no quantum of "newly-discovered" evidence of intruders would have been sufficient to have refuted the government's forensic evidence showing that only the defendant could have committed the murders and rearranged the crime scene, and that his account of his actions were demonstrably false. For example, the

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[33] Stoeckley testified that, when she wasn't wearing her wig, she kept it in the closet of her apartment. Tr. 5645. The apartment was shared with roommates Kathy Ann Smith and Diane Hedden Cazares, both of whom gave sworn statements to the Army Criminal Investigation Division in 1971. Smith admitted that she sometimes loaned a wig to Stoeckley but she described it as an ear length blond wig. See affidavit of Richard J. Mahon, Att. 9, in support of Gov't. Opp. to Defense Motion for a New Trial. Cazares, who recalled seeing Stoeckley on the night of the murders, was asked whether she was wearing a blond wig at that time. She responded, "[n]o I'm sure about that. She didn't even own a blond wig. * * * I never saw her wear a blond wig of any kind." Mahon Aff. supra, Att. 10.

defendant claimed that he was wearing a pajama top bearing multiple punctures which resulted from his efforts to ward off attackers and that, following the attack, he placed the pajama top -- which bore Colette's bloodstains -- over her body as part of an effort to administer first aid. The coincidence of puncture wounds on Colette's chest with the puncture holes in the pajama top, however, demonstrated that Colette was stabbed through it with an icepick after it had been placed over her body. No quantum of evidence of intruders would have altered the inescapable conclusion that only the defendant could have committed this act, apparently to create the impression that Colette had been stabbed by multiple assailants and to account for the presence of her blood on the garment.

Likewise, the presence of saran "wig" fibers cannot explain the discrepancies between the defendant's claim that his family had been murdered in their respective bedrooms where he was not present and the abundant forensic evidence demonstrating that the defendant had moved them to the locations where their bodies were ultimately discovered. See Gov't. Opp. supra at 6-10. For example, Kimberly's blood type was found soaked into the rug in the master bedroom, as well as on the defendant's pajama top, which he claimed not to have been wearing upon first finding Kimberly's body in her own bedroom; Kristen's blood type was found on the outer lens of the defendant's eyeglasses, which he, likewise, claimed he was not wearing.

Blood stains on the wall and bed of Kristen's room, as well as yarns from the defendant's pajama top and splinters from a club that originated in the MacDonald household, show that Colette was bludgeoned in Kristen's room by the defendant and not in the master bedroom where the defendant claimed to have found her body. Bloody fabric impressions, in Colette's blood type, made by her pajama cuffs as well as the defendant's pajama cuffs, appeared on a sheet found on the master bedroom. This showed that Colette's bleeding body must have been carried by the defendant in the sheet, while he was still wearing the pajama top. The defendant's bare, bloody footprint, in Colette's blood group was discovered exiting Kristen's bedroom, where no other blood of Colette's type appeared. This evidence further demonstrates that Colette was bludgeoned by the defendant in Kristen's room. In the process of moving her body from that room, his bare foot came into contact with the blood soaked sheet or bedspread, coating it with Colette's blood and leaving the footprint. None of this evidence can be explained away by the presence of a saran-wigged intruder who, according to the defense theory, must have, at sometime during the massacre in the MacDonald household, stopped, removed her floppy hat and preened her wig with the same clear handled hairbrush that Colette used for that purpose.

Finally, no amount of evidence of saran-wigged intruders would have offset the defendant's damning admission at trial that he had falsely informed his in-laws that he encountered one of the

CERTIFICATE OF SERVICE

This is to certify that on this 12th day of May, 1997, the undersigned caused to be served by first class mail, copies of the Government's Motion to Dismiss For Lack of Jurisdiction, together with its accompanying Opposition to Defendant's Motion to Reopen § 2255 Proceedings, on counsel for the defendant whose names appear below:

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