IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

_____

NO. 15-7136

_____

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY R. MACDONALD,

Defendant-Appellant.

_____

APPELLANT'S REPLY BRIEF

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
AT WILMINGTON

Joseph E. Zeszotarski, Jr.
Gammon, Howard & Zeszotarski, PLLC
115 ½ West Morgan Street
Raleigh, NC 27601
(919) 521-5878

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The Government's response to the new evidence offered by MacDonald is simple -- everyone is not telling the truth. According to the Government, all of witnesses underlying MacDonald's new evidence -- Jim Britt, Mary Britt, Helena Stoeckley Sr., Eugene Stoeckley, Jerry Leonard, and Wendy Rouder -- are all being untruthful in their sworn testimony to the Court. Perhaps the Government takes this position because it must, as the only way its position can prevail is if all of MacDonald's witnesses are being untruthful.

But a review of all of the evidence shows that the truth is being told by MacDonald's witnesses. We know this because it would be impossible for all of them to be lying in the same interlocking manner. Yet the Government seeks to attack this evidence in the same faulty manner as that employed by the district court in denying relief -- it considers the evidence piecemeal, rather than considering the new evidence "in light of the evidence as a whole" as required by law.

The Government deals with the "evidence as a whole" by ignoring it. It claims that the "trial evidence of guilt is strong," (Gov't Brief at 70), yet nowhere does it even mention (much less attempt to explain) the trial judge's letter, written just months after the verdict, wherein the trial judge states that he "confidently expected that the jury would return a not guilty verdict in the case." (JA 4102). It

claims that Jim Britt, Stoeckley Sr., and Jerry Leonard are all affirmatively lying about Helena Stoeckley's confessions to them about being present during the murder with the actual murderers, but does not explain how this can be when the statements of Stoeckley herself to Wendy Rouder during the 1979 trial directly corroborate their testimony. And it seeks to discount the powerful new DNA evidence presented by MacDonald with the extraordinary position that it contaminated the evidence itself and that contamination should be used against MacDonald, without any regard for what that theory says about the reliability of the physical evidence from the crime scene that it seeks to use against MacDonald.

The evidence presented by MacDonald in support of his Section 2255 Motion proves that Helena Stoeckley's admissions to being present with the actual murderers in the MacDonald home during the early morning hours of February 17, 1970 when they attacked MacDonald and his family are true, and that Stoeckley failed to admit her presence during her 1979 trial testimony because she had been threatened by one of the prosecutors. The new DNA evidence further confirms this fact by showing that DNA of a stranger to the home -- one of the family's attackers -- was lodged under the fingernail of MacDonald's daughter during the attack. The jury never heard this evidence. At the very least, this evidence raises a reasonable doubt as to whether MacDonald committed the crimes, and establishes by clear and convincing evidence that no reasonable juror, when considering this

new evidence in light of the evidence as a whole, would convict MacDonald of the charged crimes. The facts and the law show that MacDonald should be granted a new trial.

ARGUMENT

I. The Government's Piecemeal Treatment of MacDonald's New Evidence Employs the Same Erroneous Method as the District Court, by Failing to View the Evidence "In Light of the Evidence as a Whole" as Required by Law.

The Government argues that the district court's denial of relief should be affirmed because the new evidence presented by MacDonald is either not believable or has been proven to be false. (Gov't Br. at 72-75). But in every instance, the Government addresses each piece of evidence piecemeal, in a vacuum, with no regard or consideration for how that evidence interacts with (and corroborates) the other new evidence presented by MacDonald and the litany of prior evidence showing MacDonald's innocence.

It is on this basic ground that the district court (and the Government) errs -- in its failure to consider the newly discovered evidence "in light of the evidence as a whole." By statute, in conducting the gatekeeping review under 28 U.S.C. § 2255(h), a district court must view the newly discovered evidence "in light of the evidence as a whole." 28 U.S.C. § 2255(h). In conducting this review, the district court must consider the new evidence "with due regard for the likely credibility and the probable reliability thereof," and that "`the evidence as a whole' is exactly

that: all the evidence put before the court at the time of its ... § 2255(h)(1) evaluation." *United States v. MacDonald*, 641 F.3d 596, 610 (4th Cir. 2011). This Court, in conducting a review of the denial of a Section 2255 motion, reviews mixed questions of law and fact like these *de novo*. *United States v. Roane*, 378 F.3d 382, 395 (4th Cir. 2004).

As set out *infra*, the district court failed to apply this standard, because it considered MacDonald's evidence piecemeal, and discounted each individual piece of evidence individually without giving any weight to its effect as a whole.

A. DUSM Jim Britt

The Government argues that it has "completely disproved Britt's narratives claiming to have witnessed a confession by Stoeckley," (Gov't Br. at 73), pointing to inconsistencies among the various statements made by retired Deputy United States Marshal Jim Britt and its contention that Britt did not pick up Stoeckley in South Carolina, but rather only had custody of her in Raleigh. But both the Government and the district court fail to account for three key points in discounting the Britt evidence: (1) the consistencies in Britt's statements, and the inconsistencies in the evidence relied on by the Government; (2) the strong corroboration that exists in the record for Britt's account of the threat from AUSA Blackburn to Stoeckley, and (3) the complete absence of any motive whatsoever

for Britt to fabricate such an account (which is the only way Britt's account did not occur).

1. Britt's Account Is Consistent as to AUSA Blackburn's Threat To Stoeckley During the 1979 Trial.

The Government argues that the district court was correct in finding Britt to not be believable, because of the inconsistencies in Britt's statements about events that occurred in 1979. But finding Britt to not be credible on this basis belies common sense -- it is entirely normal for a person to have non-vital details confused as to events occurring in 1979, when trying to recall them in 2005 (which is when Britt came forward and executed his declarations). As to the key point of AUSA Blackburn's threat to Stoeckley, however, Britt is entirely consistent -- Britt recalled the prosecutor's threat to Stoeckley in the same manner and as taking place in the Raleigh courthouse. (JA 3665-3669; 3686; 3690; 3692). Any inconsistency about non-vital matters occurring 25 years ago is perfectly normal. And it is perfectly normal that Britt would vividly recall the important matters -- like a prosecutor threatening a key trial witness in his presence.

The district court's treatment of the Britt evidence also fails to account for the testimony of Britt's ex-wife, Mary Britt. Mary testified at the 2012 evidentiary hearing that during the 1979 trial, Britt told her that he was going to South Carolina to pick up a witness, and then talked with Mary that night about what the witness had said when in his custody. (JA 2388). Mary testified that she is

"absolutely certain" Britt told her this during the 1979 trial. (JA 2405). It is apparently the Government's position that Britt has made up of whole cloth his account of his interactions with Stoeckley. But given Mary's testimony, for that to be true, Britt would need to have divined such a plan in 1979, so that he could disclose it twenty-five years later in 2005. Britt would have no reason to tell Mary in 1979 about going to South Carolina to pick up a witness during the MacDonald trial -- unless it were true.[1]

Mary Britt's testimony also corroborates Britt's account of Blackburn's threat to Stoeckley during the 1979 trial. Mary testified that after she and Britt had separated, she watched the movie version of "Fatal Vision" on television. Britt had stopped by her house, and she asked Britt if he had seen the movie. Britt told her "It's not accurate. They had me standing in the hall. I was in the room, I heard every word that was said." (JA 2391-92). Mary testified that Britt told her this "through gritted teeth." (JA 2392).

Nothing in the district court's order accounts for Mary Britt's testimony on these issues. Mary's testimony is uncontradicted corroboration of Britt's account of the threat to Stoeckley. She would have no reason to believe in the early 1980s, when she saw the "Fatal Vision" movie and asked Britt about it, to believe that she

[1] The Government cannot credibly claim that Mary has some motive to lie, in favor of Britt. She divorced from Britt in 1989 amid claims of adultery that were very emotional to her. (JA 2406; 2419-21). She has no motive to assist Britt or MacDonald or to do anything other than tell the truth.

would be called to court in 2012 to testify about the issue. But she had a clear recollection of the encounter and that Britt's response was "It's not accurate ... I was in the room." (JA 2392). Mary's testimony is compelling evidence that what Britt said, about both Stoeckley's admissions to him and the threat made to Stoeckley in the courthouse during the 1979 trial, is true.

2. The Evidence Relied on by the Government is Itself Inconsistent.

The Government spent substantial time during the 2012 evidentiary hearing attempting to prove that Britt did not take custody of Stoeckley in South Carolina, but rather only took custody of her in Raleigh, and that such evidence somehow proved Britt to be not credible about his account of AUSA Blackburn's threat to Stoeckley at the courthouse in Raleigh. But much of the evidence that the Government relies on to claim it has "completely disproved" Britt's account is itself inconsistent.

The Government offered evidence about Deputy Marshal Dennis Meehan and his wife handling the transport of Stoeckley to Raleigh. But no documentation supported this account -- to the contrary, the only document in the record contradicts the Government account. An FBI report from August 1979 states that after Stoeckley's arrest on a material witness warrant in South Carolina, she was "transported directly from Pickens County Jail to Raleigh, NC on August 15, 1979." (JA 3596) (emphasis added). The Government evidence described a two-

stage transport, whereby Deputy Marshal Vernoy Kennedy transported Stoeckley from South Carolina to Charlotte,[2] and the Meehans transported her from Charlotte to Raleigh.[3] (JA 2684-87). Yet the only document in the record about this transport describes a direct transport from South Carolina to Raleigh. The only person who described a direct transport was Britt.

Nothing in the district court's order considers these inconsistencies in the Government's evidence. Yet the inconsistencies in Britt's declarations are used as a basis to disregard the statements on which he is consistent. This inconsistent treatment by the district court is indicative of its failure to consider the new evidence "in light of the evidence as a whole" as required by law.

3. The District Court's Denial of Relief Does Not Consider the Strong, Uncontroverted Corroboration That Exists for

---

[2] Curiously, Kennedy did not recall this incident. He provided a sworn statement about the transport of Stoeckley in 2006, but he could only give such a statement after the prosecutors told him their version of what had occurred in 1979:

> Q: Now, directing your attention to the year 1979, were you given the task of picking up a prisoner by the name of Helena Stoeckley?
>
> A: The name doesn't ring a bell, but you have filled me in on some details, and I concurred that I did.

(JA 3614).

[3] The Meehans also testified that they saw themselves on television after bringing Stoeckley to the local jail in Raleigh. (JA 2705). The only photographic evidence of Stoeckley with a U.S. Marshal in Raleigh involved Britt. (JA 4077).

Britt's Account of AUSA Blackburn's Threat to Stoeckley During the 1979 Trial.

The district court's dismissal of Britt's evidence fails to account for the strong and uncontroverted corroboration that exists from the other evidence presented by MacDonald. In addition to the testimony of Mary Britt, testimony from at least three other witnesses proves that Blackburn's threat to Stoeckley did occur: (1) Wendy Rouder; (2) Helena Stoeckley Sr.; and (3) Jerry Leonard.

Rouder was a law clerk for MacDonald's trial counsel during the 1979 trial. (JA 2510). As fully explained in MacDonald's Opening Brief, on the weekend after Stoeckley's interview by the Government and testimony at the 1979 trial, Stoeckley admitted to Rouder that she was present during the murders with the murderers. She told Rouder that she could not testify to the truth at trial because "those damn prosecutors ... would fry me." (JA 2515-18; 4090). When Rouder learned in 2005 of Britt's affidavit about the prosecutor's threat to Stoeckley, it was a "eureka moment" to Rouder because it explained Stoeckley's statement to her in 1979. (JA 2518-24; 4090).

The district court's order does not account in any way for Rouder's testimony. There is no evidence Rouder is being untruthful. Rouder's evidence completely corroborates Britt's statement about AUSA Blackburn's threat to Stoeckley, and does so with Stoeckley's own words during the 1979 trial. Yet the Government's response to this corroboration is to ignore it. MacDonald

respectfully submits that the Government ignores this evidence because there is no way to impeach it -- it is the truth.

But Rouder's testimony is not the only confirmation of the threat to Stoeckley made by AUSA Blackburn. Stoeckley's mother likewise confirms that a threat took place, averring as to how Stoeckley in the time before her death told her mother that she could not tell the truth about her presence during the murders because she was "afraid of the prosecutor" (JA 4063) and "was threatened with prosecution for murder." (JA 2496). And Stoeckley's own lawyer, Jerry Leonard, testified that during the 1979 trial Stoeckley admitted to him that she was present during the murders with the murderers. (JA 3280; 4098). While both the district court and the Government make some effort to explain away the testimony of both Leonard and Stoeckley Sr., as discussed *infra*, the fact that the substance of their testimony matches with the substance of Rouder's testimony confirms the credibility of all of this evidence.

4. Britt Had No Motive to Fabricate.

Finally, the district court's dismissal of Britt's evidence fails to consider that the record establishes no motive for Britt to fabricate his version of events.

At the 2012 evidentiary hearing, the Government devoted much effort to attempting to discredit the character of the by-then-deceased Britt. It elicited opinion testimony from retired law enforcement witnesses about difficulties with

Britt, and their personal opinions of his character. It brought out the circumstances of his divorce from Mary Britt. It did everything possible to try to paint a picture of Britt as a bad person.

Given the Government's tack, it must be pointed out that Britt was a lifelong law enforcement officer who as a deputy U.S. Marshal was someone relied on by the Government, when it suited their purposes. And most important, despite the Government's wide-ranging efforts to muddy Britt, the Government has not elicited one iota of evidence tending to provide any motive for Britt to fabricate his sworn declaration about the statements made to him by Helena Stoeckley and his witnessing AUSA Blackburn's threat to Stoeckley during the 1979 trial. The Government is asking this Court to conclude that Britt is making up these facts from whole cloth. Yet it has not presented a shred of evidence as to why Britt, a career law enforcement officer with no allegiance to or connection with MacDonald, would do so. This lack of motive directly undercuts the district court's dismissal of Britt's evidence urged by the Government.

5. The District Court's Dismissal of the Britt Evidence Is Error.

In sum, the district court's conclusion that Britt is not credible is error, because it fails to consider the Britt evidence "in light of the evidence as a whole" as required by law, by failing to give any weight to the substantial corroboration that exists for Britt's evidence, and the lack of any motive for Britt to lie. The

Government concedes that Stoeckley was in fact in Britt's custody during the 1979 trial -- its own witnesses have so testified. (JA 2691). Documentary evidence consisting of a photograph (JA 4077) and videotape footage (DE-126, Appendix 2, Tab 13, at 52:10 and 52:30) confirm this fact. Therefore, there can be no doubt that Britt in a position to hear Stoeckley's confession and AUSA Blackburn's threat to Stoeckley during the 1979 trial. Evidence from three other witnesses (Rouder, Stoeckley Sr., and Leonard) directly corroborates Stoeckley's admissions to being present during the murders,[4] and the threat to her by the prosecutor resulting in her refusal to admit her presence to the jury during the 1979 trial. The totality of the evidence provides strong corroboration for Britt's account of AUSA Blackburn's threat to Stoeckley during the 1979 trial. Nothing offered by the Government undercuts this corroboration in any way, and the district court's order fails to give this corroboration any consideration.

B. Jerry Leonard

In his Opening Brief, MacDonald sets out the facts showing the district court's conclusion that Leonard's testimony is "not likely credible or probably

[4] Stoeckley's admissions are further corroborated by other trial evidence. She owned the clothing that MacDonald described the female intruder wore. (JA 1126; 1131-32). She admitted to discarding this apparel after the murders, because "it connected me with the murder." (JA 1146). She could identify herself as the female in a drawing made by a police artist according to MacDonald's description of the female intruder. (JA 1152). She had a black male companion who regularly wore an Army fatigue jacket with E-6 stripes, matching MacDonald's description of one of his attackers. (JA 1368-69).

reliable" is error. The Government does not address in any way the chief error in the district court's conclusion -- the fact that Leonard's having some 30 year old details incorrect or confused says nothing about his testimony regarding Stoeckley's confession to him as her lawyer, because Stoeckley's confession is something that a lawyer in Leonard's shoes would never forget. Nor does the Government address the complete lack of any motive for Leonard to testify falsely about Stoeckley's confession to him, or the fact that Stoeckley herself would have no motive to falsely confess to her own lawyer.

Instead, the Government raises two collateral issues as to Leonard. First, like with Britt, it attacks Leonard's character by introducing completely unrelated misdemeanor criminal charges relating to public intoxication. (Gov't Br. at 74-75). The Government's reliance on these matters shows what little there is to undercut Leonard's testimony. These matters in no way affect credibility -- in direct contrast to the felony embezzlement activity of AUSA Blackburn, which included Blackburn's forging judge's names on false orders and engaging in multiple and consistent falsehoods for his own personal gain, and which go directly to Blackburn's credibility as a witness and inability to tell the truth. The Government's mud-slinging should be disregarded.

Second, the Government challenges MacDonald's characterization of Leonard's testimony as "unequivocal," claiming that Leonard's statement that

"[w]hat I put in my affidavit is what I am willing to testify to" somehow "does not constitute an averment of clear memory." (Gov't Br. at 75 fn. 61). But Leonard's statement is in fact a direct averment of clear memory. The only reasonable meaning of Leonard's statement is that he is willing to testify to what is in his affidavit because he is sure that those important matters -- including Stoeckley's confession to him in 1979 that she was present during the murders with the real murderers -- are the truth. Leonard is a lawyer and has been for almost 40 years, and as such knows what an oath means and what it means to testify to facts under oath. Leonard's testimony about Stoeckley's confession to him is unequivocal.

The only logical basis on which the district court's refusal to accept Leonard's testimony can be upheld is to find that Leonard fabricated his account of Stoeckley's confession to him. Absolutely no basis exists in the record for such a finding -- to the contrary, Leonard conceded those matters on which he was not sure of his memory, but made clear that he could testify under oath to Stoeckley's confession to him.

C. Helena Stoeckley Sr.

The district court rejected the evidence from Stoeckley Sr. because it found that Stoeckley herself was not a credible source of evidence. (JA 4532-33). In his Opening Brief, MacDonald explains the error in the district court's conclusion in this regard. The Government does not address these arguments in any way.

Instead, the Government attacks the evidence from Stoeckley Sr. on the grounds that "the circumstances under which this affidavit was executed in 2007 render it unreliable." (Gov't Br. at 75 n.62). Apparently, it is the Government's contention that those involved in the execution of Stoeckley Sr.'s affidavit (including Stoeckley Sr.'s son, Eugene, along with a licensed attorney (Hart Miles) and his paralegal (Laura Redd)) somehow got her to sign something untrue, or somehow put words in her mouth. This frivolous argument should be rejected.

There is absolutely no basis in the record for the Government to accuse those involved in the execution of Stoeckley Sr.'s affidavit of wrongdoing. To the contrary, both Eugene Stoeckley and Redd testified to the circumstances of the execution of the affidavit, and both testified that the affidavit correctly reflects Stoeckley Sr.'s own words. Eugene testified that no one told his mother what to say in the affidavit, and that the she was acting freely and voluntarily in executing the affidavit. (JA 2461). He testified that the affidavit was read to Stoeckley Sr., who made corrections to the affidavit as appropriate prior signing it. (JA 2460-61).

Redd's testimony confirmed these facts in no uncertain terms. Redd testified that the entire affidavit was read to Stoeckley Sr. by her son prior to her signing it. (JA 2571-72). Redd's testimony completely belies the Government's implication that there was some effort to put words in Stoeckley Sr.'s mouth:

> Q: In the time that you were there in the assisted living center, did anybody try to coerce Mrs. Stoeckley?

> A: Exact opposite. Especially, Mr. Miles. I don't know if you know Mr. Miles or not, he has got more integrity than anybody I think I've ever met. And he handled her with kid gloves and wanted to make sure that this is what she wanted to do. In fact, I don't know his exact words, but I think he even asked her, you know, is this -- are you coming forward with it or is anybody making you do this, kind of thing. He covered the bases, yes, sir.

(JA 2572). The Government's position, in light of this uncontradicted testimony, is dumbfounding. Again, the Government's mud-slinging should be disregarded.

It is notable that the Government chose to make this frivolous argument rather than to address in any way the substance of Eugene Stoeckley's testimony. Eugene testified: "My mother said that Helena was there and that Dr. MacDonald was not guilty of the crimes." (JA 2449). Eugene also testified that Stoeckley wanted to testify to the truth at the 1979 trial, but was threatened with prosecution for murder: "What my mother would say along those lines was that they wouldn't let her testify, she wanted to testify, but she was threatened with prosecution for murder." (JA 2496).

Eugene Stoeckley has no motive to lie. His only motive was and is to protect his family and not get involved. His testimony directly corroborates Stoeckley's confessions to Rouder and Leonard, and directly corroborates the threat from AUSA Blackburn to Stoeckley. Yet the Government does not even

attempt to address this evidence. It does not do so because the evidence is unimpeachable, and true.

D. Viewing This New Evidence Together, and "In Light of the Evidence as a Whole" as Required by Law, Results in Relief Because No Reasonable Juror Would Have Convicted MacDonald of the Charged Crimes After Hearing the New Evidence.

The Government's theory only works if all of the witnesses presented by MacDonald are being untruthful under oath. This is so because if Rouder is telling the truth about Stoeckley's statement during the 1979 trial about being unable to admit her presence at the murders because the "damn prosecutors" would "fry me," this evidence connects perfectly with Britt's account of AUSA Blackburn's threat to Stoeckley during the trial, and Eugene Stoeckley's testimony that his mother was told by Stoeckley that she could not testify to her presence because she was "threatened by the prosecutor." For the Government theory to work, not only must Britt be lying, but also Rouder, Leonard, Stoeckley Sr., and Eugene Stoeckley.

But we know this did not occur -- because it would be impossible for these witnesses (none of whom know each other) to lie in a way that their testimony would interlock in the way it does. Rouder's testimony is consistent and not impeached in any way. Like Leonard, she is a lawyer -- there is no motive for her to be untruthful. Likewise, neither Leonard, Stoeckley Sr., nor Eugene Stoeckley have any interest in this litigation or any motive to fabricate in favor of MacDonald. All of this evidence interconnects because it is the truth -- Britt's

account of the prosecutor's threat to Stoeckley is confirmed by the testimony of Rouder and Stoeckley Sr. and Eugene Stoeckley, and the fact that the threat prevented Stoeckley from admitting her presence at the murders is confirmed by the same testimony.

The district court erred in finding that this new evidence fails to meet the standard for Section 2255 relief. Under 28 U.S.C. § 2255(h) MacDonald must first present:

> 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.

The district court's factual conclusions in rejecting MacDonald's new evidence violate this standard, by failing to properly view MacDonald's evidence "in light of the evidence as a whole," as evidenced by its failure to give any weight or consideration to its interlocking nature, the powerful corroboration that exists for the new evidence, and the complete lack of any motive for MacDonald's witnesses to testify falsely.[5]

[5] MacDonald submits that the district court's failure to properly apply this standard to reach its factual conclusions is a mixed question of fact and law that is subject to *de novo* review. *See Roane*, 378 F.3d at 395. The Government apparently contends that the district court's findings in discounting MacDonald's new evidence should be reviewed under a "clearly erroneous" standard, whereby an error is shown when "on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." (Gov't Br. at 71 *citing United States v. Ragin*, 820 F.3d 609, 617 (4th Cir. 2016)). To be clear, MacDonald

Moreover, as to the second part of the Section 2255(h) inquiry, this Court has previously addressed the gravity of MacDonald's newly discovered evidence. During the direct appeal of this case in 1980, this Court noted the prejudice that inured to MacDonald from Stoeckley's trial testimony wherein she claimed to have no memory of the four hour period during which the murders occurred, and stated:

> Had Stoeckley testified as it was reasonable to expect she might have testified [admitting to her presence during the murders], **the injury to the Government's case would have been incalculably great.**

United States v. MacDonald, 632 F.2d 258, 264 (4th Cir. 1980) (emphasis added), *rev'd on other grounds*, 456 U.S. 1 (1982).

This Court's conclusion in 1980 about the gravity of the evidence relating to Stoeckley's being present during the murders answers the question regarding the § 2255(h) standard in this case. There can be no question that MacDonald's new evidence, showing Stoeckley's admission to being present during the murders and her refusal to so testify in the 1979 trial being the result of a threat from one of the prosecutors, causes "injury to the Government's case" that is "incalculably great," such that it is "sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h). This is especially so when "the evidence as a whole" is considered -- including the new exculpatory DNA evidence and the other

---

submits that the district court's conclusions are error under either of these standards.

exculpatory evidence outlined in the Opening Brief (including the litany of witnesses whose testimony regarding Stoeckley's confessions to them was excluded from evidence at trial). The district court erred in concluding otherwise.

Second, to prevail on the merits on the claim arising from the Britt evidence, MacDonald must establish by a preponderance of the evidence that his constitutional rights were violated. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958). As explained in his Opening Brief, the prosecutor's threat to Stoeckley, resulting in her failure to tell the truth during her trial testimony, violates MacDonald's constitutional rights in at least two ways -- as a *Brady* violation, *see e.g. United States v. Bartko*, 728 F.3d 327, 340 (4th Cir. 2013), and as a threat from the prosecutor that resulted in a witness testifying untruthfully, *see United States v. Golding*, 168 F.3d 700, 703-04 (4th Cir. 1999). MacDonald's new evidence proves by more than a preponderance of the evidence that these constitutional violations occurred, and the district court erred in concluding otherwise.

II. The Government Consistently Overstates the Evidence on Which it Relies, and Understates (Or Completely Ignores) the Evidence Presented by MacDonald.

The bulk of the Government's Brief is directed toward a review of "facts." It must be noted, however, that in setting out its versions of the facts the Government (a) only notes facts favorable to the conclusion it seeks to draw, with

no regard (or even mention) of the contrary facts in the record; and (b) seeks the most favorable inference possible from every fact it lists, again with no regard (or even mention) of the contrary facts in the record that undercut such an inference. The Government's approach is wrong as a matter of law, and is misleading factually.

First, the Government is not entitled to have factual inferences drawn in its favor in this appeal. In assessing the § 2255(h) standard, a district court is not required to draw all inferences in favor of the Government, as if it were conducting a sufficiency of the evidence review on direct appeal. To the contrary, this Court has held that in assessing newly discovered evidence a district court must consider the evidence only "with due regard for the likely credibility and the probable reliability thereof." *MacDonald*, 641 F.3d at 614. The Government is not entitled to have any factual inferences drawn in its favor from the evidence in this appeal, any more than MacDonald is.

Second, the Government's treatment of facts is completely one-sided and often misleading in the inferences it seeks, because it employs this improper approach. Examples exist in a nature both general and specific.

A. Government Claim That "The Trial Evidence of Guilt Is Strong"

The most glaring example is the Government's claim that the "trial evidence of guilt is strong." (Gov't Brief at 70). The Government never addresses the

merits of the points raised in MacDonald's Opening Brief showing the tenuous nature of the Government's trial evidence. (Opening Br. at 30-34). Earlier filings describe in detail the weakness of the Government trial evidence. (JA 2040-67). But most notable is the Government's failure to even acknowledge (much less attempt to explain) the trial judge's letter to Wendy Rouder, written just months after the verdict, wherein the trial judge states that he "confidently expected that the jury would return a not guilty verdict in the case." (JA 4102).

The Government's willingness to argue this position yet fail to even acknowledge this letter is startling. The only fair inference that can be drawn from the letter is that the trial judge believed that the trial evidence of guilt was not strong, yet the Government summarily argues otherwise, without even acknowledging the existence of this letter. The Government's actions in this regard are proof that it ignores the evidence contrary to the position it espouses, even when that evidence comes from such a credible source as the trial judge.

B. MP Kenneth Mica

The Government argues that MacDonald "overstates" the testimony of MP Kenneth Mica, who saw a woman matching Stoeckley's description in the neighborhood of MacDonald home as he responded to the 911 call on the night of the murders. The Government contends that because Mica did not specifically identify the woman as Stoeckley, and was not shown a picture of Stoeckley when

testifying, that somehow Mica's testimony is "unpersuasive." (Gov't Br. at 80-81). But the Government ignores other evidence in the record corroborating Mica's account at trial and showing Mica's testimony to be clear and direct about seeing a woman in a floppy hat near the MacDonald home as he responded to the 911 call. In earlier filings, a 1989 BBC documentary about this case was made part of the record. (DE-126, Appendix 2, Tab 13). Mica is interviewed in this documentary, and is clear about what he saw on the night of the murders, and how unusual it was:

> Narrator: At 3:40, the Fayetteville operator connected a call to military police at Fort Bragg ... On the way to Castle Drive, one of the MPs saw a woman standing in the rain alone.
>
> Mica: She was wearing a floppy hat -- a wide-brimmed hat -- and a raincoat. And what appeared to be boots.
>
> Narrator: How unusual was it to see somebody standing there at 3:40 in the morning?
>
> Mica: Very unusual.
>
> Narrator: Ordinarily, if you hadn't been responding to an emergency call, what would you have done?
>
> Mica: We'd have stopped. We would have asked who she was, where she was going, what she was doing there at that time of the morning.

(DE-126, Appendix 2, Tab 13, at 20:25). Given these direct statements from Mica that fully corroborate MacDonald's account of his trial testimony, the

Government's claim that MacDonald "overstates" Mica's testimony is patently groundless.

C. The Government's Pajama Top Experiment at Trial

The Government again claims that its "pajama top demonstration" at trial is "powerful evidence of MacDonald's guilt at trial." (Gov't Br. at 78). But rather than address the merits of the challenges raised by MacDonald to the efficacy of this experiment, the Government argues only that MacDonald "thoroughly but unsuccessfully challenged" the experiment at trial. (Gov't Br. at 79).

The Government's position is another example of the improper approach it takes to the facts in this appeal. The fact that MacDonald was convicted at trial does not mean he "unsuccessfully challenged" the pajama top experiment -- as noted above, the law in no way entitles the Government to have factual inferences drawn in its favor in this appeal. The Government has had every opportunity to respond, on the merits, to the fallacies of the pajama top experiment raised by MacDonald. The Government has chosen not to do so, and the only reasonable explanation for its failure to do so is its inability to respond on the merits.

The Government employs the same faulty approach -- seeking to have factual inferences drawn in its favor on this appeal -- to deal with the fact that all of the "thread" evidence relied on by the Government at trial can be explained by

threads from MacDonald's pajama bottoms, rather than the top.[6] As noted in MacDonald's Opening Brief, the fact that the Government touts the pajama top experiment as "powerful evidence of MacDonald's guilt" only emphasizes the weakness of the Government's evidence.

D. The Government's Trial Theory

At Page 5 of its Brief, in its "Statement of Facts," claims that "[t]he physical evidence adduced at trial ... demonstrated that the following occurred:", and then sets out its theory of the case as argued to the jury at the 1979 trial. There are numerous problems with the Government's statement in this regard.

First, and most glaring, this is again another example of the Government stating facts as if it were entitled to have factual inferences drawn in its favor on this appeal. Because this is not a sufficiency review on direct appeal, the law in no way entitles the Government to have factual inferences drawn in its favor in this appeal.

Relatedly, the "facts" set out by the Government as being its theory are not established facts -- these are the inferences the Government asked the jury to make from the trial evidence. Yet the Government's factual recitation makes it sound as

[6] The Government argues that it presented "uncontradicted" evidence at trial that threads throughout the MacDonald home were identical to those constituting MacDonald's pajama top. (Gov't Br. at 8). But nowhere does the Government explain how the threads could not have been from MacDonald's matching pajama bottoms, as set out in MacDonald's Opening Brief, which was not collected by the investigators and instead was discarded. (Opening Br. at 31-32).

if these inferences were accepted facts at trial, which they were not. It must be noted that the Government's physical evidence, expert opinions, and other trial efforts recited in its Brief apparently did not convince the trial judge of MacDonald's guilt. (JA 1029-30; 4102). And had the jury heard Stoeckley's confessions to being present, the damage to the Government's case would have been "incalculably great," as this Court ruled in 1980. *MacDonald*, 632 F.2d at 264. The Government's trial theory is not fact.

Next, in its "Statement of Facts" the Government repeatedly ignores contrary evidence to make the statements it seeks to make. While space limitations prevent MacDonald from addressing every misleading factual assertion made in the Government's "Statement of Facts," some substantial examples include:

- "About three feet away from the couch were MacDonald's eyeglasses with Kristen's bloodtype on the outer surface of one lens, bloody side down on the floor." (Gov't Br. at 9)

In fact, MacDonald's eyeglasses had but a speck of dried blood on them of the same blood type as his daughter Kristen, type O. They were found on the floor exactly where MacDonald said he was attacked. MacDonald was an emergency room doctor at the time, and regularly treated wounded patients. An FBI report discovered post-trial indicated that the FBI had investigated the patients MacDonald had treated the day before the murders and discovered that several had Type O blood. (JA 1996). Moreover, it is

entirely possible that the attackers had already attacked and bloodied Kristen and their weapons carried her blood to where they attacked MacDonald.

- "MacDonald's wounds were trivial." (Gov't Br. at 12)

In fact, MacDonald's wounds were severe -- medical testimony at trial established that MacDonald's chest wound "could be life-threatening." (JA 1040). MacDonald suffered wounds throughout his body (including bruising, lacerations, and a collapsed lung) that were entirely consistent with the assault he described -- he spent nine days in the ICU. (JA 1975).

- "MacDonald was initially charged under the UCMJ, but the charges were dropped after an adversary Article 32 hearing." (Gov't Br. at 17)

In fact, after a six week adversary hearing, the presiding officer issued a report finding the charges against MacDonald to be "not true" and recommending that the Army investigate Helena Stoeckley and her accomplices. (JA 1996); (DEHX 5076) (copy of presiding officer's report). This is a far cry from the charges merely being "dropped."

In addition, the Government's heavy reliance on the physical evidence it collected from the crime scene fails to acknowledge that its crime scene work was at best incomplete and at worst inept. Among other items, a piece of skin in the fingernail scrapings from MacDonald's wife was lost by the investigators prior to it being tested. *See United States v. MacDonald*, 640 F.Supp. 286, 305-307

(E.D.N.C.) (noting Government concession that it lost the skin evidence but denying MacDonald's habeas motion based on same), *aff'd* 779 F.2d 962 (4th Cir. 1985). At a motions hearing during the trial, the trial judge noted the incomplete nature of the crime scene investigation:

> And I think that if the Defendant has shown anything at all in this case, he has succeeded admirably and in depth in showing that there were just hundreds of things that these investigators could have done which they didn't do.

(Addendum at 1). Nothing in the Government's recitation of evidence from the crime scene acknowledges these major issues.

In sum, the Government's treatment of the facts it argues in support of its position should be closely scrutinized, because it states its inferential conclusions as if they were established fact, when they are anything but. The Government's efforts to cast the trial evidence as "strong" are after-the-fact advocacy, and were not shared by the trial judge himself.

III. The Government's Position That This Court Should Not Consider The Previously-Existing Exculpatory Evidence as Part of the "Evidence as a Whole" Should Be Rejected.

The Government complains that MacDonald continues to raise previously-existing exculpatory evidence that it claims has been "repeatedly disproven" (Gov't Br. at 78) or "already considered and rejected." (Gov't Br. at 81). The Government's position is wrong on both the facts and the law.

First, as a matter of law, this Court's precedent and the applicable statute both require that the "evidence as a whole" be considered. The Government cannot ask this Court to refuse to consider previously-existing exculpatory evidence merely because it was mentioned in some other prior habeas proceeding, because the law requires otherwise. *MacDonald*, 641 F.3d at 610.

Second, the fact that the substantial previously-existing exculpatory evidence may have been part of some earlier habeas proceeding in no way means it is "disproven" or "already considered and rejected" factually. Nothing in the documents cited by the Government in support of its contention (Gov't Br. at 80) constitutes a finding that any of this exculpatory evidence has been "disproven" -- these citations merely contain the Government's arguments as to this exculpatory evidence.

The Government's approach again fails to consider the cumulative effect of all of this evidence. The Government seeks to isolate each issue, and consider it in a vacuum. The law requires that MacDonald's newly discovered evidence be considered in light of all of this previously-existing exculpatory evidence. The fact that some of this evidence was included in earlier habeas proceedings does not change the fact that it is substantial evidence tending to show that MacDonald's version of events is accurate, and that Stoeckley's admissions to being present with the real murderers are true.

IV. The Government's Contamination Theory as to the New DNA Evidence Should Be Rejected.

The Government discounts the powerful new DNA evidence presented by MacDonald by arguing that it has "clearly demonstrated" that the 91A hair found under the fingernail of Kristen MacDonald in fact was not there when the fingernail scrapings of Kristen were first examined by the Government's lab personnel. (Gov't Br. at 76-77). The Government fails to explicitly tell this Court the basis for its argument, which is remarkable -- that the Government itself somehow **contaminated** the physical evidence from the crime scene, and its own contamination should be used against MacDonald to deny him relief. The Government's contamination theory is baseless, and the Government's extraordinary position should be rejected.

A. The Record Establishes That the 91A Hair Was Collected From Under the Fingernail of Kristen MacDonald During Her Autopsy, and the Record in No Way "Clearly Establishes" Contamination as Argued by the Government.

The Government pieces together numerous documents from the 1970 crime scene work in an effort to create doubt about from where, and by whom, the exculpatory 91A hair originated. It appears that the Government is arguing that the fingernail scrapings collected at the autopsy of Kristen were first examined by Army CID chemists Dillard Browning and Janice Glisson in March 1970, and the 91A hair was not there during this examination, and either (a) when the scrapings

were then examined again by Glisson in July 1970, the 91A hair was there, allegedly for the first time, or (b) what Glisson examined in July 1970 was not the fingernail scrapings from Kristen's autopsy, despite Glisson's contemporaneous notation that they were. (JA 2098-2104; 2114-2119). In its district court pleadings, the Government admits that this theory is based on a theory of contamination of the fingernail scrapings, without explicitly using the word "contamination." (JA 4305 at n.110).

The Government's efforts to obfuscate the provenance of this exculpatory hair fail, for numerous reasons. First, the Government has pointed to no affirmative evidence showing contamination, instead asking this Court to assume that the sample must have been contaminated based on pure speculation. Second, the Government ignores the fact that ***its own evidence*** soundly establishes that the 91A hair was collected by the Government's investigators in the fingernail scrapings of Kristen MacDonald at the time of her autopsy in February 1970, remained in continuous Government custody thereafter, and was noted as being present in those fingernail scrapings when they were examined by an Army CID chemist in July 1970. Third, the Government fails to recognize the effect of its argument on the totality of the case -- if the Government is correct in urging this Court to find that the Government itself contaminated this key piece of physical evidence from the crime scene, then what of the reliability of all of the

Government's crime scene evidence that it used at trial to argue that MacDonald's version of the events was false and convict MacDonald?

1. There is No Evidence of "Contamination," and the 91A Hair Is Part of the Fingernail Scrapings of Kristen Collected At Her Autopsy.

The Government concedes that fingernail scrapings from Kristen MacDonald were collected at her autopsy, taken into evidence by the Army CID as being vial #7 of 13 vials of physical evidence taken at the victims' autopsies, (JA 3958), and at some point designated Exhibit D-237 by Army personnel in February 1970. (JA 3963-63; 4302-03). The Government's own exhibits further establish that these same 13 vials of physical evidence collected at the autopsies were forwarded to Janice Glisson in July 1970 for analysis by her, (JA 2125), and that vial #7 was notated by Glisson in July 1970 as being "fingernail scrapings left hand smaller female McDonald (sic) (not labeled by Browning)" and contained the 91A hair. (JA 4304).

Key to the Government's contamination theory is an examination of Exhibit D-237 by Army CID Chemist Browning in March 1970, prior to Glisson's July 1970 examination of the 13 vials of physical evidence. Browning's March 1970 lab notes state "Exhibit # D-237 -- Fingernail scrapings from Christine's [sic] left hand -- vial contained one microscopic piece of multi strand polyester/cotton fiber identical to the pajama top material. Bloodstained but washed". (JA 2103).

According to the Government, because the Browning notation did not list the presence of a hair, this must mean that the 91A hair's presence during Glisson's July 1970 testing is somehow the result of contamination and was not part of the Kristen's fingernail scrapings collected at her autopsy. The Government further relies on a 2009 affidavit by Glisson, setting out her recollection of the testing events 39 years earlier and contending that she conducted an examination of Exhibit D-237 for blood evidence in March 1970 (separate and apart from her July 1970 examination) and has no recollection of a hair being present in Exhibit D-237 during that March 1970 examination. (JA 2122).[7]

All of these points raised by the Government fail to account for one key fact -- the Government's own evidence conclusively establishes that vial #7, which Glisson's contemporaneous July 1970 notes state to be "fingernail scrapings left hand smaller female McDonald (sic) (not labeled by Browning)," and which the Government's own evidence establishes were collected at Kristen's autopsy and were in continuous Government custody since that time, (JA 3958-59), contain the 91A hair. How can the Government claim the 91A hair is not from Kristen's fingernail scrapings when these two Government documents plainly establish the

[7] Notably, the Government did not make this claim when the 91A hair was designated for DNA testing in 1997.

fact, and plainly establish that the exhibit has been in continuous Government custody since Kristen's autopsy in February 1970?[8]

Whatever may have occurred or not occurred during the March 1970 examination of Exhibit D-237, and whatever may have caused portions of the vial #7 evidence to be "not labeled by Browning" according to Glisson's contemporaneous notes of her July 1970 exam (DE-217, Ex.2, attached in Addendum at 3), there is no evidence of contamination of the material in vial #7 beyond pure speculation and guesswork by the Government. First, the Government's reliance on affidavits executed in 2009 by Browning and Glisson as to their recollection of testing events 39 years earlier should be disregarded -- no lab technician can recall with any detail a specific lab test that occurred almost four decades prior. The Government's efforts to infer specific facts about what occurred in 1970 from these affidavits are entirely inappropriate.[9]

---

[8] In its Brief, the Government makes the following statement: "Appellant's brief only asserts that Specimen 91A came from under Kristen's fingernail, without citation to evidence that it did." (Gov't Br. at 77 n.63). Again, it is difficult to understand how the Government makes this argument, when the Government concedes that the 91A hair came from vial #7, (JA 4304), and the record plainly establishes through Glisson's own July 1970 notes that Vial #7 contains "fingernail scrapings left hand smaller female McDonald (sic) (not labeled by Browning)). (DE-217, Ex. 2, attached in Addendum at 3).

[9] MacDonald respectfully submits that it is clear that the 2009 affidavits of Browning and Glisson, attesting to events that occurred 39 years earlier, are plainly drafted by a Government lawyer and contain much argument rather than fact. For example, pages 7 through 9 of Glisson's affidavit contain a lengthy argument

Indeed, the Government's contentions regarding the March 1970 examination of Exhibit D-237 can be explained by the simple fact that only some portion of vial #7 may have been examined by Browning and Glisson at that time. The Government's own photographs of this evidence that it submitted earlier in this litigation refer to Exhibit D-237 as coming "From Vial No.7." *See United States v. MacDonald*, No. 08-8525, Supplemental Appendix to Appellant's Supplemental Opening Brief, at 227 (Addendum at 9). Nothing in the record establishes, as the Government apparently claims without any basis in the record, (JA 4304), that all of Vial #7 was somehow consumed during the March 1970 testing. And this explanation accounts for why part of the fingernail scrapings in Vial #7 were "not labeled by Browning" when forwarded to Glisson in July 1970 -- it makes perfect sense that any portions not examined by Browning would not be

---

based on assumption and speculation seeking to cast doubt on whether the contents of vial #7 that she examined in July 1970 were the same as Exhibit D-237 that she examined in March 1970. (JA 2120-22). It is impossible for Glisson, or anyone else, to testify with any certainty as to these matters 39 years later. Moreover, the Government's own evidence establishes that Exhibit D-237 came "from vial #7" containing Kristen's fingernail scrapings. (Addendum at 9). The Government's attempt to manufacture an argument otherwise are proof of the fallacy of its position.

Even so, it is notable that Browning's 2009 affidavit relied on by the Government does not affirmatively state that no hair was present in the fingernail scrapings when he examined them in March 1970. (JA 2103-2104). As noted above, there is no credible way that Browning (or any other of the lab personnel) could make such a statement more than 39 years after his examination of the evidence.

labeled by him. Everything about the Government's contamination theory is based on speculation and guess.

In short, the Government's contamination theory is baseless. The Government's own evidence establishes that the contents of vial #7 contained the fingernail scrapings of Kristen from her February 1970 autopsy, and when vial #7 was examined by Glisson in July 1970 it contained the exculpatory 91A hair, as proven by her own contemporaneous lab notes. (JA 3958-59; 4304). The Government's attempt to manufacture a contamination theory is based on pure speculation, and should be rejected.[10]

2. The 91A Hair is Powerful Exculpatory Evidence That, in Light of the Evidence as a Whole, Warrants Section 2255 Relief.

The Government argues that even if it can be accepted -- as it must -- that the exculpatory 91A hair came from the fingernail scrapings of Kristen collected at her February 1970 autopsy, the hair is not exculpatory because it claims to have

[10] It must also be noted that the Government never raised any issue about the potential contamination of its own physical evidence until that evidence proved to be exculpatory. To the contrary, prior to the results of the testing being reported, the Government consistently stated without qualification that the 91A hair originated from the fingernail scrapings of Kristen MacDonald. *See* No. 08-8525, Supplemental Appendix to Appellant's Supplemental Opening Br., at 189 n.1 (describing exhibits to be tested as including "Ex D-237 (fingernail scrapings from the left hand of Kristen MacDonald)") and at 213 (noting that affidavit submitted by defendant "included bench notes of CID chemist Janice Glisson, which catalogued unidentified human hairs with 'intact roots' found in the hands of Kimberley and Kristen MacDonald") (included in Addendum at 7-8).

shown it is not bloody or "forcibly removed." The Government's position is without merit, and fails to acknowledge the basis for why the 91A hair constitutes powerful exculpatory nature -- the location from which it was collected.

For its contention that the 91A hair was not "forcibly removed," the Government relies on a 2010 affidavit by FBI Agent Robert Fram, which for the first time opines that the 91A hair was a "naturally shed" hair in the "telogen" phase of growth. (JA 2145-64). From this opinion, the Government concludes that the 91A hair could not be "forcibly removed," and further argues that this must mean that the hair could not have come from Kristen's attacker. But both a close examination of Fram's affidavit, and common sense, refute the Government's position.

The trial evidence establishes that Kristen was fighting against her attacker, as she had defensive wounds on her hand and fingers from a sharp object.[11] (JA 530-31). The Government contends that because the 91A hair was not "forcibly removed," this is proof that it did not come from Kristen's attacker during the struggle. But the Government fails to acknowledge that Fram's affidavit states that a "naturally shed" hair in the "telegen" phase "may be sloughed from the body, as

[11] The Government contends that these wounds were to Kristen's right hand, and the fingernail scrapings containing the exculpatory 91A hair were from her left hand, and somehow this means that the 91A hair could not have come from her attacker. (JA 4302 at n. 103). This defies common sense -- one defending herself from attack could easily receive wounds to one hand while touching or grabbing her attacker with the other hand.

occurs periodically, or may fall out as the result brushing or combing (sic)." (JA 2151). In this statement, Fram's affidavit concedes that **contact** with a person -- such as brushing, combing, or, more relevant to this case, struggling -- can cause a hair in the "telegen" phase to fall out. Therefore, the fact that Fram opines that the 91A hair was a "naturally shed" hair in no way supports the Government conclusion that the hair did not come from Kristen's attacker during the attack. Fram's affidavit establishes that contact by Kristen with her attacker during the attack could have caused the attacker's hair to be lodged under her fingernail -- even if it were naturally shed.

It is on this point that the Government has no response to the powerfully exculpatory nature of the 91A hair -- its **location**. The only logical way a hair would be lodged under Kristen's fingernail such that it was scraped out during her autopsy is if it became lodged there as she struggled with her attacker -- and the DNA evidence conclusively establishes that the hair does **not** belong to MacDonald. The Government has attempted to argue that the hair was naturally shed -- but that does not matter even if it is true, because of the hair's **location**. The Government's own expert affidavit establishes that a naturally shed hair could be dislodged during a struggle, and the hair was found in Kristen's fingernail scrapings. Mere debris would not be lodged under Kristen's fingernail during her

struggle. Nothing in the manufactured arguments of the Government overcomes this fact.[12]

Contrary to the Government's urging, the new DNA evidence is powerfully exculpatory and warrants Section 2255 relief and a new trial. The only logical explanation for the origin of the 91A hair, given the location in which it was found under Kristen's fingernail, is that it came from Kristen's attacker. The DNA evidence conclusively establishes that the 91A hair did not come from MacDonald. In light of the other strong exculpatory evidence that exists in the record, the new DNA evidence "affirmatively prove[s] that [MacDonald] is probably innocent" such that Section 2255 relief should be granted. *Carriger v. Stewart*, 132 F.3d 463, 474 (9th Cir. 1997) (en banc). The district court erred in concluding otherwise.

B. If the Government's Position Regarding Contamination Is Correct, Then How Can Any of the Physical Evidence That the Government Used to Convict MacDonald Be Considered Reliable?

The Government's position is especially curious, because if it is correct and the Government itself contaminated the physical evidence in the case, then how

[12] In an effort to avoid this powerful exculpatory evidence, the Government draws attention to the fact that one of the newly tested hairs, found in Colette's left hand, had MacDonald's DNA. (Gov't Br. at 77). But the Government fails to note that MacDonald told the investigators, and testified at trial, that he rendered first aid to his wife at the scene before the investigators arrived, which logically explains the presence of this hair. (JA 1611-12). Again, the Government seeks only inferences that can help its position, without acknowledging or even attempting to explain the evidence that defeats its position.

can this Court trust the integrity of the other physical evidence collected from the crime scene that is being so heavily relied on by the Government to attempt to uphold the convictions? The Government relied almost exclusively at trial on evidence collected from the crime scene to argue that MacDonald's version of events was false, and that MacDonald must therefore be guilty. During its closing argument at the 1979 trial, the Government argued:

> The Government's case stripped to the essentials, consists of the crime, the physical evidence, the Defendant's story voluntarily told, the conflict between that story and the physical evidence from which we submit that it was a fabrication of the evidence and from that we infer and would ask you to find his guilt.

(Addendum at 2). This physical evidence remains the centerpiece of the Government's efforts to uphold MacDonald's convictions even today -- in its most recent filing in this appeal, the Government when setting out its version of the murders touts the "physical evidence" as having "demonstrated that the following occurred." (Gov't Br. at 5).

There can be no question that the Government's entire case against MacDonald is premised on its claim that the physical evidence from the crime scene somehow proves that MacDonald's version of events is false. If the Government concedes (and in fact affirmatively argues) that is has done a shoddy job of collecting, preserving, and testing that physical evidence, then how can it in good faith contend that MacDonald's convictions should be upheld? And how can

this Court be in any way assured of the validity of the evidence on which the Government seeks to hold MacDonald in custody?

The Government cannot have it both ways. There is no basis for its "contamination" argument against the powerfully exculpatory new DNA evidence. If it really urges this Court to accept that argument, then this Court should likewise reject the other physical evidence from the crime scene on which the Government so heavily relies. The Government cannot reasonably be permitted to argue that what it claims is inculpatory physical evidence collected during the investigation is reliable, but any exculpatory physical evidence in its possession must be contaminated or tainted. The fact that it is doing so speaks volumes about the weakness of its case against MacDonald.

CONCLUSION

The Government's Brief urges the same faulty analysis it advocated in the district court -- a piecemeal consideration of MacDonald's new evidence with no consideration for how it interconnects, for the substantial and powerful corroboration for it that exists in the record, and for the utter lack of any motive for MacDonald's witnesses to offer false evidence. It seeks to avoid the import of MacDonald's new DNA evidence by arguing that it contaminated evidence from the crime scene, with no consideration for what that says for the reliability of all of the crime scene evidence on which it continues to rely.

There has been a constant flow of exculpatory evidence that has been uncovered during the 35+ years of litigation in this case, culminating in the new evidence presented in this Section 2255 Motion. MacDonald submits there is only one logical reason that strong exculpatory evidence continues to come to light -- because he is innocent.

For the reasons stated herein, Appellant Jeffrey MacDonald respectfully requests that the district court's order denying his Section 2255 Motion be reversed, and that the case be remanded for entry of an order granting his motion and vacating his convictions.

This the 6th day of September, 2016.

/s/ Joseph E. Zeszotarski, Jr.
Joseph E. Zeszotarski, Jr.
N.C. State Bar No. 21310
Gammon, Howard & Zeszotarski, PLLC
115 ½ West Morgan Street
Raleigh, NC 27601
(919) 521-5878
jzeszotarski@ghz-law.com
Counsel for Appellant Jeffrey MacDonald

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's Order of August 18, 2016 because:

This brief contains no more than 10,396 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ Joseph E. Zeszotarski, Jr.
Counsel for Appellant

DATED: September 6, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing BRIEF through the electronic service function of the Court's electronic filing website, as follows:

John S. Bruce
Acting United States Attorney
Leslie K. Cooley
Assistant United States Attorney
310 New Bern Avenue
Raleigh, NC 27601

This the 6th day of September, 2016.

/s/ Joseph E. Zeszotarski, Jr.
Counsel for Appellant

ADDENDUM TO APPELLANT'S REPLY BRIEF

km18

which matters are handled in Washington, D.C.

All right; well, anything else?

MR. SEGAL: Nothing else, Your Honor.

THE COURT: Gentlemen, I do not feel that at the end of the 12th day of a trial of this case that the Court ought to uphold a subpoena for materials which, at best, are speculative as to what they show--some of them of questionable admissibility. And I think that if the Defendant has shown anything at all in this case, he has succeeded admirably and in depth in showing that there were just hundreds of things that these investigators could have done which they didn't do. So, from that standpoint, I think that they're all right.

I will not say that if there are four things to be done and the investigator only does two of them, that his failure to do the other two necessarily means that the two that he did do were not probative of anything. I don't believe that.

So, applied to this case here, I think if there is evidence--for instance--that they took a fingerprint and it showed up someplace, and there is no dispute about it, the fact that they did not take fingerprints at some other place and rule out the possibility that somebody else was there does not detract at all from the

We told you that. Mr. Blackburn told you that in his opening statement. We do not shrink from that statement. It is particularly important to keep in sight in this case because the Defense has done its utmost, I submit, to confuse the issues and to play upon your emotions.

The Government's case, stripped to the essentials, consists of the crime, the physical evidence, the Defendant's story voluntarily told, the conflict between that story and the physical evidence from which we submit that it was a fabrication of the evidence and from that we infer and would ask you to find his guilt.

The Defense, although the law imposes no duty on a Defendant to present any evidence, the Defendant has chosen to relate his version of the events. He has also chosen, I might add, to ignore or to try and explain all the physical evidence or to discredit the investigators or the experts and also to offer massive amounts of character testimony. But character testimony is really one-sided in this case because the only character witness, we submit, who could have shown the other side of the crime was Colette, and Colette was murdered.

Besides, because we contend that the

Exhibit #2

27 July 70
P.F.A.D.C. - FP. 82-70
P. 11 JH

Received in marking tape sealed box cont. br. paper bag labeled 137-70 cont two plastic bags stapled tog & said bag "13 plastic vials cont. fingernail scrapings hair samples, fibers & veg. smears taken from victim at Womack Army Hospital" marked on bottom of vials 17 Feb 70 BSH

#1 Matches - area around mouth (D68)
fibers + one long hair

#2 right hand Mother (not marked by Browning)
sm. amt debris - 2 small fragments that could be hairs, but as Def. hairs found nothing was wrapped up in the paper

#3 debris fibers smaller M'Donald child (D68)
one piece of straw-like vegetation

#4 fingernail scrapings right hand larger M'Donald female child (not labeled by Browning)
2 sm. frag. - + debris

#5 Veg. scrapings EOB

#6 left hand (not labeled by Browning)
2 sm. frag.

#7 fingernail scrapings left hand smaller female M'Donald (not labeled by Browning)
1 hair? - 2 fragments

#8 fingernail scrapings left hand larger M'Donald female child (not labeled by Browning) JH

questionable hair fragment
#9 fingernail scrapings (R) hand smaller McDonald female (not labelled by DOD)
3 fragments
E-4 #10 Hair (R) hand Mother (DOD)
1 good hair
1 ? hair or fiber
#11 skin abrasion & fx site (R) forearm Mother (not labelled DOD)
2 good fibers
#12 Mother Vag scrapings
E-5 #13 left hand Mother
all vials marked on bottom by 17 Feb 70 GFH

Microscope

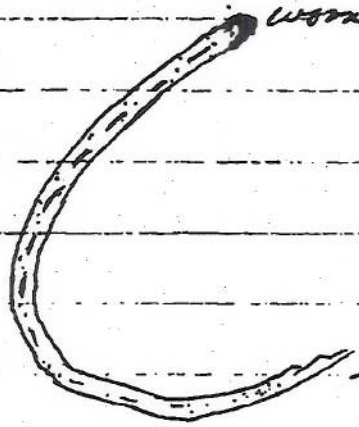
Hair #s 300 thru 308 / 305 thru 313 available

#2 no hairs - fibers only
#4 fibers only
#6 fibers only
#7 fibers + one light brown narrow hair, no medulla, striated; intact root; tapered end
#8 one light brown narrow hair [but not as narrow as #7], no medulla, intact root, worn end, not as [pointed] tapered as #7.
#9 fibers only
#10 one fiber ; one hair - bloody

155

#13 one hair - bloody

E-5
#13 appears thick - curved worn end



worn end
broken end

arrow shows the same width for segment for interrupted medulla dark color along sides

E306 = tips black
E306 = ~~gray - brown~~ diam. varies & bulges
E307 = ~~gray - brown~~
E308 = " " tapered
E309 = " " "
E310 = " " diam. varies - tapered - worn end but not like #13
E311
E312 black brown - diam. varies;
E313 medulla too heavy; diam. varies; tapered
E-5 #13 ~~Compared to~~ ~~E-1 306~~
mounted E-5 between the two hairs of 306. the two hairs of 306 were both more pts of similarity to each other than E-5 had to them. some areas

are quite similar but the coarser hairs are not the same as 306. - Calling negative. 306 is tapered slightly and E-5 is all the same width and color.

#'s 799 not similar to 300 thru 308

#10 E-4 appx 3" long - longer than any from E 300 thru 308 medulla cont. & distinct for the most part cortex intact; tapered end (rounded) * distinct pigment granules not ≈ to E 300 thru 308 ; ≈ to #1 except for length, but probably head hair.

#1 long head hair - bloody - long tapered end not cut; distinct medulla - interrupted; * shorter coat; light brown throughout.

Comparing E-5 #3 - none of the hairs 300 - 308 had the same type of worn, irregular end.

did not label all the other vials cont. fibers & hairs (#1, #2, #8) but gave #'s & slides corresponding to these #'s., since they are not going to be requested by me.

157

> Malone Affidavits, there are numerous other unsourced items such as hairs and blood debris (and also some hairs of which the government's identification is questionable) which were found on or near the victims and in other critical locations at the crime scene.

Id. at 14. Cormier then summarized a total of 10 such exhibits.[1]

Cormier Aff. No. 2, at pp. 14-16, ¶ 21(a)-(I).

Finally, the heading to Part IV of the Cormier Affidavit states that:

> THE DEFENSE SEEKS COURT-ORDERED ACCESS TO THE PHYSICAL EVIDENCE FOR THE PURPOSE OF CONDUCTING FORENSIC EXAMINATIONS AND DNA TESTING

Elaborating on this request, Cormier explained:

> As noted supra, in light of the pattern or deceptive conduct on the part of Agent Malone in this and other cases, the defense seeks access to all items of physical evidence which Malone or any other FBI agent examined in connection with MacDonald's 1990 Petition, including, but not limited to, natural hairs, fibers and blood debris. In addition, as noted above, based on my review of the FOIA materials, there are other unsourced hairs and blood debris found in critical locations (not necessarily examined by Agent Malone) to which the defense seeks access for the purpose of conducting its own laboratory examinations of these items, including, if appropriate, DNA testing.

Cormier Aff. No. 2 at 16 ¶ 22(emphasis added).

---

[1] These include: EX D-237 (fingernail scrapings from the left hand of Kristen MacDonald); EX D-238 (scrapings from Kristen's right hand); EX D-236 (fingernail scrapings from left hand of Kimberly MacDonald); EX D-235 (scrapings from Kimberly's right hand); EX 233-34 (fingernail scrapings from Colette MacDonald); EX E-4/Q-118 (debris from right hand of Colette); EX D-256 (blood debris from right hand of Colette); EX E-301/Q-78 (debris, including hairs, from vicinity of Colette's right hand); Ex D-229/Q-96 (hair removed from bedspread or found on floor of master bedroom).

under FOIA. According to Murphy, the documents "demonstrate that the government's laboratory technicians discovered the presence of human hair and a skin fragment for which there were no known sources in the MacDonald home." Murphy Aff. at 29-30 ¶ 51. Although the Affidavit included the bench notes of CID chemist Janice Glisson,[18] which catalogued unidentified human hairs with "intact roots" found in the hands of Kimberly and Kristen MacDonald, petitioner made no effort to have them forensically tested at that time nor did he seek to exploit the unidentified hairs in connection with his petition.[19] Despite these earlier defaults, petitioner now relies upon these very same documents to support his claim that forensic testing – including nuclear PCR DNA testing and preliminary microscopic analysis – is now warranted. See Cormier Aff. No. 3, Exh. 31. If such tactics are permitted to continue unchecked, petitioner will be afforded a virtual license to continue trolling the voluminous FOIA materials now in his possession in the hope that he will discover yet more previously overlooked grist for repetitive habeas litigation, based upon forensic analysis he could have but did not seek to conduct years ago. Such abuses constitute the very

---

[18] See Murphy Affidavit Ex. 1 at 3-6.

[19] Indeed, Murphy' s Affidavit noted that he "d[id] not undertake to document all of the instances in which unmatched hairs were omitted from the final CID and FBI typewritten laboratory reports." Murphy Aff. at 29-30, ¶ 51.

009

D-237 (GX-285)
Fingernail scrapings left hand of
Kristen MacDonald

(From Vial No.7)

Vial No. 7
Marked for Identifcation
"JSG"
and
"BJH 2/17/70"

155