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.

PETITION FOR REHEARING EN BANC

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 Jeffrey R. MacDonald

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RULE 35 STATEMENT

In counsel's judgment, the panel opinion issued on 21 December 2018 meets the criteria for submission of a petition for rehearing en banc under Rule 35 of the Federal Rules of Appellate Procedure. This matter involves a question of exceptional importance: the quantum of proof necessary for a federal prisoner serving a sentence of life imprisonment to obtain relief on a successive motion under 28 U.S.C. § 2255 based on newly discovery evidence.

FACTS

Dr. Jeffrey R. MacDonald was convicted at trial in 1979 of murdering his family on Fort Bragg, NC. At that time, MacDonald was an Army doctor living on base with his family. In the early morning hours of 17 February 1970, his pregnant wife and two daughters were murdered in their home on base, and MacDonald was severely injured. From the very beginning, MacDonald told investigators that the murders had been committed by a group of intruders including a blond-haired woman wearing a floppy hat (later identified as Helena Stoeckley), who had attacked him and his family.

The investigation was initially handled by military authorities, and focused on MacDonald. A six-week Article 32 hearing was held after the Army brought murder charges against MacDonald. The presiding officer recommended that all charges be dropped, concluding that "the matters set forth in all charges and specifications are not true," and further urged the civilian authorities to investigate Stoeckley. (JA 1966). Instead, the civil authorities prosecuted MacDonald, resulting in his 1979 trial that lasted twenty-nine days. MacDonald was convicted on 29 August 1979 and sentenced to three consecutive terms of life imprisonment.

The theory of prosecution at trial was unusual. The Government did not attempt to directly prove that MacDonald committed the crime, but instead sought to discredit MacDonald's account of events such that it could argue that MacDonald's version was false and MacDonald therefore must be the killer. The Government relied largely on physical evidence in its theory. This theory was as questionable as it was unusual -- in one of many unusual facts uncovered since trial, the presiding district judge wrote a letter in the months after the trial to a young lawyer who had clerked for the defense, wherein the presiding

district judge stated that he "confidently expected that the jury would return a not guilty verdict in the case." (JA 4102).

Since the 1979 trial and direct appeal,[1] MacDonald filed a series of habeas petitions based on newly discovered evidence. Each presented new evidence relating to physical evidence or Stoeckley, that contradicted or disproved the Government theory at trial, but in each instance were denied.

The §2255 Motion at issue involves claims based on newly discovered evidence that came to light in the 2000-2006 time period, including (a) exculpatory DNA results from testing long resisted by the Government, including a hair lodged under the fingernail of MacDonald's youngest daughter Kristen (who had documented defensive wounds to her hands (JA 530-31)) that was not MacDonald's hair, along with other exculpatory DNA evidence (the "DNA claim"); and (b) evidence from a retired career U.S. Deputy Marshal, Jim Britt, who worked at the trial and transported Helena Stoeckley to and from

[1] This Court reversed the convictions on speedy trial grounds, but the Supreme Court reversed and reinstated the convictions. *United States v. MacDonald*, 632 F.2d 258, 264 (4th Cir. 1980), *rev'd*, 456 U.S. 1 (1982) This Court then affirmed the convictions on remand. *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982).

the courthouse after she was subpoenaed by the defense, and who overheard a conversation between Stoeckley and one of the prosecutors (who has since been convicted of fraud offenses and served a prison sentence) wherein Stoeckely told the prosecutor that she was present in the MacDonald home during the murders, and the prosecutor responded by telling Stoeckley that if she testified in court to that fact, she would be indicted for murder (the "Britt claim").[2] MacDonald supported Britt's statements with substantial corroborating evidence from other witnesses showing that Stoeckley had made remarkably similar admissions to them (including her own lawyer), and had also made statements to other persons tending to show that she had been threatened by the prosecutor, including:

(1) Wendy Rouder -- Rouder, a law clerk for the defense at trial, had an encounter with Stoeckley during the trial wherein Stoeckley told Rouder that Stoeckley thought she was present during the murder. When Rouder asked her why she would not testify to that fact, Stoeckely told Rouder that

[2] Stoeckley was held on a material witness warrant at trial on request of the defense. She ultimately testified that she did not remember the four hour period during which the murders occurred, despite her ability to recall events before and after those four hours. The trial judge then refused to permit MacDonald to call before the jury seven witnesses he had present who would testify to Stoeckley's admissions to them of being present in the MacDonald home at the time of the murders with the killers. (JA 1051-1347).

she "can't with those damn prosecutors sitting there," adding "they'll burn me, fry me." (JA 2513-16).

(2) Jerry Leonard -- Leonard, a lawyer, was appointed by the court to represent Stoeckley during the trial. Leonard testified at the evidentiary hearing on this §2255 Motion that, during the trial, Stoeckley confessed to him her presence during the murders with the men who actually committed them. Stoeckley also provided details to Leonard that matched other evidence in the case. (JA 3279-80; 4045; 4098).

(3) Sara McCann -- McCann became a friend to Stoeckley in the years after the trial and prior to her death. McCann testified at the evidentiary hearing that Stoeckley confessed to her that Stoeckley was present during the murders with the real murderers, eventually running out of the house. (JA 2586-89).

(4) Helena Stoeckley Sr. -- Stoeckley's mother provided an affidavit averring that Stoeckley told her on two occasions prior to Stoeckley's death that Stoeckley was present in the MacDonald home during the murders, and providing details from Stoeckley that corroborated both MacDonald's account of the events and Rouder's account of Stoeckley's statements to Rouder (JA 4063).

(5) Eugene Stoeckley -- Stoeckley's younger brother testified at the evidentiary hearing that his mother told him, during the early 2000s when her health was declining, that Stoeckley had confessed to her that (a) Stoeckley was present during the murders (JA 2447-48), and (b) Stoeckley did not testify to that fact during the 1979 trial because "she was threatened with prosecution for murder." (JA 2496).

The record also contains additional corroborating evidence of Stoeckley's admissions, including the seven witnesses who were

excluded at trial (Opening Brief at 46 fn. 13) and a litany of other post-trial evidence uncovered by MacDonald (Reply Brief at 36-38).

An evidentiary hearing was held in the district court in September 2012, [3] and the district court entered an order denying the §2255 Motion on 24 July 2014. (JA 4389). MacDonald appealed the district court's denial of his §2255 Motion to this Court. On 21 December 2018, the panel opinion of 154 pages was issued affirming the district court's denial of relief.

In so holding, MacDonald respectfully submits that the panel overlooked key facts and applied the §2255(h) standard to the evidence in a manner inconsistent with the law and the approach of another recent panel of this court in *Finch v. McKoy*, ___ F.3d ___, No. 17-6518 (4th Cir., 25 January 2019), wherein that panel applied the analogous actual innocence gateway standard for §2254 proceedings from *Schlup v. Delo*, 513 U.S. 298 (1995).

ARGUMENT

MacDonald requests that the court grant rehearing en banc to address the important question of the quantum of proof necessary for a

[3] Britt died prior to the evidentiary hearing, and therefore did not testify.

federal habeas petitioner to obtain relief under §2255(h) on a successive §2255 motion.

I. The Panel Opinion's Application of the §2255(h) Actual Innocence Standard Is Inconsistent With the Decision of Other Panels of this Court.

The panel opinion notes that the §2255(h) actual innocence "gateway" standard -- whether the newly discovered evidence, if proven and viewed in light of the evidence as a whole, is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have convicted MacDonald -- is derived from the *Schlup* actual innocence standard used in state prisoner §2254 proceedings. (Opinion at 128-29). The panel opinion's treatment and rejection of MacDonald's evidence, however, contrasts with the analysis of another more recent panel of this Court, applying *Schlup* to a newly discovered evidence claim challenging a state murder conviction. *Finch v. McKoy*, ___ F.3d ____, No. 17-6518 (4th Cir., 25 January 2019).

In *Finch*, another panel of this Court found the *Schlup* actual innocence standard to be met by newly discovered evidence calling into question the identification of the defendant at trial, by the prosecution's key witness, as the perpetrator of the murder at issue in that case. The

panel in *Finch* noted the mandate of the Supreme Court that the actual innocence analysis "requires a holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard." *Finch*, Slip. Op. at 13 (citing *House v. Bell*, 547 U.S. 4518, 539 (2006)).

MacDonald respectfully submits that the "holistic judgment about all the evidence" review in this case by the panel contrasts sharply with that by the *Finch* panel. The *Finch* panel found the *Schlup* standard to be met where the newly discovered evidence called the prosecution's case into question -- but did not negate the prosecution case entirely. *See Finch*, Slip Op. at 16-17) (noting that new evidence "weakens" the evidence corroborating the identification of the defendant as the perpetrator). In this case, on the other hand, it appears that the panel held MacDonald to a much more exacting standard, rejecting at every turn the exculpatory import of the newly discovered evidence offered by him, and how it interconnected with the evidence as a whole. MacDonald respectfully submits that, as explained below, the panel opinion overlooked key facts in its analysis of his claims and its

application of the §2255(h) standard, and requests that rehearing en banc be granted.

II. The Panel Opinion Overlooks Key Facts in Applying the §2255(h) Standard to MacDonald's Evidence.

MacDonald respectfully submits that in denying relief, the panel essentially considered the evidence in the light most favorable to the Government in its §2255(h) analysis. The law permits the Government no such inference. *See* Reply Brief at 3-4. Throughout the opinion, the panel resolves factual disputes in the Government's favor, where MacDonald has produced contrary evidence that rebuts the Government's position.

For example, the panel concludes: "MacDonald has made little effort, and definitely not succeeded, in refuting the cogent evidence offered by the government to disprove his account of murderous intruders." (Opinion at 149). The panel then offers three "[n]otable examples" of this "cogent" Government evidence: (1) "MacDonald's bloody footprints in daughter Kristen's bedroom," (2) "the forty-eight 'clean' puncture holes in MacDonald's blue pajama top," and (3) the two blue pajama top threads on the bloodstained piece of lumber used" in the killings. (Op. at 149-50).

But the panel's conclusion in this regard overlooks the fact that the "evidence as a whole" does refute the Government's contentions on these issues:

- footprints at Kristen's door

The panel opinion overlooks the fact that trial testimony established that MacDonald, after EMT personnel had loaded him on a gurney, struggled with the EMTs and stepped off of the gurney in the very area where the footprints at issue were found. (Testimony of Richard Tevere, 19 July 1979, p. 1314-15). This trial testimony was apparently not considered by the panel in concluding that the footprint evidence was "notable" to its conclusion.

- puncture holes in pajama top

In both his Opening Brief (at p. 32-33) and Reply Brief (at p. 24-25), MacDonald sets out the evidence directly refuting the Government's reliance on this theory. The record contains MacDonald's dismantling of this evidence at length. (JA 1992-96). Yet the panel adopts the Government's view of this evidence, giving no credence to MacDonald's disproof of this theory.

- blue fibers on lumber

The panel's reliance on this Government evidence overlooks the fact that MacDonald introduced extensive evidence in an earlier habeas proceeding showing that FBI testing on the piece of lumber, not available to MacDonald at the time of trial, found two black wool fibers and one green wool fiber of unknown origin in the debris removed from the piece of wood. (JA 2057-59). MacDonald had no way to introduce this evidence at trial, as it was not provided to him. (JA 2059). It is, however, part of the "evidence as a whole" for §2255(h) purposes, and directly refutes the import of the Government evidence relied on by the panel. Contrary to the panel's conclusion that the thread evidence was "damning" to MacDonald, (Opinion at 56), instead the evidence as a whole shows there to be exculpatory evidence relating to the threads. It is not mentioned in the panel opinion.

Thus, as to each of the three "notable" items of proof relied on in the panel opinion, the panel overlooks the fact that earlier in this litigation MacDonald has not just attempted, but in fact rebutted, this very evidence. Indeed, as noted in his Opening Brief, MacDonald has

carefully reviewed and rebutted every piece of significant physical evidence relied on by the Government -- see Opening Brief at 33 fn. 8 -- yet the panel opinion adopts and relies on that physical evidence in full.

Moreover, the panel opinion does not address the two key points raised by MacDonald as to the two bases for his §2255 Motion. First, with respect to the DNA claim, MacDonald has argued that the hair found under his daughter Kristen's fingernail (the "91A hair") is powerful exculpatory evidence because of its location -- Kristen was fighting her attacker, the hair was lodged under her fingernail, and the hair does not match MacDonald.

The Government tries to combat this evidence by arguing that the 91A hair was not actually from under Kristen's fingernail -- that is, that it contaminated its own physical evidence. *See* Reply Brief at 30-41. This point was argued extensively in MacDonald's briefs, and discussed at oral argument. Implicit in the Government's position are two key concessions -- (1) the exculpatory effect of the location of the 91A hair must be powerful, because the Government is willing to argue that it contaminated its own evidence to try to avoid its exculpatory effect, and (2) what does this say about the efficacy of all of the other physical

evidence that the Government relied on at trial to convict MacDonald? The Government cannot have it both ways -- if it admits to tainting some portion of its own physical evidence, then how can it fairly claim that the other physical evidence it seeks to rely on to convict MacDonald is reliable? *See* Reply Brief at 39-41. Yet the panel opinion never addresses these points.

Moreover, in finding that the 91A hair is not sufficiently exculpatory to result in §2255 relief, the panel makes factual findings contrary to MacDonald that fail to account for MacDonald's evidence. For example, the panel opinion questions whether the 91A hair was bloody, and notes the alleged lack of blood on the hair as being something that supports the Government position that the hair is mere household debris. (Opinion at 126, 147).

But MacDonald, in the materials submitted with his §2255 Motion, presents Government documents showing that the 91A hair was found by the Government examiners to be bloody. (JA 2061); DE-126, Appendix, Tab 2 at 73 (lab report noting that Exhibit D-237, which contained the 91A hair, had presence of blood). The panel opinion

overlooks this issue relating to the 91A hair offered by MacDonald in finding the DNA evidence to be insufficient to support relief.

Second, the panel opinion affirms denial of the Britt claim, finding that the numerous "Stoeckley post-trial 'I was there' confessions" do not warrant relief. (Opinion at 150). But again, MacDonald respectfully submits that in reaching this conclusion the panel does not address the key points raised by MacDonald about this evidence. As explained in his Opening Brief, the Government theory adopted by the panel relies on highly illogical coincidences:

> To accept the Government's theory of guilt, one must accept that MacDonald created a story about a woman with a floppy hat being with intruders who killed his family, and that by coincidence such a woman did exist in the community *on that very night*, and that by coincidence that woman would then falsely *confess repeatedly* (both before, during, and after the 1979 trial) to being present during the murders with the murderers in a way that was *entirely consistent* with the story that MacDonald supposedly made up from whole cloth. In addition, one would have to accept that one of the men identified by Stoeckley as one of the killers in her many confessions, Greg Mitchell, would *by coincidence himself falsely confess repeatedly* to taking part in the killings, in a way that is *entirely consistent* with the story supposedly created by MacDonald. What are the chances of this occurring?

(Opening Brief at 35). The panel opinion does not address this point in its analysis of the evidence as a whole.

Moreover, the panel opinion does not account for the fact that all of the Stoeckley evidence offered by MacDonald interconnects in a way that could not occur if the evidence were not true. As explained in his Reply Brief:

> 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.

(Reply Brief at 17-18). The panel opinion does not address the interconnection of this evidence.

The panel opinion also points to the purported unreliability of Stoeckley's statements. (Opinion at 130, 140-41). But this puts MacDonald, as he argued to the panel, in the proverbial Catch-22:

> The district court's approach puts MacDonald in the proverbial *Catch 22*. Having stated from the outset that his family was attacked by intruders later shown to be drug addicts, the multiple confessions of one of these intruders has never been considered on its merits for the principal reason that she was drug-addled. If the tables had been turned, and if Stoeckley had been indicted and tried for this crime, it is unlikely that any court would have excluded her many confessions because she was drug-addled, or simply because she sometimes repudiated her admissions of guilt. Many defendants only confess once, and repudiate their confessions thereafter -- the confessions are nonetheless admissible, and it is for the jury to consider the question of reliability. So it should be in this case as to Stoeckley's many confessions to this crime.

(Opening Brief at 46). Moreover, Stoeckley was a trusted police informant, and one detective who worked with her as an informant testified at trial that "[i]f she told me, I knew it was true, because everything she told me was." (JA 1371). Another testified that Stoeckley was "by far, the best informant I have ever had." (JA 1576). The panel opinion overlooks these facts.

Contrary to the panel's conclusions, this Court has previously found that evidence of Stoeckley admitting to presence at the crime scene would greatly damage the Government's case. On direct appeal in 1980, this Court noted the import of Stoeckley's testimony to the jury's decision:

> Had Stoeckley testified as it was reasonable to expect she might have testified [admitting to presence at and participation in the crime], the injury to the government's case would have been incalculably great.

United States v. MacDonald, 632 F.2d 258, 264 (4th Cir. 1980), *rev'd*, 456 U.S. 1 (1982). The panel opinion notes this fact, but concludes that "we now know much more about Stoeckley's untrustworthiness and lack of credibility that Judge Dupree and Judge Murnaghan did not know then." (Opinion at 151). MacDonald respectfully submits that the panel's statement fails to acknowledge that both the district court and this Court, on direct appeal in 1980, were well aware of Stoeckley's credibility issues -- in fact it was those very issues that were the basis of the district court's exclusion of the seven defense witnesses at trial who could testify to Stoeckley's admissions to them, which was one of the subjects of the direct appeal.

Likewise, the panel opinion's view of the strength of the physical evidence offered at trial is in direct contrast to the opinion of the trial judge himself. Shortly after the 1979 trial, the presiding judge wrote a letter to Rouder, who he apparently had had some contact with regarding a clerkship. In the letter, the presiding judge notes that he "confidently expected that the jury would return a not guilty verdict in the case." (JA 4102). The only fair inference from this letter is that the trial judge himself did not believe the Government's case to be strong. The Government tacitly concedes so -- it fails to address this letter in its briefing in any way.

Given this statement, the panel opinion's conclusion that MacDonald has "made little effort, and definitely not succeeded, in refuting the cogent evidence proffered by the government to disprove his account of murderous intruders" (Opinion at 149) is an improper application of the §2255(h) standard. MacDonald has offered extensive and interlocking exculpatory evidence in support of his Motion. He has painstakingly reviewed and rebutted the physical evidence offered against him. He has been imprisoned for almost 40 years for the crimes

at issue, and has steadfastly proclaimed that he is innocent. MacDonald requests that a petition for rehearing en banc issue.

CONCLUSION

For the reasons set out herein, Appellant Jeffrey R. MacDonald respectfully requests that this Petition for Rehearing en banc be granted.

This the 4th day of February, 2019.

GAMMON, HOWARD & ZESZOTARSKI, PLLC

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

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because:

This brief contains 3,870 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7);

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This the 4th day of February, 2019.

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

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing PETITION through the electronic service function of the Court's electronic filing system, as follows:

Jennifer P. May-Parker
Assistant United States Attorney
Eastern District of North Carolina
310 New Bern Avenue
Raleigh, NC 27601

This the 4th day of February, 2019.

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