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Fatal revision

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Abstract: Shalit discusses reasons why the famed "Fatal Vision" murderer, Jeffrey MacDonald, may have an excellent chance to re-open his case in light of recent allegations against the FBI of misconduct. New revelations cast doubt on the FBI's version of the murder and Shalit concludes MacDonald could very well be innocent.

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Full text: On April 16, The Wall Street Journal published the results of an investigation into the practices of the increasingly beleaguered FBI crime laboratory. The article, written by reporter Laurie P. Cohen, uncovered two apparently fraudulent affidavits submitted by FBI hair-and-fibers examiner Michael P. Malone. An examination of Malone's actions, wrote Cohen, "raises serious concerns about the FBI crime lab, which is already under scrutiny for allegedly biasing its findings to favor prosecutors over criminal defendants." One victim of this practice, wrote Cohen, may have been Dr. Jeffrey R. MacDonald, the Princeton-educated Army surgeon whose sensational 1979 murder conviction was the basis for Joe McGinniss's best-selling book *Fatal Vision*, and whose lawyers have been complaining for years that the FBI manipulated forensic evidence to make their client look guilty. As Cohen reported, a strand of synthetic blond fiber—now revealed, in contradiction to Malone's sworn testimony, to be composed of the type of fiber used to make human wigs—has become the basis of a habeas petition to gain a new trial for MacDonald, who is currently in jail for the murder of his wife and their two small children, a crime he has maintained for twenty-seven years he did not commit. But MacDonald's lawyers go further. They say that prosecutorial bias, far from being confined to a single rogue agent, permeated the entire investigation. "We've known for a long time that the forensic testimony in this case was utter nonsense," says Harvey Silverglate, the Boston criminal defense lawyer who has been handling MacDonald's appeal, pro bono, since 1989. "For years, people have been telling us, 'You don't accuse the FBI lab of perjury. This is the foremost forensic lab in the world!'" When Silverglate and his associates read in the paper that the FBI lab was under fire for falsifying evidence, "we were electrified," he says. "What this case has always needed is a scandal swirling around the FBI lab. Maybe now someone will believe us." Malone declined to comment. The facts of the MacDonald case are as well-known as they are lurid. In the early morning hours of February 17, 1970, the military police at Fort Bragg, North Carolina, logged a phone call from MacDonald, a Green Beret captain and an Army group surgeon who lived with his family on the Fayetteville base. "We've been stabbed," gasped MacDonald. "People are dying.... I may be dying." When military police arrived at the scene, they found MacDonald's pregnant wife, Colette, lying on the floor of the master bedroom in a pool of her own blood. The couple's young daughters, Kimberly and Kristen, had been hacked to death in their beds. All three bore the marks of multiple weapons: an ice pick, a Geneva Forge knife and a wooden club later found in the backyard. MacDonald was found alive but unconscious. He was revived by medics, given mouth-to-mouth resuscitation and taken to a nearby hospital. When he regained consciousness, he told a bizarre tale. His family, he said, had been butchered by a pack of drug-crazed hippies. MacDonald remembered a black man in an Army field jacket with sergeant's stripes, two white men and a woman in a blond wig and floppy hat. According to MacDonald, the group had cut a macabre swath through the small apartment, carrying a candle and chanting "acid is groovy" as they stabbed and clubbed and slashed his wife and daughters. MacDonald's account of the hours leading up to the murders are as follows: after sharing an orange liqueur, he and Colette got into bed and watched Johnny

Carson. But soon 2-year-old Kristen, who couldn't sleep, crawled into their bed. Unfortunately, Kristen wet MacDonald's side of the bed. MacDonald cleaned her up, tucked her in and crashed on the living-room sofa-only to awaken hours later to the frantic screams of his dying family. Struggling to his feet, he was set upon by three men, who beat and slashed him until he passed out. When he opened his eyes, the intruders were gone and the apartment was silent. He staggered to the rooms of his wife and children, only to find them broken and bleeding. After pulling a knife out of his wife's chest, he attempted mouth-to-mouth resuscitation. He also attempted to revive his daughters. When this failed, he managed to pick up a phone and summon the Army medics. At that point, MacDonald-who, hours later, would receive treatment for multiple head contusions, a collapsed lung, as many as seventeen ice-pick wounds and at least four knife wounds, including one so deep it exposed his stomach muscle-lost consciousness again. When Army medics arrived at the scene, they found him slumped over his dead wife. William Ivory, the 26-year-old lead Army investigator, did not believe MacDonald's story. For one thing, the crime scene looked suspiciously tidy. If the MacDonald living room had indeed been the site of a bloody struggle with marauding intruders, as MacDonald claimed, why was a flowerpot standing upright? Even more graphically damning, it seemed, was the forensic evidence-gathered at the crime scene by the Army's Criminal Investigation Division and turned over to the FBI when, nine years after the murder, the agency decided to conduct its own probe. As Justice Department prosecutors would argue at trial, this circumstantial evidence overwhelmingly fingered MacDonald. On the bedspread, investigators found a bloody strand of Colette's head hair entwined with one of MacDonald's pajama fibers, evidence that a battle had taken place between MacDonald and his wife. The imprint of MacDonald's bare, bloody feet was found in Kimberly's doorway-proof, according to the prosecutor's scenario, that MacDonald had paused in his daughter's room while carrying Colette's lifeless body into the master bedroom. Most damningly, investigators claimed, two of MacDonald's pajama fibers were found on the murder club. Lead prosecutor James Blackburn called this ominous discovery the "most important" evidence in the case. Also problematic for MacDonald was what was not found in the apartment. MacDonald said he'd struggled with the intruders in the west entrance to the hallway before falling to the ground, wounded and unconscious. But investigators claimed to have found none of MacDonald's pajama fibers or blood in that area. And there was a bigger problem. According to investigators, there was not a shred of evidence to support MacDonald's farfetched tale of chanting, candle-bearing crazies. "It doesn't make any difference if there were 5,000 hippies outside Castle Drive at four o'clock in the morning screaming 'Acid is groovy; kill the pigs,'" explained Blackburn in his summation. "Because they have not shown that hippies were inside the house." In interviews after the verdict, several jurors revealed their discomfort with the government's case. The prosecution, they told reporters, could offer no explanation for how MacDonald, a doting father who had just delighted his family with surprise gifts of a bunny rabbit and a Shetland pony, could experience such a profound psychotic snap. In the end, they said, it was the lack of evidence of intruders-together with the lack of blood on the floor where MacDonald said he'd bled-that led them to accept the prosecution's claim that MacDonald was lying. Try as they might, MacDonald's lawyers proved unable to explain the discrepancies between their client's story and the forensic evidence. After a mere six hours of deliberation, the jury convicted MacDonald of triple murder. A judge sentenced him to three consecutive life terms at the Sheridan Federal Correctional Institution, in western Oregon, where he remains to this day. But there is a strong argument to be made that the government's case against MacDonald was, at least to some degree, rigged, an argument that indeed has been made by investigative journalists Jerry Allen Potter and Fred Bost in their book *Fatal Justice*, just out in paperback, which presents an exhaustive argument for MacDonald's innocence. As Potter and Bost note, during the four years leading up to the trial, MacDonald's lawyers repeatedly asked the prosecution for a look at the original source documents-investigative reports, witness statements, handwritten lab notes and other unfiltered primary material-that would substantiate the government's damning interpretation of the evidence collected at the crime scene. Brian Murtagh, the Justice Department attorney in charge of the case, refused to turn anything over; and Judge Franklin T. Dupree refused to compel him to do so. Dupree

soothed the apoplectic lawyers with a promise that, if the sought-after lab notes were later discovered to contain exculpatory information, the prosecution's case would "get reversal." The government documents weren't released until thirteen years after the murder, when MacDonald's attorneys lobbied senators and congressmen to compel disclosure under the Freedom of Information Act (FOIA). MacDonald's lawyers say this belated disclosure, which began in 1983 and continues even today, confirmed their suspicions. The handwritten notes, tens of thousands of pages of them, did contain information that was kept off the FBI's typed summations, information that contradicted the prosecution's central claims at trial. We now know from the notes that, when the government claimed that MacDonald's footprints in Kimberly's doorway inculpated him in the murders, it ignored eyewitness accounts that MacDonald, as he was being carried out of the apartment on a gurney, stumbled off the gurney with bare, bloody feet at precisely the point where the footprints were found. We also know that, when the jurors were told of a pajama fiber entwined with a hair, they never learned the truth-that Army investigators had examined debris from the bedspread three times in 1970 and found none of Colette's bloodstained hair; nothing entwined. The notes reveal no explanation for such a dramatic change in forensic evidence-evidence that was hand-carried from the Army's evidence depository to the FBI lab by the lead Justice Department prosecutor himself. What about the troubling absence of blood and pajama fibers on the hallway floor, where MacDonald insisted he'd battled multiple intruders? This claim, too, is countermanded by source documents that the government refused to allow the jurors to see. The notes reveal that, when Robert Shaw of the Army's Criminal Investigation Division first got to the apartment, he reported a "pile" of blue fibers and a spot of blood (diagnosed as probably type B, MacDonald's type) at precisely the spot in question. This evidence, too, was kept from MacDonald's lawyers and from a jury who cited its absence as their main reason for doubting MacDonald's account. As for the fibers on the murder club-the "most important" evidence-the original, handwritten lab notes reveal that, when lab technicians examined the club debris, they found not pajama fibers but two strands of black wool, wool that didn't match any clothing in the apartment. Somehow, these foreign "wool fibers" became "pajama fibers" in the government's final report. During their decade in the MacDonald FOIA archives, Potter and Bost found evidence to dispute every major claim by the government of circumstantial evidence against MacDonald. As they write: "We found each one grossly short of proof, and many of them intentionally distorted. We would be hard-pressed to mention a single important item that had not been somehow manipulated to throw suspicion away from intruders who left substantial evidence in the home, in the victims' hands, and on and around the bodies." ne piece of evidence kept out of MacDonald's trial that showed up in the FoIA documents was a confession of murder-actually multiple, polygraph-verified confessions-by Helena Stoeckley, a Fayetteville hippie, drug addict and selfstyled "witch" who admitted to owning a blond wig, floppy hat and ice pick; who was spotted by five eyewitnesses in the vicinity of the MacDonald home, in several instances in the company of two white males and a black male in an Army field jacket, on the night the murders occurred; and who never came up with an alibi for where she was during the early morning hours of February 17, 1970. In her confessions, Stoeckley explained that "MacDonald was just one of several people giving the drug users a hard time. And I don't know really who started the idea." Stoeckley explained that the group, "peaking out on mescaline," allowed matters to get out of hand. "From what I understood, there was simply going to be a little pushing around, you know, and trying to get a point across, and that was it." Before she knew it, "there was blood and I realized that things were out of control." Despite his earlier promise to reverse MacDonald's conviction in the event of documented prosecutorial suppression, Judge Dupree ruled the confessions irrelevant, due to a lack of forensic evidence tying Stoeckley to the crime scene. Such evidence later surfaced, in the form of blond wig hairs suppressed by the FBI and finally disclosed through FOIA in 1990. But this, too, was deemed insignificant. FBI expert Malone swore that the synthetic fibers had to be doll hair. "Unless the defendant wants to maintain that Ken and Barbie did it," said government prosecutor John F. DuPue in 1992, "I don't see how this hair helps them very much today." A three-judge panel agreed with DuPue: "Without any evidence that saran is used in the production of human wig hair the presence of blond saran fibers

in the MacDonald home would have done little to corroborate MacDonald's account of an intruder with a blond wig." The April 16 Journal story, which established that saran fiber was indeed used to make wigs-and that FBI hair expert Michael P. Malone knew this at the time he testified to the contrary-has vaulted the MacDonald case back into the media spotlight. From his makeshift studio at the Sheridan Federal Correctional Institution, a haggard-looking MacDonald has been storming the talkshow circuit, appearing on "Larry King Live," the "Today" show and ABC's "This Week" to proclaim his innocence, and to declare himself the victim of a malicious government prosecution. The recent avalanche of criticism of the FBI reflects "precisely what I have been saying for years," a tearful MacDonald told Larry King. "I didn't murder my wife or children. I never harmed any of them..." To those of us weaned on Fatal Vision, Joe McGinniss's slickly tendentious account of an Ivy League golden boy's descent into psychopathy, MacDonald's telegenic persuasiveness comes as a queasy surprise. For, even more than the jury's stinging verdict, this true-crime page-turner has come to define Jeffrey MacDonald in the public eye, turning a loving father and dedicated physician into a soulless monster of depravity. Not only did the McGinniss book smoothly lay out the government's case-papering over discrepancies and eliding crucial contradictions, until an iffy circumstantial case began to seem an airtight web of verification-it also gave the prosecution's argument a psychological superstructure. For McGinniss's literary narrative provided something the government's legal narrative did not-a plausible motive for why MacDonald would kill his wife and children. In turning MacDonald into his Raskolnikov, however, McGinniss faced a crucial stumbling block. The blandly middle-class Army doctor refused to display any of the traits associated with people who kill: prior to trial, five psychiatrists-including three hired by the government-had found MacDonald sane and unlikely to have committed the crimes. In trying to imbue his protagonist with the requisite horribleness, McGinniss fell back on Hervey Cleckley's *The Mask of Sanity*, which held that, for victims of a particular "grave psychiatric disorder," outer normalcy was proof of inner psychopathy. According to McGinniss's surmise MacDonald had murdered his family in a fit of "boundless rage" against the female sex, suppressed since childhood but lethally detonated after Colette voiced threatening "new insights into personality structure and behavioral patterns," gleaned from a psychology course in which she had recently enrolled. *Fatal Vision* became a national best-seller and the inspiration for a top-rated television movie of the same name. And McGinniss's book became doubly famous as the object lesson at the center of *The Journalist and the Murderer*, Janet Malcolm's exploration of the morally perilous relationship between writer and subject. During the years in which McGinniss was preparing his portrait of MacDonald as a psychopathic killer, he had, Malcolm reported, posed as his devoted fan and supporter: commiserating with MacDonald about his "nightmare"; offering him legal advice; lulling him with forty friendly letters. In truth, though, by the time the conviction was announced, McGinniss had already decided MacDonald was a cold-blooded murderer. As McGinniss later told a radio host, "[M]y mind was made up the same day the jury's mind was made up." After the verdict, MacDonald sued McGinniss, alleging breach of contract; the case was settled for \$325,000. Malcolm was scrupulously agnostic on the question of whether MacDonald committed the crime. As MacDonald's lawyers sent her ream after ream of what they claimed was newly discovered exculpatory evidence, Malcolm found herself "oppressed by the mountain of documents that formed in my office," she wrote. "I know I cannot learn anything about MacDonald's guilt or innocence from this material." When Malcolm was finishing up her book, a pleading letter from MacDonald arrived. She wrote: "It tells about developments in his criminal case-'extraordinarily powerful new evidence,' which he is 'not yet free to make public,' but which he will send me if I want it. I do not want it." Neither, it seemed, did anyone else. Over the years, the journalistic industry that has grown up around the Jeffrey MacDonald case has received far more attention than the case itself. MacDonald and his tedious protestations of innocence have become almost incidental to the affair's ancillary titillations: Did McGinniss betray MacDonald? Did Malcolm betray McGinniss? But now something new is happening. Journalists, armed with the mountain of FOIA documents Malcolm found so understandably oppressive, are asking the unsettling question: What if MacDonald is innocent, after all? Errol Morris, who exposed a famous miscarriage of justice in

his award-winning documentary, *The Thin Blue Line*, says he is now trying to get money to make a movie about the MacDonald murders. "One gets the impression reading *Fatal Vision* that there was an overwhelming case against Jeffrey MacDonald. In fact, that is just not true," Morris told me. "It's the quintessential postmodern nightmare-a man who is in jail because everyone thinks they know the story, when the story, for the most part, has been framed by a book and a television movie, rather than a careful examination of the underlying evidence." Janet Malcolm has now brought herself to look at the FOIA documents as well. "The more I read about the case," she told me, "the more I move toward the view that he could very well be innocent." s evidence mounts that MacDonald did not commit the crime, his attorneys have been grinding their teeth in frustration, realizing that exculpatory evidence is no longer sufficient to reopen a habeas petition. Thanks to reforms to the writ of habeas corpus passed in the wake of the Oklahoma City bombing, it is no longer enough for the defense to show that crucial evidence was suppressed by the government; the burden is on the defense to show that government agents did so deliberately. But now that Michael Malone's testimony has been forcefully rebuked (Malone swore under oath that the FBI's textbooks said that saran could not be used in wigs; at least one textbook, in fact, says the exact opposite), MacDonald's lawyers say they finally have the hook they need to drag into the public record a wealth of explosive exculpatory evidence the jury never saw. FOIA documents, some of which were released after the publication of *Fatal Justice*, reveal that evidence of intruders never entered the official, typewritten case record. We now know that, on the very day of the murders, Army investigators discovered five bloodstained gloves in the kitchen, a bloody syringe in a closet and an unidentified bloody palm print on the footboard of the bed in the master bedroom. Wax drippings were found at three critical locations in the apartment, including Kimberly's bedding, and the color of the wax did not match candles found in the MacDonald apartment. A burnt match was found at the foot of baby Kristen's bed-even though no one in the family smoked, and there was nothing in the room requiring the use of a flame. FOIA documents also reveal that hair and fiber evidence-unmatched to MacDonald, or to any other known sources in the home-was found in every location in the apartment where, according to MacDonald's account, a struggle occurred. In addition to the intriguing blond wig hair, plucked from Colette MacDonald's hairbrush, two unidentified "pubic or body hairs" were found next to the bodies of Kristen and Kimberly. An unidentified "short brown hair" was found clutched in Colette MacDonald's left fist. And an Army investigator, examining scrapings from the dead children's bloody fingernails, found brown hairs under the nails of both Kristen and Kimberly. According to the authors of *Fatal Justice*, the hairs exhibited "dissimilar characteristics," meaning that they may have come from two different attackers. Chillingly, their roots were intact, suggesting that the struggling girls had actually gouged hairs out of their killers' bodies. When the lab technician found that the hairs couldn't be linked to MacDonald, it seems he decided to keep them a secret. A handwritten note reads: "They are not going to be reported by me." Evidence of foreign fibers was also omitted from the prosecution's typewritten report. Two blue acrylic fibers-one found clutched in Colette's hand, the other in the hallway where MacDonald claimed he lay unconscious-were catalogued and tested by the FBI, but were ultimately unmatched to anything in the apartment. Meanwhile, several crucial fibers catalogued as MacDonald's turned out not to be his after all. Oh, and remember the telltale flowerpot? The one that supposedly proved that MacDonald murdered his family, then staged a bogus crime scene to cover his own tracks? It turns out that, moments after MacDonald was wheeled out on a gurney, a man at the scene "picked up the overturned flowerpot and set it upright on its base." "Things do not lie," prosecutor Blackburn told the North Carolina jury in 1979. "But people can and do." Given the voluminous and persuasive evidence pointing to MacDonald's innocence that has come to light since his trial, the prosecutor's words ring uncomfortably true. Should Judge James C. Fox grant a new trial to a defendant already convicted in the public consciousness, the *Fatal Vision* murderer may indeed walk out of prison a Vindicated man.

Subject: Murders & murder attempts; Criminals; Trials