IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

———

NO. 08-8525

———

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

JEFFREY R. MACDONALD,

*Defendant-Appellant.*

———

# APPELLANT'S INFORMAL OPENING BRIEF

———

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

Joseph E. Zeszotarski, Jr.
Poyner Spruill LLP
P.O. Box 1801
Raleigh, NC 27602
(919) 783-6400

Counsel for Appellant

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

Statutes



Other Authorities

## INTRODUCTION

Dr. Jeffrey R. MacDonald ("MacDonald") was a 26-year old Army captain stationed at Fort Bragg, North Carolina when his pregnant wife and two young daughters were brutally murdered on February 17, 1970. MacDonald was severely wounded and found semi-conscious by military police. Ever since his first statement to the initial responders to his emergency call on that date, MacDonald has consistently maintained that the murder of his family was committed by a group of intruders. MacDonald described a woman with long blond hair wearing a floppy hat, who along with at least three others entered his home in the middle of the night and attacked him and his family, killing his family and severely injuring him. Nine years after the murders, he was tried and convicted. Now 65 years old, MacDonald has never wavered from his initial account of the events, nor his assertion that he is innocent. He has now been imprisoned for almost thirty years.

This appeal involves the denial of a § 2255 Motion filed by MacDonald seeking a new trial, based upon startling new evidence that shows that he is actually innocent of the murders, and that his trial was infected with constitutional error.

### I. Proceedings Prior to This § 2255 Motion

MacDonald was convicted at a trial in the United States District Court for the Eastern District of North Carolina in 1979 -- nine years after the murders, and

after he had been cleared of the crimes in a military tribunal. The Government's case at trial was entirely circumstantial, and there was no direct proof of MacDonald's alleged involvement in the murders.

Since his trial in 1979, a steady flow of exculpatory evidence has come to light that tends to show that MacDonald did not commit the murders. A significant amount of this evidence relates to the key defense witness at trial, Helena Stoeckley, who almost immediately was identified by police as a suspect. She was a woman local to the area, heavy into the drug scene, who routinely wore a long blonde wig and a floppy hat. Between the murders in 1970 and MacDonald's trial in 1979, Stoeckley made incriminating statements to numerous persons implicating herself, her boyfriend Greg Mitchell, and others in the killings. At trial, however, Stoeckley testified when called as a witness by the defense that she could remember nothing about the four-hour period during which the murders occurred, despite her many statements otherwise. After this occurred, the trial judge refused to permit MacDonald to call six witnesses that he had present, who would have testified to Stoeckley's admissions made to each of them, prior to trial, of being present in the MacDonald home at the time of the murders with the killers. (TT 5508-5799).

After the trial, Stoeckley continued to make admissions contrary to her trial testimony and corroborative of her statements prior to trial, implicating herself as

present during the murders, and implicating Greg Mitchell as one of the killers. Stoeckley even went so far as to give a recorded interview, aired on television, wherein she made some of these admissions. (DE-124); (DE-115, Ex. 6).

In addition to the evidence relating to Stoeckley, MacDonald uncovered other evidence after the trial probative of his innocence. Most of this evidence relates to, and greatly discredits, the physical evidence heavily relied upon by the Government at trial in its entirely circumstantial case. This evidence includes the presence of unsourced fibers (1) on the murder weapon that were dark purple and black (Stoeckley testified that she wore purple and black) and (2) at the murder scene that were inconsistent with the Government's representations at trial that there was no evidence of intruders, and (3) the presence of wig hairs in the MacDonald home (Stoeckley testified that she owned a blond wig that she destroyed because it connected her to the murders) unmatched to any synthetic fiber found in the MacDonald home.

As would be expected, MacDonald submitted this evidence to the courts, through a number of motions and habeas corpus proceedings, in an effort to obtain a new trial. However, those attempts have been denied to date, and MacDonald remains imprisoned for the murders of his family.

## II. The Present § 2255 Motion

This appeal involves the denial by the district court of a new Motion to Vacate under 28 U.S.C. § 2255 filed by MacDonald in 2006 (hereinafter the "Motion"), after this Court granted MacDonald a pre-filing authorization under 28 U.S.C. § 2244. The Motion is based upon startling new evidence that shows (a) that MacDonald is actually innocent of the crimes for which he stands convicted, and (b) that his 1979 trial was infected with constitutional error requiring a new trial.

### A. The Britt Affidavit and Associated Evidence

First, the Motion is based upon a disclosure by Jimmy B. Britt, a Deputy United States Marshal who had custody of Helena Stoeckley during the trial. Britt's sworn statement explains why Stoeckley testified at trial that she could remember nothing about the four hour period during which the murders occurred.

DUSM Britt came forward in 2005 to MacDonald's trial counsel. DUSM Britt, by that time retired, worked at the Raleigh courthouse during the 1979 trial. He was responsible for escorting the key defense witness, Stoeckley, who was in custody on a material witness warrant. In his affidavit, Britt sets out how Stoeckley made admissions to him, after he took custody of her, that she was present in MacDonald's home on the night of the murders. (DE-115, Ex. 1, ¶15).

Most important, Britt was present when the lead prosecutor, AUSA Jim Blackburn, interviewed Stoeckley the day before she was to testify as a defense

witness in the trial. As reflected in his sworn affidavit, DUSM Britt avers that during that meeting in the prosecutor's office during the 1979 trial, Stoeckley told the prosecutor that she was in fact present in the MacDonald home on the night of the murders. (DE-115, Ex. 1, ¶ 20-23) .[1] Britt avers further that AUSA Blackburn responded to this admission by telling Stoeckley that if she testified in court to that fact, he would indict her for murder. Britt states in his affidavit that he is absolutely certain that these words were spoken. (DE-115, Ex. 1, ¶ 24-25)

Not surprisingly, when called by the defense as a witness the next day at trial, Stoeckley testified that she could remember nothing about the four-hour period during which the murders occurred. AUSA Blackburn (who was later disbarred and imprisoned in 1993)[2] did nothing to correct this testimony. Even worse, when MacDonald then sought to call six witnesses who would testify about Stoeckley's admissions to them prior to trial of being present in the home during the murders, AUSA Blackburn opposed the admission of the testimony, and in doing so told the trial judge that Stoeckley had told him in their meeting the prior day that she remembered nothing. This, of course, was directly contrary to what

[1] Citations to the record shall be noted by the numerical entry on the district court docket sheet as follows: (DE-__). Citations to pages in the trial transcript shall be noted as follows: (TT ____).

[2] After leaving the U.S. Attorney's Office and entering private practice, AUSA Blackburn was convicted in 1993 of felony embezzlement and obstruction of justice, and sentenced to three years imprisonment in the North Carolina Department of Correction. (DE-115, Ex. 10).

DUSM Britt specifically heard Stoeckley tell Blackburn. Based undoubtedly in part on Blackburn's response, the district court at trial ruled that Stoeckley's out-of-court admissions to the six defense witnesses would not be heard by the jury because the admissions were not trustworthy and not corroborated.

The importance of Stoeckley's testimony to the decision of the jury in MacDonald's case has previously been noted by this Court on direct appeal:

> 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).

In support of DUSM Britt's recitation of events and the constitutional error shown thereby, MacDonald also submitted a number of additional affidavits and evidence with the Motion showing that Stoeckley was present during the murders, and that MacDonald did not kill his family. This evidence includes:

- affidavits from three individuals testifying that Greg Mitchell (a boyfriend of Helena Stoeckley continually linked to the murders) confessed involvement to them in the murders of MacDonald's family prior to his own death (DE-115, Ex. 7);

- an affidavit from Lee Tart, a former Deputy United States Marshal who worked with Britt, testifying that Britt told him in 2002 the things that Britt has brought forward in this Motion relating to Stoeckley's confession to AUSA Blackburn and Blackburn's threat in response, and the fact that Britt was troubled greatly by carrying the burden of his knowledge of those matters (DE-115, Ex. 3);

- an affidavit from Wendy Rouder, who at the time of trial was a young lawyer assisting MacDonald's lawyers, testifying that she had

interaction with Stoeckley the weekend after Stoeckley's interview with AUSA Blackburn and subsequent appearance in court, and testifying that during that contact Stoeckley told her that she (Stoeckley) had been present in MacDonald's home during the murders and could name the murderers, but did not testify to those facts in court because she was "afraid ... of those damn prosecutors sitting there," adding that "they'll fry me" (DE-115, Ex. 5);

- an affidavit (submitted by separate motion because it was not obtained until after the § 2255 Motion was filed) from Helena Stoeckley's mother, averring that Stoeckley had told her on two occasions that she was present in the MacDonald home during the murders of MacDonald's family in February 1970, and providing details from Stoeckley that corroborated both MacDonald's account of the murders and Rouder's account of Stoeckley's statements to her (DE-144).

In the Motion, MacDonald asserts that the Britt affidavit and the other evidence submitted shows that he is actually innocent, and also shows that his trial was infected with constitutional error. Specifically, MacDonald asserts that this evidence (a) shows that AUSA Blackburn concealed exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; (b) shows that AUSA Blackburn's threatened Stoeckley, causing her to change her testimony, in violation of MacDonald's constitutional rights, see *Webb v. Texas*, 409 U.S. 95 (1972); *United States v. Golding*, 168 F.3d 700 (4th Cir. 1999); and (c) shows that AUSA Blackburn misled the district court in his representations as to what he was told by Stoeckley, in violation of MacDonald's constitutional rights, see *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959). (DE-115 at 30-31).

### B. The New DNA Evidence

In addition to the evidence relating to Stoeckley, MacDonald sought to have considered a second basis for relief in his Motion -- the results of DNA testing authorized by this Court. In 1997, MacDonald obtained permission from this Court to conduct DNA testing on the physical evidence from the scene of the killings. Years of procedural wrangling ensued over the manner of the testing, such that the results did not come available until March 2006, after MacDonald had filed the instant § 2255 Motion.

As soon as the results became available in March 2006, MacDonald sought to add them as an additional predicate for the Motion. (DE-122). The results of the DNA testing were highly exculpatory. Most notably, these DNA results show that a human hair recovered from under the fingernail of one of MacDonald's murdered children (Kristen) did not match MacDonald, his family, or any of the other known samples submitted for testing.[3] (DE-122 at 8-9). The exculpatory import of this evidence is great -- it shows that as his daughter Kristen defended herself, a hair from her attacker (a hair that is <u>not</u> the hair of MacDonald) was lodged under her fingernail. This DNA evidence is unimpeachable evidence that

[3] In addition to samples from MacDonald and his family, known DNA samples from Helena Stoeckley and Greg Mitchell were also submitted for comparison in this testing.

supports MacDonald's defense at trial -- that MacDonald is not the person who killed his family.

Additional exculpatory DNA evidence was uncovered by these tests. A human hair found on the bedspread of the bed in Kristen's bedroom (Kristen was, by all accounts, killed in her bed) also did not match MacDonald, his family, or any other of the known samples submitted for testing. Likewise, a human hair found underneath the body of MacDonald's wife Colette did not match MacDonald, his family, or any other known sample submitted for testing. These two hairs are further proof of the presence of intruders who committed the killings, and support MacDonald's innocence. (DE-122 at 9-10).

### C. The District Court's Ruling and This Appeal

Despite accepting Britt's affidavit "as a true representation of what he heard or genuinely thought he heard on August 15-16, 1979," (DE-150 at 38 n. 18), the district court denied the Motion without a hearing. In so doing, the district court expressly refused to consider the DNA evidence. The district court also expressly refused to consider the affidavit from Stoeckley's mother, and expressly refused to consider the affidavits from the three individuals attesting to Greg Mitchell's confessions to committing the murders. In addition, the district court incorrectly concluded that the law required it to not consider the abundance of other exculpatory evidence that has been assembled since the trial showing that

MacDonald did not commit the murders for which he stands convicted. This was error, and MacDonald now pursues this appeal to obtain the new trial to which this exculpatory evidence entitles him.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction over the Motion to Vacate Under 28 U.S.C. § 2255 filed by MacDonald under 28 U.S.C. § 2255. MacDonald filed the Motion pursuant to a Pre-Filing Authorization ("PFA") issued by this Court on January 12, 2006. *In re MacDonald*, No. 05-548 (4th Cir. January 12, 2006).

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 and 2253. The district court's judgment became final when it entered an order denying relief on November 4, 2008. MacDonald timely filed a Notice of Appeal filed on December 4, 2008.

## ISSUES PRESENTED FOR APPEAL

I. Did the district court err when it expressly refused to consider the "evidence as a whole," as required by 28 U.S.C. § 2244, in assessing whether MacDonald's § 2255 Motion met the "gatekeeping" standard set by 28 U.S.C. § 2244(b)(2)(B) for second or successive motions?

II. Did the district court err in refusing to consider the DNA evidence presented by MacDonald as a predicate for his § 2255 Motion?

III. Did the district court err in determining that MacDonald's § 2255 Motion should be denied without hearing under 28 U.S.C. § 2244(b)(2)(B), where MacDonald's constitutional claims meet the "no reasonable juror" standard?

## STATEMENT OF THE CASE

In the early morning hours of February 17, 1970, the pregnant wife and two young daughters of MacDonald were murdered in their home located on Fort Bragg, North Carolina. MacDonald was severely wounded at the time, suffering a collapsed lung and multiple wounds about his body. 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, who had attacked him and his family, knocking him unconscious in the struggle.

Initially, the investigation was handled by military authorities. The Army brought charges against MacDonald on May 1, 1970 and a Uniform Code of Military Justice Article 32 hearing commenced on May 15, 1970, and lasted six weeks. On October 13, 1970, the presiding officer filed a report recommending that all charges be dropped, concluding that "the matters set forth in all charges and specifications are not true." (DE-115 at 8). The presiding officer further urged the civilian authorities to investigate the alibi of Helena Stoeckley. *Id.* All military charges against MacDonald were dropped, and he was subsequently honorably discharged.

Approximately nine years later, in August 1979, MacDonald went on trial in the United States District Court for the Eastern District of North Carolina after being indicted for three counts of murder. The trial lasted twenty-nine days.

MacDonald testified in his own defense. The defense called Helena Stoeckley as a defense witness, believing that she would admit to involvement in the murders. Before the jury, however, Stoeckley denied memory of the four hour period during which the murders took place. On August 29, 1979, MacDonald was convicted and was sentenced to three consecutive terms of life imprisonment.

On direct appeal, this Court reversed the convictions on speedy trial grounds, recognizing the unfair prejudice caused to MacDonald's defense by the nine year interval between the murders and his trial. *United States v. MacDonald*, 632 F.2d 258 (4th Cir. 1980). The United States Supreme Court reversed, and remanded the case back to this Court. *United States v. MacDonald*, 456 U.S. 1 (1982). On remand, this Court affirmed the convictions. *United States v. MacDonald*, 688 F.2d 224 (4th Cir.), *cert. denied*, 459 U.S. 1103 (1983).

In 1984, MacDonald filed motions to vacate his convictions and for a new trial based upon newly discovered evidence and government misconduct. After an evidentiary hearing, these motions were denied. *United States v. MacDonald*, 640 F.Supp. 286 (E.D.N.C. 1985). This Court affirmed on appeal. *United States v. MacDonald*, 779 F.2d 962 (4th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986).

In 1990, MacDonald filed a habeas petition based on newly discovered evidence and government misconduct. The district court, without an evidentiary hearing, denied relief. *United States v. MacDonald*, 778 F.Supp. 1342 (E.D.N.C.

1991). This Court affirmed on appeal. *United States v. MacDonald*, 966 F.2d 854 (4th Cir.), *cert. denied*, 506 U.S. 1002 (1992).

In April 1997, MacDonald filed a motion to reopen his 1990 habeas petition, based on allegations of government fraud. The motion also contained a request to have DNA testing conducted on the physical evidence in the case. On September 2, 1997, the district court denied the motion to reopen the habeas proceeding and transferred the remaining matters to this Court as a petition for leave to file a successive habeas petition. *United States v. MacDonald*, 979 F.Supp. 1057 (E.D.N.C. 1997).

This Court denied leave to file a successive habeas petition, but granted MacDonald's motion for DNA testing. *In re MacDonald*, No. 97-713 (4th Cir. October 17, 1997). On appeal of the district court's refusal to reopen the 1990 habeas proceeding, this Court affirmed. *United States v. MacDonald*, 161 F.3d 4 (4th Cir. 1998) (unpublished). The case was remanded to the district court to supervise the DNA testing.

On December 13, 2005, MacDonald filed with this Court a Motion for Leave to File a Successive Section 2255 Motion. This Court granted a PFA by order dated January 12, 2006. *In re MacDonald*, No. 05-548 (4th Cir. January 12, 2006). MacDonald filed the instant Section 2255 Motion in the district court on January 17, 2006. (DE-111; DE-115).

## STATEMENT OF FACTS

### I. The Government's Evidence at Trial

At approximately 3:30 a.m. on February 17, 1970, military police were summoned to the home of Dr. Jeffrey R. MacDonald, a twenty-six-year-old Army captain serving as a medical officer at Fort Bragg, North Carolina. Upon arrival, the police found that MacDonald's pregnant wife, Colette, and his two young daughters, Kristen age two, and Kimberley age five, had been brutally murdered, and found MacDonald semi-conscious, seriously wounded, and in shock. Upon being revived, MacDonald told the military police that his family had been attacked by at least four intruders, three men and a woman. The woman he described as having long blond hair, wearing a floppy hat and boots, and bearing a flickering light such as a candle.

The Government's theory at trial was that MacDonald, an army physician with no history of violence and no record of prior arrests, got into a fight with his pregnant wife because his youngest daughter, Kristen, had wet the bed; that he picked up a club to strike his wife and accidentally struck and killed his daughter, Kimberley, who was trying to intervene; and that then, in order to cover up his accidental misdeed, killed his wife and then mutilated and killed his youngest daughter and tried to make it look like a cult slaying. (TT 7138-7141). The

Government further argued that MacDonald either wounded himself to defer suspicion or was wounded when fighting with his wife.

The evidence the Government adduced at trial to support this bizarre theory was exclusively circumstantial physical evidence from the crime scene. It included evidence such as in what rooms certain blood types were found, where the murder weapons were found, where MacDonald's pajama fibers were and were not found, where a pajama pocket was found and on which side it was bloodied, and evidence of possible ways the ice-pick holes were made in MacDonald's pajama top. Much of the evidence was speculative. The evidence adduced by the Government was designed primarily to disprove the version of events given by MacDonald as to what happened on the night of the murders, thereby casting suspicion on him as the murderer. This Government strategy was interwoven with its repeated theme that, given MacDonald's version of events, there should have been ample physical evidence of intruders, and the lack of such evidence of intruders proved MacDonald's guilt.[4]

[4] In the district court's 1985 order denying MacDonald's post-trial Motions to Vacate and for a New Trial, the trial judge enumerated what he considered to be the most significant evidence against MacDonald at trial. The court listed the following as significant: 1) the murder weapons, 2) the pajama top and pajama top demonstration, 3) the pajama top pocket, 4) MacDonald's eyeglasses, 5) the bloody footprint, 6) the latex gloves, 7) the blood spatterings and the Government's reconstruction of the crime scene, 8) the absence of physical evidence consistent with MacDonald's account. *See U.S. v. MacDonald*, 640 F. Supp. 286, 310-315 (E.D.N.C. 1985). In the Motion, MacDonald has analyzed this

There was, nonetheless, some evidence at trial from the crime scene supporting MacDonald's account that intruders committed the murders. While there was significant quarrel at trial regarding the handling of the crime scene, there was evidence that 44 useable latent fingerprints and 29 useable palm prints had been lifted from the scene of the crime, but that of these, only 26 fingerprints and 11 palm prints were matched with MacDonald family members or other investigators or individuals whose prints were available for comparison (TT. 3116, 3141). Moreover, there was some evidence showing the presence of wax drippings of three different kinds of wax, one taken from a coffee table in the living room, one from a chair in daughter Kimberley's bedroom, and one from the bedspread in Kimberley's bedroom. None of these samples matched any candles found in the MacDonald home. (TT. 3837-43).

It is also important to note that the Government introduced evidence at trial of two purple cotton fibers found on one of the murder weapons (an old wooden board found by police outside the house). The Government introduced expert testimony that the fibers on the club matched the fibers used to sew MacDonald's pajama top. (TT 3784). While this is in no way inconsistent with MacDonald's account, as he said he had been repeatedly struck by a club or clubs and his pajama

---

evidence in detail and shown that each of these items of evidence is either consistent with the account given by MacDonald of the murders, or has been proven false by newly discovered evidence. (DE-155 at 34-41).

fibers could have stuck to the club while he was being struck, what is noteworthy, as set forth *infra*, is that the Government suppressed at trial the fact that FBI analysts in 1978 had reexamined the fibers from the club and determined that in addition to the purple cotton fibers, there were black wool fibers -- fibers that did not match any fabric in the MacDonald home. And not only were these inexplicable black wool fibers found on the murder weapon, similar black wool fibers were found on the mouth and body of Colette MacDonald. The Government also did not disclose at trial that synthetic blond wig hairs of up to 22 inches in length were found in the MacDonald home. [5] Again, all of this evidence is significant corroboration of MacDonald's account of intruders.

There were, of course, no eyewitnesses to the murders other than the perpetrators. There was no evidence of MacDonald's fingerprints or blood on the murder weapons. The Government's case was entirely comprised of circumstantial

[5] These two items of newly discovered evidence were the predicate for MacDonald's 1990 habeas petition. Without an evidentiary hearing, the district court, relying in part on an affidavit by FBI agent Michael Malone that the synthetic blond hairs were not used in wigs but only in dolls, denied the motion. *MacDonald,* 778 F.Supp. 1342 (E.D.N.C. 1990). This Court affirmed, solely on the basis that the petition was barred by the abuse of the writ doctrine. *MacDonald,* 966 F.2d 854 (4th Cir. 1992). In 1997, MacDonald sought to reopen the matter after obtaining evidence that Malone's affidavit was false. The district court ruled that MacDonald failed to show fraud by clear and convincing evidence. *MacDonald,* 979 F.Supp. 1057 (E.D.N.C. 1997). This Court affirmed. *MacDonald,* 161 F.3d 4 (4th Cir. 1998).

evidence directed less at proving MacDonald's guilt, than at proving that MacDonald's version of events was false.

## II. The Defense Case at Trial

MacDonald testified in his own defense at trial. Since the moment MacDonald was first revived by medics in the early morning hours of February 17, 1970, wounded and in shock, he has contended that intruders attacked his family. At trial he testified that he awoke in his living room to the screams of his wife and one of his daughters, saw four strangers in his house, and was immediately set upon, attacked, and knocked down. (TT. 6581-82).

As he was trying to get up, MacDonald heard a female voice saying "Acid is groovy; kill the pigs." MacDonald testified in detail about how he fought with the attackers, and was stabbed in the process. (TT 6513-14; 6587-88). During the struggle, his hands became bound up in his pajama top, and he used the top as a "shield" to attempt to ward off blows from the attackers. (TT 6586; 6808-13).

MacDonald testified that the woman intruder had blond hair and was wearing a floppy hat. (TT. 6588). He only saw her for a second or two, standing between the two white men at the end of the couch. He testified that he remembered seeing a "wavering or flickering" light on the face of the woman with the floppy hat, which appeared to be a light such as from a candle. (TT. 6592).

At some point during the struggle, MacDonald testified that he was knocked unconscious. When he awoke, he found his wife Colette on the floor, covered in blood. He remembered pulling a knife from her chest, and frantically attempting to administer aid and CPR to her, to no avail. Air came out of Colette's chest through the stab wounds; MacDonald observed no signs of life. (TT. 6595-99). MacDonald then recalled going through the house to check on his daughters. He went first to Kimberley's room, then to Kristen's. MacDonald found them both in their beds, covered in blood, and he desperately attempted to revive each of them without success. (TT. 6599-6603). MacDonald testified that he was unsure of what he did next. He recalled that at some point he went into the bathroom to check his head, which was hurting, and thought he rinsed his hands in the sink. (TT. 6606-08). He went back to Colette a second time and remembered covering her with his pajama top. (TT. 6605). He dialed the operator from the master bedroom and asked for medics and MPs. He was unconscious when help finally arrived.

MacDonald testified that he recalled being given aid by the MPs who arrived, and that it was a chaotic scene with numerous MPs inside the apartment.

(TT. 6615-17). MacDonald remembered describing the group of intruders to one of the MPs[6] before being taken out of the house on a stretcher. (TT. 6518-20).

MacDonald was taken to the intensive care unit at Womack Army Hospital, where he was treated for a punctured lung and other wounds. (TT. 5367). He remained in the intensive care unit for nine days. After giving much thought to trying to figure out what happened to his family and why, MacDonald concluded that either someone held a grudge against him, or that it was a chance occurrence. (TT. 6648). MacDonald has seen many patients with drug problems in both his position as medical officer at Fort Bragg and in his private medical work, (TT. 6649), and some of the doctors providing drug counseling, himself included, were suspected of being "finks" for turning in troops for drug abuse. (TT 6657).

In countering the Government case, MacDonald's lawyers sought to underscore through cross-examination how equivocal and speculative the physical evidence put forth by the Government was, and to expose the lack of any real evidence of guilt on MacDonald's part. The defense presentation of evidence sought to reinforce these themes. In addition to presenting MacDonald's

[6] Kenneth Mica, one of the first MP's to arrive at the scene, was the person to whom MacDonald gave this description. (TT. 1414). Mica testified at trial that enroute to the MacDonald house at approximately 4 a.m. he saw a woman with shoulder-length hair, wearing a "wide-brimmed....somewhat 'floppy'" hat. (TT. 1453-54). Mica saw this woman at the corner of Honeycutt and South Lucas Road, "something in excess of a half mile" from the MacDonald home, thinking it strange that she would be out at that hour on a rainy night. (TT. 1401, 1454).

testimony, the defense called numerous character witnesses to testify about MacDonald's good character.

The key and most important facet of the defense strategy, however, was to bring before the jury the significant evidence pointing to Helena Stoeckley's involvement in the crime. This included evidence of her possession of a blond wig, which she burned shortly after the crime (TT. 5602-04); evidence of the clothes she routinely wore, which matched the clothes of the woman MacDonald described seeing in his house the night of the murders (a blond wig, floppy hat, and boots) (TT. 5583-90); evidence of her participation in a drug cult that ingested LSD, worshipped the devil, used candles, and killed cats (TT. 5525, 5542-43); evidence of her obsession with the MacDonald murders, such that she had hung wreaths all along her fence the day of the burials (TT. 5633-34); evidence that a woman matching her description had been seen by several unbiased witnesses near the crime scene at or around the time of the murders (testimony of MP Kenneth Mica, TT 1453-54, testimony of James Milne, TT 5454-56); and of critical importance, evidence that she had actually admitted to her participation in the crime to numerous people. (TT 5508-5799). Based on all of this, on her prior behavior and on her obvious psychological connection to the crime, it was the belief of the defense that she would come to court and actually admit her involvement in the murders. *See MacDonald,* 632 F.2d at 264 (noting the

"substantial possibility that she [Stoeckley] would have testified to being present in the MacDonald home" during the murders).

Regarding the many prior admissions that she had made to her involvement in the murders, the defense had placed under subpoena, and had present at the trial, six different individuals to whom Stoeckley had made statements incriminating her in the MacDonald slayings. Three of these were individuals involved in law enforcement.[7] (TT 5508-5799). The defense intended to call Stoeckley as a witness, obtain from her admissions to the crime, and then call the other six witnesses to whom Stoeckley had also confessed.

When called by the defense to testify, however, Stoeckley did not deny being present but instead denied any memory of the four hour period during which the murders occurred. (TT. 5513-5671). While Stoeckley at trial denied memory of the murders, she did testify that she had a floppy hat, wore a shoulder-length blond wig, owned a pair of boots, and that her appearance at the time of the murders was similar to the description MacDonald had given of the female intruder.

Even though Stoeckley denied memory of the time period of the murders, the defense still intended to call the six witnesses to whom Stoeckley had made

[7] One witness, P.E. Beasley, testified on voir dire that while a detective with the Fayetteville Police Department, Stoeckley acted as drug informant for him, and that Stoeckley was "[t]he most reliable informant I ever had." (TT 5739).

incriminating statements prior to trial. The Government, however, objected to these witnesses, and argued that their testimony was inadmissible because Stoeckley's admissions were not worthy of belief. Most critically for this proceeding, AUSA Blackburn then told the trial judge during a bench conference that Stoeckley had denied to him having any knowledge of the murders when he had interviewed her the prior day, (TT 5617), and the district court ruled that Stoeckley's out-of-court admissions to the six defense witnesses would not be heard by the jury because under Rule 804 (b)(3) of the Federal Rules of Evidence the admissions were not trustworthy and not corroborated.[8]

Left without the key defense evidence, the jury convicted MacDonald of all three murders. MacDonald was sentenced to three consecutive terms of life imprisonment.

## III. Evidence Discovered Post-Trial Before the Present § 2255 Motion

After the trial, MacDonald discovered that many additional pieces of evidence were suppressed at trial that would have supported the fact that there were intruders in the home that night, proved that the Government's theory was not true, and further implicated Helena Stoeckley as one of the assailants.

[8] The Government also argued, and the district court found, that Stoeckley's admissions were not reliable because there was no physical evidence to corroborate that any intruders had been in the house. *MacDonald*, 640 F.Supp. at 323. As set out herein, we now know there is significant evidence, including DNA evidence, showing the presence of intruders in the MacDonald home, corroborating Stoeckley's admissions.

### A. The 1984 Post-Trial Motions

In 1984, MacDonald filed motions to vacate his convictions and for a new trial. In the motion to vacate the convictions, MacDonald argued that the Government had suppressed certain exculpatory evidence it had in its possession showing the presence of intruders in the home and tying Stoeckley to the crime. (DE-115 at 22) (setting out particular evidence). The same district judge who tried MacDonald held an evidentiary hearing on these matters in 1985. After receiving evidence from the Government about these issues, the district judge denied the motion to set aside the convictions. *MacDonald*, 640 F. Supp. 286, 309 (E.D.N.C. 1985).

At the same time, MacDonald filed a motion for new trial based uponnewly discovered evidence. This evidence included: 1) an extensive detailed confession given by Stoeckley to two former law enforcement officers; 2) affidavits of various witnesses attesting to facts that further linked Stoeckley to the crime and corroborated her admissions of presence during the murders. (DE-115 at 23-24) (setting out evidence). The trial judge, in regard to the new Stoeckley detailed confession, again found her confession was unreliable as it was the product of a drug-addled mind. In so ruling, the trial judge stressed the importance of the fact that "no physical evidence was uncovered at the crime scene which would support

Stoeckley's confessions."[9] *MacDonald*, 640 F. Supp. at 323. The trial judge similarly found the other new evidence unpersuasive and denied the new trial motion.

### B. The 1990 Habeas Petition

In 1990, MacDonald filed a habeas petition, seeking a new trial based on newly developed evidence gleaned from over 10,000 documents obtained through numerous FOIA requests. Within these documents, MacDonald found the following: 1) handwritten lab notes of a CID investigator who testified at trial, which revealed that numerous blond synthetic hairs, up to 22 inches in length, had been found in a hairbrush in MacDonald home, and the hairs could not be matched to any known items in the MacDonald home;[10] 2) the results of a 1978 reexamination of critical fibers found on the body of Colette MacDonald and on

[9] MacDonald seems to have been caught in the proverbial *Catch 22*. Having claimed from the outset that his family was attacked by intruders later shown to be drug addicts, the multiple confessions of one of these has never been considered on its merits for the principal reason that she was drug-addled. If the tables had been turned, and if Helena 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 unreliable, or simply because she often repudiated her admissions of guilt. Many defendants only confess once, and repudiate their confessions thereafter -- the confessions are nonetheless admissible.

[10] The government countered the 1990 motion by submitting an affidavit from an FBI agent, Michael P. Malone, that the blond synthetic hairs were not wig hairs. Later, defense lawyers learned that the affidavit was incorrect, and filed a motion to reopen the 1990 habeas petition as a result. This motion was denied by the district court. *MacDonald*, 979 F.Supp. 1057 (E.D.N.C. 1997).

the murder weapon, done at the request of the prosecution prior to the 1979 trial, that revealed the presence of black wool fibers in the debris taken from around the mouth area of Colette, on the bicep area of her pajama top, and on the club that the Government contended was the murder weapon. This reinvestigation revealed that the purple cotton fibers previously identified on the murder weapon as matching the sewing threads on MacDonald's pajama top were not such, in fact, but were black wool fibers. These black wool fibers were never matched to any known fabric in the MacDonald home. Despite this reexamination in 1978, the Government elicited testimony from selected experts at the 1979 trial that the murder weapon had on it the blue cotton fibers of MacDonald's pajama top without disclosing the presence of the black wool fibers. *See* (DE-115, Ex. 9) (setting out evidence).

After response by the Government, the district court, without an evidentiary hearing, denied relief. *MacDonald*, 778 F.Supp. 1342 (E.D.N.C. 1991).

## IV. The Present Section 2255 Motion

MacDonald filed the present § 2255 Motion on January 17, 2006, after this Court granted MacDonald a PFA under 28 U.S.C. § 2244. As noted in the Introduction to this Brief, the Motion, through the affidavit of DUSM Jim Britt and the other affidavits submitted, sets out constitutional errors that infected

MacDonald's trial and explains why Stoeckley failed to testify at trial as expected by MacDonald.

After the Motion was filed, the results of the DNA testing earlier authorized by this Court were returned, and filed by the Government in the district court in March 2006. MacDonald immediately sought to add the new DNA evidence as a predicate for relief in the Motion. (DE-122). MacDonald also obtained, after the filing of the Motion, an affidavit from Helena Stoeckley's mother, averring that Stoeckley had on two occasions admitted involvement in the murders to her mother, and admitted that MacDonald did not commit the murders and was innocent. (DE-144). MacDonald sought to have this affidavit considered in connection with the Motion as well.

## V. The District Court's Order Denying the Motion

On November 4, 2008, the district court entered an order denying MacDonald leave to file his successive § 2255 Motion, without holding an evidentiary hearing.

The district court began by addressing the scope of evidence that it would consider in addressing the Motion. First, the district court granted the Government's motion to strike the three affidavits attached to the Motion from the three individuals testifying that Greg Mitchell confessed involvement to them in the murders of MacDonald's family prior to his own death. (DE-115, Ex. 7). The

district court agreed with the Government's contention that the affidavits should be stricken because the information in them had been submitted in support of an earlier habeas petition, and thereby removed them from consideration on the Motion. (DE-150 at 18).

Next, the district court denied MacDonald's motion to add the results from DNA testing earlier approved by this Court as an additional predicate for the Motion. The district court rejected MacDonald's reliance on precedent from this circuit for consideration of this evidence, and expressly refused to consider the DNA evidence offered by MacDonald in support of the Motion. (DE-150 at 19-20). Likewise, the district court denied MacDonald's motion to add the affidavit from Helena Stoeckley's mother as an additional evidence in support of the Motion (DE-144), and expressly refused to consider this evidence in connection with the Motion. (DE-150 at 19-20). Finally, the district court denied MacDonald's motion to add the evidence from the earlier habeas petitions he had filed (DE-124) for consideration in the Motion. (DE-150 at 21).

The district court then turned to consideration of the claims in the Motion itself. Because this was not the first § 2255 motion filed by MacDonald, the district court found that it first had to consider if the Motion met the "stringent requirements for litigating a successive § 2255 petition" under 28 U.S.C. §

2244(b)(2).[11] (DE-150 at 24-25). The district court found that MacDonald was stating three separate claims based upon the Britt affidavit: (1) what it termed the "confession" claim, relating to Stoeckley's admissions directly to Britt while in Britt's custody; (2) what it termed the "threat" claim, relating to Britt's witnessing of Stoeckley's admissions to AUSA Blackburn in Blackburn's office, and

---

[11] In *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir), *cert. denied*, 540 U.S. 995 (2003), this Court held that a successive § 2255 Motion is subject to the review standard in 28 U.S.C. § 2244(b)(2)(B), which states:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> The facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

As noted by the district court, a party seeking to file a successive § 2255 Motion must pass through two "gates" relating to this statute to have the merits of his claims considered. First, the party must seek and obtain a Pre-Filing Authorization ("PFA") from the Court of Appeals before filing a successive § 2255 Motion in the district court. 28 U.S.C. § 2255 ¶ 8; 28 U.S.C. § 2244(b)(3). To issue a PFA, the Court of Appeals must determine that the party asserting the new claim has made a "prima facie showing that the application" satisfies the Section 2244(b)(2)(B) standard. 28 U.S.C. § 2244(b)(2)(C). After the granting of a PFA and presentation of the successive motion to the district court, the district court then conducts the second gatekeeping step by examining each claim in the successive motion and dismissing those that fail to meet the 28 U.S.C. § 2244(b)(2)(B) standard. *Winestock*, 340 F.3d at 205. The exact level or standard of review for this second gatekeeping function is unclear, and was not addressed or discussed by the district court.

Blackburn's threat to prosecute Stoeckley in response if she so testified in court; and (3) what it termed the "fraud" claim, relating to AUSA Blackburn's subsequent representations to the trial judge that Stoeckley had admitted nothing to him. (DE-150 at 26).

In conducting the second gatekeeping review under Section 2244(b)(2)(B), the district court found that the Motion met the "due diligence" prong of this standard. (DE-150 at 27-28). However, the district court found that MacDonald's claims failed to meet the second part of the standard -- that "the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

The district court addressed each of the three claims based upon the Britt affidavit in succession. As to the "confession" claim, the district court found that Stoeckley's admissions to DUSM Britt while in his custody did not meet the "no reasonable juror" standard under Section 2244(b)(2)(B) because "it merely is cumulative evidence of exactly the same nature as the excluded testimony of the Stoeckley witnesses [at trial], nearly half of whom also were active or former law enforcement officers." (DE-150 at 28).

As to the "fraud" and "threat" claims, the district court held that it "accepts Britt's affidavit as a true representation of what he heard or genuinely though he

heard on August 15-16, 1979" -- finding Britt's affidavit to be accurate. (DE-150 at 38 n. 18).

Nonetheless, finding these claims to be "inextricably intertwined," (DE-150 at 30), the district court found that neither of these claims met the Section 2244 gatekeeping standard. As to the "fraud" claim, the district court found that "MacDonald has not suggested how a misrepresentation to the trial judge by Blackburn of the content of Stoeckley's statement to him in any way affected MacDonald's right to present a defense and to confront witnesses against him." (DE-150 at 34). The district court stated that the six witnesses that MacDonald sought to call at trial to testify about Stoeckley's admissions to them, were not permitted to testify by the trial judge "because MacDonald's own evidence conclusively established the unreliability and lack of trustworthiness of anything Stoeckley said to anyone." (DE-150 at 34). The district court therefore found the "fraud" claim could not meet the "no reasonable juror" standard under Section 2244, because Stoeckley's unreliability as a witness prevented any error from resulting from any "fraud" in AUSA Blackburn's representation to the trial judge regarding his interview of her. (DE-150 at 34-35).

As to the "threat" claim, the district court recognized the abundant precedent holding that a criminal defendant's constitutional rights are violated "if [the] Government intimidates a defense witness into changing her testimony or refusing

to testify." (DE-150 at 36) Despite finding the Britt affidavit to be accurate regarding the substance of the threat, (DE-150 at 38 n. 18), the district court nonetheless found the "threat" claim to be insufficient to meet the "no reasonable juror" standard under Section 2244. First, the district court found that "causation was lacking" -- because "[t]here is nothing in the record to support MacDonald's suggestion that because Stoeckley made what he believes to be statements exculpatory of him to the Government and its agents on one day, it follows that she therefore intended to make the same statements under oath the next day, but did not do so because she was 'threatened' with prosecution if she did." (DE-150 at 38-39).

Next, the district court found "speculation as to content" -- concluding that even accepting Britt's recollection as accurate, it was possible that AUSA Blackburn was threatening Stoeckley with his words, but possible he was not:

> Although the court accepts the accuracy of Britt's recollection of the words he heard, the accuracy of his interpretation thereof is sheer conjecture. Under the circumstances, a person untrained in the law easily could have perceived those words to constitute a threat -- and it may have been. However, persons educated in the criminal and constitutional law would recognize *at least the possibility* that what Britt heard was an officer of the court advising an unrepresented potential trial witness that if she were to admit under oath that she had in some way been involved in three murders, it would be his duty to indict her for those crimes.

(DE-150 at 39-40) (footnote omitted). The district court concluded that MacDonald had failed to present "competent evidence that, but for Blackburn's

'threat' of prosecution, Stoeckley would have testified favorably to MacDonald." (DE-150 at 40-41).

Finally, the district court cited "futility" as a ground for denial of the "threat" claim. (DE-150 at 41). The district court found that "MacDonald's alleged violations of due process can never be proven because Helena Stoeckley is dead," and only "Stoeckley can say whether or not she really intended to testify favorably for MacDonald prior to meeting with Blackburn the day before her court appearance." (DE-150 at 41). The district court therefore found that the "threat" claim did not satisfy the Section 2244 "no reasonable juror" standard. (DE-150 at 42).

The district court therefore denied MacDonald leave to file his successor § 2255 Motion, finding that MacDonald "cannot establish by clear and convincing evidence that, but for constitution error, no reasonable factfinder would have found MacDonald guilty." (DE-150 at 46). The district court subsequently denied MacDonald's application for a certificate of appealability, and this appeal follows.

## ARGUMENT

The district court erred in a number of ways in denying the Motion. Any one of these grounds requires that the order of the district court be vacated, and the matter remanded to the district court for either entry of an order requiring a new trial or for an evidentiary hearing on MacDonald's § 2255 Motion.

## I. The District Court Erred in Denying MacDonald Leave to File His § 2255 Motion Under the Gatekeeping Standard of 28 U.S.C. § 2244(b)(2)(B), Where the District Court Expressly Refused to Consider the "Evidence As A Whole" As Required by Law.

At the outset of its order, the district court noted that under the precedent of this Court, *see Winestock*, 340 F.3d at 205, it was required to apply 28 U.S.C. § 2244(b)(2)(B) to the claims in MacDonald's Motion to determine if they met the "stringent requirements for litigating a successive § 2255 petition." (DE-150 at 24).

28 United States Code, Section 2244(b)(2)(B) states:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> The facts underlying the claim, if proven **and viewed in light of the evidence as a whole**, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B) (emphasis added).

This "gatekeeping" standard is derived from the pre-AEDPA "cause and prejudice" standard, whereby a habeas petitioner could present an otherwise procedurally defaulted habeas claim in a second petition by passing through the "gateway" of making a sufficient showing of actual innocence. *See* Hertz & Leibman, Federal Habeas Corpus Practice and Procedure, § 28.3(e) at 1321 (4th Ed. 2001) (noting that Section 2244(b)(2)(B) "appears to adopt an 'innocence'

standard roughly equivalent to the Supreme Court's definition of 'innocence' or 'manifest miscarriage of justice'" in *Sawyer v. Whitley*, 505 U.S. 333 (1992) and *Schlup v. Delo*, 513 U.S. 298 (1995)).

MacDonald argued to the district court that the language of Section 2244(b)(2)(B), as was the case in pre-AEDPA law, required the district court to consider all evidence that has been uncovered by MacDonald since the 1979 trial -- including all of the exculpatory evidence submitted with his prior habeas filings, the affidavits submitted with the 2255 Motion, the affidavit that was obtained from Stoeckley's mother after filing of the Motion, and the DNA testing results that became available after the filing of the Motion -- in assessing if MacDonald's claims met the Section 2244 "gatekeeping" standard in light of the "evidence as a whole."

The district court, without citation to any authority, summarily rejected this position. (DE-150 at 20-21). First, the district court struck from consideration the affidavits from the three individuals testifying that Greg Mitchell confessed involvement to them in the murders of MacDonald's family prior to his death. (DE-150 at 18). Next, the district court expressly refused to consider both the affidavit from Stoeckley's mother and the highly exculpatory DNA evidence that became available after the filing of the Motion. (DE-150 at 20). And finally, the

district court refused to consider the other exculpatory evidence submitted by MacDonald with his previous post-trial motions. (DE-150 at 21).

This was error. The plain language of Section 2244(b)(2)(B) requires the district court to consider "the evidence as a whole" in assessing if but for the constitutional error underlying MacDonald's claims, no reasonable juror would have found MacDonald guilty of the murders. This language in Section 2244 is in accord with pre-AEDPA law, where a district court, when considering whether a habeas petitioner had established his actual innocence necessary to avoid a procedural bar, was required to consider "all of the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House v. Bell*, 547 U.S. 518, 537-38 (2006); *see also Schlup v. Delo*, 513 U.S. 298, 327 (1995) (noting that evaluation of whether newly discovered evidence meets standard for habeas relief, court must consider all of the evidence, including "evidence that became available only after the trial"); Hertz & Leibman, § 28.3(e) at 1321.

The district court's holding here completely disregards the "evidence as a whole" requirement in Section 2244(b)(2)(B). Contrary to the district court's holding, courts have continued to apply the *Schlup/House* standard to consideration of a successive federal habeas petition, and to define the term "evidence as a

whole" in 28 U.S.C. § 2244(b)(2)(B)(ii)'s gatekeeping standard. *See Lott v. Bagley*, 2007 U.S.Dist.Lexis 91762, * 15-17 (N.D. Ohio 2007).

In *Lott*, the Northern District of Ohio considered a second federal habeas petition filed by a state prisoner convicted of murder. The second petition was based upon a claim of a *Brady* violation, involving the suppression by the prosecutor of exculpatory evidence that was not produced to the defense at trial. In evaluating whether the petitioner met the second prong of the gatekeeping standard of 28 U.S.C. § 2244(b)(2)(B)(ii) -- whether the petitioner could demonstrate that no reasonable factfinder would have convicted him of the murder if no *Brady* violation had occurred at his trial, in light of the "evidence as a whole" -- the *Lott* court considered not only the evidence presented at trial, but also two other classes of evidence: (1) evidence consisting of "materials in support of actual innocence acquired since trial" offered by the petitioner, and (2) evidence relating to the petitioner's confession, which was suppressed from evidence at trial, but nonetheless offered by the prosecution for consideration under the *House* standard. The *Lott* court found that it could consider these matters in evaluating the § 2244(b)(2)(B)(ii) gatekeeping standard because "the *House* court dictates, this Court must consider all evidence, both inculpating and exculpating, when reviewing an actual innocence claim." *Lott*, 2007 U.S.Dist.Lexis 91762, *16.

Thus, the *Lott* court squarely held that *House* controls the definition of "the evidence as a whole" in the gatekeeping standard of 28 U.S.C. § 2244(b)(2)(B)(ii). The district court here was obliged, in assessing whether MacDonald's constitutional claims if proven and viewed in light of the "evidence as a whole" could meet the "no reasonable juror" standard of Section 2244(b)(2)(B), to consider "all of the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House*, 547 U.S. at 537-38.

There can be no question that the district court did not do that in this case. The district court expressly refused to consider the highly exculpatory DNA evidence offered by MacDonald in assessing the Section 2244 standard. The district court expressly refused to consider the affidavit from Stoeckley's mother in this analysis. The district court expressly refused to consider, and in fact struck from consideration, the three affidavits relating to Greg Mitchell's confession to involvement in the murders -- vitally important evidence not only because it directly implicates Mitchell, but also because it corroborates the admissions of Helena Stoeckley. And the district court expressly refused to consider the extensive exculpatory evidence offered in support of MacDonald's previous habeas petitions, including hair, fiber, and other physical evidence discovered post-trial that is completely inconsistent with the Government's presentation at trial.

The prejudice to MacDonald resulting from the district court's erroneous approach is manifest. The district court expressly refused to consider the very type of evidence that other courts have identified as the type necessary to demonstrate the level of actual innocence embodied in Section 2244(b)(2)(B)'s "no reasonable juror" standard. *See, e.g. Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005) ("[T]o demonstrate innocence so convincingly that no reasonable jury could convict, a prisoner must have documentary, **biological (DNA)**, or other powerful evidence"); *Watkins v. Miller*, 92 F.Supp.2d 824, 836-40 (S.D.Ind. 2000) (holding that DNA evidence showing sexual assault of murder victim likely committed by person other than defendant sufficient proof of actual innocence under *Schlup* standard to permit consideration of procedurally defaulted *Brady* claims).

In sum, the law entitles MacDonald to a cumulative review of the entire panoply of exculpatory information that has come to light since his 1979 trial, in determining if his current § 2255 claims meet the Section 2244 "gatekeeping" standard. In finding that MacDonald failed to meet the gatekeeping standard under 28 U.S.C. § 2244(b)(2)(B)(ii), the district court expressly refused to consider numerous exculpatory materials offered by MacDonald that show compellingly that he is actually innocent of the murders for which he currently stands convicted. This was error, and therefore the district court's order must be vacated, and the

matter remanded for a proper consideration of MacDonald's Section 2255 Motion in light of the "evidence as a whole."

## II. The District Court Erred in Refusing to Consider the DNA Evidence Presented by MacDonald as a Predicate for His § 2255 Motion.

In April 1997, MacDonald filed a request with this Court that the physical evidence in the custody of the Government relating to this case be subjected to DNA testing. In October 1997, this Court granted MacDonald's request, and remanded the issue to the district court to supervise the testing. *In re Jeffrey MacDonald*, No. 97-713 (October 17, 1997).

For almost a decade, there was wrangling in the district court over the nature of the DNA testing. Ultimately, a limited number of pieces of physical evidence were submitted to DNA testing at a Government laboratory. The Government filed the report of the results of the DNA testing with the district court on March 10, 2006. (DE-119).

### A. The DNA Results

The laboratory found 28 specimens from the physical evidence sufficient for DNA testing. The DNA profile for each of these specimens was compared against known exemplars from MacDonald, each member of MacDonald's family, Helena Stoeckley, and Greg Mitchell. Of the 28 specimens tested, 9 produced no useable result or an inconclusive result. Of the remaining 19 specimens, 13 were consistent with members of the MacDonald family who were killed, and 3 were

consistent with MacDonald. The three remaining specimens (Specimen 58A1, 75A, and 91A) each provided a conclusive DNA result, but that result did not match MacDonald, any of his family members, or Helena Stoeckley or Greg Mitchell. (DE-123 at 8-10).

These three unmatched results constitute powerfully exculpatory evidence that MacDonald did not commit the murders of his family:

- Specimen 91A

Specimen 91A is noted in the DNA report as a human hair that the chain of custody describes as found in "fingernail scrapings from the left hand of Kristen MacDonald." (DE-123 at 8). It is described as a human hair with hair root intact, measuring approximately 1/4" in length. There was blood residue present on the hair. (DE-123 at 8). The DNA testing of this hair produced a DNA profile that is not consistent with MacDonald, any member of his family, Helena Stoeckley, or Greg Mitchell. (DE-123 at 8).

Kristen MacDonald, by all accounts, was killed in her bed where she was found. The doctor who performed the autopsy on her testified at trial that she had numerous defensive wounds on and around her fingers. (TT 2576-77). Thus, the presence of a hair belonging to a person who is <u>not</u> MacDonald, mixed with blood residue, with the hair root intact, underneath one of Kristen's fingernails, is strong evidence that while Kristen was defending herself from her killer, a hair from her

killer came to reside under her fingernail, and that killer is not MacDonald. Given the entirely circumstantial case presented by the Government at trial, the exculpatory effect of this evidence cannot be overstated.

- Specimen 75A

Specimen 75A is a human body or pubic hair, approximately 2 1/4 inches in length, that the chain of custody describes as found under the body of Colette MacDonald at the crime scene. (DE-123 at 9-10). The hair had both hair root and follicular tissue attached. *Id.* The DNA testing of this hair produced a DNA profile that is not consistent with MacDonald, any member of his family, Helena Stoeckley, or Greg Mitchell. (DE-123 at 9).

Again, the presence of this unmatched human hair under the body of Colette MacDonald is strong proof of the presence of unknown intruders in the MacDonald home. The fact that the hair had both the root and follicular tissue attached is indicative that it was pulled from someone's skin, making this hair further probative that there were unknown intruders in the home with whom Colette struggled and from whom she extracted a hair.

- Specimen 58A1

Specimen 58A1 is a hair approximately 1/4 inch in length, with root intact, that the chain of custody describes as recovered from the bedspread on the bed in the bedroom occupied by Kristen MacDonald. (DE-123 at 10). As with the

previous two hair samples, the DNA testing of this hair produced a DNA profile that is not consistent with MacDonald, any member of his family, Helena Stoeckley, or Greg Mitchell. (DE-123 at 10).

Thus, a hair belonging to an unidentified individual was found on the bedspread on the bed where Kristen MacDonald was murdered. The fact that this hair was on Kristen's bed -- not a common area of the home and not a place some visitor to the home would be likely to be -- is further evidence supporting the presence of intruders who committed the murder.

### B. The District Court's Refusal to Consider the DNA Evidence Is Error.

The district court expressly refused to consider the DNA evidence offered by MacDonald. The district court interpreted the precedent in this circuit as requiring that MacDonald obtain a PFA from this Court before the district court could consider the DNA evidence as a predicate or claim in the Motion. (DE-150 at 19-20).

As set out above, the district court's failure to consider the DNA evidence as part of the "evidence as a whole" in making its Section 2244(b)(2)(B) determination as to MacDonald's other claims is error, and requires that the district court's order be vacated. This DNA evidence is powerful exculpatory evidence that weighs heavily in evaluation of the "evidence as a whole" under Section 2244.

*See, e.g. Watkins*, 92 F.Supp.2d at 836-40. However, the district court also erred in failing to consider this DNA evidence itself as a predicate for relief in the Motion.

**1. The Law Permits Consideration of the DNA Evidence As a Predicate Claim Without the Granting of a Separate Pre-Filing Authorization.**

Courts in this circuit have held that where a court of appeals grants a PFA for a claim in an successive habeas petition, the district court may review not only that claim, but any other claim submitted by the petitioner in that petition. *Hazel v. United States*, 303 F.Supp.2d 753, 758-59 (E.D. Va. 2004). As stated by the *Hazel* court:

> It appears that the absence of certification of these claims is not a bar to review of these claims. First, AEDPA itself includes no bar to district court review of claims that did not appear in a request for certification that was granted. And moreover, controlling caselaw makes clear that once the court of appeals finds that the application contains "any claim" that satisfies § 2255, the court [of appeals] should authorize the prisoner to file the entire application in the district court, even if some of the claim in the application do not satisfy the applicable standards.

*Hazel*, 303 F.Supp.2d at 758 (citations omitted and emphasis added).

Under *Hazel*, the district court should have considered the DNA predicate for the Motion. The results of the DNA tests were not available until two months after the filing of the Motion by MacDonald, and therefore could not have been included in the Motion when it was filed. MacDonald moved to add the results

from the analysis of the DNA evidence as a predicate claim in the Motion, and under *Hazel* the district court should have considered this additional predicate.[12]

### 2. The DNA Evidence Entitles MacDonald to Relief Under Section 2255.

The DNA evidence is powerful exculpatory evidence relevant to the Section 2244 determination as to the constitutional claims presented in the § 2255 Motion. But the DNA evidence can also stand alone as a claim permitting habeas relief.

The United States Supreme Court has assumed, without deciding, that a freestanding claim of actual innocence is cognizable under federal law. *Herrera v. Collins*, 560 U.S. 390, 417 (1993); *House v. Bell*, 547 U.S. 518, 554-55 (2006).[13] Though the Supreme Court has never articulated the standard for such a claim, other circuits have held the standard for such a claim to be that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 474 (9th Cir. 1997) (en banc).

---

[12] Furthermore, given that this Court in 1997 ordered that the DNA testing at issue take place, how could the results of that testing not be considered relevant to MacDonald's Motion?

[13] While the majority opinion in *Herrera* assumed without deciding that a freestanding claim of actual innocence was recognized by federal law, a majority of the members of the Court would have explicitly so held. *Compare* 506 U.S. at 417 (majority opinion) *with id.* at 419 (O'Connor, J., joined by Kennedy, J., concurring) *and id.* at 430-37 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting).

The new DNA evidence in this case does just that -- it "affirmatively prove[s] that [MacDonald] is probably innocent." The linchpin to the Government's argument at trial, and its arguments against admission of the Stoeckley testimony and MacDonald's other habeas petitions through the years, has been the lack of any physical evidence to corroborate the presence of intruders in the MacDonald home on the night of the murders. The new DNA findings now provide this evidence, in the strongest terms -- the presence of an unmatched human hair under the fingernail of Kristen MacDonald, in a location that shows that during Kristen's attempts to defend herself, a hair from her attacker was lodged under her fingernail, and that hair is not the hair of MacDonald.

MacDonald recognizes the extremely high standard for proof of a freestanding claim of innocence. But the DNA evidence in this case completely undercuts the Government's central theme at trial -- that the physical evidence in the MacDonald home was not consistent with, and in fact contradicted, the account of intruders given by MacDonald, and therefore the murders must have been committed by MacDonald.[14] At trial, this DNA evidence would have been powerfully exculpatory, and would have refuted the Government's key claim that

[14] In its closing argument, the Government stated: "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 ask you to find his guilt." (TT 7059).

there was no evidence of intruders in the MacDonald home in a powerful way. Had this evidence been available at trial, MacDonald would have been in a position to point out that there exists DNA evidence under the fingernail of his daughter, in a place where it is logical that the DNA of his daughter's attacker would be, and that DNA did not match him, but rather some unknown person. In short, this DNA evidence would have provided the exact corroboration demanded by the Government at trial as necessary to prove MacDonald's innocence to the jury.

This powerful new DNA evidence, in and of itself, supports a claim of actual innocence under Section 2255. The district court erred in failing to even consider this evidence as a predicate for Section 2255 relief, and this Court should remand the case to the district court for consideration of MacDonald's claim for a new trial based upon this evidence.

## III. The District Court Erred in Determining That MacDonald's § 2255 Motion Should be Denied Without Hearing Under 28 U.S.C. § 2244(b)(2)(B), as MacDonald's Constitutional Claims Meet the "No Reasonable Juror" Standard.

As noted above, in evaluating the Motion under the "gatekeeping" standard of 28 U.S.C. § 2244(b)(2)(B), the district court divided the issues relating to the affidavit of DUSM Jimmy Britt into three distinct claims. *See supra* at 27-28. The district court expressly accepted the Britt affidavit as true. (DE-150 at 38 n.18).

Nonetheless, the district court found that this evidence was insufficient to satisfy the "no reasonable juror" standard in 28 U.S.C. § 2244(b)(2)(B).

As set out in Section I of this Brief, the district court erred as a matter of law in making this determination because it expressly refused to consider "the evidence as a whole" in evaluating these claims under the Section 2244 standard. This error alone requires reversal of the district court's order.

In addition, the district court erred in its specific findings at to each of MacDonald's constitutional claims. MacDonald has proven constitutional error sufficient to meet the "no reasonable juror" standard.

**A. The "Threat" Claim**

The district court did not question DUSM Britt's assertion that the threat took place, instead setting out three reasons why, given that the incident alleged by Britt occurred, it did not meet the Section 2244 standard. But each of the reasons given by the district court is faulty.

All three of the reasons used by the district court to deny relief on the "threat" claim are based upon a purported lack of evidence of how Stoeckley understood or acted upon the statements made to her by AUSA Blackburn in his office. First, the district court concluded that "causation is lacking" -- that there was no proof that AUSA Blackburn's threat was the reason that Stoeckley testified at trial that she did not remember the four hour period during which the murders

occurred. (DE-150 at 38-39). Next, the district court concluded that there was "speculation as to content" -- that no one but Stoeckley knows how Stoeckley interpreted the statements made by AUSA Blackburn to her in his office. (DE-150 at 39-40). And finally, "futility" -- that because Stoeckley is now dead, an evidentiary hearing is unnecessary because MacDonald cannot now call her as a witness to answer the question of how she interpreted AUSA Blackburn's threat and whether that was what made her testify as she did at trial, and in any event she is an unreliable witness. (DE-150 at 40-41).

But this approach overlooks two key issues. First, the district court's approach overlooks the fact that MacDonald has already provided evidence from Stoeckley herself as to why she testified as she did at trial -- through the affidavit of Wendy Rouder. At the time of trial, Rouder was a young lawyer working with MacDonald's trial counsel. In her affidavit, she testifies that she had conversations with Stoeckley the weekend after Stoeckley's interview with AUSA Blackburn and her testimony in court that she could not recall being in the MacDonald home. Rouder states that during that contact, Stoeckley told her that she (Stoeckley) had been present in MacDonald's home during the murders and could name the murderers, but did not testify to those facts in court because she was "afraid ... of those damn prosecutors sitting there," adding that "they'll fry me" (DE-115, Ex. 5).

The district court dismisses Rouder's affidavit as another example of Stoeckley's vacillations as to whether she was present or not in the MacDonald home at the time of the murders. (DE-150 at 45-46). But the district court in no way considers that the Rouder affidavit directly answers the question posed by the district court -- where is the evidence that Stoeckley was affected by AUSA Blackburn's threat? The Rouder affidavit is that evidence, and provides the words of Helena Stoeckley. Rouder states that when she asked Stoeckley, the day after Stoeckley's trial testimony, why she did not testify in court to her presence in the MacDonald home during the murders, Stoeckley responded that it was "because of those damn prosecutors sitting there," adding that "they'll fry me." (DE-115, Ex. 5, ¶ 10). Thus, Stoeckley is not needed to testify at an evidentiary hearing now, as she has already made known the motivation for her change in position -- the uncontested affidavit of Wendy Rouder shows that Stoeckley did not admit her involvement in the murders at trial because, in her words, "those damn prosecutors sitting there" would "fry me."[15]

Second, any reliance on the argument that Stoeckley is an inherently unreliable witness is undercut by the finding that Britt's affidavit is accurate and that Blackburn did threaten Stoeckley with prosecution. If AUSA Blackburn

[15] Rouder's affidavit is itself corroborated by the affidavit of Stoeckley's mother (not considered by the district court), who avers that Stoeckley told her that Stoeckley "lied about it [her presence at the murder scene] at the trial ... because she was afraid of the prosecutor." (DE-144, Ex.1, ¶ 11).

responded to Stoeckley's admission to him in his office that she was present in the MacDonald home during the murders by threatening Stoeckley with prosecution, then that necessarily means that the Government (through AUSA Blackburn) believed Stoeckley, and more importantly believed that the jury would believe Stoeckley. Why would the Government threaten Stoeckley with prosecution for her admission, unless her admission was in fact true and accurate? The fact that AUSA Blackburn spoke those words to Stoeckley necessarily means that Stoeckley's admission was credible, and would be viewed as such by the jury.

As noted by the district court in its order, there is plenary case law holding that a prosecutor's threat to a potential defense witness that causes that witness to change her testimony, or refuse to testify, is a violation of the defendant's constitutional rights, requiring a new trial. *See, e.g. United States v. Golding*, 168 F.3d 700, 703 (4th Cir. 1999) (where defendant's wife had been prepared to testify that the gun was hers, the Government's threat to prosecute her if she so testified, then repeatedly referring to wife's failure to testify during closing, violated the defendant's Sixth Amendment rights); *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982); *United States v. Aguilar*, 90 F.Supp.2d 1152 (D. Colo. 2000) (concluding that prosecutor's statement in presence of defense witness that Government intended to challenge validity of witness' plea agreement which could result in reinstatement of previously dismissed charges violated defendant's

constitutional rights, where witness had been prepared to testify on defendant's behalf, but invoked his Fifth Amendment privilege after hearing prosecutor's statements, and witness' testimony would have been material and favorable to defense). The evidence submitted with the Motion establishes that Stoeckley was threatened by AUSA Blackburn, and establishes that the threat was the cause of her failure to testify at trial to her presence in the MacDonald home, on the night of the murders, with the real murderers.

Given these facts, there can be no question that the "threat" claim meets the "no reasonable juror" standard under Section 2244. No reasonable juror, having heard Helena Stoeckley's admissions from the witness stand at a trial, could possibly find MacDonald guilty beyond a reasonable doubt, in light of the "evidence as a whole," which includes:

- DNA evidence showing that during Kristen MacDonald's attempts to defend herself from her attackers, she wound up with a hair from her attacker under her fingernail, and that hair is <u>not</u> the hair of MacDonald, but rather the hair of some stranger to the home (DE-115 at 8-9);

- DNA evidence showing the presence of a stranger's hair on the bedspread of Kristen's bed where she was killed, and the presence of a stranger's hair under the body of Colette MacDonald (DE-155 at 9-10);

- the admissions made by Stoeckley to six other individuals, including three law enforcement officers, who were at trial and prepared to testify, as well as her admissions to Wendy Rouder during the trial;

- the fact that a woman matching Stoeckley's description was seen by MP Kenneth Mica at 4 a.m. in the rain on the night of the murders approximately a half-mile from the murder scene (TT 1453-54);

- the detailed admission made by Stoeckley after trial that was the basis of MacDonald's 1985 new trial motion;

- the synthetic blond wig hairs found in the MacDonald home, unmatched to any other fiber in the home, but consistent with Stoeckley's presence that night wearing a long blond wig;

- Stoeckley's admission at trial that she wearing a blond wig and floppy hat the night of the murders and burned both the wig and the hat shortly after the murders (TT 5603-04);

- the fact that Greg Mitchell, years after the crime and long after he had separated from Stoeckley, confessed to involvement in the murders to numerous other persons (DE-115, Ex. 7);

- the black wool fibers found on the mouth and bicep of Colette MacDonald and on the murder weapon that were not matched to any fabric in the MacDonald home;

- the numerous statements of witnesses submitted with MacDonald's earlier habeas petition and new trial motions linking Stoeckley to the murders.

This Court has previously forecast the answer to this inquiry, when it noted on direct appeal the import of Stoeckley's testimony to the result at trial:

> 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).

AUSA Blackburn's threat to Stoeckley, as set out in the affidavit of DUSM Britt and as confirmed by the affidavits of Wendy Rouder and Stoeckley's mother,

entitles MacDonald to Section 2255 relief and a new trial. The order of the district court must be reversed.

### B. The "Fraud" Claim

The district court's conclusion regarding the "fraud" claim is similarly faulty. In most basic terms, the district court concluded that even if AUSA Blackburn had admitted to the trial judge that Stoeckley had admitted her presence in the MacDonald home during the murders to him during his interview of her on the prior day, that this would have made no difference to the result of the trial because Stoeckley was an inherently unreliable witness. (DE-150 at 35).

The district court's conclusion, however, gives short shrift to the effect such an admission by AUSA Blackburn would have had upon the admissibility of testimony of the six witnesses MacDonald sought to call to testify to Stoeckley's pretrial admissions to them. The trial judge's exclusion of this evidence was found by this Court to be an extremely close question, *MacDonald*, 688 F.2d at 231-33, and the concurring judge went so far as to state that "MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted." *MacDonald*, 688 F.2d at 236 (Murnaghan, J., concurring). If AUSA Blackburn had admitted to the trial judge that Stoeckley had told him during his interview of her that she was present in the MacDonald home at the time of the murders, it is difficult to

comprehend how the trial judge would have prevented MacDonald from calling the six witnesses he had present to testify to Stoeckley's admissions.[16]

Given the closeness of the question of the admission of this testimony (even on the record before this Court on the direct appeal), and the key nature of Stoeckley's testimony to the result of the trial, *see MacDonald*, 632 F.2d at 264, any statement by AUSA Blackburn to the trial judge that Stoeckley had admitted to him her presence in the MacDonald home at the time of the murders would have tilted the scales in favor of the admission of this testimony. The result would have been the presentation of MacDonald's six witnesses to the jury who could testify to Stoeckley's admissions to presence in the MacDonald home during the murders. In sum, the premise of the district court's holding is faulty -- a true representation by AUSA Blackburn to the trial judge about Stoeckley's admission would have made a difference, because it would have altered the evidence presented at trial dramatically.

Had AUSA Blackburn disclosed to the trial judge the admission made to him by Stoeckley in his office during his interview of her, resulting in the six witnesses being presented by the jury to testify to Stoeckley's admissions to them, no reasonable juror would have found MacDonald guilty of the murders in light of the "evidence as a whole." The suppression of this evidence through AUSA

[16] In addition, at that point, AUSA Blackburn would have been the seventh witness that MacDonald sought to call to testify about Stoeckley's admissions.

Blackburn's representations to the trial judge, and the resulting deception of the trial judge and the jury, demonstrates constitution error that entitles MacDonald to Section 2255 relief and a new trial.[17] The order of the district court must be reversed.

## CONCLUSION

For the reasons stated herein, Appellant Jeffrey R. MacDonald respectfully requests that the district court's November 4, 2008 Order be vacated, and that the case be remanded to the district court for entry of an order requiring a new trial, or in the alternative for an evidentiary hearing on MacDonald's § 2255 Motion.

## REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), MacDonald respectfully requests oral argument in this appeal, as he submits that the Court's decisional process will be aided by oral argument given the complexity of the factual and legal issues involved in this case.

[17] Moreover, the district court overlooked that the "fraud" claim included the misrepresentation by AUSA Blackburn not only to the trial judge, but also to the jury -- by eliciting Stoeckley's testimony on cross-examination that she did not remember being present in the MacDonald home on the night of the murders, when actually she had told AUSA Blackburn otherwise the day prior, AUSA Blackburn presented false testimony to the jury. Where the Government knowingly presents a false picture of the evidence to the court and jury, the defendant's constitutional rights are violated and a new trial is required. *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959).

This the 19th day of February, 2009.

/s/ Joseph E. Zeszotarski, Jr.
Joseph E. Zeszotarski, Jr.
N.C. State Bar No. 21310
Poyner Spruill LLP
P.O. Box 1801
Raleigh, NC 27602
(919) 783-1005
jzeszotarski@poyners.com
Counsel for Appellant

## 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) because:

This brief contains 13,923 words, excluding the parts of the 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.

This the 19th day of February, 2009.

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

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing BRIEF through the electronic service function of the Court's electronic filing system, as well as by first class mail, as follows:

Brian M. Murtagh
Special Assistant United States Attorney
U.S. Department of Justice
National Security Division, CTS
950 Penn. Ave., NW
Washington, DC 20530

Anne Hayes
John S. Bruce
Assistant United States Attorney
310 New Bern Avenue
Raleigh, NC 27601

This the 19th day of February, 2009.

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