UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 75-CR-26-3
No. 5:06-CV-24-F

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	RESPONSE OF THE UNITED STATES
	)	TO MOTION TO SUPPLEMENT
	)	STATEMENT OF ITEMIZED MATERIAL
JEFFREY R. MacDONALD,	)	EVIDENCE
Movant	)	
	)	
	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby opposes the Motion To Supplement Applicant's Statement of Itemized Material Evidence ("Motion To Supplement") filed in the district court on April 16, 2007 by Jeffrey R. MacDonald, alleged to contain newly discovered evidence, on the grounds that it is time barred pursuant to 28 U.S.C. § 2255 ¶6. Further, although no authority is cited by MacDonald, the Motion To Supplement is effectively a second or successive application for relief pursuant 28 U.S.C. § 2255 which was not certified by a panel of the Fourth Circuit as required by 18 U.S.C. § 2255 ¶8, and should, therefore, be dismissed for lack of jurisdiction.[1] The Motion To Supplement should also be denied because the record forecloses a finding that the motion contains evidence, which even if true, constitutes clear and convincing evidence of innocence as required by § 2255 ¶8.

[1] The acronym"PFA" (Pre Filing Authorization) is sometimes used in this Response in lieu of "certification pursuant to 28 U.S.C. § 2244".

To the extent that the Motion To Supplement is not really being offered as additional proof of MacDonald's actual innocence, but merely as corroborative evidence to support the affidavits of Jimmy Britt and Wendy Rouder, the motion should still be denied on both procedural and substantive grounds.[2]

Should this Court not agree with our submission that the instant motion, and its predecessors, be denied on procedural grounds or any other grounds, and should the Court convene an evidentiary hearing on any of the pending MacDonald motions, the Government will contest some of the factual averments in the purported affidavit of Mrs. Stoeckley, because based on information and belief as a result of investigation by the FBI, the Government contends they are in essence the unsworn statements of MacDonald's current wife. Kathryn MacDonald interviewed Mrs. Stoeckley at the nursing home where she is confined, drafted and typed the affidavit, and induced Mrs. Stoeckley to sign it. See Mot. at ¶1-12.

To further delineate those averments in Mrs. Stoeckley's Affidavit which we contend are not her own statements, we have attached as a demonstrative exhibit to this Response, a redacted version of the affidavit. See Exhibit A hereto. In particular, the statement in ¶11 ("She told me she was afraid to tell the truth because she was afraid of the prosecutor.") the Government contends was not made, or adopted, by Mrs. Stoeckley. With respect to the remaining un-redacted portions, which the Government does not contest, the Government submits that if the Court does not agree with our legal arguments for dismissal, they should be considered as part of the evidence as a whole, but only in relation to similar statements made in the same time period, which Judge Dupree considered

[2]The affidavit, from an 86 year old legally blind woman, is not in proper form and is not supported by other affidavits to attest to the circumstances of its execution. See *infra* at pp. 27-29.

in the context of the denial of MacDonald's Motion For New Trial.[3]

To the extent that contested factual issues remain, and should the Court decide to convene an evidentiary hearing, the Government requests an opportunity to cross-examine the affiant, and all those involved in the interviews of Mrs. Stoeckley, the drafting and editing of the affidavit, as well as its execution. And, if necessary, the Government further requests an opportunity to present evidence in rebuttal.

In support of our submission that the instant petition should be dismissed, we present the following pertinent facts and legal argument:

1. Procedural History

The procedural history of this case has been fully set forth in pleadings filed by the Government and in the opinions of this Court and the Court of Appeals. Accordingly we set out only so much as is relevant to the current motion.

On August 29, 1979, a jury convicted MacDonald on all counts of murder, in violation of 18 U.S.C. § 1111. On appeal, the court of appeals reversed his conviction on speedy trial grounds. *United States v. MacDonald*, 632 F.2d 258 (4th Cir. 1980) (App. Vol I, Tab 5). The Supreme Court reversed and remanded the case to the court of appeals for disposition of the remaining issues. *United States v. MacDonald*, 456 U.S. 1 (1982) (App. Vol. I, Tab 6). The court of appeals affirmed, rejecting MacDonald's remaining claims. *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982) (App. Vol I, Tab 7).[4] MacDonald sought further review but the Supreme Court denied certiorari on

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[3] See *United States v. MacDonald*, 640 F. Supp. 286, 322-327. (E.D.N.C., 1985).

[4] The principal issue on remand was the district court's exclusion at trial of Helena Stoeckley's out-of-court statements under Fed. R. Evid. 804 (b)(3).

January 10, 1983, and his conviction became final. *MacDonald v. United States*, 459 U.S. 1103 (1983).

In April 1984, MacDonald filed in this Court a motion for a new trial, pursuant to Fed. R. Crim. P. 33, on the basis of "newly-discovered" evidence, consisting primarily of the post-trial confessions of Helena Stoeckley, and two motions for post-conviction relief under 28 U.S.C. § 2255. The second of these motions captioned "Motion To Set Aside Judgment of Conviction Pursuant to 28 U.S.C. § 2255", was based on the alleged suppression of physical evidence which purportedly linked Helena Stoeckley and others to the crimes. After an evidentiary hearing, the Court denied the motions. *United States v. MacDonald*, 640 F. Supp. 286 (E.D.N.C. 1985) (App. Vol. I, Tab 10).[5] The court of appeals affirmed. *United States v. MacDonald*, 779 F. 2d 962 (4th Cir. 1985) (App. Vol. I, Tab 11). In October 1990, MacDonald, through a new team of lawyers, filed a second collateral attack alleging, once again, newly-discovered evidence (principally fibers) and the concealment of such evidence by the prosecution. Once again, this Court denied relief. *United States v. MacDonald*, 778 F. Supp. 1342 (E.D.N.C. 1991) (App. Vol. I, Tab 12). The court of appeals affirmed. *United States v. MacDonald*, 966 F.2d 854 (4th Cir. 1992) (App. Vol. I, Tab 13).

On April 22, 1997, MacDonald filed a third petition for habeas relief captioned "Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery." This Court denied the motion insofar as it was based upon a "fraud on the court" claim. It transferred to the court of appeals the motion for a new trial, once again based upon alleged newly-discovered evidence, for certification as a successive petition. *United States v. MacDonald*, 979 F. Supp. 1057 (E.D.N.C. 1997) (App. Vol. I, Tab 14). The court of appeals then entered an order granting MacDonald's motion insofar as it

[5] The transcript of this hearing is at App. Vol. V, Tab 1.

authorized DNA testing and remanded that matter to this Court (App. Vol. I, Tab 14). The court of appeals in all other respects denied the motion to file a successive habeas petition. MacDonald then appealed this Court's ruling on the fraud on the court claim. The court of appeals affirmed (App. Vol. I, Tab 16).

On December 13, 2005, MacDonald, through a fourth set of lawyers, filed a "gatekeeping motion" in the Fourth Circuit seeking leave to file yet another motion to set aside his sentence under 28 U.S.C. § 2255. Once again, the motion was predicated on "newly-discovered evidence," i.e., MacDonald's claim that prosecutor James L. Blackburn made factual misrepresentations to the trial judge and thwarted his ability to obtain testimony from Helena Stoeckley, a prospective defense witness. On January 17, 2006, the court of appeals granted the gatekeeping motion pursuant to 28 U.S.C.§ 2244 expressly stating "that the motion is granted insofar as MacDonald may file in the district court the proposed 28 U.S.C.§ 2255 now attached to his § 2244 motion". On January 17, 2006, the motion based upon the Britt allegations was filed in this Court.[6] On March 22, 2006, without prior authorization from the court of appeals, MacDonald filed a Motion to Add An Additional Predicate To His Previously Filed Motion Under 28 U.S.C. Section 2255 To Vacate His Conviction - Namely Newly Discovered DNA Evidence.[7] On March 23, 2006, MacDonald filed Petitioner's Motion Pursuant to Rule 7 Of The Federal Rules Governing Section 2255 Proceedings,

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[6]Per the Order of this Court the Government filed its "Response Of The United States To Successive Motion For Relief Under 28 U.S.C. § 2255" on March 30, 2006, urging that the motion be denied on legal grounds, but reserving on the merits in the event the Court did not agree with our submission.

[7]The Government filed its Response to this motion on April 13, 2006, in which it argued that this Court lacked jurisdiction to grant the relief sought. MacDonald did not file a Reply to the Government's Response.

To Expand The Record To Include The Itemized Authenticated Evidence Set Forth Herein (Motion to Expand).[8] On May 8, 2006, MacDonald filed his Reply To The Response Of The Government To His Motion Under 28 U.S.C.§2255 To Vacate His Sentence attacking the Government's Response on various grounds, and requesting that the Court either grant his motion to vacate his sentence "or alternatively to schedule a hearing and proceed to consider the movant's motion on its merits." Movant's Reply at 2. Rulings on these motions are pending before this Court.

2. The Motion To Supplement Applicant's Statement Of Itemized Material Evidence

On April 16, 2007 "Applicant/Defendant, Jeffrey R. MacDonald," without prior authorization from the court of appeals filed the above captioned motion in this Court.[9] Without citation of any authority MacDonald seeks to supplement "his itemized material evidence in support of his motion under 28 U.S.C. § 2255" with the attached affidavit of [Mrs]. Helena Stoeckley.[10]

Mrs. Stoeckley's affidavit is offered as proof that on two separate occasions her daughter,

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[8]The Motion To Expand was accompanied by a two volume appendix, each volume captioned Petitioner's Statement of Itemized Material Evidence- With Citations To The Record Or To Authenticated Proofs- In Support Of His Motion Under 28 U.S.C. Section 2255 To Vacate His Sentence. The Government filed its Response on April 17, 2006, requesting that the motion be denied, or a ruling deferred on various grounds. MacDonald did not file a Reply to this Response.

[9] The first 12 numbered paragraphs consist of factual averments which are not supported by any sworn statements.

[10] It is unclear whether MacDonald is seeking to insert Mrs. Stoeckley's affidavit in the Exhibits To Jeffrey MacDonald's Motion Under 28 U.S.C. Section 2255 To Vacate His Sentence, which contained as exhibits the Affidavit of Jim Britt (Exhibit 1) and the Affidavit of Wendy Rouder (Exhibit 5) that the court of appeals previously authorized him to file with this Court, or to insert it in the afore-described Statement Of Itemized Material Evidence offered in support of his Motion To Expand The Record, that was not filed pursuant to a PFA, and was challenged by the Government.

also named Helena Stoeckely, made statements purportedly demonstrating her presence in the MacDonald household during the murders. The first occasion was after the trial, and prior to her daughter moving to South Carolina.[11] The second occasion was shortly before her daughter's death in 1983. Aff. ¶¶3, 4. Neither the affidavit nor the motion contain any explanation why these statements alleged to have been made between 1979 and 1983, and constituting the facts supporting this claim, could not have been previously discovered through the exercise of due diligence, and prior to the expiration of the 1-year limitation period on April 24, 1997, as provided by 28 U.S.C. § 2255 ¶6.[12]

Listed below are those statements which, based upon her affidavit, Mrs Stoeckley attributes to her daughter on the second occasion.[13]

- She wanted to set the record straight*;
- She wished she had not been present in the house*;
- [She] knew that Dr. MacDonald was innocent*;
- She, Greg Mitchell, and two other men went to the MacDonald apartment during the early morning hours of February 17, 1970, to "intimidate" Dr. MacDonald because

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[11]No further statement is attributed to Helena Stoeckley on the first occasion other than: "she was present in the MacDonald house during the murders on February 17, 1970."

[12] In pertinent part 28 U.S.C. § 2255 provides at ¶6: A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of

* * *

(4) the date on which the facts supporting the claim could have been discovered through the exercise of due diligence.

[13]In those instances where the Government contests the statement, in whole or in part, as being Mrs. Stoeckley's own statement, as opposed to Kathryn MacDonald's statement, the statement is marked with asterisk.

they believed he was too hard on drug users in the Fayetteville community;

- She and others had not gone there to harm anyone*;
- Helena and the men were high on drugs, but she absolutely knew what was happening*;
- She saw a hobby horse in a child's bedroom*;
- She saw one of the men stab Dr. MacDonald*;
- Greg Mitchell and one of the other men "went out of their minds"*;
- When she became aware that Mitchell and the other man were killing the family, she and "the other male" fled*;
- The FBI and other law enforcement officials told her to keep quiet*;
- She could not live with her guilt of knowing she had been in the house but lied about it at the trial*; and
- She was afraid to tell the truth because she was afraid of the prosecutor*.

MacDonald contends that Helena Stoeckley's statements corroborate the affidavits of Jimmy Britt, and Wendy Rouder. (Mot. ¶¶13, 14). He further claims that these confessions made by Helena Stoeckley to her own mother are "profoundly" reliable. (Mot. ¶ 15). Accordingly, MacDonald requests that his statement of material evidence be supplemented with the affidavit of Mrs. Stoeckley so "that this court can consider the attached affidavit as part of the evaluation of the evidence as a whole, and as a further profound addition to the body of proof of Jeffrey MacDonald's actual innocence . . .." (Mot. at 4) The Government's understanding of this dual purpose prayer for relief is as follows: As part of the evaluation of the evidence as a whole he seeks to add Mrs. Stoeckley's

affidavit as an 11th exhibit to the 10 Exhibits To Jeffrey MacDonald's Motion Under 28 U.S.C. Section 2255 To Vacate His Sentence, which the court of appeals previously authorized him to file in this Court; as a separate matter, he asks this Court to consider the affidavit as additional proof of his actual innocence.[14]

3. The Trial Testimony of Wendy Rouder

The Government begins its canvass of the record with the trial testimony of Wendy Rouder. Following Helena Stoeckley's testimony before the jury on Friday, August 17, on Monday, August 20, 1979 Judge Dupree denied MacDonald's motion to introduce Stoeckley's out-of-court statements finding them not worthy of belief, notwithstanding the additional testimony of Wendy Rouder offered by the defense (Tr. 5806-07). Over the weekend of August 18-19, 1979, Stoeckley remained under defense subpoena (Tr. 5951) and initially stayed in a Raleigh motel called "The Journey's End". Wendy Rouder, then a law student member of the defense team, was dispatched by Bernard Segal in response to a report that Stoeckley had been beaten and possibly subjected to a drowning by her fiancé. (Tr. 5929). After making small talk with Rouder, Stoeckley brought up the subject of the MacDonald case. Rouder, who also held a Ph.D., testified to this conversation by reading her notes made at the time of the conversation. (Tr. 5932).

> . . . After a pause, she said to me, "I still think I could have been there that night." I [Rouder] then asked , "What makes you think so?" She said, "I don't know." There was a pause, and then she said, "That rocking horse." There was another pause, and she added, "You know, Kristen, Kristen Jean. Those pictures, when I looked at those pictures, I knew I had seen her somewhere before." Another pause, and she added, "and that driveway, I remember being in that

[14] In this regard, Applicant MacDonald's claim of actual innocence is effectively a second or successive application for relief, which is also subject to the certification requirements of 28 U.S.C. § 2244, by virtue of § 2255 ¶8.

driveway." (Tr.5932-33) App. Vol. IV.

Later in the day after changing hotels, and while being provided transportation so that she could seek medical treatment for her bloody nose, Stoeckley had a second conversation with Rouder:

> There was a pause. She said, "I still think I was there that night." And I said, "Helena, is it a feeling you are having or a memory?" She said it's a memory. I remember standing at the couch, holding a candle, only–you know-it wasn't dripping wax. It was dripping blood."
>
> Q. Is that the last conversation you had with her yesterday that related to the case?
>
> A. My follow-up to that was, "Helena, why don't you just go and say that in court, "and she said, "I can't with those damn prosecutors sitting there."[15] (Tr. 5937).
>
> Mr. Segal: I have no further questions.
>
> The Court: Any questions of this witness ?
>
> Mr. Blackburn: Yes, sir. I would be the prosecutor.
> (Tr. 5937-38).

Finally, as part of its rebuttal case, the government introduced into evidence a certified copy of a newspaper photo from the February 18, 1970, Fayetteville Observer, taken through the window of Kristen's bedroom. It depicted a rocking horse in the room. (Tr. 7042 GX 1153).

4. Stoeckley's Post-Trial "Confessions"

Following MacDonald's conviction and while his case was on direct appeal, the defense

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[15] We note that after being contacted in 2005 by Kathryn MacDonald, "who was working on her husband's behalf as a paralegal", and informed of Britt's allegations, Ms. Rouder's recollection was suddenly refreshed and she now recalled something that what was not in her notes, specifically, that Stoeckley added words to the effect of "They'll fry me". Affidavit of Wendy Rouder, at ¶¶ 5, 9, 10 and 11.

camp enlisted retired FBI Special Agent Ted Gunderson, aided by retired Fayetteville Detective Prince Beasley, to conduct further investigation and, in particular, to further interview Stoeckley. See *United States v. MacDonald*, 640 F. Supp. 286, 318 (E.D.N.C. 1985) (App. Vol I. Tab 10). Stoeckley's "confessions" provided the defense with the predicate for a motion for a new trial on the basis of "newly-discovered evidence"–Stoeckley's alleged perjury in testifying that she lacked any recollection of her whereabouts on the night of the murders. In addressing the motion, Judge Dupree observed that following the trial Stoeckley "has since alternated between lack of memory and almost total recall, on at least ten occasions . . .." Id. at 332-34.

On October 21, 1980, Stoeckley provided Beasley with what was to be the first of a series of "confessions" to having been present during the MacDonald murders. Id. at 319. Beasley then flew Stoeckley to California where, upon being confronted by Gunderson, she initially stated that she could not recall what happened on the night of the murders. The following day, however, Stoeckley experienced a "miraculous recovery of her memory" (id.) and gave a detailed confession to the MacDonald murders. id. She again "confessed" to Gunderson and Beasley on December 4-5, 1980, and gave incriminating statements to the author of a book during February 1981. However, in July 1981, she wrote a letter to Gunderson accusing him of coercing her into signing a false confession and misconstruing and distorting the statements she made to him. In September 1981, FBI agents interviewed Stoeckley. She provided them a statement disclaiming her preceding "confessions" to Gunderson, stated that her admissions to them were the result of dreams, and concluded: "I do not know if I was present or participated in the MacDonald murders." Id. at 320.

Distressed with this turn of events, Gunderson and Beasley re-interviewed Stoeckley during May 1982. On that occasion, she restated her confession, and asserted that: (1) she had been in the

MacDonald home on several different occasions; (2) that she had stolen a bracelet from it; and (3) several weeks prior to the murders, one of the cult members visited MacDonald at his home in an effort to convince him to cooperate in treating drug addicts. None of these alleged occurrences meshed with any information that MacDonald had furnished investigators. Finally, on May 27, 1982, Stoeckley, who was visibly pregnant, accompanied Gunderson and Beasley to a taping of the television show "60 Minutes." Once again, she confessed to being in the MacDonald home on the night of the murders but refused to name the persons actually responsible for killing the members of the MacDonald family. Id. at 321.

Judge Dupree wrote "[t]he statements contain numerous inconsistencies rendering it almost impossible to reconcile them into one cohesive account of events. Giving MacDonald the benefit of all doubts however the court has chosen to recite in large part what MacDonald claims Stoeckley's statements prove occurred on the night of the murders and thereafter." 640 F. Supp, 286 at n. 22.

Much of Judge Dupree's recitation of Stoeckley's post- trial statements (Id. 321- 323) is relevant to the instant motion and so much of it is set forth below:

> Stoeckley was a member of a satanic cult which was angry with military physicians, MacDonald among them, because they refused to help drug users with their problems. The leaders of the cult decided to approach MacDonald in an attempt to persuade him to treat drug addicts.
>
> Stoeckley was assigned responsibility for determining the whereabouts of Colette MacDonald on the night of February 16, 1970 . . ..
>
> Later that evening, at approximately 10:30 p.m., Stoeckley, Greg Mitchell, Shelby Don Harris, Bruce Fowler and Dwight Smith met at Stoeckley's apartment to discuss their plans to go to MacDonald's apartment to seek his cooperation . . ..

> The Stoeckley group left a Dunkin' Donuts restaurant at about 2:00 a.m. and drove to the MacDonald residence . . ..
>
> It was dark inside the house and Stoeckley lit a candle to help the group find their way . . ..
>
> Some members of the group shook MacDonald to awaken him so that they could talk to him about drugs but upon awakening he became excited and began to fight with them. During the fight, Stoeckley chanted "acid is groovy; kill the pigs." . . ..
>
> According to Stoeckley, things "got out of control " at this point and she heard Colette MacDonald calling to her husband for help from the master bedroom. Stoeckley went to the room where she saw Colette MacDonald being assaulted by Greg Mitchell and another member of the group . . ..
>
> Stoeckley left the master bedroom and went into one of the children's bedrooms where she saw a record player, some books and a hobby horse which she noted was broken . . ..
>
> The group became scared and left in a hurry, leaving all of the murder weapons behind except a pair of scissors [FN23 omitted] . . ..
>
> Called to testify at MacDonald's trial nine years later, Stoeckley perjured herself in order to escape prosecution. She eventually decided to confess to the crimes to clear her conscience. Id. at 321-323.

Judge Dupree also wrote:

> This summary of Stoeckley's "confessions" does not fully reveal the contradictions and inaccuracies that predominate the statements. ... For instance, she states on several occasions that Allen Mazerolle was with the group on the night of the murders but prison records confirm that he was in jail from January 29, 1970 to March 10, 1970. See Defendant's Evidentiary Hearing Ex 2, 3, and 8; Government's Response To Motion for New Trial, Appendix Vol. I, Ex B at 13-16. Similarly, her claim that members of the group talked to MacDonald for almost eight minutes after having awakened him in an attempt to obtain drugs is inconsistent with MacDonald's version of events because he has never said that such a discussion took place.
> Id. at 322.

5. The Credibility of the Stoeckley "Confessions"

In rejecting Stoeckley's post-trial confessions as warranting a new trial, Judge Dupree noted that:

> Aside from the inaccuracies and contradictions which become apparent upon reading Stoeckley's confessions together and against MacDonald's account of the murders and the physical evidence, the government has submitted the affidavits of witnesses who further discredit Stoeckley's story. Id. at 323 . . ..
>
> After dropping [roommates] Cazares and Smith off at the Village Shoppe, Stoeckley went to visit her parents who remember her coming home and complaining she did not want to be around her apartment because her girlfriends were painting the bathroom at the apartment. Id. Affidavit of Richard J. Mahon at 14. Mr. and Mrs. Stoeckley say Helena did not stay with them long that night leaving by herself at around 10:00 or 10:30 p.m.
>
> Diane Cazares remembers Stoeckley returning to the Village Shoppe with Greg Mitchell shortly before 11:00 p.m. Id. Appendix Vol. IV at Ex. 10. Where Stoeckley went after she left the Village Shoppe and what she did between 11:00 p.m. when Diane Cazares last saw her and 4:00 a.m. the next morning when she returned to the apartment is not known, but the record does reflect affidavits concerning the whereabouts of the other people Stoeckley says went with her to the MacDonald apartment. Shelby Don Harris was with Diane Cazares at her apartment while she was painting the bathroom until about 5:00 a.m. the next morning and Bruce Fowler was with Kathy Smith at her trailer until late in the morning of February 17, 1970. Id at Ex. 9
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> * * *
>
> Whether or not Stoeckley and Mitchell were together during this time, the affidavits of the witnesses who saw Stoeckley that night and were members of the group whom Stoeckley claims committed the murders directly contradict the substance of her confessions, thereby diminishing their credibility. Id. at 323.

In assessing the credibility of Stoeckley's confessions offered in support of the motion for a new trial, Judge Dupree observed that:

> Helena Stoeckley testified before the court at trial and the court has reviewed the affidavits relating to her and the videotape supplied by MacDonald of a television program featuring her, all of which lead the court to the conclusion that this woman is not reliable.
> Id. at 324.

Judge Dupree went on to state:

> The court's conclusion that Stoeckley is not a reliable confessor should not be construed to mean necessarily that she was not telling what she believed to be the truth when she confessed to the MacDonald murders. From the beginning, she said she could not remember what she had done on that night because she had taken so many drugs. Based upon MacDonald's account of the murders, the Fayetteville police, military police and the FBI investigated members of the drug culture in Fayetteville and Stoeckley, quite understandably, became anxious because she could not recall where she was during the crimes. This anxiety, her drug-induced state of confusion, and the observations of her friends and Detective Beasley that she met the description of the woman involved in the murders led Stoeckley to believe that she might have participated in them but had a mental block about the night which prevented her from recalling details.

Judge Dupree's opinion continues:

> Stoeckley's uncertainty and the relentless attention the case focused upon her undoubtedly tortured her over the years. Her drug abuse of the late 1960's and early 1970's gave way to alcohol abuse in the late 1970's which contributed to her premature death in 1983. The confluence of her drug and alcohol abuse and uncertainty over her role in the crimes appears to have ultimately led her to believe that she was involved and to piece together her fragmented memory of 1970 into an explanation which MacDonald says amounts to a confession. Whether this was done innocently or by design to gain the attention which she craved is unclear from the record. What is clear is that considering all of the circumstances, neither Stoeckley nor her "confessions" are reliable. Thus, although the inconsistencies in Stoeckley's confessions and contradictions of the statements by the

> facts of other witnesses would be more than enough to lead the court to conclude that the confessions are untrue, Stoeckley's unreliability adds even greater force to this conclusion.
> Id. at 324.

6. The Court of Appeals Affirms The Denial of the Motion For A New Trial

MacDonald appealed the denial of his motion for a new trial, based upon the post-trial confessions of Helena Stoeckley, and the court of appeals affirmed Judge Dupree's ruling. *United States v. MacDonald*, 799 F.2d 962 (4th Cir. 1985). Writing for a unanimous court Senior Circuit Judge Haynsworth opinion provides in pertinent part:

> If these hearsay statements had been before the jury, it is most unlikely that the jury would have given them any credence. The circumstantial evidence made a strong case against MacDonald and demonstrated that his story was a fabrication entirely or in substantial part. Nevertheless, when his story first came out, Helena Stoeckley had no reason to doubt his truthfulness. It is clear that she thought his description of the blonde woman with the floppy hat and brown boots fit her, and a pitiable person whose memory had been completely blocked by drugs is bound to be highly suggestible. Since she could not remember where she had been or what she had been doing, MacDonald's description of the blonde woman necessarily would have caused her to wonder whether she had been in the MacDonald residence and to fantasize participation in a crime as horrible as it was senseless . . .. Id. at 964-965.

Noting the care with which Judge Dupree had considered every contention that MacDonald advanced, Judge Haynsworth wrote:

> The care with which it was done is evident, and we may conclude this much briefer opinion with the statement that there is no basis upon which any ruling in this case by a meticulous district judge can be overturned. Id. 966.

ARGUMENT

1. MacDonald's Motion To Supplement Is Effectively A Successive Collateral Review Application Under 28 U.S.C. § 2255

MacDonald, through his retained counsel, claims that the affidavit of Mrs. Stoeckley contains "a further profound addition to the body of proof of Jeffrey MacDonald's actual innocence, a body of proof that has become overwhelming." Mot. at 4. In light of this contention, the Motion To Supplement should be treated as a successive collateral review application under 28 U.S.C. § 2255. As the court of appeals has instructed in *United States V. Winestock*, 340 F.3d 200, 203 (4th Cir. 2003):

> . . . the question of how to treat such motions . . . is important because, review of successive applications is available only in limited circumstances. In order for these limitations to be effective, courts must not allow prisoners to circumvent them by attaching labels other than "successive application" to their pleadings. See *Calderon v. Thompson,* 523 U.S. 538, 553, 118 S.Ct. 1489, 140 Ed.2d 728 (1998).

As MacDonald has filed a motion which is effectively a motion for relief under 28 U.S.C. § 2255, and as the extensive procedural history set forth herein demonstrates that this is at least his fourth such motion, he must comply with the requirements of 28 U.S.C. § 2255. This he has failed to do.

2. The Antiterrorism And Effective Death Penalty Act of 1996 Established A Strict 1-Year Limitation Period On § 2255 Motions

In enacting the Antiterrorism And Effective Death Penalty Act (AEDPA), Congress established a "1-year period of limitation" governing motions for collateral relief under Section 2255. The one year period runs from the latest of four specified events, of which only one is applicable to this case:

* * * *

> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. See 28 U.S.C. § 2255 ¶6(4).

The legislative history reflects that the purpose of this, and other provisions of Title I, was to ". . . incorporate reforms to curb the abuse of the writ of habeas corpus, and to address the acute problem of unnecessary delay and abuse in capital cases.[16] "

In the Supreme Court's recent decision in *Mayle v. Felix*, 545 U.S. 644, 125 S.Ct. 2562 (2005) Justice Ginsberg wrote for the Court:

> In enacting AEDPA in 1996, Congress imposed for the first time a fixed time limit for collateral attacks in federal court on a judgment of conviction. Section 2244(d) (1) provides: 'A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.' See also § 2255, ¶6 (providing one- year limitation period in which to file a motion to vacate a federal conviction). FN3 (Emphasis supplied)
>
> FN 3 Section 2255 establishes a separate avenue for post-conviction challenges to federal, as opposed to state, convictions.
>
> Id. 2569.

The plain language of § 2255 ¶6 indicates that the one year limitation period applies, without exception, to any motion filed in the district court under 28 U.S.C. § 2255.

Prisoners whose convictions became final before the AEDPA took effect on April 24, 1996 had a one-year grace period from AEDPA's effective date- until April 24, 1997– in which to file a

[16]See H.R. Conf. Rep 104-518, at 111, 1996 U.S.C.A.N. 944.

Motion under Section 2255 to "vacate, set aside or correct the sentence.[17] MacDonald filed the instant motion more than 24 years after his conviction became final, almost 11 years after the effective date of AEDPA, and more than two years after Jimmy Britt allegedly first came forward.

MacDonald has offered no explanation for his failure to exercise due diligence by interviewing Mrs. Stoeckley during the 28 year interval between the trial and March 2007.

On August 6, 1979, Defense Attorney Bernard Segal subpoenaed Mrs. Stoeckley to appear at the trial in Raleigh.[18] As the record reflects, Segal sought to locate Helena Stoeckley by interviewing her parents.[19] That Mrs. Stoeckley, at the time, clearly did not credit her daughter's statements was recorded by author Joe McGinnis who was present during the interview.[20] Mrs. Stoeckley's prior views about the unreliability of her daughter's statements do not excuse, however, the defense's failure to determine if Helena Stoeckley had made any post-trial admissions to her mother. In particular, during the period 1980-82 when Helena Stoeckley was at her most cooperative with MacDonald's investigators, due diligence mandated that her parents be re- interviewed .[21]

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[17]See *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2003) (*en banc*), cert.denied 541 U.S. 905, 124 S.Ct. 1605, 158 L.Ed. 2d 248. (2004)"For prisoners like Rouse, whose convictions became final before the AEDPA was enacted, the one- year period limitations period began to run on AEDPA's effective date, and, thus they had until April 24, 1997, absent tolling, to file their federal habeas petitions." citing *Hernandez v. Caldwell*, 225 F.3d 435, 438-39 (4th Cir. 2000).

[18]See Docket Entry 8/7/79, "Marshals return on Subpoena to testify-executed on Mrs. Clarence Stoeckley".

[19] Tr. 4847-48 .

[20] "She's not at all like she used to be. She's a physical and mental wreck. She's not even a human being anymore. You find her now, sure she'll talk. She'll always talk. But I'm telling you, she's gonna talk all kinds of nonsense." See Fatal Vision at pp 517-518.

[21]Judge Dupree noted that when the Army CID began to reinvestigate Stoeckley in December, 1970 it assigned CID Agent Richard J. Mahon. Further, "Mahon also spoke with

Given Stoeckley's known propensity to flip-flop back and forth, a logical avenue for the defense to explore would have been to determine if Stoeckley had also made post-trial statements to her parents to the same effect as those made to Gunderson and Beasley.

Following Stoeckley's death in 1983, and in the ensuing years when § 2255 motions were being filed, would have been an equally logical time to re-interview Mrs. Stoeckley. After the allegations of Jimmy Britt, in which he contends AUSA Jim Blackburn threatened Helena Stoeckley to keep her from testifying, the exercise of due diligence particularly mandated that Mrs. Stoeckley be re-interviewed. However, the defense took no steps to re-interview Mrs. Stoeckley until March 31, 2007, more than two years after Britt allegedly came forward.[22] No evidence has been offered to demonstrate that Mrs. Stoeckley was at anytime unwilling to disclose her daughter's post -trial statements to the defense. In fact, the defense's representation is to the contrary. As they that state, when contacted by Kathryn MacDonald, Mrs. Stoeckley readily agreed to provide an affidavit. Mot. at ¶ 9.

No external force or governmental action prevented MacDonald from seeking to develop this evidence such as might justify application of the doctrine of equitable tolling. See *Rouse v. Lee*, *supra,* at n.17.

Stoeckley's parents on April 7, 1971, concerning the crimes. Her parents said that their daughter had laughed and joked about an August 1970, newspaper article suggesting that she might be connected to the crimes, but that as time went along and she thought more about it she began to have doubts about whether or not she might have been involved. They also noted that she needed constant praise and attention." 640 F. Supp. at 316.

[22]We assume here for the sake of argument that Britt first contacted the MacDonald defense in January 2005, as his affidavit states. As Britt's affidavit is the sole basis for the conclusion that the §2255 motion was timely filed, we do not concede this assertion to be true, and reserve any challenge pursuant to § 2255 ¶6 which may become apparent in the event this Court orders an evidentiary hearing.

For the reasons stated above, MacDonald's Motion To Supplement should be denied as untimely under 28 U.S.C. § 2255 ¶6.

3. MacDonald's Motion To Supplement Does Not Relate Back To A Timely Filed Motion Under 28 U.S.C.§ 2255

In effect, MacDonald is seeking to amend his pending § 2255 motion, which he is not permitted to do absent a PFA from the court of appeals, or by demonstrating that the amendment falls within the narrow relation-back exception as delineated in *Mayle v. Felix*, 125 S.Ct. 2562, 2569 (2005). MacDonald can not meet this standard because he seeks to introduce statements, that while somewhat similar in content as those allegedly made to Britt pre-trial, they allegedly occurred in two different post-trial episodes years apart from each other, and the trial.

In *Mayle v. Felix*, *supra*, a state prisoner sought federal relief based on two alleged trial errors, both involving the admission of out-of court statements during the prosecutor's case in chief, but otherwise unrelated. Id. Felix's conviction became final on August 12, 1997, and therefore under AEDPA he had until August 12, 1998, to file a habeas petition in federal court.

On May 8, 1998, in a timely filed habeas *pro se* petition Felix challenged the admission of video taped testimony of a prosecution witness as a violation of his Sixth Amendment Confrontation rights. On January 28, 1999, over five months after the August 12, 1998 expiration of the AEDPA time limit, and eight months after the court appointed counsel to represent him, Felix filed an amended petition asserting a Fifth Amendment objection to the admission of his pretrial statements. The State asserted that his Fifth Amendment claim was time barred. Felix asserted the rule that pleading amendments relate back to the filing date of the original pleading when both the original plea and the amendment arise out of the "same conduct, transaction, or occurrence set forth in the

original pleading." Fed. Rule Civ. Proc 15(c)(2).

The Supreme Court overturned the Ninth Circuit's ruling which would allow relation back of a claim first asserted in an amended petition, so long as the new claim stems from the habeas petitioner's trial, conviction or sentence. Justice Ginsberg, for the Court, wrote:

> Under that comprehensive definition, virtually any new claim introduced in an amended petition will relate back, for federal habeas claims, by their very nature, challenge the constitutionality of a conviction or sentence, and commonly attack proceedings anterior thereto. See *Espinoza-Saenz,* 235 F.3d, at 505 (A "majority of amendments" to habeas petitions raise issues falling under the broad umbrella of a defendants trial and sentencing." *United States v. Hicks*, 283 F.3d 380, 388.
> Id. 2570.

Justice Ginsberg continued:

> The Majority of Circuits, mindful of "Congress' decision to expedite collateral attacks by placing stringent time restrictions on [them], id., at 388, defined "conduct, transaction, or occurrence" in federal habeas cases less broadly. [Citation omitted] They allow relation back only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when new claims depend on events separate in "both time and type" from the originally raised episodes. *Craycraft*, 167 F.3d at 457. Because Felix's own pretrial statements newly raised in his amended petition, were separated in time and type from witness Williams's videotaped statements, raised in Felix's original petition, the former would not relate back under the definition of "conduct, transaction, or occurrence" to which most Circuits adhere.
> Id. at 2571.

Justice Ginsberg noted Habeas Corpus Rule 2 (C) instructs petitioners to "specify all [available] grounds for relief" and to state the facts supporting each ground." In contrast *Felix*'s approach would involve:

> A miscellany of claims for relief could be raised later rather than sooner and relate back, for "conduct, transaction, or occurrence"

would be defined to encompass any pre-trial, trial, or post-trial error that could provide a basis for challenging the conviction. An approach of that breadth, as the Fourth Circuit observed, "views 'occurrence' at too high a level of generality." *Pittman,* 209 F.3d at 318. FN6

FN 6 "The dissent would read Rule 15 (c) (2)'s words "conduct, transaction, or occurrence," into AEDPA's provisions governing second or successive petitions and motions 28 U.S.C. §§ 2244(b) and 2255, ¶8), although Congress did not put those words in there. Nor is there any other reason to believe that Congress designed AEDPA's confinement of successive petitions and motions with a view to the relation back concept employed in Rule 15(c)(2).

Congress enacted AEDPA to advance the finality of criminal convictions. See *Rhines v. Weber,* 544 U.S. 269, 125 S.Ct. 1528*,* 1534, 161 L.Ed. 2d 440 (2005). To that end, it adopted a tight time line, a one-year limitation period ordinarily running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U.S.C. § 2244(d)(1(A). If claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance. 379 F.3d at 619 (Tallman, J. concurring in part and dissenting in part) (Ninth Circuit's Rule would permit" the relation back doctrine to swallow AEDPA's statute of limitation"); *Pittman*, 209 F.3d, at 318 ("If we were to craft such a rule, it would mean that amendments . . . would invariably be allowed even after the statute of limitations had expired, because most [habeas] claims arise from a criminal defendant's underlying conviction and sentence."); *Duffus,* 174 F.3d at 338 ("A prisoner should not be able to assert a claim otherwise barred by the statute of limitations merely because he asserted a separate claim within the limitations period.") The very purpose or Rule 15(c) (2) , as the dissent notes, is to "qualify a statute of limitations." *Post*, at 2567. But "qualify" does not mean repeal. See *Fuller v. Marx,* 724 f.2d 717, 720 (8th Cir. 1984). Given AEDPA "finality" and "federalism " concerns . . . it would be anomalous to allow relation back under Rule 15(c)(2) based upon a broader reading of the words "conduct, transaction, or occurrence" in federal habeas proceedings than in ordinary civil litigation, *see supra*, at

2570-2572. Id. 2573-2574.

* * *

> So long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order. FN 7
>
> FN7 *Manacina v. United States*, 328 F.3d 995, 1000-1001 (8th Cir. 2003) *Woodward v. Williams*,263 f.3d 1135, 1142 (10th Cir. 2001), also 3 J. Moore, et al Moore's Federal Practice §15.19 [2], p. 15-83 (3rd. Ed 2004) (relation back ordinarily allowed "when the new claim is based on the same facts as the original pleading and only changes the legal theory").

Here MacDonald is relying on different facts than those in the original pleading, and has advanced no new legal theory. Consequently, he should not be permitted, after the 1- year period of limitation has expired to amend his pending §2255 motion, because he has not established that it relates back to a timely filed § 2255 motion. The interests of judicial economy and finality which inform the rule laid down in *Mayle v. Felix*, *supra,* apply with particular force to this case. There are, undoubtedly, numerous Stoeckley auditors who have yet to come forward, and who could attest to "confessions" similar in content to those rejected by Judge Dupree and the Fourth Circuit.

4. Because MacDonald Has Failed to Obtain Certification From the Court of Appeals This Court Is Without Jurisdiction to Grant His Motion to Supplement

The AEDPA further amended 28 U.S.C. § 2255 by the addition of ¶ 8, which provides in pertinent part that:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain–

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the defendant guilty of the offense;

That statements virtually identical in content to those in Mrs. Stoeckely's affidavit were raised in a prior motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, rather than in a prior § 2255 motion, saves MacDonald from § 2255 ¶8's certification requirement for successive motions. This is not the case, however, with respect to the requirement of certification of "second" motions seeking relief under § 2255. As the procedural history, *supra*, at pp.3-5 demonstrates, MacDonald filed two motions for § 2255 relief in 1984, another in 1990, another in 1997, and yet another in 2005-6. In no sense can the instant motion be considered a first application for relief under § 2255.

Absent prior certification by the court of appeals, 28 U.S.C. § 2255 ¶8 strips away jurisdiction from the district court to vacate, set aside or correct the sentence which it imposed in cases involving a second or successive application.[23]

As, once again, MacDonald has deliberately failed to obtain a pre-filing certification from the court of appeals, this Court is without jurisdiction to grant his motion. Accordingly, the Motion To Supplement should be denied for lack of jurisdiction.

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[23] 28 U.S.C. § 2244(b)(3)(A) states: " Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the motion." *See also Pratt v. United States* 129 F.3d 54. 57 (1st Cir. 1997) ("AEDPA's prior approval provision allocates subject-matter jurisdiction to the court of appeals by stripping the district court of jurisdiction over a second or successive habeas petition unless and until the court of appeals has decreed that it may go forward."), cert denied 523 U.S. 1123. *See also Pease v. Klinger*, 115 F.3rd 763. 764 (10th Cir. 1997)(per curiam); *Nunez v. United States* , 96 F.3d 990, 991 (7th Cir. 1996).

5. The Record Conclusively Forecloses Consideration of MacDonald's Newly Discovered Evidence As Grounds For Relief Under 28 U.S.C. § 2255

As we have demonstrated *supra*, at pp. 13-16, post trial "confessions" of Helena Stoeckley containing statements virtually identical in content to those now attributed to her by Mrs. Stoeckley were the basis for MacDonald's 1984 Motion For New Trial. Judge Dupree found both Stoeckley and her confessions unreliable and untrustworthy, and denied MacDonald a new trial. 640 F. Supp. 286. The court of appeals affirmed that decision on the merits . See *United States v. MacDonald*, 779 F.2d. 962 (4th Cir. 1985). These decisions, which applied the lesser standard applicable for motions for a new trial ("that the newly discovered evidence [be] of such a nature that a new trial would probably produce a different result") (640 F.Supp, at 333), establish the law of this case, and conclusively forecloses that virtually identical statements "would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense . . .." See 28 U.S.C. § 2255 ¶8.

6. The Affidavit Is Not In Proper Form And The Circumstances of Its Execution Lack Indicia of Trustworthiness

The newly discovered evidence consists exclusively of post-trial "confessions" of Helena Stoeckley to her mother ("Mrs. Stoeckley") prior to Helena Stoeckley's death in January 1983. These statements are contained in a three-page document, purportedly the affidavit of Mrs. Helena Stoeckley, who is 86 years old, legally blind and a resident of a nursing home. See Mot. ¶¶ 5, 12. The affidavit was produced by defendant's current wife, Kathryn MacDonald, who manages the MacDonald Website, following a contact with the website by Mrs. Stoeckley's son Eugene ("Gene") Stoeckley. See Mot. ¶¶ 1-11.

Mrs. Stoeckley's signature appears on "Page 1" of a document captioned "Untitled", which is otherwise totally devoid of any text from the 15 numbered paragraphs of the "affidavit" contained in the first two unnumbered pages. Each unnumbered page consists of self-contained paragraphs which do not carry over text from the first to the second page. The first two unnumbered pages have not been signed or initialed by anyone. The second page, containing paragraphs 11-15, ends in the middle of the page. Although 5 ½ inches of space remain between the last line of ¶15 and the bottom of the page, which is more than sufficient space for the signatures of the affiant, the notary and the witnesses, no such signatures appear on this page. See Affidavit appended to Motion to Supplement. The signature page does not in any way incorporate the preceding pages. There is no way of discerning whether the signature page ("Page 1") comes after a one page affidavit or a hundred page affidavit. The sole basis to support the inference that Mrs. Stoeckley was in fact swearing to the averments in the 15 numbered paragraphs, is an unsworn statement in ¶12 of the Motion.[24] The Government does not dispute that Gene Stoeckley read to his mother some form of document typed by Kathryn MacDonald. As Gene Stoeckley was not provided a copy of that document contemporaneously, we have no proof that, except for the signature page, the affidavit read and the affidavit filed are one and the same. When these circumstances are added to her disavowal to the FBI that her daughter ever said she was afraid of the prosecutor, and Mrs. Stoeckley's evident cognitive and visual limitations, the reliability of this affidavit becomes questionable. That three individuals (although not Kathryn MacDonald) witnessed Mrs. Stoeckely, with some apparent difficulty, sign a

[24]"Gene Stoeckley reviewed the affidavit with his mother (who is legally blind) for accuracy by reading it to her. She requested a few changes be made to the original draft and those changes were made. She then, in front of Gene Stoeckley, Kathryn MacDonald, Laura Redd, Hart Miles, and a nurse technician Grady Peterson, signed the Affidavit."

blank piece of paper is utterly meaningless under these circumstances. In view of the irregular circumstances under which this affidavit was procured, the admitted incapacity of the affiant to read what she was signing, her cognitive limitations, and the absence of supporting affidavits attesting that the affidavit as read to Mrs Stoeckley is the same document, without additions deletions or alterations, that was filed with this Court, the Government objects to the form of the affidavit, and moves to strike it. Alternatively, it is respectfully requested that the Court not consider the affidavit in its present form as part of the evaluation of the evidence as a whole, or for any other purpose.

7. MacDonald Applies An Incorrect Standard To Consideration Of The Evidence As A Whole

Although he cites no authority, MacDonald urges the Court to accept the proposition that the newly discovered evidence (Britt's allegations) "viewed in light of the evidence as a whole" involves a holistic consideration of other allegedly newly discovered evidence in the form of Mrs. Stoeckley's affidavit, without the requirement that Mrs. Stoeckley Affidavit first be certified by the court of appeals pursuant to § 2255 ¶8. In effect, he is seeking to apply the holistic *gateway* standard applicable to procedurally defaulted claims in first habeas applications brought by state prisoners, while circumventing the statutory *gatekeeping* standard applicable to second or successive motions brought by Federal prisoners under 28 U.S.C.§ 2255 ¶ 8.

Although both involve claims of actual innocence, the holistic gateway standard applicable to procedurally defaulted state claims is governed by the *Carrier/ Schlup/House* line of decisions of

the Supreme Court[25]; the gatekeeping standard applicable here, is governed by the statutory standard enacted as part of AEDPA, which codified the clear and convincing evidence test of *Sawyer v. Whitley* 505 U.S. 333, 112 S.Ct. 2514(1992).

In *Schlup, supra*, which was decided before the passage of AEDPA, the Supreme Court held that, in assessing the adequacy of a state habeas petitioner's showing with respect to the second gatekeeping requirement–that of "actual innocence,"–the reviewing tribunal's consideration of the evidence should include "relevant evidence that was either excluded or unavailable at trial," such as "evidence tenably claimed to have . . . become available only after trial." 513 U.S. at 327. Thus, under *Schlup*, this Court's assessment of whether the impact of MacDonald's "newly-discovered" evidence is so significant that no reasonable juror would have voted to convict, could properly include favorable evidence elicited at trial (See "Statement of Itemized Material Evidence"¶¶ 1-30), Stoeckley's excluded pretrial admissions to others suggesting that she participated in the murders of the MacDonald family (id. ¶. 31), as well as the "newly-discovered" evidence relating to her alleged admissions to Deputy Marshal Jim Britt (id. ¶ 32).

Nothing in *Schlup*, however, suggests that a Federal prisoner once he has passed through the gatekeeping process with newly discovered evidence pertaining to one specific episode, thereby acquires an exemption from pre-certification by the court of appeals for any other newly discovered relating to any other episode. Stated another way, for purposes of post-certification litigation before the district court under § 2255 ¶8, the evidence as a whole is limited to: the record of trial, the record of evidence claimed to be improperly excluded, the record of prior collateral review proceedings, and

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[25]*See Murray v. Carrier*, 477 U.S. 478(1986); *Schlup v. Delo*, 513 U.S. 298 (1995); *House v. Bell* 126 S.Ct. 2064 (2006).

the specific evidence which is claimed to be newly discovered which the court of appeals has certified pursuant to 28 U.S.C. § 2244. This formulation does not imply that the movant is thereby authorized to re-litigate contested trial issues resolved against him by the jury's verdict, or in prior collateral review proceedings, unless the newly discovered evidence calls that particular evidence into question. Absent some nexus between the newly discovered evidence and the trial evidence, which calls the trial evidence into question, "[w]hen confronted with a challenge based on trial evidence, courts presume the jury resolved evidentiary disputes reasonably so long as sufficient evidence supports the verdict." See *House v. Bell*, *supra*, at 2078. Consequently, MacDonald's attempt in his Reply at pages 1-9, to re-litigate the sufficiency of the physical evidence, unrelated to Stoeckley, which established his guilt beyond a reasonable doubt, is foreclosed to him unless he can establish that essential nexus which calls into question the specific physical evidence used to convict him.

Should the court determine that an evidentiary hearing is appropriate, the scope of that hearing is determined not by the movant's desire to re-try his case more than 37 years after the murders, but rather by the extent to which the certified newly discovered evidence calls into question prior evidence in the record of trial. To put this in less abstract terms, Jim Britt's affidavit no more entitles MacDonald to re-litigate the 1984, 1990, 1997 § 2255 decisions than it does the jury's determination that MacDonald stabbed his wife Colette through his own pajama top, after he placed it on her body.

Obviously, the considerations of comity and federalism, as noted in *House v. Bell*, *supra*, which inform decisions involving first Federal habeas review by the district court of procedurally defaulted state claims of Constitutional violations, when also linked to claims of actual innocence, have no applicability to a Federal prisoner who has already brought at least four collateral attacks on his conviction, and is seeking to circumvent, once again, the requirements of § 2255 ¶8.

For this Court to consider the affidavit of Mrs. Stoeckley as newly discovered evidence and view it "in light of the evidence as a whole," there are four prerequisites which MacDonald must first meet. First, he must make a *prima facie* showing in an application pursuant to 28 U.S.C. § 2244 to a panel of the Fourth Circuit. Second, the panel must authorize the filing in the district court, and certify the newly discovered Stoeckley evidence to be, if proven, and viewed in light of the evidence as a whole, sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty. Third, the credibility and reliability of Britt's evidence must be established by clear and convincing evidence, or at least subject to cross-examination in this Court, in order to meet the "if proven" requirement of 28 U.S.C. § 2255 ¶8 (2), before Mrs. Stoeckley's affidavit is offered to corroborate Britt's allegation of the alleged threat by Blackburn.[26] Fourth, the purported affidavit of Mrs. Stoeckley must be proven to actually contain only her sworn statements, and not those of MacDonald's wife who orchestrated its production. Only after these prerequisites have been met, may the Court consider so much of Mrs. Stoeckley's affidavit as relates to the statements actually made by her daughter as part of the evidence as a whole. For the purpose of this argument, the Government assumes that what Mrs. Stoeckley can actually attest, is that what her daughter said on these two occasions, she (Mrs. Stoeckley) believed to be the truth. However, the clear and convincing evidence test is not satisfied by what Mrs. Stoeckley believed to be the truth.

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[26] The sole nexus offered between Stoeckley's alleged statements to her mother ("She told me she was afraid to tell the truth because she was afraid of the prosecutor." (Aff. ¶11)), and Britt's affidavit is the attempt to equate Stoeckley's unexplained fear of the prosecutor with Britt's specific allegation that Blackburn threatened Stoeckley with prosecution if she repeated her confession on the witness stand. Someone as mentally troubled as Stoeckley, and under the traumatic circumstances of having been arrested, jailed and compelled to testify in Raleigh, could well have expressed lack of affinity for the prosecutor. This would certainly be consistent with her statement to Wendy Rouder during the trial.

Nor, as Judge Dupree wrote, *supra*, even by what Helena Stoeckley believed to be the truth, but rather by the objective facts. To put this another way, if Helena had told her mother that she saw Allen Mazerolle stab Colette MacDonald in the house on the night of February 17, 1970, and both mother and daughter truly believed this to be true, both the underlying statement, and the declarant are untrustworthy, because independent evidence proves Mazerolle was in jail that night.

CONCLUSION

As the court of appeals has previously observed, "[e]very habeas appeal MacDonald brings consumes untold government and judicial resources." MacDonald, 966 F.2d at 861. The instant motion, which resuscitates claims that have been essentially rejected by this Court and the court of appeals on prior occasions, constitutes yet another abuse of the writ through the presentation of "specious evidence." Id. It therefore merits the same disposition. In addition, this motion marks the fourth occasion since 1997 in which MacDonald has sought to circumvent the PFA requirements of § 2255 ¶8.[27] Therefore, for the reasons we previously stated in the Government's Responses to

[27]Three such attempts have occurred after the court of appeals authorized the filing of the underlying § 2255 motion. The first attempt was the Motion To Add An Additional Predicate to His Previously Filed Motion Under 28 U.S.C. Section 2255 , based on the results of DNA testing filed March 22, 2006, the second attempt was the Motion To Expand The Record filed March 23, 2006.

MacDonald's Motion To Expand The Record, and his Motion To Add An Additional Predicate To His Previously Filed Motion Under 28 U.S.C. Section 2255 To Vacate His Conviction–Namely Newly Discovered DNA Evidence, these motions should also be denied.

Respectfully submitted this 7th day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the defendant in this action either electronically or by placing a copy of same in the United States mail, postage prepaid, and addressed to counsel for defendant as follows:

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This, the 7th day of May, 2007.

By: /s/ Brian M. Murtagh
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