UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 75-CR-26-3
No. 5:06-CV-24-F

JEFFREY R. MacDONALD,	)	
	)	
Petitioner,	)	**GOVERNMENT'S RESPONSE TO MOTION FOR CERTIFICATE OF APPEALABILITY AND MEMORANDUM OF LAW**
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby responds to above-captioned Petitioner's "Motion for Certificate of Appealability & Memorandum of Law," filed December 4, 2008, and, in opposition thereto, shows unto the Court the following:

SUMMARY OF ARGUMENT

To appeal from a final order in his 28 U.S.C. § 2255 motion, Petitioner must obtain from this Court or the Fourth Circuit a certificate of appealability ("COA"). To obtain a COA, Petitioner must make a substantial showing of the denial of a constitutional right. When, however, the district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable *whether the petition states a valid claim of the denial of a constitutional right* and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Of the five rulings by this Court for which MacDonald seeks a COA, only one, the denial on the merits of

his Motion To Vacate Sentence under 28 U.S.C. § 2255 [DE-111], *infra*, involved an underlying constitutional claim. The other four[1] rulings either involved free standing claims of actual innocence unrelated to any alleged constitutional claim, and/or the right to expand the record under Rule 7, of the Rules Governing Section 2255 Proceedings; all were denied on procedural grounds.[2] Applying the COA principles made applicable to denials on procedural grounds set forth in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), the Government submits that jurists of reason would not find it debatable that any of the four underlying claims failed to state a claim, much less a valid claim, of the denial of a constitutional right.[3] Rather, each of the claims were denied, or in the case of the Government's Motion to Strike, allowed, because of the presence of one or more plain procedural bars.[4] Of these four ruling, only two involved a final order[5]. The other two rulings involved the denial of the Motion to Add An Additional Predicate Based On DNA Test Results [DE-122], and the denial of the Motion To Supplement Itemized Evidence [DE-144], based on alleged additional confessions of Helena Stoeckley to her mother. These rulings did not constitute a final order within

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[1]The denial of: MacDonald's Motion To Add DNA Predicate [DE-122]; Motion To Expand With Itemized Evidence [DE-124]; Motion to Supplement Itemized Evidence[DE-144]; and the granting of the Government's Motion To Strike Exhibits [DE-129].

[2]As we demonstrate, *infra*, free standing claims of actual innocence, are not in and of themselves, constitutional claims.

[3]"Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted." Id.

[4]Because MacDonald's motions failed to state a constitutional claim, MacDonald fails to meet the threshold for a COA under 28 U.S.C. § 2253(c).

[5]The granting of the Government's Motion To Strike Exhibits [DE 129], and the Motion To Expand With Itemized Evidence [DE-144].

the meaning of 28 U.S.C.§2253, as this Court's order expressly stated.[6] Consequently the denial of MacDonald's Fifth and Seventh Motions are not subject to review under 28 U.S.C. § 2253(c). Even if underlying constitutional deprivation claims had been present, and even if all of the four rulings are deemed final orders, under the facts of this case, no COA is warranted. See *Slack*, *supra*, at 485, quoting *Ashwander v. TVA,* 297 U.S. 288, 347 (1936). The cases cited by MacDonald as authority for the proposition that the court is required to consider as part of "the evidence as a whole" (1) claims ("predicates") which have not received a PFA, or (2) if PFA has been received, claims--or former claims--still offered as part of the evidence as a whole, but which, in any event, do not meet the requirements of 28 U.S.C. § 2244(b)(4), are not applicable to the facts of this case.

A COA should not issue for the denial of MacDonald's constitutional claims in relation to the Motion To Vacate [DE-111] because he cannot demonstrate that jurists of reason would find it debatable that Helen Stoeckley was an inherently unreliable witness, or this Court's assessment, in light of that inherent unreliability, that the essential element of Government causation of a constitutional violation was lacking.

INTRODUCTION

1. Applicant ("MacDonald") has sought a COA from this Court pursuant to 28 U.S.C. § 2253(c), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996("AEDPA"), seeking review by the United States Court of Appeals For the Fourth Circuit ("the Fourth Circuit") of this Court's November 4, 2008, Order ("the Order") denying MacDonald's four pending motions for relief under 28 U.S.C. § 2255, and granting the Government's Motion To Strike Exhibits. As

[6]"MacDonald is free to seek authorization from the Fourth Circuit Court of Appeals to raise these grounds in yet another successive § 2255 motion." Order at 20.

each of the four motions in question [Docket Entries ("DE") 111,122, and 124] has its own procedural history, and may, or may not, implicate different provisions of 28 U.S.C. §§ 2244, 2253, and 2255, respectively, as well as the case law relied upon by MacDonald, we treat each separately for analytical purposes. For the sake of consistency, we have followed this Court's sequential numerical designation of MacDonald's post-conviction motions identified by Docket Entry number, but have added an abbreviated descriptive term.[7] As we demonstrate, *infra*, some of the governing legal principles which we set forth next apply only to one of MacDonald's motions, while others have application to more than one motion. We do not address MacDonald's motions in sequential order from Four to Seven. Rather, after setting forth the governing legal principles, we begin with the procedural history which resulted in the Government moving to strike the three affidavits appended to MacDonald's Fourth Motion to Vacate pursuant to 28 U.S.C. § 2255 (DE-111), offered to support his claim that Greg Mitchell's confessions exculpate him, and the Courts granting of the motion to strike (DE-129). After addressing MacDonald's Fifth [DE-122](DNA), Sixth [DE-124] (Rule 7), and Seventh [DE-144] (Stoeckley Supplement) post-conviction motions, we address the remaining issues related to the Britt allegations in MacDonald's Fourth Motion to Vacate [DE-111].

Governing Legal Principles Generally Applicable To A COA

2. "Unless a circuit justice or judge issues a certificate of appealability ["COA"], an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255." 28 U.S.C. § 2253(c)(1)(B). In addition, § 2253(c)(2) provides that:

> A certificate of appealability may issue under paragraph (1) only if the applicant has made a *substantial showing of the denial of a*

[7]For example: "DE- 122," MacDonald's "Fifth Motion" may also be referred to as his "Motion To Add DNA Predicate," or even "the DNA motion."

constitutional right.

(Emphasis added).

3. Fed. R. App. P. 22(b) provides, in pertinent part:

> [I]n a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge must either issue a certificate of appealability or state why a certificate should not issue . . . If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

4. "A prisoner who seeks to appeal the final order in a proceeding under section 2255 . . . must obtain a COA as a jurisdictional prerequisite to appeal." *United States v. Hadden*, 475 F.3d 652, 659 (4th Cir. 2007), citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). A COA "may issue . . . only if the applicant 'has made a substantial showing of the denial of a constitutional right' and must specify the issue or issues as to which the COA has been granted." *Reid v. True*, 349 U.S. 788, 795 (4th Cir.), *cert. denied*, 540 U.S. 1097 (2003), citing 28 U.S.C. § 2253(c)(2) and (3). If the petitioner shows that he made a constitutional claim that was rejected on the merits, he must further show that "reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In *Slack v. McDaniel*, *supra*, the Supreme Court provided guidance to courts faced with motions for COA's under 28 U.S.C. § 2253:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Id. at 484. The Court in *Slack* went on to hold that:

> When the district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, a COA should issue when the prisoner

> shows, at least, that jurists of reason would find it debatable *whether the petition states a valid claim of the denial of a constitutional right* and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress's requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard in *Barefoot, supra,* at 893, and n.4, 103 S.Ct. 3383, and adopted by Congress in AEDPA. *Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.*

Id. (emphasis added). In *Slack, supra,* The Court also explained that

> Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claim and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain an appeal. Each component of the § 2253(c) is part of the threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments. The recognition that the "Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of, *Ashwander v. TVA*, 297 U.S. 288, 347 . . . (1936) . . . allows and encourages the court to first resolve procedural issues. The *Ashwander* rule should inform the court's ruling in this regard.

6. Section 2253(c)(2) restricts appellate review to constitutional claims, rather than claims based on another source of federal law, such as a statute, rule, or sentencing guideline. See, e.g., *Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir, 1997) (denying appeal from the denial of habeas petition claiming violation of rights under the Vienna Convention); *United States v. Gordon*, 172 F.3d 753, 754-55 (10th Cir. 1999)(denying request for COA with respect to claimed violation of Fed. R. Crim. P.32). In *Gordon*, *supra*, the Tenth Circuit held:

> Defendant urges us to read § 2253(c)(2) in tandem with § 2255 and hold that a COA may issue if a defendant makes a substantial showing of the denial of a *federal* right. We decline to read such language into the statute. We find no inconsistency between § 2255 and § 2253(c)(2). The two provisions address different steps in the judicial process. Congress, in enacting § 2253(c)(2), differentiated between the type of

> petition that can be filed and the type that can be appealed [citation omitted]. Petitions may be filed in district court alleging violations of the Constitution *or* federal law. The claims may only be appealed, however, if they involve the denial of *constitutional* rights.

Id. (Emphasis in original).

7. In pertinent part, 28 U.S.C. § 2255 provides that:

> (a) A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the Untied Sates . . . may move the court which imposed the sentence to vacate . . . the sentence.
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> * * * *
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> (f) 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 or claims* presented could have been discovered through the exercise of due diligence.
> >
> > * * * *
>
> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeal to contain–
>
> > (1) newly discovered evidence that, if proven, and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.

Id. (emphasis added).

8. The certification requirements applicable in the court of appeals at the PFA stage to successive applications for relief under 28 U.S.C. § 2244 provide in pertinent part that:

> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

As the Fourth Circuit has explained in *In re Williams*, 330 F.3d 277 (2003):

> By "prima facie showing" we understand . . . simply a sufficient showing to warrant a fuller exploration by the district court . . . If in light of the documents submitted with the [PFA motion] it appears reasonably likely that the [motion] satisfies the stringent requirements for filing of a second or successive petition, [the court of appeals] shall grant the motion.

Id. at 281, quoting *Bennet, 119 F.3d at 469.*

Consequently, as the *Bennet* court explained, the grant of a PFA is "tentative in the following sense: [as a preliminary gatekeeping step] the district court must dismiss the motion that the [court of appeals] has allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion." *Bennet* 119 F.3d at 470 citing 28 U.S.C. § 2244(b)(4). Accordingly, "[w]hen the [successive] application is thereafter filed in the district court, that court must examine each claim and dismiss those that are barred under § 2244(b) or § 2255 para. 8." *United States v. Winestock* , 340 F.3d 200, 205 (4th Cir. 2003), citing *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) (following grant of PFA, the district court is obligated to conduct its own gatekeeping review under § 2255 to determine whether the movant had satisfied its requirements). And, in contrast to the cursory gatekeeping review conducted by the court of appeals employing a "prima facie" standard, "under section 2244(b)(4), the district court must conduct a thorough review of all allegations and evidence presented by the prisoner to determine whether the motion meets the statutory requirements for the filing of a second or successive motion." *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000).

9. The relevant provisions of 28 U.S.C. § 2244 ("Finality of determination") applicable in the district court *after a PFA has been granted* begin with subsection § 2244(b)(4) which states:

> A district court shall dismiss *any claim presented* in a second or successive *application that the court of appeals has authorized to be filed unless the application shows that the claim satisfies the requirements of this section.* (Emphasis added)

The requirements of "this section," which the district court must find that the application satisfies, encompass all the requirements found in 28 U.S.C. § 2244, including the 1-year period of limitation on claims predicated on newly discovered evidence. See § 2244(d)(1). Section 2244(b)(1) also mandates that a claim presented in a second or successive habeas corpus application that was presented in a prior application shall be dismissed. In addition § 2244(b)(2) requires dismissal of claims presented in a second or successive application, that were not presented in a prior application unless:

> (B)(I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
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> (ii) 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 fact finder would found the applicant guilty of the offense.

Id. (Emphasis added).

Governing Principles Applicable To Free Standing Claims of Actual Innocence

10. In deciding whether to grant a motion to file a second or successive motion under § 2255, as amended by AEDPA, it is important to distinguish between the gatekeeping standard mandated by § 2255, and the *Schlup* gateway standard applicable to review of procedurally defaulted constitutional claims filed by state prisoners on death row. Although both involve claims of actual innocence, the "gateway" is governed by "the more likely than not" *Carrier/Schlup* standard ("a constitutional violation has probably resulted in the conviction of one who is actually innocent"), "gatekeeping" motions are determined by the subsequently enacted "clear and convincing evidence"

standard of §§ 2255 and 2244 codifying *Sawyer v. Whitley*. 505 U.S. 333 (1992). Accordingly, while *Schlup, supra,* continues to have applicability to first-time habeas petitions from state death row prisoners claiming actual innocence who seek federal review of procedurally defaulted constitutional claims, it is inapplicable to second or successive § 2255 motions from federal prisoners which only assert that the movant is actually innocent. See also *House v. Bell*, 547 U.S. 518, 126 S.Ct (2006).[8] One who has asserted no independent constitutional claim can not prevail under *Schlup*. One who relies on *Herrera v. Collins*, 506 U.S. 390, 442 (1992), is essentially making a free-standing claim of innocence in order to have the entire panoply of evidence reviewed, and thus re-litigate previously rejected sufficiency of evidence claims.

11. In *Herrera v. Collins*, 506 U.S. at 401, the petitioner claimed that he was actually innocent because others, now deceased, had committed the crime and advanced the constitutional claim that the execution of an innocent man would violate the Eight Amendment. Id. The Supreme Court rejected this proposition stating:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. Chief Justice Warren made this clear in *Townsend v. Sain*, 372 U.S. 317, 83 S.Ct. 759 . . . *the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.* This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution–not to correct errors of fact . . .

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[8] In *House, supra*, DNA testing proved that the semen on the victim's nightgown came from her husband, and not from House, and other testimony established that the Mrs. Muncey's blood on House's jeans was probably the result of contamination, which resulted from autopsy blood, some of which was spilled, being shipped to the laboratory in the same carton with the jeans. The semen and the blood had been the core of the State's forensic evidence linking House to the murder.

12. In *Schlup*, *supra,* the Supreme further distinguished free standing claims of actual innocence from *gateway* claims involving an allegation of deprivation of a constitutional right:

> Schlup's claim of innocence, on the other hand, is procedural, rather than substantive. His constitutional claims are based on his contention that the ineffectiveness of his counsel, see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984), and the withholding of evidence by the prosecution, see *Brady v. Maryland* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963), denied him the full panoply of protection afforded to criminal defendants by the Constitution.
>
> * * * *
>
> Schlup's claim thus differs in at least two important ways from that presented in *Herrera*. First Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland and Brady* claim. [Footnote omitted] Schlup's claim of innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. 404, 113 S.Ct. 862; see also 11F.3d 740. [Footnote omitted]

Id.

13. In *House v. Bell*, supra, which involved a first federal habeas petition from a state prisoner on death row, the Supreme Court, while granting House's federal petition for review of his procedurally defaulted constitutional claims, reaffirmed that the standard for relief of one asserting a free standing claim of actual innocence is extraordinarily high. "In addition to his gateway claim under *Schlup,* House argued that he had shown freestanding innocence, and that as a result his imprisonment and planned execution are unconstitutional." Id. at 554. The Supreme Court rejected this claim

> *In Herrera*, decided three years before *Schlu*p, the Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim". . . [citation omitted]. House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one.

Id. 554-555.

The Court in *House* declined to resolve this issue, stating:

> We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. To be sure House has cast considerable doubt on his guilt sufficient to satisfy *Schlup's* gateway standard for obtaining federal review despite a state procedural default. In *Herrera*, however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high."

506 U.S. at 417. Id.

The Court in *House* went on to hold that *Herrera* claims implicate a higher standard of proof than *Schlup*:

> The sequence of the Court's decisions in *Herrera* and *Schlup* – first leaving unresolved the status of freestanding claims and then establishing the gateway standard – implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup.* It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

One who can not obtain successive review of the trial evidence under either *Schlup* or *House,* must meet the gatekeeping requirements of 28 U.S.C § 2255 in order have the evidence as whole reviewed.

The Granting of the Government's Motion to Strike Exhibits

14. On December, 13, 2005, MacDonald filed with the Fourth Circuit a *Motion Under 28 U.S.C. Section 2244 For Order Authorizing District Court To Consider Successive Application For Relief Under 28 U.S.C. Section 2255* ("gatekeeping motion"). The gatekeeping motion had a number of Appendices. Appendix B was styled: *Memorandum In Support Of Jeffrey R. Macdonald's Motion Under 28 U.S.C.2255 to vacate Sentence (which petitioner seeks to file before the U.S. District court for the Eastern District of North Carolina,* and at pp. 26-27, contained the claim in relation to alleged confessions by the then deceased Greg Mitchell. Under the heading "Additional New

Evidence," the full text of the claim was:

> Additional new witnesses have come forward to whom Greg Mitchell confessed to murdering the MacDonald family, Attached as Exhibit 7 are the affidavits of Everett Morse, Bryant Lane, and Donald Buffkin. Morse swears that he was told by Greg Mitchell that Mitchell murdered the MacDonald family. Lane, in amplification of his earlier deposition, swears that he was told by Mitchell that Mitchell murdered the Macdonald family. And Buffkin swears that he was told by Mitchell that Mitchell murdered the MacDonald family. Mitchell died in 1982. Taken in conjunction with the Stoeckley confessions, the record now contains direct admissions made by two of the people identified as those most likely to have been the intruders that killed MacDonald's family. *Two of the four have confessed!* The statistical probability that each of these two somehow suffered independently from the same psychotic illusion -– that they murdered the MacDonald family -- is not believable. To argue such is patently ridiculous. They both confessed, independently, and long after their association had ended, because they both were involved. Moreover, these statements of Greg Mitchell were declarations against interest and would be admissible in any future trial.

See, Fed. R. Evid. 803, 804.

15. The Mitchell claim as set forth above in its entirety, contained no allegation of the denial of any constitutional right.[9] The Mitchell claim, and the Britt-Stoeckley claims, were the only claims made in MacDonald's application to the Fourth Circuit to file with the district court a successive Motion To Vacate Sentence Pursuant to 28 U.S.C. § 2255. Although the majority of the Memorandum In Support of the Motion was taken up by recounting the Britt allegations, there was nothing to alert the reader that the confessions allegedly made by Greg Mitchell to the three affiants were not being offered as a claim for relief.

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[9]In fact it makes no allegation of the denial of any right whatsoever. It merely posits that because Mitchell and Stoeckley both confessed to the crime MacDonald is factually innocent. As we discuss in greater detail *infra*, it is essentially a free standing claim of actual innocence under *Herrera v. Collins*, 506 U.S. 390 (1993). Assuming that these affidavits constitute newly discovered evidence within the meaning of Rule 33, Fed. R. Crim. P., they were made more than twenty years after the three-year post-verdict limitation on filing a motion for a new trial provided by Rule 33(b)(1).

16. MacDonald repeated the Mitchell claim verbatim at p. 29 of Appendix D.[10] All the three affidavits in question were attached as Exhibit 7, to Appendix "E" of the Form Motion Under 28 U.S.C. Section 2255 filed with the Fourth Circuit.

17. On January 12, 2006, the Fourth Circuit granted MacDonald's motion filed pursuant to 28 U.S.C. § 2244, stating: ". . . that the motion is granted insofar as MacDonald may file in the district court *the proposed 28 U.S.C. § 2255 motion now attached to his § 2244 motion."(emphasis added).*[11]

18. Having received a pre-filing authorization ("PFA") from the Fourth Circuit, on January 17, 2006, MacDonald filed with this Court the Form Motion Under 28 U.S.C.§ 2255 To Vacate Sentence [DE-111], docketed as Civil Action 5:06-CV-24-F). Accompanying the form § 2255 motion, and incorporated into it by reference was a *Memorandum In Support of Jeffrey R. MacDonald's Motion Under 28 U.S.C. Section 2255 To Vacate His Sentence* [DE-115] which repeated verbatim the Mitchell confession allegation at pp.26-27 and referenced the three affidavits as being attached as "Exhibit 7."[12]

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[10] *Brief In Support of Jeffrey R. MacDonald's Motion Under 28 U.S.C. Sections 2244 and 2255 For an Order Authorizing The District Court To Consider The Attached Successive Motion Pursuant to 28 U.S.C. Section 2255 to Vacate The Sentence of Jeffrey R. MacDonald Based on Newly Discovered Evidence*. ("CA 4 Brief in Support").

[11] See *In Re; Jeffrey R. MacDonald, No. 05-548, (CA-4, January 12, 2006.)*

[12] Apparently some of the pages of Exhibit 7 previously filed with the Fourth Circuit, and included in the copies of that filing, and the subsequent filing in the district court, both served upon the Government, were not physically attached to the copy filed with the Clerk's Office in the U.S. District Court for the Eastern District of North Carolina because Exhibit 7 "was not copied in full by [defense counsel's] copying company. See DE-115. See also DE-120, Letter of March 10, 2006, from defense counsel to the Clerk of Court. This may account for this Court's observation, unrelated to any claim by the Government in the Motion To Strike Exhibits, or the subsequent ruling on that motion by the Court that: "It is not apparent whether these

19. On March 22, 2006, MacDonald filed his Motion to Add An Additional Predicate [DE 122] to his previously filed motion under 28 U.S.C. § 2255 based upon the results of the DNA testing. In pertinent part the motion states: "The three remaining specimens, specimens 58A1, 75A, 91A [hairs] provided results that did not match any of the Macdonald family members or Helena Stoeckley or Greg Mitchell." [DE-122, p.3.] MacDonald pointed to no evidence used to convict him at trial which was called into question by the DNA test results. Id.

20. On March 23, 2006, MacDonald filed: *Petitioner's Motion, Pursuant to Rule 7 of the Federal Rules Governing Section 2255 Proceedings, To Expand the Record To Include The Itemized Authenticated Evidence Set Forth Herein* [DE-124, "Motion to Expand"], which had as an attachment *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* [DE-126, "Statement of Itemized Evidence"]. The Motion To Expand incorporated by reference "Exhibit 7" the three affidavits [DE-124, p.4] but did not make out a claim of deprivation of a constitutional right related to the alleged confession by Greg Mitchell. The Statement of Itemized Evidence recounted the affidavits purporting to show Greg Mitchell's responsibility for the murders, including those from Bryant and Norma Lane, filed as part of MacDonald's 1984 *Motion For a New Trial,* and their rejection by the district court [DE-126, pp. 16 -17]. The district court ruled that "absent a stronger showing, these affidavits are insufficient to prove Mitchell was in the MacDonald apartment on February 17, 1970." Noting that he had now submitted Exhibit 7,

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affidavits were among the materials presented to the Fourth Circuit Court of Appeals for consideration of MacDonald's application for a PFA to file the instant motion." Order at pp. 4-5. As we demonstrate *infra,* MacDonald's heavy reliance (Memorandum of Law, at pp-7-8) on this *dicta* in support of his argument for a COA on the granting of the Motion To Strike is misplaced.

consisting of the "three additional and new affidavits", the prior affidavits ". . . are now bolstered and corroborated by others, and deserve consideration as part of the this court's analysis of the evidence of Petitioner's innocence, taken as a whole." Id. The Itemized Statement of Evidence [DE-126] at paragraph 46, pp.23-24, summarizes the contents of the three affidavits, and concludes that: "These statements of Greg Mitchell were declarations against interest and should be admissible in this proceeding and in any future trial." *See*, Fed. R. Evid. 803, 804. Neither DE -124, nor DE-126, made any reference to the DNA results eliminating Mitchell as the source of any of the hairs which remained un-identified, or articulated any claimed deprivation of a constitutional right.

21. On March 30, 2006, the Government filed with this Court a *Motion Of The United States To Strike Exhibits Submitted In Connection With Petition For Relief Under 28 U.S.C. § 2255, And For Additional Relief* [DE-129]. The Government recounted Mitchell's May 21, 1971, sworn statement to Army Criminal Investigators (CID) in which he denied both being in Stoeckley's presence earlier in the evening of February 16, 1970, and any involvement in the murders [DE-129, p, 2]. The Government also recounted MacDonald's newly discovered evidence claim under Fed. R. Crim. P. 33, filed in 1984, which included affidavits from Bryant and Norma Lane offered to demonstrate that Mitchell had confessed to involvement in something while he was in the Army that was "too horrible to talk about." Id. The district court found these too-horrible-to-talk-about-it statements "unpersuasive because Mitchell made no specific reference to having been involved in the MacDonald slayings." Id. at 4. In addition, the Government's Motion to Strike stated in pertinent part:

> On July 15, 1988, Bryant Lane executed another declaration apparently designed to remediate the absence of specificity in its predecessor.FN5

> FN 5. *See* Declaration of Bryant Lane, attached as "Exhibit 8" to Affidavit of John J. Murphy (#2) filed May 14, 1991. (App. Vol. V, Tab 13).
>
> On this occasion, Lane recalled that sometime in the 1970's, while depressed and under the influence of alcohol, Mitchell had told him that he "personally kn[ew] Macdonald is innocent because I was the one that killed the MacDonald family." Lane further recounted that he[Lane] called Mitchell one night and Mitchell told him that he was being harassed by the FBI. Mitchell told Lane to be careful because he thought the phone was bugged. On another occasion, while working on Lane's boat, Mitchell admitted to Lane's wife that he was guilty of the murders. "Well that's it, I did do it, I am guilty." He later told Lane that a "bitch was out there . . . if she didn't keep her mouth shut she could get a lot of us in trouble." Lane further explained that the declaration he had previously furnished to defense investigators lacked these details because he "did not at the time feel comfortable about telling the strangers the whole story."

This 1988 declaration was submitted in support of MacDonald's second petition for habeas relief filed with this Court on October 19, 1990, which alleged, *inter alia,* that the government had withheld laboratory notes and physical evidence, including the presence of blond synthetic fibers from the MacDonald household . . . This Court denied that petition both on the merits and grounds that it constituted an abuse of the writ. *See United States v. MacDonald, 778 F.Supp.1342, 1360 (E.D.N.C. 1991).*

22. After recounting these prior unsuccessful attempts to use statements attributed to Greg Mitchell to overturn his conviction [DE-129, pp. 2-6], the Government's motion offered two independent arguments for striking the affidavits: first, notwithstanding the holding in *Schlup v. Delo, 513 U.S. 298 (1995),* the subsequent passage of AEDPA, and the case law interpreting this statute, precluded MacDonald from recycling Mitchell's "Confessions" which were previously considered and rejected [DE-129, pp. 7-10]. As a second basis for striking the affidavits the Government set forth the undisputed facts which demonstrated that all three affidavits were facially untimely under the one-year period of limitation provided by 28 U.S.C. § 2255¶6(4), [DE-129, pp.7-

11]. The Government did not move, or in any way suggest, that the affidavits should be stricken because they had not been previously filed as part of MacDonald's gatekeeping motion.

23. On April 6, 2006, MacDonald filed *Petitioner's Opposition To the Government's Motion To Strike Exhibits Submitted In Connection With the Petition For Relief Under 28 U.S.C. Section 2255* [DE-133]. MacDonald maintained that the Government's posited reasons for striking the new affidavit of Bryant Lane, namely that it was barred under the qualified doctrine of *res judicata* applicable to federal habeas actions, and that all three affidavits were time barred, were flawed on both counts [DE-133, p.2]. In regard to the third affidavit of Bryant Lane executed in 2005, MacDonald maintained that it contained "specific and direct information linking Greg Mitchell to the MacDonald murders that was [allegedly] not contained in the 1984 Bryant Lane affidavit, and which has never been considered on the merits by a federal court."[13] In relation to the contention that the affidavits were time barred under AEDPA from consideration, MacDonald announced for the first time that the three affidavits had not been included as a "predicate" for relief in the habeas application.[14] "The predicate for this new motion is twofold: 1) the new evidence supplied by retired deputy U.S. Marshal Jim Britt; and, 2) the new results supplied by the DNA testing." [DE-133, p. 4]. Both of these predicates MacDonald submits ". . . meet the requirements in 28 U.S.C. Section 2255 . . . and taken in light of the evidence as a whole, they establish that no reasonable juror could

[13]MacDonald did not address "the specific and direct information linking Mitchell to the MacDonald murders" recounted in the second affidavit of Bryant Lane executed in 1988, filed in 1990 in conjunction with his second post-conviction motion, considered and rejected by the district court, and detailed in the Government's Motion To Strike, *supra* [DE-129, pp.4-5].

[14]MacDonald uses the terms "predicate" and "claim" interchangeably.

find guilt beyond a reasonable doubt."[15] "Having submitted this new evidence, the petitioner submits that this court is required to conduct an analysis of the new evidence *taken in the light of the evidence as a whole*, this court is empowered and required to consider to consider all of the evidence developed during the trial, evidence that was arguably wrongly excluded during the trial, and importantly, evidence that has become available since the trial. *Herrera v. Collins*, 506 U.S. 390, at 442 (1992); *Sawyer v. Whitley*, 506 U.S. 333, at 339 & n.5 (1992); *Schlup v. Delo*, 513 U.S. (1995)." Id. MacDonald conceded that:

> While it is clear, that for petitioner to file a new successive habeas application based on new evidence, that such evidence, being the predicate for the motion, is subject to the one year statute of limitations for newly discovered evidence set forth in the statute, it is not the case that when this court embarks upon an analysis of the "evidence as a whole" including that which has been developed post trial, that each item of such evidence that has been developed post trial, must also have only been discovered within the past year. [DE-133, p. 4]. . .
> Thus while the "new evidence" which forms the predicate for the successive habeas is subject to the one year statute of limitation set forth in 28 U.S.C. Section 2255, each item of evidence to be considered by the court in its final evaluation of "the evidence as whole" is not subject to such a limitation.

According to MacDonald, this proposition,

> ". . . is made explicitly clear by the statute itself. The statute reads in this regard as follows:
>
> 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 or claims presented** could

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[15]By recounting MacDonald legal assertions for the purpose of describing the procedural history of this ruling, the Government does not intend in any way to convey the impression that the Government did not then, or does not now, dispute his unsupported factual or legal conclusions. See *Response of the United States To Successive Motion For Relief Under 28 U.S.C. § 2255.* [DE-128]; See also *Response Of The United States To Petitioner's Motion To Add An Additional Predicate To His Previously Filed Motion For Relief Under 28 U.S.C. § 2255.* [DE-134].

have been discovered through the exercise of due diligence.

Id. (emphasis in original).

It therefore follows, that the new Britt evidence and the DNA results support the new claim. While the three affidavits, ". . . on the other hand, are part of the panoply of the 'evidence as a whole' including that which has been discovered since the trial, that must be considered in this court's analysis of petitioner's claim of innocence. Id. at 6. Petitioner's Opposition [DE-133] does not assert a constitutional claim, much less the substantial basis for such a constitutional claim.

24. On May 8, 2006, MacDonald filed *Movant's Reply To The Response Of The Government To His Motion Under 28 U.S.C. § 2255 to Vacate His Sentence,* which repeated his prior arguments, but still did not articulate a constitutional claim. Id. at 14, n.8.

25. On November 4, 2008, this Court granted the Government's Motion to Strike [DE-129] stating:

> The court has carefully considered the parties' positions, and has reviewed the content and timing of the Lane, Morse, and Buffkin affidavits in light of other evidence in the case as well as relevant prior orders herein. Having done so, the court concludes that the Government's motion to strike is well taken, and is ALLOWED for the reasons cogently set forth in that motion. [DE-129].

Order, at p.18.

26. MacDonald contends that this Court erred when it granted the Government's Motion to Strike. According to MacDonald, because the affidavits were physically attached to the proposed § 2255 which the Fourth Circuit authorized to be filed, the granting of the Government's Motion to Strike removed from consideration part of "the evidence as a whole" which "the law requires the district court to consider in evaluating if MacDonald's § 2255 motion meets the 'no reasonable juror' standard. *Memo in Support of COA Application* [DE-156,at p. 7-8]. MacDonald therefore submits

that a COA should issue," as the denial (sic) of this motion is directly connected to the constitutional claims raised in [his] § 2255 Motion." Id.

Legal Argument In Opposition To Issuance OF COA Because The Government's Motion to Strike Exhibits Was Allowed

27. As we have demonstrated, neither MacDonald's Motion to Vacate [DE-111] incorporating the three affidavits, the affidavits themselves, nor any of his subsequent pleadings described *supra,* articulated a claim of constitutional deprivation by Government action, or in any other manner whatsoever. Now, in the instant application for a COA, MacDonald appears to be saying that the granting of the Government's Motion To Strike Exhibits compels the issuance of a COA because they [the three stricken affidavits] are ". . . directly connected to the constitutional claims raised in his § 2255 Motion" and "by removing valid evidence from consideration by the district court in addressing the validity of the [Britt] claims in the § 2255 Motion" this Court denied MacDonald of a substantial constitutional right, which is not further identified. [DE-156 at 8]. To begin with, there is no direct connection, even if one assumes that Stoeckley actually made the statements to Britt that are the basis for MacDonald's constitutional claim in DE-111, because Britt did not allege that Stoeckley inculpated Mitchell in the murders either by name or by description. See Britt Affidavit, ¶¶ 15, 22. Nor has MacDonald demonstrated any causative link between Mitchell's alcohol induced "confessions," which spanned the period 1973-1982, and the alleged mid-trial August of 1979 Stoeckley "confessions" to Britt and Blackburn, which allegedly resulted in Blackburn threatening Stoeckley. We submit that MacDonald must identify, and substantiate, a specific denial of a recognized constitutional right in relation to the alleged Mitchell confessions, and that he has not met this requirement. See *Reid v. True*, *supra*, at 795.

28. Because MacDonald cannot point to the denial of any specific constitutional right, based

upon *Schlup*, *supra*, and *House v*. *Bell, supra,* he asserts that striking the affidavits violated the law that empowers and mandates that the court consider "the evidence as a whole" in evaluating whether he has met the "no reasonable factfinder" standard. [COA App., DE-156, at 3,7-8]. There are several flaws in this argument: The first is that freestanding claims of actual innocence, unrelated to any claimed constitutional violation, do not establish a claim of denial of a constitutional right. See *Herrera, supra, House, supra*. The second flaw is that his argument ignores the fact that AEDPA was enacted after *Schlup*, *supra*, and it is 28 U.S.C. §§ 2244, and 2255, as amended by AEDPA, and not *Schlup or House* (involving a first habeas petition from a state priosner), which establishes the requirements for a federal prisoner seeking to vacate his sentence by means of a second or successive motion brought under 28 U.S.C. § 2255, on the grounds that he is being detained "in violation of the Constitution or laws of the United States."[16] Stated another way, it is the meaning of the phrase "viewed in light of the evidence as a whole" in the context of § 2444 as a whole, and not in the factually distinguishable context of *Schlup* or *House,* that controls. Evidence, that is offered as part of the panoply of the evidence as a whole, but which is not offered as a part of a claim or predicate forming the basis for vacating a sentence under § 2255 by the district court, has no standing under AEDPA. This is made clear by the very language of § 2244(b)(ii):

> 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 fact finder would have found the applicant guilty of the offense.

(Emphasis added.)

The government submits that the meaning of the term "in light of the evidence as a whole"

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[16]The "evidence as a whole" phrase found in *Schlup* and *House* can not be taken out of the procedural contexts in which those cases arose.

in § 2244(b)(2)(ii) must be read in *pari materia* with the same language found in §2255(h)(1). The government further submits, that in the context of § 2255(h)(1), the only logical meaning of "in light of the evidence as a whole," given the overarching Congressional intent of AEDPA to severely curtail successive applications, is that it circumscribes the totality of the evidence which the district court may consider to be the combination of two categories: (a) the evidence in the record of the previous proceedings, including evidence claimed to have been wrongfully excluded; and (b) the alleged newly discovered evidence contained in the application filed with the court of appeals seeking authorization to file a successive motion, based upon a claim that "the facts underlying the claim, if proven, . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." The evidence from the prior proceedings is not frozen for all times (as MacDonald contends the Government maintains, COA App. p.4), but may be called into question by the alleged newly discovered evidence proffered in the § 2244 gatekeeping motion. It does not follow, however, that because an applicant has made a prima facie showing that new evidence "A," if proven, potentially calls into question trial ruling "B," that the court of appeals has authorized the applicant to litigate in the district court new evidence "C" through "Z," which was not before the court of appeals at the gatekeeping stage, or does not meet the requirements of § 2244(B)(4), and in any case does not call into question evidence either used to convict MacDonald or claimed to have been wrongfully excluded.

The final flaw in MacDonald's argument is that the term "viewed in light of the evidence as a whole," found in § 2244(b)(ii), must be read in *pari materia* with the other requirements of § 2244, such as the one-year period of limitation provided by § 2244(d)(1)(D), the mandatory dismissal of

claims presented in prior applications provided by § 2244(b)(1), and the due diligence requirement of § 2244(b)(2). MacDonald's overarching premises is that once a PFA has been obtained for any claim, then the district court must consider any other proffered evidence, even if it is not offered as part of a claim or predicate justifying vacation of sentence, and even if it does not meet the requirements of §§ 2244 and 2255, applicable to second or successive motions under §2255 filed in the district court. Further, MacDonald contends that failure by this Court to consider this non-claim, non-predicate evidence, which does not meet the applicable requirements of § 2244, and which has been proffered in the context of a free standing claim of actual innocence, in some unexplained manner results in a substantial showing of a denial of a constitutional right (which right is not further identified), and merits the granting of a COA. This can not, and should not, be the law, because it ignores the Congressional purpose of AEDPA, namely to curtail endless claims from prisoners like MacDonald seeking to overturn the jury's verdict because they cannot accept the fact of their conviction, and the subsequent upholding of the verdict on direct and prior collateral appeals. Further, MacDonald's position ignores the language of § 2244 (b)(4), *supra*, which Congress enacted specifically with the intent that the district court could, and should, dismiss any claims presented in a second or successive application that do not meet the requirements of section 2244, even if they are contained in an application which the court of appeals has authorized to be filed. It would make no sense whatsoever for Congress to have enacted this provision, if it intended that the district court would still be required to consider non-claim/non-predicate evidence, which did not meet the requirements of § 2244, as part of the calculus under §2244(b)(2)(ii).

Assuming arguendo that this Court erred in its application of 28 U.S.C. § 2444(b)(4) by striking the three affidavits, any such error would have been a statutory one which can not be the

basis for a COA under §2253(c), which is limited to circumstances involving a substantial showing of a constitutional right. See *Reid v. True, supra; Murphy v. Netherland, supra, U.S. v Gordon, supra*.

29. Because MacDonald did not distinguish between denial on procedural grounds and denial on the merits in the "Standard of Review" section of his Application for a COA, and because he incorporated the merits standard by reference from Part I (Motion To Vacate) where this Court dismissed on the merits, into Parts II (Motion to Strike), III (Motion to Add Additional Predicate), IV (Motion To Expand), and V (Motion To Supplement), all of which were disposed of on procedural grounds, the wrong standard for a COA has been applied to the granting of the Government's Motion To Strike. The applicable standard for a COA under 28 U.S.C. § 2253(c) when the district court dismisses a claim (and we assume for the purposes of discussion that the Mitchell confessions were filed as a claim for relief), was articulated in *Slack v. McDaniel, 529 U.S. 473 (2000)*:

> When the district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable *whether the petition states a valid claim of the denial of a constitutional right* and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

529 U.S. 473. (Emphasis added).

It cannot be disputed that the three affidavits in question were struck on procedural grounds, rather than rejected on the merits. Accordingly, the standard applicable to a COA determination, assuming an underlying constitutional claim in relation to Mitchell's alleged confessions, is whether reasonable jurists would find it debatable *whether* the *petition states,* in relation to Mitchell's confessions contained in the three affidavits, a valid claim of the denial of a constitutional right. For

the reasons set forth herein, we submit that reasonable jurists would not find it debatable that the petition fails to state a valid claim of the denial of a constitutional right, because, *a fortiori*, it states no claim of the denial of any right, constitutional or otherwise, but merely asserts MacDonald's free standing claim of actual innocence. Hence no further appeal is warranted.

30. To the extent that MacDonald's Motion To Vacate is considered by reasonable jurists to state a constitutional claim, a COA should still not be issued because valid procedural bars also existed, and as the holding in *Slack*, *supra*, makes clear:

> *Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.*

Id. at 484.

Procedural History -(Fifth) Motion To Add Additional DNA Predicate- And (Seventh) Motion To Supplement Itemized Evidence

30. On October 17, 1997, in case No. 97-713, the Fourth Circuit granted MacDonald's September 17, 1997, motion with respect to DNA testing filed in conjunction with his Motion Under 28 U.S.C.§ 2244 for Order Authorizing The District Court To Consider Second or Successive Application for Relief Under 28 U.S.C. § 2244, and remanded the testing issue to this Court (Opp'n App. Vol I., Tab 15). The court of appeals further ruled that: "In all other respects, the motion to file a successive application is denied." Id.

31. On December 13, 2005, MacDonald filed a "gatekeeping motion" pursuant to 28 U.S.C. § 2244 with the court of appeals seeking leave to file the instant motion to set aside his sentence under 28 U.S.C. § 2255. On January 12, 2006, the Fourth Circuit granted MacDonald's motion filed

pursuant 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 motion now attached to his § 2244 motion."* (Emphasis added.)[17] On January 17, 2006, the motion pursuant to 28 U.S.C. § 2255 alleging prosecutorial misconduct based on the Britt allegations, and also claiming that Greg Mitchell had confessed to the murders was filed in this Court.[18]

32. On March 10, 2006, the Armed Forces DNA Identification Laboratory (AFDIL) simultaneously provided the parties with a report detailing the results of the DNA testing.[19] On March 22, 2006, based upon the DNA results, MacDonald filed with this Court his Fifth motion to add an additional predicate to his pending 28 U.S.C. § 2255 motion, claiming that three of the hairs tested by AFDIL do not match any member of the MacDonald household, and therefore could only have come from intruders.[20] He conceded that the hairs in question also do not match the DNA sequences of Helena Stoeckley or her boyfriend Gregory Mitchell (deceased) [DE-122, Mot. p.3].

33. MacDonald alleged no constitutional or statutory violation in relation to any unsourced hair, but rather asserted that the results of the DNA testing demonstrates his actual innocence of the crime which entitles him to have his sentence vacated. [DE-122, p. 4]. MacDonald asserted, however, that: "[i]n reviewing a claim of innocence based upon newly discovered evidence, which is concomitant to a claim of 'manifest injustice,' this Court is required to conduct an analysis of the

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[17] See *In Re; Jeffrey R. MacDonald*. No. 05-548, Order filed 1/12/06.

[18] See DE-111, *Jeffrey R. MacDonald's Motion Under 28 U.S.C. § 2255 To Vacate His Sentence*.

[19] See DE-119, *Notice of Filing, March 10, 2006*.

[20] See DE-122: *Petitioner's Motion To Add An Additional Predicate to His Previously Filed Motion Under 28 U.S.C. Section 2255 To Vacate His Conviction . . .*

evidence "as a whole, including evidence developed post-trial." [DE-122 Memorandum of Evidence at 12].[21] MacDonald cited 28 U.S.C. § 2255 as authority for this assertion. Id. MacDonald also cited, *inter alia*, Herrera v. Collins, 506 U.S. 390, at 442 (1992); *Sawyer v. Whitley, 506* U.S. 333 at 339 & n.5; and *Schlup v. Delo,* 513 U.S. 298 (1995) as authority for this assertion. Id. (Memorandum of Evidence, *supra*, at 12.)

34. MacDonald did not seek prior authorization from the Fourth Circuit pursuant to 28 U.S.C.§ 2244, or Local Rule 22(d), to file this Fifth Motion under § 2255. Instead, MacDonald told this Court that ". . . since these DNA tests were previously ordered by the U.S. Court of Appeals for the 4th Circuit, and since the matter was remanded to . . . [the district court] to oversee and manage such testing, it is implicit in the 1997 Order from the 4th Circuit that . . . [the district court] has been authorized to consider the effect of the results of such testing." [DE-122, Mot. p. 2, ¶3] "Further, [MacDonald] contended that this new evidence, irrespective of the new evidence submitted through witness retired Deputy U.S. Marshal Jim Britt, entitles the petitioner to have the entire panoply of evidence reviewed (both evidence adduced at trial, and developed post-trial), and to have a determination now made of whether this evidence, analyzed in its entirety, proves the petitioner's innocence." Id. at 4, ¶6.

35. The Government opposed MacDonald's motion on the grounds that this was a successive motion under 28 U.S.C. § 2255, which required certification under 28 U.S.C. § 2244, and in the absence of such certification, the district court was without jurisdiction to entertain the

[21] We understand MacDonald to be using the term "concomitant to a claim of 'manifest injustice' in the context of a claim of actual innocence accompanying a claim of manifest injustice. As we demonstrate *infra* MacDonald fails to describe the specific injustice, or how it is manifested, in any fashion.

motion.[22]

36. On May 3, 2007, while his Fourth, Fifth, and Sixth Motions were pending before this Court, MacDonald filed his *Motion to Supplement Applicant's Statement Of Itemized Evidence Material Evidence* [DE-143]. This, his Seventh Motion, was based entirely on the affidavit of the 86 year old mother of Helena Stoeckley (the elder Helena Stoeckley), obtained under bizarre circumstances while she was a resident of a nursing home. The elder Helena Stoeckley averred that on two occasions after the [1979] trial and prior to her daughter's death in 1983, the younger Helena Stoeckley confessed to being present in the MacDonald home, along with her boyfriend Greg Mitchell, and witnessing Mitchell and another unidentified male "killing the family." According to the elder Helena Stoeckley, her daughter tried to tell the truth about her own presence, along with Mitchell's, but "the FBI and other law enforcement officials [not further idnetified] told her to keep quiet and to stop contacting them. On the second occasion her daughter confided in her mother ". . . that she was afraid to tell the truth because she was afraid of the prosecutor" whom she also did not identify. (DE- 143, Aff., ¶¶ 4-11).

37. The Government opposed MacDonald's Motion to Supplement on procedural and jurisdictional grounds, principally that he had not obtained a PFA from the court of appeals. See DE-145.

38. On November 4, 2008, this Court denied both MacDonald's Fifth and Seventh Motions. Noting that MacDonald had not first obtained a PFA from the Fourth Circuit to file his Fifth Motion (based upon the DNA test results) or Seventh Motion (based on the untimely affidavit of the elder

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[22]See DE-134, *Response of The United States To Petitioner's Motion To Add An Additional Predicate To His Previously Filed Motion For Relief Under 28 U.S.C. § 2255.*

Helena Stoeckley), this Court distinguished the instant case from the facts in *Hazel v. United States*, 303 F. Supp.2d 753, 758-59 (E.D.Va. 2004) (upon which MacDonald now relies in his application for a COA (see pp.8-9), from those in *Untied States v. Winestock*, *supra,* upon which *Hazel, supra,* relied. (Order, pp. 19-20).[23] This Court termed these latter claims "untimely, successive, and independent [of the Britt claim] and that it lacked subject matter jurisdiction over them. *Cf. Evans v. Smith,* 220 F.3d 306, 325 (4th Cir. 2000) (concerning § 2254 petition), *cert. denied*, 532 U.S. 925 (2001)." Id. This Court adopted the Government's rationale set forth in its opposition to the two motions, [DE-135] and [DE-145], respectively, and denied both motions. (Order, p.20). That this ruling was not a final order was made absolutely clear: "Macdonald is free to seek authorization from the Fourth Circuit Court of Appeals to raise these grounds in yet another successive § 2255 motion." Id.

40. MacDonald repeats his previous "evidence as a whole" arguments in Parts III and V of his COA application as reasons why, based entirely on *Hazel, supra,* this Court "should" have entertained these motions on the merits. See COA App. pp. 9 - 10.

Legal Argument In Opposition To Granting A COA For Denial Fifth And Seventh Motions

41. The application of the Governing Legal Principles set forth, *supra*, to the denial of MacDonald's application for a COA in relation to this Court's previous denial of his Fifth and Seventh Motions is straightforward**.** MacDonald does not even meet the threshold requirement for a COA set forth in § 2253(c) because these denials were not a final order within the meaning of the statute. Because he deliberately did not seek a PFA from the Fourth Circuit, he can not be heard to

[23]Moreover, *Hazel*, *supra*, is a decision by another district court, and is not controlling precedent in the Fourth Circuit, nor does it appear to have been followed in this or other circuit.

complain that this Court abused its discretion, when it ruled that it did not have jurisdiction to entertain these claims. Conversely, the fact that he may still seek a PFA, and attempt to meet the certification requirements of §§ 2244 and 2255, does not dictate that he may now use § 2253(c) as a vehicle for avoiding challenges to these claims, on untimeliness and other grounds, that the gatekeeping process would require.

42. This Court denied MacDonald's Fifth and Seventh Motions strictly on procedural grounds. Assuming, therefore, that he can overcome the jurisdictional prerequisite of a final order in § 2253(c), *Slack, supra,* makes it abundantly clear that:

> When the district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable *whether the petition states a valid claim of the denial of a constitutional right* and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

529 U.S. at 473. (Emphasis added).

As *Slack, supra,* further holds, there are two components to the inquiry , the first involves whether jurists of reason would find it debatable that there is an underlying constitutional claim in the petition. Clearly, MacDonald intended that his Fifth (DNA) Motion, independent of his Britt claim, serve as grounds for vacating his sentence. Notwithstanding that, MacDonald clearly fails to meet the requirements of an underlying constitutional claim in respect of his Fifth (DNA) Motion, because he makes no allegation of Government misconduct, ineffective assistance of counsel, or relationship to the Britt claims, but merely asserts a free standing claim of actual innocence under *Herrera*. The government submits that the "confessions" of the younger Helena Stoeckley to the elder Mrs. Stoeckley contained in the Seventh Motion, also fail to state a constitutional claim, and are properly categorized as free standing claims under *Herrera*. Assuming for the sake of argument

that the Government's assessment that the Seventh Motion fails to allege an underlying constitutional violation is not correct, the inquiry does not end there under *Slack*. At that point the second component of the inquiry becomes whether, notwithstanding the underlying constitutional claim, a plain procedural bar exists, and the district court correctly invoked it to dispose of the matter.

> Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

529 U.S. at 484.

The government submits that there is no plainer procedural bar in the context of entertaining successive § 2255 motions, than where the applicant has repeatedly and deliberately circumvented the PFA requirements of § 2244 and § 2255 by filing in the district court, with the result that the district court is without jurisdiction to reach the merits of the claim. We further submit that is precisely what happened here, and that jurists of reason would not find it debatable that this Court correctly invoked a plain procedural bar. Accordingly, for all the reasons stated herein, a COA should not issue in respect of the denial of MacDonald's Fifth [DE-122] and Seventh [DE-144] Motions, respectively.

Procedural History - Motion To Expand the Record With Itemized Evidence

43. On March 23, 2006 MacDonald filed his Sixth Motion to Expand The Record pursuant to Rule 7 of the Federal Rules Governing Section 2255 Proceedings accompanied by Petitioners Statement of Itemized Material Evidence [DE-124]. Incorporated by reference among the numerous exhibits were the affidavits of Britt,*infra*, Morse, Buffkin, and Lane, *supra*, as well as the March 10, 2006 report of the DNA test results, *supra*, [DE -126]. "MacDonald Itemized Statement of Material

Evidence [DE-126] consists of 48 numbered paragraphs of text setting forth his version of the universe of evidence he has compiled to date- old and new, admitted and rejected." Order at 21. The Government opposed expanding the record for the reasons stated in its *Response of the United States to Petitioner's Motion to Expand The Record* [DE-138].

44. On November 4, 2008 this Court denied MacDonald's Motion to Expand [DE-126], in doing so it rejected his reliance on the cases cited for the proposition that in deciding MacDonald's Fourth Motion to Vacate [DE-111] it must consider the evidence as a whole:

> The court believes MacDonald's reliance on the above quoted authority is misplaced, and rejects his suggestion that this court is required, under the circumstances presented by this case, to expand the record and to consider every manner of supplementary material he deems supportive of his position, regardless of its source or its competence. The court finds the record as it presently is constituted to be more than adequate to permit a thorough and complete understanding of the material facts pertinent to the motions now before it.

Order, pp. 21-22.

45. In his Application for a COA in relation to the denial of the DNA predicate, MacDonald merely incorporates by reference his "evidence as a whole" argument. [COA App., pp.9-10].

Legal Argument In Opposition To The Granting Of A COA Based On The Denial Of MacDonald's Motion To Expand The Record

46. In pertinent part, Rule 7, *Rules Governing Section 2255 Proceedings For the United States District Courts*, provides:

> (a) **In General**. If the motion is not dismissed, *the judge may direct* the parties to expand the record by submitting *additional materials relating to the motion*. The judge may require that these materials be authenticated.

(Emphasis added.)
The language of Rule 7 itself does not bestow upon a movant a right, much less a constitutional

right, to expand the record, but rather permits the district court to do so in the exercise of its discretion. The government submits that the applicable standard of review is that of abuse of discretion. In any event, §2253(c)(2) restricts appellate review to constitutional claims, rather than claims based upon another source of federal law such as a statute or rule. See *Murphy v. Netherland, supra, United States v. Gordon, supra.* Rather than repeat our prior arguments in relation to the rulings on DE-122, DE-144, and our subsequent argument in relation to the denial of MacDonald's Motion To Vacate Sentence [DE-111], we incorporate by reference so much of those arguments as are applicable to the facts presented by the denial of the Motion Expand [DE-124]. For all these reasons, a COA should not issue in relation to the denial of MacDonald's Sixth Motion.

Procedural History - The Denial Of MacDonald's Fourth Motion Under 28 U.S.C. Section 2255 To Vacate His Sentence

47. We incorporate by reference the procedural history applicable to the Fourth Motion set forth above in relation to the granting of the Government's Motion To Strike.

48. On November 4, 2008, this Court after addressing the merits of all of MacDonald's constitutional claims (the Britt "confession claim"[pp.28-30], the "Blackburn fraud claim"[pp.32-35], the "Blackburn threat claim"[pp. 35-37], and the Rouder claim[42-46]), denied relief. We incorporate by reference the Court's recitation of the facts and procedural history. We note that this Court accepted Britt's affidavit "as a true representation of what he heard or genuinely though he heard on August 15-16, 1979." Order at 38, n.18. However, this Court expressly found, as a matter of law, that MacDonald failed to meet his burden of proof of causative impact:

> Even accepting the accuracy of Britt's recollection that Stoeckly made admissions to him and to Blackburn on August 16, 1979 [footnote 18 omitted], it simply does not follow (1) that Stoeckley had intended to testify consistently therewith if called as a witness, or (2) that, but for Blackburn's alleged threats, she would have. ... The

> record is well-established that Stoeckley was not a reliable witness and her statements were untrustworthy.

Order at 38-39.

Further, this Court determined that:

> Although the court accepts the accuracy of Britt's recollection of the words he heard, the accuracy of his interpretation thereof is sheer conjecture.... Stoeckley's death over twenty years ago prevents there *ever* being a reliable factual determination that even arguably might support post-conviction relief.

Order at 39-40.

> Contrary to MacDonald's bald assertion [footnote 20 omitted] there is absolutely no evidence to support MacDonald's assumption that before she spoke with Blackburn, Stoeckley was ready to testify under oath in court that she had been present during the murder of MacDonald's family. [Footnote 21 omitted]. Resolution of the prosecutorial misconduct by intimidation claim would require the testimony of Stoeckley, and that is impossible....Absent competent evidence that, but for Blackburn's "threat" of prosecution, Stoeckley would have testified favorably to MacDonald, MacDonald's claim that his Fifth and Sixth Amendment rights thereby were violated is founded on sheer speculation.[Footnote 22 omitted] Even less likely is the suggestion that had she done so, the jury would have believed her and acquitted MacDonald.

Order at 40-41.

49. This Court also determined that it would be futile to hold an evidentiary hearing because:

> . . . MacDonald's alleged violations of due process can never be proven because Helena Stoeckley is dead . . . The passage of time has rendered a factual determination of MacDonald's prosecutorial misconduct claim impossible. Neither Britt's testimony nor that of Blackburn or Segal could establish a factual basis for what, if anything, Helena Stoeckley intended to say before she was interviwed by the Government prior to being called as a witness by MacDonald's team. Ordering an evidentiary hearing on MacDonald's new claim of prosecutorial misconduct by threat and intimidation of a witness would constitute a disgraceful waste of judicial and Governmental resources, and unrealistically would raise MacDonald's hope of relief where none is possible.

Order at 41.

In conclusion, this Court determined as a matter of law that:

> Assuming proof of the facts alleged therein in light of the evidence as a whole, even if Britt's affidavit were deemed "newly discovered", it simply cannot be established by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found MacDonald guilty.

Order at 46.

50. MacDonald seeks a COA in relation to this Court's denial of his Motion Under 28 U.S.C.§ 2255 To Vacate Sentence[DE-111] on two grounds. The first is that this Court erred when, by denying his motions to add the DNA predicate [DE-122], expand the record [DE-124], and supplement the record [DE-144], as well as by granting the Government's motion to strike exhibits [DE-129], it failed to evaluate his Britt claim in light of the evidence as a whole. COA App.,pp.3-6. The second ground for issuing a COA, according to MacDonald, is his contention that reasonable jurists could debate whether the evidence in the Britt affidavit, taken as true, and in light of the evidence as a whole, would establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty of the murders of his family. Id. at 6. Significantly, MacDonald does not seek a COA based on this Court's denial of relief because it rejected the "Blackburn Fraud" claim.

Legal Argument In Opposition To Issuance Of COA In Relation to Denial Of Motion to Vacate Sentence [DE-111]

51. For the reasons stated, supra, in connection with the Court's disposition on procedural grounds of DE-122, DE-124,DE-144, and DE-129, it is submitted that MacDonald's reliance on his "evidence as a whole" argument is misplaced, and that a COA should not issue on that basis.

52. In relation to MacDonald's rejected constitutional claims, as the Supreme Court held in *Slack,* the showing required to satisfy §2253(c) is straightforward:

> The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

For the reasons stated in this Court's Order at pages 28-42**,** we submit that MacDonald has not, and can not, make the requisite showing. A COA should not issue for the denial of MacDonald's constitutional claims in relation to the Motion To Vacate [DE-111] because he cannot demonstrate that jurists of reason would find it debatable that Helen Stoeckley was an inherently unreliable witness, or this Court's assessment, in light of that inherent unreliability, that the essential element of Government causation of a constitutional violation was lacking. The government further submits this to be the case because other jurists of reason on the Fourth Circuit have previously determined that Stoeckley was an inherently unreliable witness.

On his unsuccessful direct appeal, MacDonald challenged the trial court's exclusion of Stoeckley's out of court inculpatory statements to the so called "Stoeckley Witnesses." In sustaining their exclusion under FRE 804(b)(3),Senior Circuit Judge Albert V. Bryan, for the panel, wrote that despite a number of corroborating circumstances MacDonald failed to demonstrate that they "make Stoeckley's alleged declarations trustworthy."

> Her apparent longstanding drug habits made her an inherently unreliable witness. Moreover, her vacillation about whether or not she remembered anything at all about the night of the crime lends force to the view that everything she has said and done in this regard was a product of her drug addiction.

United States v. MacDonald, 688 F.2d 224, 233 (4th Cir. 1982).

The government submits that no distinction in terms of content or detail can be drawn between the pre-trial confessions of which Judge Bryan wrote, and the additional pre-trial confessions allegedly made to Britt, who belatedly claimed to have joined the ranks of the "Stoeckley Witnesses."

MacDonald attempts to obscure [DE-156, p.7] the judicial determination of Stoeckley's inherent unreliability by once again relying on a partial quote from the *dicta* in Judge Murnaghan's opinion reversing MacDonald's conviction on grounds of Sixth Amendment speedy trial deprivation.[24] The context of the quoted statement was based upon Judge Murnaghan incorrect assumption that Stoeckley's memory had eroded during the two-year period following the 1972 referral to the Justice Department by the Army, and the convening of a grand jury in 1974. Judge Murnaghan, despite his assessment "...that Stoeckley had theretofore demonstrated a great unreliability. . . " and that: "[h]er memory has resembled a lightbulb not screwed tight, blinking on and off," found that the delay had prejudiced MacDonald. *United States v. MacDonald*, 632 F.2d 258, 264-265 (4th Cir. 1980), rev'd on other grounds, 456 U.S.1 (1982).

After MacDonald's conviction had become final on direct appeal, in 1984, he filed a motion for a new trial under Rule 33, Fed. R. Crim. P., based upon Stoeckley's extensive and detailed post-trial confessions to MacDonald's investigators, which she later retracted. See *United States v. MacDonald,* 640 F. Supp.286, 318-323 (EDNC, 1985). Judge Dupree, before whom Stoeckley appeared at the trial, reviewed both the pre-trial and post-trial confessions and found them insufficient to warrant the granting of a new trial.

> The court's conclusion that Stoeckely 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 very 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 the members of the drug culture in Fayetteville, and Stoeckely quite understandably, became anxious because she could

[24]The sentence actually reads: "Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great." Id. at 264.

> not recall where she was during the crimes. This anxiety, 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.

Id. at 324. Judge Dupree's Order goes on to state:

> 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[25] which contributed to her premature death in 1983. The confluence of her drug and alcohol 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 the case and the affidavits 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. (emphasis added.)

MacDonald appealed Judge Dupree's order, and the Fourth Circuit, by a panel which included Judge Murnaghan, in a unanimous decision authored by Senior Circuit Judge Haynsworth, affirmed Judge Dupree stating:

> In much greater detail than we, the district judge considered every contention that MacDonald advanced. 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.

United States v. MacDonald,779 F.2d 962, 966(4th Cir. 1985). In reviewing the Stoeckely pre-trial confessions Judge Haynsworth wrote that:

> Before trial, however, she made statements to the effect that she had been, or might have been, in the MacDonald home. *The statements contained internal suggestions*

[25]The confessions to Britt are alleged to have occurred on August 15-16, 1979.

> *that they had were the product of fantasy.* She stated, for instance, that she held a lighted candle for illumination but "it was not dripping wax; it was dripping blood."

Id.at 964. In relation to her post-trial confessions, Judge Haynsworth observed:

> **. . .** Sometimes she remembered nothing about what happened that night**,** while, apparently depending upon who questioned her, she sometimes remembered in some gory detail being with the slayers of the MacDonald mother and children. The details she gave, however, contain many inconsistencies with MacDonald's version of what occurred and with the circumstantial evidence derived from the scene.

Id. There is, perhaps, no better example of the judicial recognition of Stoeckley's utter unreliability as a witness than Judge's Dupree's observation that:

> 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.

640 F. Supp. at 322.

53. This Court only became aware of Britt's death just days before the Order of November 4, 2008, was finalized. [Order p.9, n.5.] Because this Court accepted the factual allegations in Britt's affidavit as true for he purpose of analysis, it may not have found it necessary to include the fact of Britt's death in the calculus of the futility of holding an evidentiary hearing because of Stoeckley's death. [Order pp. 41-42] In the interim, additional evidence has been filed with the Court by the Government in the form of the Affidavit of Special Agent James C. Cheroke, FBI, and the exhibits thereto, including the sworn statement of retired DUSM Vernoy Kennedy[See DE- 152-DE-152-14]. This evidence, which we incorporate by reference, establishes beyond doubt that, contrary to his sworn affidavit, Britt did not transport Helena Stoeckley from the Greenville County Jail in Greenville, South Carolina, to Raleigh, North Carolina, during the trial in August 1979. In fact on August 15, 1979, Stoeckley was transported from the Pickens County Jail in Pickens, South

Carolina, where she had been lodged by the FBI, to the vicinity of Charlotte, North Carolina by DUSM Vernoy Kennedy and a female guard, where they were met by DUSM Dennis Meehan and Janice Meehan (then his wife), who transported Stoeckley to the Wake County Jail in downtown Raleigh, North Carolina.[26] It was on the following day, August 16, 1979, that Britt, accompanied by U.S. Marshal Service employee Geraldine Holden, drove Stoeckley the few blocks from the Wake County Jail to the U.S. Courthouse.[27] MacDonald has not refuted the fact that Britt was never in Stoeckley's presence on August 15, 1979, and in fact appears to concede the fact that Stoeckley didn't confess to Britt "during the long trip from Greenville, South Carolina" as previously claimed.[28] Instead, MacDonald maintains that:

> (a) Stoeckley's confession to AUSA Blackburn–which is still unrefuted in any way by the Government and is assumed by the district court to be true . . . demonstrates a constitutional violation of Brady that requires that Macdonald's convictions be vacated; and (b) AUSA Blackburn's threat to Stoeckley–again unrefuted by the Government and assumed by the district court to be true . . . –is a constitutional violation requiring that Macdonald's conviction be vacated.

COA Memo, DE-156, pp.6-7.

As this Court accepted Britt's Affidavit as true, it is not being suggested by the Government that the new Kennedy-Cheroke evidence requires this Court to revise its analysis. Rather, it is submitted that this evidence is relevant, and should be considered, in the context of the futility of holding a future evidentiary hearing on the Britt-Stoeckley claims which MacDonald, through his

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[26]Stoeckley made no incriminating statements during either segment of the trip.

[27]No confession by Stoeckley during this trip was alleged by Britt, or relied upon by MacDonald. See Britt Aff., ¶17.

[28]See *Movant's Opposition To Government's Motion For Publication And Modification of Order* [DE-154, p.3].

COA motion, seeks.

54. The government submits that it would be futile, as well as a waste of judicial and prosecutorial resources, to grant a COA to MacDonald to appeal in order to win an evidentiary hearing on the August 15, 1979, the "Car Confession" as Brady violation claim. Not only does the Kennedy-Cheroke evidence, USMS "Commitment" and "Release" records, coupled with the Pickens Jail Records, demonstrate that the confession didn't happen, but it is now impossible for MacDonald to adduce the requisite sworn testimony in a futile attempt to show that it did happen. This is so, we submit, because not only is Stoeckley dead, and Geraldine Holden dead, but now Britt has died, without the Government having had an opportunity to cross-examine him in order to further demonstrate the falsity of his affidavit. Consequently, MacDonald can not meet the "if proven" requirement of Section 2255, nor would he in the event of a re-trial be able to meet the stringent standards of Fed. R. Evid. 804(b)(3), in order to get this double hearsay admitted.

55. The same analysis is applicable to MacDonald's Brady claim in relation to the alleged confession on August 16, 1979 by Stoeckley to AUSA Blackburn in the U.S. Attorney's Office. This confession is fully refuted, we submit, by the fact that Britt swore that: "After Ms. Stoeckley was settled in the room, Mr. Blackburn began to interview her. Ms Stoeckley told Mr. Blackburn the same things she had stated to me on the trip from Greenville to Raleigh." See Britt Aff. ¶22. As it is now clear that Stoeckley did not, and could not, have confessed to Britt in Holden's presence in the car on August 15, 1979--that in fact she said nothing to Britt on that date because she was not in his presence--it follows, therefore, that as Britt incorporated by reference the purported August 15 confession, MacDonald can no longer rely on Britt's affidavit to establish the confession on August 16, 1979. Stated another way, proof of the alleged August 16 office confession is inextricably

intertwined, and therefore totally dependent on proof of the August 15 car confession , and that proof fails. Without an office confession, any Brady claim collapses, because what cannot be proven to have been said, cannot be shown to have been suppressed. MacDonald would fare no better at an evidentiary hearing (or a trial), because Britt's affidavit is inadmissable hearsay and both Britt and Stoeckley are dead. As a consequence, he cannot meet the "if proven" requirement of Section 2255. Had MacDonald chosen to, he could have moved to take Britt's deposition pursuant to 28 U.S.C.§2246 in order to preserve Britt's testimony.[29]

56. The same analysis set forth above in paragraphs 54-55, applies with equal force to the alleged threat by Blackburn claim. As the purported purpose of the alleged threat was to keep Stoeckley from testifying on August 17, to the same effect as her alleged August 16 office confession, it follows, that without proof of the office confession--independent of the incorporation by reference of the non-existent car confession–MacDonald can not establish by clear and convincing evidence a violation of his Fifth or Sixth Amendment rights . This Court determined that the alleged threat and the alleged fraud by Blackburn contentions are "inextricably intertwined," and rejected both claims. See Order at 30. MacDonald seeks a COA on the Threat Claim, but not on the Fraud Claim. We submit, that if the contemporaneous record established to the Court's satisfaction that Stoeckley said the same thing to the defense as she said to the Government [AUSA Blackburn], and that is "I don't remember"–and MacDonald doesn't seek to challenge that ruling– then, there has been admission by omission. The admission that there was no confession to AUSA Blackburn--anymore that there was a confession to Segal on August 16--cuts the ground out from any threat

[29]DE-148, Ex.1, reflects knowledge of Britt's "serious heart problems" on the part of MacDonald's attorneys as of September 7, 2007, over a year before Britt's death on October 19, 2008. [See DE-149].

claim based on the office interview.

57. The alleged threat by Blackburn is further refuted by the almost 1000 pages of transcripts of post-trial confessions by the defense, which are part of the record. See Order at 16, n.9. These confessions from 1980, until the time of her death in 1983, demonstrate that Stoeckley would essentially say anything that the defense asked her to say. During all this time she never once alleged that Blackburn threatened her when she was interviewed by him during the trial, and MacDonald has been unable to point to any statement to the contrary.

CONCLUSION

WHEREFORE, the Government respectfully requests that Petitioner's motion for a certificate of appealability be denied.

Respectfully submitted, this 29th day of December, 2008.

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CERTIFICATE OF SERVICE

This is to certify that I have this 29th day of December, 2008, served a copy of the foregoing and the proposed Order upon the Petitioner in this action either electronically or by depositing a copy of the same in the United States mail in a postpaid envelope addressed as follows:

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