UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Crim. No. 75-26-CR-3
	)	No. 5:06-CV-24-F
JEFFREY R. MacDONALD,	)	Judge Fox
	)	
Movant/Defendant,	)	

MOVANT'S REPLY TO THE RESPONSE OF THE GOVERNMENT TO HIS MOTION UNDER 28 U.S.C. § 2255 TO VACATE HIS SENTENCE

The movant, Jeffrey R. MacDonald, with leave of this Court, and through undersigned counsel, respectfully replies to the *Response of the United States to Successive Motion For Relief Under 28 U.S.C. § 2255* [hereinafter "Response"] as follows:

In opposing the movant's successive motion for relief under 28 U.S.C. § 2255, the government sets out a factual statement of the salient evidence that was adduced at trial, summarizes the various statements of key witness Helena Stoeckley, and then argues, without producing any evidence to refute the merits of the movant's claim, that as a preliminary matter the movant has failed to meet the two gate-keeping requirements for a successive habeas filing under the statute, namely, 1) that he have newly discovered evidence that could not have been discovered previously through the exercise of due diligence, and, 2) that the new evidence, if proven, and considered in light of the evidence as a whole, is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense. The government requests that the movant's motion to vacate be summarily denied.

The movant submits this reply to demonstrate that the factual statement of evidence set forth in the government's Response is replete with inaccuracies, misleading omissions, and faulty conclusions, and to further demonstrate that the government's arguments concerning both the facts and the law are

flawed and without merit. The movant requests, thus, that either his motion to vacate his sentence be granted,[1] or alternatively, that this Court schedule a hearing and proceed to consider the movant's motion on its merits.

I. The Government's Recitation of the Evidence at Trial is Replete with Error, Misleading Omissions, and Unsupported Conclusions, and Demonstrates the True Lack of Reliable Evidence Proving the Guilt of Jeffrey MacDonald

In its Response, and in support of its argument against factual innocence, the government beginning on page five sets forth its recitation of the salient facts produced at trial tending to prove Jeffrey MacDonald's guilt. This recitation is replete with errors, critical omissions, and flawed conclusions. A careful examination of each such item refutes the government's oft-stated claim that MacDonald was convicted based on overwhelming evidence of guilt. In fact, such an examination proves the contrary—that there is no reliable evidence supporting the convictions of the movant. A point by point analysis follows:

1. The government begins its recitation of the material evidence by stating that "MacDonald's pajama top was, perhaps the single most inculpatory piece of evidence." This is a critical admission, because a careful and fair analysis of the pajama top evidence reveals that it provides no reliable proof of MacDonald's guilt. First in this regard, the government claims that when a forensic technician folded the pajama top (which had 48 puncture holes in it) in the same manner in which it had been found on Colette MacDonald's body, whose chest contained 21 puncture holes, and inserted 21 probes in the garment's 48 puncture holes, they aligned in a pattern matching the pattern of the 21 puncture wounds on Colette's chest, proving that MacDonald had placed the pajama top on Colette's chest and then stabbed her through it. The government, in writing this, misrepresents the trial record and the import of this experiment. In point of fact, Paul Stombaugh, the government expert who conducted the experiment, testified that he could not even opine that the stabbings occurred through the garment as the probes suggested. All he

[1] Pursuant its Order of January 17, 2006, this Court required the government to respond to the movant's motion by March 30, 2006. The government, in its response, produced no evidence through affidavits or otherwise to refute or contradict the sworn testimony of retired deputy U.S. Marshal Jim Britt that comprises the new evidence upon which the movant's motion is predicated.

could opine was that it was possible that it took place the way they folded the garment, not that it, in fact occurred that way. This qualification was repeated by him several times. [Testimony of Paul Stombaugh Tr. 4371, 4381].[2] And unquestionably, his experiment was badly flawed, a fact that he acknowledged implicitly if not explicitly on cross-examination. For example, in his experiment, he did not even attempt to line up the wider holes (as opposed to narrow holes) in the garment with the wider holes in the body of Colette MacDonald. [Tr. 4380-81]. He admitted the garment he experimented on was not even in the exact same position as it was originally. He admitted that there were likely many other configurations that would also align the holes, but that he stopped when he found one way to do it (after many many hours spent trying to make them match up). He stated that he was only asked to try to make the holes fit a *specific pattern*, not to take *any other factors* into account. He did not take into consideration the directionality of the threads and thrusts. He did not take into consideration the knife cuts in the body and in the garment at all. [Tr. 4357- 4409]. For these and a variety of other reasons, as set forth in more detail the Movant's Memorandum in Support of his Motion to Vacate [hereinafter "Memorandum" pp. 35-36], the experiment proved nothing except that it was *possible* to align the holes in a desired pattern, if all other factors were disregarded, and that *the desired pattern, admittedly, was not proof of what actually occurred.*

2. In its Response the government next writes that the fact that the holes in the pajama top were clean and showed no tearing proved that the pajama top was not moving when the punctures were made, thereby flatly contradicting McDonald's claim that he used it to ward off his attackers. Again, this statement mischaracterizes the trial evidence. This conclusion was subject to contrary expert opinions. Defense expert Dr. John Thornton testified that given the condition of the pajama top, it may very well have been torn while it was in motion, i.e., while MacDonald was defending himself. [Tr. 5150-53].

3. The government claims in its Response that threads and yarns from MacDonald's blue pajama top were found underneath Colette's body in the master bedroom, in the bedding in which his daughter,

[2] To the extent that citations are to portions of the trial transcript not previously provided to this Court in movant's prior submissions, those excerpts are copied and attached as Exhibit 3 hereto.

Kimberley, was wrapped, and in his youngest daughter, Kristen's bedroom, and that no threads from the blue pajama top were found in the living room where MacDonald claimed he was assaulted by intruders. This, the government argues, demonstrates that MacDonald's version of events was a lie. Again, however, the government engages in an incomplete and misleading recitation of the true facts regarding this issue. CID investigator Robert B. Shaw testified at trial that he discovered a "bunch" (also described by him as "a pile") of tangled blue fibers or threads at the west entrance of the hallway landing where it intersected the living room. This is precisely where MacDonald said he struggled with the intruders and where his pajamas were first ripped. [Tr. 2480-81, 2411-12]. While these blue threads were apparently never analyzed or compared, it is probable that this "pile" or "bunch" of blue threads came from MacDonald's ripped pajamas. There is certainly no other explanation for their presence. Contrary to the government's assertion, they provide direct evidence supporting MacDonald's version of where he was attacked. Additionally but importantly, the government conveniently omits the fact that MacDonald was wearing his blue pajama bottoms, which were ripped, when he tried to revive both his wife in the master bedroom, and then his two daughters in their respective bedrooms, accounting therefore, for the blue pajama fibers found around their bodies. [See, testimony of medic Michael Douglas Newman Tr. 2661-2662]. Again, through the apparent oversight of the investigators, the pajama bottoms were discarded. Nevertheless, it is extremely probable that the fibers of the blue pajama top and blue pajama bottom—a matching pair--were similar if not identical. The ripped pajama bottoms, consequently, which would have been shedding fibers wherever MacDonald went would completely account for the blue pajama fibers found around Colette's body in the master bedroom, and around the bodies of MacDonald's two children in their respective bedrooms, children whom he tried desperately to revive.

4. The government in its Response claims that the fact that the pocket of the pajama top was found separated from the pajama top, and the fact that the pocket was stained with both Colette and Kimberley's blood before it was torn away from the top refuted MacDonald's story that he placed the pajama top over his wife before he went to aid his children. Again, this conclusion is no more than a contrivance, and while convenient to the government's overall theory, is entirely speculative and

unproven. Jeff MacDonald consistently claimed that the torn pajama top became wrapped or bound around his wrists while he attempted to use it defensively in the living room as he was being attacked by a man wielding a club, knife or icepick. [Tr.6808-6813]. When he regained consciousness and rushed to aid his wife the pajama top was still bound around his wrists. [Tr. 6832]. His wife, of course, was covered in her own blood, and the bath mat on top of Colette was splattered with blood of Kimberley's blood type. [Tr. 3645-46]. A conclusion equally plausible with the government's theory is that Jeff MacDonald, upon finding his wife's bloody body in the master bedroom, and while removing the bath mat and trying to move Colette as he testified happened, at some point began trying to frantically unbind the pajama top that was wrapped around his wrists. As he was attempting to do this the pajama pocket could easily have been torn away from the top, but only after it had already come in contact with both Colette's blood which was all around her body, and blood of Kimberley's blood type which was on the bath mat covering Colette. This explanation is consistent with the evidence. It is no more or less likely than the government's speculation about it. Hence, the torn pajama pocket evidence is neutral. Contrary to the myth perpetrated by the government over the years, it is not probative of Jeff MacDonald's guilt.

5. The government suggests that the blood splatterings throughout the apartment, i.e., facts such as that Colette's blood was found in Kristen's bedroom, and blood of Kimberley's blood type was found in the master bedroom, demonstrated that MacDonald had rearranged the crime scene and moved the bodies. Again this is a baseless conclusion, and one that is totally speculative. It is likely that Colette and Kristen were assaulted by intruders in two different rooms as the bloody fight ensued. They must have run or been moved from one room to the next. The blood splatterings, in fact, only proved *where* the victims were assaulted. They offer no proof of *by whom* the victims were assaulted. The fact is that MacDonald was knocked unconscious for much of the struggle, so he would have had no way of knowing for how long or where in his apartment the struggles occurred. Once again, evidence trumpeted by the government as inculpatory does not hold up as being so, once scrutinized.

6. The government claims that Kristen's blood was found on MacDonald's eyeglasses, (which were found lying in the living room). This, the government argues, proves that MacDonald stabbed

Kristen. Once again, this particular government claim is simply false and is another misrepresentation made to this Court. It misstates the blood evidence. Moreover, the conclusion drawn from it and the reasoning that supports the conclusion is flawed. First, contrary to the government's assertion, there was no proof that it was Kristen's blood on MacDonald's eyeglasses. The speck of blood on the eyeglasses was found only to be blood of the same blood-type of Kristen (which was the only specific test available at the time.) [Tr. 3586-87]. Moreover, upon review of the testimony, it is unclear even what blood type was on the glasses. Dr. Chamberlain testified at trial that the blood speck revealed "a weak indication" of antigen A and antigen B. [TR. 3507-08]. Whatever the blood type, though, one of the intruders, in fact, may have had that same blood-type, and it may have been intruders' blood that ended up on the eyeglasses. (It was, after all, in the living room where MacDonald fought the intruders, and where the glasses were found lying, not in Kristen's bedroom.) Moreover, as pointed out in the movant's previously filed Memorandum (p. 38) and exhibits, MacDonald had treated patients in the emergency room within 24 hours of the murders—patients who were bleeding and had the same exact blood-type as Kristen, and the blood speck on his glasses may have come from treating those patients. So what does that blood speck prove? The fact is that it proves nothing—unless of course one engages in unfettered speculation.

7. The government argues that MacDonald was discredited because he did not recall owning an icepick, when one was found outside his back door and linked to the killings, and when a previous babysitter claimed she had seen one in the MacDonald home. But again, the government reasoning here is hardly sound. Logically, if MacDonald had gone to the extremes that the government contends he went to, to murder his family and then to cover it up, including wounding himself as the government contends and disposing so carefully of the scalpel he used to do so, why would he be so careless as to just throw the murder weapons including an icepick out the back door? And why would he deny that he owned an icepick? It is a nonsensical conclusion. The fact that MacDonald did not recall owning an icepick is probative of nothing.

8. The government claims that the word *Pig* written on the headboard in blood was written by someone wearing latex gloves, and that latex gloves were found in MacDonald's kitchen, thereby

inculpating MacDonald in the crime. But these facts no more point to Jeff MacDonald as the murderer than they point to intruders as the murderers. Intruders could have come with gloves of their own, or used the latex gloves that were readily available in the MacDonald kitchen in an effort to cover up their fingerprints.

9. The government claims that the presence of one of MacDonald's footprints stained in Colette's blood leading out of Kristen's bedroom inculpates MacDonald in the murders. But, again, as set forth in the movant's Memorandum (p. 39), there are several possible explanations for the presence of this footprint that are consistent with Jeff MacDonald's description of what occurred. The footprint, itself, is probative of nothing and to state otherwise is a disingenuous misrepresentation.

10. The government claims in its Response that almost no physical evidence supported MacDonald's version of events. This claim, in fact, has become over the years a cornerstone of the government's myth that it produced "overwhelming evidence of guilt." Yet the claim is not sustainable. Three different kinds of candle wax were found in the home the night of the murder (one such sample taken from the coffee table in the living room near which MacDonald said the woman with the candle stood) which investigators were unable to match to any wax samples in the MacDonald home [see Movant's Statement of Itemized Material Evidence, {hereinafter "Statement"}pp. 18]. This unsourced wax is direct evidence of intruders consistent with MacDonald's description of a female assailaint bearing a candle. Eighteen separate useable fingerprints and eighteen separate useable palm prints (thirty-six in all) were lifted from the MacDonald home that investigators were unable to match with any MacDonald family member or other individuals known to have been inside the home [*Id*. pp. 19]. Again, this comprises physical evidence of strangers in the home. Often overlooked as physical evidence are Jeffrey MacDonald's significant wounds.[3] He suffered a punctured and collapsed lung, stab wounds to the upper left arm, abdomen, and chest, and a serious head injury. Additionally, as discussed in the movant's prior pleadings, significant new physical evidence supporting Jeff MacDonald's claim of innocence has

[3] The government has perpetuated the misrepresentation over the years that MacDonald had no wounds consistent with icepick stabs, and was not seriously injured. These falsehoods are addressed *infra*, ¶. 11.

surfaced since the trial. Such evidence includes the 22 inch long blond synthetic (arguably wig) hairs found inside the MacDonald home the night of the murder (supportive of the description given by MacDonald that one of the women intruders had long blond hair, and potentially consistent with Helena Stoeckley's admission that she regularly wore a long blond wig) [see Movant's Statement pp. 42]; the black wool fibers found on the murder weapon and on the body of Colette which have no known origin and were not traceable to clothes or fibers in the MacDonald home [*Id*. pp. 43]; the human hair with root intact found under the fingernail of Kristen MacDonald that was bloody and that pursuant to DNA analysis did not match any MacDonald family member [*Id*. pp. 47]; and the two and a half inch long human hair with root and follicle intact found on the body of Colette MacDonald, which again, pursuant to DNA analysis, did not match any MacDonald family member [*Id*. pp. 47]. Physical evidence corroborating the presence of intruders indeed was not just there but is overwhelming. And once again, the government's oft-repeated claim that there was no such physical evidence simply misrepresents the true facts.

11. The government explicitly claims in its Response that MacDonald sustained no wounds consistent with wounds inflicted by an icepick.[4] This is a patently false statement. Attached hereto as Exhibit 1 is a nine page excerpt from MacDonald's hospital record from Womack Army Hospital for February 17, 1970. As it indicates, on the third page, in addition to having suffered a traumatic pneumothorax collapsing 40% of his right lung resulting from a stab wound, he was noted to have sustained "several small puncture wounds that may have been from an instrument, such as an ice pick." The government claims in its Response that MacDonald's wounds were superficial and could easily have been self-inflicted with disposable scalpel blades he kept in his closet. Once again, this is a blatant misrepresentation. In addition to the punctured lung, the numerous ice pick-like puncture wounds, and the abdominal injuries noted in the hospital report, Dr. Frank Gemma testified at trial the MacDonald had suffered a second deep stab wound that went into the abdominal fascia, as well as a severe contusion to

[4] On page 11 of its Response the government represents that MacDonald "sustained no wounds on his arms, hands, or body consistent with wounds inflicted by an icepick." This is a direct misrepresentation made to this Court.

the head, sufficient to render him unconscious. [Tr. 3006-3015]. And Dr. Bronstein testified at trial that MacDonald suffered an inch long cut on the left upper arm, and a two-inch deep wound in his abdomen that went through both his skin and fat. He explicitly described these as *not superficial*. [Tr. 2956-57]. And in no place in his medical record or in the trial record did any medical provider note or opine that his wounds appeared to be self-inflicted.

The above "facts", as set forth in the government's Response, constitute the salient items of what supposedly comprise the "wealth of physical and circumstantial evidence which affirmatively established that MacDonald was the murderer." [Govt. Response p. 5]. As the movant has respectfully attempted to demonstrate throughout the pleadings filed on his behalf in this matter, the government's continued claim that there was an overwhelming amount of evidence probative of movant's guilt is simply a myth supported by nothing but government misrepresentation. Strip away the misrepresentations and exaggerations, and the government evidence simply fails to prove that Jeffrey MacDonald murdered his wife and children.

II. Contrary to the Government's Claim in its Response, The Movant Has Satisfied the Two Gatekeeping Requirements For a Successive Petition

A. The Movant Has Newly Discovered Evidence that Could Not Have Been Previously Discovered Through the Exercise of Due Diligence

The thrust of the government's argument on this issue, is that MacDonald, through his lawyers and investigators, failed to reasonably exercise due diligence over the years, and could have discovered the secret known only to former U.S. Attorney James Blackburn, former deputy U.S. Marshal Jim Britt, and Helena Stoeckley had he conducted a "reasonable and diligent investigation." *McCleskey v. Zant*, 499 U.S. 467 (1991). This is a specious and unmerited claim.

MacDonald has attached hereto as Exhibit 2 his own affidavit summarizing the considerable efforts he has engaged in since his conviction in 1979 to uncover every piece of information about the crime that might enable him to prove his innocence. As it reflects, and as is self-evident from the considerable record of his past efforts to overturn his conviction, and the thousands of pages of affidavits and other documents that he has filed on his behalf in this effort, MacDonald has pursued reasonably and

diligently his investigation. That is what is required by *McCleskey v. Zant, supra,* and by the gatekeeping provisions of the statute, and MacDonald has met this requirement. *See*, *Williams v. Taylor*, 529 U.S. 420, 435-37 (2000) (due diligence standard equates to a prisoner making a "reasonable attempt" to investigate and pursue his claims); *U.S. v. Walus*, 616 F.2d 283, 303-04 (7th Cir. 1980) (due diligence standard is met where a movant engaged in extensive search for proof of innocence).

The new information recently revealed by Jim Britt, was known about and secreted by two government officials, a federal deputy marshal and a federal prosecutor. Our federal courts have consistently held that evidence within the purview of government officials, secreted by them, or withheld by them, is evidence that could not have been discovered through the exercise of due diligence. *See, e.g.*, *Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (*per curiam*) (transcript not discovered based on State's assertions that it had not been transcribed); *Kirkpatrick v. Whitley*, 992 F. 2d 491, 495-96 (5th Cir. 1993) (information hidden in undisclosed police report); *Fairchild v. Lockhart*, 979 F.2d 636 (8th Cir. 1992) (prosecutor did not turn over sheriff's file containing exculpatory information); *United States v. Biberfield*, 957 F.2d 98, 104-5 (3rd Cir. 1991) (government withheld information that testimony of witness was false); *Paradis v. Arave*, 130 F. 3d 385, 394 (9th Cir. 1997) (prosecutor withheld exculpatory information at the time of the criminal trial and successfully quashed a subpoena for documents at the time of the first *habeas* petition.) *See, also, Strickler v. Greene*, 527 U.S. 263, 282, 289 (1999) (conduct by state in impeding access to exculpatory information provided cause for filing a successive petition.) *Strickler, supra*, stands for the proposition that any extraordinary obstructive circumstance beyond the control of the movant and his attorney, in which both were faultless, amounts to justification for a successive petition.

Were this Court to rule as the government suggests, movants seeking post-conviction relief would have an affirmative duty to interview every marshal, courtroom clerk, bailiff, prosecutor, law clerk, police officer and judge in order to satisfy the due diligence requirements of the statute, and this is an absurd suggestion. It is not the law.

Regarding Helena Stoeckley, as this Court well knows from her many prior conflicting statements, she was a difficult witness to pry the truth from. She often contradicted herself. She withheld information. Jeff MacDonald, through his lawyers and investigators, made numerous reasonable and diligent efforts to cause her to divulge all of the information she knew about the crime and her involvement in it. While on many occasions Stoeckley did confess to having committed the crime, and while she did tell Wendy Rouder that she testified at trial falsely because she was "afraid of the those damn prosecutors," [see affidavit of Wendy Rouder, attached as Exhibit 5 to Movant's Memorandum], Stoeckley never divulged the fact that during Blackburn's interview of her in the midst of the trial, she had told prosecutor Blackburn that she had committed the crime and that Blackburn had threatened her. This fact Stoeckley withheld. Her unwillingness to divulge it, however, in no way detracts from the reasonable and diligent efforts of investigation conducted on behalf of MacDonald. The record is clear. MacDonald did pursue the investigation reasonably and diligently, and he clearly does meet the first prong of the gatekeeping requirement.

B. The Newly Discovered Facts, When Taken in Light of the Evidence as a Whole, Are Sufficient to Establish by Clear and Convincing Evidence That No Reasonable Fact-finder Would Have Found the Applicant Guilty of the Underlying Offenses

The government initially argues, concerning this issue, that "the record" somehow proves that it is inconceivable that Jim Britt's revelations are accurate. In so doing it seems to misunderstand the import of Jim Britt's new evidence. Not only did Helena Stoeckley confess to Jim Britt, but in Jim Britt's presence, Helena Stoeckley confessed to prosecutor James Blackburn. Once this occurred, Blackburn had an absolute obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, to immediately notify both the defense attorneys and the court of the confession of Helena Stoeckley. Had he done so, the defense would have had notice that Stoeckley was willing and ready to confess, and would have elicited such a confession directly from Stoeckley before the jury. As the 4th Circuit in its opinion on direct appeal in 1980 stated, had this occurred, **"the government's case would have been incalculably**

damaged."[5] However, according to Jim Britt, rather than fulfill his constitutional obligation, prosecutor Blackburn threatened and intimidated Helena Stoeckley into changing her trial testimony, so that rather than confess to the crime before the jury, she claimed amnesia as to her whereabouts on the night of the murder. Blackburn then knowingly elicited testimony from Stoeckley supporting this false testimony. Continuing with his misconduct, Blackburn then, when questioned by the trial court as to what Stoeckley had told him during his interview of her, further misrepresented the truth and further misled the court.

The record, when closely examined, in fact, contains much support for Jim Britt's account. It stands to reason and reflects consistent behavior that Stoeckley was willing to confide the truth to government officials, but reluctant to do so to the defense, at least until a relationship of trust was developed. First she confided in deputy U.S. Marshal Jim Britt while on the long (5 hour) journey from Greenville, S.C. to Raleigh, N.C. Apparently, Stoeckley was then unwilling to open up to the Bernard Segal during his conference with her. In the presence of Jim Britt, however, to whom she had already confessed and apparently developed some trust, and in the office with Britt and prosecutor James Blackburn, (who was in a position to offer her protection/immunity) Stoeckley became candid again, and told Blackburn the truth. According to Britt, she was then threatened by Blackburn. Interestingly, prior to her testimony in court the next day, Blackburn suggested to the judge that Stoeckley might need to be furnished an attorney. [Tr. 5513]. There would have been no reason for Blackburn to raise this issue if Stoeckley had consistently insisted to him that she had nothing to do with the MacDonald crime. And after Blackburn threatened and intimidated her, and Stoeckley claimed amnesia on the stand, and later told Wendy Rouder that she had been in the MacDonald home the night of murders, when Rouder inquired of her why she didn't tell the jury that, Stoeckley answered that it was because she was afraid—not of her co-murderers—but of "those damn prosecutors." All of these circumstances lend credence to the recollection of Jim Britt.

The government further argues that Britt should not be credited because his assertion that Stoeckley mentioned seeing a broken hobby horse in the MacDonald home on the night of the crime to

[5] United States v. MacDonald, 632 F.2d at 264 (4th Cir. 1980).

him, during his trip with her from Greenville to Raleigh, could not be true. The government represents that the subject of the hobby horse was first interjected into the proceedings by Bernie Segal when he showed Stoeckley pictures during his pre-trial interview, and thus Stoeckley would not likely have mentioned the hobby horse a day earlier to Britt. Again, the government misstates the facts. The trial transcript makes clear, as does the government elsewhere in its Response, that Stoeckley first volunteered having seen a broken hobby horse in the MacDonald home long before her trip to Raleigh, to witness William Posey back in 1970 at the time of the Article 32 hearing. [Voir dire testimony of William Posey, Tr. 575—61 at 5760, attached to Movant's Memorandum as Exhibit 4]. Posey testified that back in 1970 Stoeckley told him that she had been in MacDonald's home the night of the murder and seen a broken hobby horse. Moreover, the government's claim that the hobby horse was not broken is unproven. None of the government photographs show the right front spring of the hobby horse, so there is no way to know if that area of the toy was broken. Moreover, the hobby horse was found the night of the crime against the wall in an unuseable position inside the MacDonald home (as the govt. crime scene photos depict) indicative of the fact that it was not being used and may very well have been broken. [Govt. App. Vol. V, Tabs 6 and 7]. Given where it was stationed, it looks as though it could not have been ridden, and Stoeckley may well have thought it was broken. If anything, the recollection by Jim Britt that Helena Stoeckley mentioned the broken hobby horse to him lends credence to his recollections.

The gravamen of the government's Response, however, seems to be that the outcome of a hypothetical trial today would be no different, notwithstanding the new evidence offered by Jim Britt and notwithstanding the very powerful other new evidence probative of innocence that has come to light since the 1979 trial. This government claim, once again, is without merit.[6] The Jim Britt revelations, on their own, suggest that had prosecutor Blackburn not violated movant's constitutional rights, Helena Stoeckley would have taken the witness stand and told the jury directly that she and others—not Jeffrey MacDonald—were responsible for the murders. This evidence, itself, would certainly have changed the

[6] Movant has set out the salient evidence probative of innocence, taken as a whole, in his Statement of Itemized Material Evidence attached to his Motion to Expand the Record, and asks that it be incorporated herein by reference and considered herewith.

outcome of the trial, for as the 4th Circuit has written, **"the government's case would have been incalculably damaged."**[7] However, when the additional substantial new evidence that has come to light since 1979 is added to the calculation, it becomes overwhelmingly clear that no reasonable juror could find guilt beyond a reasonable doubt. As part of this new evidence of innocence that has been uncovered post-trial, the movant has provided to this Court new affidavits, never before considered by a court, of the direct confessions made by Helena Stoeckley's boyfriend, Greg Mitchell, before he died. [See, Exhibit 7 attached to the movant's Memorandum]. **These affidavits are of profound importance, as they not only directly and unequivocally implicate Greg Mitchell in the crime, but they provide for the first time true corroboration of the confessions of Helena Stoeckley.**[8] Additional new evidence that has come to light only after the trial also includes the recently obtained DNA evidence demonstrating that there were unsourced hairs in key places found on the bodies of Colette and Kristen MacDonald. Other new evidence that should be considered is set forth in the movant's Statement of Itemized Material Evidence. Upon a fair analysis of it, taken as a whole, and set next to the very weak circumstantial case compiled by the government, it is abundantly clear that no reasonable juror could find that Jeffrey R. MacDonald is guilty beyond a reasonable doubt.

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[7] United States v. MacDonald, 632 F.2d at 264 (4th Cir. 1980).

[8] The government argues that the affidavits of the Greg Mitchell confessions are foreclosed under the abuse of the writ doctrine because they were previously reviewed and found speculative and circumstantial, and has filed a motion to strike to which MacDonald has responded. But the government misrepresents the facts in this regard. First, while the court in 1984 found the affidavits submitted at that time to be speculative and circumstantial, it explicitly stated, that **"absent a stronger showing, these affidavits are insufficient to prove that Mitchell was in the MacDonald apartment on February 17, 1970."** *U.S. v. MacDonald*, 640 F. Supp. 286, 328 (E.D.N.C. 1985). The movant has now submitted new affidavits, including two from additional new people to whom Greg Mitchell directly and unequivocally confessed, affidavits that—unlike the prior affidavits regarding Greg Mitchell— are neither speculative nor circumstantial. Thus the movant has now provided the "stronger showing" that the trial court found was needed. These new affidavits have not been reviewed before by any court; nor have they been found lacking. They were, in fact, unavailable at the time of trial and have come to light only since the trial. While the movant has not sought to make them the predicate for his motion to vacate his sentence, they nonetheless must be considered by this Court as "evidence that became available only after the trial." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). In this regard, given the fact that Helena Stoeckley has been found to be unreliable, the question has still remained whether she was telling the truth when she confessed to the MacDonald murders, or when she recanted such confessions. The Greg Mitchell confessions answer that question, as they corroborate the fact that she was truthful when she confessed.

WHEREFORE, FOR THESE AND OTHER REASONS CONSIDERED BY THIS COURT, MOVANT RESPECTFULLY REQUESTS THAT HIS MOTION TO VACATE HIS SENTENCE BE GRANTED, OR ALTERNATIVELY, THAT MOVANT BE GRANTED A HEARING ON THE MERITS OF HIS MOTION.

Respectfully submitted,

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Timothy D. Junkin, Esq.
D.C. Bar No. 940601
800 S. Frederick Ave., Suite 203
Gaithersburg, Md. 20877
(301) 987-0600
Fax. (301) 987-0682

_____
John Moffett, Esq.
Fed. Bar No. (Md.) 9027

_____
J. Hart Miles, Jr., Esq.
NC Bar # 23342
Hart Miles, Attorney at Law, P.A.
19 W. Hargett Street, Suite 805
Raleigh N.C. 27601
Tel: (919) 834-8650
Fax. (919) 834-9105

Certificate of Service

I hereby certify that a copy of this motion and accompanying brief were mailed by me, first class mail, postage pre-paid, on the _____ day of _____, 2006, to the United States Attorney for the Eastern District of North Carolina, at the following address:

Honorable Frank D. Whitney, United States Attorney
Att. John Stuart Bruce
Terry Sanford Federal Building
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601-1461

And to U.S. Justice Department counsel of record at the following address:

Brian Murtaugh, Senior Trial Attorney
U.S. Department of Justice
Domestic Security Section, Room 6747
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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J. Hart Miles, Jr., Esq.