PAGE PROOF BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 08-8525

UNITED STATES OF AMERICA,

Appellee,

vs.

JEFFREY R. MACDONALD,

Appellant.

ON APPEAL FROM THE UNITED STATES Court
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

PAGE PROOF BRIEF OF THE UNITED STATES

GEORGE E. B. HOLDING
United States Attorney

BY: JOHN STUART BRUCE
First Assistant U.S. Attorney
JOHN F. DE PUE
BRIAN M. MURTAGH
Special Assistant U.S. Attorneys
ANNE M. HAYES
Assistant U.S. Attorney
310 New Bern Avenue
Suite 800
Raleigh, North Carolina 27601
Telephone: (919) 856-4530

Attorneys for Appellee

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STATEMENT OF JURISDICTION

The district court entered its order denying MacDonald's Motion to File a Successive Petition under 28 U.S.C. § 2255 on November 4, 2008. On December 4, 2008, he filed a timely notice of appeal. On January 9, 2009, the court denied MacDonald's Motion for a Certificate of Appealability. MacDonald then filed an application for a Certificate of Appealability in this Court, and his motion was granted on June 9, 2009. The district court's jurisdiction over this proceeding rested upon 28 U.S.C. §§ 2244(b)(4) & 2255. This Court's jurisdiction rests upon 28 U.S.C. § 2253(a).

STATEMENT OF ISSUES

1. Whether the instant appeal is now moot due to the affiant Britt's death and the consequent inability of a habeas court to entertain his testimony.

2. Whether, in making a gatekeeping determination relating to a successive habeas application predicated upon newly-discovered evidence, a district court's assessment of such evidence "in light of the evidence as a whole" includes: (1) "newly-discovered evidence" that is independent of and unrelated to the evidence the court of appeals considered in issuing its prefiling authorization under 28 U.S.C. § 2244(b)(3); (2) evidence that was proffered and rejected in connection with previously denied habeas petitions; and (3) evidence that does not meet the jurisdictional provisions of 28 U.S.C. §§ 2244, 2255.

3. Whether this Court's order authorizing an appeal under 28 U.S.C. § 2252(c)(3) authorizes review of an issue not embraced by the order.

STATEMENT OF CASE

MacDonald was indicted in the Eastern District of North Carolina on January 24, 1975, for the murders of his pregnant wife and two daughters. He moved to dismiss his indictment claiming denial of his Sixth Amendment right to speedy trial, based on the time lapse between the dismissal of military charges in 1970, and the federal indictment. He also claimed that his protection against double jeopardy was violated because he had been "exonerated" by an investigation conducted by the military pursuant to Article 32 U.C.M J., 10 U.S.C. § 832. The district court denied these motions, and MacDonald filed interlocutory appeals. In August 1975, this Court stayed the trial, and ordered the indictment dismissed on Sixth Amendment speedy trial grounds. U.S. v. MacDonald, 531 F.2d 196 (4th Cir. 1976). The Supreme Court reversed. U.S. v. MacDonald, 435 U.S. 850 (1978). MacDonald then appealed the district court's double jeopardy ruling, which this Court affirmed. U.S. v. MacDonald, 585 F.2d 1211 (4th Cir. 1978). On August 29, 1979, following a seven-week jury trial, MacDonald was convicted on one count of first degree murder and two counts of second degree murder, in violation of 18 U.S.C. § 1111. He was sentenced to three consecutive life terms. This Court affirmed. U.S. v. MacDonald, 688 F.2d 244 (4th Cir. 1982).

In 1984, MacDonald filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 on the basis of "newly-discovered" evidence, as

well as two motions for post-conviction relief under 28 U.S.C. § 2255 ("First Post-Conviction Motion"). The motions were denied. U.S. v. MacDonald, 640 F. Supp. 286 (E.D.N.C. 1985). This Court affirmed. U.S. v. MacDonald, 779 F.2d 962 (4th Cir. 1985).

In October 1990, MacDonald filed a second collateral attack alleging, once again, newly discovered evidence as well as the concealment of such evidence ("Second Post-Conviction Motion"). The district court denied relief, U.S. v. MacDonald, 778 F. Supp. 1342 (E.D.N.C. 1991), and this Court affirmed, U.S. v. MacDonald, 966 F.2d 854 (4th Cir. 1992).

On April 22, 1997, MacDonald filed a third petition for habeas relief captioned "Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery" ("Third Post-Conviction Motion"). The district court denied the motion insofar as it was based upon a "fraud upon the court" claim, and transferred the motion for a new trial based upon claimed newly-discovered evidence to this Court for certification as a successive petition. U.S. v. MacDonald, 979 F. Supp. 1057 (E.D.N.C. 1997). This Court granted MacDonald's motion with respect to DNA testing and remanded that matter to the district court. In re MacDonald, No. 97-713 (Oct. 17, 1997) (unpublished). In all other respects it denied his motion to file a successive application. Id.

On December 13, 2005, MacDonald filed a gatekeeping motion with this Court, once again, alleging "newly-discovered evidence in

the form of prosecutorial misconduct." This Court granted a Prefiling Authorization (hereafter "PFA"). In Re MacDonald, No. 05-548 (Jan. 12, 2005) (unpublished).[1] On January 17, 2006, MacDonald filed with the district court the Motion to Vacate Under 28 U.S.C. § 2255 which had been the subject of the PFA ("Fourth Post-Conviction Motion"). [D.E.111][2]. He subsequently filed three additional motions with the district court: a Motion to Add the Results of DNA Testing [D.E.122]; a Motion to Expand The Record Pursuant to Rule 7 of the Rules Governing § 2255 Proceedings [D.E.124]; and a motion to supplement the evidence [D.E.143] based upon the affidavit of the now-deceased mother of Helena Stoeckley [D.E.144]. The district court granted the government's motion opposing entertainment of the additional submissions and denied the application for leave to file a successive Section 2255 petition. [D.E.150]. U.S. v. MacDonald, 2008 WL 4809869 (E.D.N.C., Nov. 4, 2008) (unpublished). MacDonald filed a timely Notice of Appeal. [D.E.157]. Thereafter, MacDonald sought a certificate of appealability (COA) from the district court [D.E. 156], which the district court denied [D.E.162]. He then sought a COA from this

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[1] In granting MacDonald's § 2244 motion this Court expressly limited the scope of the § 2255 motion he could file. It granted the motion "insofar as MacDonald may file in the district court the proposed motion now attached to his § 2244 motion." Id.

[2] "D.E." refers to the district court docket entries.

Court, which it issued on June 9, 2009, but which confined review to the district court's procedural rulings.

STATEMENT OF FACTS

A. The Crime and Events Resulting in MacDonald's Conviction.

In the early morning of February 17, 1970, while MacDonald was stationed at Fort Bragg as an Army Medical Corps Captain, his pregnant wife, Colette, and two daughters, Kimberly and Kristen, were murdered in the military quarters they shared with him. U.S. v. MacDonald, 640 F. Supp. 286, 289 (E.D.N.C. 1985).

During subsequent interviews with Army investigators, MacDonald recounted his version of what occurred on the night of the murders. Id. He stated he had fallen asleep on a living room sofa at approximately 2:30 a.m. and was awakened by the screams of family members. Id. He claimed he observed a blond woman wearing a floppy hat, muddy boots, and a short skirt, carrying a lighted candle and chanting "'acid is groovy; kill the pigs.'" Id. Allegedly, three men standing near the couch attacked MacDonald, pulling or tearing his pajama top over his head, which he claimed he then used to ward off their blows until he lost consciousness. Id. MacDonald stated that when he regained consciousness he went to the master bedroom, where he found his wife dead. Id. He said, after removing a knife from her chest, he covered her body with his pajama top. Id. He claimed he then went to his children's bedrooms and discovered they were also dead. Id. He then summoned the Military Police. Id.

The Army charged MacDonald with the murders in May 1970 and convened a formal pretrial investigation, pursuant to Article 32 of the Uniform Code of Military Justice, 10 U.S.C. § 832. Id. At the recommendation of the investigating officer, however, the charges were dismissed and MacDonald was discharged from the Army. Id. at 289-90. The investigating officer further recommended that the civilian authorities investigate the alibi of Helena Stoeckley, a member of the Fayetteville "hippie" community whose name had surfaced. Id.

B. The Government's Evidence At Trial

At trial, the government introduced MacDonald's exculpatory statements, and a wealth of physical, demonstrative, and other circumstantial evidence which, as summarized in a decision of the district court (640 F. Supp. at 310-315), affirmatively established that MacDonald was the murderer, and that his exculpatory account was false.[3] The physical evidence and the manner in which it refuted MacDonald's account of the murders is summarized in the 1991 decision of the district court denying habeas relief. U.S. v. MacDonald, 778 F. Supp. at 1345-1347. Most significantly, the government proved that only MacDonald could have stabbed his wife 21 times with an ice pick through his pajama top, which MacDonald

[3] D.E.132, Vol. VI, Tabs 1-11, 14-15.

had previously placed on her chest in order to account for the presence of his wife's blood on the garment.[4]

C. Stoeckley's Arrest as a Material Witness

Prior to trial, the prosecution provided a list of possible witnesses to the defense, which included Stoeckley's name and last known address. [Tr. 4845-4850][5]. On August 13, 1979, lead defense counsel, Bernard Segal, raised the issue of Stoeckley's appearance for the first time at a bench conference. [Id.]. After consultation with local defense counsel, Wade M. Smith, Assistant U.S. Attorney ("AUSA") James Blackburn asked the FBI to locate Stoeckley for the defense. [Id.,p.4849]. Later that same day, the Honorable Franklin T. Dupree, Jr., who was presiding over the case, issued a material witness warrant for Stoeckley. [Id.]. On August 14, FBI Agents Frank J. Mills and Thomas John Donohue located and arrested Stoeckley at her trailer in Oconee, South Carolina. [D.E.152,Ex.3]. The agents transported her to the Pickens County Jail, in Pickens, South Carolina, the nearest detention facility which was authorized to house federal prisoners. [Id.,Ex.7]. Pursuant to the prior request of AUSA Blackburn, Stoeckley was interviewed by Special Agent Mills en

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[4]D.E.132, Vol. VI, Tabs 12,13,16; Trial Transcript, pp.7059-7060, 7090-7093.

[5]"Tr." refers to the trial transcript.

route to the detention facility.[6] At the Pickens County Jail, at 6:32 p.m. on August 14, 1979, Special Agent Donohue signed a U.S. Marshal Service (USMS) "Commitment" Form No. 102 for Helena Stoeckley. [Id.,Ex.4]. Stoeckley was "booked" and fingerprinted at the Pickens County Jail. [Id.,Ex.5-6]. In accordance with standard procedure, the U.S. Magistrate and U.S. Marshal in Greenville were notified that Stoeckley was incarcerated in the Pickens County Jail, and AUSA Blackburn was telephonically advised of the results of Stoeckley's interview by the FBI. [Id.,Ex.7].

During a bench conference on the following morning of August 15, 1979, Judge Dupree advised Segal that Stoeckley was in custody "in Greenville, South Carolina." [Tr. 5258-5259]. Segal then requested that Stoeckley be transported to Raleigh and that he be given a chance to interview her. [Id.]. After Judge Dupree instructed that Stoeckley be made available to the defense, Deputy

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[6] During this interview in the FBI vehicle Stoeckley recounted taking drugs the day before the murder, up until midnight when she had a "hit" of mescaline. [D.E.152,Ex.3]. "This drug completely knocked her out to the point that she had absolutely no recollection of any activities of hers for the rest of the night." [Id.] ". . . Stoeckley advised that she honestly does not know what she did that night and therefore could not categorically state that she was not involved in the murder. She stated that she had a recurring dream since the murder in which she is pictured as being dressed in black with a candle in her hand with the words appearing on a wall of whatever room she is in with the inscription 'Acid is Groovie, Kill the Pigs.' She stated in this dream, she does not specifically see bodies or any one being killed or anything of that nature. She stated that this dream could very well be based upon information that she has read in newspaper accounts of the murder." [Id.].

U.S. Marshal (DUSM) Vernoy Kennedy from the U.S. Marshal's Office in Greenville, S.C., accompanied by a female guard, took custody of Stoeckley at the Pickens County Jail after signing a USMS Release Form 103 at 2:30 p.m. on August 15, 1979. [D.E.152,Ex.11 and Ex.12,pp.7-11]. Kennedy then drove Stoeckley to the vicinity of Charlotte, North Carolina, where he transferred her to DUSM Dennis C. Meehan, who was accompanied by his wife. [Id.,Ex.1,pp.1-4; Ex.12,pp.7-14]. On the night of August 15, Meehan lodged Stoeckley in the Wake County Jail, located in downtown Raleigh a few blocks from the U.S. Courthouse. [Id.,Ex.1,pp.1-3]. The following morning (August 16th), DUSM Jimmy Britt, accompanied by USMS employee Geraldine "Jerry" Holden, transported Stoeckley a few blocks from the Wake County Jail to the U.S. Courthouse. [Britt Aff. ¶ 17]. At her arrival, Segal requested a recess to interview her. See U.S. v. MacDonald, 485 F. Supp. 1087, 1091 (E.D.N.C. 1979). The interview (which Britt does not claim to have witnessed, Britt Aff. ¶ 18) continued for almost an entire day and involved defense counsel, Stoeckley, and a number of witnesses to whom Stoeckley had allegedly made potentially incriminating statements. MacDonald, 485 F. Supp. at 1091.

D. The Events Relating To Stoeckley's Trial Testimony

Stoeckley's testimony before the jury, and the circumstances relating to the exclusion of her out-of-court statements offered through the "Stoeckley Witnesses," have been described in numerous

judicial decisions. See U.S. v. MacDonald, 485 F. Supp. 1087, 1091-1094 (E.D.N.C. 1979) (order of the district court denying bail); U.S. v. MacDonald, 456 U.S. 1, 4 (1982) (decision of the Supreme Court reversing dismissal on speedy trial grounds); U.S. v. MacDonald, 688 F.2d 224, 230-235 (4th Cir. 1982) (decision of this Court affirming conviction following remand); U.S. v. MacDonald, 640 F. Supp. 286, 315-318 (E.D.N.C. 1985) (order of the district court denying first habeas petition); U.S. v. MacDonald, 778 F. Supp. 1342, 1347 (E.D.N.C. 1991) (order of the district court denying second habeas petition); and U.S. v. MacDonald, 979 F. Supp. 1057, 1059 (E.D.N.C. 1997) (order of the district court denying motion to reopen).

As part of its response to the instant motion, the government filed copies of all the relevant portions of the trial transcript.[7] The district court, in its order denying habeas relief [D.E.150,p.10], stated that "[t]he summary contained in the Government's Response to the Fourth Motion fairly represents the more material aspects of Stoeckley's examination by defense counsel . . . . See . . . [DE-128], at 18-19; Tpp. 5513-5642; 5672-76 [DE-130 ## 1 & 4]." [D.E.150,p.10]. The district court also chronicled the events at trial relating to Stoeckley and the Stoeckley witnesses. [D.E.150,pp.10-15,42-46].

[7]D.E.130, Vol. III; D.E.131, Vol. IV.

E. Stoeckley's Post-Trial "Confessions"

Following MacDonald's conviction and while his case was on appeal, the defense camp enlisted retired FBI Special Agent Ted Gunderson, aided by retired detective Prince Beasley, to conduct further investigation and, in particular, to further interview Stoeckley. See U.S. v. MacDonald, 640 F. Supp. 286, 318 (E.D.N.C. 1985). The flurry of Stoeckley's confessions to Gunderson and Beasley, followed by the retraction of these confessions, are set forth in detail in Judge Dupree's opinion denying MacDonald's motion for a new trial. Id. at 318-324.

Stoeckley's "confessions" provided the defense the predicate for MacDonald's First Post-Conviction Motion, in which he sought a new trial and habeas relief on the basis of "newly-discovered" evidence and Stoeckley's alleged false testimony. See MacDonald, 640 F. Supp. at 309-32. In support of that motion, MacDonald also proffered evidence showing that on several occasions when Stoeckley had "confessed" to the murders of the MacDonald family, she also implicated her friend, Greg Mitchell (who died of alcohol-related illness in 1982) by alleging that he was with her in the MacDonald home and responsible for the murder of Colette. Id. at 327.

Additionally, MacDonald proffered evidence which he maintained indicated that Mitchell had, himself, made statements demonstrating involvement in the murders. Id. More specifically,

he submitted the declarations of Bryant and Norma Lane who became friends with Mitchell in the 1970s. Id. According to their statements, in 1977 Mitchell came to the Lane home in a depressed state. Id. When asked what was wrong, Mitchell responded that something was bothering him that was too horrible to talk about. Id. In 1982, Mitchell again allegedly told the Lanes "that something had happened while he was in the service and if anyone found out about it he would have to leave the country." Id. at 327. In addressing the Lanes' affidavits, Judge Dupree found them "unpersuasive because Mitchell made no specific reference to having been involved in the MacDonald slayings." Id. at 328. And, in characterizing the totality of the evidence relating to Mitchell's "confessions" as "speculative and circumstantial," he observed that "Mitchell, like Stoeckley, may have been tormented by accusations that he was involved in the murders but the court was unable to conclude from the evidence submitted that there is any real likelihood that he was involved." Id. He therefore determined that MacDonald's claim relating to Mitchell's purported confession was "without merit." Id. And he concluded that, even assuming that the newly-discovered evidence concerning the alleged presence of Stoeckley, Mitchell, and other intruders in the MacDonald household on the night of the murders was discovered using due diligence, such evidence, "with its multiple

inaccuracies and inconsistencies would not produce a different result were it introduced at a second trial." Id. at 333.

This Court affirmed the rulings of the district court denying motions for habeas relief and for a new trial, stating "that there is no basis upon which any ruling in this case by a meticulous district judge can be overturned." U.S. v. MacDonald, 779 F.2d 962, 966 (4th Cir. 1985). It further observed that "the district judge could appropriately find that the post-trial statements [of Stoeckley, Mitchell and others] were all lacking in trustworthiness and that they did not meet the materiality requirement for a new trial." Id. at 965.

F. MacDonald's Second Motion for Post-Conviction Relief

On October 19, 1990, MacDonald filed a second petition for habeas relief, alleging that the government failed to comply with its discovery obligations by neglecting to furnish the defense laboratory notes about physical evidence, including information relating to the presence of unmatched human hair in the bedding of the victims, wool fibers unmatched to any known source from the MacDonald household, and blond synthetic fibers from the MacDonald household suggesting the presence of a wig-wearing intruder on the night of the murders. See U.S. v. MacDonald, 778 F. Supp. 1342 (E.D.N.C. 1991). A new declaration from Bryant Lane, executed on July 15, 1988, was appended as an exhibit to an affidavit in support of the petition. See Declaration of Bryant Lane, attached

as Exhibit 8 to Affidavit of John J. Murphy (#2) filed May 14, 1991. [D.E.129-8,pp.24-30]. It stated that sometime in the 1970s, while depressed and under the influence of alcohol, Mitchell had told Lane he "personally kn[ew] MacDonald is innocent because I was the one that killed the MacDonald family." [Id.]. On another occasion, Mitchell admitted to Lane's wife that he was guilty of the murders. [Id.]. Mitchell later told Lane that a "bitch was out there which if she didn't keep her mouth shut she could get a lot of us in trouble." [Id.]. Lane further explained that his previous affidavit lacked these details because he "did not at the time feel comfortable about telling strangers the whole story." [Id.]. He also explained that, when subsequently interviewed by an FBI Agent, he declined to provide the full story of Mitchell's admissions because the agent treated him in a sarcastic and judgmental manner. [Id.]. Judge Dupree denied MacDonald's petition both on the merits and on the ground that it constituted an abuse of the writ. See MacDonald, 778 F. Supp. at 1360. This Court affirmed. U.S. v. MacDonald, 966 F.2d 854 (4th Cir. 1992).

G. MacDonald's Third Motion for Post-Conviction Relief

On April 22, 1997, MacDonald filed a motion to reopen his Second Motion, alleging fraud by the government and seeking an order permitting DNA testing of enumerated "unsourced" human hair that had been collected at the crime scene. See U.S. v. MacDonald, 979 F. Supp. 1057 (E.D.N.C. 1997). The district court (the

Honorable James C. Fox)[8] denied the motion insofar as it sought to reopen the Second Motion, but transferred the remaining matters to this Court for a gatekeeping determination. Id. at 1069. This Court affirmed the denial of the motion to reopen but granted the motion with respect to the DNA testing and remanded the matter to the district court to oversee the DNA testing. In re MacDonald, No. 97-713 (Oct. 17, 1997) (unpublished). On March 10, 2006, the Armed Forces Institute of Pathology, which was hired to conduct the testing, issued its report. See U.S. v. MacDonald, 2008 WL 4809869, at *2 (E.D.N.C. Nov. 4, 2008) (unpublished).

H. MacDonald's Fourth and Instant Motion Post-Conviction Relief

On December 13, 2005, MacDonald filed in this Court an application for authorization to file yet another motion to set aside his sentence under Section 2255, once again on the basis of additional "newly-discovered evidence" and government misconduct. The motion was predicated upon the affidavit executed November 3, 2005, by now-deceased DUSM Jimmy Britt. [D.E.115-2,Ex.1]. According to Britt, he and Ms. Jerry Holden (who died the preceding March 21, 2005[9]) were assigned to travel to Greenville, South Carolina, to take custody of Helena Stoeckley, then lodged in the

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[8] Judge Fox assumed responsibility for the MacDonald habeas litigation upon the death of Judge Dupree in December 1995. U.S. v. MacDonald, 979 F. Supp. 1057, 1058 (E.D.N.C. 1997).

[9] D.E.152,Ex.8

Greenville County Jail, and return her to Raleigh where the MacDonald trial was underway. [Britt Aff. ¶11]. (Britt did not claim that either he or Holden had anything to do with Stoeckley's arrest.) Britt claimed that during the trip from Greenville, Stoeckley allegedly made statements in the car to the effect that she, along with others, were in the MacDonald residence on the night of the murders of the MacDonald family and she recalled the presence of a hobby horse in the home. [Id. ¶¶15-16]. The following day, Britt was assigned to escort Stoeckley to the federal courthouse. [Id. ¶18]. He said he first took her to the defense team's office and left her with attorneys Segal and Smith. [Id. ¶18]. When they were finished with her, Britt claimed that he took her to the U.S. Attorney's office where, in his presence, she was interviewed by prosecutor Blackburn. [Id. ¶18]. Britt swore that, during that interview: "Ms. Stoeckley told Mr. Blackburn the same things she had stated to me on the trip from Greenville to Raleigh. She specifically mentioned the hobby horse and various other things, and specifically told Mr. Blackburn that she, along with others, had been inside the Jeffrey MacDonald home on the night of the murders. She also said that she had gone to the MacDonald house to acquire drugs." [Id. ¶22]. According to Britt, Blackburn then told her that, if she testified to that effect before the jury, he would indict her for murder. [Id. ¶24].

This Court then issued a Prefiling Authorization ("PFA"), pursuant to 28 U.S.C. § 2244(b) and 28 U.S.C. § 2255 authorizing MacDonald to submit his proposed successive Section 2255 motion for filing in the district court. In re MacDonald, No. 05-548 (4th Cir. Jan. 12, 2006) (unpublished).

I. MacDonald's Submissions to the District Court

Upon submitting his Fourth Motion to the district court to determine whether it met the requirements necessary for filing, MacDonald included as exhibits the affidavits of Everett Morse, Bryant Lane, and Donald Biffkin [D.E.111,Ex.7]. The Lane affidavit, ostensibly executed in 2005 [D.E.111,Ex.7], reiterated assertions made in Lane's 1988 declaration that he and his wife knew Greg Mitchell, and that they heard him acknowledge participation in the murder of the MacDonald family and assert MacDonald's innocence. The Bufkin and Morse affidavits likewise assert that the affiants overheard Mitchell acknowledge participation in the murders of the MacDonald family. [D.E.111,Ex.7]. The government moved to strike the three affidavits on the ground that identical claims relating to Mitchell's admissions had been considered and rejected in the context of previous petitions and, in any event, claims predicated upon such evidence were untimely. [D.E.129].

MacDonald subsequently filed a motion styled "Motion to Add an Additional Predicate to His Previously Filed Motion" (hereafter

"Fifth Motion"). [See D.E.150,p.6]. It sought to add to MacDonald's motion authorized by the PFA, the "newly-discovered" results of the DNA testing. [Id.]. It further alleged that the mitochondrial DNA testing established the presence of unsourced hair at the crime scene, including one hair found with blood residue found in a critical location, under the fingernail of Kristen MacDonald, and one two-inch hair with roots and a follicle intact found under the body of Colette MacDonald. [Id.]. The government opposed the inclusion of such evidence, arguing that it was not properly the subject of a gatekeeping determination by this Court. [D.E.134-135].

The following day, MacDonald filed a "Motion to Expand the Record with Itemized Evidence" ("Sixth Motion"). [See D.E.150,pp.6-7]. The motion was accompanied by two large, bound and tabbed collections of documents and a video recording, purportedly containing evidence that "'was not part of the trial record.'" [Id.,pp.20-21]. MacDonald's "'Itemized Statement of Material Evidence'" consisted of 48 numbered paragraphs of text setting forth his version of what he purportedly compiled to date. [Id.,p.21].

Finally, MacDonald moved to "'Supplement [His] Statement of Itemized Material Evidence'" by adding the March 31, 2007, affidavit of Helena Stoeckley's now-deceased mother ("Seventh Motion"). [D.E.150,p.7]. It asserts that Helena twice confessed

to her mother to having been present during and having participated in the murders of the MacDonald family. [Id.].

J. The Government's Response

The "Response of the U.S. To Successive Motion For Relief Under 28 U.S.C. § 2255" [D.E.128] maintained that the Motion to Vacate [D.E. 111] was barred under the "gatekeeping" rules governing the statute. The government further advised, however, that should the district court not agree with our legal submission, that we anticipated contesting the factual allegations MacDonald had made in support of his motion. [D.E.128]. "In that event, we request an evidentiary hearing and an opportunity to cross-examine the affiants supporting relief, and an opportunity to present evidence in rebuttal." [D.E.128,p.1].[10]

K. The Order of the District Court

On November 4, 2008, the district court denied MacDonald's motion to file successive Section 2255 motions. [D.E.150]. As a threshold matter, the district court granted the government's Motion to Strike the affidavits concerning Greg Mitchell's admissions, concurring with the government's observations that the claims had previously been considered and rejected and that the evidence was untimely. [D.E.150,p.18]. The district court also

[10]In view of the possibility of an evidentiary hearing, and under no legal obligation to disclose in advance evidence impeaching defense witnesses, the government did not file on March 30, 2006, the evidence it had discovered by that date establishing that Britt's claim to have participated in the transportation of Stoeckley from South Carolina to Raleigh was false.

rejected MacDonald's efforts to embellish his Fourth Motion with additional matters that had not been presented to this Court in a motion for a PFA. More specifically, with respect to the motions proffering the results of the DNA test and the affidavit of Stoeckley's now-deceased mother (the Fifth and Seventh Motions), it adopted the government's rationale supporting its motions to exclude the items. [Id.,pp.18-20]. It observed that the submissions "have been the subject of neither an application for a PFA nor an award thereof" [Id.,p.19], but were instead "bootstrapping, 'piggybacking' attempts" involving claims that "are untimely, successive and independent," and over which the district court "lack[ed] subject matter jurisdiction." [Id.,p.20]. As to MacDonald's "Motion to Expand the Record" (the Sixth Motion), which (according to the court) included "[MacDonald's] version of what is proved by the universe of evidence he has compiled to date – old and new, admitted and rejected," that he "acquired before, during and after his trial," the court rejected his suggestion that it was required to "expand the record and consider every manner of supplementary material he deems supportive of his position, regardless of its source or its competence." [Id.,pp.20-21]. It instead found "the record as it presently is constituted to be more than adequate to permit a thorough and complete understanding of the facts pertinent to the motions now before it." [Id.,pp.21-22].

And it further "emphasiz[ed] that MacDonald already has litigated exactly the same basic legal issues he raises herein." [Id.,p.16].

The district court then addressed--for gatekeeping purposes--MacDonald's Fourth Motion, which primarily involved Britt's affidavit. [See D.E.150,pp.22-25]. At the outset, the district court observed that the "new evidence," which it accepted as accurate for the purpose of analysis [id.,p.38,n.18), contained three independent components, each of which warranted separate analysis: a "confession" claim[11]; a claim that AUSA Blackburn lied to the trial judge about what Stoeckley told him during their interview; and a claim that Stoeckley did not testify as the defense anticipated due to Blackburn's threat to prosecute her. [Id.,p.26]. The Government incorporates by reference the district court's analysis and rejection of each of these claims. [D.E.150,pp.28-46].

The district court concluded that, in light of the evidence as a whole, even if Britt's affidavit were considered "newly-discovered," it simply cannot establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-

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[11]Significantly, MacDonald does not persist in his argument made to the court below, that Stoeckley's alleged "confession" to Britt in the car en route to Raleigh should have entitled him to habeas relief. The government's evidence subsequently submitted to the district court in its Motion for Publication and Modification of Order [D.E.152] demonstrates beyond cavil that Britt did not drive Stoeckely from South Carolina to Raleigh on August 15, 1979, and therefore, Britt could not have witnessed any such confession by Stoeckley.

finder would have found MacDonald guilty of the murders of his wife and daughters. [Id.,p.46].

L. The Government's Motion For Publication And Modification Of Order

Although the order of the district court accepted the averments in Britt's affidavit as true for the purpose of disposition of MacDonald's Motion to Vacate, the government was concerned that, in particular, the following sentence in the order might be construed as adjudicated facts: "Stoeckley's arrest and transport by car to Raleigh [from Greenville, South Carolina] was executed by former Deputy U.S. Marshals ("DUSM") Jerry Holden and Jim Britt, both of whom now are deceased." [D.E.150,p.9]. Accordingly, on November 24, 2008, it filed the "Government's Motion For Publication And Modification Of Order" [D.E.152], requesting, *inter alia*, that the court's order be modified to reflect only that Britt had claimed to have transported her on this trip [Id.,p.2-3]. In support of this motion, the government filed the incontrovertible proof that other DUSMs had transported Stoeckley, not from Greenville, but from Pickens, South Carolina. [Id.,pp.4-12]. By order of January 9, 2009, the district court, while noting that "the Government now reveals that it has evidence, including affidavits and official documents, that prove the falsity of Jim Britt's affidavit upon which the Fourth Circuit Court of Appeals' Pre-Filing Authorization primarily was based," denied the

motion. [D.E.162,pp.1-2]. The district court also denied MacDonald's motion for a COA. [Id.,p.3].

M. MacDonald's Instant Appeal

MacDonald appealed. He sought a certificate of appealability authorizing review of all of the rulings in the district court's November 4, 2008, order. [D.E.150]. On June 9, 2009, this Court entered an order granting a certificate of appealability on the single issue of whether "the district court's procedural decisions prohibiting expansion of the record to include evidence received after trial and after the filing of the 28 U.S.C.A. § 2255 . . . motion was erroneous in light of 28 U.S.C. § 2244(b)(2)(B)(ii)." Nevertheless, in his brief, MacDonald addresses a broader range of issues, alleging: (1) that in assessing the adequacy of his gatekeeping motion, the district court improperly refused to consider the affidavits of the witnesses who claimed to have heard Greg Mitchell admit to participation in the murders of the MacDonald family, the affidavit of Stoeckley's mother, the DNA evidence, and the other exculpatory evidence he submitted in earlier post-trial motions; (2) that the DNA evidence entitled him to relief under Section 2255; and (3) that the district court erred in determining on the merits that the allegations in Britt's affidavit were insufficient to satisfy the gatekeeping requirements of 28 U.S.C. § 2244(b)(2)(B).

SUMMARY OF ARGUMENT

1. The instant appeal should be dismissed as moot. Former DUSM Jimmy B. Britt, the defense witness whose "newly-discovered" evidence was embodied in an affidavit and considered by the court below in denying MacDonald's motion for a Certificate of Appealability, is now deceased. As Britt's live testimony cannot be entertained in a subsequent habeas proceeding, which would be governed by the Federal Rules of Evidence (including the hearsay rule), no purpose is served by considering whether, in denying a gatekeeping motion for a successive Section 2255 petition in which his affidavit was the centerpiece, the court below should have considered it in the context of the items of extrinsic evidence now at issue.

2. The central issue in the case involves a question of statutory construction: whether, as it appears in AEDPA, the phrase requiring a habeas court to consider the factual basis for leave to file a second or subsequent habeas petition "in light of the evidence as a whole" (see 28 U.S.C. § 2244(b)(2)(B)(ii)) requires it to disregard other contemporaneously-enacted provisions of that statute which confine the scope of habeas review in such cases. MacDonald's broad construction of that isolated phrase would have the practical effect of nullifying: (1) the prohibition against the entertainment of a second or successive application, based on newly-discovered evidence that had not been authorized by

a PFA from the court of appeals (28 U.S.C. § 2244(b)(3)); (2) the prohibition against considering second or successive claims that were rejected in a prior habeas motion (28 U.S.C. § 2244(b)(1)); and (3) the prohibition against entertaining untimely claims (28 U.S.C. § 2255(f)). Such results contravene a fundamental canon of statutory construction. Consequently, the court below properly excluded from its analysis: items of newly-discovered evidence submitted directly to it after this Court issued its PFA; evidence that had been considered and rejected in earlier habeas proceedings; and evidence that was untimely.

3. MacDonald's argument that, after reviewing the potential impact of Britt's affidavit upon a hypothetical retrial, the court below erred in concluding that his instant petition should be denied on the merits is not within the scope of this Court's Certificate of Appealability ("COA"). The COA was limited to specific procedural rulings rendered by the district court. Accordingly, his arguments relating to the district court's ruling on the merits of his Motion To Vacate pursuant to 28 U.S.C. § 2255 should be rejected at the outset.

ARGUMENT

I. THE INSTANT APPEAL IS NOW MOOT DUE TO THE AFFIANT BRITT'S DEATH AND THE CONSEQUENT INABILITY OF A HABEAS COURT TO ENTERTAIN HIS TESTIMONY.

A. Standard of Review.

Whether this appeal is moot is a matter for this Court's determination in the first instance.

B. Discussion of Issue.

As a threshold matter, this Court should dismiss the instant appeal due to Britt's death.[12] The sole purpose of this appeal is to consider whether, in making a "gatekeeping assessment" as to whether Britt's affidavit should entitle MacDonald to an evidentiary hearing on the merits of his fourth habeas motion, the district court properly refused to consider extrinsic evidence, including evidence that came to light following this Court's issuance of a PFA and evidence considered and rejected in connection with MacDonald's previous habeas claims.

Assuming *arguendo* that such evidence was improperly excluded from the district court's determination, and that Britt's statements considered in tandem with such evidence would have merited an evidentiary hearing, Britt's demise forecloses testimony consistent with the statements reflected in his affidavit from ever being entertained at an evidentiary hearing.

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[12] See D.E.150,p.9,n.5.

It is foreseeable that MacDonald would seek to introduce Britt's affidavit during such a proceeding. Such evidence, like Stoeckley's alleged admissions to Britt, is, of course, rank hearsay to which the government would object under Fed. R. Evid. 802.[13] That rule, which makes hearsay generally inadmissible, as well as rules addressing the admissibility of certain hearsay evidence, governs habeas proceedings under 28 U.S.C. § 2255. See Fed. R. Evid. 1101(e).

Nor are we aware of any exception to the hearsay rule that would permit the introduction of Britt's affidavit. While it may be argued that the affidavit would be admissible under the residual exception to the hearsay rule, Fed. R. Evid. 807, it plainly lacks "circumstantial guarantees of trustworthiness" equivalent to the hearsay exceptions covered by Rules 803 and 804, as Rule 807 requires. Thus, although Britt is now unable to testify due to his intervening death, in contrast to other circumstances in which the statement of an unavailable hearsay declarant is admissible (see

[13] Thus, the introduction of Britt's statement would present a double hearsay issue as it would involve his out-of-court statement concerning Stoeckley's alleged admission to him, which the defense seeks to have admitted for the truth of the matters asserted therein, i.e., that she was present and participated in the murders of MacDonald's wife and daughters. In such cases, hearsay within hearsay is only admissible "if each part of the combined statements conforms with an exception to the hearsay rule." Fed. R. Evid. 805. The district court has already determined – consistently with the trial judge's previous rulings – that Stoeckely's alleged admissions against interest lacked sufficient indicia of trustworthiness to be admissible under Fed. R. Evid. 804(b)(3). [See D.E.150,pp.29,34-35].

Fed. R. Evid. 804(b)), he was never subject to cross-examination by the government; there is no indication that the statements concerned the cause or circumstances of what, at the time of his statement, the declarant believed to be impending death; and the statements were not against his pecuniary or proprietary interests. Moreover, the record is devoid of any other equivalent circumstantial guaranty of the statement's trustworthiness. To the contrary, as the court below observed, even if Britt's statement accurately reflects what *he thought* he recalled Stoeckley admit during the interview at the U.S. Attorney's office, his recollection of those events, following a time lapse of almost 30 years, simply cannot be reconciled with the trial record reflecting the statements of both Stoeckley and MacDonald's own lawyer. [D.E.150,pp.34-35].

II. IN MAKING A GATEKEEPING DETERMINATION RELATING TO A SUCCESSIVE HABEAS APPLICATION PREDICATED UPON NEWLY- DISCOVERED EVIDENCE, A DISTRICT COURT'S ASSESSMENT OF SUCH EVIDENCE "IN LIGHT OF THE EVIDENCE AS A WHOLE" DOES NOT INCLUDE: (1) "NEWLY-DISCOVERED EVIDENCE" THAT IS INDEPENDENT OF AND UNRELATED TO THE EVIDENCE THE COURT OF APPEALS CONSIDERED IN ISSUING ITS PREFILING AUTHORIZATION UNDER 28 U.S.C. §2244(b)(3); (2) EVIDENCE THAT WAS PROFFERED AND REJECTED IN CONNECTION WITH PREVIOUSLY DENIED HABEAS PETITIONS; AND (3) EVIDENCE THAT DOES NOT MEET THE JURISDICTIONAL PROVISIONS OF 28 U.S.C. §§ 2244, 2255.

A. Standard of Review

This issue is governed by the construction of a federal habeas statute. This Court reviews issues of statutory construction de novo. See, e.g., U.S. v. Linney, 134 F.3d 274, 282 (4th Cir.

1998); see also Reyes-Requena v. U.S., 243 F.3d 893, 900 (5th Cir. 2001) (applying de novo review to the denial of a second Section 2255 motion on the ground that it failed to meet statutory gatekeeping conditions).

B. Discussion of Issue.

1. The Statute At Issue and the Governing Principle of Statutory Construction

This case presents the question of whether, in making a gatekeeping determination under 28 U.S.C. § 2244(b(2)(B)(ii) on the basis of newly discovered evidence, a habeas court must consider such evidence in tandem with (1) facts considered and rejected as not "newly-discovered" during preceding motions for post-conviction relief, and (2) additional items of "newly-discovered" evidence filed in the district court without first being subject to a PFA in the court of appeals. In this connection, Section 2244(b) provides, in pertinent part, as follows:

> (2) A claim presented in a second or successive habeas application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> . . . .
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (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 factfinder would have found the applicant guilty of the underlying offense (emphasis added).

MacDonald maintains that the italicized phrase, "viewed in light of the evidence as a whole," enables him to import into such an assessment evidentiary matters falling within both categories identified above. But as the Supreme Court has repeatedly explained, in construing a statute:

> [t]he meaning–or ambiguity--of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into a harmonious whole," . . . .

Food and Drug Adm'n. v. Brown and Williamson Tobacco Corp., 529 U.S. 120, 132-133 (2000) (internal citations omitted); see, e.g, U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of America, 508 U.S. 439, 455 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'") (quoting U.S. v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)); accord Bailey v. U.S., 516 U.S. 137, 145 (1995); Ayes v. Dept. of Veterans Affairs, 473 F.3d 104, 108 (4th Cir. 2006).

MacDonald's open-ended construction of the isolated phrase "in light of the evidence as a whole" disregards this fundamental canon of construction. It wrenches that language from its proper statutory context and, in doing so, effectively defeats the

overarching Congressional "object and policy" (U.S. Nat. Bank of Oregon, 508 U.S. at 455) to curtail repetitive, vexatious habeas petitions, of which this case is the nation's paradigm example.

2. The Statutory Requirement For A PFA In Cases Involving "Newly-Discovered" Evidence (Relates to MacDonald's Fourth and Seventh Motions)

Title 28, United States Code, Section 2244(b) was enacted as part of Title I, Section 106 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 106(b)(2)(B), 110 Stat. 1220 (1996) (hereafter "AEDPA"), captioned, "Limits on Second or Successive Applications." In addition to the portion of Section 2244(b) upon which MacDonald's argument is predicated, the paragraph was further amended to state as follows:

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a successive application shall be determined by a three judge panel of the court of appeals.
>
> (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.

28 U.S.C. § 2244(b)(3).

In turn, Section 105 of the AEDPA amended 28 U.S.C. § 2255 to provide, in part:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain–
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> >
> > (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Pub. L. 104-132, Tit. I § 105; 28 U.S.C. § 2255(h).

As this Court explained in In Re Williams, 364 F.3d 235, 238 (4th Cir. 2004), taken collectively, these provisions of AEDPA were enacted in response to "the problem of repetitive collateral litigation" by "rais[ing] the threshold that a prisoner must cross to obtain review of claims presented in a successive application for collateral review." See H.R. Conf. Rep. No. 104-518 at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944 ("This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus" and requires "[s]uccessive petitions [to be] approved by a panel of the court of appeals").

Thus, considered in tandem, the foregoing provisions of AEDPA require that, as a condition precedent to the entertainment of a second or subsequent petition for habeas relief under Section 2255, the petitioner must first submit a motion to the court of appeals for an order authorizing the district court to consider the application. This order is commonly referred to as a PFA

(prefiling authorization). A three-judge panel must then consider the application and cannot issue a PFA unless the application fulfills the stringent criteria set out in 28 U.S.C. § 2255(h). Where alleged newly-discovered evidence constitutes the basis for the application, the panel must conclude that the evidence is of such a nature that, "if proven and viewed in light of the evidence as a whole, [it] would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." [Id.].

In this case, MacDonald obtained a PFA from this Court with respect to the Britt affidavit and other items of alleged "newly-discovered evidence" identified in his Section 2255 motion. As explained, when, following issuance of the PFA, MacDonald submitted that motion to the district court for a gatekeeping assessment under Section 2244(b)(2), he attempted to add by separate motions directed to the district court two additional items of newly-discovered evidence – the results of the DNA testing (MacDonald's Fifth Motion) and the affidavit of Stoeckley's now-deceased mother (the Seventh Motion). In conducting its gatekeeping assessment, the district court fully considered Britt's affidavit. [See D.E.150,pp.22-42]. However, it properly refused to consider these additional items, correctly observing that they have "been the subject of neither an application for a PFA nor an award thereof"

[D.E. 150,p.19] and were, instead, "bootstrapping, 'piggybacking' attempts." [Id.,p.20].

MacDonald maintains that the court below erred in refusing to consider these items because, under Section 2244(b(2)(B)(ii), the district court's gatekeeping assessment of "the facts underlying the claim [of newly-discovered evidence]" must be considered "in light of the evidence as a whole." (E.g., Br. 37-40).[14] Differently stated, he construes the phrase "evidence as a whole" as a license to append to a Section 2255 motion authorized for filing in a district court any "new" factual matter that may have come to light subsequent to issuance of the PFA, without regard to whether such matters were embraced by the application considered by the appellate court. Such reasoning cannot withstand scrutiny when considered in light of AEDPA in its entirety.

More specifically, if MacDonald's construction of that phrase were adopted, it would virtually eviscerate the remainder of the statutory scheme that Congress carefully crafted in §2255 to curtail vexatious, repetitive claims for habeas relief, i.e., that

[14] In the district court, MacDonald argued that, by authorizing DNA testing and remanding the motion to the district court to supervise the testing process, this Court also "implicitly" authorized it to evaluate any eventual DNA test results. See "Petitioner's Motion to Add Additional Predicate to His Previously Filed Motion Under 28 U.S.C. Section 2255." [D.E.122,p.11]. But this Court's order did no such thing; indeed, to construe it in such a manner would defeat the stringent requirements for issuance of a PFA under 28 U.S.C. §§ 2244(b)(3) & 2255(h), requiring a separate determination by this Court that any such test results, when considered in light of the evidence as a whole, would likely result in an acquittal.

before a district court can consider any claim in a successive petition involving alleged newly-discovered evidence, it must first be submitted to a three-judge appellate panel in a PFA application and survive an assessment of whether the claim fulfills the stringent criteria set out in Section 2255(h). Under MacDonald's construction of the statute, these requirements could be circumvented in any case where an appellate court issues a PFA and authorizes the district court to conduct a gatekeeping analysis by the expedient of piggybacking the additional claims onto the granted application. Plainly Congress did not intend such a result.

This Court's decision in U.S. v. Winestock, 340 F.3d 200 (4th Cir. 2003), upon which MacDonald relied in the district court, lends no support to an argument that its gatekeeping assessment should have embraced such additional matters. In Winestock, observing that Section 2244(b)(3) establishes gatekeeping criteria for courts of appeals "with respect to 'second or successive *application[s]*,'" (emphasis and bracket in original), this Court held that, in making a PFA assessment, it must examine the application to determine whether it contains any claim that satisfies the requirements for authorization. Id. at 205. "If so, the court should authorize the prisoner to file the entire application in the district court, even if some of the claims *in the application* do not satisfy the applicable standards." Id. at

205 (emphasis added). Then, upon submission to the district court, "that court must examine each claim and dismiss those that are barred under § 2244(b) or § 2255 ¶ 8." Id.

In this case, neither the DNA test results nor the affidavit of Stoeckley's now-deceased mother was included in the PFA application authorized by this Court for consideration by the court below.[15] Indeed, the results of the DNA test were not even filed with the district court until almost two months after this Court's issuance of the PFA, and the affidavit of Stoeckley's mother was not filed until March 31, 2007, over a year after issuance of the PFA. Consequently, neither item falls within the ambit of this Court's decision in Winestock.[16]

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[15]Moreover, the subsequent death of Helena Stoeckley's mother renders the issue moot for the same reasons that apply to Britt's affidavit. In any event, since Mrs. Stoeckley's affidavit was never the basis for a PFA while she was alive, it cannot be submitted *post mortem* under § 2255 as the justification for the filing of a successive application for relief. This is so because it can never meet the "if proven" certification requirement of § 2255(h)(1) because both Mrs. Stoeckley and her daughter are dead.

[16]Nor is MacDonald's cause materially assisted by the district court's decision in Hazel v. U.S., 303 F. Supp. 2d 753 (E.D. Va. 2004), upon which he relied in applying for a Certificate of Appealability. See Def. Application for a Certificate of Appealability at 8. In that case, the court, relying upon Winestock, entertained additional claims that were apparently not part of a certified PFA application. Id. at 758-59. But, as the district court observed in the case at bar, the Hazel court's reliance upon Winestock was misplaced because, unlike Winestock, the additional claims in Hazel were *not* part of "the entire application" that the court of appeals permitted the petitioner to file. [D.E.150,p.19]. Moreover, the Hazel court itself acknowledged the practical consequences of the approach it believed had been adopted in Winestock. It aptly observed that, under its (continued...)

In his instant brief, MacDonald argues at length concerning the potential impact of the DNA evidence--which by his own admission merely constitutes additional evidence concerning the presence of unsourced human hair in the MacDonald household--upon the result of a hypothetical retrial. (See Br. 43-45).[17] That issue, however, has no bearing whatever upon the limited question on which this Court granted review, and the government's argument that, absent issuance of a PFA by this Court, the district court properly refused to consider it. As the Supreme Court's recent decision in District Attorney's Office For The Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009), made clear, the fact that the newly discovered evidence involves DNA does not excuse the prisoner's default in failing to follow the applicable legislative scheme. As MacDonald had filed four previous habeas petitions, the only means provided by Congress for MacDonald to collaterally

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[16](...continued) interpretation of that case, "a law designed to shield the federal courts from the flood of successive habeas petitions" would "permit a petitioner who wins certification on only one ground to use that certification as a means to piggyback in for review a host of other uncertified and unscrutinized claims." Hazel, 303 F. Supp. 2d at 759 n.6. Surely, neither this Court nor Congress intended such an "arguably anomalous" result. Id.

[17] This is the same type of specious evidence rejected by the jury. Furthermore, there is no claim that the DNA results call into question any of the physical evidence used at trial to convict MacDonald. Consequently this case is clearly distinguishable from House v. Bell, 547 U.S. 518 (2006), where the physical evidence central to the prosecution's case (semen on the victim's nightgown) was called into question by subsequent DNA tests. [Tr. 7265-7280].

attack his conviction based on the DNA test results was for him to seek a PFA from this Court pursuant to 28 U.S.C. § 2244.[18] For whatever tactical reason, he chose not to follow the legislative scheme crafted by Congress. We submit that a deliberate bypass of the PFA process vitiates any claim that the district court erred in determining that it lacked jurisdiction.

As the court below observed, MacDonald remains free to seek a PFA relating to such evidence. [D.E.150,p.20]. If and when he does so, the government will address in detail the overstated claimed significance of the DNA test results (which eliminate Stoeckley and Mitchell as the source of any of the hairs) and their probable impact upon a hypothetical retrial.[19] At that time, the government will also address the DNA results which, in fact, strengthen the prosecution's case.[20]

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[18] MacDonald does not meet the statutory requirements for a new trial under the Innocence Protection Act, because the DNA test results do not exclude him as the source of any of the biological evidence used to convict him. See 18 U.S.C.§ 3600(g).

[19]As the government has previously informed this Court, there is no evidence to support MacDonald's claim that the unsourced hairs were bloodstained or forcibly removed. See Appellee's Response In Opposition To Motion For Leave To File Brief As *Amici Curiae*, at n.4.

[20] See D.E.122,Tab 1,App.1,pp.2-5 (for example, the blood stained *hair* fragment found in Colette MacDonald's left hand, which MacDonald's counsel argued at trial proved the presence of intruders).

3. Prohibitions Governing Previously-Rejected Or Untimely Claims (Addresses Claims Relating to Greg Mitchell and MacDonald's "Motion To Expand the Record")

ADEPA contains two other limitations on a habeas petitioner's ability to raise items of "newly-discovered" evidence in a second or subsequent petition under Section 2255 that govern the subject matter of MacDonald's additional claims concerning the district court's refusal to consider extrinsic evidence. First, it provides:

> 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.

Pub. L. 104-132, Tit. I, § 105, codified at 28 U.S.C. § 2255(f)(4).

Additionally, AEDPA amended Section 2244 with the following language:

> (b)(1) A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed.

Pub. L. 104-132, Tit. I, § 106(b)(1); 28 U.S.C. § 2244(b)(1). Although this Court has pretermitted the question whether paragraph (b)(1) of Section 2244 applies to habeas applications brought under Section 2255 (see Winestock, 340 F.3d at 205), the appellate courts that have considered the issue are in agreement that it governs successive petitions submitted under both Sections 2254 and 2255 by virtue of the cross-reference in the latter Section to Section

2244. See Taylor v. Gilkey, 314 F.3d 832, 836 (7th Cir. 2002) ("Although § 2244 refers to § 2254 rather than § 2255, we have held that the cross-reference to § 2244 in § 2255 ¶ 8 means that it is equally applicable to § 2255 motions.") (citing Bennett v. U.S., 119 F.3d 468, 469 (7th Cir. 1997)); accord Charles v. Chandler, 180 F.3d 753, 758 (6th Cir. 1999); U.S. v. Card, 220 Fed. App'x 847, 851 (10th Cir. 2007) (unpublished); see also Reyes-Requena v. U.S., 243 F.3d 893, 898 (5th Cir. 2001) ("Although the legislative history is silent as to the extent of § 2244['s] incorporation into § 2255, we . . . can find no intent to treat federal and state prisoners differently."); Triestman v. U.S., 124 F.3d 361, 367 (2d Cir. 1997) ("In the absence of . . . specification, it is logical to assume that Congress intended to refer to all of the subsections of § 2244 dealing with the authorization of second and successive motions"); 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure, § 41.7d at 1962 (5th ed. 2005) (Section 2255 "appears to adopt the same procedure for section 2255 cases as applies to successive state-prisoner habeas corpus petitions [under § 2244]").

Consistent with that understanding, MacDonald and the district court both assumed that, for the purpose of this litigation, the gatekeeping standards contained in Section 2244(b) governed his pending successive petition. [See D.E.150,p.24]. In its order granting a certificate of appealability, this Court--expressly

citing 28 U.S.C. § 2244(b)(2)(B)(ii)--appears to have made the same assumption. And, in his instant appeal, MacDonald has once again relied upon language from that paragraph as the predicate for his claim that the district court failed to review his gatekeeping motion in light of "the evidence as a whole." (E.g., Br. at 32 n.11, 37-40, 50). If those assumptions concerning the applicability of § 2244(b)(2)(B)(ii) to gatekeeping motions filed under Section 2255 are correct, the preclusion against the entertainment of previously presented and dismissed claims contained in § (b)(1) of the same subsection must also govern such petitions.

Further, as this Court has explained, the provisions of AEDPA, including those barring claims "recycled from [a] previous [habeas] application" (In Re Williams, 330 F.3d 277, 282 (4th Cir. 2003)), are "based on longstanding principles of habeas practice" governing "abuse of the writ," which includes precluding a federal court from considering claims presented in prior habeas applications. In Re Williams, 364 F.3d 235, 239 (4th Cir. 2004). That limitation is, in turn, bottomed upon a qualified application of the doctrines of res judicata and collateral estoppel to habeas review. See Alexander v. U.S., 121 F.3d 312, 314 (7th Cir. 1997) ("Rejected justifications may not be reiterated in a successive motion for leave to file. Doctrines of preclusion (res judicata and collateral estoppel) are fully applicable."); see also Schlup v.

Delo, 513 U.S. 298, 318-319 (1995) ("In [prior] decisions, the Court held that a habeas court may not ordinarily reach the merits of successive claims" raised in a second or subsequent habeas petition. "The net result of . . . congressional and judicial action has been the adoption in habeas corpus of a 'qualified application of the doctrine of res judicata.'") (quoting McCleskey v. Zant, 499 U.S. 467, 486 (1991)); see also Sanders v. U.S., 373 U.S. 1, 15 (1963). There is no logical reason why that well established limiting principle should govern successive and duplicative petitions for collateral review under Section 2254 but not those brought under Section 2255 as well.

Because the entirety of Section 2244(b) governs gatekeeping determinations in the context of successive Section 2255 petitions, if the phrase "in light of the evidence as a whole" in Section 2244(b)(2)(B)(ii) were construed to embrace "evidence" that was considered and rejected in prior habeas proceedings, it would nullify the prohibition in the preceding sub-paragraph, Section 2244(b)(1), against the entertainment of claims considered and rejected in a prior habeas corpus application. By the same token, if that language were construed to embrace evidence uncovered without regard to the time of its discovery, it would nullify the one-year time limitations on the submission of Section 2255 motions contained in Section 2255(f). Thus, if the phrase "the evidence as a whole" were construed as MacDonald suggests, both limitations

could be circumvented by simply tacking previously rejected or untimely claims onto a successful motion for a PFA, and then arguing that the district court must take them into account in its gatekeeping determinations despite the fact that their entertainment is otherwise precluded by the statute.

None of the cases upon which MacDonald relies (Br. 37-38) lend any support whatever for the proposition that, in evaluating a second or subsequent habeas petition, a trial judge must consider evidence rejected in adjudicating prior petitions for collateral relief. For example, in Schlup, which predated the enactment of AEDPA, the Court held that, in assessing the adequacy of a habeas petitioner's showing with respect to the gatekeeping requirement of "actual innocence," the reviewing court's consideration of the evidence should include "relevant evidence that was either excluded or unavailable at trial," such as "evidence tenably claimed to have . . . become available only after trial." 513 U.S. at 327-28.[21] But nothing in that case suggests that, in the guise of a "gatekeeping motion," a habeas petitioner has a license to revisit "evidence" that a prior habeas court had already reviewed and rejected as a basis for collateral relief. And, although the

[21]Thus, under Schlup, the district court's assessment of whether the impact of MacDonald's newly discovered evidence is so significant that no reasonable juror would have voted to convict, could properly include the evidence elicited at trial from Stoeckley, her excluded pretrial admissions to others suggesting her participation in the murders, and the "newly-discovered" evidence relating to her alleged admissions to DUSM Britt.

Schlup Court did not address that discrete issue, as we have noted, it expressly recognized that established principles of habeas jurisprudence included a qualified application of the doctrine of *res judicata*, which would preclude the entertainment of evidence rejected following the adjudication of a prior petition.[22]

Similarly, in House v. Bell, 547 U.S. 518, 538 (2006), the Court, in the context of a first federal habeas petition, reiterated its holding in Schlup that, in considering on habeas review a gateway claim of newly-discovered evidence, the court must consider "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial." Id. at 538 (internal quotation marks omitted). In addressing the state's argument that the intervening enactment of AEDPA and, in particular, 28 U.S.C. §2244(b)(2), resulted in the establishment of a more restrictive standard than that articulated in Schlup, the House Court observed that the provision does not address "the type of petition at issue here--a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence." Id. at 539. Consequently, that decision also has no bearing whatever upon the question of whether,

[22]As Schlup predated the enactment of AEDPA, its treatment of "newly-discovered evidence" did not take into account the subsequently-enacted statutory limitation requiring, as a pre-condition to the entertainment of such evidence by a habeas court, issuance of a PFA by a court of appeals.

in a second or successive habeas motion based upon newly-discovered evidence, a habeas court must, in the wake of ADEPA, throw previously-rejected claims into the mix in assessing whether the newly-discovered evidence satisfies the exacting requirements for a gatekeeping determination under Section 2244(b)(2).[23]

On the basis of these governing principles, we next consider whether, under the foregoing provisions of AEDPA, the district court properly excluded from its gatekeeping determination the

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[23]The unpublished decision in Lott v. Bagley, 2007 WL 2891272 (N.D. Ohio, Sept. 28, 2007), aff'd, 569 F.2d 547 (6th Cir. 2008), cert. denied, 129 S. Ct. 2053 (2009), likewise lends no support to MacDonald's claim that the district court improperly truncated its gatekeeping responsibilities under Section 2244(b)(2). MacDonald observes (Br. 40-41) that the Lott court considered evidence tending to demonstrate actual innocence acquired since trial. That evidence – consisting of the victim's previously-suppressed description of his assailant – was, however, the subject of an antecedent PFA issued by the court of appeals. See Lott, 2007 WL 2891272, at *10. No PFA was issued by this Court relating to either the DNA test results or the affidavit of Stoeckley's now-deceased mother. MacDonald also observes that in Lott, the habeas court considered the newly-discovered evidence along with matters that were suppressed from evidence at trial. Here, likewise, the habeas court considered the Britt affidavit in tandem with similarly excluded evidence – the testimony of persons who claimed to have heard Stoeckley acknowledge possible participation in the murder of the MacDonald family. Following that review, it found that Britt's affidavit "was merely cumulative evidence of *exactly* the same nature as the excluded testimony of the Stoeckley Witnesses." [D.E.150,p.28]. And although the Lott decision also involved a second federal habeas petition, the court in that case had no occasion to address the question whether evidence rejected in a prior unsuccessful habeas petition based upon "newly-discovered" evidence must, despite the language of Section 2244(b)(1), be thrown into the mix in making a gatekeeping determination with respect to a second or successive petition based upon other "newly-discovered" evidence.

materials relating to Greg Mitchell's confessions and several of the items enumerated in MacDonald's "Motion to Expand."

a. Greg Mitchell's Incriminating Statements to Others.

In rejecting consideration of three affidavits from persons who allegedly heard now-deceased Greg Mitchell make statements suggesting participation in the murders of the MacDonald family, the court below adopted the government's arguments [D.E. 129] that the same information was previously considered and rejected in the course of earlier post-conviction motions or was untimely [see D.E.150,p.18]. As we have recounted previously, MacDonald has, on two previous occasions, argued that evidence relating to Mitchell's "confessions" to participation in the murders of the MacDonald family constituted a basis for affording him habeas relief. In 1984, he proffered the declarations of Bryant and Norma Lane asserting that he had been involved in unparticularized but horrific activity while in the military. [D.E.128,App.Vol.V,Tab11]. The district court rejected the argument after a thorough analysis of all the facts, finding the affidavits were vague (MacDonald, 640 F. Supp. at 328); the evidence relating to Mitchell's purported confessions was "without merit" (id.); and the totality of the evidence involving the possible presence of Stoeckley, Mitchell, and other intruders in the MacDonald household on the night of the murders would not produce a different result at a new trial (id. at 333). In his 1991 habeas petition, MacDonald supported his claim

relating to Mitchell with a more detailed 1988 declaration from Bryant Lane. (D.E.128,App.Vol.V,Tab 13). Like its predecessor, that petition--which similarly argued that physical evidence demonstrated that the murders of the MacDonald family was committed by a band of hippies, including Mitchell – was rejected. MacDonald, 778 F. Supp. at 1360.[24]

When read alongside the declaration Lane produced in 1988 and which MacDonald proffered with his second habeas petition in 1991, it is readily apparent that MacDonald virtually repackaged the facts contained in the preceding Lane declaration by redrafting the document as an affidavit, making additional cosmetic changes, and having it re-executed with a 2005 date to make it appear that the information was truly newly-discovered evidence. [D.E.128,App.Vol.V,Tab 14]. To compound the deception, MacDonald's 2005 counsel failed to disclose that prior counsel submitted

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[24]In the district court, MacDonald argued that, in its 1991 ruling, the district court never reached "the merits of the second affidavit of Bryant Lane." (See Opposition to Government Motion to Strike, D.E.133, filed Apr. 6, 2006, at 3). Although not singling out the second Lane affidavit for individualized consideration, the district court observed that it "has reviewed in detail the newly-discovered evidence [which included the affidavit] and has considered the merits of MacDonald's claims. . . . In the end, the additional evidence [which included the affidavit] has not changed the court's opinion that 'if the government were again called upon to present its evidence at a new trial and MacDonald was able to put all, or even selected parts of his new evidence before a second jury, the jury would again reach the almost inescapable conclusion that he was responsible for these horrible crimes.'" MacDonald, 778 F. Supp. at 1360. Consequently, it can hardly be argued that the court's rejection of the affidavit as a basis for relief was not supported by the record.

virtually the same information in 1991 to the district court in support of his second habeas petition.

The supporting affidavit executed by Everett Morse asserts that, between 1972 and 1974, he lived across the street from Mitchell and was a co-worker at an employment agency. [D.E.111,Ex.7]. Morse stated that on one occasion when he accused Mitchell of stealing golf balls, Mitchell threatened to kill him in the same manner as he had murdered the MacDonald family. [Id.]. The affidavit of Donald Bufkin asserts that he knew Mitchell from 1980 until 1982 and that the two frequented a Charlotte, North Carolina bar. [Id.]. On one occasion, Mitchell allegedly told Bufkin that he had been involved in the murders of the MacDonald family and that he and his associates had committed the murders because MacDonald "wouldn't do what they wanted." [Id.]. Such material is of precisely the same nature as the 1984 Lane declaration that was expressly rejected by the habeas court in 1985 as without merit and unlikely to result in an acquittal if presented in a hypothetical retrial. MacDonald, 640 F. Supp. at 328. Consideration of such "recycled" claims is foreclosed by Section 2244(b)(1). In Re Williams, 330 F.3d at 282; see also Altman v. Benik, 337 F.3d 764, 766 (7th Cir. 2003) (PFA "is completely barred by § 2244(b)(1) because [petitioner] presented [the instant] claim in his prior untimely petition").

Moreover, these affidavits are ineligible for consideration under AEDPA not only because they reassert previously rejected evidentiary claims, but also because they are untimely under Section 2255(f)(4). As explained, under that paragraph, a one-year period of limitation applies to an application. That year runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Section 2255(f)(4). In this respect, the entire scope of Mitchell's alleged admissions to Lane were known to the defense as early as July 1988 and were employed to support MacDonald's 1991 habeas petition. Although Bufkin's affidavit was executed in 2005, it acknowledged that the information it contained was provided to MacDonald's defense counsel on May 22, 2003, over two years earlier and two and one-half years prior to the date of the instant petition. [D.E.111,Ex.7]. Finally, the affidavit of Everett Morse bears an execution date of July 25, 2003, making the information it contained untimely by over two years. [D.E.111,Ex.7]. For these reasons alone, they were properly stricken by the court below. Cf. Dodd v. U.S., 545 U.S. 353, 359 (2005) ("The limitation period in [Section 2255] applies to 'all motions' under § 2255, initial motions as well as second or successive ones.").

In the court below, MacDonald argued that the time limitations contained in Section 2255(f) are inapplicable to these affidavits because they were included as part of an application for leave to

file a successive petition which respect to which this Court granted a PFA. Although, as discussed above, this Court has held that, if a PFA is issued, the district court should authorize the petitioner to file the entire application (Winestock, 340 F.3d at 205), it is equally plain from Winestock that, under Section 2244(b)(4), the district court must dismiss any claim presented in a second or successive application filed pursuant to a PFA that is otherwise barred. Winestock, 340 F.3d at 205; see 2 Federal Habeas Corpus Practice, § 28.3d at 1450 ("if the circuit panel authorized the filing of the petition, the district court must examine each of its claims to ensure that they satisfy ADEPA's substantive standards for successive petitions"). As explained, the three affidavits at issue are barred both because they replicate previously litigated claims relating to Greg Mitchell and are untimely. Consequently, it makes no difference whether they were appended to MacDonald's motion upon which this Court granted a PFA.

b. The "Motion to Expand the Record"

MacDonald's Sixth Motion, a "Motion to Expand the Record" (D.E.124), consists of a potpourri of 48 items. Some were extracted from the trial record; others are predicated upon claims rejected in previous habeas petitions; and yet others involve items we have previously addressed.[25] Finding "the record as it is

[25]Rule 7 of the Section 2255 Rules provides for expansion of the record. The purpose of the rule "is to enable the judge to (continued...)

presently constituted to be more than adequate to permit a thorough and complete review of the material facts pertinent to the motion now before it" [D.E.150,pp.21-22], the court below found it unnecessary to rely upon MacDonald's skewed compilation of what he deems to be the pertinent facts. We nonetheless briefly address each category of evidence embraced in the Motion.

Paragraphs 1-31 of the Motion to Expand [D.E.124] contains snippets from the trial transcript, carefully parsed by the defense to include only MacDonald's exculpatory version of the attack upon his household by hippie intruders, as well as Stoeckley's pretrial statements concerning her possible involvement in the crimes. Such evidence is properly subject to consideration in determining the significance of the "newly-discovered evidence" subject to a PFA. It is apparent from the decision of the district court, however, that it considered "the facts most pertinent to the motions" [D.E.150,p.7], including "all the circumstances and other competent evidence of record." [Id.,p.8].

Paragraphs 32-36 of the Motion involve the facts concerning Stoeckley's conduct at trial and the recollections of DUSM Britt

[25] (...continued)
dispose of some habeas petitions *not dismissed on the pleadings*, without the time and expense required for an evidentiary hearing" and "to include additional material relevant to the merits of the petition." See Advisory Committee Note to Rule 7 of the Section 2244 Rules (emphasis added), incorporated by reference by the Advisory Committee Note to Rule 7 of the Section 2255 Rules. In this case, such an "expansion" is inapplicable because the district court dismissed the petition on the pleadings.

concerning Stoeckley's admissions to him while he claimed to have transported her from Greenville, South Carolina, to Raleigh and AUSA Blackburn's alleged threat to her. Such matters were the centerpiece of the district court's thorough analysis and were fully considered by it. (See, e.g., D.E.150,pp.8-15,26-35).

Paragraph 38 of the Motion involves the fact that, subsequent to MacDonald's conviction, AUSA Blackburn was convicted in state court of obstruction of justice and embezzlement as the result of events that occurred between February 16, 1991, and December 31, 1992. That matter was, likewise, before the district court as part of the allegations of Blackburn's misconduct triggered by Britt's affidavit. [D.E.111,Ex.10].

Paragraphs 38-41 of the Motion address Stoeckley's post-trial admissions to others suggesting that she had participated in the murders of the MacDonald family, and other evidence, including Greg Mitchell's "admissions," that allegedly corroborated her statements. In reasoning that Britt's rendition was "merely . . . one more of many instances of perfectly credible persons relating to what they heard Helena Stoeckley confess and retract *for more than a decade after the MacDonald murders*" [D.E.150,p.29] (emphasis added), and that "MacDonald never has had a shortage of credible hearsay witnesses to relate what Stoeckley had said at various times in the past," [id.], the court below plainly considered such post-conviction "admissions."

Further, the potential impact of Stoeckley's post-trial admissions upon a hypothetical retrial was fully litigated and ultimately rejected as the basis for collateral relief during the course of MacDonald's first habeas petition. See U.S. v. MacDonald, 640 F. Supp. 286 (E.D.N.C. 1985); U.S. v. MacDonald, 779 F.2d 962 (4th Cir. 1985).

Paragraphs 42 and 43 of the Motion relate to MacDonald's Second Motion for habeas relief and his 1997 motion to reopen the denial of that motion. The Second Motion alleged that the government had concealed from the defense prior to trial that blond synthetic "wig" hairs were discovered in a hairbrush in the MacDonald household--thus confirming the presence of a wig-wearing Stoeckley--and that woolen fibers, having no identified source within the household, were removed from a wooden club and from Colette's face, near her mouth. See MacDonald, 778 F. Supp. at 1350-1351. The government response was based, in part, upon the affidavit of FBI Agent/laboratory examiner Michael Malone that saran, the substance from which the synthetic fibers were made, was unsuitable for the manufacture of human cosmetic wigs. See id. Judge Dupree denied the motion not only on the basis of Malone's averment (id.), but also on three entirely separate grounds: (1) that such "evidence of unmatched household debris" in the MacDonald household would not have altered the district court's preceding decision to exclude Stoeckley's hearsay statements due to their

inherent lack of reliability (id. at 1352, internal quotaion marks omitted); (2) that the government had not suppressed the evidence in the first place (id. at 1353-1354); and, finally (3) that MacDonald was aware of the existence of such evidence at the time he filed his preceding petition for collateral relief but failed to include it in that petition (id. at 1356-1360). Thereafter, Judge Fox rejected MacDonald's Motion to reopen based upon the assertion that Agent Malone's statement that saran was unsuitable for the manufacture of human wigs was false. See MacDonald, 979 F. Supp. at 1061-1067. It reasoned that, as the prior petition was denied on two separate and alternative theories, Malone's testimony was not material to the disposition of the petition (id. at 1063), and, in any event, the defense had failed to demonstrate government impropriety (id. at 1064-1067).[26] Consequently, further consideration of the evidence at issue is foreclosed under Section 2244(b)(2)(B)(ii) as having been addressed and rejected in a previous habeas petition.

Paragraph 44 of the Motion asserts that, since trial, MacDonald has found evidence in the form of a lab report, allegedly obtained through a FOIA request, that blood of his blood type was found at the location where he claimed to have been stabbed by intruders. As we explained in our response to the motion, however (D.E.139,p.17), that same information was available to the defense

[26]This Court affirmed the district court's ruling. U.S. v. MacDonald, 1998 WL 637184 (4th Cir. Sept. 8, 1998) (unpublished).

prior to trial as evidenced by attorney Segal's express reference to the lab report in a pretrial motion.[27]

Paragraphs 46 and 47 of the Motion relate respectively to the affidavits of persons, including Bryant Lane, who allegedly heard Greg Mitchell acknowledge participation in the MacDonald family murders, and the results of the DNA testing authorized by this Court and filed in the district court subsequent to its issuance of the PFA relating to Britt's affidavit. As we have explained earlier, the former is subject to rejection as both previously-considered and untimely; the report of the DNA results cannot be considered as it has not yet been the subject of a PFA from this Court.

Finally, paragraph 48 of the Motion to Reopen relates to evidence of MacDonald's alleged good character, including the assertions that he was a "distinguished Green Beret officer" and accomplished physician, which are cumulative of similar evidence presented at trial, and claims that he is a "model prisoner." Such self-serving assertions are irrelevant to the Britt motion.

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[27]See "Exhibit A" to Motion of Defendant To Compel Production of Tangible Objects, filed April 23, 1979. [D.E.138, Vol.X, Tab8].

III. THIS COURT'S ORDER AUTHORIZING AN APPEAL UNDER 28 U.S.C. § 2252(c)(3) DOES NOT AUTHORIZE REVIEW OF AN ISSUE NOT EMBRACED BY THE ORDER.

A. Standard of Review

The scope of the Certificate of Appealability is a matter for this Court's consideration in the first instance.

B. Discussion of Issue

Finally, MacDonald maintains (Br. 46-54) that, after fully considering the likely impact of Britt's allegations concerning Stoeckley's admissions and prosecutor Blackburn's alleged misconduct, the district court improperly rejected the affidavit as the basis for entertaining a successive habeas petition. This issue, however, does not fall within the scope of this Court's certificate of appealabilty ("COA"), and it therefore is not properly before the Court. See 28 U.S.C. § 2253(b)(3) ("The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2))."

This Court's COA was limited to specific procedural rulings. It stated: "The court grants a certificate of appealability on the issue of whether the district court's procedural decisions prohibiting expansion of the records to include evidence received after trial and after the filing of the 28 U.S.C. § 2255 (West Supp. 2009) motion was erroneous in light of 28 U.S.C. §

2244(b)(2)(B) (ii) (2006)." 4th Cir. No. 08-8525, Doc. 36, filed June 9, 2009.

The district court's procedural rulings in turn were limited to granting the Government's Motion To Strike Exhibits [D.E.129], and denying MacDonald's Motion To Add an Additional [DNA] Predicate [D.E.122], Motion To Expand the Record [with] Itemized Authenticated Evidence [D.E.124], and Motion To Supplement Itemized Material Evidence [D.E.144]. [D.E.150,p.46]. Accordingly, MacDonald's arguments relating to the district court's ruling on the merits of his Motion To Vacate pursuant to Section 2255 [D.E.111] should be rejected at the outset.

In any event, because the district court properly concluded that any out-of-court statements of Stoeckley were "untrustworthy in 1970, in 1979, in 1990, and in 2005, and . . . remain so in 2008" [D.E.150,p.29], its decision to deny leave to file a successive § 2255 petition based on the Britt affidavit is clearly correct. By attempting to broaden his argument beyond the parameters of the certificate of appealability, MacDonald unintentionally weakens his arguments that the district court's procedural rulings prejudiced him. Repeatedly, in its order denying leave to file yet another successive § 2255 petition, the court below made clear that it had considered MacDonald's claim "in light of the evidence as a whole." Said the court, " . . . MacDonald has not demonstrated that the Britt affidavit, taken as

true and accurate on its face and viewed in light of the evidence as a whole, could establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found MacDonald guilty of the murder of his wife and daughters." [D.E.150,p.46 (emphasis added); see also id.,30,46].

CONCLUSION

For the foregoing reasons, the United States respectfully submits that the judgment of the district court should be affirmed.

Respectfully submitted, this 21st day of August, 2009.

George E. B. Holding
United States Attorney

BY: /s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant U.S. Attorney

JOHN F. DE PUE
BRIAN M. MURTAGH
Special Assistant U.S. Attorneys

310 New Bern Avenue
Suite 800, Federal Building
Raleigh, North Carolina 27601-1461
Telephone: 919-856-4530

ANNE M. HAYES
Assistant U.S. Attorney

Of Counsel

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JOHN STUART BRUCE
First Assistant U.S. Attorney