NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY R. MACDONALD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is actual innocence of the crimes for which Petitioner was convicted and imprisoned a freestanding ground for relief under 28 U.S.C. § 2255?

II. Do the Fifth and Eighth Amendments to the United States Constitution prohibit the imprisonment of a person who is actually innocent of the crimes for which the person has been convicted?

III. By what standard is "actual innocence" determined when presented as a freestanding claim for relief in a motion under 28 U.S.C. § 2255?

IV. Did the Court of Appeals err in concluding that Petitioner failed to meet the gatekeeping standard of 28 U.S.C. § 2255(h)?

LIST OF PARTIES

All parties appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey R. MacDonald respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is a 154 page published opinion dated 21 December 2018, a copy of which is attached hereto in the Appendix.

JURISDICTION

The opinion and judgment of the Fourth Circuit was issued on 21 December 2018. Petitioner timely filed a Petition for Rehearing En Banc, which was denied by the Fourth Circuit by order dated 19 February 2019. This Court's jurisdiction exists under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in relevant part:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

The Eighth Amendment to the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

STATEMENT OF THE CASE

This Petition squarely presents the issue of actual innocence as a freestanding basis for relief under 28 U.S.C. § 2255 to this Court. Jeffrey MacDonald was convicted at trial in the United States District Court for the Eastern District of North Carolina in 1979 for the most serious of crimes -- the murders of his wife and two young daughters. He has been in federal prison for almost forty (40) years as a result of these convictions. MacDonald was a 26-year old Army captain and doctor stationed at Fort Bragg when his pregnant wife and two young daughters were brutally murdered on 17 February 1970 in their home. MacDonald was severely wounded and found unconscious by military police.

Ever since his first statement to the responders to his emergency call on that date, MacDonald has consistently maintained that the murders of his family were committed by a group of intruders. MacDonald described a woman with long blond hair wearing a floppy hat, who along with at least three others entered his home in the middle of the night and attacked him and killed his family. Now 75 years old, MacDonald has never wavered from his initial account of the events, nor his assertion that he is innocent.

This case is highly unusual in many ways. MacDonald was convicted at a trial in the district court in 1979 -- nine years after the murders, and after he had been cleared of the crimes by a military tribunal. The trial was unusual. The Government's case at trial was entirely circumstantial, offering no direct proof of MacDonald's alleged involvement in the murders, but instead focusing entirely on

trying to disprove MacDonald's version of events. While the jury did convict MacDonald, the Government's approach was less than compelling -- in one of the more bizarre factual turns of this litigation, the trial judge wrote a letter to one of the lawyers involved in the trial shortly after the verdict, noting that during the trial he had "confidently expected that the jury would return a not guilty verdict in the case." (JA 4102).

Equally unusual has been the course of events after trial. Since the 1979 trial, a steady flow of exculpatory evidence has come to light demonstrating that MacDonald did not commit the murders. Much of this evidence relates to the key defense witness at trial, Helena Stoeckley, who almost immediately was identified by police as a suspect. She was a woman local to the area, heavy into the drug scene, who routinely wore a blonde wig and a floppy hat. Between the murders in 1970 and the 1979 trial, Stoeckley made incriminating statements to numerous persons implicating herself, her boyfriend Greg Mitchell, and others in the killings.

At trial, however, Stoeckley testified when called as a defense witness that she could remember nothing about the four-hour period during which the murders occurred, despite her many statements otherwise, and despite her ability to remember events before and after those four hours. After this occurred, the trial judge refused to permit MacDonald to call seven witnesses that he had present, who would have testified to Stoeckley's specific admissions made to each of them, prior to

trial, of being present in the MacDonald home at the time of the murders with the killers. (JA 1051-1347).[1]

After the trial, Stoeckley continued to make admissions contrary to her trial testimony, implicating herself as present during the murders, and implicating Greg Mitchell as one of the killers. MacDonald also uncovered other physical evidence, such as the presence of unsourced fibers on a murder weapon and in the home, discrediting the Government's case. In 1984, and again in 1990, MacDonald filed motions to vacate his convictions based on the discovery of new evidence of this nature. In each instance, relief was denied. *United States v. MacDonald*, 640 F. Supp. 286 (E.D.N.C.), *aff'd*, 779 F.2d 962 (4th Cir. 1985); *United States v. MacDonald*, 778 F.Supp. 1342 (E.D.N.C. 1991), *aff'd*, 966 F.2d 854 (4th Cir. 1992).

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[1] The Fourth Circuit, on direct appeal in 1980, recognized the vital importance of Stoeckley's testimony to the decision of the jury in MacDonald's case:

> Had Stoeckley testified as it was reasonable to expect she might have testified [admitting to presence at and participation in the crime], the injury to the government's case would have been incalculably great.

United States v. MacDonald, 632 F.2d 258, 264 (4th Cir. 1980), *rev'd*, 456 U.S. 1 (1982). The Fourth Circuit on direct appeal reversed MacDonald's convictions on speedy trial grounds. This Court reversed. On remand from this Court, one judge of the Fourth Circuit noted the importance of the exclusion of these seven witnesses to the jury's verdict:

> I conclude with the observation that this case provokes a strong uneasiness in me. ... [T]he way in which a finding of guilt is reached is, in our enduring system of law, at least as important as the finding of guilt itself. I believe MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted.

United States v. MacDonald, 688 F.2d 224, 236 (4th Cir. 1982) (Murnaghan, J., concurring), *cert denied*, 459 U.S. 1103 (1983).

The discovery of new, powerful, exculpatory evidence has continued. This appeal involves the denial of a successive Section 2255 Motion filed by MacDonald in 2006 seeking to vacate his convictions, based on newly discovered evidence. This new evidence shows that Stoeckley, during MacDonald's 1979 trial, confessed her involvement in the murders to a deputy U.S. Marshal (Jimmy Britt), a young lawyer working for the defense team (Wendy Rouder), and her own lawyer appointed by the trial judge (Jerry Leonard), contrary to her sworn trial testimony at trial. The newly discovered evidence shows that Stoeckley also subsequently confessed her involvement in the murders to her own mother and to the caretaker of her child, shortly before her death in 1983. And the newly discovered evidence shows why Stoeckley would not make these admissions at MacDonald's trial and instead testify falsely -- because she had been threatened by one of the prosecutors (who has since been prosecuted, imprisoned, and disbarred for unrelated fraudulent criminal conduct) in violation of MacDonald's constitutional rights, when she confessed to him during an out-of-court interview during the trial.

Were this not enough, the newly discovered evidence also includes DNA evidence showing that unsourced hairs that indisputably do not belong to MacDonald were found in places on the victims of the murders where they could only have been left by the real murderers. Specifically, a hair found in the fingernail scrapings of the left hand of MacDonald's daughter Kristen, produced a profile not consistent with MacDonald or the other comparison samples. It is undisputed that Kristen had numerous defensive wounds on and around her fingers. (JA 530-31).

The presence of a hair belonging to a person who is not MacDonald, underneath one of Kristen's fingernails, is strong physical evidence that while Kristen was defending herself from her killer, a hair from her killer came to reside under her fingernail, and that killer is not MacDonald. The Government, likely recognizing the strong exculpatory nature of this evidence, actually argued below that this DNA evidence was the result of it contaminating its own evidence -- and that its own contamination should be used against MacDonald to deny relief. Of course, if the Government's position regarding contamination could be correct, then how can any of the physical evidence that the Government relied on at trial in 1979 to convict MacDonald be considered reliable?[2]

MacDonald argued below that no reasonable juror, upon hearing the new evidence on which MacDonald's motion is based, would convict him of any crime in this case, and in light of the constitutional violations proven by this new evidence, MacDonald should be granted Section 2255 relief. One of the constitutional bases relied on by MacDonald in his Motion is a freestanding claim of actual innocence,

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[2] At the 1979 trial, the Government explicitly told the jury that it was relying entirely on the physical evidence from the crime scene to attempt to show that MacDonald's version of events was false. In closing argument, the Government stated:

> The Government's case stripped to the essentials, consists of the crime, the physical evidence, the defendant's story voluntarily told, the conflict between that story and the physical evidence from which we submit that it was a fabrication of the evidence and from that we infer and would ask you to find his guilt.

(1979 Trial Transcript, at 7059). Yet now, the Government seeks to avoid the exculpatory import of the new DNA evidence by arguing that it contaminated the very crime scene it primarily relied on in the 1979 trial.

under the Fifth and Eighth Amendments to the Constitution. The Fourth Circuit, in a 154 page opinion, denied relief to MacDonald.

I. The Investigation, Military Court Proceedings, and 1979 Trial

In the early morning hours of 17 February 1970, the pregnant wife and two young daughters of MacDonald were murdered in their home located on Fort Bragg. MacDonald was severely wounded at the time, suffering a collapsed lung and multiple wounds. From the very beginning, MacDonald told investigators that the murders had been committed by a group of intruders, including a blond-haired woman wearing a floppy hat, who had attacked him and his family, knocking him unconscious and severely wounding him in the attack.

Initially, the investigation was handled by military authorities. The Army brought murder charges against MacDonald and a Uniform Code of Military Justice Article 32 hearing commenced on 15 May 1970, and lasted six weeks. On 13 October 1970, the presiding officer filed a report recommending that all charges be dropped, concluding that "the matters set forth in all charges and specifications are not true." (JA 1966). The presiding officer further urged the civilian authorities to investigate the alibi of Helena Stoeckley. *Id.* All military charges against MacDonald were dropped, and he was subsequently honorably discharged.

Approximately nine years later, in August 1979, MacDonald went on trial after being indicted in the district court for three counts of murder. The trial lasted twenty-nine days. On 29 August 1979, MacDonald was convicted and was subsequently sentenced to three consecutive terms of life imprisonment.

A. The Government's Evidence at Trial

At approximately 3:30 a.m. on 17 February 1970, military police were summoned to MacDonald's home at Fort Bragg. Upon arrival, the police found that MacDonald's wife, Colette, and his two young daughters, Kristen age two, and Kimberly age five, had been brutally murdered, and found MacDonald unconscious and seriously wounded. Upon being revived, MacDonald told the military police that his family had been attacked by at least four intruders, three men and a woman. The woman he described as having long blond hair, wearing a floppy hat and boots, and bearing a flickering light such as a candle.

The Government's theory at trial was that MacDonald, an army physician with no history of violence and no prior record, got into a fight with his pregnant wife because his youngest daughter, Kristen, had wet the bed; that he picked up a club to strike his wife and accidentally struck and killed his daughter, Kimberly, who was trying to intervene; and that then, in order to cover up his accidental misdeed, killed his wife and then mutilated and killed his youngest daughter and tried to make it look like a cult slaying. (JA 1695-98). The Government further argued that MacDonald either wounded himself to defer suspicion or was wounded when fighting with his wife.

The evidence the Government adduced at trial to support this bizarre theory was exclusively circumstantial evidence from the crime scene. It included evidence such as in what rooms certain blood types were found, where the murder weapons were found, where MacDonald's pajama fibers were and were not found, where a

pajama pocket was found and on which side it was bloodied, and an experiment involving the possible ways the holes were made in MacDonald's pajama top. Much of the evidence was speculative. The Government presentation was designed to attempt to disprove the version of events given by MacDonald as to what happened on the night of the murders, thereby casting suspicion on him as the murderer. This Government strategy was interwoven with its repeated theme that, given MacDonald's version of events, there should have been ample physical evidence of intruders, and the lack of such evidence of intruders proved MacDonald's guilt.

There was, however, some evidence at trial from the crime scene supporting MacDonald's account that intruders committed the murders. Numerous fingerprints and palm prints were collected at the crime scene that did not match the MacDonald family members or other investigators or individuals whose prints were available for comparison. (JA 636, 645). There was evidence showing the presence of wax drippings of three different kinds of wax in three different areas of the home. None of these samples matched any candles found in the MacDonald home. (JA 786-92).

There were no eyewitnesses to the murders other than the perpetrators. There was no evidence of MacDonald's fingerprints or blood on the murder weapons. The Government's case was entirely circumstantial, and primarily focused on attempting to disprove MacDonald's version of events.

B. The Defense Case at Trial

MacDonald testified in his own defense at trial. MacDonald testified that he awoke in the early morning hours of 17 February 1970 in his living room to the

screams of his wife and one of his daughters, saw four strangers in his house, and was immediately set upon, attacked, and knocked down. (JA 1599-1600).

As he was trying to get up, MacDonald heard a female saying "Acid is groovy; kill the pigs." MacDonald testified in detail about how he fought with the attackers, and was assaulted and stabbed in the process. (JA 1601-07). During the struggle, his hands became bound up in his pajama top, and he used it as a "shield" to attempt to ward off blows from the attackers. (JA 1601; 1632-37).

MacDonald testified that the woman intruder had blond hair, was wearing a floppy hat, appeared to be carrying a candle, and was with several men. (JA 1603-07). At some point during the struggle, MacDonald was knocked unconscious. Upon coming to, MacDonald testified in detail to finding his family members bloodied and dead, his efforts to revive them, and his phone call for help. (JA 1608-18). He was unconscious when help finally arrived.

MacDonald remembered describing the group of intruders to one of the MPs[3] before being taken out of the house on a stretcher. MacDonald was taken to the intensive care unit at Womack Army Hospital, where he was treated for more than a week for a punctured lung and other wounds. (JA 1040). MacDonald gave much thought to what had occurred to his family, and concluded that either someone held

[3] Kenneth Mica, one of the first MP's to arrive at the scene, was the person to whom MacDonald gave this description. (JA 94). Mica testified at trial that enroute to the MacDonald house at approximately 4 a.m. he saw a woman with shoulder-length hair, wearing a "wide-brimmed....somewhat 'floppy'" hat. (JA 133-34). Mica saw this woman "something in excess of a half mile" from the MacDonald home, thinking it strange that she would be out at that hour on a rainy night. (JA 131, 134).

a grudge against him, or it was a random crime. (JA 1620). MacDonald had treated many patients with drug problems as medical officer at Fort Bragg and in private practice, and he and other doctors who had provided drug counseling were suspected of being "finks" for turning in troops for drug abuse. (JA 1621, 1627).

MacDonald's lawyers sought to underscore through cross-examination how equivocal and speculative the physical evidence put forth by the Government was, and to expose the lack of any real evidence of guilt on MacDonald's part. In addition to MacDonald's testimony, the defense called numerous character witnesses to testify about MacDonald's good character, and experts to rebut parts of the Government presentation.

The most important facet of the defense strategy, however, was to bring before the jury the significant evidence pointing to Helena Stoeckley's involvement in the crime. This included evidence of:

- her possession of a blond wig, which she burned shortly after the crime (JA 1145-47);
- the clothes she routinely wore, which matched the clothes of the woman MacDonald described seeing in his house the night of the murders (a blond wig, floppy hat, and boots) (JA 1126-34);
- her participation in a drug cult that ingested LSD, worshipped the devil, and used candles (JA 1068, 1085-87);
- her obsession with the MacDonald murders, such that she had hung wreaths all along her fence the day of the burials (JA 1176-77);
- a woman matching her description being seen by several unbiased witnesses near the crime scene at or around the time of the murders (JA 133-34; 1041-43);

- and of critical importance, evidence that she had actually admitted to her participation in the crime to numerous people. (JA 1220-1347).

Based on all of this, it was the defense belief she would come to court and actually admit her involvement in the murders. *See United States v. MacDonald*, 632 F.2d 258, 264 (4th Cir. 1980) (noting the "substantial possibility that she [Stoeckley] would have testified to being present in the MacDonald home" during the murders).

Regarding the many prior admissions that Stoeckley had made to her involvement in the murders, MacDonald had subpoenaed to trial seven different individuals to whom Stoeckley had made statements incriminating her in the MacDonald killings. Three of these were individuals involved in law enforcement. (JA 1220-1347; 1350-1359). The defense intended to call Stoeckley (who had been detained on a material witness warrant) as a witness, obtain from her admissions to the crime, and then call the other seven witnesses to whom Stoeckley had also confessed.

When called by the defense to testify, however, Stoeckley denied any memory of the four hour period during which the murders occurred. (JA 1094-1100). Stoeckley did testify that she had a floppy hat, wore a shoulder-length blond wig, and that her appearance at the time of the murders was similar to the description MacDonald had given of the female intruder.

After Stoeckley denied memory of the time period of the murders, the defense intended to call the seven witnesses to whom Stoeckley had made incriminating statements prior to trial. The Government objected, and after a voir dire hearing the trial court ruled that Stoeckley's out-of-court admissions to the seven defense

witnesses were inadmissible under Rule 804 (b)(3) because the admissions were not trustworthy or corroborated. *See United States v. MacDonald*, 688 F.2d 224, 231 (4th Cir. 1982) (summarizing voir dire testimony of the seven witnesses).

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

II. Evidence Discovered Post-Trial Before the Instant § 2255 Motion

After the trial, MacDonald discovered evidence that was suppressed at trial that showed the presence of intruders in the home that night, and further implicated Stoeckley as one of the assailants. In 1984, and again in 1990, MacDonald filed motions to vacate his convictions based on the discovery of evidence of this nature. This evidence includes the presence of (1) unsourced fibers on the murder weapon that were dark purple and black (Stoeckley testified that she wore purple and black); (2) other unsourced fibers at the murder scene that were inconsistent with the Government's representations at trial that there was no evidence of intruders; and (3) wig hairs in the MacDonald home (Stoeckley testified that she owned a blond wig that she destroyed) unmatched to any synthetic fiber found in the MacDonald home. *See* (JA 1979-84) (outlining new evidence underlying 1984 and 1990 motions). In each instance, relief was denied. *MacDonald*, 640 F. Supp. 286 (E.D.N.C. 1985), *aff'd*, 779 F.2d 962 (4th Cir. 1985); *MacDonald*, 778 F.Supp. 1342 (E.D.N.C. 1991), *aff'd*, 966 F.2d 854 (4th Cir. 1992).

III. The Instant Section 2255 Motion

MacDonald filed a motion in the district court to set aside his convictions under 28 U.S.C. § 2255, alleging constitutional violations shown by newly discovered evidence of two general types: (1) witness testimony relating to key defense trial witness Helena Stoeckley, from a retired deputy U.S. Marshal who worked at the 1979 trial, and other witnesses including Stoeckley's own lawyer, tending to show that Stoeckley confessed to being present during the murders of MacDonald's family to the prosecutor, who told Stoeckley that if she testified in that manner at trial then he would indict her for murder; and (2) DNA evidence consisting most prominently of a hair recovered from under the fingernail of one of MacDonald's daughters, in a location where she would have been struggling with her attacker, that is not MacDonald's hair. MacDonald asserted in his motion that this evidence shows a violation of his constitutional right to due process and also is the basis for a freestanding claim of actual innocence under the United States Constitution.

A. The Jimmy Britt Evidence

The instant Motion is based first upon a disclosure by Jimmy Britt, a now-deceased Deputy U.S. Marshal who had custody of Stoeckley during the 1979 trial. DUSM Britt came forward in 2005 to MacDonald's trial counsel. Britt, by that time retired, worked at the Raleigh courthouse during the 1979 trial. In his affidavit, Britt sets out how he went to South Carolina to transport Stoeckley, who was in custody on a material witness warrant, back to North Carolina, and that he then maintained custody of her at several times during the trial in Raleigh until she was released. In

his affidavit, Britt sets out how Stoeckley made admissions to him that she was present in MacDonald's home on the night of the murders. (JA 2007, ¶15).

Britt also explains that he was present when the lead prosecutor, AUSA Jim Blackburn, interviewed Stoeckley before she was to testify at trial. Britt avers that during that meeting in the prosecutor's office during the 1979 trial, Stoeckley told the prosecutor that she was in fact present in the MacDonald home on the night of the murders. (JA 2008, ¶ 20-23). Britt avers further that AUSA Blackburn responded to this admission by telling Stoeckley that if she testified in court to that fact, he would indict her for murder. Britt states in his affidavit that he is absolutely certain that these words were spoken. (JA 2008, ¶ 24-25).

In support of Britt's recitation of events and the constitutional error shown thereby, MacDonald has presented new evidence showing that Stoeckley was present during the murders, and that MacDonald did not kill his family. This evidence includes:

- affidavits from three individuals testifying that Greg Mitchell (a boyfriend of Helena Stoeckley continually linked to the murders) confessed involvement to them in the murders of MacDonald's family prior to his own death (JA 2012-19);

- an affidavit from Lee Tart, a former Deputy United States Marshal who worked with Britt, testifying that Britt told him in 2002 the things that Britt has brought forward in this Motion relating to Stoeckley's confession to AUSA Blackburn and Blackburn's threat in response, and the fact that Britt was troubled greatly by carrying the burden of his knowledge of those matters (JA 2010);

- an affidavit from Wendy Rouder, who at the time of trial was a young lawyer assisting MacDonald's lawyers, testifying that she had interaction with Stoeckley the weekend after Stoeckley's interview with AUSA Blackburn and subsequent appearance in court, and testifying

that during that contact Stoeckley told her that she (Stoeckley) had been present in MacDonald's home during the murders and could name the murderers, but did not testify to those facts in court because she was "afraid ... of those damn prosecutors sitting there," adding that "they'll fry me" (JA 4090);

- an affidavit from Helena Stoeckley's mother, averring that Stoeckley had told her on two occasions that Stoeckley was present in the MacDonald home during the murders, and providing details from Stoeckley that corroborated both MacDonald's account of the murders and Rouder's account of Stoeckley's statements to her (JA 4063).

This evidence was buttressed by further evidence adduced at the evidentiary hearing, set out *infra,* showing that Stoeckley confessed, **during MacDonald's trial**, her presence at the murders **to her own lawyer**. MacDonald argued in his Motion that the facts underlying the Britt evidence showed a violation of his Fifth Amendment right to due process, and under *Brady*.

2. The DNA Evidence

In 1997, MacDonald obtained permission from the Fourth Circuit to conduct DNA testing on the physical evidence from the crime scene. The DNA testing was performed by the Armed Forces Identification Laboratory. There was much procedural haggling over the testing, resulting in it taking nine years to complete. There were 28 specimens for testing, three of which could not be matched to any relevant person. [4]

a. Specimen 91A

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

Specimen 91A is noted in the DNA report as a human hair that the chain of custody describes as found in "fingernail scrapings from the left hand of Kristen MacDonald." (JA 2027). It is a human hair with hair root intact, measuring approximately 1/4" in length. The DNA testing of this hair produced a profile that is not consistent with MacDonald or the other comparison samples. (JA 2028).

Kristen MacDonald, by all accounts, was killed in her bed where she was found. The doctor who performed her autopsy testified at trial that she had numerous defensive wounds on and around her fingers. (JA 530-31). Thus, the presence of a hair belonging to a person who is not MacDonald, underneath one of Kristen's fingernails, is strong evidence that while Kristen was defending herself from her killer, a hair from her killer came to reside under her fingernail, and that killer is not MacDonald. Given the entirely circumstantial case presented by the Government at trial, the exculpatory effect of this evidence is direct and strong.

b. Specimen 75A

Specimen 75A is a human hair, approximately 2 1/4 inches in length, that the chain of custody describes as found under the body of Colette MacDonald at the scene. (JA 2028). The DNA testing of this hair produced a profile that is not consistent with MacDonald or the other comparison samples. (JA 2028). The presence of this unmatched human hair under the body of Colette MacDonald at the murder scene is strong proof of the presence of unknown intruders in the MacDonald home.

c. Specimen 58A1

Specimen 58A1 is a hair approximately 1/4 inch in length, with root intact, that the chain of custody describes as recovered from the bedspread on the bed in the bedroom occupied by Kristen MacDonald. (JA 2029). As with the previous two samples, the DNA testing of this hair produced a profile that is not consistent with MacDonald or the other comparison samples. (JA 2029).

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

MacDonald, in his Motion, asserts a freestanding claim of innocence under the Fifth and Eighth Amendments to the Constitution based on the facts of this claim.

B. Evidence at the September 2012 Evidentiary Hearing.

The district court held an evidentiary hearing on the Motion in September 2012. MacDonald called seven witnesses at the hearing, and the Government called twelve witnesses. The key evidence from MacDonald's witnesses is as follows:[5]

1. Wade Smith

Wade Smith is a lawyer who, with Bernard Segal of the Pennsylvania bar, represented MacDonald in the 1979 trial. (JA 2186). Smith described how in January

[5] A full recitation of the hearing testimony of all witnesses is set out in the parties' pleadings in the district court. (DE-343 at 15-31; DE-344 at 32-64). By the time the evidentiary hearing was held in 2012, Britt was not available to testify. Britt passed away in 2008.

2005, Jimmy Britt contacted Smith "and told me that something had worried him and had been heavy on his mind and heart for all the years since the MacDonald case and he needed to talk to me about it and sort of unload his soul." (JA 2189). They met at Smith's office, and Britt told Smith about the events set out in Britt's affidavit underlying the Motion. Smith testified about obtaining a sworn statement and two affidavits from Britt, including the one that is attached to the Motion. (JA 2208-18; 4069; 4073). Smith also arranged for a polygraph examination of Britt, which was conducted and showed no deception on the part of Britt. (JA 2202-07; 4066).

2. Mary Britt

Mary Britt was Jimmy Britt's wife at the time of the MacDonald trial in 1979. They were married in 1957, and divorced in 1989. (JA 2387; 2406).

During the 1979 trial, Jimmy Britt told Mary that he was going to South Carolina to pick up a witness, and "when he got home that evening, when he came in the door, he was very excited, and that's the only word I know to describe it, because he felt the woman talked in the car coming back about her involvement, that he said, his words, she described the inside of the apartment where the MacDonalds lived, and he used the term that she described it to a T even to the fact of a child's hobby horse that was broken." (JA 2388). Mary was absolutely certain that during the 1979 trial Jimmy Britt told her these things. (JA 2405).

Jimmy Britt returned home the next day from the trial, and "as soon as he walked in that night, of course, I asked him and I know very well the words that he

used to tell me. He said they say they can't use her testimony because her brain is fried from the use of drugs." (JA 2390).

3. Eugene Stoeckley

Eugene Stoeckley is the younger brother of Helena Stoeckley. (JA 2432). After the murders of the MacDonald family, there were rumors of Helena's involvement that caused stress in the family. (JA 2434). As he grew up, the issues continued until one day he confronted Helena about the allegations of her involvement, and Helena "told me to be careful because she had certain friends and she told me she also had an ice pick." (JA 2436). The topic became taboo at their family home and was not discussed, through Helena's death in 1983. (JA 2438-39).

In the mid 2000s, Eugene's mother's physical health deteriorated, and she lived in an assisted living facility in Fayetteville. (JA 2444-45). Eugene was in charge of her care and close to her. (JA 2445-46). As her health deteriorated and they understood that "her time was drawing short," Eugene and his mother "would have some intimate discussions about our family." (JA 2448). Eugene started questioning his mother about Helena's involvement in the MacDonald murders, because he wanted to know the truth, and "she said that Helena was there that night." (JA 2448). Eugene's mother told him that Helena had confided that in her when Helena came to visit her with Helena's newborn child in October 1982, because at that time Helena knew she was dying. (JA 2447-48). Eugene testified: "My mother said that Helena was there and that Dr. MacDonald was not guilty of the crimes." (JA 2449).

This information weighed heavily on Eugene. Eventually, he contacted Kathryn MacDonald (MacDonald's wife), which led ultimately to his mother executing an affidavit setting out the events of Helena's confession to her, which his mother approved before signing as accurate. (JA 2449-62; 4063).

Eugene also testified that his mother told him that Helena wanted to testify at trial, but was threatened with prosecution for murder: "What my mother would say along those lines was that they wouldn't let her testify, she wanted to testify, but she was threatened with prosecution for murder." (JA 2496).

4. Wendy Rouder

During the 1979 trial, Wendy Rouder worked for the defense team as an assistant attorney after just having passed the bar. (JA 2510). She was present in Raleigh for the entire trial.

On the weekend of 18 August 1979 during the trial, a call came into their office asking that Helena Stoeckley be removed from the motel where she was staying. (JA 2511). Rouder went to the motel and assisted in Stoeckley getting moved to another location. (JA 2512-13). Rouder spent several hours with Stoeckley, and during this time Stoeckley would make references to her involvement in the murders of the MacDonald family, by saying things like "she thinks she was there, she feels guilty," and other statements to that effect. (JA 2513-14); (JA 4090).

Rouder "eventually said to her at some point in time, Helena, why are you telling me all this, why don't you testify that way on the stand, or something to that effect." (JA 2515). Stoeckley's response was that "she said I can't with those damn

prosecutors sitting there," adding "I believe she added they'll burn me, fry me, hang me, you know, those words are not specific." (JA 2515-16).

Rouder testified that she executed an affidavit in 2005 regarding these events. (JA 2516-18; 4090). Rouder was informed around that time by Kathryn MacDonald that there was a deputy U.S. Marshal to whom Stoeckley had made "remarkably similar statements," and that the marshal "had sworn that also in his presence one of the prosecutors, James Blackburn, had threatened to indict Ms. Stoeckley for murder if she were to make the same admissions regarding her involvement in the MacDonald murders in the courtroom." (JA 2518-19).

Rouder testified that this information "rang a bell for me ... a-ha, that's why she said she can't testify with those damn prosecutors sitting there. In '79, I had no such association with that phrase." (JA 2519). Rouder testified that hearing the information from the Britt affidavit was her "eureka moment" in explaining Stoeckley's statements to her in 1979 about "those damn prosecutors" who want to "fry me." (JA 2522).

Rouder testified on cross-examination that during her interaction with Stoeckley that weekend, she received a phone call at Stoeckley's motel room from the trial judge instructing her to not ask Stoeckley any questions. (JA 2559-60; JA 4090 at ¶ 13). In addition, Rouder testified that after trial, she received a letter from the trial judge wherein the judge told her that he could not offer her employment as a law clerk due to the appeal on the MacDonald case pending. In the letter, the trial

judge stated that he "confidently expected that the jury would return a not guilty verdict in the case." (JA 2560-61; 4102).

5. Sara McCann

In 1982, Sara McCann lived in South Carolina with her husband, and befriended Helena Stoeckley through a church. (JA 2583-84). Stoeckley had a newborn child that they assisted Stoeckley with, and Stoeckley moved in with them during the period October through December 1982. (JA 2586). When Stoeckley told her that she was from Fayetteville and involved in an "FBI case," they realized her connection to the MacDonald case. (JA 2587).

McCann asked about the case, and Stoeckley told her that "the men that did the murdering, okay, Jeffrey's wife, children, and almost killed Jeffrey, that they were going to rough Jeffrey MacDonald up and that she would become a wizard in the occult group." (JA 2588). Stoeckley told her that she ran out screaming and continued to have nightmares about the events. (JA 2588-89). Based on her conversations with Stoeckley, McCann testified that "I know as well as I know that I'm sitting here today that Jeffrey MacDonald is innocent." (JA 2589).

6. Jerry Leonard

During the 2012 evidentiary hearing, MacDonald requested permission to call Jerry Leonard, the attorney appointed by the trial judge to represent Stoeckley during the 1979 trial, to testify about his communications with Stoeckley. The district court ordered Leonard to submit an affidavit of his communications with Stoeckley under seal to the Court for a determination as to whether the privilege

should be set aside under the principles of *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). (JA 2873). The district court found that the privilege should be set aside, and unsealed Leonard's affidavit and ordered him to testify. (JA 3202-03).

Leonard is a lawyer in Raleigh and in 1979 was in private practice. He had previously worked in 1971 as a law clerk to Judge Dupree. (JA 3272). During the MacDonald trial, he received a call to represent Stoeckley from Judge Dupree's office, (JA 3273), which he believed occurred on Sunday, 19 August 1979. (JA 3304). Leonard picked up Stoeckley and took her to his house to talk with her and try to build trust with her. (JA 3275). Stoeckley fell asleep in a chair at his home, and the next morning he took her to court. (JA 3275). They were given a room in the courthouse in which to wait. That morning, Leonard asked Stoeckley about the murders of MacDonald's family, and she told Leonard that she did not remember anything about the night of the killings. (JA 3276-78).

In later conversations that afternoon, Stoeckley asked Leonard "what would you do if I told you I was there." (JA 3279). Leonard told Stoeckley that he would continue to represent her, but needed to know the truth. Stoeckley then told Leonard that she was present during the murders. (JA 3279-80). Leonard's affidavit sets out the particulars of Stoeckley's confession to him, including that she was present at the murders with the men who did it, at least one of whom had a grudge against MacDonald. Importantly, Stoeckley also told Leonard that during the murders, the phone rang, she answered it, and quickly hung up when instructed to do so by the other men. (JA 4098). This statement is corroborated by other evidence showing that

such a phone call did take place. (JA 4045). Leonard testified unequivocally that the matters in his affidavit regarding the statements made to him by Stoeckley were true and accurate, and he was willing to testify to them under oath. (JA 3396).

The key evidence offered by the Government is as follows:[6]

1. Frank Mills

Mills was an FBI agent from 1962 to 1990. On 14 August 1979, he arrested Helena Stoeckely on a material witness warrant, and took her to the Pickens County Jail, which is about 40 minutes from Greenville, SC. (JA 2639-2651; 2670). Mills testified that he interviewed Stoeckley on the way to the jail and she said that she used drugs on the night of the murders that "put her out" and she could not remember anything further about the night. (JA 2645-2646).

Mills testified that he released Stoeckley the next day (8/15/1979) into the custody of Vernoy Kennedy, a deputy U.S. Marshal. (JA 2653). The Government then introduced a sworn statement from Kennedy, dated 23 August 2006, wherein Kennedy stated that he picked up Stoeckley at the Pickens County Jail on 15 August 1979 and transported her to Charlotte, where he met someone from the Marshal Service from North Carolina. (JA 2676-2678).

2. Dennis Meehan

[6] The majority of the evidence offered by the Government centered on attacking Britt's credibility, and attempting to show that Marshal Service personnel other than Britt picked up Stoeckley in South Carolina, and that Stoeckley was only in Britt's custody at times during the trial in Raleigh.

Meehan was a deputy U.S. Marshal in the Eastern District of North Carolina from 1978 to 2001. (JA 2680). Meehan testified that during the MacDonald trial, he was assigned to pick up Stoeckley, who had been arrested on a material witness warrant. (JA 2683). Meehan testified that he was instructed to drive to Charlotte, NC, to pick up Stoeckley, and that he and his wife did so, where they met a deputy marshal from South Carolina and picked up Stoeckley. (JA 2686-87). Meehan testified that they took Stoeckley directly to the Wake County Jail in Raleigh, where Stoeckley was booked into the jail. (JA 2687-2690). Meehan testified that no other deputies were involved in the transport of Stoeckley to Raleigh. (JA 2690-91).

Meehan testified that Stoeckley was transported the next day, 16 August 1979, from the Wake County Jail to the federal courthouse in Raleigh by deputy marshal Jimmy Britt and Geraldine Holden, another marshal's office employee. (JA 2692). Meehan testified that this trip is approximately 6 city blocks. (JA 2692). Meehan identified Government Exhibit 2074 as a photograph from the 17 August 1979 edition of a Raleigh newspaper, showing Stoeckley with Britt at the federal courthouse, with Stoeckley's boyfriend in the background. (JA 2692-94).

3. **Eddie Sigmon**

Sigmon was the chief deputy U.S. Marshal in 1979. Sigmon testified that Stoeckley was arrested on a material witness warrant in South Carolina during the trial and had to be transported to Raleigh. (JA 2711-12). Sigmon could not recall specifically who he assigned to perform the transport. (JA 2713). When asked who he would have chosen between Meehan and his wife or Britt and clerical employee

Geraldine Holden, Sigmon testified that he would have used Meehan and his wife for the transport to avoid having a clerical person out of the office. (JA 2713). Sigmon testified that, contrary to Britt's affidavit, he did not instruct Britt to check Stoeckley out of her motel and into a different hotel. (JA 2723).

4. James L. Blackburn

Blackburn was one of the prosecutors at MacDonald's trial. He prosecuted the case with U.S. Attorney George Anderson, AUSA Jack Crawley, and DOJ Attorney Brian Murtagh. He and Murtagh did the in-court work. (JA 2761).

Blackburn testified that Stoeckley was arrested on a material witness warrant and brought to Raleigh to be interviewed by the defense and prosecution. (JA 2764-66). Court was suspended on Thursday, 17 August 1979, for these interviews to take place. (JA 2767). Blackburn testified that at approximately 2 p.m., Stoeckley was brought to U.S. Attorney's Office for interview, though he does not know how she was transported there. (JA 2771). Blackburn testified that Stoeckley was interviewed in Anderson's office, in the presence of him, Anderson, Crawley, and Murtagh. (JA 2772-73). According to Blackburn, no one else was present. (JA 2773). Blackburn testified that he asked Stoeckley questions, and Stoeckley denied being present or participating in the murders. (JA 2775). Blackburn denied threatening Stoeckley with prosecution. (JA 2776). Blackburn testified that DUSM Britt was not present during this interview with Stoeckley. (JA 2805). Blackburn testified that the next day, Stoeckley testified and thereafter was released from the material witness warrant but placed under defense subpoena. (JA 2784-90).

Blackburn left the U.S. Attorney's Office in September 1981, and entered private practice. (JA 2798). In private practice, Blackburn began embezzling funds from his law firm and forging documents, and in 1993 was convicted of felony embezzlement and obstruction of justice offenses in state court, sent to prison, and disbarred. (JA 2799-2802; DE-115, Ex. 10). In committing these offenses, Blackburn stole approximately $234,000 and forged 17 judge's signatures to false pleadings. (JA 2802-02; 2844-45). Blackburn lied to his clients continually in committing his criminal offenses. (JA 2820-21). Blackburn admitted that in the 2000s, he accepted a $50,000 advance for writing a book about this case but did not do so, and has not returned the money despite entering a promissory note to do so. (JA 2853-54).

5. Jack B. Crawley, Jr.

Crawley was an AUSA involved in the MacDonald case. (JA 2879). When Stoeckley was interviewed by the Government during trial, Crawley recalls the interview taking place in Anderson's office, but he does not recall "all of the specifics of that interview." (JA 2886). Crawley testified that during the interview, Stoeckley denied being present at the murders of the MacDonald family. (JA 2887). Crawley testified that he thought that DUSM Britt was not present at the Stoeckley interview, (JA 2886), but he was "not positive" of that fact. (JA 2903). Crawley did not remember if he or Murtagh left during the Stoeckley interview. (JA 2903-04).

After leaving the U.S. Attorney's Office, Crawley worked in private practice and for a short time was a state court judge. (JA 2893-95). Several bar complaints were filed against him in the 1990s relating to his failure to complete work and his

trust account, and eventually the result of those complaints was that he was placed in disability inactive status by the bar. (JA 2896-97).

IV. The Decision Below

The district court denied relief, and in a 154 page opinion, the Fourth Circuit affirmed. The majority of the opinion is devoted to factual matters from the almost forty (40) year record of this litigation, wherein the Fourth Circuit (it is respectfully submitted by MacDonald) drew undue inferences in favor of the Government to reject the evidence offered by MacDonald and to conclude that MacDonald is not entitled to relief. The Fourth Circuit found that MacDonald failed to meet the "gatekeeping" standard of 28 U.S.C. § 2255(h), and likewise denied MacDonald's claims on the merits. The Fourth Circuit specifically found that if a freestanding claim of actual innocence can be a basis for relief under 28 U.S.C. § 2255, MacDonald failed to meet whatever "extraordinarily high" burden would apply to such a claim. (Appendix at 154).

REASONS THE WRIT SHOULD ISSUE

MacDonald raises issues in this Petition that implicate a federal criminal defendant's right to challenge his conviction and sentence on the grounds of actual innocence. In one of his claims, MacDonald asserts that his newly discovered evidence establishes his actual innocence, when examined in light of the evidence as a whole in the case, and that such actual innocence can constitute a freestanding constitutional basis for relief in a motion under 28 U.S.C. § 2255. Certiorari should be granted because (a) this Court has not settled the question of whether actual

innocence of the charged offense alone establishes a constitutional violation that may be the basis for relief under Section 2255, (b) the standard for evaluation of such a claim has not been settled by this Court, and (c) the issue is an important question of federal law involving an individual's right to liberty and due process.

I. This Court Has Not Settled the Question of Whether Actual Innocence of the Charged Offense Alone Establishes a Constitutional Violation That May Be the Basis for Relief Under 28 U.S.C. § 2255.

This Court considered the issue of whether actual innocence can constitute a freestanding claim for relief in a habeas petition in *Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, a majority of this Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.* at 417; *see also id.* at 419 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution"). The *Herrera* court declined to specifically identify the standard that would apply to such a claim, noting only that "the threshold showing for such an assumed right would necessarily be extraordinarily high" and that the petitioner's evidence in that case fell "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist." *Id.* at 417, 418-19; *see also id.* at 427 (O'Connor, J., concurring).

This Court was again presented with the same legal issue in *House v. Bell*, 547 U.S. 518 (2006), where the petitioner sought to assert a freestanding claim of actual innocence as a basis for habeas relief. This Court declined to settle the question:

> We decline to resolve this issue. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petition has not satisfied it. To be sure, House has cast considerable doubt on his guilt -- doubt sufficient to satisfy *Schlup*'s gateway standard for obtaining federal review despite a state procedural default. In *Herrera*, however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high." 506 U.S. at 417, 113 S.Ct. 853, 122 L.Ed.2d 203. The sequence of the Court's decisions in *Herrera* and *Schlup* -- first leaving unresolved the status of freestanding claims and then establishing the gateway standard -- implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

House, 547 U.S. at 555. This Court has more recently affirmed that this remains an unsettled question. *See McQuiggen v. Perkins*, 569 U.S. 383, 392 (2014) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence"); *District Attorneys Office for 3d District v. Osborne*, 557 U.S. 52, 71-72 (2009) (assuming without deciding that actual innocence is a freestanding constitutional claim in a non-capital case); *In re Davis*, 557 U.S. 952 (2009) (remanding actual innocence claim to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence").

The fact that this issue has not been settled by this Court has created confusion in the lower courts. Some courts have interpreted the Court's statements as affirmatively disallowing claims of actual innocence. For example, the First Circuit

has stated that the "actual innocence rubric ... has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary circumstances in a capital case." *David v. Hall*, 318 F.3d 343, 347-48 (1st Cir.), *cert. denied*, 540 U.S. 815 (2003); *see also Fisher v. Varner*, 379 F.3d 113, 122 (3d Cir. 2004), *cert. denied*, 543 U.S. 1067 (2005) (dismissing actual innocence claim as not cognizable).

Other circuits have followed *Herrera* and assumed, without deciding, that a "freestanding claim of actual innocence is cognizable in a federal habeas corpus proceeding." *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014). The Eighth Circuit found that a freestanding claim of actual innocence "has considerable intuitive appeal, for, to some extent, the very purpose of a writ of habeas corpus is to forestall the unjustified punishment of the innocent," but denied relief based on *Herrera*. *Burton v. Dormire*, 295 F.3d 839, 848 (8th Cir. 2002), *cert. denied*, 538 U.S. 1002 (2003). And other circuits have reached conflicting conclusions within their own decisions. The Fourth Circuit in 1999 denied an actual innocence claim because "[p]recedent prevents us from granting [petitioner's] habeas writ on this basis alone." *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999); *see also Rouse v. Lee*, 339 F.3d 238, 255 (4th Cir. 2003), *cert. denied*, 541 U.S. 905 (2004) (citing *Herrera* in concluding "that claims of actual innocence are not grounds for habeas relief even in a capital case"). Yet the same circuit later stated in dicta that a "petitioner may also raise a freestanding claim of innocence in a federal habeas petition." *Teleguz v. Pearson*, 689 F.3d 322, 328 fn.2 (4th Cir. 2012).

This case squarely presents the Court with the opportunity to address this unsettled area of federal criminal law.

II. The Standard For Evaluation of An Actual Innocence Claim Has Not Been Settled By This Court.

Likewise, the standard for evaluation of an actual innocence claim is presently not settled. *Herrera* made clear that the standard for proving any actual innocence claim would be "extraordinarily high," without saying more. *Herrera*, 506 U.S. at 417. The *House* court, as set out above, found that the Court's sequence of decisions in this area "implies at the least" that a freestanding claim of actual innocence would require more proof than the *Schulp* standard.[7] *House*, 547 U.S. at 555.

Lower courts that have considered the question have attempted to formulate such a standard. *See, e.g. Carriger v. Stewart*, 132 F.3d 463, 474 (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998) ("a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent"); *DeMattina v. United States*, 949 F.Supp.2d 387, 420-21 (E.D.N.Y. 2013) (noting that *Carriger* is only appellate case to discuss standard for actual innocence claims, and discussing a possible "shocks the conscience" standard). But this Court has yet to definitively address the issue. This case presents the Court with an opportunity to do so.

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[7] The *Schlup* standard holds that "prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of the new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House*, 547 U.S. at 536-37 (*citing Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

III. The Issue is an Important Question of Federal Law Involving an Individual's Right to Liberty and Due Process, and This Case Presents a Compelling Claim of Actual Innocence.

As DNA and other sciences have progressed in recent years, the concept of actual innocence in the criminal law has come under scrutiny. Reversals of often-decades old convictions on the basis of DNA evidence, recanted eyewitness testimony, or other scientific evidence have filled the press in recent years. And as these fields of science have advanced, the reasoning underlying the precedent considering actual innocence claims has been questioned. As recently stated by a federal district court:

> Submitting those who can prove their innocence through highly reliable evidence to continued criminal punishment following an otherwise constitutional trial is "brutal ... and offensive to human dignity." *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952). What might once have been viewed as regrettable, but acceptable, error in our constitutional justice system cannot be countenanced in an age where DNA testing, reliable social science research, and other forms of decisive proof are available.

DeMattina, 949 F.Supp.2d at 420.

Legal commentators note that the landscape has changed significantly since this Court's decision in *Herrera* in 1993. At that time, "very few people had been exonerated by DNA evidence. Today, however, at least 316 people have been exonerated by DNA evidence; nearly one thousand have been exonerated without DNA evidence." Page Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 Cal. W. L. Rev. 171, 202 (2014). Another source notes

that, to date, there have been more than 2,400 exonerations.[8] Those exonerations have occurred in state courts, which generally provide a mechanism for consideration of actual innocence claims. Kaneb, *Innocence Presumed*, at 203-08 fn. 140.

Those procedures are not available to MacDonald, who was tried in federal district court and is a federal prisoner. Establishing a procedure for federal prisoners to prove they are actually innocent of the crimes for which they are imprisoned for decades would not raise the federalism concerns considered in *Herrera*. There would be no risk that federal courts would become "forums in which to relitigate state trials." *Herrera*, 506 U.S. at 401. This is an important federal question that has been debated not just by the courts, but also by legal commentators.[9]

MacDonald presents a compelling case of actual innocence. His claim of actual innocence is based on both DNA evidence and witness testimony that shows that persons other than MacDonald committed the murders of his family, as outlined above. To accept the Government's theory of guilt, one must accept that MacDonald created a story about a woman with a floppy hat being with intruders who killed his family, and that by coincidence such a woman did exist in the community *on that very*

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[8] The Exoneration Registry, Nat'l Reg'y of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited 19 May 2019).

[9] *See, e.g.*, Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. Pa. J. Law & Social Change 1 (2016); Shannon Laoye, *Innocent Beyond a Reasonable Doubt: Granting Federal Habeas Corpus Relief to State Prisoners With Freestanding Actual Innocence Claims*, 36 T. Jefferson L. Rev. 309 (2014); Caroline Livett, *28 U.S.C. § 2254(j): Freestanding Innocence as a Ground for Habeas Corpus Relief*, 14 Lewis & Clark L. Rev. 1649 (2010); Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 Am. Crim. L. Rev. 121 (2005).

night, and that by coincidence that woman would then falsely *confess repeatedly* (both before, during, and after the 1979 trial to several people, *including her own lawyer*) to being present during the murders with the murderers in a way that was *entirely consistent* with the story that MacDonald supposedly made up from whole cloth. In addition, one would have to accept that one of the men identified by Stoeckley as one of the killers in her many confessions, Greg Mitchell, would *by coincidence himself falsely confess repeatedly* to taking part in the killings, in a way that is *entirely consistent* with the story supposedly created by MacDonald. What are the chances of this occurring? The lower courts' decisions denying MacDonald relief never address this very basic point.

Moreover, to accept the Government's theory, one would have to completely overlook that it is impossible that the witnesses providing the new evidence (none of whom know each other) could concoct false or incorrect evidence in a way that their testimony would interlock in the way it does. Britt averred that he heard the prosecutor, Blackburn, threaten Stoeckley when she told the prosecutor that she was present during the murders. Wendy Rouder's testimony corroborates this testimony, regarding the "a-ha" moment she had after learning of Britt's account and how it explained Stoeckley's statements to her in 1979. Stoeckley even confessed to her own lawyer, Jerry Leonard, during the 1979 trial -- a fact that was unknown until the 2012 evidentiary hearing. Rouder's testimony is consistent and not impeached in any way. Like Leonard, she is a lawyer -- there is no motive for her to be untruthful. Likewise, neither Leonard, Stoeckley's mother, nor Stoeckley's brother Eugene have

any interest in this litigation involving MacDonald or any motive to fabricate in favor of MacDonald. All of this evidence interconnects because, MacDonald submits, it is true. Britt's account of the prosecutor's threat to Stoeckley is confirmed by the testimony of Rouder and Stoeckley's mother and brother, and the fact that the threat prevented Stoeckley from admitting her presence at the murder scene during her trial testimony is confirmed by the same evidence.

Finally, to accept the Government's theory of guilt, one would have to discount the powerful new DNA evidence uncovered by MacDonald, showing that an unsourced hair that is not MacDonald is under his daughter's fingernail, where she was struggling with her attacker. The location of this DNA evidence establishes its exculpatory power. The Government's response to these facts is to argue that it must have contaminated its own evidence from the crime scene -- without consideration for the fact that it relied entirely on that physical evidence from the scene at trial in 1979 to convict MacDonald, and that such a concession would undermine the entire basis for the Government's prosecution.

In sum, this case presents a compelling case for review of the legal issues attendant to a claim of actual innocence in a federal Section 2255 proceeding. Few (if any) federal criminal cases have remained in litigation for forty (40) years, as exculpatory evidence showing the defendant to be actually innocent continues to come to light. Few (if any) federal criminal cases involve a combination of powerful DNA evidence and witness testimony showing the defendant to not be the person who committed the crimes at issue. And few (if any) federal criminal cases have

affirmative proof of the weakness of the Government's trial evidence from the trial judge himself, who in this case wrote a letter shortly after the trial to one of the lawyers involved in the case, wherein the trial judge stated that he had "confidently expected that the jury would return a not guilty verdict in the case." (JA 4102). This case presents newly discovered evidence that is powerfully exculpatory. MacDonald submits that certiorari should issue and this Court consider the important legal issues raised herein and how they apply to the newly discovered evidence in his case.

CONCLUSION

Petitioner Jeffrey R. MacDonald respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted this 20th day of May, 2019.

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