IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 08-8525

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY R. MACDONALD,
Defendant-Appellant.

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BRIEF OF THE INNOCENCE PROJECT, NORTH CAROLINA CENTER ON ACTUAL INNOCENCE, NEW ENGLAND INNOCENCE PROJECT, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL OF THE DISTRICT COURT'S JUDGMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
AT RALEIGH

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INTEREST OF THE *AMICI CURIAE*

The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University to assist prisoners who could be proven innocent through DNA testing. To date, 254 people in the United States have been exonerated by DNA testing, including 17 who served time on death row. These people served an average of 13 years in prison before exoneration and release.

The Innocence Project's full-time staff attorneys and Cardozo clinic students provide direct representation or critical assistance in most of these cases. The Innocence Project's groundbreaking use of DNA technology to free innocent people has provided irrefutable proof that wrongful convictions are not isolated or rare events but instead arise from systemic defects. Now an independent nonprofit organization closely affiliated with Cardozo School of Law at Yeshiva University, the Innocence Project's mission is nothing less than to free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment.

The North Carolina Center on Actual Innocence, which coordinates the Innocence Projects at each of North Carolina's law schools (Campbell, Charlotte, Elon, Duke, NCCU, UNC, and Wake Forest), is dedicated to investigating post-conviction claims of actual innocence from unrepresented North Carolina inmates.

The Center is part of the National Innocence Network coordinated by the Innocence Project at The Benjamin N. Cardozo School of Law at Yeshiva University.

The New England Innocence Project ("NEIP") is a member of the International Innocence Network of regional Innocence Projects. Each of these regional projects was modeled after the Innocence Project, which was founded by Barry Scheck and Peter Neufeld at the Cardozo School of Law in 1992. The NEIP is unique, however, in that it was the first project in the country coordinated by a law firm. The NEIP consists of attorneys from Goodwin Procter LLP, area criminal defense and other private attorneys, exonerees, and faculty and students from law schools across New England. The NEIP works in conjunction with area criminal defense attorneys, law students and faculty to couple experienced representation with a unique clinical experience for future lawyers. NEIP attorneys and personnel screen and respond to requests for legal assistance from inmates, supervise law students as they conduct initial case reviews, provide direct legal representation to inmates who are seeking to vacate their convictions through the use of DNA evidence, and work to secure legal representation for inmates through the NEIP Network of attorneys.

The National Association of Criminal Defense Lawyers is a nonprofit corporation and the only national bar association working in the interest of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL was established to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the

proper and fair administration of justice. NACDL has a membership of more than 10,000 direct members worldwide—who are joined by 90 state, local, and international affiliate organizations with more than 35,000 members. NACDL members include private criminal defense lawyers, public defenders, military defense counsel, and law professors who are committed to preserving fairness and due process in criminal justice everywhere.

NACDL has a significant interest in guaranteeing criminal defendants their right not to be incarcerated for crimes of which they are factually innocent and to vindicate their right to seek relief from wrongful convictions. NACDL urges this Court to fortify those rights.

INTRODUCTION

In cases in which exonerations occur, the records almost invariably include evidence of one or more factors that contributed to the wrongful convictions: mistaken eyewitness identifications; erroneous forensic evidence including, but not limited to, incorrect blood serology, erroneous fingerprint analysis, unreliable and erroneous microscopic hair and fiber comparison; false confessions; false testimony by informant witnesses; ineffective defense counsel; police misconduct; and prosecutorial misconduct. The Innocence Project's extensive experience with exonerations of persons wrongfully convicted is not that exculpatory DNA test results override case records that lacked significant reasons to believe the wrongful

convictions were unfairly obtained. To the contrary, in studying 62 cases of wrongful convictions that ultimately resulted in exonerations, we determined that prosecutorial misconduct contributed to the wrongful convictions in 31 or half of the cases, many of which involved coercion of witnesses. *See* Scheck, Neufeld, and Dwyer Actual Innocence (Doubleday: 2000) Appendix 2 at 263 & 265.

The provisions of the *habeas corpus* statute that are central here mandate that the evidence be "viewed as a whole" and reflect what experience teaches all of us about wrongful convictions of the innocent. Unless *habeas* courts perform this review assiduously, these courts will fail to determine accurately whether the petitioner is actually innocent and whether and how he was unfairly and wrongly convicted. If that review is not performed, *habeas* courts heighten the risk that the hallmarks of cases of innocent convicts (either exculpatory evidence or events that contributed to the wrongful conviction, or both) will be overlooked, and will fail in their mission to find the truth and render justice.

Such a failure has occurred in this case. The district court erred by refusing to consider and weigh the combined exculpatory significance of results of DNA testing authorized by this Court together with evidence that a prosecutor had threatened the defense's key witness and lied to the trial judge about what occurred during his mid-trial interview of that witness. The evidence now establishes beyond doubt that no reasonable juror would have convicted MacDonald, had the newly discovered evidence been presented at his 1979 trial. The 1979 jury heard the testimony of

Kenneth Mica, a military police officer and first responder to MacDonald's 911 call, who recounted seeing a woman fitting Helena Stoeckley's description within a mile of the MacDonald home as he responded to the call. The description of the female intruder that MacDonald always described from his initial interview through his trial testimony closely matched Mica's description of the woman he saw walking in Fort Bragg in the pre-dawn minutes shortly after MacDonald's call for help. The *habeas* district court found and accepted as true Deputy United States Marshal Jimmy B. Britt's testimony that, the day before she was to testify as the defense's star witness, Stoeckley admitted that she had been in the MacDonald home on the night of the murders and that a trial prosecutor, James Blackburn, had threatened to prosecute her for the murders, if she repeated to the jury that she had been present during the murders. On such a record, it is far from evident that the trial would have been allowed even to proceed to a verdict. Certainly, at a minimum, MacDonald would have been entitled to curative relief, including an instruction condemning Blackburn's misconduct. Even if the district court had discretion to allow the trial to proceed notwithstanding Blackburn's misconduct, no reasonable factfinder would have found MacDonald guilty. This is true even if the 1979 jury had not received the additional newly discovered evidence, including powerful DNA test results, proving the presence of intruders. Certainly, had the 1979 jury received the evidence of prosecutorial misconduct in combination with the newly discovered scientific and

non-scientific evidence confirming the intruders' presence, no reasonable factfinder would have found MacDonald guilty.

This case also presents a rare circumstance of a *habeas* petitioner who has received Court of Appeals prefiling authorization (PFA) for two claims: a 1997 PFA for his free-standing claim of innocence based on DNA test results, and a 2006 PFA for his prosecutorial misconduct claim. Taken as a whole, the evidence supporting these claims is mutually reinforcing so that MacDonald is entitled to relief from his convictions based on either or both claims.

I. THE DISTRICT COURT'S ORDER CONCERNING THE BRITT CLAIM SHOULD BE REVERSED, BECAUSE IT ERRED BY DRAWING FLAWED CONCLUSIONS FROM THE EVIDENCE THAT IT CONSIDERED.

A. The District Court Erred by Failing to Correctly Apply Governing Constitutional Law, and By Ignoring Uncontroverted Evidence That Blackburn Lied to the Trial Judge Concerning What Was Said During His Mid-Trial Interview of Stoeckley.

James Britt states that Stoeckley told Blackburn that she, along with others, had been inside the Jeffrey MacDonald home on the night of the murders and that she had gone to the MacDonald home to acquire drugs. District Court Docket Entry (hereinafter "D.E.") 115, Ex. 1 Britt Aff. ¶ 22. Britt also states that, in response to Stoeckley's admissions, Blackburn told Stoeckley that, if she testified to that effect before the jury, he would indict her for the murders. Id. at ¶ 24. Faced with a record in which Britt's very serious accusation was not rebutted by Blackburn, and with no reason suggested by the evidence why Britt would falsify, or be mistaken about, such

a serious accusation,[1] the district court found the accusation to be true. The district court did not merely make a hypothetical assumption that Britt's accusation is true. "The court accepts Britt's affidavit as a true representation of what he heard or genuinely thought he heard on August 15-16, 1979." D.E. 150 at 38 n.18. This finding of fact is amply supported by the record and is binding here.

For that reason, this Court's May 6, 2010 order focuses on the district court's November 4, 2008 ultimate finding of fact and legal conclusion that:

> 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 the constitutional error, no reasonable factfinder would have found MacDonald guilty of the murder of his wife and daughters.

D.E.-150 at 46 (emphasis added). In its May 6, 2010 amended Certificate of Appealability Order (hereinafter "COA"), this Court asked, in part, whether the district court erred by "drawing flawed conclusions from the evidence it did consider." The answer is that the district court drew erroneous factual and legal

[1] Britt's affidavit indicates that his law enforcement career spanned nearly 40 years. He worked with Judges Dupree and Fox in the Eastern District of North Carolina for 18 years providing security for jury deliberations, prisoners, and courthouse personnel, including the judiciary. He was sufficiently trustworthy, exacting and attentive to details that he became Supervisor of Operations in that district. Britt was anyone but a man who would falsify an affidavit and offer to testify in order to fulfill a non-existent "moral burden" to exonerate a man who had been convicted of murdering his pregnant wife and two young daughters. Blackburn is well known to have been disbarred after pleading guilty to felony theft and obstruction of justice. The record amply supports Judge Fox's finding that credits Britt's account of the Blackburn-Stoeckley interview.

conclusions from key facts that the court found to be true and others that are incontrovertibly established in the trial record.

1. The District Court Ignored Uncontroverted Evidence That Blackburn Failed to Disclose What Occurred During His Stoeckley Interview and That He Lied to the Trial Judge and Defense Counsel About What Was Said During His Stoeckley Interview.

During the trial, Judge Dupree specifically asked the government about what Stoeckley had told the prosecution during its mid-trial interview of her. Blackburn told Judge Dupree that he had asked Stoeckley, "Have you ever been in that house?" and that her reply was "no." Trial Transcript (hereinafter "TT") 5616-18 (quoted in the District Court's opinion. DE-150-12.). Having accepted the truth of Britt's account of Blackburn's interview of Stoeckley as true, the district court committed clear and reversible error by ignoring the flat contradiction between his finding about what was said by Blackburn and Stoeckley in Britt's presence and Blackburn's answer to Judge Dupree about the same interview. Britt's account states that, during the interview, Stoeckley admitted having been in the MacDonald home on the night of the murders. Blackburn told Judge Dupree that, during the same interview, Stoeckley said she had never been there. The district court erred by failing to make the only supportable findings that can be made on this record, that: (1) Blackburn's answer to Judge Dupree's question was flatly contradicted by the judicially-accepted truth of Britt's account of the interview and was, for that inescapable reason, a flagrant falsehood; and (2) Blackburn did not forthrightly disclose to the trial judge

and/or defense counsel what Stoeckley had said to him and what his response had been. Manifestly, Blackburn's non-disclosure of what occurred during his interview of Stoeckley violated the duty imposed by *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667 (1985).

No one doubts the damage that lying to the Court can do to the truth finding function of courts. And, Justice Brandeis said: "Justice is but truth in action." Louis D. Brandeis, "Interlocking Directorates," 57-58, Annals of Amer. Acad. of Political and Social Science at 45 (1915). Ignoring uncontroverted evidence that Blackburn lied to Judge Dupree and defense counsel cannot be countenanced, much less affirmed, by this Court.

2. Erroneous Application of Controlling Constitutional Law.

To be sure, even without taking Blackburn's non-disclosure and blatant lie into account, MacDonald is entitled to relief. The district court erred by failing to correctly apply controlling Fifth and Sixth Amendment law that applies to improper prosecutorial interference with the testimony of a defense witness. *Webb v. Texas*, 409 U.S. 95 (1972); *United States v. Golding*, 168 F.3d 700, 702-705 (4th Cir. 1999); *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980) ("Threats against witnesses are intolerable. Substantial government interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant."); *United States v. Blackwell*, 224 U.S. App. D.C. 350, 694 F.2d 1325, 1334 (D.C.Cir. 1982) ("The constitutional right of a criminal defendant to call witnesses in his

defense mandates that they be free to testify without fear of governmental retaliation.").

Blackburn's unconstitutional response to Stoeckley's admissions during the interview violated MacDonald's Fifth Amendment right to a fair trial and his Sixth Amendment right to present witnesses in his defense who choose to testify free of government interference. And, here, the government exploited its misconduct in final argument, just as it did in *United States v. Golding*, *supra* 168 F.3d at 704. In *Golding*, the prosecutor's interference was communicated to defense lawyers and thence to the witness. Here, the interference was communicated directly to the witness in the presence of a Deputy United States Marshal. During district court proceedings in *Golding*, the prosecutor admitted what she communicated to the witness. Here, Blackburn has not rebutted Britt's account. In *Golding*, the content of the prosecutor's response to the witness's self-inculpatory statement exculpating her husband for a firearms felony was not to provide a perjury warning, but rather to accept the witness's account as true, and on that basis, threaten to prosecute her for her admitted firearms offense. Here, Blackburn's response to Stoeckley's self-inculpatory admissions was not to express doubt about her truthfulness and provide what might have been interpreted by the court as a benign perjury warning to her. Blackburn told Stoeckley that he would accept her admissions as true if she repeated them to the jury and, on that basis, threatened to prosecute her for the MacDonald family murders. In short, even without taking Blackburn's non-disclosure and lie

into account, this record establishes all of the elements of the government's violation of MacDonald's constitutional rights to a fair trial and to compulsory process. Under controlling law in this and every other circuit, MacDonald is entitled to § 2225 relief on the basis of Blackburn's unconstitutional misconduct during his Stoeckley interview alone. This is certainly true in combination with the government's summation exploiting Stoeckley's failure to make the same admissions to the jury that she made to Blackburn. Even on that portion of this record, MacDonald is entitled to § 2225 relief, whether or not the Court applies an automatic, *per se* prejudice standard.

3. The District Court Drew Impermissible and Flawed Conclusions by Ignoring Blackburn's Non-Disclosure and Lie to the Trial Judge and Defense Counsel.

The district court's denial of MacDonald's motion relies most heavily upon Judge Dupree's finding concerning Stoeckley that "this woman is not credible" and "Stoeckley's unreliability adds even greater force to this conclusion." DE-150 at 29-30 (*quoting United States v. MacDonald,* 640 F.Supp. 286, 324 (E.D.N.C. 1985)). The district court also relies upon her present unavailability to testify due to her death 25 years ago in ruling that it is now impossible to determine whether, somehow, Stoeckley might have misunderstood Blackburn's response to her admission of having been present at the murder scene as something other than its literal meaning: a threat to prosecute her for the murders. DE-150 at 40. The district court also relies upon Stoeckley's death and Judge Dupree's finding concerning the unreliability of

her many self-inculpatory and detailed admissions to rule that it is now impossible to determine what Stoeckley's testimony would have been, had she not been threatened by the prosecutor the day before she testified. *Id.* On this uncontroverted record, it is clear that Blackburn threatened Stoeckley as the most effective means at hand to prevent her from repeating her self-inculpatory admissions to the jury. The district court drew flawed conclusions in failing to recognize and accept that Blackburn could have no other motive for threatening Stoeckley. Had Stoeckley not been threatened, it is clear that Blackburn believed Stoeckley's self-inculpatory testimony would have exonerated MacDonald. So viewed, but for the unconstitutional threat, no reasonable fact finder would have convicted MacDonald.

Moreover, the district court's rulings cannot be affirmed because they all depend on the district court having ignored what would have happened, if Blackburn had forthrightly disclosed to Judge Dupree and defense counsel what (the district court found) had occurred during his interview of Stoeckley in the presence of Deputy U.S. Marshal Britt.

First, the unrebutted evidence now shows that Judge Dupree's findings about the unreliability of Stoeckley's statements against penal interest were procured by fraud. Judge Dupree never knew that Stoeckley had admitted to Blackburn that she had been present in the MacDonald apartment on the night of the murders. Even more significantly, due to Blackburn's misrepresentation, Judge Dupree never knew that Blackburn threatened Stoeckley that she would be prosecuted for the murders, if

she repeated her admission to the MacDonald trial jury when she testified the next day. Had Blackburn been forthright rather than deceitful, Stoeckley might well have taken the Fifth Amendment, in which case the prejudice would have precluded conviction under controlling law. *Golding, supra,* 168 F.3d at 703-705. But, whether Stoeckley testified or not, the jury would have heard Britt's unrebutted testimony that Stoeckley, by far the most important trial witness, had admitted to Blackburn (just as she had to several other persons) that she had been in the MacDonald home on the night of the murders and that she had been threatened with prosecution for the murders by the prosecutor. Had Blackburn been forthright, it is by no means clear that the prosecution would have been viable or allowed to continue. But, even if the trial had continued after Stoeckley's admissions and Blackburn's threat had been disclosed, no reasonable factfinder would have found MacDonald guilty. As Judge Murnaghan stated:

> Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great.

United States v. MacDonald, 632 F.2d 258, 264 (4th Cir. 1980). Had the jury heard Britt's testimony, the injury would have been at least doubly fatal.

Second, neither the district court nor this Court can properly rely upon Judge Dupree's fraudulently-obtained, 1985 findings discounting the reliability and rejecting the admissibility of Stoeckley's declarations against penal interest. Neither

can this Court rely upon its 1980 affirmance of Judge Dupree's fraudulently-obtained ruling that excluded Stoeckley's declarations against penal interest.

Third, the defense also would have been able to cross examine Stoeckley about what occurred when she was interviewed by Blackburn in Britt's presence. Had Stoeckley testified in obviously contrived fashion (as she did after being threatened) that she remembered her whereabouts in the hours shortly before and after the time of the murders, but not during the murders (TT 5556-5557), her testimony would have corroborated the occurrence of Blackburn's threat then, just as it does now.

Fourth, the district court's ruling states: "The fraud aspect of this theory depends on the truth of (defense counsel) Segal's representations to Judge Dupree that Stoeckley essentially had cleared MacDonald of the crimes by her admissions during the defense team's interview in the presence of half a dozen or more witnesses the day before." DE-150 at 33. To the contrary, the admissibility of powerfully exculpatory evidence of the government's misconduct does not depend "on the truth of (defense counsel) Segal's representations to Judge Dupree" or what any counsel other than Blackburn said at the time. Rather, MacDonald's claim relies, in part, on what Blackburn <u>failed to tell</u> Judge Dupree and the defense.

Fifth, MacDonald would have been able to argue to the jury during the 1979 trial (rather than 30 years later) that one of MacDonald's prosecutors was sufficiently convinced that the jury would be impressed by the truthfulness of Stoeckley's

statements to inform her that she would be prosecuted for the murders if she repeated her admissions to the jury. Blackburn would not have made such a statement to Stoeckley if he did not consider her admissions worthy of belief and true.[2] The district court erroneously ruled (DE-150 at 38-39) that "Causation is Lacking" because MacDonald cannot now call Stoeckley or Britt as a witness to prove what her trial testimony would have been, if she had not been threatened by Blackburn. The district court's ruling, of course, perversely exploits Blackburn's perfidy and rewards government malfeasance; having hid the truth for decades, the government

[2] Blackburn had reason to understand that Stoeckley's admissions were true and would be believed by the jury. From the moment he was revived by military police ("MPs"), MacDonald has not once wavered from his account that he and his family were brutally attacked by at least four intruders. He testified that in the early morning of February 17, 1970, he awoke in his living room to screams of his wife and one of his daughters, and saw four people – one black and two white men, and a white woman. (TT 6581) He described the woman as having blond hair, boots and a white floppy hat. (TT 6588) The black male was wearing what appeared to be an Army field jacket with E-6 sergeant stripes on the sleeve. (TT 6583-85) He testified to having seen a "wavering or flickering" light on the woman's face – as from a candle, though he never actually saw a candle. (TT 6592). Kenneth Mica, an MP who went to the crime scene, testified that, on his way, he saw a woman with shoulder-length hair, wearing a "wide-brimmed…somewhat 'floppy'" hat (TT 1453-54), standing at the corner of Honeycutt and South Lucas Road, "something in excess of a half mile" from the home. (TT 1401, 1454) On hearing MacDonald's description of intruders, he connected the blond-haired woman described by MacDonald with the woman he saw on the corner. Mica told the other MPs "to send a patrol to see if they could locate her," but he did not recall if that was done. (TT 1598). As part of its review of all the evidence, the district court failed to explain how MacDonald and Mica could have independently provided the same description of a woman fitting Stoeckley's description as having been in the MacDonald apartment and a short distance away shortly after the murders in the wee hours of the morning, if MacDonald was lying and guilty.

now, according to the district court, should be allowed the presumption that such testimony would not have exculpated MacDonald (contrary to Judge Murnaghan's view). Not only is this reasoning counterintuitive to the government's (Blackburn's) motive in hiding facts consistent with innocence, it is, in any event, contrary to the factual record now before this Court.

Had Blackburn's misconduct been disclosed during trial, as it should have been, it is difficult to say which would have had the greater exculpatory impact upon MacDonald's jury: (1) Stoeckley admitting before the jury her presence during the murders; (2) Stoeckley acknowledging before the jury her admissions during the Blackburn interview; or, (3) Britt's testimony to the jury concerning Stoeckley's admissions to Blackburn and Blackburn's response.

Sixth, the district court acknowledged that Blackburn's words constituted a threat, but adverted to the "possibility" that what Blackburn said was benign advice.

> Although the court accepts the accuracy of Britt's recollection of the words he heard, the accuracy of his interpretation thereof is sheer conjecture. Under the circumstances, a person untrained in the law easily could have perceived those words to be threat -- and it may have been. However, persons educated in the criminal and constitutional law would recognize *at least the possibility* that what Britt heard was an officer of the court advising an unrepresented potential trial witness that if she were to admit under oath that she had in some way been involved in three murders, it would be his duty to indict her for those crimes.

DE-150 at 39 (italics in original; underlining added; footnote omitted). Blackburn's non-disclosure of both Stoeckley's admissions to him and his response precludes the possibility that Blackburn, acting as an "officer of the court," provided benign and,

indeed, appropriate legal advice to the defense's most crucial witness, Stoeckley.[3] Certainly, an "officer of the court" would have responded to the district court's specific inquiry about what occurred during the government's interview of Stoeckley with a timely, complete, and scrupulously accurate disclosure. Blackburn's non-disclosure was the antithesis of what an officer of the court was obliged to do. Most tellingly, Blackburn's non-disclosure confirms his consciousness of wrongdoing -- that he had unconstitutionally threatened and discouraged Stoeckley from repeating her admissions to the jury. For these reasons, had Blackburn made a timely disclosure, MacDonald would have been able to prove that Blackburn's response to Stoeckley's admissions constituted an unconstitutional threat.

Seventh, the government could not have exploited its fraud in final summation by arguing as it did, "The only thing that links Helena Stoeckley to this crime scene is the fact that the Defendant says that he saw the girl and poor Helena doesn't know where she was between 12:00 o'clock and 4:30 in the morning." TT 7108-7109. Neither could it have told the jury in summation, "I asked her on cross examination if she did participate to her own knowledge in the killing of the MacDonald family.

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[3] The prosecutor's misrepresentation in MacDonald's case is a far cry from cases cited by the district court (DE-150 at 36-37) in which the prosecutor's communications with the witness were deemed benign and harmless. *See United States. v. Jackson,* 935 F.2d 832, 847 (7th Cir. 1991) (prosecutor communicated with witness in trial judge's presence); *Davis v. Straub,* 430 F.3d 281, 284-285 (6th Cir. 2005) (same; counsel was appointed for, and consulted with the witness, before the witness invoked his Fifth Amendment privilege and declined to testify).

She said 'no.' The only thing that she said was that she didn't know where she had been." TT 7110. The district court acknowledged this Court's holding that exploitation in final summation of the prosecutor's threats of prosecution to a witness requires automatic reversal of the conviction, DE-150 at 37, *citing United States v. Golding*, 168 F. 2d 700, 703-705 (4th Cir. 1999). The district court failed to acknowledge that the government had exploited its undisclosed threats in final summation in order to unconstitutionally procure MacDonald's conviction.

Eighth, the district court would not be in a position to question whether, contrary to *Golding*, harmless error applies to Blackburn's misconduct. The district court questions whether this Court's holding that a prosecutor's threatening of a defense witness requires a new trial "without regard to a harmless error analysis." DE-150 at 41 citing *United States v. MacCloskey*, 682 F.2d. 468, 479 (4th Cir. 1982). In *MacCloskey*, the defense was promptly informed about the prosecutor's threat to prosecute the witness and the defense was able to present that misconduct to the court during the trial. *Id. at* 475. Here, Blackburn covered up his misconduct by telling an outright lie to the district court, and the truth remained hidden while MacDonald served thirty years in prison. On such a record, there is no occasion to reconsider *MacCloskey's* holding, and *Golding* was decided years after *MacCloskey*. Nor does the district court provide any reason for the government to unfairly reap the benefit of its fraud because, thirty years later, Britt and Stoeckley are deceased and unavailable to testify. DE-150 at 41-42.

In sum, the record establishes that MacDonald is entitled to § 2255 relief without relying on the DNA and other exculpatory evidence that district court excluded and thus ignored, as stated in the amended COA. Certainly, MacDonald's case for relief becomes even more overwhelming when this Court considers the powerful exculpatory evidence that the district court erroneously excluded and ignored.

II. MacDONALD IS ENTITLED TO RELIEF FROM HIS WRONGFUL CONVICTION BECAUSE THE EVIDENCE AS A WHOLE ESTABLISHES THAT NO REASONABLE FACTFINDER WOULD HAVE FOUND HIM GUILTY UNDER 28 U.S.C. §2244(b)(2)(B)(ii) OR ANY OTHER STANDARD.

A. § 2244(b)(2)(B)(ii) and § 2255(h)(1).

This Court's May 6, 2010 Order recognizes that, on its face and as indicated in *United States v. Winestock*, 340 F.3d 200, 205(4th Cir. 2003), 28 U.S.C. § 2244(b)(2)(B)(ii) applies exclusively to state prisoners. The amended COA asks whether the district court should have applied the standard in 28 U.S.C. § 2255(h)(1). The only difference in the burden of persuasion imposed by the two statutes is that state prisoner provision, § 2244(b)(2)(B)(ii), includes the phrase, "but for the constitutional error," whereas the federal prisoner provision does not. The uncontroverted evidence in the record and judicially-found facts establish that, but for the constitutional error of Blackburn's misconduct, no reasonable factfinder would have found MacDonald guilty. If MacDonald need not establish "but for" causation because § 2244(b)(2)(B)(ii) does not apply, he satisfies the burden of

persuasion by a wider margin. For this reason, this Court need not resolve this question in order to grant MacDonald the relief to which he is entitled.

Alternatively, this Court should rule that § 2244(b)(2) does not apply to MacDonald's case. The Courts of Appeals that have analyzed the relationship between §§ 2244 and 2255 have determined which subsections of § 2244 are incorporated by § 2255 and apply to federal prisoner applications. This and other Courts of Appeals have held that § 2244(b)(3) and (b)(4) apply when a district court reviews a federal prisoner's second or successive § 2255 application, but none of them have decided that § 2244(b)(2) applies to such cases. *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001); *Bennett v. United States*, 119 F.3d 468 (7th Cir. 1997). Unlike § 2244(b)(3) and (b)(4), § 2244(b)(2) explicitly applies exclusively to "a second or successive *habeas corpus* application under section 2254…." In determining whether a federal prisoner meets the Anti-Terrorism and Effective Death Penalty Act's (hereinafter AEDPA) conditions for filing a successive petition, the district court must apply § 2255, not § 2254, standards. *Reyes-Requena v. United States*, 243 F.3d at 900; *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164 (9th Cir. 2000).

Villa-Gonzalez explicitly decided the question presented in the amended COA about § 2244(b)(2)(B)(ii). It held that the reference in § 2244(b)(4) to "the requirements of this section" does not refer to § 2244(b)(2). *Id.* n. 4. According to

the plain meaning of their texts, some subsections of § 2244 apply exclusively to federal prisoners (§ 2244(a)); some apply exclusively to state prisoners (§ 2244(b)(1) and (2), 2244(c), and 2244(d)); and others apply to both (§ 2244(b)(3) and (4)). When applied to a claim in a second or successive § 2255 application, § 2244(b)(4) does not impose the requirements imposed by subsections of § 2244 that are exclusively applicable to § 2254 applications. This Court can apply § 2244(b)(2) to this case only by impermissibly declining to give effect to words in its text that limit its applicability to § 2254 applications.

B. At the Least, "Evidence As a Whole" Includes Newly-Discovered Evidence That Would Have Been Admitted At the Trial.

The evidentiary burden of persuasion at issue requires a probabilistic and retrospective projection of the evidence that the factfinder would have heard and seen had MacDonald's 1979 trial taken place with all the evidence that is now available. The standard is whether "no reasonable factfinder would have found the movant guilty of the offense." That an item or body of newly-discovered evidence, when considered separately and independently, is insufficient for filing a first, second, or successive § 2255 claim in no way renders that evidence inadmissible under the Federal Rules of Evidence when retrospectively projecting the evidence that the factfinder would have heard and seen at MacDonald's trial 1979.[4] The body of

[4] Evidence that may not appear to be relevant or probative when initially presented often increases in importance when considered in light of subsequently presented evidence. Jurors are so instructed every day. The saran and wool fibers would be

newly discovered, but excluded, evidence at issue in this appeal is the evidence that was presented timely to the district court in these § 2255 proceedings.

There can be no question that Britt's uncontroverted evidence concerning Stoeckley's statements during the Blackburn interview and Blackburn's response would have been admissible and would have devastated the government's case in 1979. The same is true of other newly discovered physical and scientific evidence: (1) the blue-black wool fibers found on a club that had been used as a murder weapon that was unmatched with anything in the MacDonald home but consistent with the color of garments that Stoeckley testified that she always wore in 1970 (TT 5634); she "always wore black or purple" clothing); (2) the saran fibers up to 22 inches in length unmatched to anything in the MacDonald home and evidence that such fibers were used in wigs coupled with Stoeckley's admission that she destroyed her wig so as not to be connected to the MacDonald murders (TT 5602-5604); and, of course, (3) the powerfully exculpatory DNA test results on a hair with intact root found under a fingernail on the left hand of Kristen MacDonald which also bore defensive wounds, a hair with intact root and detached follicular tissue under the body of Colette MacDonald, and a hair with intact root found on the bedspread in Kristen's room. The trial court's ruling in 1979 was that declarations against penal interest were not admissible in the absence of physical evidence left at the crime scene by

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admissible and probative of the presence of intruders, and Stoeckley in particular, when considered in light of Britt's evidence and the DNA test results.

intruders. In light of the unrebutted evidence concerning the Blackburn-Stoeckley interview, Stoeckley's and Greg Mitchell's declarations against penal interest would have been admitted even without the newly discovered physical evidence. When the physical evidence is added to the mix, it overwhelmingly demonstrates that Stoeckley and other intruders were in the MacDonald home that night.

Considered together and recognizing how all of this evidence is mutually reinforcing, the newly discovered evidence would have obliterated the government's only theory: that the absence of physical evidence of intruders proved beyond a reasonable doubt that MacDonald's account of the murder was a false exculpatory story. Indeed, at the trial the government would not have been able to make the following argument as the key and most effective portion of its final summation:

> Not to put too fine a point on it, "Has the Defendant lied about the alleged struggle with intruders? TT 7056.
>
> I suggest to you, ladies and gentlemen, that if we prove to you that that was MacDonald's footprint in A type blood as I will later speak to – if we prove to you that Colette's blood got on the pajama top before it was torn, then it doesn't make any difference if there were 5,000 hippies outside Castle Drive at 4:00 o'clock in the morning screaming, "Acid is groovy, kill the pigs" because they have not shown that those hippies were inside the house. It doesn't matter what was going on outside unless they can also tie that in to the inside. That is where the people died. TT 7113-7114.

MacDonald has two claims to § 2255 relief pending: (1) an actual innocence claim based on the Britt constitutional error; and (2) a free standing actual innocence claim based on the DNA test results. MacDonald is entitled under § 2255 and the Fifth Amendment's due process clause to have all of the evidence considered on each

of these claims. For example, he is entitled to have the DNA evidence considered in connection with the Britt claim and vice versa.

III. THE DISTRICT COURT'S PROCEDURAL DECISION WITH RESPECT TO THE FREE STANDING DNA CLAIM, REQUIRING ADDITIONAL PREFILING AUTHORIZATION FROM THIS COURT, WAS ERRONEOUS IN LIGHT OF 28 U.S.C. § 2255(h).

In our earlier brief, we argued that no additional PFA was required for MacDonald's DNA-based actual innocence claim after this Court's October 17, 1997 Order authorized MacDonald to file his successive application in the district court, asserting his free standing claim of actual innocence based on DNA testing. *See* Supp. A. 184. This Court's May 6, 2010 Order, including its amended Certificate of Appealability, directed that supplemental briefs be filed on this issue.

The record that led to the issuance of this Court's October 17, 1997 Order shows that this Court issued two PFAs: one on October 17, 1997, concerning MacDonald's free standing actual innocence claim based on DNA testing; and a second on January 12, 2006, pertaining to the Britt claim. No additional PFA was required for the DNA evidence as such PFA had already been authorized by this Court. The district court's contrary ruling was erroneous. Moreover, on this record, the district court's ruling requiring multiple PFAs impermissibly burdens litigation of actual innocence claims based on DNA testing, contrary to § 2255 law as well as the Innocence Protection Act of 2004, 18 U.S.C. § 3600.

A. The Record That Resulted in This Court's October 17, 1997 Prefiling Authorization Establishes Beyond Doubt That This Court Issued a PFA For MacDonald's DNA Testing-Based Actual Innocence Claim, and No Additional Prefiling Authorization Was Required.

MacDonald first raised his actual innocence claim based on DNA testing in the district court. On April 22, 1997, MacDonald filed in the district court his motion to reopen 28 U.S.C. § 2255 proceedings and for discovery. In his accompanying memorandum of law, MacDonald sought, through discovery related to his motion to reopen his prior § 2255 motion, access to physical evidence including certain hairs found at the crime scene for the purpose of conducting DNA testing to establish his actual innocence. Supp. A. 119-124. MacDonald's DNA testing request was explicitly tied to his actual innocence claim. MacDonald sought access to itemized crime scene evidence in order to conduct independent laboratory tests, including mitochondrial DNA tests, "to permit him to demonstrate his factual innocence." Supp. A. 123.

On September 2, 1997, the district court denied MacDonald's motion to reopen. In doing so, the district court specifically quoted and denied MacDonald's request for access to "unsourced hairs, blood debris and fibers, found in critical locations such as underneath the fingernails of the victims, which may very well contribute toward a demonstration of Dr. MacDonald's factual innocence." Supp. A. 150; see also the district court's reference to MacDonald's claim of actual innocence and his request for DNA evidence. Supp. A. 138. In its order the district court stated:

"While the court DENIES the motion to reopen, the court TRANSFERS this matter to the United States Court of Appeals for the Fourth Circuit for consideration of certification as a successive motion under 28 U.S.C. § 2255." Supp. A. 128, 155.

After the district court transferred this case, MacDonald filed in this Court a motion for an order authorizing the district court to consider a successive application for relief under § 2255. Supp. A. 156. The last page includes itemization of evidence supporting MacDonald's claim of actual innocence including the physical evidence to be subjected to DNA testing. Supp. A. 162. In his memorandum of law in support of his motion, MacDonald argued specifically that "defendants should be given access to physical evidence to conduct DNA and other forms of testing to establish their innocence." Supp. A. 178. Further, MacDonald argued: "Here, DNA testing could be used very effectively to further demonstrate Jeffrey MacDonald's innocence." Supp. A. 179.

On October 17, 1997, this Court issued its order allowing only so much of MacDonald's motion as asserted his DNA-based claim of actual innocence. There was no separate motion to conduct DNA testing. The only motion to which the October 17, 1997 Order referred was MacDonald's motion for an order authorizing him to pursue a successive § 2255 application based on yet to be obtained DNA test results. The government's brief in this Court acknowledged this. Brief of the United States, 8/21/09 at 17.

Review of this record establishes beyond doubt that this Court authorized MacDonald to file a successive application alleging his actual innocence based on what MacDonald asserted would be exculpatory results of DNA tests. This Court's October 17, 1997 order is consistent with § 2255(h)(1). That provision states that MacDonald's successive petition "must be certified" by a panel of this Court to contain: "(1) newly discovered evidence that, if proven and viewed in light of 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…." (emphasis added). This Court ruled in 1997 that if proven exculpatory, the DNA tests, when considered with the evidence as a whole, satisfied the § 2255(h)(1) standard.

For these reasons, nothing in the record or any law requires MacDonald to obtain a new PFA in addition to the PFAs that this Court issued in 1997 and 2006.

B. Requiring an Additional Prefiling Authorization Impermissibly Burdens Efficient and Prompt Adjudication of Claims of Actual Innocence Based on DNA Test Evidence.

There is no legal or equitable basis for requiring MacDonald to endure even more undeserved imprisonment by requiring him to move again for an additional PFA after obtaining a PFA in 1997 prior to the DNA testing. There is anything but equity in imposing further delay and imprisonment on MacDonald for the fact that the Defense Department did not report the results of the DNA testing until months

after MacDonald had obtained the PFA for the Britt claim in 2006.[5] After a motion to file a successive application on any claim is granted by the Court of Appeals and the District Court, the scope and standard of § 2255 review is the same as it is for a first § 2255 motion. The Supreme Court has held that § 2255 provides a remedy in the sentencing court that is "exactly commensurate" with the pre-existing federal *habeas corpus* remedy. *Hill v. United States*, 368 U.S. 424, 427 (1962). The Supreme Court has also stated that § 2255 "attempts to streamline *habeas corpus* relief, not to cut it back," and that "[t]he purpose and effect of the statute was not to restrict access to the writ but to make postconviction proceedings more efficient." *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2229, 2264 (2008) (noting also that the AEDPA provisions "did not constitute a substantial departure from common-law habeas procedures."). The avowed purpose of AEDPA amendments to § 2255 with respect to second and subsequent applications was to accelerate, and prevent delay of, judicial resolution of second or subsequent claims of entitlement to postconviction relief. The *habeas corpus* statutes have always been intended to promptly resolve such claims. *See* 28 U.S.C. § 2243 (setting time limits).

The district court's order requiring MacDonald to obtain a PFA in addition to the one this Court issued on October 17, 1997, would have the perverse effect of

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[5] The parties and the Court agreed that the DNA testing, including mitochondrial testing, should be conducted by the Defense Department's Armed Forces Institute of Pathology (hereinafter AFIP). The nearly ten-year delay in conducting the testing and reporting the results were largely attributable to the enormously increased burden placed on the AFIP after the start of the Iraq war in 2001.

encouraging claim-splitting and prolonging litigation of actual innocence claims, contrary to the AEDPA's intent. MacDonald is not a death-sentenced prisoner. He has no motive to delay these proceedings by splitting his claims; to the contrary, every day that passes without full and fair consideration of his Britt claim and his claim of actual innocence, including consideration of the DNA test results, is an irretrievably lost day of liberty. For this reason, the district court's error should be reversed in order to fulfill Congress's intent that § 2255 claims, and especially second and successive claims, be adjudicated efficiently, promptly and justly.

In any event, and alternatively, no additional PFA is required because this Court's October 17, 1997 Order comports with and should be deemed to constitute an order to conduct DNA testing under the Innocence Protection Act, 18 U.S.C. § 3600(a). In its first merits brief, the Government raised the issue of the Innocence Protection Act (hereinafter "IPA") and stated wrongly that for MacDonald to be eligible for relief under the IPA, he must show that he is not the source of DNA in evidence introduced at trial. (First Gov't Brief at 39 n. 16). The Government's argument is incorrect -- under the IPA, all MacDonald must show to obtain relief is that the evidence to be tested for DNA was secured during the investigation of the murders for which he was convicted, not that it was used at trial to convict him. 18 U.S.C. § 3600(a)(2) & (4); *United States v. Fasono,* 577 F.3d 572 (5th Cir. 2009) (discussing IPA requirements).

On October 17, 1997, seven years before the IPA was enacted, this Court

authorized MacDonald to test certain hairs seized by law enforcement investigators at the scene of the murders for which MacDonald was convicted, and held by law enforcement ever since. Though it took close to ten years, the DNA testing was conducted by order and under the supervision of the district court and the results reported to the district court in 2006. (JA 1088). There can be no question that MacDonald's request for DNA testing is timely under the IPA, as it was made and allowed by this Court seven years prior to the enactment of the IPA. 18 U.S.C. § 3600(a)(10). MacDonald testified to his innocence at trial, thereby satisfying the requirements of 18 U.S.C. § 3600(a)(7). His theory of defense based on DNA testing is the same as his theory of defense at trial, and would establish his actual innocence of the charges. The identity of the perpetrators of the murders was at issue in the trial. 18 U.S.C. § 3600(a)(6) & (7). This Court authorized the DNA testing in 1997 because, if the results were exculpatory, the testing would produce powerful evidence supporting MacDonald's defense that intruders killed his wife and daughters and would raise more than a reasonable probability that MacDonald did not murder them. 18 U.S.C. § 3600(a)(8). In short, the requirements of Section 3600 are all met by MacDonald.

Nor can there be any question that the DNA results were timely raised by MacDonald as a basis for a new trial. When the DNA results were received, MacDonald's Britt-based § 2255 motion for a new trial was pending. Promptly after the district court and the parties received the DNA testing results, MacDonald

moved to add the DNA results as additional grounds for relief, because the results showed that no member of the MacDonald family was the source of hairs found at critical locations at the murder scene, including underneath the fingernail of one of his daughters where she had been fighting with her attacker and under the body of his wife. (JA 1088).

Most significantly, pursuant to Section 3600(h) an IPA motion for a new trial "is not to be considered as a motion under section 2255 for purposes of determining whether the motion or any other motion is a second or successive motion under section 2255." 18 U.S.C. § 3600 (h)(2). The purpose and intent of § 3600(h) is to by-pass the gatekeeping provisions of the AEDPA amendments to §§ 2554 and 2255 with respect to DNA-based claims raised by prisoners who have unsuccessfully sought § 2255 relief. If this Court concludes that its October 17, 1997 Order did not authorize MacDonald to file a DNA-based successive § 2255 application asserting his actual innocence, the Court should, in fairness and justice, treat that order as an Innocence Protection Act order for DNA testing under 18 U.S.C. § 3600(a). So viewed, this Court is obliged by § 3600(h)(2) not to treat MacDonald's DNA-testing based claim of innocence as a successive § 2255 motion. There can be no question that MacDonald promptly submitted the DNA test results in support of his already pending motion for a new trial. Under 18 U.S.C. § 3600(g), the court shall grant MacDonald a new trial "if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence

was produced at trial), establish by compelling evidence that a new trial would result in an acquittal" for the "federal offense" for which MacDonald was convicted. 18 U.S.C. § 3600(g)(2) (emphasis added). Under this standard, independent of § 2255, MacDonald is also entitled to relief from his convictions. This Court's 1997 PFA, when combined with the exculpatory test results, permits MacDonald to obtain relief under either or both § 2255 and the IPA, as all of the requirements of both statutes have been satisfied.

The amended COA recognizes that, at the least, it is debatable whether the constitution forbids the punishment of a prisoner who the evidence shows is innocent even if he had a fair trial in all respects. *Buckner v. Polk,* 453 F.3d 195, 198-199 (4th Cir. 2006). The American understanding of *liberty* when used in our constitution, including its due process clause, has never been blind to inevitable occasions when belatedly disclosed evidence undermines confidence in the accuracy a criminal conviction. In defense of British soldiers accused in the 1770 Boston Massacre, John Adams aptly identified the profound danger in allowing convictions of the innocent to go unremedied:

> But when innocence itself is brought to the bar and condemned, especially to die, the subject will exclaim “It is immaterial to me whether I behave well or ill, for virtue itself is no security.” And if such sentiment as this should take place in the mind of the subject there would be an end to all security entirely.

IV. MacDONALD'S PROOF OF HIS ACTUAL INNOCENCE ENTITLES HIM TO *HABEAS CORPUS* RELIEF UNDER 28 U.S.C. § 2255.

It should almost go without saying that the Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the continued incarceration of a federal prisoner who is able to demonstrate that he is actually innocent – that in fact he *did not* commit the crime of which he stands convicted. A different conclusion would reduce the Fifth Amendment to a merely procedural provision, read the Constitution as turning a blind eye to any plausible sense of justice, and treat the Great Writ of *habeas corpus* as simply a procedural device. But it is far too late in the day to suggest that Due Process is merely procedural. *See, e.g., Doe v. South Carolina Dept. of Social Services*, 597 F.3d 163, 170 (4th Cir. 2010) (discussing Fourteenth Amendment Due Process jurisprudence):

> The [Due Process] Clause "guarantees more than fair process." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion) (internal quotation marks omitted). It "also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id*. (internal quotation marks omitted); *see County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (The Due Process Clause "cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." (internal quotation marks omitted)); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995) ("Substantive due process is a far narrower concept than procedural; it is an absolute check on certain governmental actions notwithstanding the fairness of the procedures used to implement them." (internal quotation marks omitted)).

Cf., e.g., Wolf v. Fauquier County Board of Supervisors, 555 F.3d 311, 323 (4th Cir. 2009) ("[o]nly abuse of power which 'shocks the conscience' creates a substantive due process violation") (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

Surely there are few abuses of governmental power which should be more shocking to the conscience than the prolonged incarceration of a person who has committed no crime; probably only the execution of an innocent person would be a more egregious violation of an individual's substantive right to due process of law. Yet until recently this proposition, which seems so self-evident, was in doubt. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming 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 419-21 (O'Connor, J., concurring) (stating "the fundamental legal principle that executing the innocent is inconsistent with the Constitution …. [T]he execution of a legally and factually innocent person would be a constitutionally intolerable event"; but declining to resolve the question whether a persuasive showing of actual innocence would warrant *habeas* relief); *id*. at 427-29 (Scalia, J., concurring) (arguing that there is *no* "right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction"); *id*. at 429 (White, J., concurring in the judgment) ("assum[ing] that a persuasive showing of 'actual innocence,'" sufficient

to show that based on the entire record "'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt,'" *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), would render Herrera's execution unconstitutional); and *id*. at 430-44 & n. 2 (Blackmun, J., dissenting) (arguing that "the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence" but declining to decide whether the same rule applies to "continued imprisonment").

Those doubts now have been put to rest, by the Supreme Court's recent decision in *In re Davis*, No. 08-1443, 130 S. Ct. 1, 174 L. Ed. 2d 614 (2009) (*per curiam*). Davis, a state prisoner, applied directly to the Supreme Court for a writ of *habeas corpus* (*see* 28 U.S.C. § 2241(a)), claiming actual innocence of the murder for which he had been convicted. The Court barely paused to consider whether such relief would be available, notwithstanding the protracted debate among the Justices sixteen years earlier, in *Herrera*. In a brief *per curiam* opinion joined by six Justices,[6] the Court transferred Davis' *habeas* petition to the federal district court (*see* 28 U.S.C. § 2241(b)) with instructions 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." That order of transfer obviously would have been meaningless and futile – a "fool's errand," in the words of Justices Scalia

[6] Justice Sotomayor did not participate in the *Davis* decision.

and Thomas, the sole dissenters – if proof of innocence were *not* a legally sufficient basis for issuance of the writ.

Davis therefore should answer the question affirmatively, once and for all, whether proof of actual innocence is a sufficient ground for *habeas* relief in the case of a state prisoner imprisoned under penalty of death. The only possible issues remaining for decision are (1) whether the same conclusion applies to an individual who is serving a sentence of life imprisonment but not facing execution; (2) whether the same conclusion applies to a federal prisoner; and, of course, (3) whether the evidence in this case "clearly establishes [MacDonald's] innocence," *id*.

The first two questions arguably point in opposite directions. Intuitively it seems obvious that prolonged incarceration of an innocent person is as constitutionally offensive as execution of that same prisoner, or at least nearly so; but there can be no denying that "'death is different.'" *E.g.*, *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring in the judgment). But to limit the *Davis* rule to capital cases would create a striking, even capricious anomaly: death row inmates (such as Davis) who were able to clearly establish their innocence necessarily would be freed entirely (*see Herrera*, 506 U.S. at 405); while long-term, even life-term prisoners (such as MacDonald) would remain imprisoned and denied the opportunity to make the same showing. Due process surely does not tolerate such arbitrary

distinctions.[7] And the fact that MacDonald is not a state but a federal prisoner, on the other hand, weighs strongly in favor of applying the *Davis* rule to this case. "Federalism and comity considerations," which have weighed heavily in numerous decisions involving state prisoners' *habeas* claims under 28 U.S.C. § 2254,[8] "are unique to *federal* habeas review of state convictions." *Danforth v. Minnesota*, 552 U.S. 264, 279 (2008). Those factors are simply irrelevant to federal prisoners' claims under § 2255.

The final question, then, is whether the evidence in this record "clearly establishes" that MacDonald is, in fact, innocent of the horrible crimes of which he was convicted. For the reasons stated in MacDonald's brief and elsewhere in this *amicus* brief, that standard is satisfied. Moreover, the newly discovered evidence would not exist if intruders had not killed MacDonald's wife and daughters and beaten and stabbed MacDonald. The record shows far more than that MacDonald would not have been convicted in 1979 had the new evidence been presented. It

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[7] *Cf. Herrera*, 506 U.S. at 398 (assertion "that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted…. has an elemental appeal, as would the similar proposition that the Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted"); *id*. at 405 ("we have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus'" (quoting *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion)).

[8] *See, e.g.*, *District Attorney's Office v. Osborne*, No. 08-6, 129 S. Ct. 2308, 2324, 174 L. Ed. 2d 38, 56 (2009) (Alito, J., concurring), and cases cited; *Fry v. Pliler*, 551 U.S. 112, 116 (2007), citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Edwards v. Carpenter*, 529 U.S. 446, 451-53 (2000).

proves that MacDonald is in fact innocent, and is a victim -- not the perpetrator -- of the crimes of which he has been convicted.

CONCLUSION

For the foregoing reasons, the Amici urge this Court to reverse the district court's ruling and grant MacDonald's petition for relief from his convictions.

Respectfully submitted,

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This the 15th day of June, 2010.

/s/ Andrew Good
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 15th day of June, 2010 served a copy of the foregoing BRIEF via the electronic case filing system and by first class mail, as follows:

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