

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08525

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY R. MACDONALD,
Defendant-Appellant.

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

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, 233 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 12 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 Innocence Network, and 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 review, 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.

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 provision of the habeas corpus statute that is central here, 28 U.S.C. § 2244(b)(2)(B), which mandates that the evidence "be viewed as a whole," seeks to examine and capture what experience teaches all of us about wrongful convictions of the innocent. Unless habeas courts adhere to this mandatory and all-inclusive scope of review, these courts will fail to determine accurately whether the petitioner is actually innocent and whether and how he was unfairly and wrongly convicted. If

this mandated scope of review is not observed, 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 failing 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.

I. THE DISTRICT COURT'S ERRONEOUS REFUSAL TO CONSIDER THE RESULTS OF DNA TESTS THAT WERE AUTHORIZED BY THIS COURT SHOULD BE REVERSED.

DNA testing has revolutionized our ability to solve crimes accurately, convict the guilty, and exonerate the innocent. DNA testing has also been a major factor in improving the criminal justice system's capacity to identify and rectify wrongful convictions. It has provided scientific proof that our system convicts and sentences innocent people — and that wrongful convictions are not isolated or rare events. Most importantly, DNA testing has opened a window into wrongful convictions so that we may study the causes and propose remedies that may minimize the chances of convicting more innocent people. An essential part of the mission of the Innocence Project and its network of regional Innocence Projects is to advocate for scientifically reliable and accurate use of DNA in the criminal justice system, and particularly in

post-conviction proceedings after direct appeals and other procedures have been completed.

In 1997, many years prior to its issuance of a Pre-Filing Authorization for MacDonald's successive habeas petition based on newly-discovered evidence of prosecutorial misconduct, this Court approved MacDonald's request that items found at the crime scene be subjected to DNA testing. *In re MacDonald*, No. 97-713 (4th Cir. 1997). Thereafter, Chief Judge Fox oversaw how the parties would identify items to be tested, determined what laboratory would conduct the testing, as well as other issues related to the DNA testing.¹ The tests were conducted by one of world's foremost forensic laboratories, the Defense Department's Armed Forces Institute of Pathology ("AFIP"), using what was then relatively new technology that extracts DNA from the mitochondria in human cells found in hair and other human tissue, rather than more commonly-used nuclear DNA testing which extracts DNA from the cells' nuclei. The court-authorized DNA testing for this case took many years to complete, partly due to the AFIP's obligation to prioritize its work to perform its primary mission to serve our military. The AFIP results did not issue until after this Court issued its PFA concerning MacDonald's prosecutorial misconduct claim. But the results were promptly presented to the district court by MacDonald's counsel. There is no question that MacDonald exercised due diligence in presenting the DNA test results to the district court. The district court refused to weigh the DNA test

¹ Some of the signatories to this amicus brief, Barry C. Scheck, Andrew Good, Harvey A. Silverglate and Philip G. Cormier, were co-counsel for MacDonald during that phase of the case.

results as part of the section 2244(b)(2)(B) record, because it read the PFA pertaining to prosecutorial misconduct as if it prohibited consideration of results of DNA testing that this Court authorized many years before it approved the PFA. DE-150 at 18-20

This error should be reversed. This Court approved MacDonald's request for DNA testing, because it correctly understood and expected that the results would constitute highly reliable evidence as to whether intruders left biological traces of their presence at the crime scene. The district court's ruling effectively nullifies this Court's authorization for the DNA testing by declining to weigh the results with the other evidence in the record. The distinguishing factor that these DNA tests were specifically authorized by this Court is not present in any reported case relied upon by the district court and the government, and is more than sufficient to warrant reversal of the district court's refusal to consider the DNA evidence. The district court provides no reason why the interests of justice are served by requiring MacDonald to spend even more time in prison while his case returns to this Court for a DNA-specific PFA before the district court may consider the long awaited, exculpatory results of DNA tests this Court authorized in 1997. On this record which includes this Court's authorization for the DNA testing, section 2244(b)(2)(B) requires the habeas court to weigh the results of tests authorized by this Court with all the other evidence in the record. Review of results of tests authorized by this Court is required whether the test results are inculpatory, exculpatory or inconclusive. Here, the test results are powerfully exculpatory. *See* MacDonald

Informal Opening Brief at 50-53. This is particularly true when the DNA tests results are viewed, as the law requires, by viewing “the evidence as a whole,” including the fiber and other evidence of the presence at the crime scene of the intruders MacDonald described on the night of the murders. *House v. Bell*, 547 U.S. 518 (2006); *Schlup v. Delo*, 513 U.S. 298 (1995).²

Here, the district court refused to even consider, for example, the link between the newly-discovered, court-authorized DNA test results showing that a blood-smear hair complete with intact root found under a fingernail of Kristen MacDonald did not come from her, Jeffrey MacDonald, or any other member of the MacDonald family. This is critical because at trial the government medical examiner found that Kristen’s hands bore signs of defensive wounds. TT2576-77. A pulled hair with an intact root from a third party in the hand of a victim, which bore signs of defensive wounds, corroborates the accounts of Helena Stoeckley and Jeffrey MacDonald, from the outset of the investigation of the murders, that third parties attacked Jeffrey MacDonald and his family. Neither truth nor justice will be found in this case unless this Court reverses the district court’s blinkered review that excluded the results of DNA tests which this Court authorized in 1997.

² Government lab notes show that black wool fibers, unmatched to any source in the MacDonald home, were found on Colette MacDonald’s mouth, arm and on the wooden club used to murder her. Saran fibers, not sourced in the MacDonald home and consistent with the appearance of Stoeckley’s wig were also found on a hair brush at the crime scene. In *United States v. MacDonald*, 966 F.2d 854, 860-861 (4th Cir. 1992), this Court ruled that, on the record then before it, this evidence would not probably raise a reasonable doubt concerning MacDonald’s guilt. In the view of the exculpatory DNA test results and the prosecutorial misconduct evidence that have since emerged, *House* and *Schlup* require reconsideration of the exculpatory significance of the saran and wool fiber evidence.

II. THE DISTRICT COURT'S REVIEW ERRONEOUSLY FAILED TO CONSIDER THE NEWLY DISCOVERED EVIDENCE OF PROSECUTORIAL MISCONDUCT AS INDEPENDENTLY ADMISSIBLE PROOF OF MACDONALD'S INNOCENCE AND THAT NO REASONABLE JUROR WOULD HAVE CONVICTED HIM.

As we have noted, habeas courts increase the risk that the innocent will not be exonerated if they ignore evidence in the record that the petitioner's conviction was wrongfully obtained. The record clearly shows that is what has occurred here. Of all the newly discovered evidence of MacDonald's innocence that has been uncovered and presented to the courts over the years, none is as fatal to his wrongful conviction as former Deputy United States Marshal Jimmy B. Britt's ("Britt") account of prosecutorial conduct during then-Assistant United States Attorney James Blackburn's ("Blackburn") mid-trial interview of MacDonald's most important defense witness, Helena Stoeckley ("Stoeckley"). Britt's account of the words spoken during that mid-trial interview is unrebutted by Blackburn (who has since been convicted of felony obstruction of justice and embezzlement). Britt's account has been accepted as true by the district court. During her interview by Blackburn in Britt's presence while the trial was on-going, Stoeckley admitted being present in the MacDonald apartment on the night of the murders. Blackburn responded by telling Stoeckley that, if she repeated these admissions before the jury, he would indict her for the murders. DE-150 at 30 quoting Britt affidavit ¶¶ 22 & 24.

The district court's summary of MacDonald's prosecutorial misconduct claim is substantially correct: "In short, MacDonald's fraud theory is that Blackburn

browbeat a drug-addled young murderer into silence in order to achieve MacDonald's convictions, then committed fraud on the court by lying to the presiding judge to cover up his misconduct." DE-150 at 30. The district court then trifurcated MacDonald's claim into a "confession" claim, a "threat" claim, and a "fraud" claim. But, among other errors, the court failed to consider these three aspects of MacDonald claim as mutually reinforcing, and thereby overlooked their powerfully exculpatory significance.

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 un rebutted evidence now shows that Judge Dupree's findings were procured by fraud. 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." TT 5616-18 quoted in the District Court's opinion. DE-150-12. According to Britt's un rebutted affidavit which the district court accepted as true, Blackburn's representation to Judge Dupree was a blatant lie. 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. And, of course, Judge Dupree could not know that DNA evidence corroborates Stoeckley's confession. For these reasons, 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.

Blackburn's fraud on the district court had several other consequences that require that the instant § 2255 petition be allowed. Had Blackburn been forthright during the trial, rather than deceitful, about what occurred during the government's mid-trial interview, at the least, the following would have occurred.

First, the defense would have been constitutionally entitled by *Brady v. Maryland* and its progeny to present Deputy U.S. Marshal Britt as a powerfully impeaching witness to testify concerning what occurred during the government's interview the day before Stoeckley testified before the jury. The defense also would have been able to cross examine Stoeckley about what occurred when she was interviewed by Blackburn in Britt's presence. 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 Dupree" but rather on what Blackburn failed to tell Judge Dupree and the defense.

Second, MacDonald would have been able to argue to the jury that during the trial (rather than 30 years later) one of MacDonald's prosecutors was sufficiently 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.³ The district court erroneously ruled (DE-150 at 38-39) that "Causation is Lacking" and, for that reason, MacDonald's claim fails because he 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, has the perverse result of rewarding government malfeasance; having hid the truth for decades, the government now, according, to the

³ 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. (Tr. 6581) He described the woman as having blond hair, boots and a white floppy hat. (Tr. 6588) The black male was wearing what appeared to be an Army field jacket with E-6 sergeant stripes on the sleeve. (Tr. 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. (Tr. 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 (Tr. 1453-54), standing at the corner of Honeycutt and South Lucas Road, "something in excess of a half mile" from the home. (Tr. 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. (Tr. 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.

district court, should be allowed the presumption that such testimony would not have been harmful. 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 fact 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 and participation 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.

Third, though the district court acknowledged that Blackburn may have threatened Stoeckley, the court declined to find that he did.

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.⁴ 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.

Fourth, 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. She said 'no.' The only thing that she said was that she didn't know where she had been." Tpp.7110. The district court acknowledged this Court's holding that

⁴ 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).

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.700, 703 (4th Cir. 1999). But by failing to review the record "as a whole," 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.

Fifth, 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. 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.

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 conviction.

Respectfully submitted,

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This the 26th day of March, 2009.

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CERTIFICATE OF SERVICE

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