UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

WESTERN DIVISION

3:90-CV-00104-DU
3:75-CR-26-F

UNITED STATES OF AMERICA

V.

JEFFREY R. MacDONALD

RESPONSE OF THE UNITED STATES TO THE ISSUANCE OF AN ORDER AUTHORIZING THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA TO CONSIDER SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. § 2255

APPENDIX OF THE UNITED STATES

VOLUME V

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March 30, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
VS.	)	75-23-CR-3
	)	
JEFFREY R. MACDONALD,	)	
DEFENDANT.	)	

MOTION HEARING
JUNE 26, 1991
BEFORE THE HONORABLE F. T. DUPREE, JR.
U. S. DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

MR. BRIAN MURTAGH
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FOR THE DEFENDANT:

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MR. PHILIP CORMIER
ATTORNEYS AT LAW
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MR. NORMAN SMITH
LOCAL COUNSEL
101 S. ELM STREET
GREENSBORO, NC

COURT REPORTER: DONNA J. TOMAWSKI

WEDNESDAY, JUNE 26, 1991

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN. WE HAVE CONVENED HERE THIS MORNING, THERE'S A MOTION IN THE CASE OF UNITED STATES AGAINST JEFFREY MACDONALD. THE PETITIONER READY IN THAT?

MR. SILVERGLATE: YES, YOUR HONOR.

THE COURT: I WILL RECOGNIZE MR. NORMAN SMITH OF THE GREENSBORO BAR. PERHAPS YOU HAVE A PRESENTATION TO MAKE.

MR. SMITH: I WANT TO INTRODUCE MY CO-COUNSEL, HARVEY SILVERGLATE AND PHIL CORMIER. JUDGE DUPREE, THESE ARE LAWYERS FROM BOSTON; YOU WERE KIND ENOUGH TO ADMIT THEM PRO HAC VICE THE OTHER DAY.

THE COURT: WE ARE PLEASED TO HAVE YOU.

MR. MURTAGH: GOOD MORNING, BRIAN MURTAGH.

THE COURT: I BELIEVE I HAVE MADE YOUR ACQUAINTANCE ON A PREVIOUS OCCASION.

MR. MURTAGH: YOUR HONOR, I HAVE THE PLEASURE TO INTRODUCE MY COLLEAGUES, MR. JOHN F. DEPUE. HE IS AN ATTORNEY WITH THE CRIMINAL DIVISION, U. S. DEPARTMENT OF JUSTICE AND HAS BEEN MY COLLEAGUE IN ALL OF THE APPELLATE PROCEEDINGS IN THIS CASE SINCE 1978. I'VE ALSO KNOWN HIM AS A CLASSMATE SINCE 1964. OF COURSE, MR. DEPUE, JUDGE DUPREE, AND MR. ERIC EVENSON, MY COLLEAGUE HERE WITH THE UNITED STATES ATTORNEY'S OFFICE, EASTERN DISTRICT OF NORTH

CAROLINA.

THE COURT: WE'RE PLEASED TO HAVE YOU. HAVE YOU CONFERRED AS TO THE POSSIBLE LENGTH OF TIME THAT YOU WANT TO MAKE YOUR ARGUMENTS THIS MORNING?

MR. SILVERGLATE: WE HAVE NOT, YOUR HONOR.

THE COURT: WELL, COULD YOU PLEASE GIVE THE COURT SOME ESTIMATE OF HOW LONG YOU THINK IT WILL TAKE?

MR. SILVERGLATE: YES, YOUR HONOR. I WOULD THINK THAT I CAN MAKE MY INITIAL PRESENTATION IN FORTY MINUTES, IF I MAY HAVE THAT MUCH TIME, YOUR HONOR.

THE COURT: THAT'S PLENTY, SURE. I'M PLEASED TO LET YOU HAVE THAT MUCH IF THAT'S ALL YOU WANT.

MR. SILVERGLATE: I WOULD HOPE I MIGHT HAVE SHORT REBUTTAL AFTER THE GOVERNMENT.

THE COURT: SAY TWENTY MINUTES FOR THAT?

MR. SILVERGLATE: YES, YOUR HONOR.

THE COURT: WOULD AN HOUR TO A SIDE THEN BE AGREEABLE?

MR. MURTAGH: THAT WILL BE FINE, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, LET ME SAY, GENTLEMEN, THAT I READ YOUR BRIEFS AND MUCH OF THE SUPPORTING MATERIALS, THE AFFIDAVITS AND SO FORTH; NOT ALL OF IT BUT THAT WHICH I HAVE NOT BEEN ABLE TO READ PERSONALLY MY CLERKS HAVE BEEN KIND ENOUGH TO SUMMARIZE FOR ME SO YOU MAY ASSUME THAT I HAVE A REASONABLE

FAMILIARITY WITH THE CASE AND IF THAT WILL HELP YOU SHORTEN IT ANY YOU MAY PROCEED WITH THAT INFORMATION AND I'LL HEAR FROM THE PETITIONER.

MR. SILVERGLATE: MAY IT PLEASE THIS HONORABLE COURT. I FIRST WANT TO THANK YOUR HONOR FOR ALLOWING MY MOTION TO APPEAR TO ARGUE PRO HAC VICE THIS MORNING. IT'S AN HONOR TO BE BEFORE THIS COURT.

THE COURT: WE'RE PLEASED TO HAVE YOU.

MR. SILVERGLATE: THANK YOU, YOUR HONOR. YOUR HONOR, PARTLY IN THE INTEREST OF SAVING TIME AND PARTLY AS A RESULT OF THE SYMMETRY OF THE LEGAL ARGUMENTS PRESENTED, I'M GOING TO ESSENTIALLY COLLAPSE THE TWO MAJOR SEGMENTS OF THE ARGUMENTS IN THIS CASE.

THE TWO SEGMENTS ARE, NUMBER ONE, THE SO-CALLED ABUSE OF THE WRIT ISSUE WHICH WAS RAISED AFFIRMATIVELY BY THE GOVERNMENT IN ITS PAPERS AND THEN REPLIED TO BY THE PETITIONER IN HIS PAPERS. AND THERE IS THE MERITS OF THE CASE, AND THAT IS THE ISSUE OF THE MATERIALITY OF THE EVIDENCE THAT WAS UNCOVERED THROUGH THE FREEDOM OF INFORMATION ACT.

THE REASON I AM PLANNING TO MERGE THE TWO, COLLAPSE THE TWO, YOUR HONOR, IS BECAUSE, AS YOUR HONOR CAN SEE FROM THE REPLY BRIEF OF THE PETITIONER, THE ABUSE OF THE WRIT ISSUE, FROM OUR PERSPECTIVE, REALLY WILL BE RESOLVED ON THE BASIS OF WHETHER OR NOT WE CONVINCE YOUR HONOR THAT

WE HAVE AN ISSUE HERE IN WHICH THE PETITIONER HAS MADE, SET FORTH EVIDENCE WHICH CONSTITUTES A COLORABLE CLAIM OF INNOCENCE. DOESN'T MEAN IT'S A CLAIM THAT HAS TO PERSUADE YOUR HONOR BUT IT DOES MEAN THAT IT HAS TO BE A COLORABLE CLAIM.

NOW, GETTING TO WHAT I MEAN BY THAT A LITTLE INTO THE ARGUMENT, YOUR HONOR. SO IF WE HAVE SHOWN A COLORABLE CLAIM OF INNOCENCE, SOMETHING THAT THE JURY MIGHT USE IN ORDER TO ACQUIT, WE GET OVER THE HURDLE OF THE GOVERNMENT'S ABUSE OF THE WRIT CLAIM. GOVERNMENT CLAIMS, YOUR HONOR, IT CANNOT GET TO THE MERITS OF THIS HABEAS PETITION BECAUSE IT IS A SECOND OR SUBSEQUENT HABEAS PETITION AND --

THE COURT: BY ODD TURN OF EVENTS, THE SUPREME COURT HAS SPOKEN NOT ONCE BUT TWICE IN THE LAST SIXTY DAYS ON MATTERS THAT TOUCH ON THE ISSUES INVOLVED HERE; HAS IT NOT?

MR. SILVERGLATE: THAT IS CORRECT, YOUR HONOR.

THE COURT: LAST EVENING I WAS READING A CASE OF COLEMAN AGAINST THOMPSON, DECIDED ON MONDAY OF THIS WEEK. SO THE SUPREME COURT APPARENTLY IS LOOKING OVER OUR COLLECTIVE SHOULDERS.

MR. SILVERGLATE: I CERTAINLY FEEL THEY LOOK OVER MY SHOULDER; WHETHER THEY ARE LOOKING OVER YOUR HONOR'S SHOULDER AS WELL, I DON'T KNOW. IT WAS RATHER

BIZARRE TO HAVE, YOUR HONOR, TO HAVE THE MCCLESKEY OPINION COME DOWN JUST DAYS, LITERALLY JUST A COUPLE DAYS BEFORE OUR REPLY BRIEF WAS DUE AND YOUR HONOR RECALLS WE ASKED FOR ENLARGEMENT OF TIME. AND THEN TO HAVE THE COLEMAN CASE COME DOWN TWO DAYS BEFORE THE ORAL ARGUMENT MAKES ME WONDER WHAT'S GOING TO HAPPEN TOMORROW MORNING, YOUR HONOR, BUT THE ASSUMPTION THAT NOTHING MUCH WILL HAPPEN TOMORROW MORNING, I WILL PROCEED WITH THE ARGUMENT.

THE MCCLESKEY CASE, AS YOUR HONOR POINTS OUT, COLEMAN DOES MAKE CLEAR THAT WHILE THERE ARE VARIOUS PROCEDURAL OBSTACLES THAT HAVE BEEN ERECTED TO THE COURT'S ENTERTAINING A SECOND OR SUBSEQUENT HABEAS, THAT IF THERE IS A COLORABLE CLAIM OF INNOCENCE, THAT TRUMPS ALL OF THE TECHNICAL, THE GOVERNMENT'S TECHNICAL DEFENSES. SO IF WE CAN CONVINCE YOUR HONOR OF THAT, THAT IS THAT WE HAVE A COLORABLE CLAIM OF INNOCENCE, THEN EVEN IF WE MANAGE TO CONVINCE YOUR HONOR TO HEAR THE HABEAS WE WOULD PRESUMABLY LOSE ON THE MERITS. SO THAT'S WHY WE HAVE COLLAPSED THEM TOGETHER.

WHAT MCCLESKEY DOES, YOUR HONOR, IS TO REQUIRE THAT IN ORDER TO GET A NEW TRIAL IN CIRCUMSTANCES SUCH AS THIS, NOT ONLY DOES THERE HAVE TO BE A CLAIM OF A CONSTITUTIONAL VIOLATION, WHICH IN THIS CASE YOUR HONOR IS AWARE IS THE CLAIM UNDER THE BRADY LINE OF CASES, BUT THERE ALSO HAS TO BE THE COLORABLE SHOWING OF FACTUAL INNOCENCE. AND THAT

ENTERTAINED.

THE U. S. SUPREME COURT IN A CASE KUHLMAN VERSUS WILSON, 106 SUPREME COURT 20627 ADOPTED JUDGE FRIENDLY'S STANDARD AND THE COURT STATED THE STANDARD AS FOLLOWS. AS JUDGE FRIENDLY EXPLAINED:

> A PRISONER DOES NOT MAKE A COLORABLE SHOWING OF INNOCENCE BY SHOWING THAT HE MIGHT NOT OR EVEN WOULD NOT HAVE BEEN CONVICTED IN THE ABSENCE OF EVIDENCE CLAIMED TO HAVE BEEN UNCONSTITUTIONALLY OBTAINED.

THAT'S THE TYPICAL SUPPRESSION CASE.

> RATHER, THE PRISONER MUST SHOW A FAIR PROBABILITY THAT IN LIGHT OF ALL THE EVIDENCE, INCLUDING THAT ALLEGED TO HAVE BEEN ILLEGALLY ADMITTED BUT WITH DUE REGARD TO ANY UNRELIABILITY OF IT, AND EVIDENCE TENABLY CLAIMED TO HAVE BEEN WRONGLY EXCLUDED OR TO HAVE BECOME AVAILABLE ONLY AFTER THE TRIAL, THE TRIER OF THE FACT WOULD HAVE ENTERTAINED A REASONABLE DOUBT OF HIS GUILT. THUS, THE QUESTION WHETHER THE PRISONER CAN MAKE THE REQUISITE SHOWING MUST BE DETERMINED BY REFERENCE TO ALL PROBATIVE EVIDENCE OF GUILT OR INNOCENCE.

THAT IS THE REASON, YOUR HONOR, THAT WE SUBMITTED IN SUPPORT FOR FURTHER SUPPORT OF OUR REPLY BRIEF OF SUMMARY OF ALL THE EVIDENCE IN THE CASE, INCLUDING THAT ADMITTED AND NOT ADMITTED WHICH IS NOW AVAILABLE IN ORDER TO GIVE

IS EASIER SAID, I THINK, THAN UNDERSTOOD.

MCCLESKEY USES THE TERM FACTUAL INNOCENCE. COLEMAN USES THE TERM ACTUAL INNOCENCE. I ASSUME THEY ARE BASICABLY THE SAME THING. A CASE IN WHICH THERE HAS BEEN A MISCARRIAGE OF JUSTICE, THAT'S ANOTHER WAY THE CASES REFER TO IT. IT ALL REALLY MEANS ESSENTIALLY THE SAME THING AND WE CAN GET TO THE HEART OF THIS CASE. THE CONCEPT OF FACTUAL INNOCENCE AS A COLORABLE SHOWING, FACTUAL INNOCENCE AS A PEREQUISITE TO THE COURT'S ENTERTAINING A HABEAS ACTUALLY STARTED IN 1970 IN AN ARTICLE IN THE CHICAGO LAW REVIEW BY THE LATE JUDGE HENRY FRIENDLY OF THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT.

THAT VERY FAMOUS LANDMARK ARTICLE IN WHICH JUDGE FRIENDLY COMMENTED THAT THE THING THAT HAD BEEN OF SUBSTANTIAL INTEREST TO HIM AT THAT TIME, AND THIS WAS, MIND YOU, IN 1970, YOUR HONOR, WAS THAT SO MANY OF THESE POST-CONVICTION PETITIONS INVOLVED CONSTITUTIONAL TECHNICALITIES BUT DIDN'T INVOLVE QUESTION OF INNOCENCE. WEREN'T THAT MANY PEOPLE, HE SAID, WHO COME BEFORE THE COURT CLAIMING THEY WERE WRONGLY CONVICTED AND MISCHARACTER OF JUSTICE; THEY SIMPLY CLAIMED THEIR RIGHTS WERE VIOLATED. AND JUDGE FRIENDLY SUGGESTED THAT A COLORABLE SHOWING OF FACTUAL INNOCENCE BE OVERLAY OVER HABEAS LAW SO THAT ONLY THOSE PETITIONS WOULD BE

YOUR HONOR OUR PERSPECTIVE, IN ANY EVENT, HOW ALL THE EVIDENCE WOULD UNFOLD HAD IT BEEN AVAILABLE TO THE JURY.

THE QUESTION OF FACTUAL INNOCENCE IS, IN SOME CASES IT'S RATHER CLEAR; OTHER CASES IT'S MORE SHADY; OTHER CASES IT'S CLEARLY NOT PRESENT. WE BELIEVE THAT THE MACDONALD CASE IS A CASE WAY OUT ON THE SPECTRUM IN WHICH WE DEMONSTRATE THAT THERE IS A VERY HIGH CHANCE THAT A JURY COULD ACQUIT ON THE BASIS OF ALL THE EVIDENCE, INCLUDING THE EVIDENCE THAT WAS DISCOVERED PURSUANT TO THE FREEDOM OF INFORMATION ACT.

IN ORDER TO JUST GET TO THE STANDARD FOR WHAT THAT SPECTRUM LOOKS LIKE, I WOULD REFER YOUR HONOR TO THE CASE WHICH IS CITED IN JUDGE FRIENDLY'S ARTICLE AS AN EXAMPLE OF A CASE WHERE FACTUAL INNOCENCE WAS INVOLVED AND THAT'S THE CASE OF UNITED STATES VERSUS MILLER, 411 FED 2D 825. IT'S A 1969 SECOND CIRCUIT CASE. THE OPINION FOR THE PANEL WAS WRITTEN BY NONE OTHER THAN THE HONORABLE HENRY FRIENDLY. JUDGE FRIENDLY HAD A MONOPOLY ON THIS ISSUE BACK THEN. HE WROTE THE OPINIONS AND LAW REVIEW ARTICLE. IT'S EASY TO GUESS WHY THE SUPREME COURT ADOPTED HIS POSITION; HE WAS THE EXPERT ON THIS ISSUE. AND THAT CASE, YOUR HONOR WILL ACTUALLY, I THINK, ENJOY READING THAT OPINION BECAUSE IT IS STRIKINGLY LIKE THE CASE AT BAR INCLUDING THE OBSERVATION BY JUDGE FRIENDLY THAT THE DISTRICT COURT, THE HONORABLE M. JOSEPH BLUMFELD OF THE

DISTRICT OF CONNECTICUT HAD BEEN WITH THIS CASE A VERY LARGE PART OF HIS PROFESSIONAL CAREER.

THE COURT: JUST AS I HAVE BEEN WITH THIS ONE A VERY LARGE PART OF MY JUDICIAL CAREER.

MR. SILVERGLATE: THAT'S WHAT I WAS HINTING AT, YOUR HONOR, AND ALSO INTERESTINGLY THERE HAD BEEN SUCCESSIVE HABEAS PETITIONS FILED IN THAT CASE. INDEED THAT CASE WAS WORSE THAN THIS CASE, THERE WERE FOUR OF THEM FILED IN THAT CASE AND I WON'T GO INTO ALL THE DETAILS BUT THE CASE INVOLVES -- IT'S A BRADY CLAIM IN WHICH THE PROSECUTOR FAILED TO DISCLOSE HE HIMSELF, THE PROSECUTOR, HAD HYPNOTIZED THE CHIEF GOVERNMENT WITNESS IN ORDER TO REFRESH THE WITNESS'S MEMORY BEFORE THE WITNESS TESTIFIED. AND THE COURT NOTED THAT THE HABEAS WAS UNUSUAL BUT THERE WAS A CLAIM OF FACTUAL INNOCENCE AND THE COURT NOTED THAT THE WITNESS WHO WAS HYPNOTIZED WAS A VERY IMPORTANT WITNESS IN THE CASE AND THAT EVEN THOUGH THERE WAS A FAIR AMOUNT OF DEFENSE EVIDENCE AVAILABLE AT THE TRIAL, THIS WOULD HAVE CONSTITUTED -- THE SUPPRESSED EVIDENCE WOULD HAVE CONSTITUTED, AS THE COURT SAID, ANOTHER ARROW TO THE RATHER LARGE QUIVER THAT TRIAL COUNSEL FOR THE DEFENSE SHOT AT THE GOVERNMENT WITNESS.

THE OTHER INTERESTING ANALOGY BETWEEN THE MILLER CASE AND THE MACDONALD CASE WAS THAT THE GOVERNMENT SAID EVEN IF THE PROSECUTOR REALLY DIDN'T OCCUR TO HIM IN COMPLETE

GOOD FAITH TO DISCLOSE THE FACT HE HYPNOTIZED THE GOVERNMENT'S CHIEF WITNESS, AT SOME TIME DURING THE TRIAL OR DURING THE CROSS-EXAMINATION, THE ISSUE OF HOW MANY TIMES THIS WITNESS HAD BEEN INTERVIEWED CAME UP SO FREQUENTLY, THE ISSUE OF WHETHER THERE WERE NOTES OF THE INTERVIEWS AND THE REHEARSAL SESSIONS, THAT IT SHOULD HAVE OCCURRED TO THE PROSECUTOR THAT, YOU KNOW, THIS IS THE KIND OF EVIDENCE THAT A DEFENSE COUNSEL WOULD WANT. I MAY NOT THINK, I AS THE PROSECUTOR MAY NOT THINK IT'S EXCULPATORY BUT THE WAY CROSS-EXAMINATION IS GOING IT'S PRETTY CLEAR THE DEFENSE LAWYER WOULD CONSIDER IT USEFUL IN ANY EVENT. SO THERE ARE A LOT OF ANALOGIES BETWEEN THE MILLER CASE AND THE MACDONALD CASE.

NOW, THE INTERESTING THING ABOUT THE CASE, YOUR HONOR, IS THAT THE COURT VACATED THE CONVICTION; MILLER WAS RETRIED. THE COURT VACATING THE CONVICTION SAID, YOU KNOW, AND THIS IS AT PAGE 411 FED 2D AT 832. THE COURT OF APPEALS SAID, AND WE'RE NOT COMPLETELY CONVINCED BY THE SHOWING OF INNOCENCE BUT WE'RE DISTURBED ENOUGH BY IT. WE'RE GOING TO GIVE HIM A NEW TRIAL. A JURY MIGHT VERY WELL FIND IT PERSUASIVE, ALTHOUGH JUDGE FRIENDLY DID SAY HE WASN'T GOING TO GUARANTEE A JURY OF CONNECTICUT YANKEES WOULD NECESSARILY BUY THE DEFENSE. NONETHELESS, AS JUDGE FRIENDLY OBSERVES IN HIS ARTICLE, UPON RETRIAL MILLER WAS ACQUITTED SO IT DID MAKE ALL THE DIFFERENCE.

THIS, DESPITE THE FACT THE TRIAL JUDGE SAID IT WOULD MAKE NO DIFFERENCE. THE COURT OF APPEALS EVIDENCED SKEPTICISM THAT WOULD MAKE A DIFFERENCE AND TO THE JURY IT MADE THE DIFFERENCE. MILLER WAS ACQUITTED ON RETRIAL. I CONSIDER THAT TO BE IMPORTANT FOR PURPOSES OF MY ARGUMENT THIS MORNING.

I ALSO WANT TO POINT OUT SOMETHING ELSE, YOUR HONOR, FROM THE START, AND THAT IS THIS CASE IS UNUSUAL FOR ANOTHER REASON. NOT ONLY BECAUSE A COLORABLE SHOWING OF INNOCENCE HAS, I THINK, BEEN MADE BUT BECAUSE THIS IS A CASE IN WHICH IT IS THE DEFENDANT WHO IS ARGUING FOR THE INCLUSION OF A LOT OF EVIDENCE AND THE GOVERNMENT IS ARGUING FOR THE EXCLUSION OF A LOT OF EVIDENCE. WE WILL LIKE THE JURY TO HAVE A BROADER PICTURE; THE GOVERNMENT WOULD LIKE THE JURY TO HAVE A NARROWER PICTURE. FROM MY EXPERIENCE, YOUR HONOR; I ASSUME FROM YOUR HONOR'S EXPERIENCE, THAT'S A REVERSAL OF THE USUAL SITUATION THAT YOU FIND. USUALLY THE DEFENDANT IS DEATHLY AFRAID THE FACTS ARE GOING TO COME OUT AND IT'S THE GOVERNMENT THAT WANTS TO HAVE THE BROADEST ARRAY OF FACTUAL PRESENTATION. THAT TELLS YOU SOMETHING, I THINK, ABOUT HOW THE SIDES STAND HERE.

THERE'S ANOTHER REASON WHY THE MCCLESKEY ISSUE, ABUSE OF THE WRIT ISSUE, MERGES WITH THE FACTS. AND THAT IS THE STANDARDS IN BOTH ARE SIMILAR. THE INNOCENCE STANDARD IS

THAT WE HAVE TO SHOW A FAIR PROBABILITY THE JURY WOULD HAVE A REASONABLE DOUBT. WE HAVE TO SHOW THAT TO YOUR HONOR IN ORDER TO HAVE YOUR HONOR REVIEW THE HABEAS IN ORDER TO GET OVER THE MCCLESKEY HURDLE. IN ORDER TO PERSUADE YOUR HONOR ON THE MERITS THERE'S BEEN A BRADY VIOLATION UNDER THE BRADY, ACRES, BAGLEY LINE OF CASES, THE MATERIALITY STANDARD IS ESSENTIALLY WE HAVE TO SHOW THAT THERE'S A REASONABLE PROBABILITY OF A DIFFERENT RESULT. A REASONABLE PROBABILITY IS A PROBABILITY, SAID THE COURT IN BAGLEY, SUFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME AND I WOULD CITE YOUR HONOR TO THE PETITIONER'S BRIEF AT PAGE SIXTY WHERE WE DISCUSS THE BAGLEY CASE.

SO I ALSO, BEFORE I GET ON TO THE MERITS, I WOULD LIKE TO POINT OUT TO YOUR HONOR THAT THE TYPE OF MATERIAL WE'RE DEALING WITH HERE, THE LABORATORY BENCH NOTES, WAS VERY SPECIFICALLY REQUESTED BY TRIAL COUNSEL AND THE RULE 16 MOTION, WHICH IS QUOTED AT THE PETITIONER'S BRIEF AT PAGE FIFTY-SEVEN IS EXTREMELY POINTED. IT MENTIONS LABORATORY NOTES. THERE'S NO DOUBT ABOUT THAT.

AND I ALSO WOULD POINT YOUR HONOR TO A RATHER REMARKABLE LETTER THAT IS PART OF THE RECORD OF THE CASE. IT WAS A LETTER WRITTEN FROM TRIAL COUNSEL, BERNARD SEGAL, TO GOVERNMENT COUNSEL, BRIAN MURTAGH, IN DECEMBER OF 1975. HE IS QUOTED AT PAGE FIFTY-EIGHT IN THE BRIEF. IT'S

SUFFICIENTLY IMPORTANT -- I WOULD JUST LIKE TO READ A COUPLE LINES FROM THAT LETTER, YOUR HONOR, IF I MAY. IN ORDER TO PERFORM -- THIS IS A QUOTE.

IN ORDER TO PERFORM ANY LABORATORY TESTS, WROTE MR. SEGAL, IN ACCORDANCE WITH GOOD SCIENTIFIC PRACTICE, LABORATORY TECHNICIANS AND SCIENTISTS REGULARLY RECORD THE RAW DATA OBTAINED FROM THEIR INSTRUMENTS OR BY THEIR OBSERVATIONS DURING SUCH TESTS. FRANKLY, I CONSIDER IT TOTALLY UNBELIEVABLE THAT THERE ARE NO SUCH STATEMENTS. YOU ARE OBVIOUSLY PLAYING GAMES WITHIN THE MEANING OF THE TERM STATEMENT. I KNOW THAT THE VARIOUS INVESTIGATORS IN THE GROUPS OF PERSONS HAD TO MAKE NOTES AND REPORTS OF THEIR ACTIVITIES AND WE ARE ENTITLED TO THESE.

NOW, NOT ONLY IS THAT A SPECIFIC REQUEST BUT IT IS A STATEMENT BY THE DEFENSE COUNSEL TO GOVERNMENT COUNSEL THAT DEFENSE COUNSEL IS SKEPTICAL THAT THERE ARE NO SUCH NOTES. IF EVER A PROSECUTOR HAD A HINT THAT HE SHOULD GO BACK AND LOOK, IT IS IN THIS CASE. FAR MORE SO, I THINK, THAN EVEN THE MILLER CASE WHERE JUDGE FRIENDLY, WRITING FOR THE PANEL, SAID THAT THERE WERE LITTLE HINTS THAT THROUGHOUT THE TRIAL THAT THE GOVERNMENT SHOULD HAVE GONE BACK TO ITS FILE IN ORDER TO SEE WHETHER THERE WAS EXCULPATORY --

THE COURT: WERE THE TYPED NOTES OF THE

INVESTIGATORS NOT MADE AVAILABLE TO DEFENSE COUNSEL PRIOR TO TRIAL?

MR. SILVERGLATE: THERE WERE TWO SETS OF TYPED NOTES, YOUR HONOR. THE TYPED REPORTS OF JANICE GLISSON; THAT IS TO SAY THE TYPED REPORTS RELATING TO THE HAIR AND FIBER ANALYSIS WERE MADE AVAILABLE. HOWEVER, THEY POINTEDLY EXCLUDE ANY REFERENCE TO THE BLOND SYNTHETIC WIG HAIRS, NO REFERENCE.

THE COURT: I UNDERSTAND THAT THIS CAME UP LATER IN MATERIAL WHICH YOU HAVE DISCOVERED WELL WITHIN THE LAST YEAR, LET'S SAY, OR SO, SHOWING THAT THERE WERE HANDWRITTEN BENCH NOTES WHICH CONTAIN MORE THAN THE TYPED NOTES; IS THAT CORRECT?

MR. SILVERGLATE: CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT, SIR.

MR. SILVERGLATE: AND SOME OF IT WAS DISCOVERED BACK IN '84; SOME OF IT WAS DISCOVERED LAST YEAR. AND THE BOTTOM LINE IS THAT THOSE BENCH NOTES THAT WERE DISCOVERED INCLUDE REFERENCES TO BLOND SYNTHETIC WIG HAIRS, FIBERS MADE TO LOOK LIKE HAIR WHICH WERE FOUND IN A CLEAR HANDLED HAIR BRUSH IN THE MACDONALD RESIDENCE AND WAS NOT MATCHED TO ANY ITEM IN THE HOUSE. THERE WAS NO WIG IN THE HOUSE THAT MATCHED THOSE HAIRS. THEY ARE TWENTY-TWO INCHES LONG AND THOSE WERE POINTEDLY OMITTED FROM THE REPORT BY THE FORENSIC EXAMINERS. SO LOOKING AT THE REPORT YOU WOULD

NEVER GUESS THAT THEY WERE THERE.

INTERESTINGLY, YOUR HONOR, THE GOVERNMENT CLAIMS, WHICH I'LL GET TO IN A MOMENT, THE GOVERNMENT CLAIMS THAT IT DOESN'T MATTER THAT THESE BENCH NOTES WERE NOT TURNED OVER BECAUSE THE DEFENSE FORENSIC EXPERT, DOCTOR THORNTON, WAS ABLE TO, IF HE WANTED TO, EXAMINE ALL OF THESE PHYSICAL EXHIBITS AND HE COULD HAVE FOUND --

THE COURT: IT'S NOT DISPUTED THAT THE EVIDENCE ITSELF WAS MADE AVAILABLE TO DEFENSE COUNSEL?

MR. SILVERGLATE: IT'S NOT EXACTLY DISPUTED, YOUR HONOR. WE DON'T KNOW IF IT WAS THERE OR NOT BECAUSE THORNTON DIDN'T EXAMINE MICROSCOPICALLY EVERYTHING IN THE JAIL CELL. THE GOVERNMENT CLAIMS IT MUST HAVE BEEN THERE; WE DON'T KNOW. IT'S ONE OF THOSE THINGS THAT WE FEEL IS PROBABLY IMPOSSIBLE TO RESOLVE BUT I DON'T THINK THAT IT MATTERS. OUR CLAIM DOES NOT REST ON WHETHER THESE WERE MADE AVAILABLE TO THORNTON FOR THE FOLLOWING REASON, YOUR HONOR.

FIRST OF ALL, GOVERNMENT SAYS HE SHOULD HAVE SEEN THAT THERE WERE THESE BOXES WITH SLIDES AND THE SLIDES HAVE MOUNTED ON THEM THESE HAIRS. THE PROBLEM IS THIS, YOUR HONOR. THE OUTSIDE OF THE BOX OF SLIDES DID SAY SYNTHETIC FIBERS; NO QUESTION ABOUT THAT. HOWEVER, IT SAID -- IT LISTED SYNTHETIC -- DARK SYNTHETIC FIBERS. NOW, THE EVIDENCE, THE TESTIMONY OF DOCTOR MACDONALD WAS

STOECKLEY -- A LOT OF OTHER EVIDENCE -- BUT STOECKLEY HAD A BLOND WIG SO THORNTON WOULD HAVE BEEN TOTALLY UNINTERESTED IN A BOX OF SLIDES THAT TALKED ABOUT DARK SYNTHETIC FIBERS BECAUSE HE WASN'T INTERESTED IN A DARK WIG. STOECKLEY DIDN'T HAVE A DARK WIG BUT WHEN YOU OPEN THEM UP, IF YOU OPEN THEM UP, THAT BOX, THERE WAS WITHIN THAT A MAIL ORDER WHICH HAD THE BLOND SYNTHETIC WIG FIBERS.

NOW, THIS MAKES ONE VERY SUSPICIOUS. AS I SAID IN OUR BRIEF, YOUR HONOR, I DON'T THINK WE EVER HAVE TO REACH IN THIS CASE WHETHER WHAT GLISSON DID WAS DONE INTENTIONALLY OR KNOWINGLY OR SIMPLY INADVERTENTLY. IT'S VERY INTERESTING THAT SHE TYPES THE REPORT, WHICH IS GIVEN TO SEGAL, WHICH MENTIONS EVERYTHING UNDER THE SUN EXCEPT THE BLOND BENCH NOTES AND THE PHYSICAL EXHIBITS IS A LARGER PACKAGE LABELED DARK SYNTHETIC HAIR-LIKE FIBERS. ONLY IF YOU BOTHER OPENING THAT, EVEN IF YOU ARE NOT INTERESTED IN DARK FIBERS, IF YOU HAPPENED TO OPEN IT YOU WOULD SEE A BLOND FIBER. IT WAS AWFULLY WELL HIDDEN, YOUR HONOR. WHETHER IT WAS INTENTIONALLY SO OR THIS IS ONE OF THE MORE BIZARRE COINCIDENCES IN AMERICAN LEGAL HISTORY, I DON'T KNOW. IT WILL PROBABLY BE A MYSTERY FOREVER BUT THE BOTTOM LINE IS IT WAS WELL, WELL HIDDEN FROM THORNTON AND FROM SEGAL.

NOW, YOUR HONOR ASKED ABOUT THE REST OF THE NOTES.

THAT'S ONE SET OF THE BLOND WIG NOTES. THE SECOND SET OF BENCH NOTES THAT IS THE CORE OF THE CASE THIS MORNING WAS THE EXAMINATION BY MR. FRYER, JAMES FRYER, FBI FORENSIC EXAMINER, AND YOUR HONOR ASKED ABOUT THE REPORTS. THE REPORT OF FRYER'S RE-EXAMINATION WAS NEVER TURNED OVER TO SEGAL. HAD IT BEEN TURNED OVER TO SEGAL, HE STILL WOULDN'T HAVE KNOWN ANYTHING ABOUT THE FACT THAT BLACK WOOL FIBERS WERE FOUND IN COLETTE MACDONALD'S MOUTH, ON THE BICEP AREA OF COLETTE MACDONALD'S ARM AND ON THE CLUB, MURDER WEAPON THAT MURDERED COLETTE MACDONALD. HAD THE REPORT BEEN TURNED OVER, WHICH IT WASN'T, IT WOULD STILL NOT BEEN EVIDENT BUT HAD THE REPORT BEEN TURNED OVER SEGAL MAY HAVE DECIDED TO EXAMINE FRYER ON THE WITNESS STAND BECAUSE HE WOULD HAVE PROBABLY WANTED TO KNOW WHY FRYER DID A RE-EXAMINATION; WHY WAS IT THAT MR. MURTAGH REQUESTED A RE-EXAMINATION. IN FACT, FRYER WAS ASKED TO DO TWO RE-EXAMINATIONS. SO THERE'S A CHANCE IT WOULD CLUE SEGAL IN THAT THERE WAS SOMETHING AMISS AND HE SHOULD HAVE EXAMINED FRYER.

INSTEAD, WHAT HAPPENED WAS HE GOT NOTHING AND THEN AT THE TRIAL SEGAL AGREED TO A STIPULATION PROPOSED BY THE GOVERNMENT THAT INSTEAD OF PUTTING FRYER ON THE STAND HIS TESTIMONY, WHICH WAS RATHER INSIGNIFICANT, SIMPLY BE STIPULATED TO. SO SEGAL, COMPLETELY NAIVE THAT FRYER COULD HAVE BLOWN THE WHOLE CASE WIDE OPEN, AS COULD

GLISSON HAD, AGREED TO THE STIPULATION. FRYER NEVER GOT PUT ON THE STAND AND THERE WAS NO WAY INADVERTENTLY SEGAL COULD HAVE LEARNED FROM FRYER HE FOUND THESE BLACK WOOL -- HE IDENTIFIED BLACK WOOL THREADS RIGHT ON THE MURDER VICTIM, IN HER MOUTH AND ON THE CLUB.

THE COURT: YOU KNOW MR. SEGAL?

MR. SILVERGLATE: I HAVE MET HIM ONCE FOR ABOUT AN HOUR, YOUR HONOR. I DIDN'T KNOW HIM BEFORE AND I CAN'T SAY I KNOW HIM WELL NOW.

THE COURT: YOUR DESCRIPTION OF HIM AS BEING NAIVE IS NOT EXACTLY CONSONANT WITH MY OBSERVATION OF HIM OVER A LONG PERIOD OF TIME. I THOUGHT HE WAS A VERY ASTUTE COUNSEL AND VERY THOROUGH.

MR. SILVERGLATE: I WILL BE SURE TO COMMUNICATE THAT TO HIM AS SOON AS THIS ARGUMENT IS OVER. I'M SURE HE'LL APPRECIATE IT BUT, YOUR HONOR, THIS CASE IS SUCH THAT I MUST SAY EVEN THE ASTUTE WOULD BE FOOLED. I DO CONSIDER MR. SEGAL TO BE AN ASTUTE LAWYER BUT THERE'S NO WAY THAT HE WOULD HAVE DREAMED WHAT GLISSON OR FRYER FOUND IN THIS CASE. YOUR HONOR DIDN'T KNOW ABOUT IT EITHER; IT WAS KEPT FROM THE COURT AND OBVIOUSLY THE JURY DIDN'T KNOW ABOUT IT.

NOW, WHY IS THIS IMPORTANT? WHY IS IT MATERIAL? WHY IS THIS EVIDENCE DIFFERENT FROM ALL OF THE REST OF THE EVIDENCE? AND THAT'S WHERE I'M NOW GOING TO HEAD, IF I

MAY, WITH MY ARGUMENT.

JEFFREY MACDONALD, IN HIS TESTIMONY, SAID THAT THE WOMAN WHO ATTACKED HIM HAD BLOND HAIR. THERE IS A LOT OF EVIDENCE IN THE RECORD, SOME OF IT ADMITTED BEFORE THE JURY, SOME OF IT ON VOIR DIRE, SOME OF IT FOUND SUBSEQUENT TO THE TRIAL, SOME OF IT PART OF THE NEW TRIAL MOTION BY MR. O'NEILL. THERE'S A LOT OF EVIDENCE THAT STOECKLEY HAD A SHOULDER LENGTH BLOND WIG. IT IS SOMETIMES DESCRIBED, AS IT WAS IN THE ARTICLE 32 REPORT IN THE MILITARY PROCEEDING, IT WAS DESCRIBED AS STRINGY. IT'S NOT EXACTLY A HIGH CLASS WIG BUT THEN AGAIN I DON'T THINK THE EVIDENCE ABOUT STOECKLEY SHOWS SHE WAS A HIGH CLASS LADY. IT WAS A STRINGY WIG, STRAIGHT. TESTIMONY OF -- THE EVIDENCE IS IT WAS STRAIGHT AND SHE HERSELF TESTIFIED THAT SHE OWNED IT ABOUT THIS TIME AND SHE TESTIFIED SHE WORE IT FROM TIME TO TIME AS A JOKE, SO YOU GET THE SENSE THAT IT WAS NOT A VERY HIGH QUALITY WIG AND IT WAS RATHER POOR QUALITY, IN FACT. AND MACDONALD IDENTIFIED BLOND THE MOMENT HE AWOKE AT THE SCENE OF THE CRIME. THAT'S BEING CONSISTENT.

NOW, THE OTHER INTERESTING THING IN THE RECORD THAT STRIKES ME; I KNOW IT STRIKES YOUR HONOR BECAUSE YOUR HONOR MENTIONED IT IN ONE OF YOUR HONOR'S WRITTEN OPINIONS, WAS THAT THERE WAS SOME TESTIMONY THAT THERE WAS A PHONE CALL MADE TO THE APARTMENT WHILE THE MURDERS WERE BEING COMMITTED AND STOECKLEY ANSWERED THE PHONE. YOUR

HONOR KNOWS FROM THE RECORD THAT THE CLEAR HANDLED HAIR BRUSH CONTAINING THE BLOND WIG HAIRS WAS PLACED RIGHT NEAR THE PHONE SO THERE WAS THE GEOGRAPHIC PROXIMITY. YOUR HONOR NOTED THAT 640 FED SUPPLEMENT 322. THAT'S YOUR HONOR'S 1985 OPINION DENYING THE NEW TRIAL MOTIONS AND YOUR HONOR DESCRIBED THAT.

WHAT IS SO IMPORTANT ABOUT THE BLACK WOOL? WELL, YOUR HONOR, WHAT'S IMPORTANT ABOUT IT IS THAT IT WAS FOUND ON THE VICTIM AND ON THE CLUB AND IT WAS NOT IDENTIFIED WITH ANYTHING ELSE IN THE MACDONALD HOUSE. ALSO, STOECKLEY DID TESTIFY, YOUR HONOR ALLOWED HER TO TESTIFY TO THE JURY TO THIS MUCH, AND THAT WAS THAT SHE ALWAYS WORE BLACK OR PURPLE CLOTHING. SO THAT'S QUOTED IN THE PETITIONER'S BRIEF AT PAGES THIRTY-FOUR AND THIRTY-FIVE. SO WE HAVE THIS ENORMOUS AMOUNT OF FOUNDATION EVIDENCE ALL LINKED TOGETHER THAT MAKES THE BLOND WIG HAIRS AND THE BLACK WOOL EXTREMELY IMPORTANT IN CORROBORATING DOCTOR MACDONALD'S STORY, THE VERSION THAT HE TOLD THE JURY.

THE COURT: BEFORE YOU LEAVE THE STOECKLEY TESTIMONY.

MR. SILVERGLATE: I'M NOT LEAVING IT YET.

THE COURT: WELL, I WANT TO INQUIRE. YOU SAY THAT THE COURT ALLOWED STOECKLEY TO TESTIFY TO SOMETHING. WERE THERE ANY RESTRICTIONS PLACED ON STOECKLEY'S TESTIMONY BY THE COURT AT THE TIME OF TRIAL?

MR. SILVERGLATE: NO, YOUR HONOR.

THE COURT: I HAD IT BROUGHT TO MY ATTENTION RECENTLY THAT THIS COURT WOULD NOT ALLOW HER TO TESTIFY BECAUSE SHE WAS NOT A CREDIBLE WITNESS. NOW THAT WAS IN THE NEWS REPORT, SO I UNDERSTAND. I DON'T READ THESE THINGS MYSELF BUT MY RECOLLECTION IS THAT THE GOVERNMENT FOUND THIS WITNESS FOR THE DEFENDANT, BROUGHT HER HERE AND THEN I RECESSED THE TRIAL FOR THE BETTER PART OF A DAY SO SHE COULD BE QUESTIONED AND BRIEFED AND DEBRIEFED AND SO FORTH AND THAT SHE TOOK THE STAND AND TESTIFIED AND YOU SAY THERE WERE NO LIMITATIONS PLACED ON HER TESTIMONY?

MR. SILVERGLATE: THAT'S CORRECT, YOUR HONOR.

THE COURT: SO THE JURY THAT RETURNED THE GUILTY VERDICT IN THIS CASE DID HEAR HER SWORN TESTIMONY?

MR. SILVERGLATE: ABSOLUTELY, YOUR HONOR.

THE COURT: ALL RIGHT, SIR. THANK YOU.

MR. SILVERGLATE: IN FACT, SHE WAS, I BELIEVE SHE WAS ARRESTED UNDER A MATERIAL WITNESS WARRANT. THAT'S HOW SHE WAS PICKED UP. YOUR HONOR'S MEMORY IS ABSOLUTELY CORRECT.

THE CLAIM, YOUR HONOR, IS THAT WHAT THE JURY COULDN'T HEAR WERE THE WITNESSES TO WHOM SHE HAD CONFESSED THE MURDERS, THE SO-CALLED HEARSAY WITNESSES.

THE COURT: YES, I BELIEVE I RECALL THAT. SHE MADE SOME STATEMENTS IN NASHVILLE, TENNESSEE OR SOME

PLACE.

MR. SILVERGLATE: SOME IN NASHVILLE, VARIOUS PLACES.

THE COURT: AND THEY WERE TENDERED UNDER THE EXCEPTION TO THE HEARSAY RULE AND I RULED, AS JUDGE MURNAGHAN, I BELIEVE SUGGESTED, PERHAPS A LITTLE HASTILY ON THE THING IN THAT IT WOULD HAVE BEEN BETTER FOR THE PROSECUTION HAD THOSE HEARSAY STATEMENTS BEEN ADMITTED BUT, OF COURSE, I HAD TO CALL IT AS I SAW IT AND I DIDN'T THINK IT MET THE TRUSTWORTHINESS STANDARDS. THAT'S WHY I RULED AS I DID WITH RESPECT TO THE HEARSAY.

MR. SILVERGLATE: I DON'T THINK ANYONE SAID YOUR HONOR RULED HASTILY. IN FACT, YOUR HONOR WAS VERY CAREFUL TO STATE ALL THE GROUNDS FOR YOUR HONOR'S RULING. I THINK WHAT JUDGE MURNAGHAN SAID, IF HE WERE THE TRIAL JUDGE, WHICH HE WAS NOT, WOULD HAVE RULED DIFFERENTLY BUT IT WAS YOUR HONOR'S CALL. I DON'T BELIEVE THEY SAID YOUR HONOR RULED HASTILY. NOR DO I THINK YOUR HONOR RULED HASTILY.

NOW, WHAT I WOULD LIKE TO DO NOW, YOUR HONOR, IS TO DEMONSTRATE HOW IT IS THAT --

THE COURT: MAY I SUGGEST, SIR, BEFORE YOU BEGIN A NEW SUBJECT THAT YOU HAVE USED THE BETTER PART OF YOUR FORTY MINUTES BUT I'M NOT GOING TO CUT YOU OFF. YOU FINISH YOUR ARGUMENT AND WE WILL THEN SEE WHAT WE WILL DO THE REMAINDER OF THE MORNING.

MR. SILVERGLATE: I THANK YOUR HONOR FOR THE COURTESY. THERE WAS AN EVIDENTIARY CHAIN THAT I WOULD LIKE TO TRACK HOW THIS EVIDENCE GOT IN AND WHAT WOULD HAVE BEEN DONE IN THIS TRIAL. WE START FROM THE PROPOSITION THE LAB NOTES, HAD THEY BEEN DISCLOSED, WOULD HAVE BEEN ADMISSIBLE. I DON'T SEE ANYTHING IN ANY OF THE GOVERNMENT'S BRIEFS ARGUING TO THE CONTRARY. I DON'T THINK THERE'S AN ARGUMENT TO THE CONTRARY. THEY WOULD HAVE BEEN RELEVANT PURSUANT TO THE FEDERAL RULES OF EVIDENCE 401 AND 402 AND THAT IS ARGUED IN SOME DETAIL BEGINNING ON PAGE FIFTY-SIX OF THE PETITIONER'S REPLY BRIEF. SINCE I'M RUNNING LATE I WILL NOT GET INTO ANYMORE DETAIL, ESPECIALLY IF THE GOVERNMENT HASN'T ARGUED OTHERWISE WHY SHOULD I --

THE COURT: I DON'T THINK I HAVE TROUBLE WITH THAT PART.

MR. SILVERGLATE: SO LET'S GO TO STEP TWO, IF I MAY, YOUR HONOR. THE NOTES WOULD HAVE, TO SOME EXTENT, CORROBORATED MACDONALD'S ACCOUNT; THAT IS TO SAY THE NOTES WERE LINKED TO STOECKLEY. HE HAD TESTIFIED ABOUT STOECKLEY AND A GROUP OF THREE OTHERS. THEY WOULD HAVE CORROBORATED HIS ACCOUNT. THEY ALSO WOULD HAVE SHOWN INDEPENDENTLY THAT THERE WAS A GOOD POSSIBILITY STOECKLEY WAS IN THE APARTMENT. SHE HAD A BLOND WIG HAIR, SHE ALWAYS WORE BLACK AND THERE WERE BLACK WOOL FIBERS IN

STRATEGIC LOCATIONS NOT MATCHING ANYTHING IN THE MACDONALD HOUSE INDICATING IT WAS PROBABLY INTRODUCED FROM THE OUTSIDE.

NOW, THE FOURTH CIRCUIT DID UPHOLD YOUR HONOR'S EXERCISE OF DISCRETION ALTHOUGH THERE WAS SOME MISGIVING IN JUDGE MURNAGHAN'S CONCURRENCE AND --

THE COURT: LET ME INTERRUPT YOU JUST A MOMENT, SIR. WE HAVE A RATHER LARGE AUDIENCE THIS MORNING AND PEOPLE ARE CONTINUALLY GOING AND COMING. IT'S A LITTLE BIT DISCONCERTING FOR PEOPLE TO GET UP. YOU HAVE EVERY RIGHT IN THE WORLD TO BE HERE; I WANT YOU TO BE HERE BUT WE HAVE TO OBSERVE A LITTLE DECORUM IN GOING AND COMING SO LET ME SAY NOW IF THERE'S ANYONE WHO FEELS YOU WOULD NEED TO LEAVE BEFORE ELEVEN O'CLOCK, WOULD YOU PLEASE LEAVE NOW AND THEREAFTER WE WILL TAKE A RECESS AND YOU CAN GO AND COME AS YOU LIKE AND THEREAFTER WE WILL TRY TO LET YOU GO AND COME AT FIFTEEN MINUTE INTERVALS RATHER THAN JUST AS YOU ARE DOING NOW. ANYONE CARE TO LEAVE NOW? ALL RIGHT, THIS IS LAST CALL FOR DEPARTURE AND WE WILL LET YOU GO AGAIN AT ELEVEN.

MR. SILVERGLATE: MAY I CONTINUE, YOUR HONOR?

THE COURT: YES, SIR. I'M SORRY FOR THE INTERRUPTION. I WILL NOT CHARGE THAT AGAINST YOUR TIME. IT'S A LITTLE DISCONCERTING HAVING PEOPLE OPENING THE DOOR RIGHT BEHIND YOU THERE, GOING AND COMING WHILE I'M TRYING

TO CONCENTRATE ON YOUR ARGUMENT.

MR. SILVERGLATE: I MUST SAY, YOUR HONOR, I CAN'T SEE THE DOOR.

THE COURT: WE HAVE THAT GROUND RULE SET NOW.

MR. SILVERGLATE: AS LONG AS YOUR HONOR IS ON THE BENCH I'M HAPPY TO GO ON.

AT THE ARGUMENT ON THE APPEAL OF THE MERITS OF THIS CONVICTION, IT TOOK PLACE AT THE FOURTH CIRCUIT ON JUNE 9, 1982. JUDGE MURNAGHAN STATED TO MR. DEPUE, WHO ARGUED FOR THE GOVERNMENT, THAT THIS WAS A TORTURE QUESTION, A CLOSE QUESTION AND ITS FAIRLY OBVIOUS FROM HIS OPINION HE WAS DISTURBED BY THE CLOSENESS OF IT. AND THE GOVERNMENT AGREED AS WELL THAT THERE WOULD HAVE COME A POINT AT SOME POINT HAD THE DEFENDANT HAD MORE CORROBORATING EVIDENCE THAT IT WOULD HAVE BEEN AN ABUSE OF DISCRETION TO OMIT THAT EVIDENCE FROM THE -- TO NOT ALLOW IT IN BEFORE THE JURY.

AND HERE'S THE VERY PREGNANT QUESTION JUDGE MURNAGHAN ASKED MR. DEPUE. PAGE FORTY OF THE ORAL ARGUMENT TRANSCRIPT OF THE FOURTH CIRCUIT.

SUPPOSE THE EVIDENCE WAS ABSOLUTELY CLEAR THAT SHE, STOECKLEY, HAD IN FACT BEEN ON THE STREET CORNER WITHIN A VERY NARROW DISTANCE FROM THE HOME OF THE MACDONALDS ON THAT MORNING OR SUPPOSE THE EVIDENCE HAD GONE SO FAR AS TO SHOW SHE HAD IN FACT BEEN IN

THE HOUSE. THEN THE FACT THAT PEOPLE MAY HAVE TALKED TO HER AND PLANTED THINGS IN HER MIND WOULD NOT BE ALL THAT SIGNIFICANT. SHE WOULD HAVE BEEN THERE; SHE WOULD HAVE BEEN IN A POSITION TO SEE AND TO TESTIFY AS TO WHAT HAPPENED.

MR. DEPUE SAID, IT WOULD CERTAINLY LOSE SOME OF THE SIGNIFICANCE BUT WE'RE TALKING ABOUT MOVING UP THE SLIDING SCALE WITH A DIFFERENT SET OF FACTORS, WHICH THE TRIAL JUDGE HAD TO WEIGH. CERTAINLY SOME POINT WOULD BE REACHED AT WHICH YOU MIGHT FIND AN ABUSE OF DISCRETION. I SUBMIT, HOWEVER, THOSE FACTS ARE NOT HERE NOW.

THAT WAS IN RESPONSE TO THE QUESTION ABOUT WHETHER THERE WAS INDEPENDENT EVIDENCE SHE WAS IN THE HOUSE. THERE'S NOW INDEPENDENT ADMISSIBLE EVIDENCE THAT SOMEBODY WITH A BLOND WIG WEARING BLACK WOOL CLOTHES WAS IN THAT HOUSE AND WHOEVER IT WAS WAS INVOLVED WITH THE MURDERS BECAUSE THE BLACK WOOL WAS IN THE MOUTH OF THE VICTIM AND ON THE CLUB THAT MURDERED THE VICTIM. SO A WHOLE DIFFERENT WEIGHING PROCESS WOULD HAVE TO GO ON. YOUR HONOR WOULD HAVE A VERY DIFFERENT DECISION TO MAKE, A VERY DIFFERENT ISSUE BEFORE YOUR HONOR HAD THESE LAB NOTES BEEN AVAILABLE TO YOUR HONOR.

THE LAB NOTES, THEREFORE, WOULD HAVE BEEN THE TRIGGER, IN MY VIEW, FOR THE ADMISSIBILITY OF THE

STOECKLEY HEARSAY TESTIMONY AND AS SUCH, WOULD HAVE MADE A TREMENDOUS DIFFERENCE IN THE CASE. THE COURT OF APPEALS NOTED AT ONE POINT, YOUR HONOR, THAT HAD THE STOECKLEY HEARSAY TESTIMONY, HAD EVIDENCE OF STOECKLEY'S INVOLVEMENT IN THE MURDERS GONE TO THE JURY, THE DAMAGE TO THE GOVERNMENT'S CASE WOULD HAVE BEEN INCALCULABLY GREAT. THE INJURY WOULD HAVE BEEN INCALCULABLY GREAT. THAT'S 632 FED 2D 264. IT'S THE FOURTH CIRCUIT 1980 OPINION AND IT'S QUOTED AT PAGE TWENTY-FIVE OF THE PETITIONER'S BRIEF.

THAT IS THE LAW OF THIS CASE, YOUR HONOR, THE LAW OF THIS CASE. I DON'T SEE HOW THE GOVERNMENT CAN GET AROUND IT. HAD THE STOECKLEY HEARSAY GONE TO THE JURY THE DAMAGE TO THE GOVERNMENT'S CASE WOULD HAVE BEEN INCAL -- I CAN NEVER PRONOUNCE THAT WORD -- GREAT BEYOND CALCULATION, IF I MAY PARAPHRASE THE FOURTH CIRCUIT. I PRACTICED THE WORD ALL LAST NIGHT, YOUR HONOR, AND I CAN'T PRONOUNCE IT.

THE COURT: I THINK YOU DID VERY WELL.

MR. SILVERGLATE: THANK YOU, YOUR HONOR. JUDGE MURNAGHAN, IN HIS CONCURRING OPINION IN 1982 AT 688 FED 2D 235 SAID SOMETHING QUITE INTERESTING, YOUR HONOR. HE SAID YOUR HONOR DECIDED THAT STOECKLEY WAS A HEAVY DRUG USER, SHE WAS A DISHEVELED, LOST SOUL KIND OF PERSON, A PERSON WHO WAS NOT AN INHERENTLY RELIABLE WITNESS. HER STATEMENTS DIDN'T HAVE THE INDICIA OF RELIABILITY AND THAT WAS FINE, GIVEN THE FACT THAT YOUR HONOR DIDN'T HAVE THE

LAB NOTES. THAT RULING WAS WITHIN YOUR HONOR'S DISCRETION.

JUDGE MURNAGHAN POINTED OUT, THOUGH, IN 1982 THERE'S ANOTHER WAY OF LOOKING AT IT AND THAT IS AFTER THE MANSON/TATE/LABIANCA MURDERS, THERE'S A NEW WAY OF LOOKING AT THESE KIND OF UTTERLY HORRIBLE CRIMES. THAT IS, THERE'S A CERTAIN TYPE OF PERSON WHO IS CAPABLE OF THIS DEGREE OF HEINOUSNESS AND MANSON SHOWED THAT THIS WAS SO. AND JUDGE MURNAGHAN SAID A PERSON LIKE STOECKLEY MIGHT BE A VERY GOOD CANDIDATE FOR GETTING INVOLVED IN THIS KIND OF MURDER. SO THE FACT SHE WAS A DRUG USER AND A DISHEVELED LOST SOUL TYPE OF PERSON MIGHT BE A DOUBLE EDGED SWORD. IT COULD ARGUABLY CUT FOR ADMISSION OF THE STOECKLEY HEARSAY; IT COULD ARGUABLY CUT AGAINST IT.

YOUR HONOR DECIDED TO CUT AGAINST HER BUT HE SAID IT CAN BE ANOTHER SIDE AND IF THERE WERE CORROBORATING EVIDENCE THEN IT WOULD TIP IN FAVOR OF ADMISSION. IT'S A VERY INTERESTING ANALYSIS HE DOES IN HIS OPINION AND WHAT I'M SUGGESTING TO YOUR HONOR IS THAT THIS CASE IS NOW TIPPED WAY OVER TO THE SIDE THAT THIS EVIDENCE HAD TO BE ADMITTED. THERE WAS A FOUNDATION FOR IT. IT TIED UP WITH -- MACDONALD TESTIFIED STOECKLEY, POSEY, BEASLEY, ZILLIOUX AND MICA; THAT ALL TIES TOGETHER NOW.

NOW, THE GOVERNMENT SAYS THESE LAB NOTES DON'T REALLY MEAN AS MUCH AS WHAT YOU THINK THEY MEAN. GOVERNMENT SAYS

TAKE THE BLOND WIG FIBERS, AND THIS IS EXTREMELY CRUCIAL, YOUR HONOR. GOVERNMENT SAYS WE HAVE AN EXPERT AFFIDAVIT, WHICH WE HAVE FILED, THAT SHOWS THAT IT WAS MADE OF SARAN, S-A-R-A-N. THAT'S A LOW GRADE FIBER; THEY DON'T MAKE GOOD WIGS FROM THIS MATERIAL. THEY MAKE DOLL'S HAIR FROM THIS MATERIAL; THEY MAKE MANNEQUIN WIGS FROM THIS MATERIAL; THEY DON'T MAKE GOOD WIGS FOR WOMEN TO WEAR. NOW, NOBODY EVER SAID THIS WAS A GOOD WIG. NOBODY EVER SAID STOECKLEY WAS WHAT'S COME TO BE KNOWN AS A HIGH MAINTENANCE WOMAN. SHE WORE THIS, SHE SAID, AS A JOKE FROM TIME TO TIME, THIS WOMAN'S WIG. IT'S PERFECTLY CONSISTENT WITH ALL THE EVIDENCE THAT A WIG FIBER MADE -- A WIG THAT WAS FIT FOR A MANNEQUIN WOULD HAVE BEEN WORN BY HELENA STOECKLEY.

THE GOVERNMENT'S OWN ATTACK ON THESE LAB NOTES SIMPLY STRENGTHENS OUR CLAIM THAT THERE'S A TIE BETWEEN HER WIG AND THESE LAB NOTES. POSEY TESTIFIED HER WIG WAS STRINGY. AND THE GOVERNMENT THEN GOES ON TO SAY WELL, MAYBE IT CAME FROM COLETTE MCDONALD'S FALL. SHE HAD A FALL IN THE APARTMENT. THE GOVERNMENT HADN'T FOUND IT. THEY HAVE SINCE RETRIEVED IT FROM MR. KASSAB BUT IF YOU READ THEIR AFFIDAVIT, THE AFFIDAVIT SAYS THE FALL WERE GRAY FIBERS AND THEY DIDN'T MATCH THE BLOND WIG FIBERS. SO CLEARLY IT DIDN'T COME FROM COLETTE MACDONALD'S FALL. I DON'T KNOW WHY THE GOVERNMENT INJECTED HER FALL INTO THE CASE; THEY DON'T MATCH. THE FALL FIBERS WERE NOT BLOND.

THE GOVERNMENT ALSO SAYS MAYBE THEY CAME FROM THE KIDS' DOLLS. WELL, I HAVEN'T SEEN A DOLL WITH TWENTY-TWO INCH LONG HAIR, NUMBER ONE; AND NUMBER TWO, THE GOVERNMENT TRIED TO MATCH IT TO THE KIND OF DOLLS THE MACDONALD CHILDREN WERE KNOWN TO HAVE HAD AND THEY DIDN'T MATCH. IT'S RIGHT IN THE GOVERNMENT'S AFFIDAVITS. SO THIS IS ALL A GIGANTIC RED HERRING.

NUMBER TWO, THE GOVERNMENT SAYS TAKE THE BLOND WOOL; MAYBE IT CAME FROM WOOLEN CAPS THE CHILDREN GOT FOR CHRISTMAS. MAYBE THEY DID GET WOOLEN CAPS FOR CHRISTMAS BUT THE GOVERNMENT FORGETS ONE POINT. WHAT WAS COLETTE MACDONALD WHEN SHE WAS MURDERED, WHY DID SHE HAVE THE CHILDREN'S CAPS IN HER MOUTH? WAS SHE EATING THEM? IT MAKES NO SENSE. CLEARLY THE WOOL CAME FROM THE PERSON WHO ASSAULTED HER AND NOT FROM THE CHILDRENS' CAPS, ASSUMING THE CHILDREN HAD WOOLEN CAPS.

WHAT I'M TRYING TO SAY, YOUR HONOR, IS THAT ALL OF THE GOVERNMENT'S CLAIMS IN ITS BRIEFS THAT THESE LAB NOTES MAY NOT MEAN WHAT WE THINK THEY MEAN ARE INADMISSIBLE. THERE'S NO FOUNDATION FOR THE GOVERNMENT TO EVEN MAKE THESE CLAIMS TO THE JURY; THERE'S SHEER SPECULATION. WE'RE NOW IN A POSITION WHICH IS OPPOSITE THAT WE WERE IN AT MACDONALD'S TRIAL. WE, THE DEFENSE, HAS A THEORY FOR THE ADMISSIBILITY OF ALL OF THIS. IT IS PROBATIVE; IT IS RELEVANT. AND ON THE FOURTH CIRCUIT'S VIEW, WOULD DO

INCALCULABLE DAMAGE TO THE GOVERNMENT'S CASE, AND THE GOVERNMENT HAS NO THEORY FOR ADMISSIBILITY OF ITS SPECULATIONS, THAT MAYBE THESE NOTES DON'T MEAN QUITE WHAT WE SAY THEY MEAN. THE SHOE IS NOW ON THE OTHER FOOT, ONE HUNDRED EIGHTY DEGREE TURNAROUND. THERE IS NO THEORY UNDER THE FEDERAL RULES OF EVIDENCE THAT THE GOVERNMENT CAN ADMIT THIS NONSENSE ABOUT MANNEQUIN'S HAIR, CHILDRENS' DOLLS, COLETTE'S FALL, CHILDRENS' WOOLEN CAPS; ALL INADMISSIBLE.

WHAT ELSE DOES THE GOVERNMENT DO? IT COMES UP WITH A REMARKABLE THEORY, FORENSIC THEORY, IN ITS PAPERS CALLED THE TRANSFER THEORY OF LOCARD, L-O-C-A-R-D. THIS IS THE PART. THIS OPENED UP MY EYES. WHEN I READ THAT PART OF THE GOVERNMENT'S BRIEF I UNDERSTOOD, I THINK, HOW THIS CASE CAME OFF TRACK IN A WAY THAT NEITHER YOUR HONOR NOR MR. SEGAL, PERCEPTIVE THOUGH HE MAY HAVE BEEN, COULD NOT HAVE IMAGINED.

HERE'S WHAT HAPPENED. I THINK IT'S QUITE OBVIOUS. THE TRANSFER THEORY OF LOCARD HELD IN ORDER TO BE FORENSICALLY SIGNIFICANT, A FIBER HAD TO BE MATCHED TO SOME KNOWN. AND SO THE GOVERNMENT, EARLY ON, HAD THIS THEORY THAT MACDONALD WAS THE MURDERER AND THEY WENT AROUND TRYING TO MATCH FIBERS FOUND AT THE CRIME SCENE TO HIM AND SOMETIMES THEY DID AND SOMETIMES THEY DIDN'T. THEY FOUND SOME OF HIS PAJAMA FIBERS IN VARIOUS PLACES,

INCLUDING ON THE CLUB, MURDER WEAPON. THEY MADE A BIG DEAL OF THAT THAT OH, MACDONALD'S PAJAMA FIBERS WERE ON THE CLUB. RATHER THAN ASSUME HE WAS CLUBBED WITH THE CLUB THEY ASSUMED HE WAS THE ONE WHO WIELDED THE CLUB. BUT THE GOVERNMENT DID NOT MAKE A BIG DEAL; IN FACT, THEY DIDN'T INCLUDE IN ITS REPORTS --

THE COURT: WAS THERE ANY EVIDENCE THAT MACDONALD HIMSELF WAS HIT WITH THIS CLUB?

MR. SILVERGLATE: WELL, HE HAD INJURIES. HE HAD A CONTUSION ON HIS HEAD. HE DIDN'T KNOW WHAT IT WAS. HE DESCRIBED SOMETHING THAT LOOKED LIKE A CLUB THAT HIT HIM. THAT WAS HIS TESTIMONY BUT WE, OF COURSE, DON'T KNOW. HE WAS CERTAINLY HIT WITH SOMETHING.

THE GOVERNMENT'S THEORY IS THAT BECAUSE A FIBER CAN'T BE MATCHED TO ANYTHING IN THE HOUSE IT IS, UNDER THE TRANSFER THEORY OF LOCARD, NOT FORENSICALLY SIGNIFICANT. JUST LOOK AT IT FROM THE DEFENSE POINT OF VIEW. THE DEFENSE WAS OUTSIDERS, INTRUDERS COMMITTED THE MURDERS. ONE WAY OF PROVING THAT IS TO SHOW THERE ARE UNMATCHED FIBERS, FIBERS THAT ARE UNMATCHED TO ANYTHING BELONGING TO THE MACDONALDS AT STRATEGIC LOCATIONS AT THE MURDER SCENE. ANYTHING IN THAT CATEGORY, HOWEVER, THAT THE GOVERNMENT FOUND HE PUT TO THE SIDE; IT DIDN'T INCLUDE IN ITS REPORTS BECAUSE UNDER THE TRANSFER THEORY OF LOCARD IF IT CAN'T BE MATCHED IT'S NOT FORENSICALLY SIGNIFICANT.

THE COURT: WAS THERE NOT EVIDENCE AT THE TRIAL THAT THERE WERE UNMATCHED FIBERS?

MR. SILVERGLATE: THERE WAS SOME EVIDENCE, YOUR HONOR, AND THAT'S WHAT MAKES ME PARTICULARLY SUSPICIOUS. IF THERE WAS SOME EVIDENCE THE GOVERNMENT LET THROUGH THAT THERE WAS UNMATCHED FIBERS THEN IT'S VERY SUSPECT THAT THE TRANSFER THEORY OF LOCARD WAS REALLY APPLIED RIGOROUSLY. I THINK THE GOVERNMENT WOULD LIKE THE COURT TO THINK THE REASON THE BLACK WOOL AND THE REASON THE BLOND WIG HAIRS WERE NOT DISCLOSED WAS BECAUSE THERE WAS A GENERAL FORENSIC THEORY THE GOVERNMENT IN GOOD FAITH BELIEVED THAT MADE IT INSIGNIFICANT FORENSICALLY. MAYBE THAT WAS OR WASN'T.

ONE HAS TO APPROACH THIS WITH SOME SKEPTICISM BECAUSE IT'S REALLY IRRELEVANT TO THIS MOTION WHETHER THE GOVERNMENT ACTED INTENTIONALLY OR NOT. I HAVEN'T MADE THAT BIG OF A DEAL OF IT IN THE ARGUMENT THIS MORNING. THERE'S NO REASON FOR ME TO PROVE THE GOVERNMENT HAD ILL WILL IF IT ISN'T NECESSARY TO WIN THE MOTION BUT ONE DOES RAISE AN EYEBROW ABOUT HOW THE SELECTIVITY THAT WENT ON HERE, HOW IT HAPPENED. THIS THEORY OF LOCARD SOUNDS PLAUSIBLE UNTIL YOU REALIZE IT'S A RECIPE FOR EXCLUDING EVERYTHING THAT'S EXCULPATORY. WHAT SUPPORTED THEIR THEORY WAS FORENSICALLY SIGNIFICANT; WHAT SUPPORTED THE DEFENSE WAS FORENSICALLY INSIGNIFICANT.

THE PROBLEM WITH LOCARD, YOUR HONOR, IS EVEN ASSUMING IT'S A LEGITIMATE SCIENTIFIC THEORY, WHICH I DON'T BELIEVE IT IS, IT'S IN SUCH VIOLENT CONFLICT WITH THE FEDERAL RULES OF EVIDENCE AND SUCH VIOLENT CONFLICT WITH BRADY, ACRES, AND BAGLEY, EVEN IF IT'S A VALID FORENSIC THEORY IT CERTAINLY HAS NO PLACE IN A FEDERAL CRIMINAL CASE LIKE THIS. WHAT GOVERNS IS NOT THIS HOKEY; I CALL IT HOKEY BECAUSE IT SEEMS HOKEY TO ME, THIS HOKEY THEORY. WHAT MATTERS IS THE FEDERAL RULES OF EVIDENCE AND BRADY, ACRES AND BAGLEY. SO IT DOES NO GOOD TO REST ON THE TRANSFER THEORY OF LOCARD.

I'M NEARLY AT THE END OF MY ARGUMENT NOW, YOUR HONOR. THE GOVERNMENT REALLY NEVER PROVED MACDONALD COMMITTED THE CRIMES. AS YOUR HONOR NOTES, WHAT THE GOVERNMENT PROVED WAS THAT MACDONALD'S STORY WAS NOT TRUE AND, AS YOUR HONOR POINTS OUT TIME AND TIME AND TIME AGAIN, AND IT IS REPEATED BY THE FOURTH CIRCUIT, THERE WAS NO PHYSICAL EVIDENCE TO CORROBORATE MACDONALD'S STORY AND SURELY THERE WOULD HAVE BEEN HAD HIS STORY BEEN TRUE. AND YOUR HONOR DOES THAT AT 640 FED SUPP 322; THE FOURTH CIRCUIT REPEATS IT. YOUR HONOR INSTRUCTED THE JURY AND YOUR INSTRUCTION IS QUOTED IN THE BRIEF OF THE PETITIONER, PAGE TWENTY-FOUR.

WITH RESPECT TO A FALSE EXCULPATORY STATEMENT, IF MACDONALD WAS FOUND BY THE JURY TO HAVE MADE FALSE

EXCULPATORY STATEMENTS, THE JURY CAN VIEW THAT AS EVIDENCE OF GUILT AND SO HE WAS CONVICTED BECAUSE THE JURY DIDN'T BELIEVE HIS ACCOUNT. HAD THESE LAB NOTES BEEN THERE, YOUR HONOR, WITH ALL DUE RESPECT, I THINK THE JURY WOULD HAVE BELIEVED HIS ACCOUNT, AT LEAST THERE WOULD HAVE BEEN A VERY SUBSTANTIAL REASONABLE DOUBT. THESE LAB NOTES ARE MUCH MORE IMPORTANT EVEN THAN THE PHYSICAL EXHIBITS THEMSELVES BECAUSE THIS IS THE GOVERNMENT'S OWN EXPERT SAYING THAT THERE WERE WIG HAIRS AND THERE WERE BLACK WOOL FOUND IN STRATEGIC LOCATIONS AT THE MURDER SCENE. THERE WASN'T GOING TO BE A FIGHT OVER WHAT THESE WERE. THE GOVERNMENT'S LAB NOTES IDENTIFIED THEM. THAT'S THE POSITION THE GOVERNMENT WAS GOING TO BE STUCK WITH. IF IT TRIED TO WIGGLE OUT FROM THAT POSITION IT WOULD HAVE BEEN IN AN EMBARRASSING POSITION IN FRONT OF THE JURY. AND IT WOULD HAVE BEEN EXTREMELY POTENT BECAUSE IT WOULDN'T HAVE HAD TO COME FROM DOCTOR THORNTON, IT WOULD HAVE COME FROM THE GOVERNMENT'S EXPERTS.

IN HIS CLOSING ARGUMENT, PROSECUTOR BLACKBURN SAID THE PHYSICAL EVIDENCE WAS NOT RECONCILABLE TO MACDONALD'S TESTIMONY. THAT'S QUOTED AT THE PETITIONER'S BRIEF, PAGE FIFTY. HE SAID THAT ONLY MACDONALD'S TESTIMONY LEADS STOECKLEY TO THE CRIME SCENE. THAT'S QUOTED, PAGES FIFTY AND FIFTY-ONE OF PETITIONER'S BRIEF. NO OTHER EVIDENCE LINKING STOECKLEY; WE NOW KNOW THAT'S NOT TRUE.

MR. MURTAGH, IN HIS CLOSING ARGUMENT, SAID PHYSICAL EVIDENCE CONNECTS ONLY MACDONALD TO THE CRIME SCENE. QUOTED AT PAGE FIFTY OF MY BRIEF; THAT'S NO LONGER TRUE. HE TOLD THIS COURT THAT PHYSICAL EVIDENCE POINTED ONLY TO MACDONALD. AND THE CLOSING ARGUMENT POINTED OUT, THIS IS QUOTED AT PAGE FIFTY-TWO OF THE BRIEF, THAT IT WAS MACDONALD'S PAJAMA FIBERS ON THE CLUB. WE NOW KNOW IT WAS BLACK WOOL ON THE CLUB AND BLACK WOOL ON THE VICTIM'S MOUTH AND ON HER BICEP AND NONE OF IT MATCHED ANYTHING BELONGING TO JEFFREY MACDONALD. THE SAME STATEMENTS WERE MADE IN THE BRIEF TO THE FOURTH CIRCUIT QUOTED, PAGE FIFTY-THREE OF MY BRIEF AND SUPREME COURT OF THE UNITED STATES QUOTED AT PAGE FIFTY-FOUR.

YOUR HONOR STATED TIME AND AGAIN THERE WAS NO DIRECT EVIDENCE OF INTRUDERS. I CALL YOUR HONOR'S ATTENTION TO YOUR HONOR'S OPINION, 640 FED SUPPLEMENT 322, AT 289, AT 314, AT 333 AND I ALSO CALL YOUR HONOR'S ATTENTION TO THE STATEMENTS THE GOVERNMENT MADE THAT IF IT DIDN'T TURN OVER ALL BRADY MATERIAL THERE WOULD BE INEVITABLY A REVERSAL IN THIS CASE. THAT'S QUOTED IN MY BRIEF AT PAGE SEVENTY-SEVEN, AND WE'RE AT THAT POINT.

I HAVE ONE FURTHER CASE TO CITE THEN I'M FINISHED WITH YOUR HONOR'S TIME PERMISSION AND THAT IS THE CASE THAT CAME DOWN. I NOTIFIED THE GOVERNMENT OF THIS YESTERDAY. IT JUST ARRIVED IN SLIP OPINIONS. NEEDLESS TO

SAY, YOUR HONOR, SINCE WE GOT INTO THIS CASE WE STARTED TO ORDER THE SLIP OPINIONS OF THE FOURTH CIRCUIT AND THE TWO CASES FROM THE U. S. SUPREME COURT THAT WE ALLUDED TO IN THE OPENING OF TODAY'S ARGUMENT, WERE NOT THE ONLY TWO CASES THAT CAME DOWN THAT HAVE A REMARKABLE IMPACT ON THIS CASE. THERE'S A CASE, UNITED STATES OF AMERICA VERSUS HAYWOOD WILLIAMS, JUNIOR, WHICH WAS DECIDED JUNE 21, 1991. I HAVE ALREADY SUPPLIED A COPY TO THE GOVERNMENT. IS IT PERMISSIBLE FOR ME TO HAND THIS ONE TO THE CLERK?

THE COURT: TELL US WHAT IT IS FIRST. WHAT COURT AND --

MR. SILVERGLATE: FOURTH CIRCUIT.

THE COURT: ALL RIGHT. UNITED STATES AGAINST WILLIAMS?

MR. SILVERGLATE: YES, U. S. AGAINST WILLIAMS AND IT IS A CASE THAT, POST-MCCLESKEY CASE. THAT'S IMPORTANT. POST-MCCLESKEY CASE HEARD BY A PANEL CONSISTING OF JUDGES MURNAGHAN, SPROUSE AND BUTZNER. INTERESTING, ALL THREE OF THOSE JUDGES HAVE SAT ON ONE OR ANOTHER MACDONALD CASE AND IT WAS A SECOND 2255 MOTION, WHICH IS WHAT WE HAVE IN THIS CASE, YOUR HONOR. AND THE COURT VACATED EVEN THOUGH THE ISSUE HAD BEEN RAISED PREVIOUSLY, WHICH I DON'T BELIEVE IS THE CASE HERE, BUT EVEN THOUGH THE ISSUE WAS RAISED PREVIOUSLY THE COURT FINDING THAT THE INTEREST OF JUSTICE REQUIRED IT TO

VACATE, VACATED NOTWITHSTANDING MCCLESKEY. THIS IS, AS I SAID, POST-MCCLESKEY CASE AND THERE'S A VERY INTERESTING FOOTNOTE THAT THE PANEL WROTE.

FOOTNOTE FOUR AT THE END OF THE OPINION EXPLAINING WHY, EVEN THOUGH THIS WAS THE SECOND TIME IT WAS HEARING THIS ISSUE AND IT WAS GOING TO REVERSE AND HERE'S THE QUOTE WHICH I CLOSE MY INITIAL ARGUMENT THIS MORNING.

A COURT POSSESSES THE POWER TO CHANGE A PRIOR DECISION WHICH IS IN ERROR AND WOULD RESULT IN SUBSTANTIAL INJUSTICE. CITING EDWARDS VERSUS JOHNSTON COUNTY HEALTH DEPARTMENT, 885 FEDERAL 2D AT 1218, FOURTH CIRCUIT 1989. THIS COURT WILL NOT ALLOW ANY LAW OF THE CASE DOCTRINE TO PREVENT IT FROM CORRECTING A PREVIOUS DECISION WHICH RESULTED IN SUBSTANTIAL INJUSTICE.

NOW, IN THE CASE IN FRONT OF YOUR HONOR --

THE COURT: I DON'T SEE HOW ANY COURT COULD FAIL TO DO THAT.

MR. SILVERGLATE: YES, NO COURT COULD FAIL TO DO THAT. IN THIS INCIDENT CASE, YOUR HONOR, YOUR HONOR NOW HAS SUBSTANTIAL NEW EVIDENCE, ADMISSIBLE EVIDENCE THAT WOULD HAVE TRIGGERED THE ADMISSION OF A WHOLE CLASS OF HEARSAY TESTIMONY THAT THE COURT OF APPEALS SAID WOULD DO INCALCULABLY GREAT DAMAGE TO THE GOVERNMENT'S CASE.

WITH ALL DUE RESPECT, THE PETITIONER ASKS YOUR HONOR

TO GRANT, ON THAT BASIS, MACDONALD A NEW TRIAL. I THANK YOUR HONOR FOR YOUR COURTESY AND PARTICULARLY FOR YOUR PATIENCE IN MY OVERLY LONG ARGUMENT.

THE COURT: THANK YOU, MR. SILVERGLATE. NOW, TO START THE GOVERNMENT'S ARGUMENT WOULD RUN US A LITTLE BEYOND OUR CUSTOMARY RECESS HOUR FOR THE MORNING HOUR. SUPPOSE WE TAKE IT A LITTLE EARLY TODAY AND WE'LL COME BACK AT ELEVEN FIFTEEN. NOW, THOSE IN THE AUDIENCE, THIS COURT TRIES TO OPERATE ON TIME. THAT MEANS IF YOU DESIRE TO COME BACK FOR FURTHER SESSION AT ELEVEN FIFTEEN YOU SHOULD BE BACK IN YOUR SEATS AT THAT HOUR AND WE WILL RESUME AT THAT TIME. THEREAFTER, THERE WILL NOT BE -- YOU WILL NOT BE ALLOWED TO GO OR COME UNTIL THIRTY MINUTES. SO, YOU CAN WRITE YOUR OWN TICKET ON THAT. TAKE A RECESS UNTIL ELEVEN FIFTEEN.

(RECESS TAKEN.)

THE COURT: ALL RIGHT, I'LL HEAR FROM THE GOVERNMENT. MR. DEPUE?

MR. DEPUE: GOOD MORNING, YOUR HONOR. PLEASE THE COURT, I'M DELIGHTED TO BE HERE PARTICIPATING ONCE AGAIN IN THE MACDONALD CASE.

THE COURT: ALL RIGHT, SIR.

MR. DEPUE: PERMIT ME FIRST TO ADDRESS THE PROBITY OF THE SO-CALLED NEWLY DISCOVERED EVIDENCE BEFORE GOING ON TO DISCUSS THE MCCLESKEY ISSUE AND PROCEDURAL

MATTER OF DEFAULT. IN THIS CONTEXT, YOUR HONOR, I THINK IT'S VITALLY IMPORTANT TO UNDERSTAND WHAT PRECISELY IS THE QUANTUM OF EVIDENCE THAT'S NECESSARY TO OBTAIN AN EXCEPTION TO THE BAR OF MCCLESKEY UNDER THE COURT'S DECISION. TO THAT END I'M GOING TO QUOTE FROM THE MCCLESKEY DECISION ITSELF.

> FEDERAL COURTS RETAIN THE AUTHORITY TO ISSUE THE WRIT OF HABEAS CORPUS IN A FURTHER NARROW CLASS OF CASES DESPITE THE PETITIONER'S FAILURE TO SHOW CAUSE FOR PROCEDURAL DEFAULT. THESE ARE EXTRAORDINARY ISSUES WHEN A CONSTITUTIONAL VIOLATION PROBABLY HAS CAUSED A CONVICTION OF ONE INNOCENT OF THE CRIME. WE HAVE DESCRIBED THIS CLASS OF CASES AS IMPLICATING A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

IT'S OUR SUBMISSION THAT NOTHING THAT HAS BEEN PRESENTED HERE TODAY IN THE CONTEXT OF THIS NEWLY DISCOVERED EVIDENCE IN ANY WAY, SHAPE OR FORM CHANGES THINGS FROM THE WAY THEY WERE WHEN THIS TRIAL OCCURRED BACK IN 1979.

LET ME FIRST ADDRESS THE PHYSICAL EVIDENCE ITSELF. THAT EVIDENCE FOCUSES ON LABORATORY BENCH NOTES WHICH ALLEGEDLY REFLECTED THE DISCOVERY OF UNMATCHED SYNTHETIC FIBERS AND WOOL FIBERS AT THE CRIME SCENE. AT THE OUTSET, I THINK IT'S IMPORTANT TO UNDERSTAND TWO THINGS. FIRST, THE SIGNIFICANCE OF THE PHRASE UNMATCHED. IT DOES NOT

MEAN THAT FORENSIC EXAMINATIONS WERE CONDUCTED ON THIS PHYSICAL EVIDENCE BACK IN 1975 USING ITEMS KNOWN TO HAVE BEEN IN THE MACDONALD HOUSEHOLD AND RESULTING IN A DETERMINATION THEN AND THERE THAT THE MATERIAL DID NOT ORIGINATE IN THE HOUSEHOLD.

IN THE CONTEXT OF THESE REPORTS, UNMATCHED SIMPLY MEANS THAT NO EFFORT WHATSOEVER WAS MADE TO MATCH THIS PHYSICAL EVIDENCE BECAUSE AT THAT TIME IT WAS NOT VIEWED BY ANYONE AS HAVING ANY FORENSIC SIGNIFICANCE WHATSOEVER. SO IT DOES NOT MEAN, AS THE PETITIONER WOULD SUGGEST, THAT EXAMINATIONS WERE MADE AND IT WAS DETERMINED THAT NOTHING IN THE HOUSEHOLD COMPORTED WITH THESE PARTICULAR ITEMS.

SECOND, THESE LABORATORY BENCH NOTES APPEAR IN PETITIONER'S PAPERS. TO HAVE DEVELOPED A LIFE OF THEMSELVES THAT THEY THEMSELVES ARE IN SOME WAY EXCULPATORY BUT AT THEIR VERY BEST THEY ARE NOTHING MORE THAN FLAGS OR SIGN POSTS THAT WOULD POSSIBLY INVITE ONE'S ATTENTION TO THE ACTUAL PHYSICAL EVIDENCE ITSELF AND TO PERHAPS REQUIRE FURTHER CONSIDERATION OF THAT EVIDENCE. AND I WOULD SUBMIT YOUR HONOR THAT WHEN YOU FOLLOW THAT TRAIL AND YOU LOOK TO THE PHYSICAL EVIDENCE IT IS TOTALLY, ABSOLUTELY WORTHLESS.

LET ME FIRST ADDRESS THE SYNTHETIC FIBER THAT PETITIONER NOW MAINTAINS ORIGINATED IN THE WIG OF HELENA STOECKLEY. IN THE FIRST PLACE, THERE IS NOTHING IN THIS

RECORD WHATSOEVER SUGGESTING THAT ANY TWENTY-TWO INCH FIBER ORIGINATED IN THE WIG. THERE IS NOTHING IN THIS RECORD THAT SUGGESTS THAT HELENA STOECKLEY WAS WEARING A WIG ON THE NIGHT OF THE MURDER. IN FACT, HER TESTIMONY BEFORE YOUR HONOR WAS THAT SHE WAS NOT WEARING A WIG ON THE NIGHT OF THE MURDER BECAUSE HER BOYFRIEND DIDN'T LIKE HER WEARING THE WIG. SO IT'S VERY DIFFICULT FOR US TO UNDERSTAND HOW THIS SO-CALLED EXCULPATORY EVIDENCE WOULD IN ANY WAY HAVE ASSISTED IN MAKING HER EVIDENCE ADMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE.

IN FACT, THE TESTIMONY OF MR. POSEY BEFORE THE ARTICLE 32 INVESTIGATION, TO WHICH THE PETITIONER HAS DIVERTED, WAS TO THE CONTRARY. THAT SHE HAD STRINGY BRUNETTE HAIR AND THAT'S THE WAY SHE APPEARED DURING THE TIME IN QUESTION. NOT ONLY IS THERE NO EVIDENCE THAT SHE WAS NOT WEARING A WIG ON THE NIGHT IN QUESTION, NOT ONLY IS THERE NO EVIDENCE THAT THE DEFENDANT HAS PROFFERED EVEN SUGGESTING THAT THESE SYNTHETIC FIBERS ORIGINATED IN A WIG, THE GOVERNMENT CAN DEMONSTRATE TO THE CONTRARY PRECISELY WHAT THE SOURCE OF THESE FIBERS WAS. IN FACT, THE LABORATORY BENCH NOTES OF GLISSON REFLECT THAT FOUR SYNTHETIC FIBERS ORIGINATED IN THAT HAIR BRUSH. ONE WAS KNOWN AS A DELUSTERED MONACRYLLIC FIBER, VARIOUSLY REFERRED TO BY GLISSON AS GRAY OR BLOND.

AS A RESULT OF A FORENSIC ANALYSIS CONDUCTED RECENTLY