

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
FAYETTEVILLE DIVISION

JEFFREY R. MACDONALD, )  
 )  
 ) PETITIONER, )  
 ) 75-26-10-E-CRF  
V. ) 90-104-CV-3F  
 )  
 ) UNITED STATES OF AMERICA, )  
 )  
 ) RESPONDENT. )

MOTIONS HEARING BEFORE  
THE HONORABLE JAMES C. FOX  
UNITED STATES DISTRICT JUDGE

AT WILMINGTON: MARCH 23, 1999

FOR THE GOVERNMENT:

ERIC EVENSON  
ASST. U.S. ATTORNEY  
310 NEW BERN AVENUE  
RALEIGH, NC 27601

BRIAN MURTAUGH  
JOHN F. DEPUE  
WASHINGTON, D.C.

FOR PETITIONER:

WADE SMITH, ESQUIRE  
RALEIGH, NORTH CAROLINA

BARRY SCHECK, ESQUIRE  
NEW YORK, NEW YORK

PAUL CORMIER, ESQUIRE  
ANDREW GOOD, ESQUIRE  
83 ATLANTIC AVENUE  
BOSTON, MASS. 02110

VOLUME 1 OF 1  
PAGES 1 THROUGH 43

(PROCEEDING RECORDED BY STENOMASK; TRANSCRIPT PRODUCED FROM  
DICTATION)

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1 P R O C E E D I N G S 1:55 P.M.

2 THE COURT: PLEASE BE SEATED. GOOD  
3 AFTERNOON, COUNSEL. YOU MAY ASSUME THAT I HAVE READ  
4 EVERYTHING THAT YOU HAVE SUBMITTED. DO NOT ASSUME THAT I  
5 UNDERSTOOD IT ALL, BUT I HAVE READ IT ALL. NOW, BEFORE WE  
6 GET STARTED, I WOULD LIKE TO GET SOME HELP FROM YOU ALL ON  
7 SOME THINGS THAT ARE NOT CLEAR.

8 AT THE OUTSET, LET ME SAY TO YOU THAT THIS IS THE  
9 FIRST TIME I HAVE HAD ANY CASE THAT HAD ANY DNA TESTING  
10 PROTOCOL ISSUES RAISED IN IT, AND I AM CERTAINLY NOT  
11 FAMILIAR WITH DNA TESTING. AND IT MAY BE THAT YOU CAN HELP  
12 ME CONSIDERABLY. BUT ONE THING I WANTED TO ASK WAS, THE  
13 DIVISIBILITY ISSUE OF EXHIBITS, I HAD ASSUMED--AM I CORRECT  
14 THAT THAT IS A PHYSICAL DIVISIBILITY ISSUE? THE EXHIBITS ARE  
15 PHYSICALLY DIVISIBLE; IS THAT CORRECT?

16 MR. MURTAUGH: YES, YOUR HONOR.

17 THE COURT: LET ME ASK YOU--WE WILL GO TO  
18 ANOTHER ISSUE AND WE WILL COME BACK TO THIS. I AM WANDERING  
19 AROUND A LITTLE BIT TO GET EDUCATED. I ASSUME THAT THERE ARE  
20 FURTHER INTERESTS IN THIS CASE OTHER THAN THE PROSECUTION AND  
21 THE DEFENSE IN THIS MATTER IN THE SENSE THAT WHATEVER EVIDENCE  
22 IS EXISTENT, HOPEFULLY AFTER THE TESTING BY BOTH SIDES  
23 IN THIS CASE, THERE WOULD BE STILL BE EXHIBITS EXISTENT THAT  
24 COULD BE USED IN FURTHER PROSECUTION OR FURTHER DEFENSE  
25 EXAMINATION INQUIRY.

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1           IN OTHER WORDS, I DON'T--IT SEEMS TO ME IT IS NOT  
2 POSSIBLE TO ASSUME THAT THESE ISSUES CAN BE RESOLVED DESTROY-  
3 ING ALL THESE EXHIBITS WITHOUT A CONCERN THAT THERE STILL BE  
4 EXHIBITS IN EXISTENCE. WOULD YOU ALL AGREE WITH THAT, COUN-  
5 SEL?

6           MR. MURTAUGH:           IF I MAY, YOUR HONOR?

7           THE COURT:               SURE.

8           MR. MURTAUGH:           YOUR HONOR'S CONCERN IS EXACTLY  
9 WHAT THE CONCERN IS THAT WE HAVE. IT IS GOING TO LITERALLY  
10 BE A HAIR BY HAIR DETERMINATION. IN OTHER WORDS, WE ARE NOT  
11 DEALING WITH LARGE BLOOD STAINS HERE.

12          THE COURT:               I UNDERSTAND.

13          MR. MURTAUGH:           SO, YES. THE CONCERN THAT YOU  
14 HAVE IS EXACTLY THE ISSUE THAT NEEDS TO BE RESOLVED: WILL  
15 THERE BE ENOUGH FOR TESTING BY BOTH SIDES; IS THERE ONLY  
16 ENOUGH FOR ONE TEST; IS THERE ENOUGH FOR THE THIRD TEST BY AN  
17 INDEPENDENT LABORATORY.

18          THE COURT:               WELL, LET ME GET RIGHT BACK TO  
19 THAT. I HAVE THOUGHT ABOUT THAT A LITTLE BIT. AND THE  
20 THOUGHT HAS OCCURRED TO ME--I NOTICE THAT THE PETITIONER  
21 WANTS TO HAVE HIS PEOPLE IN THE FBI LAB TO OBSERVE THE  
22 UNPACKING OF THE MATERIAL, ET CETERA, ET CETERA, BUT ALSO  
23 DURING THE COURSE OF THE EXAMINATION OF THE EXHIBITS  
24 THEMSELVES.

25           I ASSUME, OF COURSE, IF THE DEFENSE WANTS THAT, THEY

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1 WOULDN'T OBJECT TO THE FBI BEING PRESENT WHEN THEIR TESTS  
2 WERE BEING CONDUCTED. WELL, POSSIBLY--AND I AM THROWING THIS  
3 OUT AS A SUGGESTION. MAYBE THE WAY TO HANDLE IT WOULD BE TO  
4 SEE WHAT EXHIBITS WERE DIVISIBLE, THE GOVERNMENT TO RETAIN A  
5 PORTION OF SUCH EXHIBITS, AND TO SUBMIT THE PORTION THAT WAS  
6 SIGNIFICANT OR SUFFICIENT ENOUGH FOR TESTING TO AN INDEPEN-  
7 DENT LABORATORY WHERE BOTH SIDES COULD BE PRESENT WHILE IT  
8 WAS BEING EXAMINED.

9 NOW, I DON'T SEE--IT SEEMS TO ME THAT THAT WAY IT  
10 WOULD SAVE YOU THE NECESSITY OF HAVING TO TAKE ANY MATERIAL  
11 THAT THE GOVERNMENT IS INTERESTED IN RETAINING THE  
12 EXHIBITS--THEIR EXISTENCE UNDER ITS CONTROL AND AS FAR AS  
13 PUBLIC INTEREST IS CONCERNED AS RESPECTS TO POSSIBLE OTHER  
14 VIOLENT PROSECUTIONS, ET CETERA, WOULD BE PROTECTED. AND AT  
15 THE SAME TIME THERE WOULD BE NO INTRUSION IN THE GOVERNMENT  
16 LABORATORY WHILE THE EXHIBITS WERE BEING EXAMINED, AND AT THE  
17 SAME TIME BOTH SIDES WOULD HAVE THE OPPORTUNITY TO BE IN THE  
18 LABORATORY WHEN THE EXHIBITS WERE IN FACT BEING TESTED.

19 NOW, THAT SEEMS TO ME TO BE AN APPROPRIATE PROTOCOL,  
20 IF YOU WILL, AS IT RELATES TO DIVISIBLE EXHIBITS. I WANT TO  
21 GO BACK NOW TO SOME OTHER ASPECTS OF IT. AS TO EXHIBITS  
22 WHICH ARE NOT DIVISIBLE, I THINK THAT THE SOLUTION--NOT A  
23 SOLUTION, BUT THE WAY TO HANDLE THAT WOULD BE TO FIRST HAVE  
24 THEM IDENTIFIED, AND AFTER THEY ARE IDENTIFIED, THE  
25 PETITIONER COULD MAKE KNOWN TO THE COURT OR PETITION THE

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1 COURT, IF YOU WOULD, TO HAVE THAT PARTICULAR EXHIBIT EXAMINED  
2 BY THE INDEPENDENT LABORATORY WITH THE UNDERSTANDING THAT IT  
3 IS GOING TO BE--IT WOULD PETITION THE COURT AND THE COURT  
4 WOULD MAKE A DECISION, PRIORITIZATION, IF YOU WILL, HAVING IN  
5 MIND THE SIGNIFICANCE OF THE POTENTIAL EXHIBITS OR THE  
6 PRIORITIZATION OF THE IMPORTANCE OF THAT PARTICULAR EXHIBIT.

7 FOR EXAMPLE, I THINK IF AN EXHIBIT WERE BOUND TO BE  
8 CONSUMED, IF IT WERE FOUND UNDER THE FINGERNAIL OF ONE OF THE  
9 VICTIMS, THAT WOULD BE FAR MORE IMPORTANT THAN SOME EXHIBIT  
10 THAT WAS FOUND IN THE CLOSET. IN OTHER WORDS, I THINK THAT  
11 THE APPROACH IN THAT SITUATION WOULD BE HANDLING THE  
12 STRUCTURE OF THOSE EXHIBITS WHICH WERE GOING TO BE  
13 DESTROYED ON A FACT SPECIFIC BASIS IN CONTEXT TO WHICH THE  
14 EXHIBIT WAS DISCOVERED OR FOUND--WHERE IT WAS FOUND.

15 AND THAT IS JUST A SUGGESTION. NOW, HAVING SAID THAT,  
16 THAT IS THE WAY THAT I THINK I WOULD APPROACH THE ACTUAL  
17 TESTING, AS IT WERE, TAKING INTO ACCOUNT CONCERNS OF BOTH THE  
18 GOVERNMENT AND THE DEFENSE. THERE IS A SEPARATE PROBLEM  
19 OTHER THAN THE TESTING. THERE IS A SEPARATE AND DISTINCT  
20 PROBLEM IN THAT, AND THAT IS THAT THE EXHIBITS ARE IN THE  
21 CONTROL OF THE UNITED STATES GOVERNMENT, BECAUSE AFTER ALL,  
22 THEY HAVE RETAINED THEM AND IT IS THE EVIDENCE THAT THEY  
23 ACQUIRED DURING THE COURSE OF THE INVESTIGATION.

24 NOW, THE EXHIBITS, OF COURSE, ARE GOING TO HAVE TO BE  
25 INVENTORIED AND DIVISIBILITY ASSESSMENTS MADE, THOSE ITEMS

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1 THAT PRECEDE THE TESTING PROTOCOL WE JUST DISCUSSED. I AM  
2 NOT SURE AS TO HOW WE SHOULD APPROACH THAT. IT SEEMS TO ME  
3 THAT THE UNITED STATES--THAT THE PETITIONER'S INTEREST MIGHT  
4 BE SATISFIED IF THE UNITED STATES WERE TO INVENTORY--UNPACK  
5 AND INVENTORY AND MOUNT THE EXHIBITS ON SLIDES, ET CETERA,  
6 AND DURING THAT PROCESS HAVE THE PROCESSED PHOTOGRAPHED--IN  
7 OTHER WORD, PHOTOGRAPH THE UNPACKAGING AND THEN PHOTOGRAPH  
8 THE UNSEALING AND THE PLACEMENT ON SLIDES, AND MICROPHOTO-  
9 GRAPH THOSE--THE EXHIBITS AFTER THAT WAS DONE WITHOUT THE  
10 PRESENCE OF THE PETITIONER'S EXPERTS IN THE FBI  
11 LABORATORIES.

12 I AM NOT AT ALL COMFORTABLE IN INTRODUCING OUTSIDERS  
13 TO THE FBI LABORATORIES FOR A NUMBER OF REASONS: THERE IS A  
14 QUESTION OF CONTAMINATION. THERE IS A QUESTION OF WHERE THE  
15 ENVELOPE STOPS VIS-A-VIS ALL THE FURTHER TESTING TO BE DONE  
16 IN THAT LAB. AND I THINK THAT IF THE LABORATORY--IF THE  
17 UNPACKAGING, UNSEALING AND PLACEMENT ON SLIDES AND SO ON IS  
18 PHOTOGRAPHED AND THE PHOTOGRAPHS OF THAT PROCESS AND A  
19 DESCRIPTION OF THAT PROTOCOL IS FURNISHED TO THE DEFENSE,  
20 THAT THAT SHOULD BE ADEQUATE.

21 AND IT WOULD BE ONLY AT THAT POINT IN TIME THAT THE  
22 DEFENSE AND THE GOVERNMENT WOULD BE ABLE TO GET TOGETHER AND  
23 TRY TO MAKE AN ASSESSMENT OF THE DIVISIBILITY ISSUE PER  
24 EXHIBIT, PER EXHIBIT, WHICH WOULD THEN RAISE THE ISSUE AS  
25 TO--WOULD IDENTIFY THE NON-DIVISIBILITY EXHIBITS THAT WOULD

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1 HAVE TO BE SUBJECT TO FURTHER PROCEDURE AS WE DESCRIBED.

2 I ASSESSED THE--AND I UNDERSTAND THE CONCERNS OF THE  
3 PETITIONER VIS-A-VIS THE UNPACKAGING AND UNSEALING. HOWEVER,  
4 I THINK THAT THAT IS A SITUATION WHERE THE INTEREST OF THE  
5 GOVERNMENT IN THE INTEGRITY OF ITS LABORATORY, ET CETERA IS  
6 BEYOND THE INTEREST OF THIS PARTICULAR CASE, AND IT WOULD BE  
7 IN THE PUBLIC INTEREST THAT THAT INTEGRITY BE MAINTAINED.

8 OF COURSE, IT IS THE OBLIGATION OF THE GOVERNMENT TO  
9 TURN OVER ANY EXCULPATORY MATERIAL, AND I AM SURE THAT THEY  
10 WILL DO THAT. NOW, COUNSEL, THE OTHER ASPECT--THE PETITIONER  
11 SUGGESTED THAT THE GOVERNMENT, THOUGH, SHOULD BE OBLIGED TO  
12 FURNISH IT WITH CERTAIN EQUIPMENT. I DON'T THINK SO. THIS  
13 IS AN ADVERSARIAL SITUATION, AND I DON'T SEE WHERE THE  
14 GOVERNMENT IS REQUIRED TO UNDERTAKE DEFENSE OF THE PERSON IT  
15 IS PROSECUTING--EXCULPATORY MATERIAL IS ONE THING. PROVIDING  
16 IT WITH EQUIPMENT AND MATERIAL AND EXPENDITURES, IT SEEMS TO  
17 ME, IS A DIFFERENT MATTER.

18 THAT DOESN'T MEAN THAT THE DEFENSE CAN'T--THAT DOESN'T  
19 NECESSARILY PRECLUDE THE EQUIPMENT THAT THE PETITIONER  
20 DESIRES TO HAVE. I DON'T KNOW--I DON'T KNOW ENOUGH ABOUT IT  
21 SCIENTIFICALLY TO KNOW WHAT THAT IS, AND I DON'T KNOW THE  
22 EXTENT TO WHICH THE EXPENSE WOULD BE UNDULY BURDENSOME OR  
23 ANYTHING ELSE. WE MIGHT HAVE TO APPROACH THOSE ISSUES ONCE  
24 THEY HAVE BEEN APPROPRIATELY IDENTIFIED.

25 BUT AT THE OUTSET, AT LEAST, I DON'T SEE ANY CARTE

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1 BLANCHE ACCESS TO GOVERNMENT EQUIPMENT FOR PURPOSES OF THIS  
2 TESTING. NOW--EXCUSE ME. ONE OTHER FACET: I WAS READING  
3 WITH INTEREST THE RECENT BRIEFS FILED BY THE GOVERNMENT THAT  
4 HAD TO DO WITH AN HISTORICAL EXPLANATION OF THE LAB NOTES AND  
5 ITS RECONCILIATION OF APPARENT, NOT INCONSISTENCIES, BUT THE  
6 METHODOLOGY USED BY THE ORIGINAL CID INVESTIGATORS IN THE  
7 CASE.

8 I AM REFERRING TO THE EXHIBITS REFERRED TO IN THE  
9 EXAMINER'S NOTES. IT SEEMS TO ME THE GOVERNMENT HAS PRETTY  
10 WELL RECONCILED ALL OF THOSE ISSUES. DO YOU ALL AGREE WITH  
11 ME OR DISAGREE WITH THAT, COUNSEL? ANYBODY KNOW?

12 MR. CORMIER: YOUR HONOR, MY NAME IS BILL  
13 CORMIER. WE HAVE NEVER SEEN THE EXHIBITS, SO WE DON'T KNOW  
14 EXACTLY WHAT IS IN EACH EXHIBIT. WE KNOW BASED ON WHAT MR.  
15 MURTAUGH HAS SAID--HE HAS IDENTIFIED SLIDES.

16 THE COURT: IT SEEMS TO ME THAT THAT--I  
17 KNOW YOU HAVEN'T SEEN THE EXHIBITS. BUT IT SEEMS TO ME THAT  
18 ANY CONFUSION THAT MAY HAVE EXISTED WITH REFERENCE TO THE  
19 EXAMINER'S NOTES, THE METHODOLOGY USED BY THE EXAMINER, HAVE  
20 BEEN RESOLVED PRETTY MUCH. I ASSUME THAT IS SOMETHING YOU  
21 ALL CAN DISCUSS.

22 MR. CORMIER: I AM NOT SURE I UNDERSTAND YOUR  
23 QUESTION, YOUR HONOR.

24 THE COURT: WELL, I WOULD HAVE TO GO BACK  
25 IN THE BRIEF. BUT AS I UNDERSTAND IT, MISS GLISSON--SHE HAD

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1 HER OWN INTERNAL RECORD SCHEME WHICH FACIALLY COULD NOT BE  
2 RECONCILED WITH VARIOUS EXHIBIT NUMBERS, POSSIBLY CERTAIN  
3 LABORATORY REFERENCES. AND I UNDERSTAND THAT THE BUREAU AND  
4 THE GOVERNMENT HAVE BEEN ABLE TO UNRAVEL THAT--THOSE  
5 REFERENCES SO THAT THEY MADE SENSE HISTORICALLY IN THE CON-  
6 TEXT OF THE NOTES THAT WERE MADE.

7 AND I DON'T KNOW WHETHER YOU WILL ACCEPT THAT  
8 EXPLANATION OR NOT. I DON'T KNOW WHETHER YOU HAVE HAD A  
9 CHANCE TO DISCUSS THAT.

10 MR. CORMIER: WITHOUT SEEING THE EXHIBITS,  
11 YOUR HONOR, I DON'T KNOW THAT WE CAN DO THAT. BUT I  
12 UNDERSTAND THAT MISS GLISSON DID HAVE A DIFFERENT NUMBERING  
13 SYSTEM.

14 THE COURT: WELL, FACIALLY, AT LEAST, THEY  
15 GAVE YOU AN EXPLANATION?

16 MR. CORMIER: THEY HAVE GIVEN US AN  
17 EXPLANATION.

18 THE COURT: AND AFTER YOU HAVE A CHANCE TO  
19 EXAMINE THE EXHIBITS, YOU CAN SEE WHETHER THAT IS CORRECT OR  
20 NOT; EVALUATE WHAT THEY HAVE COME UP WITH.

21 MR. CORMIER: AND THE OTHER THING I JUST  
22 MENTIONED, YOUR HONOR, AND MAYBE YOU WILL GET TO THIS: I  
23 DON'T KNOW TO WHAT EXTENT, IF ANY, ANY OF THESE EXHIBITS HAVE  
24 RESIDUAL ITEMS IN THEM.

25 THE COURT: WELL, I THINK YOU ARE GOING TO

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1 HAVE TO--YOU KNOW, THE GOVERNMENT IS GOING TO PHOTOGRAPH THEM  
2 WHILE THEY ARE BEING UNPACKAGED AND THEY WILL PHOTOGRAPH THEM  
3 WHILE THEY ARE UNSEALED, AND THEY ARE PHOTOGRAPH THEM WHILE  
4 THEY ARE BEING MOUNTED BY SLIDES, AND YOU ARE GOING TO GET A  
5 COPY OF THEIR REPORT. AND YOU ARE GOING TO GET A COPY OF ALL  
6 THE PHOTOGRAPHS.

7 MR. CORMIER: OUR CONCERN ON THAT, YOUR  
8 HONOR, IS THAT SOME OF THESE ITEMS ARE--AND I AM NOT SAYING  
9 THAT ANYBODY IN THE FBI WOULD INTENTIONALLY DO ANYTHING WRONG  
10 WITH RESPECT TO EXHIBITS--VERY, VERY MINUTE ITEMS, SUCH AS  
11 THESE BLOOD STAINS.

12 THE COURT: I UNDERSTAND. AND MY  
13 DIRECTION TO THE GOVERNMENT WOULD CERTAINLY BE TO HANDLE  
14 THEM IN THE MOST POSSIBLE METICULOUS MANNER. BUT I HAVE  
15 ALREADY MADE UP MY MIND THAT I THINK THE INTEGRITY OF THE FBI  
16 LAB AS IT RELATES TO THE THOUSANDS AND THOUSANDS OF CASE UPON  
17 WHICH IT WORKS IS SUCH THAT I DO NOT INTEND TO PERMIT THE  
18 DEFENSE EXPERTS TO GO IN THERE. I INTEND TO HAVE THE  
19 GOVERNMENT PHOTOGRAPH EVERYTHING AND MAKE A RECORD OF IT AND  
20 ALL OF THAT BE SUPPLIED TO YOU.

21 BUT THE PHYSICAL ENTRANCE WILL NOT OCCUR. BUT NOW, AS  
22 REGARDS YOUR CONCERNS ABOUT TESTING, I TOLD YOU HOW I INTEND  
23 TO HANDLE THAT, AND THAT IS HAVE BOTH SIDES PRESENT IN AN  
24 INDEPENDENT LAB WHEN THE TESTING IS DONE. IT SEEMS TO ME  
25 THAT IS ABOUT AS--THAT IS THE BEST I CAN COME UP WITH ON HOW

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1 TO HANDLE THE CONCERNS OF BOTH SIDES. YES, SIR?

2 MR. SCHECK: MY NAME IS BARRY SCHECK, YOUR  
3 HONOR. THANK YOU FOR HEARING ME TODAY. THE SOLUTION---

4 THE COURT: I HAVE JUST GOTTEN THE MATERIAL  
5 THAT YOU SENT ME. I GOT IT LAST FRIDAY, AND I HAVE JUST  
6 GLANCED AT IT. I HAVEN'T HAD A CHANCE TO READ IT.

7 MR. SCHECK: YES, SIR. WHAT THIS IS, YOUR  
8 HONOR, IS RECOMMENDATIONS FOR HANDLING APPLICATIONS FOR---

9 THE COURT: I SAW IT. I GLANCED AT IT. I  
10 HAVEN'T HAD A CHANCE TO---

11 MR. SCHECK: (INTERPOSING) I WILL MAKE SOME  
12 SPECIFIC REFERENCE TO IT. I THINK WHAT IS INTERESTING IS  
13 THAT THE COURT'S SOLUTION TO THIS REFLECTS SUGGESTIONS MADE  
14 IN THIS DOCUMENT.

15 THE COURT: WELL, I HAVE READ SOME OF IT,  
16 AND I MAY HAVE GOTTEN SOME OF MY IDEAS FROM THERE.

17 MR. SCHECK: AND IT ACTUALLY REFLECTS MY  
18 EXPERIENCE, BECAUSE I HAVE DONE SO MANY OF THESE CASES.  
19 LOOKING BACK AT OLD CASES, RE-EXAMINING THEM BOTH FROM THE  
20 POINT OF VIEW OF DNA TESTING, WHICH PROVES SOMEBODY INNOCENT,  
21 AND ALSO WORKING IN BEHALF OF THE POLICE COMMISSIONER FOR THE  
22 CITY OF NEW YORK, LOOKING AT OLD UNSOLVED CASES THERE,  
23 HOMICIDES, RAPES, ET CETERA, AND FOR OTHER PROSECUTORIAL  
24 AGENCIES.

25 ONE OF THE SUGGESTIONS, IF I MIGHT MAKE TO THE COURT

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1 IN TERMS OF THE WAY TO SET UP A PROTOCOL, BECAUSE THAT IS A  
2 SOLUTION THAT HAS BEEN DONE IN A NUMBER OF CASES JUST LIKE  
3 THIS IN CANADA, THE BILGARDE (PHONETIC) CASE, WHICH WAS A 30-  
4 YEAR OLD CASE, AND A NUMBER OF THE OTHERS. ONE THING I MIGHT  
5 SUGGEST TO THE COURT, AND IT EVEN GOES TO THE ISSUE OF THE  
6 INVENTORYING AND UNPACKAGING, AND THAT IS THE POSSIBILITY OF  
7 THE COURT APPOINTING A SPECIAL MASTER.

8 THE COURT: WELL, I AM NOT SURE ABOUT THAT.  
9 THE GOVERNMENT IS RESPONSIBLE FOR THAT EVIDENCE. IT IS THE  
10 CUSTODIAN. IT IS RESPONSIBLE FOR ITS EXISTENCE. AND I THINK  
11 THAT IF--IT MAY BE THAT IT WOULD NOT OBJECT TO A SPECIAL  
12 MASTER BEING PRESENT WHILE THAT WAS DONE; I DON'T KNOW.

13 HOW DOES THE GOVERNMENT FEEL ABOUT THAT AS OPPOSED TO  
14 THE EXPERTS SIMPLY HAVING AN INDEPENDENT--POSSIBLY SOMEBODY  
15 FROM THE LAB WHO WAS GOING TO DO THE TESTING, BEING PRESENT  
16 WHILE THE MATERIAL WAS BEING UNPACKAGED?

17 MR. SCHECK: YOUR HONOR, IF I MAY AMPLIFY ON  
18 THAT A LITTLE BIT BEFORE THE GOVERNMENT DECIDES WHETHER TO GO  
19 ALONG WITH IT OR NOT?

20 THE COURT: SURE.

21 MR. SCHECK: AND EXPLAIN WHY WE THINK THAT  
22 IS IMPORTANT, IS THAT IN MY EXPERIENCE WITH THESE OLD CASES,  
23 WHAT HAS OCCURRED IS THAT IN THE COURSE OF INVENTORYING, WE  
24 ARE TALKING ABOUT, AS THE COURT APPRECIATES FROM WHAT YOU  
25 SAID BEFORE, THAT YOU MAY HAVE HAIR THAT HAS A LITTLE BLOOD

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1 CRUSTED AROUND IT, OR A FILE THAT MAY OR MAY NOT HAVE  
2 SOMETHING, AND IT IS NOT A QUESTION OF THE GOVERNMENT PEOPLE  
3 DOING ANYTHING DELIBERATELY WRONG IN ANY FASHION. BUT IT IS  
4 A QUESTION OF OBSERVATION AND BEING ABLE TO, WHEN THEY TAKE A  
5 HAIR OUT, FOR EXAMPLE, TO MOUNT IT ON A SLIDE, ARE THEY GOING  
6 TO SEE IT IF IT HAS BLOOD ON IT OR NOT; HOW THEY ARE GOING TO  
7 PRESERVE ALL THE PACKAGING AND EVERYTHING ELSE.

8 PICTURES ALONE, WHILE HELPFUL, MAY NOT TRULY DOCUMENT  
9 THE ENTIRE PROCESS, BECAUSE VERY OFTEN WHAT WE HAVE FOUND IN  
10 SOME OF THESE OLD CASES IS THAT THERE WAS A BLOOD STAIN A  
11 SEMEN STAIN, A STRAY HAIR, SOME DEBRIS WHICH PEOPLE HADN'T  
12 SEEN BEFORE, BECAUSE AT THE TIME THAT THE EVIDENCE WAS PUT  
13 TOGETHER IN THIS CASE, WE DIDN'T HAVE THIS TECHNOLOGY AND  
14 PEOPLE WEREN'T LOOKING FOR THESE THINGS.

15 WHAT I WOULD SUGGEST, YOUR HONOR, CONSISTENT WITH THE  
16 RECOMMENDATIONS THAT THE JUSTICE DEPARTMENT ITSELF HAS  
17 APPROVED IN THIS REPORT, BASED ON WHAT IS DONE BEFORE, IS  
18 THAT LET US SAY, PURSUANT TO THE COURT'S SUGGESTION, THAT A  
19 SPECIAL--AN INDEPENDENT LABORATORY IS APPOINTED FOR THIS  
20 PURPOSE, AND I CAN TELL YOU BASED ON MY EXPERIENCE THAT  
21 FORENSIC SCIENCE SERVICES OF GREAT BRITAIN MAY BE ONE OF THE  
22 LEADING LABORATORIES IN THE WORLD AND HAS BEEN USED FOR THIS  
23 PURPOSE.

24 THE CANADIAN TORONTO LABORATORY, ANOTHER GOVERNMENT  
25 LABORATORY, CAN BE USED FOR THIS PURPOSE. EVEN PERHAPS THE

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1 ARMED FORCES LABORATORY COULD BE USED FOR THIS PURPOSE. ALL  
2 THREE OF THOSE LABORATORIES WOULD BE ACCEPTABLE TO US FOR ALL  
3 GOVERNMENT AGENCIES. WHAT I WOULD SUGGEST IS THAT WE COULD  
4 GIVE THE GOVERNMENT THREE NAMES, FOUR NAMES, FIVE NAMES IF  
5 THEY WANT, OF PEOPLE THAT ARE TRAINED IN THIS AREA, WHO I  
6 HAVE WORKED WITH BEFORE IN MY CAPACITY BOTH AS SOMEBODY THAT  
7 WORKS WITH THE GOVERNMENT MAKING RECOMMENDATIONS ON THIS AND  
8 ON INSTANT CASES, AND SAY TO THEM, PICK ANY OF THESE FIVE  
9 PEOPLE WHO YOU HAVE WORKED WITH BEFORE.

10 THAT PERSON COULD ASSIST IN OBSERVING THE UNPACKING  
11 PROCEDURES AND DOCUMENT IT; MAYBE THE SAME PERSON THAT WOULD  
12 THEN TAKE IT TO THE LABORATORY TO ASSIST IN MAKING THE  
13 DIVISIBILITY DECISIONS. AND THAT PERSON COULD BE APPOINTED A  
14 SPECIAL MASTER BY THE COURT. AND MAYBE THAT IS ONE SOLUTION  
15 THAT IS EXACTLY ON TRACK WITH WHAT THE COURT IS PROPOSING.

16 THE COURT: WHAT DOES THE GOVERNMENT--WHAT  
17 IS YOUR VIEW ON IT?

18 MR. MURTAUGH: MAY I RESPOND, YOUR HONOR?

19 THE COURT: SURE.

20 MR. MURTAUGH: YOUR HONOR, LET ME INTRODUCE  
21 MYSELF. I AM BRIAN MURTAUGH, AND I WORK FOR THE DEPARTMENT  
22 OF JUSTICE. WITH ME IS MR. JOHN DEPUE, WHO ALSO WORKS FOR  
23 THE DEPARTMENT OF JUSTICE, AND OF COURSE, YOU KNOW MR.  
24 EVENSON. WE, BY THE WAY, ARE BOTH ALSO SPECIAL ASSISTANT  
25 UNITED STATES ATTORNEYS FOR THE EASTERN DISTRICT OF NORTH

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1 CAROLINA.

2 YOUR HONOR, IF I COULD ADDRESS MR. SCHECK'S POINTS AND  
3 SOME OF YOUR HONOR'S CONCERNS, AND THEN I THINK THERE ARE  
4 SOME FACTS THAT I NEED TO MAKE THE COURT AWARE OF SO THAT WE  
5 ARE ALL SINGING FROM THE SAME SHEET OF MUSIC? YOUR HONOR,  
6 WITH RESPECT TO THE RECOMMENDATIONS OF THE NATIONAL  
7 INSTITUTE OF JUSTICE, I BELIEVE MR. SCHECK HAS SENT TO THE  
8 COURT AND SENT TO COUNSEL A DRAFT, WHICH HE REPRESENTS HAS  
9 BEEN APPROVED BY THIS COMMITTEE.

10 BUT I WOULD JUST LIKE TO DRAW THE COURT'S ATTENTION  
11 THAT, FIRST OF ALL, IT HASN'T BEEN PUBLISHED. I HAVEN'T HAD  
12 A CHANCE TO STUDY IT.

13 THE COURT: NOR HAVE I.

14 MR. MURTAUGH: BUT I DID NOTICE THAT IT SAYS  
15 THAT THE POINTS OF YOUR OPINIONS CONTAINED WITHIN THIS  
16 DOCUMENT, TALKING ABOUT THE FIRST PAGE, OF THOSE OF THE  
17 AUTHORS AND DO NOT NECESSARILY REPRESENT OFFICIAL POSITIONS  
18 IN THE U.S. DEPARTMENT OF JUSTICE.

19 SO YOU KNOW, WE RESERVE THE RIGHT---

20 THE COURT: I HAVEN'T ACCEPTED IT. WHAT I  
21 AM GIVING YOU IS LARGELY OFF THE TOP OF MY HEAD.

22 MR. MURTAUGH: OKAY. YOUR HONOR, WITH RESPECT  
23 TO--LET ME ADDRESS, IF YOU WILL, THE ISSUE OF THE INVENTORY  
24 AND TELL YOU WHERE WE ARE BASICALLY. WE HAVE OPENED NO  
25 FILES; WE HAVE MOUNTED NOTHING ON SLIDES. WE HAVE

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1 PHOTOGRAPHED THE STUFF. IT WAS NOT SEALED. IT WAS AS IT WAS  
2 EITHER SENT LAST BACK TO THE LABORATORY OR IN SOME CASES THAT  
3 THE CLERK MAY RECALL ENTERED INTO EVIDENCE DURING THE TRIAL.

4 SO IN TERMS OF, IF I COULD, THE GLISSON POINT: WHAT  
5 WE HAVE GOT IS EITHER FILES THAT ARE NUMBERED ONE THROUGH 13  
6 THAT ARE--BEAR THE INITIALS OF THE AGENT WHO INTRODUCED THEM  
7 AT TRIAL, BENNY J. WALKER (PHONETIC), SCRATCHED ON THE  
8 BOTTOM. THOSE FILES HAVE LITTLE PIECES OF PAPER IN THEM  
9 WHICH PRECLUDE YOU FROM SEEING EVERYTHING THAT IS IN THE  
10 FILE. IT IS THOSE FILES THAT WE NEED TO FINISH THE INVENTORY  
11 ON TO BE SURE THAT THERE ISN'T ANY RESIDUAL BLOOD FLAKES.  
12 THERE ARE NO HAIRS IN THERE. I MEAN, THAT MUCH WE CAN SEE.

13 WE BELIEVE ALL THE BLOOD WAS CONSUMED IN ANALYSIS  
14 DURING THE PRIOR LABORATORY TESTING. SO THE FBI HAS BEEN  
15 HIGHLY SENSITIZED TO THIS POINT. THEY UNDERSTAND THE  
16 CONCERNS OF COUNSEL, AND THEY ARE GOING TO BE SUPER CAREFUL  
17 WHEN THEY INVENTORY THIS MATERIAL. AND THEY UNDERSTAND THAT  
18 THEY MAY WELL HAVE TO TESTIFY AT A LATER TIME. AND THEY ARE  
19 MORE THAN PREPARED, YOU KNOW, TO DO THAT IF IT BECOMES  
20 NECESSARY.

21 WITH RESPECT TO THE VIALS THAT CONTAIN OR ARE BELIEVED  
22 TO CONTAIN HAIRS, WE HAVE LOOKED AT ALL OF THOSE FILES. AND  
23 THEY HAVE NO PIECES OF PAPER IN THEM. SO YOU CAN SEE. AND  
24 THEY ARE TRANSPARENT PILL VIALS WE GOT FROM THE ARMY  
25 PHARMACY AT WOMACK ARMY HOSPITAL. THERE ARE NO HAIRS IN ANY

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1 OF THESE FILES. EVERYTHING THAT WAS IN THOSE FILES HAS BEEN  
2 MOUNTED ON A SLIDE AT SOME TIME BETWEEN 1970 AND 1991, EITHER  
3 IN THE COURSE OF ONE LABORATORY EXAMINATION OR ANOTHER.

4 SO WE ARE MORE THAN WILLING TO MAKE ALL OF THE FILMS,  
5 ALL OF THE SLIDES, AVAILABLE FOR DEFENSE INSPECTION SO THEY  
6 CAN RECONCILE THE--FOR EXAMPLE, THE GLISSON NUMBERING SYSTEM.  
7 AS I THINK YOUR HONOR WAS ALLUDING TO, GLISSON DIDN'T MARK  
8 THE BLOOD VIALS D-233, ET CETERA. AND I THINK WE HAVE  
9 EXPLAINED, USING HER NOTES, THAT THOSE "D" NUMBERS REFER TO  
10 THE SEROLOGICAL EXAMINATION RESULTS THAT ARE FOUND IN THE LAB  
11 REPORTS.

12 IN ANY EVENT, WE HAVE THE VIALS, WHICH WE BELIEVE ARE  
13 EMPTY, AND WE HAVE THE SLIDES UPON WHICH SHE MOUNTED ANY  
14 HAIRS THAT WERE IN THOSE VIALS WHEN SHE GOT THEM IN JULY,  
15 1970. ALL OF THAT STUFF IS AVAILABLE FOR DEFENSE INSPECTION.  
16 NOW, IN TERMS OF THE DIVISIBILITY ISSUE, WHAT WE HAVE  
17 PROPOSED--AND YOUR HONOR DOESN'T HAVE THIS, BUT I AM  
18 PREPARED--I SENT IT TO COUNSEL ON FRIDAY, AND IF I COULD  
19 TENDER TO THE CLERK WHAT I HAVE MARKED AS GOVERNMENT'S  
20 1209 WITH TODAY'S DATE?

21 THE COURT: CERTAINLY.  
22 (GOVERNMENT EXHIBIT NO. 1209 WAS MARKED FOR IDENTIFICATION.)

23 MR. MURTAUGH: AND THEY HAVE A COPY.

24 THE COURT: WELL, LET ME ASK YOU THIS--I AM  
25 SORRY. I COULDN'T RESIST HAVING READ THE FIRST PARAGRAPH.

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1 DON'T YOU THINK THE QUESTION AS TO DIVISIBILITY MIGHT BE BEST  
2 RESOLVED BY THE INDEPENDENT LABORATORY?

3 MR. MURTAUGH: WELL, YOUR HONOR---

4 THE COURT: I MEAN, YOU ARE GOING TO WANT  
5 TO KEEP--IT SEEMS TO ME THAT YOU ARE GOING TO WANT TO KEEP AS  
6 MUCH OF THIS AS YOU CAN.

7 MR. MURTAUGH: WELL, YOUR HONOR, IF I COULD  
8 ADDRESS THIS?

9 THE COURT: SURE.

10 MR. MURTAUGH: WHAT I THINK--WHAT I AM PROPOS-  
11 ING IN EFFECT IS THAT THE DEFENSE EXPERTS IN THEIR OWN  
12 FACILITY LOOK AT THE SLIDES; DON'T DO ANYTHING MORE THAN LOOK  
13 AT THEM, BECAUSE AS WE UNDERSTAND, FOR DIVISIBILITY DETERMI-  
14 NATION PURPOSES, THIS IS A MICROSCOPIC EXAMINATION, CERTAINLY  
15 AS FAR AS THE FBI IS CONCERNED. YOU LOOK TO SEE HOW MUCH OF  
16 THE HAIR YOU HAVE; DOES IT HAVE A ROOT; IS THERE TISSUE  
17 ATTACHED?

18 SO BASED ON VARIOUS FACTORS THAT EXPERTS MAY DISAGREE  
19 ON, EITHER IT IS DIVISIBLE OR IT IS NOT DIVISIBLE, OR IT MAY  
20 BE SUITABLE OR NOT SUITABLE FOR DNA TESTING. AND HERE I AM  
21 REFERRING PRIMARILY ABOUT MITOCHONDRIAL DNA TESTING. SO WE  
22 WOULD PROPOSE THAT THE DEFENSE HAVE A CHANCE TO LOOK AT THESE  
23 SLIDES, AND THE GOVERNMENT AND THE DEFENSE BOTH FILE WITH THE  
24 COURT THEIR--IF YOU WILL, THEIR INITIAL DIVISIBILITY  
25 DETERMINATION.

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1           AND I BELIEVE SOME OF THE HAIRS, IT WILL BE AGREED  
2 UPON, ARE SIMPLY NOT DIVISIBLE, AND THEN WE DO GET INTO THE  
3 ISSUE OF IF THERE IS ONLY ENOUGH FOR ONE TEST, WHO DOES IT.  
4 BUT I DON'T THINK THAT IS SOMETHING THAT HAS TO BE DECIDED  
5 TODAY. THERE MAY BE OTHER HAIRS THAT WE AGREE THEY ARE  
6 DIVISIBLE, SO AT THAT POINT WE WOULD SEEK THE COURT'S  
7 PERMISSION TO CUT OFF A PIECE AND GIVE IT TO THE DEFENSE AND  
8 THEY CAN TAKE IT AND HAVE IT TESTED WHEREVER THEY CHOOSE.

9           WE DON'T BELIEVE THAT IT IS NECESSARY, CERTAINLY AT  
10 THIS JUNCTURE, TO GO OUTSIDE THE UNITED STATES TO FIND A  
11 COMPETENT LABORATORY. AND I WOULD ALSO MAKE THE PROFFER--AND  
12 I HAVE GIVEN THE DEFENSE A COPY OF GOVERNMENT'S 1204 FOR  
13 IDENTIFICATION, IF I MAY APPROACH THE CLERK?

14           THE COURT:                                   CERTAINLY.  
15 (GOVERNMENT EXHIBIT NO. 1204 WAS MARKED FOR IDENTIFICATION.)

16           MR. MURTAUGH:                               IT IS THE CERTIFICATION OF  
17 ACCREDITATION FROM THE AMERICAN SOCIETY OF CRIME LABORATORY  
18 DIRECTORS FOR THE FBI LABORATORY.

19           THE COURT:                                 ALL RIGHT, SIR.

20           MR. MURTAUGH:                             AND THE POINT OF THAT, YOUR  
21 HONOR, IS THAT THEY ARE ACCREDITED BY THIS INDEPENDENT BODY  
22 FOR NOT ONLY TRACE EVIDENCE DETECTION OR EXAMINATION, BUT  
23 ALSO DNA ANALYSIS. AND SO WE WOULD--I GUESS IN THE BEST OF  
24 ALL POSSIBLE WORLDS, THERE WOULD BE ENOUGH SAMPLE FOR THREE  
25 DIFFERENT BODIES TO TEST EACH SAMPLE. I DON'T BELIEVE THAT

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1 IS GOING TO BE THE CASE WITH EACH HAIR.

2 SO WE WOULD PROPOSE INITIALLY THAT THE DEFENSE HAVE A  
3 CHANCE TO TAKE A LOOK AT THE THINGS IN THEIR OWN LABORATORY  
4 USING THEIR OWN MICROSCOPES, WHATEVER, FOR THE PERIOD OF TIME  
5 THAT THEY HAVE REQUESTED, WHICH I THINK IS 50 DAYS. IT MAY  
6 NOT TAKE THAT LONG, BUT IF THAT IS WHAT THEY WANT, WE DON'T  
7 HAVE A PROBLEM WITH IT.

8 SO WE DON'T BELIEVE IT IS NECESSARY TO HAVE A SPECIAL  
9 MASTER APPOINTED. WE ARE MINDFUL THAT THIS IS THE  
10 GOVERNMENT'S EVIDENCE; IN SOME INSTANCES IT WAS INTRODUCED IN  
11 EVIDENCE AT TRIAL. IN AT LEAST ONE INSTANCE, AND YOUR HONOR  
12 MENTIONED PRIORITIZATION, THERE WAS A HAIR THAT WE BELIEVE  
13 COULD FURTHER INCULPATE THE DEFENDANT IF IT TURNED OUT TO BE  
14 HIS.

15 THE COURT: THAT IS THE GAMBLE HE TAKES.

16 MR. MURTAUGH: THAT IS RIGHT. SO THERE WILL  
17 BE, IF YOU WILL, A PRIORITY OF, YOU KNOW, WHICH HAIR IS MORE  
18 PROBATIVE THAN NOT. BUT WE THINK THAT THIS CAN BE DONE WITH-  
19 OUT A SPECIAL MASTER. AND I HAVE TO INFORM THE COURT THAT  
20 THIS IS AN INSTITUTIONAL THING ON BEHALF OF THE FBI. IT HAS  
21 NOTHING TO DO WITH THIS PARTICULAR CASE. BUT THEY CANNOT,  
22 YOU KNOW, ESTABLISH A PRECEDENT.

23 THE COURT: WELL, I PROTECTED YOU ON THAT  
24 ASPECT.

25 MR. MURTAUGH: I HAD BETTER QUIT WHILE I AM

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1 AHEAD ON THAT ONE.

2 THE COURT: I THINK SO, BECAUSE WHAT I  
3 SEE--THE ADVANTAGE THAT I SEE OF GOING TO AN INDEPENDENT LAB  
4 AT THE OUTSET, ONCE YOU HAVE MADE YOUR INVENTORY--YOU HAVE  
5 GOT IT. YOU HAVE GOT YOUR INVENTORY. YOU HAVE GOT A RECORD.  
6 YOU HAVE MADE PHOTOGRAPHS. THEY HAVE GOT A RECORD OF THAT.  
7 IT SEEMS TO ME THAT THE ADVANTAGE OF GOING TO THE INDEPENDENT  
8 LABORATORY AT THAT POINT IS TWOFOLD: ONE, IT IS--FROM THE  
9 STANDPOINT OF CONCERNS OF EACH SIDE BEING PRESENT WHEN THE  
10 LAB DOES ITS TESTING, YOU HAVE ALREADY GOT PERSONS WHO ARE  
11 GOING TO DO THE TESTING. YOU HAVE GOT SOMETHING OF A  
12 PROTOCOL IN PLACE, IF YOU WILL, AS TO HOW YOU ARE GOING TO  
13 DEAL WITH IT.

14 AND NUMBER TWO, THE VERY ISSUE OF DIVISIBILITY. IT  
15 MAY BE--IF IT IS APPARENT TO BOTH SIDES, THAT IS GREAT. BUT  
16 WHAT HAPPENS WHEN IT IS NOT? EXCUSE ME. AND THERE IS ONE  
17 OTHER CONCERN THAT I HAVE, AND THAT IS--AGAIN, I AM BEING  
18 REDUNDANT. I AM NOT CONCERNED JUST WITH THE DIVISIBILITY  
19 VIS-A-VIS THE GOVERNMENT AND THE DEFENDANT IN THIS CASE. IN  
20 OTHER WORDS, MY VIEW OF IT IS THAT AN INDEPENDENT LAB SHOULD  
21 EXAMINE--SHOULD TAKE WHAT IT FEELS IS DIVISIBLE; TAKE THE  
22 SMALLEST AMOUNT POSSIBLE, AND THE REST OF IT BEING RETURNED  
23 IMMEDIATELY TO THE GOVERNMENT.

24 AND THEN THE TESTING OF THAT ITEM DONE--TESTING DONE  
25 WITH BOTH SIDES PRESENT, AND THAT WAY YOU WOULD PRESERVE AS

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1 MUCH OF THE EXHIBIT AS POSSIBLE. AND YOU HAD AS MUCH OF A  
2 MUTUAL GROUND SUBJECT TO OBSERVATION UPON WHICH THE TESTING  
3 HAS OCCURRED. NOW, I DON'T KNOW; I GUESS THE GOVERNMENT  
4 COULD EITHER APPOINT THE LAB ON ITS OWN, OR SEE IF YOU ALL  
5 CAN GET TOGETHER AND AGREE ON ONE. BUT THERE IS ANOTHER  
6 ASPECT TO THAT, AND THAT IS THE FINANCES, OF WHO IS GOING TO  
7 PAY FOR IT.

8 AND I DON'T THINK THAT THE GOVERNMENT AT THIS POINT--  
9 THIS IS A HABEAS CASE. THE PROSECUTION IS OVER, AND I DON'T  
10 THINK THE GOVERNMENT OUGHT TO NECESSARILY CARRY THE LOAD OF  
11 PAYING FOR THIS INDEPENDENT LAB. NOW, IT MAY BE WHEN YOU GET  
12 OVER TO THE INDEPENDENT LAB, AND IT FIGURES OUT WHAT IT HAS  
13 GOT, THE DEFENSE WILL BE ABLE TO PRIORITIZE ITS TESTING TO  
14 ACCOMMODATE ITS FINANCIAL SITUATION INSOFAR AS POSSIBLE.

15 BUT FOR EXAMPLE, LET'S ASSUME WE WENT TO THE LAB--MR.  
16 SCHECK MENTIONED GREAT BRITAIN OR CANADA OR WHATEVER. THAT  
17 IS GOING TO BE EXPENSIVE. AND I DON'T KNOW ANYTHING ABOUT  
18 THE PETITIONER'S FINANCES OR WHERE ITS FUNDS COME FROM OR WHO  
19 PAYS ITS LAWYERS, AND WHAT IS AVAILABLE TO HIM. I JUST  
20 HAVEN'T ANY IDEA. IF YOU CAN ANSWER THAT, I WOULD LIKE TO  
21 KNOW.

22 MR. SCHECK: WELL, I CAN ANSWER THE LAWYER  
23 QUESTION. IT IS ZERO.

24 THE COURT: WELL, YOU HAVE MY DEEPEST  
25 SYMPATHY. I REMEMBER PRACTICING ABOUT 25 YEARS, OR PRETTY

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1 CLOSE TO THAT.

2 MR. SCHECK: ONE OF THE THINGS I WOULD POINT  
3 OUT: THE COURT'S CONCERN IS ADDRESSED IN OUR RECOMMENDATIONS  
4 AT PAGE 74 IN TERMS OF PICKING A LABORATORY. THERE IS A  
5 LITTLE SECTION THERE CONCERNING WHICH LABORATORIES BE PICKED  
6 BY A COURT OR OTHERS FOR PURPOSES OF THIS KIND OF INDEPENDENT  
7 TESTING WHEN YOU HIT A DIVISIBILITY PROBLEM, BECAUSE  
8 ULTIMATELY THERE IS GOING TO HAVE TO BE A TEST. AND IT IS  
9 RECOMMENDED THAT IT BE A LABORATORY THAT PERMITS OUTSIDE  
10 OBSERVERS, BECAUSE I SHOULD INFORM THE COURT, THIS ISSUE HAS  
11 ARISEN BEFORE WITH RESPECT TO THE FBI LAB, NEVER IN THE  
12 CONTEXT OF BEING PRESENT TO OBSERVE THE INVENTORYING.

13 FRANKLY, THAT IS A NEW QUESTION, AND I MUST SHARE WITH  
14 THE COURT THAT I HAVE BEEN IN THE FBI LAB ON DNA CASES AND  
15 BEEN PRESENT WHEN THE RESULTS OF VARIOUS DIFFERENT  
16 VALIDATION EXPERIMENTS AND DATA BASES HAVE BEEN INVENTORIED  
17 IN MY PRESENCE. BUT LET'S PUT THAT ASIDE FOR A MINUTE. THE  
18 TESTING ISSUE IS WHERE THEY HAVE DRAWN THE LINE. THEY DON'T  
19 WANT ANYBODY IN THERE WHEN THEY PERFORM THE TESTS.

20 THERE ARE SOME STATES LIKE COLORADO AND CALIFORNIA  
21 THAT ACTUALLY HAVE PROVISIONS IN THEIR LAW THAT SAY THE  
22 DEFENSE HAS A RIGHT TO BE PRESENT WHEN GOVERNMENT TESTING IS  
23 GOING ON. SO THE FBI CAN'T LITERALLY DO CASES IN THOSE  
24 JURISDICTIONS, OR CAN ONLY DO A LIMITED AMOUNT.

25 THE COURT: I THINK I HAVE RESOLVED THAT

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1 ISSUE PRETTY MUCH IN MY MIND.

2 MR. SCHECK: I UNDERSTAND. I UNDERSTAND  
3 THAT YOU HAVE. BUT ON PAGE 74, THAT IS ONE REASON WHY I  
4 THINK THE COURT IS WISE TO PICK AN INDEPENDENT LAB. NOW, ON  
5 THE ISSUE OF FUNDING, IT DOES SEEM TO ME THAT BECAUSE OF THE  
6 GOVERNMENT'S VIEW WITH RESPECT TO WHAT CAN AND CANNOT BE DONE  
7 ON THE PREMISES OF THE FBI, AND TRAVEL AND THINGS OF THAT  
8 NATURE, THAT IT DOES UP THE ANTE IN TERMS OF EXPENSE. IN  
9 ADDITION, I THINK THAT THE COURT DOES HAVE POWER UNDER THE  
10 CRIMINAL JUSTICE ACT TO PROVIDE FOR SOME LIMITED FINANCING  
11 FOR THE PURPOSES OF SCIENTIFIC TESTS, PARTICULARLY IF THIS IS  
12 A LAB THAT IS AN INDEPENDENT LAB CHOSEN BY THE COURT FROM  
13 EVEN A GROUP OF THEM.

14 THE COURT: I WILL JUMP AHEAD OF YOU A  
15 LITTLE BIT. I THINK THE FIRST THING YOU NEED TO DO IS SEE IF  
16 YOU ALL CAN AGREE ON AN INDEPENDENT LAB, BECAUSE I AM GOING  
17 TO USE AN INDEPENDENT LAB. I CAN TELL YOU THAT RIGHT NOW.  
18 THERE IS NO OTHER WAY FOR THE COURT TO RESOLVE THE  
19 CONFLICTING INTERESTS OF THE PARTIES. YOU WANT YOUR EXPERTS  
20 THERE AND THE FBI DOESN'T WANT THEM IN THEIR LAB. IT SEEMS  
21 TO ME THAT--AND FURTHERMORE, THERE IS ANOTHER ASPECT ABOUT  
22 THAT THAT I THINK IS SIGNIFICANT, AND THAT IS THE FACT THAT  
23 IT WILL BE LEAST DESTRUCTIVE OF THE EXHIBITS BECAUSE YOU HAVE  
24 ONLY GOT ONE TESTING AGENCY, IF YOU WILL, AND THAT IS IN THE  
25 INTEREST OF THE GOVERNMENT VIS-A-VIS PROTECTION SUBSEQUENT

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1 PROSECUTIONS OR WHATEVER.

2 MR. SCHECK: YES. AND YOUR HONOR, ALSO YOU  
3 MENTIONED HISTORY. I AM A NEWCOMER TO THIS CASE.

4 THE COURT: WELL, WELCOME TO THE CLUB.  
5 JUDGE DUPREE TRIED THIS CASE. I JUST GOT IT A YEAR AGO.

6 MR. SCHECK: I AM A NEWCOMER, AND I AM MORE  
7 LIKE A TECHNICIAN THAN ANYTHING ELSE, BECAUSE I HAVE DONE  
8 THIS FOR THE GOVERNMENT AND DEFENSE AND THOUGHT ABOUT THESE  
9 KINDS OF PROTOCOLS. AND I WOULD STRONGLY URGE THE COURT TO  
10 SPEND SOME MONEY IN SUPPORT OF THIS INDEPENDENT LAB AND THE  
11 TESTING FOR THIS REASON: FOR THE SAKE OF HISTORY, SINCE THIS  
12 IS A CASE OF ENORMOUS NOTORIETY, AND FOR THE SAKE OF DOING IT  
13 RIGHT.

14 I ASSURE THE COURT THERE ARE TREMENDOUS DIFFERENCES  
15 BETWEEN THE BODY OF LABORATORIES. AND I AM NOT SAYING ANY-  
16 THING ABOUT THE FBI LABORATORY, WHICH I AM PLEASED HAS  
17 RECENTLY BEEN ACCREDITED. BUT IN TERMS OF THE INDEPENDENT  
18 LABS, I WOULD URGE THE COURT TO PICK A LAB THAT THE OTHER  
19 SIDE WOULD ACKNOWLEDGE IS AMONG THE LEADING AND THE VERY  
20 BEST IN THE WORLD.

21 THE COURT: NUMBER ONE, SEE IF YOU ALL CAN  
22 AGREE. I HAVE TOLD YOU--I MEAN, OLD JUDGE BOWMAN--I DON'T  
23 KNOW WHETHER ANY OF YOU REMEMBER HIM. HE USED TO GO UP THERE  
24 AND STICK HIS HAND OUT, "I HAVE RULED." AND I AM GOING TO GO  
25 WITH THE INDEPENDENT LAB, BECAUSE THAT WAY BOTH SIDES GET TO

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1 HAVE SOMEBODY THERE AS TO THE LEAST DESTRUCTIVE OF THE  
2 EXHIBITS.

3 MR. MURTAUGH: YOUR HONOR, I AM NOT GOING TO  
4 ARGUE WITH YOUR RULING, BUT IF I MAY INFORM THE COURT OF A  
5 COUPLE OF FACTS THAT I THINK YOU NEED TO BE AWARE OF? ONE,  
6 WE WOULD HOPE THAT IT WOULD BE AN ACCREDITED LAB THAT HAS THE  
7 CAPABILITY TO DO THE ALSO MITOCHONDRIAL DNA TESTING.

8 THE COURT: IF YOU ALL CAN'T AGREE, I WILL  
9 UNDERTAKE TO GET WHATEVER HELP I CAN IF NECESSARY TO KNOW  
10 THAT I CAN PICK A LAB MYSELF.

11 MR. MURTAUGH: AND YOUR HONOR, WE WOULD ALSO--  
12 I MEAN, WE HAVE HAD NO CONTACT WITH INDEPENDENT LABORATORIES  
13 IN THIS CASE. SO WE WOULD ALSO HOPE THAT THAT WOULD BE A  
14 QUALIFYING FACTOR FOR ANY INDEPENDENT LAB; THAT IT NOT HAVE  
15 HAD A PRIOR INVOLVEMENT---

16 THE COURT: ABSOLUTELY.

17 MR. MURTAUGH: ---IN THE CASE.

18 THE COURT: NO QUESTION ABOUT THAT.

19 MR. MURTAUGH: YOUR HONOR, DO I UNDERSTAND HOW  
20 IT WOULD WORK WITH THE INDEPENDENT LABORATORY--AND IF MY  
21 UNDERSTANDING IS CORRECT, I DON'T THINK WE HAVE ANY PROBLEM.  
22 THE INDEPENDENT LABORATORY WOULD MAKE A DIVISIBILITY ASSESS-  
23 MENT AND WOULD THEN EITHER SAY THIS IS DIVISIBLE INTO THREE  
24 PARTS, OR IT ISN'T. IF IT ISN'T, THEN COME BACK TO THE COURT  
25 AND WE WILL, YOU KNOW, TAKE IT FROM THERE---

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1 THE COURT: ACTUALLY THERE ARE TWO PARTS,  
2 BECAUSE YOU ARE GOING TO GET--IF IT IS DIVISIBLE, THEY ARE  
3 GOING TO DO THE TESTING, AND THE SECOND PART GOES BACK TO THE  
4 GOVERNMENT.

5 MR. MURTAUGH: TO THE GOVERNMENT, WHICH COULD  
6 DO ITS OWN TESTING IF IT SO CHOSE, I TAKE IT?

7 THE COURT: SURE.

8 MR. MURTAUGH: OKAY. THAT IS FINE. AS I SAY,  
9 I HOPE THAT THERE IS ENOUGH SAMPLE. I AM PRETTY SURE IT  
10 WON'T BE THE SITUATION WITH RESPECT TO EVERY CASE, BUT THE  
11 PRINCIPLE WE DON'T HAVE A PROBLEM WITH.

12 THE COURT: WELL, AS I HAVE INDICATED,  
13 WHERE THE EXHIBITS ARE GOING TO BE DESTROYED AND THERE IS  
14 ONLY ENOUGH FOR ONE TEST, THEN I WOULD EXPECT THE PETITIONER  
15 TO INDICATE--TO MAKE A PETITION TO THE COURT AND ASK THE  
16 COURT TO RULE ON WHAT SHOULD BE DONE; GET AUTHORITY TO  
17 CONDUCT THE TEST OF THAT PARTICULAR ITEM. BUT OBVIOUSLY--AND  
18 AT THAT PARTICULAR POINT IN TIME, I WILL BE GLAD TO HEAR FROM  
19 EITHER SIDE AS TO WHY THEY THINK THIS PARTICULAR EXHIBIT IS  
20 SIGNIFICANT.

21 OBVIOUSLY, IF IT WAS FOUND, AS I THINK THE PETITIONER  
22 POINTED OUT IN ONE OF ITS BRIEFS--IF IT WAS FOUND UNDER THE  
23 FINGERNAILS OF A VICTIM, OR IN THE BED CLOTHES OF THE VICTIM  
24 OR SOMETHING OF THAT NATURE, COULD BE MORE SIGNIFICANT THAN  
25 SOMETHING THAT IS FOUND COMPLETELY ISOLATED IN ANOTHER

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1 LOCATION. AFTER ALL, AS IS ALWAYS THE CASE, THE GOVERNMENT  
2 IS CORRECT IN ITS ASSERTION THAT THE FACT THAT OTHER INDIVID-  
3 UALS'--EXEMPLARS FROM UNKNOWN INDIVIDUALS THAT WERE IN THE  
4 HOUSE, DOES NOT NECESSARILY PROVE INNOCENCE.

5 ON THE OTHER HAND, THE PETITIONER IS ALSO CORRECT IN  
6 THAT IF THE CIRCUMSTANCES AS IT RELATES TO THAT PARTICULAR  
7 EXHIBIT MAY BE SUCH THAT IT WOULD BE HIGHLY PROBATIVE OF--  
8 COULD BE PROBATIVE EITHER OF INCULPATORY OR EXCULPATORY  
9 ASPECT. IT JUST DEPENDS ON WHAT IS FOUND. BUT MY VIEW ON  
10 THAT--AND THE REASON I RAISED THAT ISSUE IS ONLY THIS: I  
11 THINK THE PUBLIC INTEREST IS SUCH THAT WHERE AN EXHIBIT WHERE  
12 IT IS NOT NECESSARY TO DESTROY THE EXHIBIT, THAT IT SHOULD  
13 NOT BE DESTROYED.

14 IN OTHER WORDS, THE SIGNIFICANCE OF ITS PRIORITIZATION  
15 WOULD HAVE TO BE DEMONSTRATED TO THE COURT.

16 MR. MURTAUGH: YOUR HONOR, I THINK THERE IS NO  
17 DISAGREEMENT BETWEEN THE GOVERNMENT AND THE PETITIONER ON  
18 WHATEVER SAMPLE IS TESTED, THE TEST SAMPLE IN DNA TESTING,  
19 WHETHER IT IS NUCLEAR OR MITOCHONDRIAL WILL BE CONSUMED IN  
20 ANALYSIS.

21 THE COURT: THAT IS WHAT I UNDERSTAND.

22 MR. MURTAUGH: IF YOU HAVE A HAIR THAT IS A  
23 FOOT LONG, THE BUREAU WILL CUT OFF AN INCH AND TEST THAT AND  
24 SAVE THE REST. SO I DON'T THINK WE ARE DEALING WITH LONG  
25 HAIRS.

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1 THE COURT: I UNDERSTAND.

2 MR. MURTAUGH: YOUR HONOR, IF I UNDERSTAND

3 CORRECTLY, THEN, THE GOVERNMENT WOULD COMPLETE ITS  
4 INVENTORY--IF YOU WILL, LET GO WITH A BLOOD ISSUE, WHICH IS  
5 THE VIALS WITH THE LITTLE PIECES OF PAPER IN THEM--AND  
6 SEGREGATE OUT ANYTHING THEY FIND AND REPORT BACK TO THE  
7 COURT?

8 THE COURT: YES. I THINK THE PROGRAM--THE  
9 PROCESS SHOULD BE PHOTOGRAPHED.

10 MR. MURTAUGH: YES.

11 THE COURT: AND COPIES MADE AVAILABLE TO  
12 PETITIONER AND ALSO OBVIOUSLY WHATEVER REPORTS ARE GENERATED.

13 MR. MURTAUGH: WE WILL FILE IT WITH THE COURT.

14 THE COURT: SURE.

15 MR. MURTAUGH: ALL RIGHT, YOUR HONOR, AND THEN  
16 DO I UNDERSTAND THAT WE WOULD MAKE THE SLIDES OF THE HAIRS  
17 AVAILABLE TO THE DEFENSE FOR THEIR OWN DIVISIBILITY?

18 THE COURT: NO. I THINK I AM GOING TO HAVE  
19 IT GO STRAIGHT TO THE INDEPENDENT LAB, UNLESS YOU ALL WANT TO  
20 EXPLORE THAT FURTHER TOGETHER. BUT IT SEEMS TO ME YOU ARE  
21 GOING TO GET INTO ISSUES THAT ARISE. IT DEPENDS ON SOMEONE'S  
22 KNOWLEDGE OF THE DNA TESTING PROCESS. BUT I MEAN, IT IS  
23 CONCEIVABLE, AT LEAST, THAT CERTAIN EXPERTS WILL TAKE  
24 SOMETHING AS TO THIS ONE AND SOME WILL TAKE IT OF ANOTHER.

25 MR. MURTAUGH: AND YOUR HONOR, WE MAY WANT TO

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1 BE HEARD ON THAT ISSUE IF WE FEEL THAT THE HAIR OR WHATEVER  
2 IS NOT DIVISIBLE AND THE INDEPENDENT LAB FEELS THAT IT IS.

3 THE COURT: I WILL BE GLAD TO HEAR YOU.

4 MR. MURTAUGH: YOUR HONOR, I THINK WE HAVE AN  
5 AGREEMENT.

6 MR. SCHECK: YES. I THINK WE ARE CLOSE.  
7 FIRST OF ALL, WITH RESPECT TO THE INVENTORY ISSUE, WE WOULD  
8 LIKE TO AT LEAST HAVE THE OPPORTUNITY TO CONSULT WITH THE  
9 GOVERNMENT. IF I MAY GO INTO A LITTLE BIT ON THE NATURE OF  
10 THE TESTING?

11 THE COURT: SURE.

12 MR. SCHECK: BECAUSE, AS MR. MURTAUGH  
13 POINTED OUT, ON THE ONE HAND IT MAY BE THAT ALL THAT CAN BE  
14 DONE ARE MITOCHONDRIAL DNA TESTS ON HAIRS. AND YOUR HONOR,  
15 THIS IS TESTING WHERE WE ARE LOOKING AT THE MITOCHONDRIA IN A  
16 CELL. AND ALL OF OUR MITOCHONDRIAL DNA IS THE SAME AS OUR  
17 MOTHER'S. YOURS IS THE SAME AS YOUR MOTHER'S. IF YOU HAD  
18 ANY SIBLINGS, YOUR SIBLINGS' MITOCHONDRIAL DNA PATTERN WILL  
19 BE THE SAME AS YOURS AND YOUR MOTHER'S; OKAY?

20 THERE IS ALSO THE POSSIBILITY OF DOING NUCLEAR DNA  
21 TESTING. THAT IS THE MORE TRADITIONAL KIND WHERE YOU MIGHT  
22 BE ABLE TO GET IT OUT OF THE FLESHY PART OF THE ROOT OF THE  
23 HAIR, WHICH IS ONE OF THE POTENTIAL VERY PROBATIVE EXHIBITS  
24 HERE, PULLED HAIR FROM STRUGGLE, OR FROM BLOOD THAT MIGHT  
25 HAVE BEEN TAKEN FROM UNDER THE NAILS OF THE VICTIMS IN THIS

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1 CASE OR OTHER BLOOD THAT MIGHT BE FOUND.

2           THEY MIGHT BE ABLE TO DO NUCLEAR DNA TESTING AS TO  
3 THAT. AND INCIDENTALLY, ONE BENEFIT OF IT, AND I AM SURE THE  
4 GOVERNMENT WOULD AGREE WITH THIS, IS THE KIND OF NUCLEAR  
5 TESTING TO BE PERFORMED--WE HAVE TO FIND A LABORATORY THAT  
6 CAN DO THE MITOCHONDRIAL AND ALSO CAN DO WHAT IS KNOWN AS STR  
7 TESTING--THAT IS, THERE IS A TECHNIQUE NOW, NUCLEAR DNA  
8 TESTING TECHNIQUE, CALLED SHORT TANDEM REPEATS.

9           THIS IS THE SYSTEM THAT IS BEING USED EVERYWHERE IN  
10 THE UNITED STATES, ON THE FEDERAL LEVEL BY THE FBI LAB, AND  
11 ON THE STATE LEVEL, TO BUILD A NATIONAL DNA DATA BASE. I AM  
12 ONE OF THE PEOPLE THAT RUNS THE--THAT REGULATES THE DNA DATA  
13 BASE FOR THE STATE OF NEW YORK. AND THE VALUE OF THIS, YOUR  
14 HONOR, IS THAT TWO, THREE, FOUR YEARS FROM NOW WHEN WE BEGIN  
15 TO TYPE THE CONVICTED OFFENDERS IN THE STATE OF NORTH  
16 CAROLINA AND ALL ACROSS THE COUNTRY, AS WELL AS OLD UNSOLVED  
17 CASES, WE WILL HAVE STR DNA PATTERNS.

18           AND IT MAY VERY WELL BE, YOUR HONOR, IN THIS CASE THAT  
19 IF YOU CAN GET AN STR DNA PATTERN, A NUCLEAR PATTERN FROM  
20 BLOOD OR FROM THE FLESH OF THAT HAIR, AND YOU STICK IT INTO  
21 THE DNA DATA BASE, IT MAY COME BACK TO SOME CONVICTED  
22 OFFENDER, SOME KILLER, OR SERIAL KILLER, OR IT MAY COME BACK  
23 TO SOME OTHER UNSOLVED CRIME THAT WAS COMMITTED WHILE MR.  
24 MACDONALD WAS IN JAIL.

25           THE COURT:                           I THINK THAT IS FINE AS LONG AS

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1 THAT CAN BE DONE WITH PREJUDICE TO THE PARTIES IN THIS  
2 LITIGATION.

3 MR. SCHECK: WELL, FRANKLY, YOUR HONOR, THAT  
4 IS IN THE INTEREST OF ALL PARTIES ON THIS ISSUE.

5 THE COURT: WELL, I DON'T KNOW THAT MUCH  
6 ABOUT IT. ASSUMING THAT CAN BE DONE AS A COLLATERAL MATTER  
7 WITHOUT COMPROMISING THE TESTING THAT IS DONE IN THIS  
8 LITIGATION, THAT IS FINE.

9 MR. SCHECK: THAT IS THE TESTING, YOUR  
10 HONOR. I AM SURE THAT THE GOVERNMENT WILL AGREE TO THAT.

11 THE COURT: THAT IS FINE. IF YOU ALL AGREE  
12 TO IT, I AM SURE THE COURT WILL AGREE TO IT.

13 MR. SCHECK: IT WASN'T MENTIONED IN THE  
14 PAPERS, AND I JUST WANTED THE COURT TO APPRECIATE THE POWER  
15 OF THIS.

16 THE COURT: AGAIN, THE FIRST THING YOU HAVE  
17 GOT TO DO IS ADVISE ME WHETHER YOU ALL CAN AGREE ON AN  
18 INDEPENDENT LAB, AND IF YOU CAN, THEN I WILL UNDERTAKE TO  
19 APPOINT SOME EXPERT TO ADVISE ME.

20 MR. SCHECK: I WOULD URGE THAT FOR THIS  
21 REASON: MAYBE IT COULD BE THE SAME PERSON FOR THE INDEPEN-  
22 DENT LAB. AS FAR AS WE ARE CONCERNED, ONCE THE COURT  
23 DECIDES UPON THAT INDEPENDENT LAB, ALL RIGHT, AND IT IS  
24 DETERMINED THAT, LET'S SAY A HAIR IS NOT DIVISIBLE, HOPEFULLY  
25 IT IS A LAB OF SUCH STATUE OR AN INDIVIDUAL OF SUCH STATUE IN

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1 THE COMMUNITY THAT BOTH SIDES WOULD CERTAINLY AGREE THIS  
2 WOULD BE THE RIGHT PERSON AND THE RIGHT INSTITUTION.

3 THE COURT: WELL, I HOPE YOU ALL CAN AGREE  
4 ON THAT.

5 MR. SCHECK: IF WE CAN, AND I FEEL THAT WE  
6 SHOULD BE ABLE TO; I HAVE DONE IT IN THE PAST. THEN I JUST  
7 SAY LET THEM TEST IT RIGHT THERE.

8 THE COURT: THAT IS FINE.

9 MR. SCHECK: AND BE DONE WITH THIS. THAT  
10 WOULD BE ONE POINT. BUT I THINK THAT WHAT WE REALLY WOULD  
11 NEED IS TO MAKE THIS AGREEMENT ON THE INDEPENDENT LAB AND  
12 MAYBE AN ADVISER TO THE COURT FOR THIS REASON: IN THE COURSE  
13 OF DOING THE INVENTORY, I WANT TO MAKE SURE THAT THE PROTOCOL  
14 THAT THE GOVERNMENT IS USING IS ACCEPTABLE TO THE INDEPENDENT  
15 LAB AND EVERYONE ELSE.

16 LET ME GIVE YOU A VERY SPECIFIC REASON. IN THE PRO-  
17 CESS OF THE MITOCHONDRIAL DNA TESTING PROCEDURES, WHAT IS  
18 ORDINARILY DONE, AND VERY IMPORTANT IN THIS CASE, IS THEY  
19 TAKE A STRAND OF HAIR AND THEN THEY PERFORM LIKE WHAT THEY  
20 CALL A SONAROGRAPHY--A SONAROGRAM TYPE PROCEDURE WHICH  
21 LITERALLY TAKES SOUND AND IT VIBRATES THE HAIR, AND ANY  
22 ENCRUSTED  
23 BIOLOGICAL MATTER, COULD BE BLOOD OR WHATEVER THAT IS ON THAT  
24 HAIR--COULD BE SALIVA--THAT IS ON THAT HAIR, IS ESSENTIALLY  
25 CLEANED OFF IT.

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1           AND THEY TAKE THE DEBRIS FROM THAT HAIR AND IT IS  
2 SEPARATELY PUT ASIDE AND THEN A DNA TEST IS DONE ON THE  
3 DEBRIS FROM THE HAIR TO SEE IF YOU CAN GET A PATTERN ON THAT.  
4 THAT IS ALSO A PROTECTION AGAINST CONTAMINATION, OKAY? NOW,  
5 DEPENDING ON WHAT PROCEDURES ARE BEING DONE FOR MOUNTING THE  
6 HAIRS, THAT POTENTIALLY CAN COMPROMISE THAT PROCESS. AND I  
7 WANT TO MAKE SURE THAT EVERYBODY IS ON THE SAME PAGE AS TO  
8 THE SCIENTIFIC RELIABILITY OF THE PROTOCOL IN TERMS OF TAKING  
9 A HAIR THAT MAY BE IN A VIAL AND THEN MOUNTING IT.

10           MR. MURTAUGH:           YOUR HONOR, IF I MAY? I THINK  
11 I HAVE ANSWERED THAT QUESTION. WE WOULD BE HAPPY TO CONSIDER  
12 ANY PROTOCOLS THEY WOULD LIKE US TO TAKE A LOOK AT. WHAT I  
13 AM ADVISING THE COURT AND TELLING COUNSEL--I REPRESENT THIS  
14 TO THE BEST OF MY KNOWLEDGE AND BELIEF--WHATEVER WAS DONE  
15 WITH THOSE HAIRS, THEY ARE ALREADY ON SLIDES. SO WHETHER IT  
16 CONFORMS WITH WHATEVER PROTOCOL THEY WOULD LIKE TO SEE US  
17 FOLLOW IN THE FUTURE, I CAN'T MAKE THAT REPRESENTATION. THEY  
18 ARE ALREADY THERE.

19           THE COURT:           WELL, WHEN YOU MAKE YOUR  
20 INVENTORY, YOU CAN INDICATE THE STATUS OF PARTICULAR  
21 EXHIBITS.

22           MR. MURTAUGH:           YES, YOUR HONOR. WE CAN  
23 CERTAINLY DO THAT. OUR UNDERSTANDING WOULD BE THAT THE  
24 INDEPENDENT LABORATORY WOULD MAKE THE DIVISION. SO THEY ARE  
25 GOING TO HAVE TO GET THIS HAIR OFF THE SLIDE.

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1 THE COURT: THAT IS CORRECT.

2 MR. MURTAUGH: THERE MIGHT BE ALL KINDS OF  
3 PROBLEMS WITH THAT.

4 THE COURT: THAT IS CORRECT. I AM TRYING  
5 TO GET IT SOMEWHERE WHERE YOU ALL CAN LOOK AT EVERYTHING THAT  
6 IS DONE.

7 MR. MURTAUGH: YOUR HONOR, TO SORT OF CLOSE  
8 THE LOOP ON THIS, IF MR. SCHECK SUGGESTS AN ACCREDITED  
9 LABORATORY THAT CAN DO MITOCHONDRIAL AND NUCLEAR DNA AND IS  
10 NOT OTHERWISE INVOLVED WITH EITHER PARTY IN THIS CASE, WE ARE  
11 GOOD TO GO.

12 MR. SCHECK: I CAN SUGGEST LABORATORIES THAT  
13 WERE ACCREDITED FOR A MUCH LONGER PERIOD THAN THE FBI.

14 THE COURT: WELL, THAT IS FINE. YOU HAVE  
15 GOT YOUR PROBLEMS ALL WORKED OUT.

16 MR. SCHECK: ALSO, YOUR HONOR, ON THIS ISSUE  
17 OF EXEMPLARS.

18 THE COURT: ON THAT ISSUE, I WOULD LIKE TO  
19 APPROACH IN THE SAME FASHION, QUITE FRANKLY. IT SEEMS TO ME  
20 THAT THE EXEMPLARS AND THE EXHIBITS SHOULD BE TREATED THE  
21 SAME. I DON'T SEE--THE EXEMPLARS--I DON'T SEE ANY PROBLEMS  
22 WITH THE UNIVERSE EXEMPLARS. MAYBE YOU CAN EXPLAIN TO ME WHY  
23 THAT WOULD NOT BE POSSIBLE. BUT YOU KNOW, WHATEVER IS THERE;  
24 WHATEVER EXEMPLARS THE GOVERNMENT HAS, IT SEEMS TO ME THAT  
25 THEY SHOULD BE SUBMITTED TO THE LAB AT THE SAME TIME. AND

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1 THE LAB SHOULD BE ABLE TO MAKE THE DIVISIBILITY PROBLEMS  
2 VIS-A-VIS THE EXEMPLARS, FOR ALL I KNOW, BUT HAVE ALL THOSE  
3 MATTERS RESOLVED BY THE LAB.

4 MR. MURTAUGH: YOUR HONOR, IF I MAY?

5 THE COURT: SURE.

6 MR. MURTAUGH: INFORM THE COURT AND RESPOND?  
7 IF WE ARE TALKING ABOUT THE INDEPENDENT LABORATORY, AND I  
8 CERTAINLY UNDERSTAND THAT TO BE THE CASE, SOME OF OUR PRIOR  
9 PROBLEMS WITH THE EXEMPLAR ISSUE MAY WELL BE RESOLVED. IN  
10 OTHER WORDS, OUR CONCERN ON EXEMPLARS WAS, ONE, THAT IT WAS  
11 GOING BEYOND THE SCOPE OF THE COURT OF APPEALS' ORDER. AND I  
12 AM PREPARED TO ARGUE THAT IF NEED BE, AND YOUR OWN ORDER OF  
13 DECEMBER 11.

14 WE HAVE A TWOFOLD CONCERN. ONE CONCERN, I THINK, IS  
15 SOLVED BY THE INDEPENDENT LABORATORY. AND THAT WAS TURNING  
16 OVER TO THE DEFENSE AT THE SAME TIME THAT THEY ARE DOING  
17 DIVISIBILITY, EXEMPLAR HAIRS. THAT ISSUE, I THINK, IS HAN-  
18 DLED BY YOUR HONOR'S INDEPENDENT LABORATORY RESOLUTION. WITH  
19 RESPECT TO--AND WE ARE TALKING ABOUT DNA TESTING HERE. WE  
20 WOULD INTERPRET THE INDEPENDENT LABORATORY'S ROLE TO BE TO  
21 USE THESE EXEMPLARS--AND I NEED TO ADVISE THE COURT OF A FEW  
22 MORE DETAILS WITH RESPECT TO DNA TESTING, NOT COMPARATIVE  
23 RE-EXAMINATION OF PREVIOUSLY SOURCED POSITIVELY IDENTIFIED  
24 HAIRS.

25 IN OTHER WORDS, WE UNDERSTAND YOUR ORDER, YOUR HONOR,

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1 TO ENCOMPASS UNSOURCED---

2 THE COURT: WELL, I THINK--MY VIEW ON THAT  
3 IS, I THINK THAT THE PETITIONER HAS GOT IT RIGHT. IT SEEMS  
4 TO ME THAT THEY HAVE GOT TO BE IN A POSITION TO COMPARE WHAT  
5 EVER WAS FOUND WITH WHATEVER EXEMPLARS EXIST. AND I DON'T  
6 SEE WHY THEY SHOULDN'T. WHAT--HOW COULD THAT POSSIBLY  
7 DO ANYTHING OTHER THAN EXPAND THE KNOWLEDGE THAT IS REQUIRED  
8 BY BOTH PROCESSES?

9 MR. MURTAUGH: WELL, YOUR HONOR, WITH  
10 RESPECT TO--IT HAS TO DO WITH WHAT THEY ASKED FOR IN THE  
11 COURT OF APPEALS AND WHAT THE COURT---

12 THE COURT: EXCUSE ME. LET'S HAVE A REASON  
13 FOR EVERYTHING WE DO. IF IT DOESN'T IN ANY WAY INTRODUCE  
14 SOME WEAKNESS IN THE WHOLE PROCESS AND EXPANDS--CONVERSELY  
15 EXPANDS THE SCOPE OF KNOWLEDGE REQUIRED FOR THE PROCESS, WHY  
16 NOT GO THROUGH WITH IT?

17 MR. MURTAUGH: YOUR HONOR, I DON'T HAVE--YOU  
18 KNOW, I NEED TO TELL YOU SOMETHING ELSE. YOUR HONOR, WITH  
19 RESPECT TO MITOCHONDRIAL DNA, AND THIS IS MY FIRST VENTURE  
20 INTO THE WORLD OF DNA ALSO, WE HAVE PLENTY OF HAIRS THAT WERE  
21 TAKEN AT THE EXHUMATION OF THE THREE VICTIMS. SO WE HAVE GOT  
22 HAIRS, YOU KNOW, THAT SPILL OUT OF THE GRAVE, SO TO SPEAK,  
23 AND THEN OTHERS THAT ARE MOUNTED ON SLIDES.

24 MY UNDERSTANDING IS THAT THE MITOCHONDRIAL DNA CAN BE  
25 EXTRACTED FROM THE HAIRS, BUT ONLY FOR MITOCHONDRIAL DNA

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1 COMPARISON PURPOSES. IN OTHER WORDS, YOU CAN'T--AS I SAY,  
2 THIS IS MY UNDERSTANDING. YOU CANNOT TAKE THE MITOCHONDRIAL  
3 DNA AND THEN USE IT FOR NUCLEAR DNA COMPARISONS, BECAUSE  
4 APPARENTLY IT IS A DIFFERENT PART OF THE DNA SEQUENCE.

5 WITH RESPECT TO NUCLEAR DNA EXEMPLARS, WE DON'T HAVE  
6 BLOOD SAMPLES FROM THE VICTIMS AT THIS POINT. I MEAN, THEY  
7 WERE SENT TO THE THIRD ARMY TOXICOLOGY LABORATORY IN 1970 AND  
8 APPARENTLY CONSUMED IN ANALYSIS THEN. WE DO NOT HAVE OBVI-  
9 OUSLY SALIVA SAMPLES FROM ANY OF THE VICTIMS. SO WITH  
10 RESPECT TO EXEMPLARS FOR NUCLEAR DNA PURPOSES, I THINK WE ARE  
11 PROBABLY IN THE SAME BOAT THAT THE DEFENSE IS IN TERMS OF  
12 PROVIDING THOSE EXEMPLARS.

13 THE COURT: WELL, YOU CAN PROVIDE WHATEVER  
14 YOU HAVE GOT TO THE INDEPENDENT LAB AND THE INDEPENDENT LAB  
15 CAN DO WHATEVER IT CAN WITH IT. IF IT IS A QUESTION OF ONCE  
16 THE INDEPENDENT LAB SAYS WE HAVE ONLY GOT ENOUGH TO DO  
17 MITOCHONDRIAL--IF THEY HAVE ONLY GOT ENOUGH TO DO THAT, AND  
18 ONE SIDE WANTS NUCLEAR, THEN YOU WILL HAVE TO COME BACK TO ME  
19 AND EXPLAIN WHAT YOU WANT TO DO AND WHY.

20 MR. SCHECK: YOUR HONOR, IT IS A DIFFERENT  
21 KIND OF DNA. BUT THE POINT IS WELL TAKEN THAT WE DO NEED TO  
22 FIND A NUCLEAR DNA EXEMPLAR FOR THE VICTIMS THAT COULD BE  
23 FOUND. THIS IS WHERE AN ADVISER TO THE COURT THAT  
24 COMMUNICATES THAT IS MAYBE PART OF THE INDEPENDENT LAB MIGHT  
25 BE OF SERVICE.

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1           THERE MAY BE SOMETHING ELSE IN THE GOVERNMENT'S  
2 INVENTORY. FOR EXAMPLE, IF THERE IS A HAIR THAT IT IS PRETTY  
3 CLEAR IS A VICTIM'S HAIR THAT HAS A FLESH ROOT, YOU CAN EX-  
4 TRACT THE NUCLEAR DNA FROM THE FLESHY ROOT. THERE MAY BE  
5 STAINS ON A BED OR BLOOD STAINS THAT ARE STILL EXTANT ON SOME  
6 ITEMS THAT EVERYBODY AGREES DEFINITELY CAME FROM THE VICTIM  
7 WHERE YOU COULD DO AN EXTRACTION, AND IN ADDITION--AND WE  
8 HAVE DONE THIS MANY TIMES BEFORE. IT IS MENTIONED IN THE  
9 PROTOCOL.

10           THERE IS A VERY EASY WAY TO RECONSTRUCT THE EXEMPLARS  
11 FROM THE INDIVIDUALS. FOR EXAMPLE, WE MIGHT BE ABLE TO  
12 RECONSTRUCT IT THROUGH RELATIVES.

13           THE COURT:                           WELL, I THINK THE ISSUE, FIRST  
14 OF ALL, IS TO GET THE THING OVER TO THE INDEPENDENT LAB AND  
15 AS THESE ISSUES ARISE VIS-A-VIS A PARTICULAR EXHIBIT, THEN WE  
16 CAN FOCUS ON THAT EXHIBIT.

17           MR. SCHECK:                       YOUR HONOR, ONE MATTER THAT I  
18 THINK YOU COVERED BY WHAT YOU SAID BEFORE: THERE WERE, I  
19 THINK, THREE ITEMS IN THE ORIGINAL AFFIDAVIT THAT WE FILED  
20 THAT WERE ACTUALLY HAIRS THAT WERE ON, YOU KNOW, THE  
21 MICROSCOPIC EXAMINATION SAID TO EITHER BE JEFFREY MACDONALD  
22 HAIRS, AND I THINK ONE OR TWO--THERE WERE JUST THREE ITEMS.  
23 THESE ARE ALSO--THEY WERE IN VERY APPROPRIATE PLACES. AND IT  
24 IS FOR THE GOVERNMENT, I THINK--WE HAVE A CHART ACTUALLY OF  
25 EVERYTHING.

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1 MR. CORMIER: COULD I HAND THIS UP?

2 THE COURT: I WANT TO KNOW WHAT IS THE  
3 ISSUE IS. I HAVEN'T GOT THE ISSUE IN FOCUS. WHAT ISSUE ARE  
4 YOU TRYING TO ADDRESS?

5 MR. SCHECK: WHAT I AM TRYING TO ADDRESS IS  
6 THAT THERE ARE JUST A FEW ITEMS HERE THAT WE ASKED TO HAVE  
7 EXAMINED WHICH THE GOVERNMENT HAS OBJECTED TO, WHICH ARE  
8 HAIRS THAT CAME BACK MICROSCOPICALLY THAT WERE SOURCED.

9 THE COURT: IT IS ALL GOING OVER TO THE  
10 INDEPENDENT LAB, ALL OF IT.

11 MR. SCHECK: OKAY. THAT WAS THE ANSWER TO  
12 MY QUESTION.

13 THE COURT: ANYBODY HAVE ANY OTHER ISSUES?

14 MR. SCHECK: ONE.

15 THE COURT: SHOOT.

16 MR. SCHECK: IN TERMS OF THE RESOURCES FOR  
17 THIS, MAYBE WE CAN AGREE UPON AN INDEPENDENT LAB, BUT I KNOW  
18 THIS, THAT MR. MACDONALD--HIS FUNDS ARE LIMITED, AND HIS  
19 ABILITY TO PAY---

20 THE COURT: WELL, I KNOW NOTHING ABOUT  
21 THAT. MY SUGGESTION ON THAT IS THAT IF IT IS GOING TO BE A  
22 PROBLEM IN THAT REGARD, MAYBE YOU OUGHT TO FILE AFFIDAVITS  
23 UNDER OATH CONCERNING HIS RESOURCES, AND THE COURT WILL MAKE  
24 SUCH ASSESSMENT AT THE CONCLUSION AS IT FEELS IS APPROPRIATE.

25 MR. SCHECK: OKAY.

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1 THE COURT: IN OTHER WORDS, YOU ARE NOT  
2 GOING TO GET BLOOD OUT OF A TURNIP NO MATTER WHAT HAPPENS.  
3 AND TO THE EXTENT IT SHOULD HAPPEN, AS I UNDERSTAND IT, FOR  
4 SOME REASON HE SHOULD BE EXONERATED IN THIS PROCESS; HIS  
5 FUNDS WILL BE REIMBURSED TO THE EXTENT THAT THEY WERE USED IN  
6 THE PROCESS. IF HE IS INculpATED AND THERE IS NO CHANGE,  
7 THEN HE CERTAINLY OUGHT TO BEAR HIS PORTION OF IT.

8 ANYTHING ELSE WE NEED TO TAKE UP, COUNSEL?

9 MR. MURTAUGH: YOUR HONOR, I THINK WE COVERED  
10 THIS, BUT JUST FOR THE RECORD, THE INDEPENDENT LAB WILL  
11 OBVIOUSLY MAKE A REPORT OF ANY TESTS---

12 THE COURT: TO ALL PARTIES AND THE COURT.

13 MR. MURTAUGH: AND THERE WOULD BE NO ATTORNEY-  
14 CLIENT PRIVILEGES OR ANY KIND OF---

15 THE COURT: THAT IS AGREEABLE, COUNSEL;  
16 CORRECT?

17 MR. SCHECK: THE RESULTS; ABSOLUTELY.

18 THE COURT: ALL RIGHT. ANYTHING ELSE WE  
19 NEED TO TAKE UP TODAY? ALL RIGHT. CAN YOU ALL CONSULT AND  
20 ADVISE ME WITHIN 14 DAYS AS TO WHO YOU THINK WOULD BE AN  
21 APPROPRIATE LAB? I WILL APPRECIATE YOUR RECOMMENDATIONS AND  
22 I WOULD LIKE TO HAVE THEM SET FORTH IN THE PRIORITY IN WHICH  
23 YOU REACH AGREEMENT. IN OTHER WORDS, IF YOU ALL AGREE THAT  
24 ONE LAB IS NUMBER ONE FOR BOTH OF YOU, THAT IS GREAT.

25 GIVE ME YOUR FIRST, SECOND AND THIRD CHOICES IF YOU

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1 WILL, AND IF NECESSARY I CAN FIGURE OUT SOMETHING. ANYTHING  
2 ELSE WE NEED TO TAKE UP TODAY?

3 (NO RESPONSE)

4 THE COURT: COUNSEL, I APPRECIATE YOU BEING  
5 HERE. I APPRECIATE YOUR PATIENCE. AND I WILL HAVE THE  
6 OPPORTUNITY TO REVIEW THIS DOCUMENT, MR. SCHECK WHEN I HAVE A  
7 LITTLE MORE TIME. I JUST HAVE TO GO THROUGH THIS PROCESS.  
8 WE WILL GET EDUCATED TOGETHER. AND I APPRECIATE YOUR  
9 COOPERATION TODAY. THANK YOU VERY MUCH.

10 ANYTHING ELSE WE NEED TO TAKE UP? IF NO, ADJOURN  
11 COURT.

12 (PROCEEDING CLOSED AT 2:56 P.M.)

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C E R T I F I C A T E

I, JO B. BUSH, DO HEREBY CERTIFY THAT THE  
PRECEDING PAGES REPRESENT A TRUE AND  
ACCURATE TRANSCRIPT OF THE PROCEEDINGS HELD  
IN THE ABOVE-CAPTIONED MATTER.



---

JO B. BUSH, CVR  
OFFICIAL REPORTER  
UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA

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U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

APR 22 1999

Miss Jo B. Bush  
Official Reporter  
United States District Court  
Eastern District of North Carolina  
P.O. Box 28163  
Raleigh, NC 27611

Re: United States v. Jeffrey R. MacDonald  
Nos. 75-26-10 - E - CRF  
90-104-CV-3F

Dear Miss Bush:

Thank you for the prompt transcription of the March 23, 1999 Motions Hearing before the Honorable James C. Fox in the above-captioned case. Please permit me to bring the following points to your attention:

Page 1

"Murtaugh" should be Murtagh  
Paul Cormier should be Phil Cormier

Page 14, Lines 20-21

"Murtaugh" should be Murtagh.

Page 15, Line 15

The word "FILES" should be VIALS.

Page 16, Line 5

The word "FILES" should be VIALS.

Page 16, Line 7

The name "Walker" should be HAWKINS.

Page 16, Line 8

The word "FILES" should be VIALS.

Page 16, Line 10

The word "FILES" should be VIALS.

Page 16, Line 22

The word "FILES" should be VIALS.

Page 17, Line 1

The word "FILES" should be VIALS.

Page 17, Line 4

The word "FILES" should be VIALS.

Page 17, Line 23

"Murtaugh" should be Murtagh.

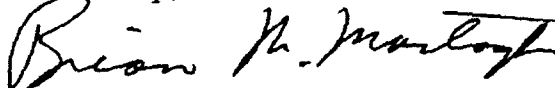
Page 32, Line 1

The word "with" preceding "prejudice", I believe should be "without" prejudice to the parties.

Please make these corrections and furnish me with a copy of the transcript filed with the Court.

Thank you for your assistance.

Sincerely,



Brian M. Murtagh, Deputy Chief  
Terrorism and Violent Crime Section  
U.S. Department of Justice  
601 D Street, NW  
Suite 6500  
Washington, D.C. 20530

cc: AUSA Eric Evenson  
All Counsel