

1 Colloquy

Vol. 1, p. 61

2 have also relinquished their contention on that.

3 And that would be all I have, Your Honor,  
4 unless you have some specific questions on certain  
5 points.

6 THE COURT: Well, you might address the  
7 legal issue that this gives rise to. Mr. Smith  
8 referred to the Erady case. He said that that  
9 was not in point. And the question -- the standard  
10 of -- by which this matter is to be -- the legal  
11 standard applicable here.

12 MR. MURTAGH: The Erady issue --

13 THE COURT: (Interposing) What do you say  
14 as to whether or not there was a reasonable  
15 likelihood that false impression could have  
16 made a difference in the jury's verdict?

17 MR. MURTAGH: Well, Your Honor, the case  
18 that they relied on principally there, is Hamric  
19 v. Bailey, I believe, a Fourth Circuit case, and  
20 in that case --

21 THE COURT: (Interposing) I didn't see  
22 much similiarity between that case and this one.

23 MR. MURTAGH: No, I don't, because there  
24 you had the suppression, not of knowledge so  
25 much, but it was a laboratory report from, I

1 Colloquy

Vol. 1, p. 62

2 believe, the state laboratory that they had  
3 examined the victims' clothing and, yes, they had  
4 found impregnated in it glass particles and  
5 splinters. And, in that case, the Defendant  
6 claimed that she shot a burglar as he was  
7 climbing in the window.

8 The Government contended, I believe, that  
9 he was ten (10) or twelve (12) feet away from the  
10 house and she shot him the minute he crossed the  
11 property line or something like that.

12 I don't think that applies at all. And I  
13 don't think -- for example, the "G" on the wall.  
14 Well, now they have the "G". Now, they have the  
15 photograph of it, and, you know, we sent the thing  
16 to the FBI document laboratory along with the  
17 photographs of the "G" -- the word 'pig' on the  
18 headboard, and the result was what we've long  
19 known about the word 'pig' on the headboard, is  
20 that that lacked sufficient distinguishing  
21 characteristics to be of any value for comparison  
22 purposes. So, our experts say it doesn't make any  
23 difference. They haven't had their experts come  
24 up with a contrary opinion, and I suggest that  
25 that's because they agree with it. So I don't

1 Colloquy

Vol. 1, p. 63

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think the "G" would make any difference.

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I can't see a reasonable likelihood of  
acquittal coming from the idea that Helena  
Stoeckley or anybody else wrote the word 'good' or  
'gemini' on the wall.

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THE COURT: I'm going to assume that you  
disagree with him on that point, but I just want  
to know do you agree that that's the applicable  
standard?

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MR. MURTAGH: No, I think the applicable  
standard to be applied is that the -- you know,  
assuming for the sake of argument, that there was  
suppression, and I do not concede that there was any  
such suppression, the applicable standard under  
the Agurs test would, I believe, be the third one,  
that the suppressed evidence would have probably  
have resulted in an acquittal in view of the light  
of the evidence at trial.

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And that's sort of a, when did you stop  
beating your wife question, because we don't  
concede any such suppression. But in any event,  
assuming for the sake of argument that we  
suppressed the loss of the piece of skin, I don't  
see how that would have affected the outcome

1 Colloquy

Vol. 1, p. 64

2 because you have the defense able if they want to  
3 to to argue, Look, there was a piece of skin found  
4 under the fingernail here. The Government  
5 didn't, you know, adduce any evidence on this  
6 point. That's because they know that that came  
7 from an intruder. They didn't want to do that,  
8 Judge, because it was a tactical decision not to  
9 draw attention to the scratch marks on the  
10 Defendant's chest.

11 On the Erady issue, the fact that it was a  
12 jury instruction in that case, and we're not  
13 talking about jury instructions here -- in fact,  
14 the defense has never attacked either the Court's  
15 instructions to the jury or anything that was said  
16 in the final argument in any of his direct  
17 attacks.

18 But, the issue or the applicability of  
19 Erady would be, look, you know about certain  
20 things. You know there's a piece of skin found  
21 under the wife's fingernail because it's in the  
22 autopsy report and you heard it in live testimony  
23 at the Article 32.

24 Now, okay. Let's say the Government  
25 negligently or wrongfully or however you want to

1 Colloquy

Vol. 1, p. 65

2 characterize it, doesn't produce that piece of  
3 skin. He could've raised that issue on direct  
4 appeal and he didn't choose to do so.

5 So, in order for them to do so now, they  
6 have to show cause and actual prejudice. I don't  
7 think they --

8 THE COURT: They say that they didn't  
9 know about this until after the appeal had already  
10 been briefed and argued, don't they?

11 MR. MURTAGH: Well, that position is  
12 without merit, Your Honor. I don't think Mr.  
13 Smith is going to stand up here and say that I'm  
14 misrepresenting to the Court about Dr. Gammel's  
15 testimony or the autopsy protocol. If he wants to  
16 do that, I would point out the attachments to the  
17 Government's reponse on this motion, in which we've  
18 put the actual exhibits in the record.

19 The point is that they either knew about  
20 these things or they could have discovered them --  
21 the "G", for example -- by the exercise of  
22 reasonable due diligence. I don't think the  
23 Government is obligated to grab the defendant's  
24 counsel and make them look at every single piece  
25 of forensic evidence if they don't want to inspect

1 Colloquy

Vol. 1, p. 66

2 what's there.

3 I don't know if that has responded to Your  
4 Honor's question sufficiently.

5 The -- there were some other matters that  
6 were raised in their initial pleading, which I now  
7 take by their failure to raise them, they do not  
8 contend. For example, there was a question about  
9 the lost pajama bottoms. Certainly they knew  
10 about that because the medic who threw them out of  
11 the emergency room testified to it on at least  
12 three (3) occasions.

13 THE COURT: Well, --

14 MR. MURTAGH: (Interposing) They haven't  
15 raised that -- or addressed it in the oral argument.  
16 I say they haven't raised it. They haven't put in  
17 it in their proposed findings of fact.

18 THE COURT: I noticed the absence of that  
19 in the proposed findings, but Mr. Smith will get  
20 another chance. He can tell us about that.

21 MR. MURTAGH: That's all I have, Your  
22 Honor, on that point. Thank you, sir.

23 THE COURT: All right, sir. Now, Mr.  
24 Smith, you may reply.

25 MR. SMITH: Thank you very much, Your

1 Colloquy

Vol. 1, p. 67

2 Honor. Just very briefly. In the material I gave  
3 you, there are two (2) cases, Brien and Corsentino,  
4 both 1982 cases construing Erady and I think they  
5 once more make the point that we wish to make and  
6 that is if we didn't know about these items and  
7 again, as emphatically as I can, if we didn't know  
8 they were lost, then we could not have raised those  
9 points when the matter was appealed.

10 If we knew about them, we lose anyway.  
11 Erady doesn't make any difference. If we knew about  
12 the items, we don't have any business coming here  
13 today. If we knew they were lost, we don't have  
14 any business in here today.

15 So, Erady makes no difference in this case  
16 at all. Those two (2) -- I think those two (2)  
17 cases are enlightening as to what the Court meant in  
18 the Erady decision.

19 Your Honor, as to the point Mr. Murtagh  
20 made about the syringes that were found in the  
21 closet, it's my recollection that there was found  
22 in the closet a box of new hypodermic syringes,  
23 the kind that might be found in a doctor's office  
24 or in a doctor's home even. But I would submit  
25 that Mr. Murtagh can show us no place where we

1 Colloquy

Vol. 1, p. 68

2 were to know that there was a syringe at the time  
3 of trial, that we were to know that there was a  
4 syringe found in that house half full of liquid.

5 And so we would say to Mr. Murtagh, what  
6 was the liquid? We were entitled to know about  
7 that. We were entitled to know that it was gone.  
8 And that's the point.

9 THE COURT: Were you aware that in this  
10 linen closet there was some evidence of blood?

11 MR. SMITH: I recall that there --  
12 something about there being some evidence of  
13 blood, yes, sir. I recall never hearing anything  
14 about a half-filled syringe, though.

15 THE COURT: As a tactical matter, suppose  
16 you had known that there was a bloody syringe in  
17 there, but you also knew that the Government was  
18 able to identify the blood as being that of the  
19 Defendant. Would you have gone -- would you have  
20 pursued that very far?

21 MR. SMITH: Well, Your Honor, if a  
22 criminal trial is a search for the truth, I'd have  
23 had a duty to check it out, I think, and find out.

24 THE COURT: That's not my question, Mr.  
25 Smith.



1 Colloquy

Vol. 1, p. 69

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MR. SMITH: Well, I think I would, yes, sir. I think I want to know. I think I want to know, yes, sir.

THE COURT: You think so? All right. You'd have said, look, there's not only MacDonald's blood, but there's somebody else's in there.

MR. SMITH: Could be, yes, sir. Yes, sir. I'd like to know also what the fluid was, what material was in the syringe. The point here is it may be true and this would apply to each of the points, I think, of the items that Mr. Murtagh has made.

Yes, it may be true that we knew that there was a box in there of new hypodermic syringes. We didn't know about half-filled syringes until we got the Freedom of Information materials.

Your Honor asked me about a receipt. Yes. When Your Honor asked me about that, of course I was aware of the receipt that I placed before you this morning. That is -- the receipt that the CID officers gave at the time they got these boots is before you. There's no other receipt of any kind. and that receipt was not available to us. We did

1 Colloquy

Vol. 1, p. 70

2 not know about it.

3 I think Mr. Douthat's affidavit would  
4 inform Your Honor that after the trial was over,  
5 here in the District Court, he probed around  
6 through his records and found a receipt, but we  
7 didn't have the receipt. We did not know about the  
8 receipt and we submit that we're not armed with  
9 the knowledge Mr. Douthat had.

10 He was not a defense attorney and was not  
11 with us in this trial and certainly we ought not to  
12 be held responsible for everything that was in Mr.  
13 Douthat's file.

14 THE COURT: Well, was there anything on the  
15 receipt that you handed me this morning -- I  
16 haven't seen it -- that refers to anything other  
17 than boots?

18 MR. SMITH: No, sir. That --

19 THE COURT: (Interposing) No blood-  
20 stained clothing receipted for?

21 MR. SMITH: That as I -- no, sir. No,  
22 sir. There's not anything about blood in that  
23 receipt that I have seen. It says a pair of  
24 woman's boots, beige, et cetera.

25 As I recall, and it may be that the

1 Colloquy

Vol. 1, p. 71

2 affidavit --

3 THE COURT: (Interposing) Well, now, you  
4 have argued that they receipted for or that there  
5 came into possession bloody clothing. Now, what's  
6 the basis of that?

7 MR. SMITH: Well, I didn't -- I don't  
8 think I said bloody clothing. If I did I didn't  
9 mean to say bloody clothing.

10 THE COURT: Well, clothing you said. Well,  
11 what's the basis for that?

12 MR. SMITH: The Nance affidavit which is  
13 before Your Honor, I think mentions the clothes.  
14 And Mr. Douthat's affidavit mentions the clothes.  
15 He says, "When Jim -- when James Nance turned over  
16 items of clothing and boots to the CID," et  
17 cetera. He mentions that. We got onto this whole  
18 area by this receipt that we received from the  
19 Freedom of Information material.

20 THE COURT: Did Nance ever represent this  
21 Defendant in any connection?

22 MR. SMITH: No, sir, not that I know of.

23 THE COURT: There's a statement some-  
24 place I read that Nance represented him in  
25 connection with his resistance of taking of hair

1 Colloquy

Vol. 1, p. 72

2 samples.

3 MR. SMITH: He may -- as I recall, Your  
4 Honor -- I don't recall that Nance was ever a  
5 retained counsel for Jeffrey MacDonald. There  
6 is something about an appearance at an Article 32  
7 proceeding. I don't know whether he was ever -- I  
8 don't believe he was ever officially Jeffrey  
9 MacDonald's lawyer.

10 THE COURT: Did this Douthat --

11 MR. SMITH: (Interposing) Douthat was.

12 THE COURT: Douthat.

13 MR. SMITH: Douthat was the military  
14 counsel for him, yes, sir.

15 THE COURT: For him?

16 MR. SMITH: Yes, sir. And Douthat had the  
17 receipt, I think, in his records. Again, we did  
18 not -- we did not have that receipt. It was not  
19 available to us. And, of course, it raises an  
20 interesting point about whether all of the  
21 information that is available to all the attorneys  
22 is attributed to each of them.

23 THE COURT: Yeah. I'd have some trouble  
24 with that. I don't know that the Government, if it  
25 knew that one lawyer of this Defendant had knowledge,

1 Colloquy

Vol. 1, p. 73

2 that it would be incumbent upon the Government to  
3 come and say, "Has he told you all of this?" That's  
4 not normal.

5 MR. SMITH: Well, no, sir, but it would be  
6 our position that if there is something as  
7 important as a receipt in the possession of the  
8 Government, that we ought to have had it, if it  
9 had anything like that in it. And they ought to  
10 have known that we were entitled to it. We needed  
11 everything we could get in order to know the truth  
12 about this matter.

13 Your Honor, it may be that we were on  
14 notice as to the existence at some point of the  
15 skin and I suspect we were. Our big point, I  
16 think, as to the skin is that we were not on  
17 notice as to its loss. We were not on notice as  
18 to its loss, and we submit that we should have  
19 been notified of its loss.

20 Mr. Murtagh says, I think, in the courtroom  
21 this morning that it was lost, and we were not  
22 notified that it was lost and that was an  
23 important point, Your Honor.

24 Thank you very much, Your Honor.

25 THE COURT: All right. Thank you, Mr.

1 Colloquy

Vol. 1, p. 74

2 Smith. We'll take our morning recess now and  
3 we'll come back at 11:40.

4 -----  
5 (MORNING RECESS: 11:26 - 11:40 A. M.)  
6 -----

7 THE COURT: All right, sir.

8 MR. O'NEILL: Thank you, Your Honor.

9 THE COURT: Next motion.

10 MR. O'NEILL: Your Honor, the next motion  
11 is the motion for a new trial --

12 THE COURT: (Interposing) Unh-hunh (yes).

13 MR. O'NEILL: -- based upon newly  
14 discovered evidence.

15 I believe a consideration of this  
16 motion, Your Honor, requires a consideration of  
17 many of the items that counsel just discussed and  
18 I think it's a good idea, Mr. Murtagh, we do argue  
19 these motions in this order because it helps set  
20 the frame work for consideration of this new  
21 evidence.

22 As both Mr. Murtagh and Mr. Smith  
23 discussed, this was a case which was unusual in  
24 many respects, but particularly with respect to the  
25 nature of the proof, not unusual in that it

1 Colloquy

Vol. 1, p. 75

2 doesn't happen, but unusual in the sense that it  
3 was a murder trial wherein there was effectively  
4 no proof of motive.

5 There were no eyewitnesses; there were no  
6 confessions and no admissions. The Defendant  
7 denied his participation and, in effect, what  
8 happened was the Defendant's statements about the  
9 crime scene were proven by the crime scene  
10 evidence to be incorrect. And further it was argued  
11 and obviously believed by the jury that many of  
12 the Defendant's explanations, such as they were,  
13 of the crime scene evidence, were consistent with  
14 possible manipulation of the crime scene.

15 So, that's what we have and that's the  
16 background against which this new evidence comes  
17 to the Court.

18 As Mr. Smith argued during the course of  
19 the motion which we just heard, the Government's  
20 crime scene was very much like a photograph, which  
21 they presented to the jury and said, here's what  
22 happened. This is a snapshot of what occurred on  
23 that evening. However, as we just discussed, and  
24 which is part of the newly discovered evidence,  
25 that snapshot was not in all respects correct.

1 Colloquy

Vol. 1, p. 76

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By way of analogy, I think it might be said that a corner of the snapshot was torn off so that that snapshot of the crime scene was not an accurate portrayal -- totally accurate portrayal of the crime scene. And it is against that snapshot that the Defendant's statements about what happened are judged.

In addition, we now have in a case where there has been no evidence presented as to motive, no eyewitnesses, no confessions and no admissions by the Defendant, and a continual protestation of his innocence, we have three (3) confessions.

Three (3) people who, by independent evidence, associated, at the time of the murders, with Stoeckley, including Stoeckley, including Greg Mitchell and Cathy Perry, have made confessions of their involvement in this crime.

Well, we know from the evidence presented at the trial -- back when considering this new evidence -- that either Dr. MacDonald committed this crime or somebody else did.

Dr. MacDonald's first statement to the arrest -- to the officers responding to this crime scene was, "I have been assaulted. My family has



1 Colloquy

Vol. 1, p. 77

2 been assaulted and the assailants are", and he  
3 described four (4) people with pretty good  
4 particularity. And later those descriptions became  
5 reduced to police artists' sketches, which were in  
6 evidence before the Court at the time of trial.

7 Now, what this new evidence does is fill  
8 in the intricacies, if you will, surrounding  
9 those four (4) people whom Dr. MacDonald saw. It  
10 creates a context which brings those people to the  
11 MacDonald residence and that context includes  
12 witnesses seeing them going there, garbed just as  
13 Dr. MacDonald described them, citizen witnesses  
14 who have no stake in this litigation whatsoever,  
15 just residents of the community of Fayetteville.

16 We saw people garbed -- physically  
17 appearing just as the four (4) people whom Dr.  
18 MacDonald described. Those same people were seen  
19 hours after the murders. One of them, Ms.  
20 Stoeckley, has been identified here in this court  
21 or a courtroom in this building, by Mrs. Averitt,  
22 dressed just exactly as Ms. Stoeckley was  
23 described by another witness who was here in this  
24 courtroom by virtue of her affidavit, Mrs.  
25 Boushey, the English professor at North Carolina

1 Colloquy

Vol. 1, p. 78

2 State.

3 THE COURT: I seem to recall that there  
4 was a witness who testified -- a neighbor who  
5 testified to seeing these people.

6 MR. O'NEILL: Your Honor, there were two  
7 (2) witnesses who testified generally about the  
8 presence of some unspecific visitor. This was at  
9 the time of trial now.

10 A fellow by the name of Milne, who was, at  
11 that time, a military officer or a military  
12 personnel who lived out by Dr. MacDonald, whose  
13 trial testimony, as I recall it, was he saw some  
14 people, not particularized as to appearance,  
15 except insofar as he could say one of them  
16 appeared to be carrying a candle, were walking  
17 through the woods in the area in back of  
18 MacDonald's home somewhere.

19 There was one other trial witness talking  
20 about seeing somebody -- one person, rather than  
21 several -- somebody matching a description similar  
22 to that of Stoeckley; that is to say a woman in a  
23 floppy hat and boots who was seen some, I think,  
24 eight hundred (800) yards away from the MacDonald  
25 residence, standing at an intersection on the base

1 Colloquy

Vol. 1, p. 79

2 of Fort Bragg at approximately four (4) in the  
3 morning or thereabouts.

4 But, with respect to witnesses who existed  
5 or who were known to the defense before trial,  
6 there were none who had come forward and said that  
7 these four (4) people were seen, these four (4)  
8 people were garbed this way, and we saw these  
9 folks both before and after the time of the  
10 reported murders.

11 So, that is the context in which I think  
12 we should look at these confessions of Stoeckley.  
13 And as counsel for the Government has urged in his  
14 papers and will no doubt urge here, Stoeckley did  
15 not sit down and give a statement which was  
16 comprehensive from A to Z in one sitting.  
17 Stoeckley was interviewed over a period of several  
18 years on different occasions by different people,  
19 and Stoeckley did confuse things on occasion. She  
20 did interject things which we have pretty well  
21 concluded were not correct in her statements.

22 And Stoeckley did one other thing, and that  
23 is Stoeckley consistently told the same account of  
24 what happened throughout all her statements. And  
25 that account was that she and her colleagues, some

1 Colloquy

Vol. 1, p. 80

2 of whom she named, had determined within their  
3 group for reasons known only to them, that Dr.  
4 MacDonald ought to be punished for not taking care  
5 of or -- the medical needs of servicemen with drug  
6 problems.

7 And in pursuit of that end, of either  
8 punishing Dr. MacDonald -- to punish him for his  
9 past acts or to persuade Dr. MacDonald perhaps to  
10 mend his ways, they went out to his house that  
11 evening. And during the course of their visit to  
12 his house, violence erupted and the family was  
13 killed, he was wounded, and they left abruptly --  
14 that is the assailants left abruptly.

15 Among other things Ms. Stoeckley has told  
16 us, and it's before the Court by way of Mr.  
17 Gunderson's affidavit, I believe, that -- some  
18 particulars about the murders that she recalled.  
19 One of them was that she witnessed a person  
20 killing Colette MacDonald, who actually did kill  
21 Colette MacDonald -- that is to say, among these  
22 assailants, the person who inflicted those blows  
23 which ultimately would have led to Colette  
24 MacDonald's death, the blows to the head, and that  
25 was Greg Mitchell.

1 Colloquy

Vol. 1, p. 81

2           And Greg Mitchell is another person who's  
3 confessed. In the first instance, he made a  
4 generalized admission and in a later instance, a  
5 specific statement relative to the MacDonald  
6 crimes. And, as the Court will recall, his first  
7 admission, which really wasn't a confession, was  
8 to a -- some people who were assembled at a drug  
9 rehabilitation center where he had gone,  
10 apparently for treatment, in Fayetteville, in  
11 February, 1971 or March, 1971, approximately a  
12 year after the murders, after his discharge from  
13 the service.

14           And at that prayer service, he confessed  
15 to those around him that he had done horrible things  
16 in his life, he had been a member of a cult, he had  
17 taken drugs and he had murdered.

18           A day after that admission, Mitchell had left  
19 this place, which was then called The Manor, and gone  
20 on to a country house maintained by this group at  
21 The Manor, and was seen running from that house by  
22 three (3) people from The Manor who were out there  
23 inspecting a house on a Sunday evening to  
24 ascertain that it was safe, that it wasn't being  
25 vandalized over the weekend and so forth.

1 Colloquy

Vol. 1, p. 82

2 He was seen running from the house and when  
3 the people go into the house they see, written on  
4 the walls of the house in fresh paint, "I killed  
5 MacDonald's family."

6 That alone is a pretty significant  
7 admission, but it's not the only admission that  
8 Greg Mitchell made.

9 Some years later to his best friends,  
10 Mitchell talked generally about his involvement  
11 in some horrible events. And then in a few  
12 months before his death, he was visited by  
13 the FBI, who were investigating the MacDonald  
14 crime. This was in November or December of 1981.

15 And shortly after that visit -- that  
16 interview of Mr. Mitchell by the FBI, he speaks to  
17 his best friends, his neighbors, people he's known  
18 for ten (1) years, talks about the FBI being after  
19 him for some horrible crime and if he gets caught  
20 and convicted of this crime, he will go away  
21 forever, to which the neighbor, friend, attempts  
22 to console him and says, "Greg, you have nothing  
23 to worry about if you didn't do it." And he said,  
24 "That's the problem. It's -- I did do it. It was  
25 something horrible that happened when I was

1 Colloquy

Vol. 1, p. 83

2 stationed at Fort Bragg."

3 What do we know about Greg Mitchell? We  
4 know he associated with Stoeckley. There are a  
5 number of independent witnesses to that. We know  
6 he was a person who had a serious drug problem and  
7 we know that he was left-handed. Why is that  
8 significant?

9 Well, a forensic pathologist who we had  
10 consulted on this case, took a look at the autopsy  
11 protocol and the autopsy photograph and concluded  
12 from a review of them that those crushing blows  
13 that killed Colette MacDonald were struck by  
14 someone facing her from -- swung from the left  
15 consistent with a left-handed person's swing.

16 THE COURT: I thought that was very  
17 interesting. I used to -- quite a number of years  
18 ago, I used to aspire to being a baseball player and  
19 back when I was a child I started off batting  
20 cross-handed. I'm a right-handed person, but I  
21 put the left hand above the right hand on the bat.  
22 And it was not until many years later that it was  
23 explained to me that although I was right-handed,  
24 that I was a left-handed batter and that I should  
25 have just changed around to the other side.

1 Colloquy

Vol. 1, p. 84

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The interesting thing to me in this --  
about this evidence was how can you tell that a  
blow is struck by a left-handed person or a person  
who is right-handed, but who bats left-handed?

MR. O'NEILL: Your Honor, you can't with  
certainty and the expert whom we consulted has so  
stated pretty candidly I think.

THE COURT: Well, I just wanted to say --  
to interject that that was of interest to me in  
view of my own personal --

MR. O'NEILL: (Interposing) Experience.

THE COURT: -- experience. And so many  
things that I do now, like cutting with an ax or  
chopping with a hoe, all of those things I do  
left-handed, but I'm a right-handed person. Go  
ahead.

MR. O'NEILL: Your Honor, we do know those  
things of Mitchell. We also know of Mitchell that  
he ran this group that Stoeckley ran with, and  
with whom Cathy Perry also ran.

During the discussion of the boots and the  
argument on the Brady motion I was reminded, in  
reviewing the pleadings, of the question which was  
in our mind when we were raising those boots as to



1 Colloquy

Vol. 1, p. 85

2 whether we could really connect Stoeckley directly  
3 to those boots, because the chain of evidence  
4 essentially is Cathy Perry gave those boots to  
5 Mrs. Garcia a few days after the murders. A few  
6 days is imprecise. A short time after the  
7 murders, I believe, is Mrs. Garcia's statement.

8 THE COURT: Why would they have to be  
9 Stoeckley's boots?

10 MR. O'NEILL: Well, I --

11 THE COURT: (Interposing) Perry says that  
12 she committed this murder, too.

13 MR. O'NEILL: That's the point I was about  
14 to make, Your Honor.

15 THE COURT: (Interposing) All right.  
16 Sorry.

17 MR. O'NEILL: And I believe they could  
18 well have been Perry's boots. The truth is, for  
19 reasons which Wade Smith argued, we'll never know.  
20 We'll just never know.

21 Perry came forward in December of this  
22 year -- or November of this year -- just recently  
23 in recent months and Government counsel was kind  
24 enough to furnish a copy of her interview with the  
25 FBI to us and suggest -- and advise us of the

1 Colloquy

Vol. 1, p. 86

2 circumstances of that interview, which are pretty  
3 interesting.

4 I think they're interesting and  
5 illustrative because they apply, not just to  
6 Perry, but to Stoeckley and Mitchell as well,  
7 because Perry called up the FBI and wanted to make  
8 a statement -- wanted to talk to the FBI, "I want  
9 to confess." Calls them back, "I don't want to  
10 confess." Ultimately, calls them a third time and  
11 says, "Yes, I want to confess", and recounts to  
12 them the events which are described in the FBI  
13 302, which we have affixed to our motion or our  
14 addendum to motion, which I'll go into in a  
15 second.

16 And shortly after that, more than out of  
17 just a little curiosity, we attempted to  
18 interview her because we had attempted to  
19 interview her earlier with limited success. She  
20 just would not talk with us. After she spoke with  
21 the FBI, she wouldn't talk with us.

22 I'm not suggesting anything at all if the  
23 FBI said don't talk to us because I know they  
24 don't do that.

25 What I'm suggesting is this. Perry's

1 Colloquy

Vol. 1, p. 87

2 conduct, as Stoeckley's conduct, and as  
3 Mitchell's conduct, in making the statements which  
4 they made, and the circumstances under which they  
5 made them is conduct consistent with one thing  
6 and that is a desire to get this off my chest.

7 And it's not, contrary to what I believe  
8 the Government will urge, consistent at all with  
9 an effort to attract publicity or to become known  
10 for some participation in some horrible event.  
11 Rather it's consistent with, I'll tell you --  
12 Mitchell didn't want to tell anybody. He wouldn't  
13 tell his wife, according to his friends. Perry  
14 wouldn't talk to us -- wouldn't talk to us except a  
15 little bit in the beginning and I suspect, from  
16 the nature of the interview which is before the  
17 Court, sounds like she thought twice during the  
18 interview. And after the interview by FBI,  
19 wouldn't talk to us either.

20 Stoeckley wouldn't talk until she, for  
21 some reason or other, believed that on one  
22 occasion she thought she was immunized or could be  
23 immunized or she thought that the statute had run.

24 And -- but most importantly of all those  
25 people, applicable to all those people is this. They

1 Colloquy

Vol. 1, p. 88

2 were talking about events from different parts of  
3 the country, at different times, not at all in  
4 association with one another. They apparently  
5 weren't in contact with one another and they  
6 admitted the same crime, same place, same  
7 circumstances.

8 Perry's statement, as the Court knows, is  
9 a little bit different insofar as her imprecision  
10 about -- not imprecision -- flat wrong about the  
11 character of the weather, flat wrong about the  
12 configuration of the MacDonald housing. She has  
13 an upstairs in it and there was no upstairs  
14 except, I think, one or two stairs in the  
15 beginning -- in the front part of the house, and  
16 talks about male children.

17 But the circumstances of her having been  
18 with a group of drug-using people, going to the  
19 house of a physician, who Perry doesn't name by  
20 name, to punish him for his sins in turning in  
21 drug abusers and talking about an assault upon a  
22 pregnant woman and two children on the same date  
23 as the MacDonald murders, clearly conveys that --  
24 what she is talking about.

25 What is there to, by way of physical

1 Colloquy

Vol. 1, p. 89

2 evidence, to support Perry? Well, Perry says a  
3 couple of things that were new to me and I spoke  
4 to Mr. Smith, who knows this case as well as Mr.  
5 Murtagh and almost as well as the Court having  
6 lived with the case so long, and it was new to  
7 him, too.

8 And that was that she said at some  
9 point during this crime -- this tragedy -- Colette  
10 MacDonald was somehow secured by a rope and at  
11 sometime during that crime, Perry attempted to  
12 protect or shield one of the children from this  
13 assault by hiding her in a closet.

14 Well, residing in the physical evidence  
15 reports and laboratory reports and photographs,  
16 are two pieces of evidence which heretofore had,  
17 to me at least, zero significance. They made no  
18 sense. I looked at them, I saw them, it made no  
19 sense at all to me, so I passed them by. What were  
20 those?

21 One was a report of Dr. Fisher, who was  
22 one of the consulting criminalists hired by the  
23 Government, an eminent man in his field. I  
24 believe he is the Chief Medical Examiner for  
25 Baltimore and he has a a perfect reputation. In a

1 Colloquy

Vol. 1, p. 90

2 response to a questionnaire about physical evidence  
3 sent him by the military investigators as to a  
4 particular abrasion, said, it resembles a rope  
5 mark around Mrs. MacDonald's arm -- a rope burn.  
6 That's one.

7 Nobody ever made much about it because it  
8 never seemed to make any -- it didn't have any  
9 relevance to anything else that was involved.

10 THE COURT: Wasn't that the victim's right  
11 arm?

12 MR. O'NEILL: It was, Your Honor, yes.

13 THE COURT: And wasn't that arm broken?

14 MR. O'NEILL: Both arms were broken, Your  
15 Honor, yes.

16 In addition, there was a lock of hair,  
17 apparently that of the younger MacDonald child,  
18 found in a closet in the MacDonald house. Prior  
19 to Perry, it had no significance. Perry, however,  
20 talks about moving a child into a closet to hide  
21 that child.

22 Now, why all these things? Why are they  
23 all so important? I think they're all so  
24 important because we're talking, as a legal  
25 matter first of all, about the applicability of

1 Colloquy

Vol. 1, p. 91

2 Section 804(b)(3) and whether or not these  
3 admissions against penal interest ought to be  
4 received in evidence, a question I know with which  
5 this Court has grappled before and which is here  
6 again.

7 And under the most recent statements of  
8 the Fourth Circuit under Brainard, what is that  
9 standard? How do we assess whether or not this  
10 sort of thing ought to come in? And the Fourth  
11 Circuit told us that Brainard says that admissions  
12 against penal interest can come into evidence and  
13 are admissible despite their hearsay character so  
14 long as there are corroborating circumstances of  
15 these statements' trustworthiness -- the  
16 statement's trustworthiness.

17 And looking to the Advisory Committee  
18 Notes and all the rest of that, they say the  
19 reason they have that -- the reason they want that  
20 -- some corroboration to indicate that the  
21 statement is trustworthy, is about a fear or a  
22 concern that somebody might fabricate a story.

23 The one they talk about, the example they  
24 give, and with which counsel cites in his papers,  
25 is the braggadocia of someone in prison. I am Billy

1 Colloquy

Vol. 1, p. 92

2 the Kid. I've done so many major crimes. Or I  
3 am Dillinger and I live in this prison, et  
4 cetera. And, in order to avoid that sort of  
5 fabrication, which does nothing but injustice to  
6 everybody within the system, there are  
7 requirements built in now.

8 Well, what do we have? We have  
9 Stoeckley's statement. How is Stoeckley's  
10 statement corroborative?

11 Stoeckley's statement is that we got  
12 together that evening. Some of us went out to  
13 North Carolina State Extension at Fort Bragg to  
14 visit, for some reason, with Colette MacDonald.  
15 What reason, we'll never know.

16 And we went from there back to our  
17 gathering spot to plan this assault on the MacDonald  
18 family. We went from our gathering spot to the  
19 Dunkin Donuts Restaurant at an approximate time.  
20 We assembled there.

21 We went from there out to the MacDonald  
22 house. We left the MacDonald house and came back  
23 and I -- Stoeckley was saying that she and some of  
24 her crowd were later confronted by Detective Beasley  
25 about twenty-four (24) hours after the murder



1 Colloquy

Vol. 1, p. 93

2 outside her house.

3 That's the -- Stoeckley's said that all  
4 along. And she describes the manner in which they  
5 were dressed. She was wearing this floppy hat, a  
6 raincoat, boots and a skirt. With them was a  
7 black -- with her was a black male wearing an E-6  
8 jacket, described as a short stocky fellow, and  
9 Greg Mitchell, Don Harris, and she mentions other  
10 names, Mazerolle and Fowler.

11 There is a -- there are two (2) witnesses  
12 who were in this Dunkin Donuts Restaurant sometime  
13 in the hours leading up to one A. M. -- one-thirty  
14 (1:30), who see people matching those exact  
15 descriptions and, of course, had an opportunity, I  
16 know, to review those statements of those  
17 witnesses and -- they're just witnesses who  
18 happened to be at a place at a time, and happened to  
19 see a car wreck. They didn't own the car, they  
20 don't own the insurance company. They're just  
21 people who saw something happen.

22 THE COURT: What is the date of those  
23 statements?

24 MR. O'NEILL: Pardon me?

25 THE COURT: What's the date of those

1 Colloquy

Vol. 1, p. 94

2 statements?

3 MR. O'NEILL: They were in 1981, '82, in  
4 that range.

5 THE COURT: Over ten (10) years after the  
6 crime?

7 MR. O'NEILL: Yes, Your Honor.

8 And a careful reading of those statements  
9 revealed that this event -- first of all, the  
10 character of these people was so bizarre and  
11 secondly, it's backdrop against the MacDonald  
12 case what we see here the next day was so  
13 interesting or catchy at the time, it was  
14 indelibly ink printed into their memories.

15 Then there is a woman at North Carolina  
16 State Extension -- a university professor who  
17 identifies these people, or some of them, and who  
18 makes a statement to us, again some ten (10) years  
19 after the crime, having made a statement,  
20 according to her -- having summoned the CID and  
21 told the CID about what had happened, what she had  
22 seen a day or so after the murders, which she  
23 identifies a person matching Stoeckley's  
24 description, a person matching Mitchell's  
25 description.

1 Colloquy

Vol. 1, p. 95

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She gives a physical -- a description of the attire of Stoeckley which is identical in all respects save one to the description given by Mrs. Averitt about a sighting at eight-fifteen (8:15) the morning after the murders. She has the same hat, the same jacket, the same skirt, the same boots.

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The difference is when Mrs. Averitt saw the boots, they were covered with some dark substance that smelled like a hog slaughter. When the first woman saw them she just said they were white boots.

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And -- excuse me, Your Honor -- and Stoeckley said, there were specifics about the murders themselves, to wit, Mr. Mitchell's participation in them, which were particularized and which saw corroboration in other areas.

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That other area -- that first other area is Mr. Mitchell whose statement we've gone through -- or whose statements we've gone through and whose left-handedness we've gone through, and whose presence at Fort Bragg has been established through his wife and whose departure from Fort Bragg and his efforts at seeking drug rehabilitation and

1 Colloquy

Vol. 1, p. 96

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counselling have also been established through his wife.

The association --

THE COURT: (Interposing) Excuse me. Would you please tell the Marshal not to let anybody else come in until eleven-thirty (11:30)? He can hear me. He's right there.

MR. O'NEILL: The issue, Your Honor, is this I think. Are these people -- these three (3) people have confessed and the two (2) people in whose presence admissions were made and who went along with those admissions -- implied admissions, I guess we'd call them -- Don Harris and this black fellow with the E-6 jacket on, both of whom were present at different times when Stoeckley and they discussed participation in something -- in one instance, the MacDonald murders, in another instance, some ritual in which shed blood cleanses, are they bizarre people? I mean, are they just so off the wall that they're just repugnant to all of us? The answer is they are. That's exactly what they are. They're just horrible, horrible people.

Now, the question is because they are such

1 Colloquy

Vol. 1, p. 97

2 horrible, horrible people who are engaged in such  
3 horrible, horrible conduct, apart from this  
4 murder, does that mean that the confessions they  
5 would make about these crimes are incredible?

6 I suggest, Your Honor, that it is their  
7 very character, their very bizarre character which  
8 lends credence to their confessions and admissions  
9 rather than diminishes the credibility of those  
10 statements.

11 And who else would commit such unspeakable  
12 horrors except people who themselves have such  
13 unspeakable problems?

14 In the analysis of people like this, what  
15 do you try to figure out? Well, you try to figure  
16 out just like we try to figure out about every  
17 witness. Just what do they have in mind? What is  
18 behind what they're doing?

19 There is only one who remains about whom  
20 we know much about what sort of person she has  
21 become and that's Perry, and Perry was a person who  
22 -- at about the time of these transactions, was  
23 involved in these rituals which involved blood  
24 shed.

25 She was involved in stabbings of apparently

1 Colloquy

Vol. 1, p. 98

2 anybody who got close to her, her boyfriend, her  
3 friend who was some young man who lived there,  
4 her dog, and a bizarre pattern of behavior, which  
5 culminated in her leaving the Fayetteville area  
6 and going home to Florida where she was  
7 institutionalized for a period and has been under  
8 psychiatric care since, and is apparently under  
9 daily medication for whatever problem she has.

10 There is a case that we have -- this is  
11 this case -- if we were to take this case, with  
12 the evidence that has been assembled about these  
13 people -- this group of people -- and bring it up  
14 to the United States Attorney's Office and say,  
15 "I'm with the FBI and here's my investigation.  
16 This case should be indicted. What do you think?"

17 There is zero doubt that every standard for  
18 indictment of these people could be satisfied. A  
19 more than a reasonable probability that this crime  
20 was committed. More than a reasonable probability  
21 that these people did it.

22 They admitted it. They were seen there.  
23 Their admissions are supported and corroborated by  
24 independent sightings of these specific people before  
25 the crime on their way to the MacDonald house, after

1 Colloquy

Vol. 1, p. 99

2 the crime proximate to the MacDonald house, with  
3 the woman participant with apparently blood on her.

4 THE COURT: There would be a problem with  
5 the Statute of Limitations, would there not?

6 MR. O'NEILL: I don't believe so, Your  
7 Honor, not for a capital crime. I believe it's  
8 five (5) years for everything save and except taxes  
9 and death, like so many things in life.

10 THE COURT: Under the federal system?

11 MR. O'NEILL: I believe it's -- yes, sir.  
12 I believe it's an open-ended Statute of  
13 Limitations.

14 THE COURT: That's interesting. I was  
15 under the impression that the reason that this  
16 indictment had to be returned in this case along  
17 about January of 1975 was that in a few more days  
18 it would be unindictable. Now, under the State --

19 MR. O'NEILL: (Interposing) Well, the  
20 answer is I'm not that certain, Your Honor.

21 THE COURT: Now, under the State system, I  
22 did not understand that there was any Statute of  
23 Limitations on murder. Let's ask the Government's  
24 lawyer here. How about it?

25 MR. MURTAGH: Your Honor, the Statute,

1 Colloquy

Vol. 1, p. 100

2 Title 18, United States Code, Section 1111,  
3 provides that a crime that is punishable by death  
4 can be indicted at any time. However, due to the  
5 Supreme Court's decision in Eurman vs. Georgia,  
6 while the Statute provided for the death penalty  
7 at the time of the commission of the crime, at the  
8 time of the indictment it could not have been  
9 applied.

10 We operated under the assumption that  
11 there was a -- in other words, it's no longer a  
12 capital crime for that purpose, so we operated  
13 under the assumption that it's a five (5) year  
14 Statute of Limitation. That's -- for what it's  
15 worth, that's the Government's position.

16 MR. O'NEILL: Your Honor, --

17 THE COURT: (Interposing) Well, now, it  
18 seemed like there was a suggestion here that your  
19 Mr. Gunderson, is it, who conducted this  
20 investigation, at some point assured Stoeckley  
21 that she was no longer indictable because of the  
22 Statute of Limitations.

23 MR. O'NEILL: There was evidence of that,  
24 Your Honor. I believe either Mr. Gunderson  
25 testified to it or it was in one of Stoeckley's



1 Colloquy

Vol. 1, p. 101

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statements. That is correct.

3

I believe he's wrong. Anecdotically Mr.

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Murtagh just explained their reasoning. I lost a

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Statute of Limitation motion on a federal murder case

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in Hawaii about five (5) years ago and I wish I had

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the kind of -- were like in the cases I have a bad

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memory, but I remember that issue was raised and

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we lost it and I think that's where I formed my

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impression that I believe it to be an open-ended

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statute, because it says the death penalty and

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even though the death penalty's unconstitutional,

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the Statute still prescribes that.

14

But perhaps we can brief that and send

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in yet another addenda to the Court.

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Your Honor, the important thing here, and

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the reason we've raised all these obviously, is

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that against a backdrop where there has been no

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proof of motive, no eyewitness testimony, no

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confessions and physical evidence only, new

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evidence has come forward or been brought forward

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which establishes eyewitnesses, gives you

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confessions, and gives motives, all of which were

24

absent.

25

Why important? Well, because of the

1 Colloquy

Vol. 1, p. 102

2 assessment which now has to be made by this Court  
3 as a trier of fact as to what impact this evidence  
4 would have had at trial to the jury, the trier  
5 back at that time.

6 As the Court knows, we have urged that, in  
7 light of the Brady problems, which Mr. Smith so  
8 capably discussed, there would, in the absence of  
9 what we're urging be an impossible task before this  
10 Court or any Court, and that is to put on and take  
11 off hats which require the Court to change points  
12 of view.

13 If you apply a Brady standard -- any of  
14 the Brady standards it's going to be a standard  
15 of the probability that the -- let me make  
16 sure I don't misstate it here -- whether any  
17 reasonable likelihood exists that the new evidence  
18 could change the result of trial, number one; number  
19 two, whether the new evidence might have affected  
20 the result, or number three, whether it probably  
21 would affect result.

22 They're the three (3) Agurs standards  
23 which Mr. Murtagh and Mr. Smith were describing  
24 and discussing.

25 Historically, the standard for motion for

1 Colloquy

Vol. 1, p. 103

2 a new trial, when there's no Brady business  
3 involved, is the last standard. Would it probably  
4 affect the results of the trial?

5 We are urging, Your Honor, that that's an  
6 inappropriate standard if the Court finds a Brady  
7 violation. And the reason that it's an inappropriate  
8 standard is that under a case which we have cited  
9 called Marzeno -- it's cited in the moving  
10 papers -- the Court -- a Court has told us that in  
11 assessing a Brady case, the Court has to consider  
12 the Brady information in the context of all the  
13 evidence, which, I guess, is a logical statement  
14 about what the Court would do in any event. And in  
15 so doing, if you're applying a Brady standard,  
16 that's the standard you're applying.

17 It's, I think, intellectually and humanly  
18 impossible to apply more than one standard despite  
19 the considerable prowess that goes into the  
20 judicial role to change the approach. I think it  
21 can only -- any human being can only approach it  
22 one way and apply one standard and we're urging,  
23 Your Honor, that it would be -- obviously there's  
24 no case law one way or the other. I don't think  
25 it's ever come up before, at least we've been

1 Colloquy

Vol. 1, p. 104

2 unable to find anything, so this would be a case  
3 of first impression --

4 THE COURT: (Interposing) Well, that's all  
5 we deal in here, Mr. O'Neill. If anybody knows  
6 the answer, they don't bring it here. Or if it  
7 can be found in a book. Go ahead.

8 MR. O'NEILL: We're urging that the only  
9 realistic standard to be applied and fair standard  
10 to be applied would be the appropriate Brady  
11 standard and, in this case, it would be either the  
12 standard applicable in the case of a false  
13 impression or the standard applicable where the  
14 evidence was specifically requested because the  
15 evidence was specifically requested as is pretty  
16 well chronicled and documented in the Brady  
17 motion, and because that standard, at least,  
18 should apply.

19 Because of the arguments that we have made  
20 about the false impression of facts, that is to  
21 say this is our photograph and nobody knew that  
22 the edge was trimmed a little bit, we're saying  
23 that was a creation of a false impression,  
24 therefore the lowest standard of materiality ought  
25 to be the standard to which we are held.

1 Colloquy

Vol. 1, p. 105

2 For these purposes, Your Honor, however, I  
3 think -- let's explore it at the other end of the  
4 spectrum. What probably would have resulted?

5 And I suggest that where the evidence is a  
6 physical evidence picture, which can be shown by --  
7 the Brady materials have been distorted somewhat  
8 -- set off against a Defendant's account of the  
9 crime, the best he recalls it, a traumatic event,  
10 all kinds of emotion associated with it, and the  
11 proof is that that photograph of the crime is  
12 inconsistent with what he says about it.

13 When that case is measured against a case  
14 where participants who have been seen by strangers  
15 going out there, coming back from there and three  
16 (3) of them have confessed and two (2) of them  
17 have admitted it, that a jury couldn't help but  
18 probably conclude otherwise, certainly in the  
19 words of Mr. Smith, these are the things of which  
20 reasonable doubt are made.

21 And I suggest, Your Honor, and submit to  
22 this Court, that's precisely what this case is all  
23 about, and when the Court applies even the most  
24 difficult standard to this new evidence, the  
25 conclusion that we urge is that that new evidence

1 Colloquy

Vol. 1, p. 106

2 would probably have changed the results of this  
3 trial.

4 Thank you, Judge.

5 THE COURT: Let me ask you something which  
6 I also found intriguing, which as a matter of  
7 trial tactics, let's assume for the moment that  
8 your motion is allowed and it gets you a new  
9 trial. Now, you've got the whole basketful of  
10 confessions by at least three (3) different  
11 people. Would you offer them all?

12 MR. O'NEILL: Yes, I would, Judge. I  
13 would think, just to be perfectly candid, I wish  
14 -- to be honest with you, I wish Stoeckley had  
15 given one statement. She didn't. She said a bunch  
16 of different things. I would put them all in because  
17 she made them and I'd be putting -- she would be  
18 my witness through the detectives to whom she  
19 confessed, and I'd put them all in and let the  
20 jury take it and sift it, because I have no  
21 trouble with the -- that statement is consistent.

22 It is also inconsistent. There are  
23 inconsistencies which, in my mind, are at the  
24 periphery or which are outright lies designed to  
25 protect her.

1 Colloquy

Vol. 1, p. 107

2 THE COURT: Actually, Mitchell never did  
3 say, "I committed these murders" -- the  
4 MacDonald murders.

5 MR. O'NEILL: That's correct, Your Honor.

6 THE COURT: He just said he committed  
7 some crime.

8 MR. O'NEILL: He said, Your Honor, I just  
9 -- I'm sorry --

10 THE COURT: (Interposing) Now, of course,  
11 you may not be familiar with the situation in  
12 Cumberland County the hone of the Fort Bragg people,  
13 but murders down there, if you read the papers,  
14 are just about a daily occurrence. And not all of  
15 them are solved. So Mitchell says, "yeah, I  
16 committed a serious crime." You could probably go  
17 back in the books and find two dozen murders that  
18 are unsolved and they say, "well, which one of  
19 these was it?" and he might not know.

20 MR. O'NEILL: I think that's a very good  
21 point, Your Honor, because it helps me --

22 THE COURT: (Interposing) Yeah.

23 MR. O'NEILL: -- and that's this.

24 Mitchell made the statement in a context of his  
25 concern that the FBI was after him for this crime.

1 Colloquy

Vol. 1, p. 108

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What we do know is that the FBI had been after him for -- or, not really -- but out to interview him about the MacDonald murders a few months before this statement of his.

So, I think that is significant. The fact that they're out there with a particularized crime in mind, and the testimony of his wife and his friends, is that after that interview, which was specifically about the MacDonald murders, his behavior changed, he began drinking significantly higher -- more heavily than he had been. He began sleeping with a gun in his bed and it was to the FBI that he referred when he said, "I am in trouble for having done a horrible thing at Fort Bragg."

If the Court has no question or if the Court does have a question, I'd be more than happy to respond.

THE COURT: Well, I don't know. This matter of the trial tactics was -- sort of intrigued me because there was a time when I was out there faced with the choice of how much evidence to put in or whether to leave out some, and so forth. But you say you'd put it all in?



1 Colloquy

Vol. 1, p. 109

2 MR. O'NEILL: I would, Your Honor. I  
3 think they all complement one another. I think  
4 they all fill in the spaces for each other and I  
5 think they all corroborate one another.

6 THE COURT: Did anyone ever interview this  
7 Jimmy Friar?

8 MR. O'NEILL: Yes, Your Honor. The -- Mr.  
9 Friar was interviewed by our detective, post  
10 trial. I might say, Your Honor, that there will  
11 be a contention, I know, by Mr. Murtagh, that Mr.  
12 Friar is a -- is not newly discovered and I wanted  
13 to make certain the Court understands the  
14 underlying facts of that.

15 It involves my colleague here. There is a  
16 point during the trial at which there was a ruling  
17 as to the admissibility of certain Stoeckley  
18 admissions. Stoeckley had made these -- I call  
19 them half-baked admissions -- to colleagues of  
20 hers, then later recanted. I may have been  
21 involved -- no, I wasn't. The Court will probably  
22 recall those.

23 At that point, Friar had been under  
24 subpoena either by the government or by the  
25 defense -- I believe the defense -- and was -- at

1 Colloquy

Vol. 1, p. 110

2 least was readily available somewhere here in the  
3 courthouse, and there was a question about whether,  
4 -- at that point in time whether the defense would  
5 call her. And the defense made the decision not  
6 -- to call him rather -- not to call him.

7 And we have urged that under the  
8 circumstances, that is not a lack of diligence.  
9 And the reason we have urged it is this. The  
10 issue was at this point, the relevance of Friar.  
11 At that time, all we had available was Stoeckley's  
12 half-baked admissions to her friends that I may  
13 have been involved, et cetera.

14 We didn't have anything about Friar -- her  
15 saying anything about this call. We had Friar who  
16 said he made a call. So, --

17 THE COURT: (Interposing) And he says he  
18 inadvertently reached --

19 MR. O'NEILL: (Interposing) Dr.  
20 MacDonald.

21 THE COURT: -- Dr. MacDonald's house. Now,  
22 this was the thing that intrigued me, was that if  
23 he got it by reason of dialing a wrong number,  
24 how'd he know it was MacDonald's house?

25 MR. O'NEILL: It wasn't the wrong number.

1 Colloquy

Vol. 1, p. 111

2 He was connected through a post operator. Sir,  
3 what happened was this, as Mr. Friar recounts it,  
4 Your Honor.

5 Mr. Friar had previously been  
6 hospitalized in Washington. He is a South  
7 Carolinian by birth and by upbringing and he  
8 befriended a doctor there -- his doctor -- Dr.  
9 Richard MacDonald.

10 On occasion, Mr. Friar would get off the  
11 post and have one too many and at least on one  
12 occasion, and perhaps on more than one occasion,  
13 he'd call up his friend, Dr. MacDonald, to help  
14 him out and at least on one occasion, Dr.  
15 MacDonald apparently did.

16 Mr. Friar was transferred from Walter Reed  
17 Hospital to Womack, the hospital on the post at  
18 Fort Bragg. People, being more true to form than  
19 horses, Mr. Friar went out again one night and had  
20 one too many and was looking to get some help to  
21 go home. The buses had stopped running, I  
22 believe, at two (2) A. M. in Fayetteville.

23 He had to get back to post, so what does he  
24 do when he's in a crunch? He calls up Dr. MacDonald.  
25 He gets on and misrepresents his person to the

1 Colloquy

Vol. 1, p. 112

2 operator and claims he's another doctor or something.  
3 "Put me through to Dr. MacDonald." And that's how he  
4 gets Dr. MacDonald.

5 THE COURT: Well, then he did know. It  
6 wasn't any inadvertence. He did know that he was  
7 calling MacDonald's house?

8 MR. O'NEILL: Yes, sir.

9 THE COURT: All right. Okay.

10 MR. O'NEILL: Yes, Judge, just the wrong  
11 MacDonald. He was calling a Dr. Richard  
12 MacDonald. The post connected him with Dr.  
13 Jeffrey MacDonald, the only Dr. MacDonald on post  
14 there.

15 THE COURT: Yeah. Oh, I see. Well, then,  
16 he got the wrong MacDonald. How'd he know he got  
17 the wrong MacDonald?

18 MR. O'NEILL: Because the phone gets hung  
19 up on him.

20 THE COURT: Okay. All right. Anything  
21 else? Are you through?

22 MR. O'NEILL: Nothing else. Thank you,  
23 Judge.

24 THE COURT: All right. Yes, sir?

25 MR. MURTAGH: Your Honor, I would ask --

1 Colloquy

Vol. 1, p. 113

2 . if I could sort of start with Jimmy Friar and then,  
3 depending on how long the Court intends to hold  
4 session before breaking, I can decide which way I  
5 want to go with the argument.

6 THE COURT: Well, normally on Monday, we  
7 recess at twelve forty-five (12:45) and come back  
8 at two-fifteen (2:15). However, if this is going  
9 to inconvenience anybody, we can go straight on  
10 through.

11 MR. MURTAGH: Fine.

12 THE COURT: What -- well, what do you  
13 want?

14 MR. MURTAGH: Well, that sounds fine, Your  
15 Honor. I think, if I had my druthers, I'd either  
16 want to go all the way through it, but I know --

17 THE COURT: (Interposing) How long is it  
18 going to take?

19 MR. MURTAGH: Oh, it'll probably be a half  
20 an hour, forty-five (45) minutes. So, perhaps if  
21 -- maybe if I could address the Jimmy Friar  
22 question and then if the Court --

23 THE COURT: (Interposing) All right.  
24 . Okay.

25 MR. MURTAGH: Your Honor, the record --

1 Colloquy

Vol. 1, p. 114

2 the docket will indicate that Mr. Friar was  
3 incarcerated at the time of the trial -- he was a  
4 jailbird who wanted a trip to the courthouse. And  
5 what was pending in front of Your Honor was a  
6 motion for a writ of habeas corpus ad  
7 testificandum.

8 And there was a colloquy at the bench,  
9 sidebar, about whether Mr. Friar was going to be  
10 needed or not and Mr. Smith -- that subsequently  
11 there was, in open court, an inquiry from the Court,  
12 I believe in the presence of the jury, which was to  
13 the effect of have you reached a decision on that  
14 matter, to which Mr. Smith went thumbs down.

15 So, Mr. Friar was available and could have  
16 been called and anything he would have said is not  
17 newly discovered. With respect to Mr. Friar's  
18 interview, he was also interviewed by Special  
19 Agent Madden of the FBI and I would draw the  
20 Court's attention to the government appendix,  
21 Volume One, Tab E, Madden Affidavit Number Five  
22 (5), the substance of which is Mr. Friar says that  
23 he was pretty well drunk out of his mind on the  
24 night of the 16th and 17th of February.

25 So, we don't think Mr. Friar -- whether

1 Colloquy

Vol. 1, p. 115

2 you'd consider him newly discovered or not is in  
3 any way, shape or form a witness who would affect  
4 the outcome of this trial.

5 Your Honor, two (2) other preliminary  
6 points, I think, before I launch into this thing.  
7 I still don't understand -- and perhaps it's my  
8 fault -- from counsel's argument, as to who it is  
9 they contend actually perpetrated a crime, other  
10 than Dr. MacDonald.

11 Now, I say this not facetiously, but I  
12 don't understand as to whether it is Helena  
13 Stoeckley, Greg Mitchell, Don Harris, Allen  
14 Mazerolle, Dwight Smith and Bruce Fowler, who are  
15 the so-called "Stoeckley group", which, by the way  
16 does from time to time in her statements, include  
17 other people. One time --

18 THE COURT: (Interposing) What's the  
19 total number of people that these confessions put  
20 in the house at one time or other?

21 MR. MURTAGH: Well, let me answer that  
22 question this way. I would say there are about  
23 six (6) confessions and if you take everybody  
24 that's in every confession, you've got about  
25 twenty-two (22) people in the house.

1 Colloquy

Vol. 1, p. 116

2 With respect to the Stoeckley group, it  
3 varies from five (5) to six (6) to seven (7),  
4 depending on whether you include Kathy Smith, her  
5 roommate. In one of her statements to Prince  
6 Beasley, the one at the motel, the Bordeaux Motel  
7 incident, she says Kathy Smith was there.

8 Now Beasley has Kathy Smith and Cathy  
9 Perry confused from time to time as his  
10 statements and testimony indicate --

11 THE COURT: (Interposing) Aren't they the  
12 same -- one and the same person?

13 MR. MURTAGH: No, they are two (2)  
14 different people, Your Honor. Kathy Smith is --  
15 Stoeckley has two (2) roommates in the house at  
16 Clark Street, at least two (2). One is a woman  
17 by the name of Diane Hedden, H-e-d-d-e-n, Cazares,  
18 C-a-z-a-r-e-s, and the other one is a Kathy  
19 Elizabeth Smith. I believe Kathy is spelled with  
20 a "K".

21 We know from the affidavits which were not  
22 contested at the evidentiary hearing of both of  
23 those people in 1971, when the agents were trying  
24 to pin down where Stoeckley was on that night,  
25 that Kathy Smith says, "Well, I don't know where



1 Colloquy

Vol. 1, p. 117

2 she was, but I was with Bruce Fowler at a trailer  
3 the whole night."

4 And we know from Diane Hedden that she  
5 says that Don Harris came home from the Village  
6 shop with me and he fell asleep on the couch  
7 while I was painting the bathroom.

8 So, it's kind of important to pin down who  
9 it is we're supposed to respond to because we also  
10 have the Cathy Perry statement. Now, in the Cathy  
11 Perry statement you have accord -- she doesn't name  
12 anybody as accompanying her. The only description  
13 she gives is two (2) additional females and five  
14 (5) or six (6) white males, two (2) of whom she  
15 further describes as one being a blond-headed fat  
16 person and another one as a dark-skinned, dark  
17 complected individual.

18 Another problem you have is Stoeckley says  
19 she was the only female involved and expressly  
20 says that Cathy Perry was not there; and according  
21 to Cathy Perry, she, Cathy Perry, killed the wife;  
22 and according to Stoeckley, it's Mitchell,  
23 Mazerolle, who we know was in jail, and Harris who  
24 was stabbing Stoeckley in the bedroom.

25 So, I wonder, Your Honor, if perhaps, for

1 Colloquy

Vol. 1, p. 118

2 want of a better term, if the government could not  
3 ask the Court respectfully to inquire of counsel  
4 if they will elect as to who it is we're supposed  
5 to prove didn't commit the crime. Is it all of  
6 them or are they --

7 THE COURT: (Interposing) I have asked  
8 that question in effect by saying, as a matter of  
9 trial tactics, whose confession would you put in.  
10 He said all of them.

11 MR. MURTAGH: Well, yes, Your Honor, he  
12 said all of them, but he responded specifically  
13 with respect to all of Stoeckley's confessions.  
14 Now, I would point out -- that's my understanding  
15 of what he said.

16 THE COURT: I thought he was talking about  
17 Perry -- he's talking about Perry and Mitchell and  
18 anybody else who gave a confession that's  
19 available to him.

20 MR. MURTAGH: Well, then we would have Neal  
21 Braswell, who also says he did it. Yes, Your  
22 Honor, that's in the -- we have another  
23 confession. A guy who says he broke in the back  
24 door of the place.

25 THE COURT: Oh.

1 Colloquy

Vol. 1, p. 119

2 MR. MURTAGH: And he names people. And  
3 then we have two (2) more jailbirds named Shields  
4 and Rhodes, who were in Marion, who talked to  
5 somebody and they claimed that they did it.

6 And the point I'm trying to make, Your  
7 Honor, is that you can't pick and choose between all  
8 of these confessions and at the same time contend  
9 that only people who actually perpetrated these  
10 crimes would confess to them or make statements  
11 indicating that they are responsible for them.

12 There is the phenomenon of the compulsive  
13 confessor, the braggadocios prison inmate and the  
14 aberrant mental patient who makes this statement  
15 from time to time. And I think if we could narrow  
16 it down as to, you know, is it -- also their  
17 pleadings, Your Honor, talk in terms of Perry's  
18 statement proves that the Stoeckley group did it.

19 Now, is -- does that mean Perry's  
20 statement proves that the Stoeckley group, as  
21 Stoeckley described the crime, or does that mean  
22 that Perry, as Perry describes the crime, because  
23 we're not talking about the same crime here if you  
24 look at all the statements. I mean they just cannot  
25 be reconciled, either with each other or with the

1 Colloquy

Vol. 1, p. 120

2 Defendant's account of the crime.

3 So, I guess, I would ask again, is it the  
4 Stoeckley statements with -- to the exclusion of  
5 the Perry statements, or is it the two (2)  
6 together?

7 THE COURT: Well, I won't require him to  
8 answer it, but if he'd like to, I'll give him the  
9 opportunity.

10 MR. O'NEILL: Well, thank you, Judge. I  
11 would like to answer.

12 THE COURT: Yeah.

13 MR. O'NEILL: Mr. Murtagh is correct. There  
14 is a phenomenon of aberrant mental patients, people  
15 who read about an event and are looking to take part  
16 in this event through this bizarre phenomenon of  
17 claiming participation. Wacky as it is, we know  
18 it exists.

19 And there are such people in this case.  
20 Mr. Muragh identified one of the them. There are  
21 several others as well. We learned of those and  
22 we tracked them down, and none of them are  
23 corroborated by anything. And in my judgment, if  
24 something is not corroborated by something, you  
25 don't rely upon it -- something of this nature.