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2 proffered. In fact, we don't know what clothes  
3 we were supposed to have not selected from this  
4 cornucopia of items that Mr. Nance brought into  
5 the office.

6 Also Your Honor may recall from our  
7 filings, Mr. Nance later represented somebody who  
8 was a friend of Jackie Don Wolverton, Perry's  
9 roommate, that precipitates the stabbing incident  
10 and Perry moving back in with Mrs. Garcia.

11 Those two (2) guys, Wolverton and -- I  
12 forget the other fellow's name, but it's in our  
13 response -- were arrested for possession of  
14 marijuana. It was afterwards that Mr. Nance came  
15 back, you know, to the CID and tried to make some  
16 sort of linkup to the clothes that Wolverton was  
17 transporting from his off-post residence to Mrs.  
18 Garcia's house.

19 Your Honor, that completes the  
20 government's --

21 THE COURT: (Interposing) Well, let me  
22 ask you one more thing.

23 MR. MURTAGH: Yes, sir.

24 THE COURT: This relates to the 804 rule  
25 -- 804(b)(2) rule question.

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2 Both sides have referred repeatedly to the  
3 Brainard case, but I've heard no mention of United  
4 States against Carvalho, an August 1984 case of  
5 the Fourth Circuit, also written Judge Murnaghan.  
6 Are you familiar with that case?

7 MR. MURTAGH: Yes, Your Honor, I am. As  
8 luck would have it, a co-worker of mine at the  
9 Department of Justice, handled the prosecution. And  
10 I believe the -- as I recall it was an immigration  
11 service case. And the issue did not arise in the  
12 context of the admissibility of an out-of-court  
13 inculpatory statement by a third party offered to  
14 exculpate the Defendant.

15 I believe that if you look at that  
16 decision -- if we're talking the same one -- I  
17 believe he's the Portuguese national who --

18 THE COURT: (Interposing) Yeah. The  
19 immigration case.

20 MR. MURTAGH: Yes. Tried in the Eastern  
21 District of Virginia in Alexandria. And as I  
22 recall, it was a question that arose at trial in  
23 the context of the admissibility of an admission  
24 of the Defendant. And I would say that -- in other  
25 words, we have that portion of the 804(b) -- I

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2 think it's (b)(3) rule, in which they are talking  
3 about the Defendant's -- what constitutes an  
4 admission against interest.

5 THE COURT: As I recall the case, I was  
6 alerted to the fact that the Court might possibly  
7 be backing away from this principle that you pay  
8 no attention to the credibility of the  
9 declarant, but only to the trustworthiness of the  
10 statement itself, --

11 MR. MURTAGH: (Interposing) Yes, I --

12 THE COURT: -- and in that case, it seemed  
13 to me that the declarant, because of her  
14 relationship to certain parties and the impression  
15 that she wanted to leave with her interrogators  
16 strongly -- made her testimony suspect. And it seemed  
17 that the Court, in that case, took into account --  
18 considered at least to some extent the credibility  
19 of the declarant.

20 And I want to hear from your opponents about  
21 this, too, because frankly I have trouble with having  
22 to divorce myself completely from the credibility of  
23 a declarant and just view the thing from the  
24 standpoint of the statement alone.

25 You can conceive -- of course, you can make

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2 all kinds of hypotheticals, but a person who  
3 admittedly was dead drunk or strung out on LSD or  
4 some hallucinogen at the time the statement was  
5 made, and yet the corroborating circumstances  
6 might be very strong outside of that.

7 MR. MURTAGH: Well, Your Honor, all of  
8 these rulings occur in the content -- context of  
9 the admissibility of the statement. Now, I've  
10 argued this before Judge Murnaghan, so I sort of  
11 have a feeling for his thoughts on the subject.  
12 And basically it would be that, yes, the witness  
13 is totally unreliable, but that's a matter for the  
14 jury, you know. You can impeach her -- him or her  
15 or whatever.

16 And what I'm saying is that in the context  
17 of the motion for a new trial, that you can  
18 consider the character of the declarant, but you  
19 should consider it not from whether to admit the  
20 statements, per se, although -- as a practical  
21 matter, when we had the oral argument of this  
22 before the Fourth Circuit, they raised this issue.  
23 I believe it was Judge Sprouse. And it's in the  
24 transcript that I think we filed with the Court.

25 You can't -- it's kind of hard to

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2 separate the character of the declarant and the  
3 character of the statement. I mean, you know, you  
4 can't -- you're dealing in the real world --

5 THE COURT: (Interposing) Certainly you  
6 could revert, I take it, to a consideration of the  
7 credibility of the declarant when you came to  
8 decide the question of whether it would likely  
9 result in a new trial?

10 MR. MURTAGH: In a --

11 THE COURT: (Interposing) It would be  
12 relevant there in any event, wouldn't it?

13 MR. MURTAGH: Yes, that's what I'm saying.  
14 In other words, that's where it should be  
15 considered.

16 THE COURT: All right.

17 MR. MURTAGH: Now, for the -- we take the  
18 position that the statements are -- you know,  
19 Helena Stoeckley is an inherently unreliable  
20 witness, but besides that, objective circumstances  
21 contradict -- it is the statement that we're  
22 saying, you know. If it came down to an  
23 admissibility issue, not just because Helena  
24 Stoeckley is, you know, what she was, but because,  
25 you know, the corroborative circumstances are

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2 absent and, in fact, are contradictory. The best  
3 example of this is the statement, "I saw Allen  
4 Mazerolle strike Colette MacDonald", is not  
5 clearly trustworthy because the indisputable fact  
6 was that Allen Mazerolle was in jail on the night  
7 of the murders and that, while the fact situation  
8 is a little different from what the framers of the  
9 rule were considering, they were concerned not  
10 just with the braggadocios criminal where you have  
11 two (2) fellows, one says, I'll confess to your  
12 crimes and you'll call me as a witness, and I'm  
13 serving thirty-nine (39) life terms anyway. But  
14 that has occurred.

15 And you find out when you look at the  
16 guy's record that at the time he claims to have  
17 committed this crime, he was actually in jail.

18 We don't have that exactly, but I think  
19 we're as close to it as you could possibly come  
20 within this case, you know, you have Mazerolle in  
21 jail.

22 And then you would also look to the  
23 circumstances -- the basis of her knowledge for  
24 what they contend are insider details. So, you  
25 know, if we did have a new trial, I would probably

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2 argue -- well, you know, I don't really know  
3 whether I would go on the admissibility or  
4 inadmissibility or not, or given the fact that she  
5 would be so subject to impeachment, let it all out  
6 before the jury and it would not probably result  
7 in an acquittal.

8 Frankly, I would just as soon avoid as  
9 many appellate issues as is possible. But I think  
10 that is the test and not -- you know, I'm not  
11 contending that Helena Stoeckley was credible,  
12 certainly far from it. But I think there is a very  
13 difficult analytical frame of reference that you  
14 have to go through.

15 And I might just add, Your Honor, that  
16 with the Brainard case, you had somebody who was  
17 -- he was a co-defendant in the trial as I recall,  
18 and on the one hand the government is saying, as  
19 against these other defendants, we want to  
20 introduce Mr. X's admissions as co-conspirators  
21 exception to the hearsay statement. They're  
22 clearly trustworthy.

23 And then, on the other side of the fence,  
24 the government was trying to exclude a statement  
25 by this same co-conspirator during the conspiracy,

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2 which he says to his secretary, A, B and C don't  
3 know anything about the fraud. And Judge  
4 Murnaghan -- and I think he's right -- was saying,  
5 they can't have it both ways.

6 But that isn't the situation that we have  
7 here.

8 Thank you, Your Honor.

9 THE COURT: All right, sir. Now, Mr.  
10 O'Neill, do you want to respond to that?

11 MR. O'NEILL: Yes, Your Honor. Very  
12 briefly. Thank you.

13 The case -- I think Carvalho, as I read it,  
14 Your Honor, stands foursquare for the very same  
15 principles expressed by Judge Murnaghan and the  
16 majority from the Fourth Circuit in Brainard and  
17 that's this. That -- a common-sense proposition.

18 Is there a motive to fabricate? Really,  
19 when they get into the credibility of the  
20 declarant in Carvalho, they're looking to see  
21 whether there is a motive to fabricate and in that  
22 case there is a question about an affidavit which  
23 had been executed by a woman and whether or not it  
24 was presently believable.

25 Its impact, if believed, as I recall the



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2 facts, would have been to benefit somebody. Now,  
3 the person who stood to benefit, as I recall it,  
4 was a man by whom she was presently pregnant. So,  
5 that the Court was saying, this woman had a motive  
6 to fabricate and the Court also said significantly  
7 to this inquiry, there were no corroborating  
8 circumstances for the statement itself.

9 So, I think that is not different from  
10 Brainard. I think it is Brainard and I think it  
11 speaks to the same policies which underpin  
12 Brainard.

13 I'm not going to take very long at all,  
14 Your Honor, because I think the Court capsulized  
15 what this case is all about insofar as the new  
16 evidence is concerned, far better than I was able  
17 to after writing all these papers. And it's this.

18 Dr. MacDonald testified as the only  
19 eyewitness to the crime, and he testified that he  
20 was set upon by at least four (4), but if you  
21 listened to what he said, more than four (4)  
22 assailants. He said, "I was confronted by these  
23 four (4) assailants", whom he described, and at  
24 the same time he heard his wife crying for  
25 assistance from another room, apparently herself

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2 being assaulted.

3 And he identifies four (4) people, four  
4 (4) people it turns out who miraculously were seen  
5 together earlier that evening, were seen  
6 apparently going in the direction of his house,  
7 and were seen later the next morning together.  
8 And it wasn't as though it was four (4) people of  
9 the most general kind of description at all.  
10 They're very particularized descriptions.

11 A woman with an unusual mode of attire on.  
12 A man of a specific description, the black fellow  
13 with the E-6 jacket, the specific build, the same  
14 couple seen with the same woman and with these  
15 other two (2) people.

16 And Dr. MacDonald's case went to that jury  
17 uncorroborated. And it's true, as Mr. Murtagh  
18 points out, there wouldn't be any change in that  
19 physical evidence, and it is probably true that  
20 that footprint was Dr. MacDonald's, to which I  
21 say, so what?

22 There is a crime scene. The place was a  
23 mess. People were walking all over the place and  
24 that, I think, focuses specifically on why this  
25 evidence is so important and why it would have

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2 made a significant difference.

3 And that is, it gives you some understanding  
4 of the bizarre character of that crime, so that when  
5 a man -- a man with no motive to do anything like  
6 that, with no history of having done anything like  
7 that, a man who, to all intents and purposes, a man  
8 just like you and me, could commit such a crime, a  
9 natural doubt certainly arises.

10 And he tells his story about these four  
11 (4) people. He's the only one telling that story.  
12 We now have three (3) of those people saying, yes,  
13 he was right and I was one of them and here's what  
14 happened.

15 That's what this case is all about and  
16 that's what this new evidence is all about. And on  
17 those circumstances, Your Honor, it is our very  
18 strong urging that that establishes that there  
19 would have been a new trial under -- no matter  
20 what standard was applied, or should have been a  
21 new trial -- or should be a new trial because there  
22 would have been a different result had that  
23 evidence been available.

24 Thank you, Your Honor.

25 THE COURT: All right, sir. Next motion.

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2 MR. O'NEILL: We have our last motion,  
3 Your Honor, which I think will be considerably  
4 briefer than the other two (2).

5 THE COURT: Is that the Dr. Brussels  
6 motion?

7 MR. O'NEILL: (Interposing) The Dr.  
8 Brussels motion, if we can call it that, Your  
9 Honor. It's twenty-two fifty-five (2255) and  
10 that's the jurisdiction foundation for it. The  
11 facts are these.

12 During the course of the trial, it became  
13 important to the defense to attempt to put on  
14 psychiatric testimony, and at one point it was for  
15 purposes of character evidence, I believe. And I  
16 believe that's ultimately how it came to the -- to  
17 be crystalized before the Court.

18 And the Court, quite properly held in my  
19 judgment that before the defense should be able to  
20 do that, that the prosecution ought to have an  
21 expert of their own choosing to take a look at  
22 Dr. MacDonald so that they would be in a position  
23 to either -- as we do in a trial -- rebut the  
24 defense evidence or put on independent evidence  
25 relative to that subject.

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2 THE COURT: I'm familiar with all your  
3 submissions on that for both sides, and the point  
4 is whether or not there is a violation of the  
5 Sixth Amendment privileges.

6 MR. O'NEILL: Very well. Thank you, Your  
7 Honor. That is a lot of assistance.

8 THE COURT: Just go right to that.

9 MR. O'NEILL: The --

10 THE COURT: (Interposing) Tell me what  
11 questions and answers -- what questions were asked  
12 by the prosecution of MacDonald on cross-  
13 examination that would not have been asked had  
14 Brussels not been in the picture somewhere.

15 MR. O'NEILL: Your Honor, as I speak here,  
16 I can't recite them obviously, and I don't mean to  
17 say that fatuously, but they are listed with some  
18 precision in the moving papers.

19 I think that's only one aspect of the  
20 problem, Your Honor, what questions were asked.  
21 I think a more significant aspect of this problem  
22 is this. That under any standard, Dr. Brussels  
23 was an agent of the government. He was hired by  
24 the government, he was retained by the government.  
25 He was flown down here at government expense. He

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2 was -- his services were sought by the government  
3 to aid the government in its purpose, which was  
4 the prosecution of Dr. MacDonald.

5 He then puts on a government hat. With  
6 that government hat on, Dr. Brussels learns  
7 information confidential to the defense during the  
8 course of trial, outside the presence of Dr.  
9 MacDonald's counsel, confidential information.  
10 Dr. MacDonald's ability to respond, Dr.  
11 MacDonald's understanding of the crime scene, his  
12 understanding of the significance of particular  
13 aspects of evidence, becomes the property -- in our  
14 judgment, Your Honor, and it's our argument, that  
15 information becomes the property of the government  
16 at that point.

17 Now, assuming the validity of that  
18 proposition, how did the government get it? The  
19 government got it by misrepresenting what they  
20 were all about and by so misrepresenting, kept the  
21 Court from interceding or, at least, limiting the  
22 circumstances of that inquiry as the Court well  
23 might have.

24 It kept counsel from being able to say,  
25 wait a minute, time out, you can't ask our man

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2 that sort of question. Or even from agreeing,  
3 yes, you can ask that sort of a question. But, by  
4 not honestly disclosing to the Court or to counsel  
5 Dr. Brussels' pre-existing role and pre-existing  
6 opinion, they, in effect -- the government, in  
7 effect, circumvented Dr. MacDonald's Sixth  
8 Amendment rights to be protected in that business.

9 Now, the question is what if there was no  
10 -- the easy question, Your Honor, is if there was  
11 prejudice. If by an assessment of the questions  
12 asked and the -- in the examination as recalled by  
13 Dr. MacDonald and the questions asked during  
14 cross-examination as to which Dr. MacDonald could not  
15 answer, the Court concludes that, yes, he -- Dr.  
16 MacDonald suffered prejudice, then our judgment  
17 is an easy decision, because there's actual real  
18 prejudice which occurred to Dr. MacDonald by  
19 reason of this circumvention of his Sixth  
20 Amendment rights. That's the easy one.

21 The tougher question before this Court is  
22 the other question. What if there was no real  
23 prejudice? What if they could have asked these  
24 questions anyway? And what if they could have  
25 been lucky enough to be right each time -- each

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2 time to say -- to have a question asked to which Dr.  
3 MacDonald's response is, "Beats me. I don't know.  
4 I can't explain it."?

5 It is our position, Your Honor, that under  
6 the Levy case, which we cite, and under the Briggs  
7 case, which we cite and, indeed, sub silentio  
8 under the Supreme Court case which the government  
9 cites, that the mere possession by the government  
10 of information which is confidential to the  
11 defense is in and of itself sufficient prejudice  
12 that the case requires a reversal or, in this  
13 instance, a dismissal of the indictment --  
14 vacation of the conviction, because it is such --  
15 because the enormity of the right which has been  
16 invaded is so grand and so important to our system  
17 that the only fair resolution of a case in which it  
18 has been violated, and where the government is  
19 able to creep into the defense camp and possess  
20 information which may be potentially prejudicial,  
21 even if not really causing prejudice, then the  
22 result is the one mandated by the Second -- the  
23 Third Circuit in Levy and the DC Circuit in  
24 Briggs.

25 THE COURT: Are you telling me that if the



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2 government -- if this doctor obtained some  
3 information which was confidential in the sense  
4 that had MacDonald's lawyer been there, you'd have  
5 said, wait a minute, don't answer that, and  
6 nothing else was said, but did not use that  
7 information, that still this indictment's got to  
8 be dismissed?

9 MR. O'NEILL: If -- correction. Yes, Your  
10 Honor, under one condition. If it is done by the  
11 government intentionally and the government knows  
12 that that's what they're doing.

13 THE COURT: All right. Let's assume for  
14 the moment there's something in there that -- what  
15 -- which of the government's attorneys cross-examined  
16 the Defendant?

17 MR. O'NEILL: Jim Blackburn, Your Honor.

18 THE COURT: Was it Blackburn? I seem to  
19 have read something that indicated that Blackburn  
20 prepared -- and I think good lawyers do this with  
21 important witnesses and so forth -- an outline of  
22 his questions well in advance of this examination,  
23 well in advance of the trial.

24 MR. O'NEILL: That's correct.

25 THE COURT: And, of course, I've never

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2 seen any such outline, and I don't remember what he  
3 asked him now, I just remember him being at the  
4 trial. But suppose an examination of that book  
5 would show that he followed it to the letter and  
6 asked no questions at all but the ones that he had  
7 written out to start with in advance of the trial?  
8 Then what harm would have come to the Defendant if,  
9 in fact, he did spill something that he really would  
10 have preferred, and his lawyer would have preferred,  
11 that he not say?

12 MR. O'NEILL: The harm that would have  
13 come to the Defendant, Your Honor, is --

14 THE COURT: (Interposing) Prejudice,  
15 let's just use the word prejudice.

16 MR. O'NEILL: Prejudice, Your Honor, under  
17 Levy and Briggs, need to be shown. The potential  
18 for prejudice in a situation is what those cases  
19 address. So, that, I think in response to your --  
20 Your Honor's question, if it can be shown that by  
21 this device, the government intentionally kept Mr.  
22 Smith outside of MacDonald's -- Dr. MacDonald's  
23 presence, that alone would be sufficient even  
24 though, because of a pre-existing investigation,  
25 the government had found out everything it needed

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2 anyway.

3 THE COURT: Well, I have some problem with  
4 that now. If the -- has a potential prejudice --  
5 these are the situations envisioned by my  
6 hypothetical and that is that was no prejudice,  
7 there was no use of it, and we know that as a  
8 fact, then, it seems like to me that potentiality  
9 goes out and you're concerned only with what the  
10 situation really was.

11 And if we know that it really was not  
12 used, and know that for a fact, the fact that at  
13 one time it posed a potentiality would not seem to  
14 me to justify dismissing this indictment.

15 MR. O'NEILL: I'll tell you why it  
16 troubles me, Judge. It puts the government  
17 unfairly in a position that it otherwise would not  
18 have been in, and that position is this, to choose  
19 to ask a question or not, to choose to go  
20 after a subject or not, which otherwise would not  
21 have been - would not have been in that position.

22 It could've been educated as to an area  
23 that would have been troublesome for them.

24 THE COURT: Did I correctly understand you  
25 to say that you could not point to one particular

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2 fact that was potentially hurtful to the Defendant  
3 that he disclosed, that this kind of interrogation  
4 would not have made available to the Government?

5 MR. O'NEILL: Well, if I said that, I mis-  
6 spoke myself, Judge. No, we have listed a number  
7 of questions and a number of answers which Dr.  
8 MacDonald gave as best he could recall after the  
9 fact.

10 THE COURT: I thought you did that.

11 MR. O'NEILL: And our position is this.  
12 That by the device which was employed here, the  
13 prosecution was in a position to ask questions of  
14 Dr. MacDonald from a list -- let's assume they had  
15 a list of a hundred (100) on this book. Let's  
16 assume they weren't so certain as to fifteen (15)  
17 of them. It enabled them, if they wanted to, to  
18 avoid fifteen (15) subject matters -- subject  
19 matter areas.

20 But, as importantly, I think, Judge, the  
21 --

22 THE COURT: (Interposing) Well, we know  
23 what he did ask.

24 MR. O'NEILL: We do.

25 THE COURT: Now, you say that there were

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2 one, two (2), three (3), maybe a half a dozen  
3 things that Dr. MacDonald told Brussels that had  
4 you been there you would have sustained an objection  
5 to, your own objection, and would not have let him  
6 answer.

7 Now, what I'm trying to do is to fit what  
8 he did tell when you were not there and in a  
9 position to object, to what they asked him or did  
10 not ask, either one. If he spilled something  
11 and -- or said something, which presumably would  
12 have been in his favor, and they did not ask it,  
13 the fact that they did not ask it is in the record  
14 just as well as what they did ask is in the  
15 record.

16 MR. O'NEILL: Let me back away from that a  
17 second, but I think, respond to it.

18 THE COURT: All right.

19 MR. O'NEILL: The gravemente of our  
20 concern in this area is that Dr. MacDonald was  
21 asked a procession of question upon cross-  
22 examination about the physical evidence and they  
23 were questions as to which his answers were, "I  
24 don't know. I can't explain it."

25 And I was not here at the trial. I have

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2 read the transcript and it was a masterful job of  
3 cross-examination. It was just a masterpiece.

4 THE COURT: It looked like it was out of a  
5 book, didn't it?

6 MR. O'NEILL: It really did. It really  
7 was perfect. I don't know. I can't tell. The  
8 closing argument was -- part of the closing  
9 argument was this is a serious and important case.  
10 This fellow, Dr. MacDonald, is a very bright man.  
11 Don't you think if he could explain some of that  
12 physical evidence, he would have?

13 So, what happens is the prosecution gets  
14 to ask a bunch of questions which Dr.  
15 MacDonald, in their knowledge, cannot answer. And  
16 he says, "I can't answer." One after another,  
17 great impact, and then they get to argue on  
18 closing that this man would have answered those  
19 questions if he were innocent.

20 So, I think in a strange way, it turns the  
21 tables on a man on trial in a fashion that just is  
22 not envisioned by the Sixth Amendment, and indeed,  
23 is contrary to the very purpose of the Sixth  
24 Amendment.

25 THE COURT: Suppose Brussels had never

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2 come into the case at all and they had asked  
3 those questions? Then you wouldn't --

4 MR. O'NEILL: (Interposing) We'll, never  
5 know that. We'll never know that.

6 THE COURT: Then you wouldn't have a  
7 motion, would you?

8 MR. O'NEILL: Probably not. We wouldn't  
9 -- no.

10 THE COURT: (Interposing) Well, my problem  
11 is why wouldn't they have asked these questions,  
12 regardless of what he told Brussels?

13 MR. O'NEILL: That's the other thing I  
14 don't know, Your Honor, and never will and that's the  
15 danger of the violation of the Sixth Amendment and  
16 that's why -- excuse me -- Your Honor, I don't for  
17 one moment think that this is not an extraordinary  
18 remedy that we're urging.

19 It is an extraordinary remedy. But this  
20 was an extraordinary violation in my judgment, of  
21 the Sixth Amendment on the facts of this case. It  
22 just had no place in a trial -- in any trial, but a  
23 trial like this particularly.

24 THE COURT: All right. Thank you, sir.  
25 Tell me about Mr. Blackburn's cross-examination.

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2 You'd better say something good, because he's just  
3 come in back there.

4 MR. MURTAGH: Well, I'm always happy, Your  
5 Honor, to say something good about Mr. Blackburn.  
6 It's a pleasure --

7 THE COURT: (Interposing) You were  
8 talking about beating him over the head here  
9 a little earlier.

10 MR. MURTAGH: Well, he stabbed me so, what  
11 can I say? No, it was a long and to this day very  
12 pleasant and enjoyable relationship, both  
13 professionally and personally. I was very proud  
14 to be with him in the trial.

15 But let me -- back into -- responding if I  
16 can this way. I think, Your Honor, it's fair to  
17 say that from the way the Government's evidence  
18 was presented at trial, not that we didn't from  
19 time to time, you know, get our wires crossed, but  
20 we knew what we wanted to prove and we knew what  
21 physical evidence refuted the Defendant's story,  
22 and we knew what statements of the Defendant we  
23 wanted to get into evidence.

24 And all of these things was sort of a  
25 building block process in which we -- it wasn't



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2 like we rumbled around a table and said, okay,  
3 what bloodstains do we want to put in? We knew  
4 what we wanted to do.

5 And what I'm saying is that we had  
6 specific goals to show that the Defendant's story  
7 could not be reconciled with the physical  
8 evidence, principally involving the pajama top.

9 And the reason he couldn't explain a number  
10 of things not -- was not because of anything that  
11 was said in the courtroom. It was because he had  
12 made a prior statement on the subject and he can  
13 only be in one room at a time. He couldn't be  
14 distributing the evidence around the crime scene  
15 the way he would have had to have been doing if he  
16 were to escape impeachment.

17 I guess what I'm saying is, for example,  
18 MacDonald got trapped into a story that he was  
19 locked into that he placed the pajama top on his  
20 wife's chest and the reasoning for that was  
21 supposed to be to treat her for shock. We, of  
22 course, contended that it was to account for  
23 Colette MacDonald's blood being on the garment  
24 and, in point of fact, there was evidence that  
25 those stains were on the garment before it was

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torn, again contradicting his story.

But at that time he's asked, by Mr. Shaw -- this is on the April 6th statement -- I believe that's Government Exhibit 1135 of the trial -- how do you explain the pocket, Dr. MacDonald? How do you explain this pocket on the upturned corner of the throw rug by Colette MacDonald's body? It only has a little bit of blood on it. The pajama top was soaked.

So, his statement -- and this was presented as a chart as I recall to the jury -- was well, I didn't make a circuit with this thing on. I'm sure I took it off the first time I went in there and I dropped it and then I covered her.

So, he's locked in to the story that he's not wearing his pajama top when he goes into Kristen's room or Kimberly's room and it certainly gives him problems with trying to explain the presence of the threads on the club.

And I use that, Your Honor, just by way of illustration to say that by the time the trial started, there was no place for the Defendant's story to go. We knew that and I think the defense knew that. I mean there were things that

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2 would not reconcile with the physical evidence.

3 I'm not talking about something that he  
4 just couldn't explain. I'm talking about  
5 something that his initial explanation for is  
6 refuted and disproven by physical evidence and  
7 therefore that initial explanation becomes a false  
8 exculpatory statement, evidencing consciousness of  
9 guilt.

10 THE COURT: I'm interested in whether or  
11 not Mr. Blackburn had some conference with  
12 Brussels and did Brussels say, now ask him about  
13 this, and that, and so forth?

14 MR. MURTAGH: No, he did not, Your Honor.

15 THE COURT: Well, do your submissions  
16 here --

17 MR. MURTAGH: (Interposing) Yes.

18 THE COURT: -- cover that --

19 MR. MURTAGH: (Interposing) They do,  
20 Your Honor.

21 THE COURT: -- under the penalties of  
22 perjury and so forth?

23 MR. MURTAGH: Yes, Your Honor, they do. And  
24 the bottom line on that is that Dr. Brussels was  
25 not supplied with a list of questions. This isn't

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2 to say that he didn't have a list of his own.

3 And I think that the problem is that you  
4 have to recall -- and I will, you know, before I  
5 get too far along -- I took Brussels back from the  
6 interview that night, and my affidavit to that  
7 effect, under oath subject to perjury, is  
8 before the Court.

9 I took Brussels back to the hotel from  
10 Mr. Smith's office. By the way, this terrible  
11 interrogation of Dr. MacDonald took place in  
12 counsel's office over in the BB & T Building.

13 THE COURT: Yeah, but you wouldn't let  
14 them be present.

15 MR. MURTAGH: Well, Dr. Brussels was  
16 clearly identified as a Government psychiatrist.  
17 He -- and the reason we're having this  
18 psychiatric examination at this time, is you  
19 recall that the defense wanted to introduce the  
20 testimony --

21 THE COURT: (Interposing) They wanted to  
22 show that a person with his psychological or  
23 emotional makeup just could not commit this crime.

24 MR. MURTAGH: And further, Your Honor, if  
25 I might add, that that would be Dr. Sadoff's

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2 theory. But also Dr. Sadoff had testified at the  
3 Article 32 investigation that he, Dr. Sadoff, was  
4 trained to recognize whether the Defendant was  
5 lying about any of the particulars of his  
6 rendition of the defense and that he could tell  
7 that the Defendant wasn't lying.

8 We called it the human polygraph issue, if  
9 Your Honor, recalls at the various bench  
10 conferences we had.

11 Now, we know that -- and I think the  
12 Sadoff interview was relevant to why Brussels,  
13 you know, apparently interviewed MacDonald in what  
14 they contend as an adversary fashion, because Dr.  
15 Sadoff apparently had no independent frame of  
16 reference. I mean, he hadn't talked to the  
17 agents. He hadn't -- he didn't know what the  
18 crime scene looked like. And his -- and also we now  
19 know that he was viewing MacDonald after MacDonald  
20 had flunked the defense polygraph examination and  
21 that he was looking at it from the standpoint of  
22 does his fear of -- or his inability to defend his  
23 family, does that account for the deception in the  
24 polygraph. That's in Sadoff's notes, which are in  
25 the record.

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2 Dr. Brussels, on the other hand, was  
3 furnished by the Government -- and we don't make any  
4 apologies for this, we gave him the Defendant's  
5 statements, we gave him lab reports, we gave him  
6 some frame of reference to know what the crime was  
7 about. It's a difference in approach.

8 And this is not a situation in which Dr.  
9 MacDonald is coming for therapeutic treatment to  
10 somebody he doesn't know is a Government  
11 psychiatrist and who has been exposed to the  
12 evidence in the case, but quite the contrary.

13 Now, Dr. Brussels apparently asked him  
14 about specific events. My response would be what  
15 if he did, because in the first place, Dr.  
16 Brussels never got to testify. The whole issue  
17 became moot because of the Court's ruling on this  
18 human polygraph issue and they chose not to put on  
19 any psychiatric character testimony --

20 THE COURT: (Interposing) I --

21 MR. MURTAGH: -- and -- excuse me.

22 THE COURT: I have -- my recollection of  
23 this trial would compare in some respects, I  
24 suppose, with -- in faultiness with that of some of  
25 the witnesses who've been mentioned here.

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2 Did the Defendant offer Sadoff as a  
3 witness or was this an in limine ruling?

4 MR. MURTAGH: The answer to the first  
5 question, Your Honor, is no. Sadoff was never  
6 called, but the Court's ruling did not exclude all  
7 psychiatric testimony.

8 What the Court excluded was the -- an  
9 expert testifying that I, as an expert, can tell  
10 that the Defendant is not withholding any  
11 information about, you know, his rendition of the  
12 events, the polygraph, if you will.

13 And by the way, that ruling was sustained  
14 by the Fourth Circuit. We went through that --

15 THE COURT: (Interposing) Well, was that --

16 MR. MURTAGH: (Interposing) Yes, sir.

17 THE COURT: Was that an issue on appeal?

18 MR. MURTAGH: That was an issue on appeal.

19 THE COURT: I suppose the thinking was  
20 that if you had one expert saying that here's a  
21 guy that could not commit this kind of crime and  
22 another one saying he's the very kind of  
23 fellow who does commit this kind of crime, that  
24 it, even though relevant, if you get by that  
25 hurdle, it would be so confusing that under 403 --

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2 or 402 -- it should come out.

3 MR. MURTAGH: Well, that also, Your Honor.  
4 And the idea is that this is a matter that -- to  
5 just take one example -- that the jury is  
6 perfectly capable of resolving.

7 We know, from Sadoff's notes, that MacDonald  
8 told him that his wife, Colette, went to a class  
9 in English Literature that night at North Carolina  
10 Extension. I won't go into the whole reason of why  
11 that -- it was highly relevant that she went to a  
12 class in Child Psychology, but the point -- and not  
13 English Literature -- but the point is Dr. Sadoff  
14 had no independent frame of reference. He didn't  
15 know. He assumed that Colette had gone to a class  
16 in English Literature.

17 And these are things that a psychiatrist  
18 -- I think this example illustrates it -- are in  
19 no better position to resolve than the jury. And  
20 that's, I believe, why the Court of Appeals  
21 ultimately sustained Your Honor on that ruling.

22 But it's in that frame of reference that  
23 the Brussels interview takes place. Now, Dr.  
24 Brussels apparently goes and interviews the  
25 Defendant. According to their account, it's a



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2 stormy interview. And as my affidavit reflects, I  
3 then pick up -- I took Mrs. Brussels to dinner  
4 and then we picked up Dr. Brussels and Dr. Silverman,  
5 I believe, a psychologist, and I took them back to  
6 the hotel.

7 And Your Honor will recall that it was  
8 a hot summer and it was a hard court trial and by  
9 ten (10:00) o'clock at night, I submit that  
10 Government counsel's representation that he just  
11 went to bed as soon as he could get back to his  
12 hotel, has some independent corroboration.

13 But the point of fact is that we didn't  
14 debrief Dr. Brussels. That was an issue that  
15 was, if we had gotten to the psychiatric ruling  
16 thing, it would only have come up after Sadoff and  
17 I think Dr. -- I forget the other expert's name,  
18 but they had them an additional expert.

19 The point is that what Brussels said in  
20 the car going back, as I recall, is that he  
21 thought the Defendant was a psychotic and he  
22 thought he did it. I remember him saying that.

23 But, you know, so what? What difference  
24 does that make? I mean, for the defense's argument  
25 to be valid, you would have to accept the proposition

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2 that the Government wouldn't have been asking  
3 MacDonald about when he covered Colette with the  
4 pajama top, whether he was wearing it when he went  
5 into, you know, Kimberly's room, things like that,  
6 and our submission shows that we had a pre-  
7 existing reason for asking all of those questions  
8 because there was a prior statement that he  
9 couldn't live with. I mean the story could only go  
10 so far.

11 And the story that he told in front of the  
12 jury is the vaguest, most unspecific rendition of  
13 the events that he ever gave. And the reason for  
14 that is that he had his prior grand jury  
15 testimony, his Article 32 testimony, the April 6th  
16 tape, which was played to the jury, so he was  
17 stuck with the rendition of the events that he  
18 couldn't change and with physical evidence that  
19 pointed to him as the only possible perpetrator.

20 THE COURT: Did MacDonald testify at the  
21 Article 32 hearing?

22 MR. MURTAGH: Yes, Your Honor, he did. In  
23 fact he gives a rather detailed account at the  
24 Article 32 investigation.

25 Another point, Your Honor, is assuming for

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2 the sake of argument that we did all these bad  
3 things that the defense contends we did. In the  
4 first place, Dr. Brussels doesn't testify. They  
5 can't point to anything that we wouldn't have  
6 asked anyway. They contend that if we did it  
7 intentionally, it doesn't matter because our  
8 conduct would be so abhorrent.

9 Well, first of all, we don't concede that  
10 we did anything wrong, but assuming for the sake  
11 of argument, that we did what they said that we  
12 did, they knew about this surely after MacDonald  
13 had been cross-examined.

14 I mean, you don't need to know anything in  
15 addition to see if it's as bad as they say it is  
16 that, my God, the Government has gotten into the  
17 defense camp and, boy, they wouldn't have known to  
18 ask MacDonald about when he covered Colette with  
19 the pajama top if Brussels hadn't asked him about  
20 that.

21 If that was the case, then that's an issue  
22 that could have been raised, first of all, right  
23 then and there at the trial, and second of all, it  
24 could have been raised on appeal, and they didn't do  
25 that.

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2 And, therefore, clearly the Erady decision  
3 applies to that case, because you would have to  
4 show cause actual pre -- you know, cause for your  
5 failure to raise the thing and actual prejudice.

6 They have no cause for failure to raise it,  
7 because we know from their submissions that as soon  
8 as this interview was over, apparently MacDonald  
9 made some sort of memo which was given to counsel.  
10 And in any event, they knew in advance of Dr.  
11 Brussels' interview that Brussels had consulted  
12 with the Government previously because, as my  
13 affidavit points out, Mr. Segal recalled Dr.  
14 Brussels' name, and the reason that he recalled it  
15 is that in the context of Mr. Kearns -- Peter Kearns,  
16 the CID investigator -- trying to get the  
17 Rorschach test released from the defense in 1971,  
18 the -- and I believe there was an affidavit from  
19 Kearns that we filed on this point -- Segal wanted  
20 to know who the Government's expert was. So Mr.  
21 Kearns went to the Fayetteville Public Library and  
22 Xeroxed out Dr. Brussels' and Dr. Silverman's vitae  
23 and sent them off to him in the mail.

24 And Mr. Segal clearly recalled the name --  
25 in fact, he made a play on words, Dr. Brusselsprouts,

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2 or something like that -- so they knew who  
3 Brussels was.

4 But the point is that they're the ones  
5 that created this situation, in which it is not  
6 a straight clinical examination, but the  
7 Government is being forced into responding to what  
8 we consider to be inadmissible evidence, and  
9 ultimately it was determined that it was  
10 inadmissible, which is this human polygraph issue.

11 So, if Dr. Brussels, having been briefed  
12 upon the case -- I mean, it's not just looking at  
13 ink blots and whatnot. It, according to -- you  
14 know, they want to put on an expert who says  
15 he's perfectly truthful when he says the pajama  
16 top was torn in the living room. Why can't  
17 Brussels ask, well, if it was torn in the living  
18 room, how come all the threads are under the  
19 wife's body in the bedroom?

20 THE COURT: Speaking of polygraphs, I'm  
21 reminded, I've been wanting to ask somebody and I  
22 -- all through the years whether or not this  
23 Defendant was ever given a polygraph by either side,  
24 and you just tell me yes or no. Don't tell me what  
25 it said if there was one.

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2 MR. MURTAGH: Not by the Government, Your  
3 Honor. Our indication is from Dr. Sadoff,  
4 that the Defendant was given a polygraph.

5 THE COURT: Oh, Sadoff said that?

6 MR. MURTAGH: Sadoff's notes. See,  
7 Sadoff's examination comes after the defense's  
8 polygraph examination. We know that from his  
9 notes.

10 THE COURT: Yeah, all right.

11 MR. MURTAGH: We don't contend that that's  
12 admissible evidence, but --

13 THE COURT: (Interposing) Well, I don't  
14 want to know what it said if you had one, but I've  
15 just always been curious as to whether or not  
16 anybody did administer one.

17 MR. MURTAGH: Your Honor, to get back, you  
18 know, I've said it in my affidavit and I think Mr.  
19 Blackburn has said the corollary thing. His  
20 preparation for cross-examination of MacDonald  
21 comes from all of these notebooks. I was involved  
22 in having the notebooks made up, and I knew that we  
23 had specific area that we knew we wanted to cover.

24 And we also knew that the Defendant was  
25 not going to break on the witness stand. It was

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2 simply a question of putting before the jury -- and  
3 I think Jim did a beautiful job of doing it -- the,  
4 you know, the utter irreconcilability of the  
5 physical evidence and the Defendant's story.

6 And Brussels had nothing to do with it.

7 That's our response, Your Honor.

8 THE COURT: All right, sir. Do you want to  
9 respond to that, Mr. O'Neill?

10 MR. O'NEILL: If I may, Your Honor,  
11 probably no more than sixty (60) seconds.

12 This Erady business highlights what is --

13 THE COURT: (Interposing) Under our local  
14 rules you get two (2) minutes. We always  
15 double any lawyer's estimate of how long it takes  
16 to do anything.

17 MR. O'NEILL: Thank you, Judge.

18 Erady -- the Erady business kind of  
19 highlights the problem because it is urged that,  
20 well, these guys knew after Dr. Brussel's  
21 examination that there was something wacky about  
22 that examination. They should have done something  
23 about it.

24 Well, we didn't know that Dr. Brussels  
25 was a criminalist until years after the trial when

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2 we get this Freedom of Information stuff. And when  
3 Mr. Murtagh says that they knew who Dr. Brussels  
4 was. They had gotten his vitae and they had  
5 already heard his name years ago. And they had  
6 heard his name in the context of who's the  
7 Government's psychiatrist? And as Mr. Murtagh  
8 said, yes, we did know he was a Government  
9 psychiatrist. I should sit down, but I won't.

10 The reason I should sit down is that's the  
11 point. We were told he was a psychiatrist, which  
12 he was. I mean he had gone to medical school.  
13 His examination, however, was not about that. It  
14 was about Dr. MacDonald's response to questions  
15 concerning physical evidence.

16 It is our contention that once in  
17 possession of those responses, even though it  
18 didn't get into Mr. Blackburn's pocket or Mr.  
19 Murtagh's pocket, Mr. -- except in the most  
20 general sense, he had concluded -- that is Brussels  
21 had concluded that Dr. MacDonald was a psychotic and  
22 that he did it, which they knew anyway, because  
23 that was Dr. Brussel's opinion years before.

24 Nonetheless, he is a member of the  
25 Government camp. He knows information



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2 confidential to Dr. MacDonald which he shouldn't  
3 know. He should not know and would not have known  
4 unless this Sixth Amendment problem had occurred.  
5 That's the error and that's the concern about which  
6 the Sixth Amendment was drawn. And that's why the  
7 DC Circuit and the Third Circuit have said not only  
8 can you not do it, if you do it, the conviction  
9 has to be vacated.

10 Thank you, Judge.

11 THE COURT: All right, sir. You took exactly  
12 two (2) minutes. All right, now, what else?

13 MR. MURTAGH: Your Honor, could I briefly  
14 -- I'll try and do it in thirty (30) seconds --  
15 address something that's just been raised.

16 Dr. Brussels is --

17 THE COURT: (Interposing) Well, he gets  
18 to go last.

19 MR. MURTAGH: I guess so. Well, he can  
20 respond to -- if the Court will permit him. I'm  
21 not asking for the last word, but I think it is  
22 something that should be brought out, if the Court  
23 would indulge me.

24 Dr. Brussels is the author of The  
25 Casebook of the Crime Psychiatrist. That's one

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2 thing. Their psychiatrist, Dr. Hallick, is the  
3 one I'm thinking of, signs his report as a  
4 psychiatrist in criminals. So, this is something  
5 that's no big deal among forensic psychiatrists.

6 Lastly, Your Honor, the Morrison case, I  
7 think, is the one that is dispositive --  
8 United States vs. Morrison, a Supreme Court  
9 decision. We don't say we violated the  
10 Defendant's Sixth Amendment rights or for that  
11 matter, any of his rights, but Morrison says that  
12 -- and they are clearly the agents who interviewed  
13 the Defendant in jail in the absence of his  
14 counsel and, in fact, badmouthed his counsel to  
15 the Defendant.

16 There was no showing that this in any way  
17 affected the outcome of the subsequent proceedings  
18 and this is, -- you know, what we have here is a  
19 hypothetical violation at best. There is  
20 absolutely no indication that even if we did what  
21 they say we did that it in any way resulted in  
22 prejudice to the Defendant. And Morrison quite  
23 clearly holds that that's what you have to show.  
24 And Morrison is a Supreme Court case and they're  
25 relying on Circuit Court cases.

Colloquy

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THE COURT: All right.

MR. O'NEILL: Your Honor, again Morrison is a case in which two (2) agents went out to a Defendant, whom they knew was represented by counsel. That Defendant told them to go roll a hoop, wouldn't say anything to them. Zero. Said, take a hike.

And then after conviction that Defendant said that that mere act of trying to contact me, in the absence of my counsel, was a deprivation of my Sixth Amendment rights so serious as to vacate the conviction. The Supreme Court, quite properly, said, no, because nothing happened. Okay?

Following Morrison was Briggs, a case which we rely upon in the DC Circuit, wherein there is no showing -- there was a showing of an intentional interference with -- or circumvention of a Sixth Amendment right.

The Government may have gotten some information. They got that information, but didn't use. But they got it from -- I guess they did get information -- I'm sorry. It wasn't that they may have gotten information.

They got information and didn't use it.

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2 And what they said -- what Briggs said was, when  
3 the Government does that intentionally, and if  
4 they get information as a result of that  
5 intentional interference with this very  
6 substantial right, a right which distinguishes  
7 our society from so many, then they pay a price  
8 for that.

9 What that price is, is that they lose that  
10 conviction they obtained because the Sixth  
11 Amendment is more valuable to us as a society,  
12 than any conviction in any given case is to the  
13 Government.

14 THE COURT: Any other circuit spoken on  
15 this issue?

16 MR. O'NEILL: Yes, Your Honor. The Third  
17 Circuit, in Levy, which is also cited in the  
18 moving papers.

19 THE COURT: Is that in accord with Briggs?

20 MR. O'NEILL: It is, Your Honor.

21 THE COURT: Any other Circuits? How about  
22 the Fourth?

23 MR. O'NEILL: Fourth? I'm not aware of  
24 any case in the Fourth, Your Honor.

25 THE COURT: All right.

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2 MR. O'NEILL: Thank you.

3 THE COURT: Well, is that all the defense  
4 motions?

5 MR. O'NEILL: All our motions, Your Honor.

6 THE COURT: How about the Government's  
7 motion? Do you want to be heard on that?

8 MR. MURTAGH: The forfeiture motion, Your  
9 Honor?

10 THE COURT: Yeah.

11 MR. MURTAGH: We'll rely basically on the  
12 -- on our filings on that. I think this issue  
13 is clear that the Defendant shouldn't profit in  
14 any way from any type of literary or film rights  
15 that he gets as a result of the commission of this  
16 crime.

17 And with regard to the retroactivity  
18 issue, Your Honor, I think the Statute is clear on  
19 its face that it says that anytime after  
20 conviction. In any event, we are talking about  
21 rights in addition, you know, both retroactive  
22 rights and --

23 THE COURT: (Interposing) I did not see  
24 that point addressed in either of your  
25 submissions, whether I -- just on the face of it,

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2 I didn't see how you could take a man's contract  
3 rights away from him by a subsequently enacted  
4 Statute, but if it goes into effect now, nobody  
5 addressed what it -- what would happen with  
6 respect to royalties on these books and movies and  
7 things as of the date -- beginning from the date  
8 of the enactment of the Statute.

9 MR. MURTAGH: Well, I think clearly, Your  
10 Honor, we would -- I say "we" -- the  
11 victim/witness fund would be entitled to those  
12 monies, because the contract in itself is not  
13 invalidated. In other words, the publisher's  
14 obligation to pay MacDonald still remains valid.

15 We don't say that the Statute invalidates a  
16 contract. What we're saying is the Defendant  
17 doesn't get to keep that money, that Congress has  
18 determined --

19 THE COURT: (Interposing) Well, of  
20 course, you wouldn't want him to keep it from day  
21 one, but --

22 MR. MURTAGH: (Interposing) Well, yes --

23 THE COURT: -- you -- but I take it you  
24 would insist that from the date of the enactment of  
25 the Statute, which --

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2 MR. MURTAGH: (Interposing) Well, clear

3 -- I --

4 THE COURT: (Interposing) -- was that part  
5 of this new crime bill?

6 MR. MURTAGH: (Interposing) Yes, Your  
7 Honor, October --

8 THE COURT: (Interposing) What, about  
9 October the 13th of last --

10 MR. MURTAGH: -- 12th, I believe. I think  
11 it's the 12th.

12 THE COURT: -- of '84?

13 MR. MURTAGH: Of '84.

14 THE COURT: You say certainly from that  
15 day forward he would forfeit?

16 MR. MURTAGH: Yes, Your Honor.

17 THE COURT: All right. Let's hear from the  
18 other people on that.

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

20 It is our position, Your Honor, that  
21 retroactivity of legislation is a problem  
22 continually faced by the Courts and it's for that  
23 reason a very clear rule has been fashioned, and  
24 that is to avoid all this business of should it be  
25 or shouldn't it be. You look to two (2) things,

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2 the language of the Statute -- it has to say,  
3 this is intended to be retroactive, or the  
4 legislative history. Somebody somewhere along the  
5 line has to say it's important to this legislation  
6 that it be effective retroactively.

7 Neither -- in neither of these places  
8 you'd look in this case, do you see that. There's  
9 nothing in the legislative history about its --  
10 the intent that it should be applied retroactively.  
11 There's nothing in the language of the act. So,  
12 that's Statutory construction.

13 With respect, again, to the property right  
14 issue -- the contract right issue, which I believe  
15 the Court raised, if a person has a contract right  
16 or a property right, he derives that contract  
17 right as of the time of the execution of the  
18 contract, his performance, I believe.

19 Thus it's a vested right if a person  
20 has performed. In this instance, there has not  
21 only been no evidence that Dr. MacDonald didn't  
22 perform, but I don't even think that issue can be  
23 before this Court for a couple of other reasons,  
24 one of which is that there are other parties covered  
25 by this Statute which the Statute says have to be



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2 notified of such proceedings, i. e., any  
3 transferees of such proceeds.

4 Now, I understand there are transferees of  
5 such proceeds who have not been served and I think  
6 specifically the lawyer in California named  
7 Boswick, who apparently has been paid some fees  
8 out of those proceeds.

9 Now, that being the case, we probably  
10 aren't all here -- I know we're not all here, so  
11 maybe none of us are here. Maybe that's the way  
12 the Statute works. But assuming that some of us  
13 who are here who can address it, there is language  
14 in the case that's decided on the due process  
15 clause, that property rights mean contract rights  
16 and contract rights go into your pocket when you  
17 execute that contract and they can't, thereafter,  
18 be taken from you such that proceeds earned by a  
19 discreet act, but paid over a period of time, can  
20 be halted in the middle, because your contract  
21 right is to receive proceeds.

22 That would be our position, Your Honor,  
23 which is, I believe, contained in our papers.

24 THE COURT: Of course, if I grant you a  
25 new trial, this would be sort of academic, at

Colloquy

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least at this time.

MR. O'NEILL: I believe it would.

THE COURT: Or if I throw out the indictment on this third motion that you argued.

Well, I'll leave it to you on both sides as to whether or not you want to address the proposition further in your briefs as to the prospective application of this thing beginning as of the date of its enactment to contract rights which had, as you say, vested prior to that date.

MR. O'NEILL: Very well, Your Honor.

Thank you.

THE COURT: I think we should -- if we come to decide that question, I think I'd want to be enlightened a little more than I am right at the moment on that.

Anything else?

MR. O'NEILL: Nothing, Your Honor.

THE COURT: Well, let me recess this Court until the further call, then.

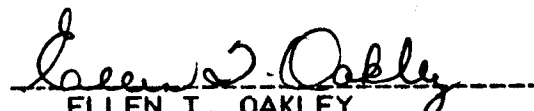
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(HEARING ADJOURNED: 4:25 P. M.)  
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1-30-85:jgw

C E R T I F I C A T E

I, Ellen T. Oakley, having been appointed official court reporter for the aforesaid session of United States District Court for the Eastern District of North Carolina, Raleigh Division, do hereby certify that the hearing in the matter of United States of America, Plaintiff versus Jeffrey R. MacDonald, Defendant, was held before the Honorable F. T. Dupree, Jr. at the United States Post Office and Courthouse, Courtroom #1, Seventh Floor, 310 New Bern Avenue, Raleigh, North Carolina, on Monday, January 14, 1985, at 10:00 A. M., that I reported the proceedings in said matter and that same was transcribed under my direct supervision, and that the foregoing pages, number 1 through 231, constitute a true and correct transcription of the record of the proceedings in said cause.

IN WITNESS WHEREOF, I have hereto affixed my hand this 30th day of January, 1985.

  
 ELLEN T. OAKLEY  
 Court Reporter