

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
3:75-CR-26-3
5:06-CV-24-F

UNITED STATES OF AMERICA)
)
 v.)
)
 JEFFREY R. MacDONALD,)
)
 Defendant)

DEFENDANT'S SUBSTITUTE POST-HEARING MEMORANDUM

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DEFENDANT’S SUBSTITUTE POST-HEARING MEMORANDUM

NOW COMES defendant, Jeffrey R. MacDonald, by and through his undersigned counsel, and files this substitute post-hearing memorandum regarding his motion to vacate, a motion authorized by the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 2255(h). This Court conducted an evidentiary hearing from 17-25 September 2013, as directed by the Fourth Circuit. The determination of the motion to vacate and the newly discovered evidence on which it was based must be made under the “evidence as a whole” under 28 U.S.C. § 2255(h)(1). *United States v. MacDonald*, 641 F.3d 596, 610-17 (4th Cir. 2011). This memorandum captures much of the evidence from the voluminous record in this litigation that has spanned more than forty-two years.¹ Based on the newly

¹ This document is offered as a summary of the “evidence as a whole.” This Court must, of course, consider all of the previous motions, memoranda, opinions, exhibits, transcripts, and other filings, which means “‘all the evidence,’ old and new, incriminating and exculpatory, without regard

discovered evidence presented in this motion to vacate, particularly (1) the statements of Helena Stoeckley that she was in the MacDonald house when her three male compatriots committed the crimes made under circumstances exhibiting high indicia of trustworthiness and reliability, and (2) DNA evidence not previously available that compellingly corroborates the presence of intruders when the murders occurred, taken in light of the “evidence as a whole,” shows “by clear and convincing evidence that no reasonable factfinder would have found [MacDonald] guilty of the offense[s].” *See* 28 U.S.C. § 2255(h)(1). Accordingly, the motion to vacate must be granted.

I. The Newly Discovered Evidence Warrants Relief

In assessing this motion and the evidence presented, this Court must not lose sight of the words of the late Judge Francis Murnaghan that “this case provokes a strong uneasiness in me” noting his belief that “MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted.” *United States v. MacDonald*, 688 F.2d 224, 234 (4th Cir. 1982) (Murnaghan, J., concurring). The evidence presented in this motion to vacate, especially from the testimony of Jerry Leonard, Helena Stoeckley’s lawyer during the MacDonald trial in 1979, and Gene Stoeckley, Helena’s younger brother who related their

to whether it would necessarily be admitted under [evidentiary rules],” *House v. Bell*, 547 U.S. 518, 538 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298 (1995)); *see MacDonald*, 641 F.3d at 612, in its assessment of MacDonald’s motion to vacate. All documents referenced herein have been previously provided to this Court and copies of all exhibits introduced in connection with the evidentiary hearing were provided to this Court. None are attached to this memorandum, although they will be provided to this Court if requested. References to the trial transcript are designated (Tp. ___); references to the hearing transcript are designated (HTp. ___).

mother's recounting of Helena's confessions of involvement to her when Helena knew she was dying, would provoke more than a strong uneasiness in the dispassionate observer. For now, MacDonald would have Helena Stoeckley's inculpatory admissions under circumstances indicating their inherent trustworthiness.

Both the striking evidence of Helena Stoeckley's statements that she was in the MacDonald house and saw the murders, made under circumstances indicating substantial reliability and trustworthiness (statements made to her attorney, to her mother, and to the late Deputy United States Marshal Jimmy B. Britt) and the compelling evidence of three unsourced hairs that constitutes positive evidence of intruders in the MacDonald house, show by clear and convincing evidence that no reasonable juror would have found Jeffrey MacDonald guilty if she had heard this new evidence. The new evidence, particularly the testimony from Jerry Leonard as to what Stoeckley told him under the promise of confidentiality, which prompted him to advise her to invoke her constitutional right against self-incrimination if either party recalled her as a witness, is compelling evidence of a reasonable doubt. A statement to one's attorney cloaked with the promise of protection of confidentiality is trustworthy.² The attorney-client privilege is protected because clients must be able to tell their lawyers the truth without fear the information will be disclosed.

²Legal advice "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). The attorney-client privilege, like all evidentiary privileges, is in derogation of the truth and obstructs the truth finding process. *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672, 675 (D.C. Cir. 1979).

Jerry Leonard honored the privilege. He had the information in 1979. He did not disclose it until this Court directed him to do so, observing “innocence trumps other aspects of the privilege.” (HTp. 1238) What Stoeckley told Leonard in 1979, while the MacDonald trial was in progress, has this ambit of trustworthiness. The importance of her statement to Leonard that she was in the house when the murders occurred can hardly be overstated. In the words of the government’s own witnesses, Joe McGinniss, it would have been the “holy grail” for the defense. (HTp. 987) It would be eyewitness evidence, a firsthand account, of intruders. The jury would have acquitted if it had heard those three words --“I was there” -- along with the circumstantial evidence of intruders that was existing at trial, even before that circumstantial evidence was augmented by other exculpatory evidence that has been amassed in the intervening years that is within the ambit of the “evidence as a whole.”

There is also persuasive evidence that James L. Blackburn knew Stoeckley said she was in the MacDonald house and threatened to prosecute her for murder if she testified in that manner. Jimmy Britt was clear and consistent that he witnessed Stoeckley tell the prosecution she was in the house and that he heard Blackburn threaten her. Indeed, he passed a polygraph examination about this evidence. [Defense Exhibit 5057] Although Blackburn denied hearing Stoeckley say she was in the house and denied making a threat to prosecute her, he was sorely lacking in credibility, a point not lost on this Court. (HTp. 698) Blackburn never provided an affidavit in the many years preceding the evidentiary hearing and did not submit to a polygraph. He was corroborated only by Jack Crawley, who had a very weak

recollection, at best, of the incident.³ (HTpp. 736-39)

Helena Stoeckley's statements have been additionally augmented by the evidence of three unsourced hairs. With regard to the unsourced hairs, DNA testing was subsequently done by the Armed Forces DNA Identification Laboratory. There were 28 specimens that were permitted to be tested. They were compared to the known DNA samples of Jeffrey MacDonald, Colette MacDonald (Jeffrey's wife), Kimberley MacDonald (one of their daughters), Kristen MacDonald (the other one of their daughters), Helena Stoeckley, and Greg Mitchell (an associate of Stoeckley). Three of these samples could not be matched to anyone in the MacDonald family, Stoeckley, or Mitchell. They are Exhibits 91A, 58A.1, 75A. [DE-306] The most important is 91A. It is a hair found in the fingernail scrapings or from the hand of Kristen MacDonald. She had exhibited what could be described as a defensive wound. (Tp. 2577) That an unsourced hair was found in her hand or in fingernail scrapings from her hand, whether forcibly removed or naturally shed, is powerful, circumstantial evidence of intruders. In tandem with the other information in the "evidence as a whole," it would have led a reasonable jury to acquit MacDonald.

Janice Glisson, chief of the Serology Branch of the Army Criminal Investigation Division, received 13 plastic vials containing fingernail scrapings, hair samples, fibers, and vaginal smears taken from the victims at Womack Army Hospital, marked on the bottom of the vials "17 February '70, BJH." Those are the vials taken from the autopsies in this

³As demonstrated during the hearing, Blackburn was later disbarred and Crawley was suspended from the practice of law for violating rules of professional responsibility.

case. She conducted a microscopic analysis of the contents of the vials and with regard to vial seven she confirmed it contained fibers and one light brown hair, a hair that came from the fingernail scrapings of Kristen MacDonald. It did not match Jeffrey MacDonald. It did not match Colette, Kimberley, or Kristen. It did not match Helena Stoeckley or Greg Mitchell. In other words, it was a hair that could have come from an intruder.

Similarly, sample 58A.1 is a hair collected from Kristen's bedspread. It is unsourced; it did not come from anybody in the MacDonald family. Sample 75A is the hair that was found in the trunk leg areas of the body outline of Colette MacDonald on the rug in the master bedroom. It is unsourced, meaning it did not come from Jeffrey MacDonald or anybody in the MacDonald family. Even if those hairs were naturally shed, as opposed to forcibly removed, they could have been shed by an intruder while that intruder was attacking Kristen or Colette.

The bookends of Helena Stoeckley's statements⁴--the statement to her attorney during the trial and the statement to her mother in October 1982 when Helena knew she was dying--in tandem with the three unsourced hairs, provide clear and convincing evidence that no reasonable jury would have convicted MacDonald when this newly discovered evidence is

⁴The government commented at the evidentiary hearing that the issue before this Court was the Britt claim, not the Jerry Leonard claim or the Gene Stoeckley claim. This representation erroneously exalts form over substance. The Fourth Circuit referred to the claim as "the Britt claim" at a time when the only information before it consisted of Jimmy Britt's statements. The court would logically use a shorthand reference of the Britt claim to capture the allegations of Helena Stoeckley's inculpatory statements and the threat to prosecute her. But this label did not mean the evidence supporting this claim was limited to what Britt said. To so limit the claim would be erroneous.

assessed within the ambit of the “evidence as a whole.” The motion to vacate should be granted.

II. Legal Principles Regarding Successive Motion to Vacate

The beginning point for determining the applicable legal analysis for this Court’s determination of the motion to vacate begins with the statute itself. Section 2255(h) provides:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovery evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.

To some extent, this language tracks the same procedure for a successive section 2255 motion as exists for successive habeas corpus petitions under section 2254 filed by a prisoner who was convicted in state court. “We find that § 2255 incorporates both § 2244(b)(3)(c) and § 2244(b)(4).”⁵ *Reyes-Requena v. United States*, 243 F.3d 893, 898 (5th Cir. 2001).

But section 2255(h)(1) uses a standard for a successive motion to vacate that is significantly different in three important ways from the comparable provision for state successive state habeas petitions. *See, e.g., Gonzalez v. Crosby*, 545 U.S. 524, 529 n.3

⁵The sections noted in *Reyes-Requena* deal only with the requirement that a claim presented in a successive application must be authorized by the appropriate court of appeals and, in the absence of such authorization, the district court must dismiss the claim.

(2005) (where court limits its consideration to cases under section 2254 because “[section] 2255...contains its own provision governing second or successive applications; although similar to section 2254 “is not identical” to it); 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure, § 41.7[d] at 2186-87 (6th ed. 2011). Each of these distinctions are important.

First, “[f]or section 2255 movants, successive relief continues to be available for either previously raised or new claims, whereas state-prisoner successive petitions are limited to new claims.” *Id.*; compare 28 U.S.C. § 2255 with 28 U.S.C. § 2244(b)(1). Section 2244(b)(1) provides that a “claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” Section 2255(h) contains no similar language.

Second, there is no “due diligence” requirement under section 2255, unlike section 2254. *See* 28 U.S.C. § 2244(b)(2)(B)(I) (state prisoners seeking to invoke “factual unavailability” basis for filing successive petition must show that “factual predicate for the claim could not have been discovered previously through the exercise of due diligence”). Section 2255(h) contains no similar language.

Third, there is no requirement in section 2255 that a movant must show that the claimed constitutional error played a role in producing the conviction. *Compare* 28 U.S.C. § 2255 (“newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable

factfinder would have found the movant guilty of the offense”) *with* 28 U.S.C. § 2244(b)(2)(B)(ii) (“facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” Section 2255 contains no language like “but for constitutional error.” Hertz & Liebman, § 41.7[d] at 2186-87 & nn.31-34. This third distinction is especially important in this case. It means MacDonald need not link his newly discovered evidence to any constitutional violation at his trial and need not show any constitutional violation at his trial to succeed on the motion to vacate.⁶

In remanding this matter, the Fourth Circuit noted the “similarities” between sections 2244(b)(2)(B)(ii) and 2255(h)(1) and interpreted them in somewhat parallel fashion. *MacDonald*, 641 F.3d at 610 (citing *In re Dean*, 341 F.3d 1247, 1249 n.4 (11th Cir.2003) (calling these provisions “materially identical”). But this analysis “glosse[d] over critical linguistic distinctions between subparagraph (B)(ii) and § 2255(h)(1). *Case v. Hatch*, 708

⁶Although MacDonald need not show a constitutional violation, he has done so. As discussed more fully below, he has shown by a preponderance of the evidence that one of the prosecutors in his trial, James L. Blackburn, (1) heard Helena Stoeckley admit she was in the MacDonald house when several people with her killed his family, but falsely told the district court he had not, and (2) told Helena Stoeckley he would indict her for murder if she testified she was in the MacDonald house. These actions—a failure to disclose material evidence and a threat leading a witness to perjure herself—constitute independent constitutional violations. *See Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995) (fifth amendment violation for prosecution to suppress material, exculpatory evidence); *United States v. Golding*, 168 F.3d 700, 703 (4th Cir. 1999) (sixth amendment violation for prosecution to threaten potential witness with charges and note absence of her testimony in closing argument).

F.3d 1152, 1171 (10th Cir. 2013). As the Tenth Circuit explained, “The provisions are different in at least two ways. First, section 2255(h)(1) refers to ‘newly discovered evidence,’ whereas subparagraph (B)(ii) refers to ‘the facts underlying the claim.’ And second, section 2255(h)(1) omits the phrase ‘but for constitutional error,’ which appears in subparagraph (B)(ii).” *Id.*

This Court must not misapprehend these crucial differences. When Congress “uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 46:06, at 194 (6th rev. ed. 2000)) (internal quotation marks omitted). Using the plain language of section 2255(h)(1), it permits “newly discovered evidence” to “establish” a movant’s innocence, i.e. showing by clear and convincing evidence, in light of the evidence as a whole, “that no reasonable factfinder would have found [him] guilty of the offense,” but it “omits any requirement that the new evidence be rooted in constitutional error at trial.” *Case*, 708 F.3d at 1172. On the other hand, the plain language of section 2244(b)(2)(B)(ii) “requires the ‘facts underlying the claim’ to ‘establish’ a petitioner’s innocence, and requires those facts to be attributable to some ‘constitutional error’ in the underlying trial proceedings.” *Id.*; accord *Ferranti v. United States*, 480 Fed.Appx. 634, 637 (2nd Cir. 2012) (finding district court “mistakenly applied” section 2244(b)(2)(B)(ii) to a movant under section 2255 and erroneously imposed on him “the additional requirement, not applicable to successive

petitioners under § 2255, of demonstrating that the exclusion of exculpatory evidence from his trial was the result of constitutional error”).

Case delineated the analysis as follows:

There is good reason to think that these linguistic differences reflect purposeful action and are not simply the product of indifferent drafting. Sections 2255(h)(1) and subparagraph (B)(ii) both govern successive collateral attacks, but they pertain to challenges on two different types of proceedings: federal criminal trials and state criminal trials, respectively. Reflecting AEDPA’s regulation of federal review of state convictions, section 2244(b)(2)(B) imposes a strict standard restricting the kinds of evidence that federal courts may consider when entertaining a state prisoner’s successive-petition claim. . . .By contrast, section 2255(h)(1), governing federal court review of federal convictions is lenient. This makes sense in light of “AEDPA’s goal of promoting comity, finality, and federalism,” as well as respect for state-court judgments. *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 1401, 179 L.Ed.2d 557 (2011) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 121, 129 S.Ct. 681, 172 L.Ed.2d 479 (2009)) (internal quotation marks omitted).

Case, 708 F.3d at 1171.⁷ Indeed, the same concerns undergirded the analysis in *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992), which formulated a standard for “actual innocence” that was later codified in section 2244(b)(2)(B)(ii).⁸ *Id.*

⁷The AEDPA further “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). As noted in *Barefoot v. Estelle*, 463 U.S. 880, 887(1983):

[I]t must be remembered that direct appeal is the primary avenue for review of a conviction or sentence... The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

⁸To some extent, whether a claim of “actual innocence” exists as a freestanding constitutional claim, aside from the Innocence Protection Act, is an open question. Nevertheless, some aspects of

The distinction makes sense because, in a section 2254 action, a state court has already ruled on a petitioner's innocence claim that was not "restricted to evidence of innocence rooted in trial-related constitutional error." *Id.*, citing *Pinholster*, 131 S.Ct. at 1401 (AEDPA's policies are furthered when state courts have the first opportunity to review the claim and to correct any error, constitutional or otherwise) (quoting *Jimenez*, 555 U.S. at 121) (internal quotation marks omitted). "Thus, by design, the actual-innocence gateway is narrower for successive applicants seeking to overturn state court convictions than it is for petitioners challenging federal convictions." *Case*, 708 F.3d at 1172.

Admittedly, this section severely "limits a prisoner's ability to bring a second or successive application for a writ of habeas corpus." *Torres v. Senkowski*, 316 F.3d 147, 150 (2d Cir. 2003). As the Fourth Circuit noted, section 2255(h)(1) will "be satisfied only in the 'rare' and 'extraordinary case.'"⁹ *MacDonald*, 641 F.3d at 615 (quoting *Schlup*, 513 U.S. at 321). But the hurdle is not insurmountable. And, unlike previous claims that have been

this concept can be gathered. "The Supreme Court has defined a claim of 'actual innocence' as constituting either (1) a *substantive* argument that, as a matter of *fact*, the petitioner did not commit the acts that constitute his crime of conviction, adding that he must prove such an assertion by 'truly persuasive' newly discovered evidence, *Herrera v. Collins*, 506 U.S. 390, 417 (1993); or (2) a *procedural* argument that constitutional errors at trial, along with newly discovered evidence of his factual innocence, undermine the certainty of the petitioner's conviction *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995)." *Henderson v. Thaler*, 626 F.3d 773, 782 (5th Cir. 2012) (Wiener, J., dissenting) (footnotes omitted; emphasis in original). For the purposes of this successive 2255, the statutory language reflects the former definition.

⁹At hearing in this matter, this Court noted this case involved "extraordinary circumstances." (HTp. 1238) ("It is my best judgment that these extraordinary conditions require the privilege to be waived at this time.")

rejected by other courts,¹⁰ MacDonald has shown compelling new evidence. As the Supreme Court itself has acknowledged “in rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the law has made a mistake. In the context of a noncapital case, the concept of ‘actual innocence’ is easy to grasp.” *Sawyer v. Whitley*, 505 U.S. at 340-41. Based on the evidence presented at the evidentiary hearing, particularly from Jerry Leonard, Gene Stoeckley, and Mary Britt, taken in light of the evidence as a whole, this is the rare case.

The Fourth Circuit authorized the filing of this section 2255 motion by finding MacDonald made a prima facie showing of the requirements for a successive motion. *MacDonald*, 641 F.3d at 603, which this Court determined was the first gatekeeping step. *Id.* at 607. The Fourth Circuit remanded the matter because this Court applied an unduly narrow approach to the “evidence as a whole.” *Id.* at 613-15. This Court must determine if, in light of the evidence as a whole, MacDonald’s newly discovered evidence would have led no reasonable factfinder to convict him. If so, this Court must then resolve the merits of the claim.

As this Court tacitly acknowledged, the two steps are intertwined and conflated. The

¹⁰*See Herrera*, 506 U.S. at 417-18 (new evidence of affidavit done eight years after trial with no explanation for delay and after revealed perpetrator had died; evidence at trial included two eyewitnesses and defendant’s handwritten note apologized for crimes); *Sawyer*, 505 U.S. at 336, 348-49 (new psychological evidence did not relate to defendant’s guilt or aggravating factors and new “latter-day” impeachment evidence showing eyewitness-victim drank on day of crime “will seldom, if ever” be clear and convincing evidence of innocence; evidence at trial included eyewitness account by victim). MacDonald’s new evidence is far more compelling; there was no direct evidence of his guilt; and he has never made an inculpatory statement.

determinations are similar if not identical. Unlike the situation in a habeas petition by a defendant who is challenging a state-court conviction, where the newly discovered evidence is tethered to a separate constitutional violation at his trial, MacDonald need not show a constitutional violation at his trial against which this new evidence is measured under section 2255(h)(1). *Case*, 708 F.3d at 1171-73; *Ferranti*, 480 Fed.Appx. at 637; *Hertz & Liebman*, § 41.7[d] at 2186-88. Thus, this Court's gatekeeping determination and its assessment of the merits are virtually identical. *See generally Strickler v. Greene*, 527 U.S. 263, 289-96 (1999) (substantive merits of underlying constitutional claim examined and resolved in context of determining whether constitutional violation established "cause and prejudice" sufficient to overcome procedural default in state-court proceedings). In light of both the reliable and persuasive evidence presented at the evidentiary hearing,¹¹ especially the revelations of Jerry Leonard, Gene Stoeckley, and Jimmy Britt about Helena Stoeckley's unequivocal statements in 1979 and in 1982 that she was in the MacDonald house with three men who committed the crimes, along with DNA evidence substantiating the presence of intruders when the murders occurred, taken in the context of "the evidence as a whole," MacDonald has carried his burden.

¹¹MacDonald bears the burden of proving the facts of the newly discovered evidence, i.e. the facts showing Helena Stoeckley made statements that she and others were in the MacDonald house when the crimes were committed, whether she was threatened by the prosecutor, and whether hairs not connected to either MacDonald or his family were found at the crime scene, by a preponderance of the evidence. *See, e.g., Sumner v. Mata*, 449 U.S. 539, 551 (1981); *United States v. Nicholson*, 475 F.3d 241, 251 (4th Cir. 2007); *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

III. Summary of Movant's Evidence From the Evidentiary hearing

Jerry Leonard, an attorney in Raleigh, served as a law clerk to the Honorable Franklin T. Dupree, Jr. after graduating from law school in 1971. (HTpp. 1106-07) He then went into private practice, about thirty percent of which involved criminal cases. (HTpp. 1107-08)

During the MacDonald trial in 1979, he received a telephone call from Judge Dupree's law clerk, Steve Coggins. On behalf of Judge Dupree, Coggins asked Leonard to accept an appointment to represent a material witness in the MacDonald case.¹² (HTpp. 1108-09) His responsibility was to have this material witness, Helena Stoeckley, to court every day. (HTp. 1109) Leonard considered this appointment "very unusual." (HTp. 1117) Leonard understood his responsibility in representing Stoeckley was to do what he could to help her "and to kind of babysit her" and make sure she did not leave Raleigh. (HTp. 1118) He was surprised Stoeckley did not have any attorney because she was possibly exposed to jeopardy for murder. (HTpp. 1143-45)

Leonard received this appointment on Sunday, 19 August 1979. He recalled meeting Stoeckley at the courthouse. Leonard recalled Stoeckley had a broken arm. Her boyfriend had been abusing her. (HTp. 1117) He spent most of the late afternoon and early evening trying to obtain her trust. (HTpp. 1109-10) She spent that evening at his home when she fell

¹²Stoeckley had called Judge Dupree at home on Saturday. This telephone call prompted him to have his law clerk to call Leonard. (HTp. 1118)

asleep on a recliner.¹³ After the first night, she stayed at the Hilton Hotel.

At the courthouse on Monday, he and Stoeckley had a room to themselves. He explained his role to her. He asked her questions. He asked her about her involvement in the crimes at the MacDonald house. "I told her that what she said was between me and her." (HTp. 1111) He talked to her about a potential charge of first degree murder. She asked him about the statute of limitations. (HTp. 1112)

Eventually, Leonard asked Stoeckley what her testimony would be if she was called to testify. At that point, Leonard did not know she had testified before the jury on Friday before he was appointed to represent her on Sunday. Stoeckley told him she did not remember anything about the early morning hours when the crimes occurred at the MacDonald house. (HTpp. 1112-13) She told Leonard she had been questioned by the police right after the murders in 1970. That was why she remembered that she had no recollection of the morning in question. (HTp. 1113) Leonard told her it seemed odd that she could recall the day but not have any recollection of it. But she persisted.

According to Leonard, "That was it as far as I was concerned." (HTp. 1113) In other words, he did not press Stoeckley for additional information. He dropped the subject. In his affidavit, he confirmed he did not ask her additional questions because she was firm in her assertion that she could not remember. [Defense Exhibit 5113]

¹³Leonard acknowledged that a non-indigent defendant would not be entitled to subsistence fees from the government. (HTp. 1167) However, a witness in a case under the Criminal Justice Act with a court-appointed attorney would be entitled to subsistence from the government. (HTp. 578)

Later on Monday afternoon, Stoeckley initiated additional discussion of the incident with Leonard. According to Leonard, “She said what would you do if I told you I was there?” Leonard told her he would still represent her, but emphasized he needed to know the truth. She then told him she was at the MacDonald house when the crimes occurred and told him what happened. In his affidavit, Leonard stated, “She then told me she had been scared to tell the truth, but that the truth was ‘not as bad as everybody thought.’ Shortly thereafter she began telling me that she was, in fact, at the MacDonald residence at the time of the murders. She said she did not actually hurt anyone, nor did she anticipate that the MacDonalds would be hurt.” (HTpp. 1114-16); [Defense Exhibit 5113]

Leonard explained Stoeckley told him she did not participate in the murders, but she was there. She additionally told him that, while she and her associates were at the MacDonald house, the telephone rang and she answered it. (HTp. 1115) One of the people in the house told her to put the phone down and she hung up. (HTp. 1115) She also told him about a hobbyhorse in the house. (HTp. 1115)

Once Stoeckley told him she was involved in the incident at the MacDonald house, he told her to assert her Fifth Amendment privilege against self-incrimination if she was called to testify. (HTp. 1202) Leonard wrote instructions on a card so that she would have it. She was not called by either side to testify.

Leonard did not relate the information Stoeckley told him in 1979 to anyone until he testified at the hearing in 2012, after this Court lifted the attorney-client privilege and

directed him to testify. In his affidavit for the Court, Leonard included this information. [Defense Exhibit 5113] According to what Stoeckley told him, the idea to go to the MacDonald residence came up one night when she and some friends were doing drugs. These friends were part of a core group in a cult. At least one of the men in the group had an issue against MacDonald because he felt MacDonald discriminated against hard drug users in his work in a drug treatment program. Helena said this man talked them into going to the MacDonald house to confront him about the unfair treatment. The group went to the MacDonald house on the night of the murders. According to Helena Stoeckley, things got out of hand and the people she was with committed the murders. [Defense Exhibit 5113]

Leonard was certain about Stoeckley's inculpatory statements. "I remember specific things that are really relevant to what I've got to do." (HTp. 1187) He did not ask her who the men were that were with her at the MacDonald house. (HTp. 1199)

In his affidavit, Leonard also explained about the telephone call. Stoeckley told him that while they were at the MacDonald house, the telephone rang and she answered it. "She hung up quickly after one of her friends yelled to her to hang up the phone." [Defense Exhibit 5113] On 25 July 1983, Jimmy Friar stated that he had made a telephone call to the MacDonald house in the early morning hours when the murders occurred. He called the number that had been given to him and asked for Dr. MacDonald. According to Friar, the woman who answered was laughing and "I heard someone in the background say, 'Hang up the God-damned phone.'" [Defense Exhibit 5021, Declaration of Jimmy Friar] Friar made

the telephone call around 2:00 a.m. on February 17.¹⁴ [Defense Exhibit 5021, Declaration of Jimmy Friar]

Leonard acknowledged he was not sure how important the statute of limitations was to Stoeckley or to him in 1979. "The bottom line . . . it was not in her best interests to get on the witness stand and say, well, I was there . . . or even to take the witness stand." According to Leonard, "I did not want her to testify," primarily because telling the truth would incriminate her in the murders. He thought the statute of limitations for murder was ten years. Regardless of any information about the statute of limitations, his decision remained the same to try his best to keep Helena Stoeckley from getting up on the witness stand and incriminating herself. He saw that as his role in representing her. (HTp. 1184) His main questions to her dealt with what she would say if she were called as a witness. (HTp. 1185) Her answers to his questions changed in the afternoon. "It changed from not remembering to telling me that she was there." (HTp. 1186)

Wendy Rouder, an attorney in California, served as a law clerk to Bernie Segal, who was MacDonald's lead defense counsel in 1979. (HTpp. 344-45) She remembered a call coming into the office on a Saturday during the trial. She answered the telephone. (HTp. 346) The manager from a motel was calling and asking that Helena Stoeckley be moved. Rouder called Segal. Segal instructed her to go to the motel and find out what was

¹⁴This statement from Friar is extremely important. It is dramatic corroboration of Stoeckley's account of the incident at the MacDonald house. It imbues her statement to Leonard with an additional aura of reliability.

happening. (HTp. 346)

Rouder went to the Journey's End. She found Stoeckley in her room. Her nose was bleeding and she was yelling at her boyfriend, Ernie Davis. (HTp. 347) Stoeckley wanted Davis to leave, and he did. Rouder stayed with Stoeckley for a while. (HTp. 348) During the afternoon, Stoeckley made statements to Rouder that she thought she remembered being in the MacDonald house and seeing the younger daughter. (HTp. 349) At some point, Rouder assisted Stoeckley in leaving the Journey's End and going to the Hilton Hotel. (HTp. 349) Eventually, Rouder left her at the new hotel.

Rouder explained Stoeckley kept talking about MacDonald. Rouder asked her why she did not testify to what Stoeckley had told Rouder. "She said I can't with those damn prosecutors sitting there." (HTpp. 350-51) She said that they would burn her or fry her. (HTp. 351) Rouder identified an affidavit that she had previously executed. (HTp. 352) The affidavit corroborated Rouder's account of her interaction with Stoeckley. [Defense Exhibit 5080]

Kathryn MacDonald informed Rouder that a new witness had come forward with information that Helena Stoeckley had given him. This information included a statement that the prosecutor, James L. Blackburn, had threatened Stoeckley. According to Rouder, "It rang a bell for me." She described it as an "ah ha" moment. (HTp. 354) At that point, she fully understood why Stoeckley had said she could not testify with the prosecutors sitting there.

During cross-examination, Rouder mentioned a letter that she had received from

Judge Dupree after she applied for a position as one of his law clerks. In the letter, Dupree stated he had believed MacDonald would be acquitted at his trial. [Defense Exhibit 5115] According to the letter, Judge Dupree stated, "At that time I confidently expected that the jury would return a not guilty verdict in the case" [Defense Exhibit 5115]

Wade M. Smith, who was co-counsel for Jeffrey MacDonald in his federal trial, explained the defense theory at trial. MacDonald had been asleep and was awakened by intruders who killed his family and seriously injured him. (HTp. 21) Several pieces of evidence at trial supported this theory. First, there were tiny pieces of rubber from gloves that did not match the gloves that were found in the kitchen. (HTpp. 22, 23) There were rubber gloves under the sink in the kitchen. Helena Stoeckley was immediately identified as a possible suspect in 1970. (HTp. 23) The defense team looked for her, but was unable to find her. (HTp. 23) At the time of trial in 1979, she had to be found and subpoenaed.

Smith knew Jimmy Britt, who had been a Deputy United States Marshal. According to Smith, "He was very good." (HTp. 24) Some twenty-six years after the MacDonald trial and on his own volition, Britt contacted him in January 2005. "Something had worried him and had been heavy in his mind and heart for all the years since the MacDonald case and he needed to talk to me about it and sort of unload his soul." (HTp. 24) Britt met with Smith. Britt told Smith he had been dispatched to South Carolina to get Helena Stoeckley and bring her to Raleigh during the MacDonald trial. (HTp. 25) On the trip from South Carolina to Raleigh, Stoeckley voluntarily made statements that she was in the MacDonald house when

the crimes occurred. (HTp. 25) Britt was accompanied on the trip by Geraldine Holden, who worked in the marshal's office.

After Stoeckley had been brought to Raleigh, Britt later transported her to the courthouse. He initially took her to a room where she was interviewed by the defense lawyers. He then took her to a room to meet with the prosecutors. One of the prosecutors asked Britt to sit in the room during the interview of Stoeckley. During this meeting, Stoeckley told the prosecutors she had been in the MacDonald house when the murders occurred. According to Britt, one of the prosecutors, James L. Blackburn, told Stoeckley he would indict her for first degree murder if she went into the courtroom and testified in that manner. (HTp. 25)

Smith said that what Britt told him was very important. It would have confirmed the defense theory of intruders. Smith felt like he needed to vet or investigate this information. Several weeks later, he examined Britt under oath in front of a court reporter. (HTp. 26) Smith identified a transcript of this recorded interview under oath. [Defense Exhibit 5055] In this sworn statement, Britt again explained why he came forward with this information. He delayed for many years because of his high regard for the trial judge, the Honorable Franklin T. Dupree, Jr., and his loyalty to law enforcement. According to Smith, Britt "was devoted to law enforcement; it was his life." (HTp. 28) Britt reiterated that he went to South Carolina to get Stoeckley. (HTp. 29) On the trip back, she volunteered that she was in the MacDonald house when the murders occurred. (HTp. 30) Britt said he knew what Stoeckley

told him was enormously important. (HTp. 32) There was no doubt in his mind she made these statements. (HTpp. 30-31) According to Smith, "It was of immense importance" to me as MacDonald's lawyer. (HTp. 32)

Britt again explained he brought Stoeckley to the courthouse. Smith identified a picture that showed Britt with Stoeckley near the courthouse. [Defense Exhibit 5060] Britt again explained he brought her to the defense room for an interview. Britt was not in the room during the defense interview. (HTp. 33) He then took her to the prosecution room. Blackburn invited him to stay in the room. (HTp. 34) Stoeckley told Blackburn she was in the MacDonald house when the murders happened. (HTpp. 34, 35) Britt reiterated that Blackburn told her he would indict her for murder if she testified to those facts. (HTpp. 34, 36) Smith found this information important because Stoeckley may have been "threatened and afraid and would not tell the truth." (HTp. 37)

To further verify Britt's information, Smith had him submit to a polygraph examination. Steve Davenport, who had formerly worked for the State Bureau of Investigation, conducted the polygraph. [Defense Exhibit 5057, Qualifications of Steve Davenport] Smith had Davenport focus his polygraph examination on the threats Blackburn made to Stoeckley. Davenport asked three questions:

1. Did you hear Helena Stoeckley tell Jim Blackburn she had seen a broken hobby horse while she was inside the MacDonald home? Britt answered, Yes.
2. Did you hear Jim Blackburn tell Helena Stoeckley he would have her indicted for murder if she testified she had been inside the MacDonald home? Britt answered, Yes.

3. Are you now lying about the conversation between Jim Blackburn and Helena Stoeckley? Britt answered, No.

[Defense Exhibit 5057] After conducting an analysis and numerical evaluation of Britt's physiological reactions when he gave these answers, Davenport concluded there was no indication of deception. [Defense Exhibit 5057] Smith had Davenport question Britt about what Blackburn said to Stoeckley, "Because it seemed to me that that was the heart of what Mr. Britt had come to tell me, that Ms. Stoeckley had been threatened and was afraid and would, therefore, not tell the truth." (HTp.43) Smith corroborated what Britt told him with the polygraph examination because, "I felt it would be irresponsible to cast this story out into the world unless I did everything I could to make sure that it was true and this helped me confirm that I needed to go ahead and move further." (HTp. 43)

Britt also told Smith that he had told his two friends, Lee Tart and Cecil Goins, about what happened. He had only done so recently. Britt told Smith "that he took a trip with them and on the trip he let them know something about a burden he had felt for a long time and that he shared that with them. (HTp. 45) Britt came to Smith of his own accord. (HTp. 45)

Britt explained, "I did not come forward previously with the information I shared with Mr. Smith and which I now share with the court out of respect for the late Judge Franklin Dupree who presided over the trial and others who were with the courts at the time of the MacDonald trial. Working on the side of law enforcement in the courthouse was my career. I did not want to betray or appear to be betraying the people I worked with and respected. I considered myself a loyal officer of the court and I still do, but ultimately I decided that I

had a duty to come forward.” (HTp. 46) [Defense Exhibit 5058] Smith also explained that Britt had mentioned an incident involving Judge Dupree accepting a cake from some of the jurors. Smith did not consider this information to be pertinent. (HTpp. 48-51)

Mary Britt married Jimmy Britt in 1957. He worked most of their marriage as a United States Marshal. Mary remembered that he worked during the MacDonald trial. (HT pp. 221-23) She specifically recalled he came home one day during the trial and said he would be making a day trip to South Carolina to pick up a witness for the trial. (HTp. 223) When he got home the following evening after returning from South Carolina, he was very excited. “That’s the only word I know to describe it,” Mary Britt explained. (HTp. 223) He said the witness he transported (Helena Stoeckley) told him she had been in the MacDonald house. Mary Britt said Jimmy Britt told her, saying, “She described the inside of the apartment where the MacDonalds lived, and he used the term she described it to a ‘T’ down to the fact of a child's hobby horse that was broken.” (HTp. 223) He made these statements to Mary when he came home after getting the witness in South Carolina. (HTpp. 223-24)

Mary Britt was very anxious for him to get home from court the next day because she wanted to know what happened during the trial. She testified he came in and said they could not use her testimony because her brain was “fried” by drugs. (HTp. 225) After the trial he refused to take MacDonald into custody. (HTp. 226)

Mary Britt also testified about seeing the movie version of “Fatal Vision” on television. (HTpp. 226-27) At that point, she and Jimmy Britt had separated. Sometime

after she saw the movie, he came by the house. As he was leaving, she thought about having seen the movie and asked him if he had seen it. According to Mary Britt, he said, "It's not accurate. They had me standing in the hall. I was in the room, I heard every word that was said." (HTp. 227)

Mary Britt did not know that Jimmy Britt was going to reveal this information in January 2005. Wade Smith called her sometime later. (HTpp. 228, 234) Two federal agents also came by her house to ask her about it. (HTpp. 229, 234) She was shocked that the agents appeared at her house and was upset, although they were very professional toward her. (HTp. 235) They asked her about the MacDonald trial. (HTp. 235) She told the agents about Jimmy Britt taking the trip to South Carolina and relating to her what Helena Stoeckley had said to him in the car on the way back. (HTp. 236) She also explained she had seen the movie version of "Fatal Vision," mentioned it to Jimmy Britt, and related his reaction. (HTp. 237)

Mary Britt's children were upset that the agents had come by the house. Sometime later, Jimmy Britt telephoned her. She asked him why he waited so long to come forward with the information. He did not answer her, but simply asked why she did not come forward herself. (HTp. 238)

Mary Britt was positive Jimmy Britt had traveled to South Carolina during the MacDonald trial to pick up Helena Stoeckley. She was also certain about what he told her that Stoeckley said to him during the trip. (HTp. 240) Mary Britt also mentioned Jimmy

Britt was upset about a cake that Judge Dupree had accepted from the jurors. (HTp. 247) Mary Britt's divorce from Jimmy Britt was very painful. "It was the most painful [thing] I've ever encountered. . . . It was a very, very painful time." (HTp. 248) Nevertheless, she was "absolutely" certain about what he told her during the MacDonald trial. (HTp.248)

Gene Stoeckley was the younger brother of Helena Stoeckley. He grew up in Fayetteville because his father was a career officer in the military. (HTpp. 265-67) He was 10 years old when the murders of the MacDonald family occurred. (HTpp. 268-69) His sister, Helena, had been linked to the incident. He was harassed at school about it; people would tell him his sister was a murderer. He learned to avoid people. His family also received threatening telephone calls. (HTpp. 268-69) When he became an adult, he realized he was not responsible for what Helena may have said or done.

Gene Stoeckley held Helena accountable for much of the harassment he encountered due to her connection to this matter. He related an incident when he was in junior high school when he confronted her about it. She had come back to the house to visit. He was mad at her. At that point, "She told me to be careful because she had certain friends and she told me she had an ice pick." (HTp. 271)

Gene Stoeckley was not involved in the MacDonald trial. At that point, he had graduated from high school and was living in Wilmington. (HTp. 272) There was never talk about the MacDonald situation at their house, especially when his father was around. (HTp. 273) It was "taboo." (HTp. 273) The Stoeckley family never discussed the MacDonald

investigation or trial while he was growing up. His father did not “want it brought up.” (HTp. 343)

His sister, Helena, died in January 1983. (HTp. 274) He did not have much contact with her between the MacDonald trial in 1979 and her death in 1983. (HTp. 274) However, he recalled a time in October 1982 when Helena came to their parents’ house to visit. She brought her infant child, David. (HTp. 275) Both of his parents were still alive at the time. Helena died about three months later. (HTp. 275) She died from post-hepatitis cirrhosis of the liver. (HTp. 332) Sara McMann corroborated Helena’s serious medical condition and her sense that she was dying. Helena and her infant son moved in with the McManns. (HTpp. 420-22) She asked the McManns to take David and care for him when she died, and they did.

Gene Stoeckley’s father died in February 2002. (HTp. 275) After his father’s death, Gene Stoeckley relocated to the Fayetteville area. (HTp. 276) At some point, his mother fell and was unable to live alone. For a time, she lived with another daughter in Virginia and later moved to an assisted living facility in Fayetteville. (HTpp. 278-78, 278-80) Once his mother was in the assisted living facility, Gene Stoeckley visited her at least once every week. He was the child who was primarily caring for her. Gene was always very close to his mother, and they frequently talked about their family. (HTp. 280)

His mother became seriously ill and was hospitalized. Gene Stoeckley was told she would die, and he began making funeral arrangements. However, she recovered and was

able to return to the assisted living facility. They continued having intimate discussions about the family. (HTp. 283) At that point, his father had died. Gene Stoeckley eventually asked his mother whether Helena was involved in the MacDonald incident. His mother told him Helena had been involved. "She said that Helena was there that night." (HTp. 283) "Helena had confided in her during that visit in Fayetteville when she brought David to see her." (HTp. 283)

Gene Stoeckley's mother explained that "Helena knew she was dying."¹⁵ (HTp. 284) Helena confided in their mother "All that she knew." (HTp. 284) According to Gene Stoeckley, "My mother said that Helena was there and that Dr. MacDonald was not guilty of the crimes." (HTp. 284) According to Gene Stoeckley, this revelation "weighed heavily on my mind. I really didn't know what to do with the knowledge. It was something I considered very carefully." (HTp. 284) He did not want to draw attention back to the family, but "by the same token, I felt somehow morally obligated to tell somebody." (HTp. 284) He discussed it in more detail with his mother and asked if she wanted to divulge this information to anyone outside their family." She did.

He continued to think about the matter carefully. (HTp. 285) He understood the potential ramifications of coming forward with this information. He did not want to rekindle these earlier, unpleasant experiences unnecessarily. According to Gene Stoeckley, he thought about it "very much." (HTp. 285) He contacted Kathryn MacDonald. They

¹⁵The dying declaration exception to hearsay is "based on the belief that persons making such statements are highly unlikely to lie." *Idaho v. Wright*, 470 U.S. 805, 820 (1990).

eventually met at a restaurant in Fuquay Varina. He explained his ground rules for any contact with his mother. If at any point his mother did not want to continue or speak to anyone, the meeting would be over. (HTp. 288) He took Mrs. MacDonald to the assisted living facility in Fayetteville. While Mrs. MacDonald waited outside, he went in to see his mother. His mother confirmed she would talk to Kathryn MacDonald. (HTp. 289) According to Gene Stoeckley, his mother's mental state was always sharp. She was very talkative and would engage people. (HTp. 290)

He brought MacDonald into the facility. After they became acquainted, he told his mother they could talk about "whatever you want to discuss." (HTp. 291) His mother related the same information and MacDonald asked if an attorney could come and speak with her. Eventually, Hart Miles and his legal assistant, Laura Redd, came to the assisted living facility. His mother was willing to speak to them as well. (HTp. 292) Again, Stoeckley explained to everyone that any discussion or interview would be discontinued at any point if his mother so desired. Eventually, they worked on an affidavit. Gene Stoeckley went over it carefully with his mother. (HTp. 295) She made some changes or corrections to it. (HTpp. 295-96) Stoeckley insisted no one was telling his mother what to say. "Absolutely not," he testified.

He examined his mother's affidavit. [Defense Exhibit 5051] The third signature on the last page was his and he signed it. The first signature on the last page was his mother's and he saw her sign it. (HTp. 297) Before she signed it, he read the affidavit to her

carefully, word for word. (HTp. 297) She would not have signed it if she had not been comfortable with the entire affidavit. (HTp. 297) No one forced her to sign the affidavit. (HTp. 298) Redd, who notarized the affidavit, corroborated the preparation and signing of it. No one forced Stoeckley; no one put words in her mouth. She signed the affidavit herself, as did Gene Stoeckley. (HTpp. 404-07, 409-10)

In the affidavit, his mother explained she held her daughter's confidences. Her daughter had confided in her in October 1982 because she knew she was dying. Her daughter told her she had lied at the trial because she was afraid of the prosecutors. She told her mother what had happened because she wanted to set things straight before she died.

Gene Stoeckley's older brother did not want his mother to be involved in this matter. (HTpp. 309-10) When agents later interviewed his mother, it was somewhat different from the situation with Kathryn MacDonald. (HTp. 332)

Gene Stoeckley explained that his parents had brought him and his siblings up to be truthful. "Those are the qualities that brought me here ultimately," he explained. (HTp. 343) According to Stoeckley, "if people are not able to find the truth then what are any of us [doing here]?" (HTp. 343) He was absolutely confident his mother knew what was in the affidavit and agreed with it, "very much so." (HTp. 344)

IV. Materials Presented in Present Motion to Vacate

The motion to vacate was initially based on the disclosure by Jimmy B. Britt, a Deputy United States Marshal who had custody of Helena Stoeckley during the trial. Britt's sworn

statement explained why Stoeckley testified as she did during the trial. It explains why Stoeckley testified at trial that she could remember nothing about the four hour period during which the murders occurred.

Jimmy Britt came forward in 2005 to Wade Smith. DUSM Britt, by that time retired, worked at the Raleigh courthouse during the 1979 trial. He was responsible for escorting the key defense witness, Stoeckley, who was in custody on a material witness warrant. In his affidavit, Britt sets out how Stoeckley made admissions to him, after he took custody of her, that she was present in MacDonald's home on the night of the murders. [Defense Exhibits 5059 at ¶15]

Most important, Britt was present when the lead prosecutor, AUSA Jim Blackburn, interviewed Stoeckley the day before she was to testify as a defense witness in the trial. As reflected in his sworn affidavit, DUSM Britt avers that during that meeting in the prosecutor's office during the 1979 trial, Stoeckley told AUSA Blackburn that she was in fact present in the MacDonald home on the night of the murders. [Defense Exhibit 5059 at ¶ 20-23] Britt avers further that AUSA Blackburn responded to this admission by telling Stoeckley that if she testified in court to that fact, he would indict her for murder. Britt states in his affidavit that he is absolutely certain that these words were spoken. [Defense Exhibits 5056, 5058, 5059]

Not surprisingly, when called by the defense as a witness the next day at trial, Stoeckley testified that she could remember nothing about the four-hour period during which

the murders occurred. Blackburn, who was later disbarred and imprisoned in 1993, did nothing to correct this testimony. Even worse, when MacDonald then sought to call six witnesses who would testify about Stoeckley's admissions to them prior to trial of being present in the home during the murders, Blackburn opposed the admission of the testimony, and in doing so told the trial judge that Stoeckley had told him in their meeting the prior day that she remembered nothing. This testimony was directly contrary to what Britt specifically heard Stoeckley tell Blackburn. Given Blackburn's response, the trial court ruled Stoeckley's out-of-court admissions to the six defense witnesses were not trustworthy and not corroborated. The importance of Stoeckley's testimony to the decision of the jury in MacDonald's case has previously been noted by the Fourth Circuit.

Had Stoeckley testified as it was reasonable to expect she might have testified [admitting to presence at and participation in the crime], the injury to the government's case would have been incalculably great.

United States v. MacDonald, 632 F.2d 258, 264 (4th Cir. 1980).

In support of Britt's recitation of events, numerous additional affidavits and other items of evidence were submitted showing Stoeckley was present during the murders and that MacDonald did not kill his family. This evidence included:

- (A) affidavits from several individuals averring that Greg Mitchell (a boyfriend of Helena Stoeckley continually linked to the murders) separately confessed to each of them his participation in the murder of MacDonald's family, prior to his own death, including once on his own deathbed [Defense Exhibits 5022, 5023, 5024A, 5024B, 5048];
- (B) an affidavit from Lee Tart, a former Deputy United States Marshal who worked with Britt, testifying that Britt told him in 2002 the things that Britt has

brought forward in this Motion relating to Stoeckley's confession to Blackburn and Blackburn's threat in response, and the fact that Britt was troubled greatly by carrying the burden of his knowledge of those matters [DE-115, Ex. 3];

- (C) an affidavit from Wendy Rouder, who at the time of trial was a young lawyer assisting MacDonald's lawyers, testifying that she had interaction with Stoeckley the weekend after Stoeckley's interview with Blackburn and her subsequent appearance in court, and testifying that during that contact Stoeckley told her that she (Stoeckley) had been present in MacDonald's home during the murders and could name the murderers, but did not testify to those facts in court because she was "afraid ... of those damn prosecutors sitting there," adding that "they'll fry me" [Defense Exhibit 5080];
- (D) an affidavit from Helena Stoeckley's mother, averring Stoeckley told her on two occasions, including one when Stoeckley knew she was dying, that she had been in the MacDonald home during the murders and providing details from her corroborating both MacDonald's account of the murders and Rouder's account of Stoeckley's statements to her and other people [Defense Exhibit 5051].

Much of this evidence was amplified in great detail in the recent evidentiary hearing, as summarized above.

Second, the motion was based upon the results of DNA testing authorized by this Court. These results did not come available until March 2006. MacDonald added them as an additional predicate for the motion, and the Fourth Circuit has directed that these results be considered as part of the "evidence as a whole" in this matter. *MacDonald*, 641 F.3d at 614. The results of the DNA testing were highly exculpatory. Most notably, these DNA results show that a human hair recovered from under the fingernail of one of MacDonald's murdered children, Kristen, did not match MacDonald, his family, or any of the other known

samples submitted for testing.¹⁶ [DE-123 at 8-9 and attached exhibits] The material nature of this specimen alone is compelling as it shows Kristen defended herself and a hair likely coming from her attacker and a hair that is *not* from MacDonald was lodged under her fingernail or found in scrapings from her hand. This DNA evidence is unimpeachable evidence supporting the defense theory and showing a reasonable doubt that MacDonald killed his family.

Other material DNA evidence also emerged. A human hair found on the bedspread in Kristen's bedroom also did not match MacDonald, his family, or any of the known samples tested. Likewise, a human hair found underneath Colette's body did not match MacDonald, his family, or any other known sample submitted for testing. These two hairs are further proof of the presence of intruders who committed the killings, and support MacDonald's innocence. [DE-123 at 9-10 and attached exhibits]

This evidence is highly powerful and material to the defense theory of the case. The prosecution could not prove directly that MacDonald killed his family. Rather, it advanced the questionable theory of disproving MacDonald's consistent, voluntary account—one from which he has never diverged. In the government's view, if MacDonald's statement of events was not accurate, then he committed the crimes.¹⁷ This point is shown by the prosecutor's

¹⁶In addition to samples from MacDonald and his family, known DNA samples from Helena Stoeckley and Greg Mitchell were also submitted for comparison in this testing.

¹⁷The district court's observations about the evidence during the trial buttress this conclusion. At a bench conference, the district court observed:

closing argument. “The Government’s case, stripped to its essentials, consists of the crime, the physical evidence, the defendant’s story voluntarily told, the conflict between that story and the physical evidence, from which we submit that it was a fabrication of the evidence, and from that we infer and ask you to find his guilt.” (Tp. 7059)

Accordingly, at trial and in opposition to MacDonald’s previous post-conviction filings, the government has continually stressed the absence of physical evidence to support his statement that intruders had entered the MacDonald home and committed the murders. This evidence now exists, in a most powerful way, in the DNA evidence submitted by MacDonald, not to mention the newly discovered eyewitness admissions by Helena Stoeckley.

The most powerful DNA evidence is the hair from the fingernail scrapings from the left hand of Kristen MacDonald. The DNA testing of this hair produced a DNA profile that is not consistent with MacDonald, any member of his family, Helena Stoeckley, or Greg Mitchell. Given the location of his hair, and the government’s own evidence showing Kristen struggled with her attacker, the existence of this evidence is substantial proof that the

THE COURT: Gentlemen, first off, and this is not why I got you up here but it is something that is on my mind so I am going to tell you; all these experiments and all this examining and cross-examining and so forth – it is interesting and it is technical and it may be going somewhere. But, for whatever it is worth, *I think this case is going to rise or fall on one thing and one thing alone and that is whether or not the jury buys the Defendant’s story as to what happened. That is all there is in this case.* We have been here five weeks, and that is still all there is in this case. I just make that as an observation.

(Tpp. 5256-57) (emphasis added).

hair came from Kristen's attacker and it was not Jeffrey MacDonald.

The other two specimens are likewise exculpatory. Specimen 75A establishes that a hair, unmatched to MacDonald or any other known sample, was found under the body of Colette MacDonald. The hair had both root and follicular tissue attached, indicative that it was pulled from someone's skin. Specimen 58A1 establishes that a hair, unmatched to MacDonald or any other known sample, was found on the bedspread that was on the bed where Kristen MacDonald was killed.

This new DNA evidence must be evaluated in light of all of the other evidence of record in this case that directly contradicts the government's theory at trial. This evidence includes:

- the Britt evidence;
- the admissions made by Stoeckley of her presence in the MacDonald home at the time of the murders to six other individuals, including three law enforcement officers, who were at trial and prepared to testify, as well as her admissions to Wendy Rouder and Lynn Markstein during the trial;
- the fact that a woman matching Stoeckley's description was seen by MP Kenneth Mica as he went to the MacDonald house in the rain on the night/morning of the murders approximately a half-mile from the murder scene;
- the detailed admission made by Stoeckley after trial that was the basis of MacDonald's 1984 new trial motion;
- the affidavit of Helena Stoeckley's mother, who avers that Stoeckley told her that Stoeckley "lied about it [her presence in the MacDonald home at the time of the murders] at the trial ... because she was afraid of the prosecutor;"
- the synthetic blond wig hairs found in the MacDonald home, unmatched to any

other fiber in the home, but consistent with Stoeckley's presence that night wearing a long blond wig;

- Stoeckley's admission at trial that she was wearing a blond wig and floppy hat the night of the murders and burned the wig shortly after the murders and never again wore the hat because they connected her to the murders;
- the fact that Greg Mitchell, after the crime and after he had separated from Stoeckley, confessed his involvement in the murders to at least eight people;
- the black wool fibers found on the mouth and bicep area of Colette MacDonald and on one of the murder weapons that were not matched to any fabric in the MacDonald home;
- the numerous statements of witnesses submitted with MacDonald's earlier habeas petition and new trial motions linking Stoeckley and Mitchell to the murders.

All of this evidence, catalogued in detail in this memorandum, in prior filings with the Court, and in the testimony and voluminous exhibits introduced at the evidentiary hearing, shows the tenuous nature of the government's theory of the case at trial. The evidence, in and of itself, and certainly in tandem with the compelling testimony from Jerry Leonard and others about Helena Stoeckley's credible admissions, supports MacDonald's claim for relief under section 2255(h)(1).

V. Evidence of Intruders from Previously Submitted Materials

A. Physical Evidence of Intruders

I. Weapons

Only one of the weapons alleged to have been used in the commission of the crime—a stick/club—could be conclusively identified as coming from the MacDonald residence. Four

intruders, relying on their numbers alone, may have entered the home without weapons and used what they found in the MacDonald home. Equally likely, they may have come with one or two weapons, and then used, in addition to what they brought, items from inside the home that were clearly at hand. They could have then taken what they came with when they left, discarding the weapons they found in the house. The fact that MacDonald had no recollection of an ice-pick proves nothing. In fact, had MacDonald committed the crime, and tried to cover it up, and had he thrown the ice-pick and other weapons into the backyard, he would not be so dense as to deny having an ice-pick in the house. That at least some of the weapons may have originated from the MacDonald home does not in any way tend to prove who committed the crime. In fact, if the weapons used came from the home, it would be consistent with Stoeckley's claim that the original intent when the intruders went to the home was just to intimidate.

ii. Blood typing

Each of the four members of the MacDonald family had a different one of the four ABO blood groups, potentially enabling the investigators to reconstruct the sequence of events in the MacDonald apartment the night of the murders. [DE-227 at ¶ 28] But this fact is not as conclusive as the government has claimed. Blood typing is not as specific as DNA testing. All the blood typing of the evidence shows is that an individual with a certain blood type could have provided the specific evidence found at the crime scene. It in no way guarantees who left behind what blood or, more importantly, a MacDonald family member

left any particular blood. If there was an intruder in the MacDonald home that night, it is inevitable that he or she had the same blood type as one of the MacDonald family members.¹⁸ Only DNA testing, which MacDonald is requesting in his motion pursuant to the Innocence Protection Act of 2004, can determine which individual's DNA profile is on any given item of evidence.

iii. Bloody syringe

A bloody-syringe half-filled with an unknown fluid was found in a hall closet in the MacDonald house by an Army CID investigator during the crime scene investigation. On 21 February 1970, Hilyard Medlin of the United States Army Crime Laboratory was interviewed concerning the crime scene processing at the MacDonald residence. During the course of his interview, Medlin "advised that a half-filled syringe that contained an as-yet unknown fluid was located in a hall closet, which also contained some evidence of blood." In this connection, Medlin said that "it appeared that someone with a bloody hand had reached into this cabinet containing medical supplies for some purpose." [1984 Defense Motion to Set Aside the Judgment, Exhibit A] Unfortunately, in another example of an uncontrolled crime scene, the syringe was never collected into evidence and was apparently lost.

The mere presence of the half-filled syringe would be probative of the presence of

¹⁸For example, Greg Mitchell and Kristen MacDonald had the same blood type: O. It is entirely possible that blood the government has previously maintained belonged to Kristen was actually evidence left behind by Mitchell or one of the other assailants.

drug-seeking intruders. The syringe itself could have yielded fingerprints and could also have yielded blood sufficient for DNA testing, either one of which would establish the presence of an intruder and exculpate MacDonald. The contents of the syringe could have been a narcotic, further corroborating MacDonald's testimony. [1984 Defense Motion to Set Aside the Judgment, Declaration of Richard Fox] The presence at the crime scene of a syringe half-filled with an unknown fluid would have bolstered MacDonald's account of intruders.

iv. Gloves

Four pieces of evidence, suspected to be from a surgical glove or gloves (s) and which bore blood, were found in the master bedroom. One piece, which was $\frac{3}{4}$ of a finger, was in the bedding on the floor at the foot of the bed. MacDonald stated that one or more used pairs of surgical gloves were on the kitchen sink (not present when the CID arrived) and usually a pair was on top of the dryer in the utility room for Colette to use (also not present). The government's theory was that MacDonald donned the surgical gloves from the kitchen. Agent William Ivory located eight pairs of rubber surgical gloves under the kitchen sink. In the master bedroom near Colette's head, he found a rubber substance "like from a ... clear rubber glove." In the sheet, which was lying on the floor at the foot of the bed in the master bedroom, Ivory found an entire bloody finger "of a rubber glove such as a surgeon's rubber glove." No remaining part of the glove was located.

The government has always contended the initial blows resulted from a spontaneous

argument between MacDonald and Colette. It is inconceivable, then, that MacDonald committed the first act of violence through a fit of passion and rage, but stopped to go to the kitchen and put on a pair of rubber gloves while Colette waited for the violence to continue.

v. MacDonald's pajama bottoms

Upon arrival at the crime scene, investigators and military police saw evidence of murders committed by clubs, knives, and other sharp instruments and involving a great deal of bloodshed. MacDonald was wearing only his pajama bottoms, which were described as being blood stained and torn. [1984 Defense Motion to Set Aside the Judgment, Exhibit O] As MacDonald's matching pajama top was blood soaked, it had little or no value as blood spatter evidence. On the other hand, MacDonald's matching pajama bottoms had the potential of proving he did not commit the crimes. The clothes worn by an assailant in a blood-shedding episode will ordinarily yield blood spatter evidence, which would prove the person wearing that item of clothing was present when blood was shed. [1984 Defense Motion to Set Aside the Judgment, Declaration of Richard Fox] If the blood stains on MacDonald's pajama bottoms did not contain spatter evidence consistent with his presence at a time when blood was shed, it would have corroborated his testimony that intruders, and not MacDonald, murdered his family. Unfortunately, the pajama bottoms were not collected and preserved.

vi. Unsourced wool fibers

The government introduced evidence of two purple cotton fibers found on one of the murder weapons, an old wood board found by police outside the house. The government introduced expert testimony that the fibers on the club, which was believed to be one of the weapons used during the crime, matched the fibers used to sew MacDonald's pajama top. (Tp. 3784) This evidence is completely consistent with MacDonald's account, as he said he had been repeatedly struck by a club or clubs; his pajama fibers could have stuck to the club while he was being attacked. However, the government suppressed the fact that FBI analysts in 1978 reexamined the fibers on the club, determining that in addition to the purple cotton fibers, there were black wool fibers—fibers that did not match any fabric in the MacDonald home.¹⁹ Not only were these inexplicable black wool fibers found on the murder weapon, but similar black wool fibers were found on Colette's mouth and body. [Defense Exhibit 5027]

MacDonald has previously brought before this Court, through various affidavits and lab notes, the fact that other lab notes discovered post-trial as part of a Freedom of Information Act (FOIA) request demonstrated that government investigators had found "one black wool fiber and one white wool fiber in the debris taken from the right biceps area of Colette's pajama top, two black wool fibers and one green wool fiber in the debris moved

¹⁹Despite this reexamination in 1978, prosecutor's elicited testimony from selected experts at the 1979 trial that the murder weapon had on it the blue cotton fibers of MacDonald's pajama top without also disclosing the presence of unmatched black wool fibers.

from the wooden club murder weapon, and two black wool fibers in the debris removed from the mouth area of Colette, none of which were matched to any known source in the MacDonald home.” See *United States v. MacDonald*, 778 F. Supp. 1342, 1347–1349 (E.D.N.C 1991). This evidence indicates intruders were in the home and corroborates Stoeckley’s many confessions.²⁰

vii. Saran fibers

Through FOIA requests made post-trial, the defense learned of the existence of handwritten lab notes of Army CID laboratory technician Janice Glisson that revealed numerous blond synthetic hairs, up to twenty-two inches in length, had been found in a hairbrush in the kitchen of the MacDonald home following the murders. These hairs could not be matched to any known items in the MacDonald home. Glisson had testified as a government witness at MacDonald’s trial but had conveniently never mentioned finding these long blond synthetic hairs. See *MacDonald*, 778 F. Supp. at 1347-49.

The government countered the evidence by submitting an affidavit from an FBI agent, Michael P. Malone, who opined that the blond synthetic hairs were not wig hairs, but were made of a saran fiber used only in doll’s hair. MacDonald has since learned Malone’s affidavit was false. The fact that Malone provided false testimony is consistent with his actions in many other cases, which has resulted in an in-depth investigation into his questionable ethics and professionalism by the FBI.

²⁰This Court should consider the affidavit of Ellen Dannelly and the FBI Laboratory Notes dated 17 October 1984 in connection with the discovery of the wool fibers and their import. [Defense Exhibit 5101]

The Department of Justice and FBI spent the last several years reviewing Michael Malone's work-product and trial testimony to determine whether Malone provided invalid, unreliable, or false hair identification testimony. *See* Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, Wash. Post, April 1, 2012, at 1. For example, Malone provided "flawed" hair testimony in Donald Gates' 1981 rape trial; his flawed testimony "was key" to securing Gates's conviction. In 2009, however, DNA testing conclusively proved that Gates could not have committed the rape and that Malone's hair testimony was incorrect. *Id.*

Malone's work-product and hair testimony have also been criticized in a Texas death penalty case that ultimately resulted in Benjamin Herbert Boyle's execution in 1997. According to a DOJ memo, without Malone's "flawed work," Boyle would not have been eligible for the death penalty. *Id.* Malone's "flawed" work-product and hair testimony also played a role in John Norman Huffington's 1981 double-murder conviction. *Id.* Additionally, in Robert Milford's homicide trial, Malone testified a strand of hair located at the crime scene perfectly matched Milford's pubic hair. Malone testified: "It would be highly unlikely for ... anybody else to have hairs exactly like the hairs of Mr. Milford." The DOJ criticized Malone's testimony because he failed to perform his tests in a scientifically acceptable manner. The DOJ also claimed that Malone's hair statistics overstated the hair evidence's significance. According to the DOJ, there are no statistical databases to determine the likelihood of whether a specific hair originated from one person or another. *See* Sydney P. Freedberg, *Sloppy Lab Work Casts Doubt on Some Florida Cases*, St. Petersburg Times, March 5, 2001, 8A.

Synthetic saran fibers found in the hairbrush were routinely used in the manufacture of wigs at the time of the murders. The issue of whether the twenty-two-inch-long fibers were wig hairs or doll hairs was never resolved by this court. *United States v. MacDonald*, 979 F. Supp. 1057, 1067-68 (E.D.N.C. 1997). This evidence is significant corroboration of MacDonald's account.

viii. Unidentified footprints

During the course of the government's investigation, two government investigators rendered opinions concerning the reliability of physical evidence which were consistent with the defense's position in the case and contradictory to the opinion of a government trial witness. However, the jury never heard those opinions as they were suppressed by the government prior to trial.

During the trial, Medlin testified that the footprint found in the bedroom of the MacDonald residence was that of MacDonald. (Tp. 3106) However, at least two other CID agents had previously questioned the validity of Medlin's opinion. CID Agent Ralph Turbyfill explicitly disputed Medlin's conclusion in a memorandum to Medlin, stating, "[Medlin] I don't think we can opionate in this matter. Personally, I can't see the crease marks you refer to. How many other peoples' feet would be close if we had the records. Assuming the feet are the same size and the body weight the same." [1984 Defense Motion to Set Aside the Judgment, Exhibit J] Similarly, a short note stapled to the page containing Turbyfill's statement contains the statement: "[Medlin] I can't see a positive make on this. 'Show me.' C.A.H." [1984 Defense Motion to Set Aside the Judgment, Exhibit K]

ix. Unsourced wax drippings

Included in the physical evidence discovered at the crime scene were wax drippings of three different kinds of wax: one taken from a coffee table in the living room (where MacDonald said he saw the woman with the flickering light), one taken from a chair in Kimberley's bedroom, and one taken from the bedspread in Kimberley's bedroom. None of these samples matched any of the candles or other wax found in the MacDonald home and submitted by investigators for comparison.²¹ (Tpp. 3837-43) The waxes found were different in chemical composition to wax from candles found in the MacDonald home. [Defense Exhibit 5004] This evidence corroborates MacDonald's contention that the intruder with the long blond hair appeared to be carrying one or more lit and dripping candles.

x. Unidentified Fingerprints

A significant number of fingerprints taken from key locations in the apartment, including the headboard and footboard of the bed in the master bedroom, as well as the back door in the master bedroom, remain unidentified. Forty-four useable latent fingerprints and twenty-nine useable palm prints were lifted from the scene of the crime. Of these, only twenty-six fingerprints and eleven palm prints were matched with MacDonald, his family members, or investigators and other individuals whose prints were available for comparison. (Tpp. 3116, 3141) These prints included one fingerprint on a drinking glass, which was located on a table directly at the head of the sofa

²¹The wax samples were brittle and flaky, indicating to they were several weeks old. But the examiner did not received them for analysis until several weeks after the crimes occurred. (Tpp. 3888-90, 3899)

where MacDonald said he struggled before being knocked unconscious. This fingerprint on the drinking glass could not be matched with any known comparison print. (Tpp. 3132-33)

In addition, there were forty-four fingerprints and seven palm prints Medlin thought should be capable of being photographed after he viewed them with a magnifying glass. However, apparently because of difficulties in the photography process, they were not useful. Some of these prints were again photographed and were readable for comparison purposes with record prints. Again these many strange unaccounted for finger and palm prints could have been viewed as corroboration of intruders. Even Ivory grudgingly admitted as much at the evidentiary hearing before this Court. (HTpp. 859-61)

Furthermore, some of the key locations mentioned in the first sentence of this subsection included unidentified fingerprints and a bloody hand print on the footboard of the MacDonald master bed and on the back door in the master bedroom, among other places. This evidence defies logic as neither of those places are where people other than family would likely be found.

xi. Lost or Destroyed Evidence

Investigators also lost or destroyed evidence that could have been used to prove the defendant did not assault his wife and children and evidence which could have been used to prove the presence of intruders in the MacDonald home. MacDonald's torn and matching pajama bottoms were taken and destroyed at the hospital before they could be examined for blood spatter evidence. MacDonald arrived at the hospital wearing only his pajama bottoms, which were described as being blood stained and torn. [1984 Defense Motion to Set Aside the Judgment, Exhibit O] The government lost

or destroyed the skin which had been recovered from under Colette's fingernail. [1984 Defense Motion to Set Aside the Judgment at 11] The government lost the bloody half-filled syringe mentioned above. *Id.* at 8-9.

In addition, the government destroyed seven fingerprints taken from the hallway in the MacDonald residence that could have been established the presence of intruders. Thereafter, the government mischaracterized what had happened to the fingerprints to hide the fact that they had been intentionally destroyed. The CID laboratory team photographed eighty-seven fingerprints and partial fingerprints at the MacDonald residence on the morning of the murders. Seven of eighty-seven photographs were described at the Article 32 proceedings as having been blurred when they were printed. Neither the photographs nor the negatives thereof were provided to the defense at the Article 32 hearing because they were "undergoing further treatment."

On 4 October 1974, Brian Murtagh requested copies of the seven photographs in order that they could be sent to Aerospace Industries for the enhancement. [1984 Defense Motion to Set Aside the Judgment, Exhibit L] On that same date, apparently in an effort to comply with this request, Medlin was contacted. But he advised the negatives of those seven photographs had been destroyed "because they kept getting mixed up with the other negatives." [1984 Defense Motion to Set Aside the Judgment, Exhibit M]

On 14 November 1974, the Army laboratory sent Murtagh "all photographs [and] photographic negatives..." from the MacDonald case. [1984 Defense Motion to Set Aside the Judgment, Exhibit N] The photographs and negatives provided to Murtagh were contained in

fourteen envelopes containing photographs and negatives and one envelope containing negatives. Some of these envelopes are marked "print missing," indicating the photographic print made from the negative was missing. While the negatives of the blurred photographs were originally preserved, at some point they were destroyed by the government, as described in Medlin's conversation. Had those fingerprints been available to the defense, they might have been matched to Helena Stoeckley or her associates and corroborated MacDonald's testimony that she and others were present and committed the crimes.

By failing to advise the defense that the negatives had been destroyed, the government knowingly permitted the defense to incorrectly assume that the negatives had no evidentiary value. Had MacDonald known the negatives were "destroyed because they kept getting mixed up with the other negatives," he could have used that information to cross-examine Medlin and show the Army's indifference in protecting evidence that could have exculpatory value.

B. Confessions of Intruders

I. Helena Stoeckley

As this Court is aware from evidence presented at and in conjunction with the September 2012 evidentiary hearing, the younger Helena Stoeckley was a woman local to the area, heavy into the drug scene, who routinely wore a long blond wig and a floppy hat. During interviews with former Los Angeles FBI Bureau chief Ted L. Gunderson and former Fayetteville police detective Prince Beasley, conversations with various other people, including her husband, Ernie Davis, and trustworthy statements to her attorney, Jerry Leonard in 1979 and her mother in 1983, Stoeckley

provided a great deal of information.

Stoeckley associated with a group of social dropouts in Fayetteville, North Carolina in late 1969 and 1970. [1984 Defense Motion for a New Trial at 12] This group included Greg Mitchell, Shelby Don Harris, a black man known to Stoeckley as “Smitty” and “Zig Zag,” Bruce Fowler, Allen Mazerolle, Keith Bowen, John Comisky, Gary Mitchell, and Robert Murray Sanders. *Id.*

Stoeckley’s group was angry with the refusal of military physicians to assist them with their drug problems and identified MacDonald as one of the offending physicians. *Id.* According to Stoeckley, they decided to try to persuade MacDonald to provide drugs and agree not to report drug users. *Id.* at 13. By watching MacDonald and Colette, they learned where the MacDonalds lived and that Colette was a student at North Carolina State University Extension School at Fort Bragg. *Id.*

On the evening of 16 February 1970, members of Stoeckley’s group went to North Carolina State Extension to speak to Colette and seek her intervention with MacDonald. *Id.* At about 10:30 p.m. that evening, Stoeckley, Mitchell, Harris, Smitty, the black male, and others met at Stoeckley’s apartment to discuss going to the MacDonald residence to seek his cooperation regarding the nondisclosure of the identities of soldiers with drugs problems. *Id.* Around 11:00 p.m., Stoeckley, Mitchell, and Smitty went to the Village Shop/Apple House Restaurant in Fayetteville and stayed until closing time. *Id.* at 14. Then they went to the Dunkin’ Donuts Restaurant in Fayetteville. *Id.* At approximately 2:00 a.m., Stoeckley, Harris, Mitchell, and Fowler left Dunkin’ Donuts for the MacDonald residence. *Id.* Mitchell was wearing dark trousers and a light colored mohair sweater,

and Smitty was wearing a fatigue jacket with E-6 stripes on the sleeves. *Id.*

When they went to the MacDonald residence, the group entered through a back door. [1984 Defense Motion for a New Trial at 14] The group passed through the house into the living room, where they saw MacDonald asleep on the couch with a book across his chest and a Valentine's Day card on the couch next to him. *Id.* at 14-15. The television was on and there was "snow" on the screen as there was no programming at that hour. *Id.* at 15. Stoeckley lit a candle to provide light in addition to the dim light in the house. *Id.* The group jostled MacDonald to awaken him and when he awoke, he became excited and began to fight with them. *Id.* Smitty struck at MacDonald and Stoeckley said something like "hit the pig" or "kill the pig" and "acid is groovy." *Id.* at 15.

Around that time, Stoeckley heard Colette calling for help from another room in the house and heard her voice gurgling as though she were clearing her throat. *Id.* Stoeckley went to the room where she heard Colette's voice and saw her being assaulted by Mitchell and another person. *Id.* One of the MacDonald children was in the master bedroom at the time and appeared to be asleep. *Id.*

When Stoeckley was in the MacDonald house, she went into one of the children's rooms and saw a record player and some children's books. *Id.* at 17. She also saw a hobby horse, which she believed to be in a different room of the house. *Id.* Stoeckley heard the sound of running water in the bathroom, looked in the bathroom, and saw Mitchell washing his hands in the sink. *Id.*

At some point the telephone rang, and others in the group directed Stoeckley to answer the phone. [1984 Defense Motion for a New Trial at 17] A person with a soft voice asked for Dr.

MacDonald. *Id.* Stoeckley began to laugh and someone in her group said to “hang up the God damn phone.” *Id.* They became scared and left in a hurry, leaving all weapons behind except for some scissors. *Id.*

Stoeckley did not remember whether the group left the crime scene in more than one car. *Id.* The group with her went to Dunkin’ Donuts, where she alone went into the bathroom to wash her hands. *Id.* at 17-18. Stoeckley arrived back at her home later that morning. Several days after the murders, Stoeckley gave the bloodstained clothes and boots which she had worn at the MacDonald residence to a friend of hers named Cathy Perry, asking Cathy Perry to dispose of the items. *Id.* Because Stoeckley was concerned that Gunderson could not get her immunity, she had protected herself by telling him that Mazerolle, who was in jail at the time of the murders, had been involved in the murders even though he had not been. [1984 Defense Motion for a New Trial at 18-19]

When called as a witness at the MacDonald trial in 1979, Stoeckley purposely acted confused in order to deceive the judge because of her fear of being prosecuted. *Id.* at 17-18. While in Raleigh for the trial, Stoeckley up in bed in her motel room and started scribbling on the wall and/or headboard, explaining to her husband, “It’s my baby.” *Id.* at 192. After Davis and Stoeckley returned home, Stoeckley said she thought she had been at the MacDonald home the night of the murders. *Id.* She would get up at night and say, “It’s my baby,” and then go wash her hands. *Id.* Stoeckley showed her husband a rocking horse and told him the broken spring on it was just like the broken spring on the horse at the MacDonald home. *Id.*

Between the murders in 1970 and MacDonald’s trial in 1979, Stoeckley repeatedly made

incriminating statements to numerous persons implicating herself, Mitchell, and others in the killings. At trial, however, Stoeckley testified she could remember nothing about the four-hour period during which the murders occurred, despite her many statements otherwise. After this occurred, the trial court refused to permit MacDonald to call six witnesses that he had present, who would have testified to Stoeckley's admissions made to each of them, prior to trial, of being present in the MacDonald home at the time of the murders with the killers. (Tpp. 5508-99)

During the nine years that passed between the crimes and the trial, a significant amount of evidence had been amassed connecting Stoeckley to the murders. For example, she had a blond wig at the time of the killings that she burned shortly after the crime. (Tpp. 5602-04) The clothes she routinely wore around the time of the crime matched the clothes of the woman MacDonald described as seeing in his house the night of the murders (a blond wig, floppy hat, and boots). (Tpp. 5583-90) Trial testimony also established she routinely wore black (Tp. 5634), indicating the black fibers found at the scene could have come from her clothing.

Around the time of the murders, Stoeckley was involved in an illegal drug cult that ingested LSD, worshiped the devil, used candles and ritualistically killed cats. (Tpp. 5525, 5542-43) She had an unexplained connection with the incident stemming from hanging wreaths along her fence the day of the burials. (Tpp. 5633-34) A woman matching Helena's description had been seen by several people near the crime scene at or around the time of the murders. (Tpp. 1453-54, 5454-56)

Prior to the trial, Stoeckley admitted her participation in the crime to numerous people, including three individuals involved with law enforcement. The defense subpoenaed several of

them, including Jane Zillioux, James Gaddis, Charles “Red” Underhill, Robert A. Brisentine, Jr., William Posey, and Beasley. They were prepared to testify to the incriminating admissions Stoeckley had made to them. The defense intended to call Stoeckley as a witness, obtain her admissions to the crime, and then call the other six witnesses to whom Stoeckley had also confessed. This effort, of course, was not permitted.

After the trial, Stoeckley continued to make admissions contrary to her trial testimony and corroborative of her statements prior to trial, implicating herself as present during the murders, and implicating Mitchell as one of the killers. Stoeckley even went so far as to give a recorded interview, aired on television, wherein she made some of these admissions.²² See *United States v. MacDonald*, 640 F.Supp. 286, 321 (E.D.N.C. 1985).

MacDonald’s 1984 *Motion for a New Trial* included numerous detailed direct post-trial confessions made by Stoeckley.²³ In these confessions, she repeatedly named Mitchell as her boyfriend at the time and specifically indicated he was the man who murdered Colette. This evidence included: (1) an extensive detailed confession given by Stoeckley to two former law enforcement officers; and (2) affidavits of various witnesses attesting to facts that further linked Stoeckley to the crime and corroborated her admissions of presence during the murders.

²²The majority of this interview can be seen at <http://www.youtube.com/watch?v=HBqkx2SYQbY>.

²³While these confessions remain important and probative, they are overshadowed by the credible admissions she made to her attorney in 1979 and to her mother in 1982, both under circumstances having a high indicia of reliability. MacDonald did not have these later admissions available to him in 1984. In fact, her admission to her attorney was not available until this Court removed the attorney-client privilege at the hearing in September 2012.

On the day following the murders, Beasley, the Fayetteville police detective, heard the descriptions of the assailants given by MacDonald. Beasley immediately thought he knew a young woman who fit the description of the female intruder. The woman, Helena Stoeckley, was a drug user and informant who provided very useful information to him. Beasley searched for her that evening and the following day. When he found her and asked her about the crime, she responded, "In my mind it seems that I saw this thing happen. I was heavy on mescaline." (Tpp. 5738-42) Beasley testified on voir dire that Stoeckley been a drug informant for him and she was "[t]he most reliable informant [he] ever had." (Tp. 5739)

Agent Ivory conducted two separate interviews with Stoeckley, the first at the Fayetteville Police Department, and the second some time later at the Cumberland County Jail. The first interview lasted approximately one hour; the second interview lasted about one-half to one hour. Answers to the same type questions during the second interview were basically the same as during the initial interview. Stoeckley told Ivory she remembered driving out alone and returning alone on 17 February 1970 around 4:00 a.m. in a blue Mustang owned by a white male named Bruce, whom she described as a former soldier, who was about 20 years old and had dark hair. She was high on marijuana, left the apartment sometime after midnight, and drove aimlessly. Because she had been smoking marijuana, she could not remember her whereabouts for those four hours. She told Ivory she owned a large floppy hat but gave it away to an unknown person, had boots that she had thrown in the trash, and occasionally wore a blond wig she borrowed from a girl friend, which she returned after February 17. Stoeckley declined to testify in the Article 32 hearing because she did not want

to get involved. Stoeckley remembered black men visiting her apartment on occasion, with Eddie being the only name she could recall. When asked if she was wearing black clothes on the date of the MacDonald funerals, she responded, “. . . probably yes”

Posey, who lived next door to Stoeckley at the time of the murders, observed Stoeckley coming home in a Mach I Mustang with at least two males during the early morning hours (3:45-4:30 a.m.) on February 17 in the Haymount section of Fayetteville, North Carolina. *Id.* at 1676. Previously, Posey had seen a blue Mach I Mustang at Stoeckley’s apartment, driven by a neat appearing male approximately six feet tall who had a mustache.²⁴ At the Article 32 hearing in 1970, Posey testified that approximately a week or two later, he was speaking to Paul Bowman, a friend of both Posey and Stoeckley. They were talking outside when Stoeckley came up to them and stated that the police had questioned her several times, apparently shortly after the MacDonald murders, concerning her whereabouts on the morning of February 17. Stoeckley told them she was “stoned” on mescaline and could not remember where she had been that night, just that she had been riding around that evening. She told Posey she threw away her boots because they had a broken heel and threw away her hat, but still had the blond wig.

On the day of the MacDonald funeral services on Fort Bragg, Posey testified that Stoeckley wore a black dress, black shoes, and a veil, and had a wreath on her door. She stayed in her apartment alone all day. When her boyfriend, Greg Mitchell, came by she refused to go out with him.

²⁴Greg Mitchell owned a blue Mustang convertible in 1970. [Defense Exhibit 5047, Declaration of Pat Mitchell]

Posey testified at trial that Stoeckley routinely wore the white boots, a blond shoulder-length wig, and purple clothing. Posey also testified that during the U.S. Army Article 32 hearing that he talked to Stoeckley and she told him “that all she did . . . was hold the light.” (Tp. 5759) He testified that she told him she had seen “a hobby horse . . . that wouldn’t roll” inside the MacDonald’s home in one of the children’s bedrooms. (Tp. 5760)

Zillioux testified that Stoeckley told her that she was wearing her blond wig and white boots when she committed the crime, and Zillioux had, in fact, seen Stoeckley’s white plastic boots. Stoeckley also told Zillioux that it had been raining, and that Stoeckley was worried that the rain might ruin her blond wig.

Gaddis, a law enforcement officer in Nashville, Tennessee, testified on voir dire at MacDonald’s trial with regards to his conversations with Stoeckley about the case. He told the Court that Stoeckley and he had discussed the crime several times and that Stoeckley repeatedly indicated she was in the home the night of the murder. On other occasions she would indicate she was not there, but that she knew who had committed the crime. Gaddis said that the topic depressed Stoeckley to the point that he did believe she was present when the murders occurred. Gaddis concluded his testimony by stating that had the murder occurred in Nashville, he would have tried to indict Stoeckley for the murders. (Tp. 5704-10)

Underhill testified on voir dire that Stoeckley had made statements which led him to believe she was involved in the MacDonald murders. In December 1970, he had approached Stoeckley’s apartment and heard her crying. He described it as an “hysterical sob instead of a normal cry.” (Tp.

5711) When he asked her what was wrong, she responded, "They killed her and the two children." (Tp. t 5712) The only other detail he got from Stoeckley was that the incident had occurred in North Carolina. (Tp. 5713)

Brisentine, a leading government polygraph examiner, interviewed Stoeckley for two days in 1970, during which time he also administered a polygraph. [Defense Exhibit 5050] He testified on voir dire that on the first day, Stoeckley initially claimed she had a "mental block" and could not remember her whereabouts from 12:30 a.m. to 4:00 a.m. on the night the MacDonald family was murdered. (Tp. 5717) Brisentine also testified that three to four months after the homicides, Stoeckley was convinced she participated in the murders, but at the time of the polygraph she believed she did not commit the crimes but may have been present when they occurred. Stoeckley also told Brisentine about her haunting dreams and insomnia, which she suffered from ever since the night of the murders. Stoeckley told Brisentine her dreams "portrayed the word 'pig' in blood on the headboard of Mrs. MacDonald's bed." (Tpp. 5718-19) Brisentine noted that Stoeckley retracted her statements during his interview of her the next day, but then admitted again that she did know something about the murders. Brisentine stated that he felt that "based on [his] investigation, that when [Stoeckley] said she was physically present that she thought in her mind that she was." (Tp. 5737)

Lynn Markstein was involved in a traffic accident in Raleigh, North Carolina in August 1979, which caused her to be at Wake Memorial Hospital for treatment. [Defense Exhibit 5017] While in the X-ray room, she met Stoeckley who said she was in town to testify at the MacDonald murder

trial. Markstein signed a declaration on 12 August 1979, in the middle of the trial, stating that Stoeckley had admitted involvement in the MacDonald murders to her. Stoeckley said that “she was at the MacDonald house at the time the murders occurred” and that “she remembered standing over a child in a bed.” Stoeckley also said that the child was covered in blood. Markstein said that Stoeckley’s statements in the X-ray room “were clear and explicit.” [Defense Exhibit 5017, Declaration of Lynn Markstein]

Davis was engaged to Stoeckley at the time of the MacDonald trial and the two married the next year. He was with Stoeckley for much of the week she was in Raleigh under a material witness warrant. In 1983, he signed a declaration stating Stoeckley had also told him she was in the MacDonald home the night of the murders. She told him “she went into ‘Dunkin Donuts’ that night with blood on her hands and she washed them there.” [Defense Exhibit 5018, Declaration of Ernie Davis] Davis said “[i]t seemed like she would remember some parts of the night but not others. She would come up with things that would make you believe she was there because they were things that no one else would know.” *Id.* He recalled how, when the two were walking in Greenville at one point and they “passed a rocking horse that was on the side of the road, Helena started crying. She pointed out the spring was broken just like the one in the MacDonalds’ house.” *Id.* Helena told her husband “[s]he remembered driving to Dr. MacDonald’s with other people and parking. She told [Davis] she remembered going into a bedroom to keep the kids quiet. When she came out, MacDonald was already stabbed and Colette MacDonald was screaming. The next thing she remembered was standing in the living room, holding a candle.” *Id.* Helena remembered

“somebody went into the jewelry box in the MacDonald house and took some things out.” *Id.* This point is especially important because MacDonald indicated items were missing from the jewelry box.

Stoeckley also told Davis that the intruders were scared and left in a hurry. As a result they left “all the weapons behind, except for some scissors.” *Id.* Later, “they went to the donut shop and cleaned up.” *Id.* When Stoeckley returned home later that morning, “her roommate asked her why she did it?” Stoeckley replied, “They deserved to die.” *Id.* Explaining her testimony at the MacDonald trial, Stoeckley told her husband “she acted confused ... in order to fool the judge.” *Id.*

ii. **Greg Mitchell**

Additional witnesses have revealed Greg Mitchell directly and unambiguously confessed to murdering the MacDonald family. These inculpatory statements are extremely important and provide direct evidence of intruders in the MacDonald house and further corroborate Stoeckley’s admissions to Leonard and her mother.

Reverend Randy Phillips, in a sworn declaration, said a man he identified from a photo array as Mitchell had confessed to the murders. In March 1971, a young blond man, who was approximately twenty years old, who had been identified by Reverend Phillips from a photo spread as Mitchell, arrived at The Manor, a ministry in Fayetteville providing counseling and assistance to young people having alcohol and drug problems, and asked for help. [1984 Defense Motion for a New Trial at 19] Several days after he arrived, Mitchell attended the regular Saturday night prayer session at The Manor and during the prayer service asked for forgiveness for having been a drug

user who had murdered people. *Id.* The following morning, Mitchell was gone. *Id.* at 20.

Anne Cannady, who was a member of Rev. Phillips' church group, also signed a sworn declaration. She also identified Mitchell from a photo array as the man who told her he had been a part of a cult in Fayetteville, North Carolina and had murdered people. Cannady also saw Mitchell run from out of the back of a farmhouse used as a counseling center, and when she went inside, written in bright red paint on the wall was "I killed MacDonald's wife and children." The paint was still wet and dripping. *Id.* at 20. Cannady called the Sheriff's Department to ask for assistance. *Id.* at 20. While Cannady asked the Sheriff to take a photograph of the writing, the Sheriff did not as he did not have a camera. *Id.* When Cannady and Rev. Phillips returned to the farmhouse a week later in order to do some repair work, the entire wall had been painted over and the words were no longer visible. *Id.* [Defense Exhibit 5023]

In sworn declarations, of Bryant Lane and his wife, Norma Lane, averred Mitchell, who was a friend of theirs, had told them that he had been involved in a terrible crime at Fort Bragg, North Carolina. [Defense Exhibit 5048] Lane, a friend of Mitchell's, stated Mitchell had admitted his involvement in the MacDonald murders to him approximately six months before Mitchell's death in 1982. [1984 Defense Motion for a New Trial at 51-52] Mitchell telephoned Lane and told him he needed to speak to him, but did not want to talk on the phone, as he believed the phone might be tapped. *Id.* Mr. Lane met with Mitchell, who was visibly upset. Mitchell said he was upset about "something that happened back when I was in the service. If they find out about it I'm going to have to leave the country and live in Haiti or something." *Id.*

Several days after his conversation with Mr. Lane, Mitchell came to the Lane house again and spoke with Mrs. Lane. [1984 Defense Motion for a New Trial at 49-50] Mitchell, who was in a very emotional state, told Mrs. Lane he was trying to get some money to leave the country because the FBI was after him. *Id.* Mrs. Lane told Mitchell that if he had not done anything wrong, he had nothing to worry about. *Id.* Mitchell told Mrs. Lane he had done something wrong and was guilty of a serious crime that had happened a long time ago at Fort Bragg, North Carolina. *Id.* Mitchell said that he was concerned about being prosecuted for this crime. *Id.*

Mitchell told Lane that, in February of 1970, he was addicted to heroin and believed MacDonald knew an intermediary who could supply him with methadone. Mitchell stated he and his friends went to the MacDonald home on 17 February 1970 to teach MacDonald a lesson and intended to “whup ’em.” Mitchell further admitted he was high on at least four drugs at the time of the murders, including mescaline, angel dust, and PCP. He said things got bad, and they did not realize what they were doing because they were so high on drugs. Mitchell told Mr. Lane Jeffrey MacDonald was lucky to be alive because the group of individuals did not know what they were doing and did not mean to kill anyone. He additionally told Mr. Lane he had tried to turn himself in on numerous occasions and had confessed to a professor at a school he was attending, as well as a Fayetteville private investigator. Mr. Lane also stated Don Mills, Mitchell’s partner at M&M Electric, had told him Mitchell also had confessed to his involvement in the MacDonald murders on many occasions. *Id.*

In a sworn affidavit, Everett Morse, Greg Mitchell’s neighbor in 1973, stated under oath that

Mitchell threatened that he would murder him just like he had murdered Jeffrey MacDonald's family. [DE-124 at 3] Morse then stated Mitchell threatened to kill him if he told anyone about Mitchell's involvement in the MacDonald murders.

Dr. Ronald Wright, Chief Medical Examiner for Broward County, Florida, examined the autopsy photographs and protocol and concluded the blunt trauma suffered by Colette killed her and was caused by left-handed blows from a club swung by a person facing Colette. From the force of the blows, Dr. Wright has concluded that they were consistent with blows from a left-handed person. Jeff MacDonald is right-handed.

iii. Cathy Perry

Another member of the group with Stoeckley and Mitchell, Cathy Perry, also confessed involvement in the crime. On 17 November 1984, Perry told the FBI she was involved in the murders of the pregnant wife and two female children of a doctor who turned on drug users. Perry stated she wrote an epithet on the wall of the victims' house in blood. Perry left bags of clothing and boots with Betty Garcia. In mid-1970, Perry returned to live in her parents' home in Jacksonville, Florida. Upon her return, she was under the constant care of a psychiatrist and was diagnosed as a paranoid schizophrenic.

Stoeckley told Beasley Perry had taken some clothes in a bag to Betty Garcia. Stoeckley stated Perry was involved in the murders, albeit not directly. Perry's stabbings at the time of the crimes and her complete psychological disintegration almost immediately after the crimes demonstrate she was the type of person capable of committing such crimes.

C. Witnesses Who Sighted Possible Intruders the Night of the Murders

Sworn declarations have been presented to the court of various witnesses, each who saw a group of people matching the description MacDonald had given of the intruders in close proximity to the MacDonald house either late the night of and just before the crime, or in the early morning hours just after the crime had occurred. These have been previously submitted to this Court in various filings and are part of the “evidence as a whole.”

A man who resided across the street from the MacDonald family at the time of the crime, James W. Milne, Jr. testified that just after midnight on the night of the murders, he heard noises, and, opening his door, he saw two males and a female who were wearing white sheets and all carrying candles walking in a direction that would have taken them directly into the side door of the MacDonald home. They were only about forty yards from the MacDonald home when he last saw them. He recalled that the woman he witnessed had long blond hair. (Tpp. 5445-57)

D. Corroboration of Stoeckley, Mitchell, and Others in Fayetteville in 1970

In late 1969 and early 1970, Keith Bowen and Gary Mitchell associated with a group of soldiers or ex-soldiers and other young men and women who lived in the Fayetteville area, including Mitchell, Stoeckley, Harris, Perry, Jackie Don Wolverson, and a black man who wore an Army jacket with sergeant stripes and was known to Gary Mitchell and Bowen as “Moses.” [1984 Defense Motion for a New Trial, Declaration of Keith Bowen] Everyone in the group used LSD and speed at that time on a regular basis. *Id.* at 24. The group had two primary hangouts in the Fayetteville area, the Village Shoppe Restaurant and Rowan Park, which was also known as Skag

Park. *Id.*

Harris admitted associating with Stoeckley and Mitchell in Fayetteville in 1970. [1984 Defense Motion for a New Trial at 15] Harris also frequented the Village Shoppe and Dunkin' Donuts restaurants in Fayetteville and knew a black man nicknamed "Smitty" at that time. *Id.*

E. Corroboration of Stoeckley Group Activities Before the Murders

Either on 16 February 1970 or a day or so before, Mable Campbell, a Fayetteville resident, saw two white males, including one identified as Mitchell, with one black male and a white female wearing a floppy hat and boots by a dark colored vehicle at a drive-in at Fort Bragg. [1984 Defense Motion for a New Trial, Declaration of Mable Campbell] The female resembled Stoeckley. *Id.*

On 16 February 1970, between the hours of 6:00 and 7:00 p.m., John Humphries, a former military policeman and member of the police reserve, saw three men, two white and one black, enter his shop in Fayetteville. [1984 Def. Mot. For New Trial, John Humphries Declaration] The three men matched the descriptions of Mitchell, Harris, and Smitty, and they appeared to be high on drugs. When the three men left the store, they got into a parked van in which a girl wearing a white floppy hat was sitting. The day after the MacDonald murders, Humphries contacted both the FBI and CID to report his observations. *Id.*

On 16 February 1970 at 9:40 p.m., Edith Boushey, an English professor at North Carolina State University Extension (where Colette was a student), saw a group of young people at the school, including a woman wearing a white floppy brim hat, a light cream colored plastic coat, dark skirt, and white boots; another woman wearing a brown floppy brim hat; and a man resembling

Mitchell. [1984 Defense Motion for a New Trial at 25] The man backed Colette against the wall and said something to the effect of “if you go along, I think it will be all right.” To which Colette replied, “I dread . . .” *Id.* at 26. Boushey reported her observations to two Army investigators within a few days of the murders. *Id.* at 26. [Defense Exhibit 5044, Declaration of Edith Bushey]

At about midnight on February 16, Frankie Bushey, a Fayetteville resident, saw a white female enter Dunkin’ Donuts with three men. The woman resembled Stoeckley and wore a light colored floppy hat and white boots that came just below the knee. [1984 Defense Motion for a New Trial at 26] One man was unshaven, husky, rough-looking, and strongly resembled the police sketch of one of the intruders described by MacDonald. *Id.* at 26. A second man had a dark complexion and slanted eyes. The third man was short, had a fair complexion, squinted eyes, walked with a slouch, and strongly resembled Mitchell. *Id.* at 26. The woman and the short white man in the group appeared to be high on drugs. The black man was wearing a dark sweater, dark trousers, and an olive drab field or fatigue jacket. *Id.* at 26. [Defense Exhibit 5046, Declaration of Frankie Bushey]

At approximately 1:30 p.m., Marian Campbell, a Fayetteville resident, saw a woman resembling Stoeckley wearing a floppy hat and boots, a black man wearing an Army fatigue jacket resembling the black intruder described by MacDonald, and one white man leave Dunkin’ Donuts. [1984 Defense Motion for a New Trial at 26] The white male and the woman appeared to be high on drugs. *Id.* at 26. A few minutes after they left, a dark colored van stopped parallel to the window at Dunkin’ Donuts. *Id.* at 26. The black man was driving the van, and a motorcycle driven by a

white man pulled alongside the van next to the driver's window. *Id.* at 26-27. The black man leaned out and said loudly to the motorcycle driver, "we'll see you there." *Id.* at 27. [Defense Exhibit 5071, Declaration of Marina Campbell]

Archie Mallow, who worked as a baker at Dunkin' Donuts in 1970, knew a black man known as "Smitty" who hung out at Dunkin' Donuts, usually wore an Army fatigue jacket, did not own a car, and sometimes borrowed a friend's motorcycle. [1984 Defense Motion for a New Trial at 27] Smitty left the Fayetteville area at about the time of the MacDonald murders. *Id.* at 27.

At approximately 2:00 a.m. on the morning of February 17, Jimmy Friar inadvertently called Dr. MacDonald's telephone number. [1984 Defense Motion for a New Trial at 27] The phone was answered by a woman who was laughing. Friar heard someone in the background say "Hang up the God damn phone." *Id.* at 27. At that point the connection was disconnected. *Id.* at 27. [Defense Exhibit, Declaration of Jimmy Friar]

Shortly after 2:00 a.m. on February 17, Military Policeman Carlos Torres saw a dark blue van parked on Bragg Boulevard about 60 to 75 yards from the intersection of Honeycutt and Bragg. [1984 Defense Motion for a New Trial at 27] The side doors to the van were open, and the inside lights were on. *Id.* at 27. Three white males walked quickly from the trees on the side of the road towards the van and got into the van with the overhead light on. *Id.* at 27. One man had an Afro hairstyle. A second man had stringy "brownish or blondish" hair. The third man had a short military-type haircut. *Id.* at 27. The third man also wore a brown jacket and has been identified as resembling Harris. *Id.* at 28. The wooded area which the three men left abuts the MacDonald

neighborhood. *Id.* at 28. The distance from the MacDonald residence on Castle Drive to the woods is approximately 40 yards. *Id.* at 28. There is a path through the woods which leads to the place where the van was parked and that distance is approximately 30 yards. *Id.* at 28.

On or about February 17, Dorothy Averitt drove to a grocery store at 4625 Murchison Road in Fayetteville. [1984 Defense Motion for a New Trial at 28] When she pulled in, she saw two men sitting in the back seat of the dark car parked outside the store. *Id.* at 28. One man was slumped over; the other man looked alert. *Id.* at 28. Averitt entered the store and she saw a woman she identified as Stoeckley, who was wearing a blond wig that was falling off and exposing her dark hair, a wide-brimmed weather hat, a light cream colored plastic coat, a dark skirt, and $\frac{3}{4}$ length white boots covered with a dark brown substance. *Id.* at 28. Stoeckley smelled like a “hog killing” and seemed to be in a fog. *Id.* at 28. When Averitt attempted to speak with Stoeckley, a black male wearing an Army field jacket and black boots put his grocery items back in the cooler, walked to where Averitt and Stoeckley were standing, and directed Stoeckley to leave with him. *Id.* at 28. Averitt did not come forward until shortly before the hearing on the new trial motion because she was afraid. *Id.* at 28-29.

On February 17 around 9:00 or 10:00 a.m., Joan Green Sonderson, a waitress at a Fort Bragg drive-in restaurant, saw three people sleeping in a dark colored sedan. [DE-126-2 at 28–29] One was a white woman with blond hair and a floppy hat and beige boots which appeared to be muddy. Another was a black man who was wearing an Army fatigue jacket and dark civilian pants, and Sonderson identified him as the black male depicted in the artist's sketch. The woman resembled

the woman depicted in the 1979 police artist sketch. Sonderson engaged in a conversation with the young woman, who asked Sonderson whether she knew that members of the MacDonald family had been murdered the previous night. Sonderson had not heard of the murders at the time. *Id.*

At approximately 2:30 a.m. on February 18, twenty-four hours after the murders, Beasley saw a car pull into the driveway of Stoeckley's apartment in Fayetteville with Stoeckley, two white males, and one black male in the car. Beasley spoke with Stoeckley, who said she thought she had been at the MacDonald residence the prior morning. Beasley radioed for assistance and attempted to detain the persons in the car but when help did not arrive, he allowed the car to depart. [DE-126-2 at 21-26]

At about 2:30 a.m. on February 18, Deputy Sheriff Blaine O'Brian heard a police radio report from Beasley to the Fayetteville police dispatcher concerning persons whom Beasley reported as being possibly involved in the MacDonald murders. O'Brian heard the dispatcher tell Beasley he would call the Army CID. [Defense Exhibit 5032, Declaration of Blaine O'Brian]

Shortly after the MacDonald murders, Perry brought a bundle of clothing and other items to Betty Garcia, a woman who had previously helped her when she had a drug problem. Perry asked Garcia to keep the items for her. Perry said that she was in trouble with the law and would return at a later time to pick up the items. After Perry left, Garcia looked through the items which Perry had left and found a pair of beige woman's boots wrapped inside a sweater and heavy jacket. The clothes and boots appeared to have bloodstains on them. [Defense Exhibits 5036, 5038, 5063]

A short while later, Perry returned to her family's home in Florida. Several weeks later her

parents called Garcia and asked her to destroy the clothing Perry had left with her. Garcia destroyed the clothing, but kept the boots and some other items which she later turned over to authorities through attorney James R. Nance, Jr. because of her concern that they were relevant to the MacDonald case.²⁵ [Defense Exhibits 5036, 5063]

VI. Summary Information Regarding Article 32 hearing

A. Pertinent testimony at hearing

On 6 April 1970, MacDonald was interviewed at length by investigators of the Army's Criminal Investigation Division (CID) and was at that time informed that he was a suspect in the murders. On 1 May 1970, the Army formally charged MacDonald with murder. On 15 May 1970, a formal investigation commenced pursuant to the requirements of Article 32, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 830. Colonel Warren V. Rock, the assigned investigating officer, required the government to present all of its evidence against MacDonald. The government presented twenty-seven witnesses. MacDonald presented a full defense to the charges, calling twenty-nine witnesses and testifying himself. Two psychiatrists testified about psychiatric examinations of MacDonald, including an Army psychiatrist appointed by Colonel Rock. Macdonald also presented evidence that a local woman named Helena Stoeckley may have been one of the intruders.

First Lieutenant Joseph L. Paulk, MP Duty Officer on February 17, testified his desk sergeant received a phone call that night. He summoned Paulk and directed him to respond to trouble at

²⁵Nance had been a local attorney for MacDonald during the Article 32 hearing.

544 Castle Drive. Upon checking the front door, Paulk discovered it was locked and sent MPs to check the rear entrance. As Paulk started towards his vehicle, one of the MPs shouted, "... they are around here." Paulk went in the master bedroom and found Colette lying on her back on the floor. She was apparently dead. MacDonald was lying beside his wife. Spc. Kenneth C. Mica was assisting MacDonald. MacDonald had some of the symptoms of shock and his speech was rather incoherent. MacDonald expressed more concern about the condition of his wife and children than about his own condition. He repeatedly asked about his children, once stating, "... Oh, Jesus Christ, look at my wife"

In his testimony at the Article 32 hearing, Mica explained he was routinely patrolling the Corregidor Courts/Anzlo Acres housing area with Spc. Dennis Morris in the early morning hours of February 17. It was a rainy cold night. They passed by 544 Castle Drive several times and noticed nothing unusual. At approximately 3:45 a.m., he was dispatched to 544 Castle Drive. When he arrived, three MP vehicles were already there. After a futile attempt to gain entrance through the front door, Sgt. Richard Tevere came from the rear of the quarters and yelled, "... Tell them to get Womack ASAP" When Tevere and Mica entered the master bedroom through the rear door, Mica observed Colette lying on her back and MacDonald lying on his stomach on top of Colette's left shoulder. Mica observed Colette's midriff and a portion of her left breast where she was not covered by a pajama top or white towel. Mica turned MacDonald over, and MacDonald said "Check my kids. How are my kids?" Mica immediately ran down the hallway, glanced in both bedrooms, and saw the children with his flashlight. Both children appeared dead. At the end of the hallway,

Mica looked quickly into the living room/dining room area. Among the things he noticed was the overturned coffee table was resting on its edge. Mica returned to the master bedroom and remained with MacDonald until medical personnel arrived. During this period, Mica administered mouth-to-mouth resuscitation to MacDonald at least three times because he kept losing consciousness. At times, MacDonald's teeth were chattering. Mica recalled MacDonald said several things, including "I can't breathe, I need a chest tube" and ". . . how are my kids? I heard my kids crying." He also asked someone to "Check my wife I tried to feel my wife's pulse and I couldn't find it"

When Mica asked what happened, MacDonald told him there were four people who attacked his family, including one blond female with a big floppy hat carrying a candle. She kept saying, "Acid is groovy, kill the pigs. Hit them again" MacDonald described the intruders as "three men and one woman, one Negro. I think I hit them. I think I scratched them." As Mica received the information, he repeated it and believed Paulk was writing it down.

During the time Mica tried to help him, MacDonald kept struggling to check on his children himself. Mica forcibly restrained him. MacDonald repeatedly insisted that Mica leave him alone and attend to the children. Mica testified when MacDonald was being taken from the house on a stretcher, he struggled to get up and said, "damn MPs, let me see my kids."

While in the master bedroom, Mica recalled MacDonald describing some details of the attack. MacDonald had been sleeping on the living room couch when he was awakened by the screams. He saw his assailants standing at the edge of the couch. Before MacDonald could get up, the assailants started hitting him while the woman chanted.

MacDonald remembered being confused. Someone tried to reassure him that everything was okay. But when he looked at Colette, he believed he said "Jesus, Christ, look at my wife." He remembered being questioned by several people in bits and pieces about what happened, who did it, could he recognize the assailants. He also vaguely remembered falling off the stretcher in the hallway while being removed from the apartment.

MacDonald was taken to the intensive care unit at Womack Army Hospital, where he was treated for a punctured lung and other life-threatening knife and stab wounds. Major William H. Straub, Womack Army Hospital, Fort Bragg, North Carolina, was one of the physicians on duty the morning of February 17. At the Article 32 hearing, he testified that he quickly examined MacDonald and noted his blood pressure had already been taken and a gauze bandage had been applied to his chest wound. Straub thought MacDonald's decreased breath sounds might indicate a collapsed lung and sent MacDonald to have X-rays. After seeing the initial X-ray film, Straub concluded MacDonald had a least a twenty percent and perhaps a forty percent collapse of his right lung. MacDonald remained in the intensive care unit for several days and then in the hospital for nine days. Five of the six doctors who testified at the Article 32 hearing stated MacDonald could not predict the medical consequences of the stab wound in his chest if it had been self-inflicted. They all agreed the location of the wound vis-a-vis other vital organs could have been damaged with greater life-threatening potential.

During a two-week recess in the Article 32 hearing, MacDonald described the assailants to an artist, who attempted to draw an approximation of the assailants as MacDonald remembered

them. The four drawings were of a female, a man with a mustache, a man without a mustache, and a black man. At this time, he identified a white floppy hat as similar to the one worn by his female attacker.

B. Description of Crime Scene Investigation

There is conflicting evidence as to the degree to which the crime scene was preserved from the time the first MP arrived on the scene until photographs were taken some minutes later. *Id.* at 1674. The controversy specifically relates to the following facts: whether or not the white towel and blue pajama top were on Colette's body when first seen by the MPs; the location of the handset of the telephone in the master bedroom; the relocation of the white flower pot holder in the living room by some unknown individual; the number (12 to 14) of MP, CID agents, and medical personnel initially in the apartment; and the movements of these people through the rooms, which may have caused them to inadvertently alter the crime scene. *Id.*

Mica, while driving his Jeep with Morris to the crime scene (within five minutes of receiving the emergency call), had seen a woman who bore a striking resemblance to the woman described by MacDonald—she was young, with long blond hair, and was wearing a wide-brimmed or floppy hat. The woman was standing outside in the rain or mist on the corner of Honeycutt and South Lucas Road, within blocks of the MacDonald residence. Mica testified that it was unusual to see someone out on a street corner on a rainy night at that very late hour as everything around her was closed. He also said he would have stopped to investigate had he not been responding to an emergency. At the crime scene, when Mica heard the description given by MacDonald of his

assailants, he advised his supervisors of the woman he had seen and suggested that a patrol be sent to find her. A patrol was never sent. (Tpp. 1596-98)

In addition to MacDonald testifying that he moved his wife from against a chair when he was trying to resuscitate her, the Army doctor who first examined her, Captain William P. Neal (Dr. Neal), said he rolled her over at the scene to examine her. *Id.* at 6921. Dr. Neal was at the MacDonald home from approximately 4:45 a.m. until 5:20 a.m. on February 17. When he arrived, he was met at the front door and requested not to disturb evidence. Thereafter, a CID agent escorted him through the house. Before entering each bedroom, Dr. Neal was requested to wait before checking vital signs until a photographer finished taking pictures of the bodies. *Id.* Next, Dr. Neal went into the master bedroom. Colette was pronounced dead, apparently from multiple stab wounds. During his examination, Dr. Neal removed the blue pajama top from Colette's chest. Dr. Neal also rolled Colette over on her side to check her for back wounds. Spc. William F. Ivory testified he asked Dr. Neal not to move the bodies any more than absolutely necessary. But he confirmed Dr. Neal moved the bodies of both Colette and Kristen.

At least twelve military personnel were in the apartment, passing back and forth through the hallway, potentially disturbing the evidence. According to Mica, there were approximately twelve to thirteen people persons inside the apartment who were either MPs or medics at the time MacDonald taken removed from the house by medical personnel. Sergeant Robert J. Duffy testified one or more drawers of the bureau in the master bedroom were open when he first went in the room with "stuff hanging out of the drawers, and as if someone had looked through them." But a picture

used at the hearing, Exhibit 18-A, showed the drawers were closed.

MacDonald testified he used telephones in the master bedroom and in the kitchen. Witnesses also described how one MP also picked up the telephone in the master bedroom using three fingers. Tevere said he picked up the telephone receiver, which was off the hook, in the master bedroom with his thumb and two fingers in order to call the Provost Marshal's office. The CID fingerprint technician testified there were no fingerprints on either phone, but there were smudges on the telephone in the master bedroom.

A flowered jewelry box on Colette's dresser in the master bedroom had reddish-brown stains inside it, as well as one latent fingerprint and one latent palm print on it. Both were unidentified. Two of the several rings requested by MacDonald were never recovered, indicating the assailants searched this box for valuables.

Mica testified at the Article 32 hearing that he observed a flowerpot in the living room lying on its side on the floor with its contents spilled out. Mica testified one of the people in the living room, whom Mica believed was an ambulance driver, picked up the flowerpot and set it on its base. Mica also said the man then sat down on the couch where MacDonald has been attacked. This testimony indicated the crime scene had been compromised.

Spc. Michael D. Newman was the Non-Commissioned Officer in charge of the emergency room on February 16-17. Newman noticed MacDonald's blue pajama bottoms were torn in the crotch and had blood on them.

During the course of the Article 32 hearing, Ivory and CID Investigator Robert B. Shaw

testified that they kicked, pushed, or knocked over the coffee table in the living room. When they did, it did not come to rest on its edge like it had been found at the crime scene. Ivory described how, over a period of time and with varying degrees of force, he caused the coffee table in the living room to be overturned. In each case, it landed on its top and not on its edge. However, on Colonel Rock's second visit to the MacDonald apartment, he knocked over the coffee table in the living room; the table struck the adjacent chair, and landed on its edge just as it had been found at the scene in the first place.

Months after the conclusion of the Article 32 hearing, the chaos at the crime scene during the initial investigation became even more evident. James Warner Paulsen was an ambulance driver called to the MacDonald murder scene. On 21 December 1970, ten months after the murders, Paulsen confessed to the CID he had stolen MacDonald's wallet from the scene to get the money inside. Paulsen noted "several MPs and a few CID agents" were in the room with him when he stole the wallet, but no one saw him take it. He walked to the ambulance and hid the wallet over the visor on the driver's side. Once agents noticed the wallet was missing, they searched the scene as well as the ambulance. Paulsen stated the agents did not find the wallet because "they searched carelessly ... The search was not very thorough." Paulsen's theft of the wallet, especially under the noses of numerous MPs and CID agents, shows how poorly the crime scene was controlled and how it was contaminated.

C. Conclusion of Hearing and Finding of Innocence

After the conclusion of all of the evidence, Colonel Rock filed a report recommending that

all charges be dropped, concluding that “the matters set forth in all charges and specifications are not true.” [Defense Exhibit 5076] He pointed to several pieces of evidence that corroborated MacDonald’s account. In addition, MacDonald had undergone two separate psychiatric evaluations, and both psychiatrists felt MacDonald “was not trying to hide any facts from them and, had he been, they would have been able to detect it.”

Further, MacDonald repeatedly spoke freely about the crime, including with investigators in the days immediately thereafter. He was interviewed by both FBI and CID agents. Colonel Rock heard from MacDonald himself, as MacDonald not only testified at the hearing but was “subjected to extensive cross-examination by the Government.” Colonel Rock found MacDonald’s multiple statements were “substantially the same in all important aspects” and any “[e]xplanation for any discrepancies are logical based on the testimony psychiatric experts, the time factor, his natural attempt to forget the horrible sights of 17 February, normal human failure to remember routine actions and the confusion following the blow to his head.” As Colonel Rock himself observed, “[m]ost importantly, [a]fter listening to the lengthy testimony of [MacDonald] in the hearing room and closely observing his actions and manner of answering questions it [was Colonel Rock’s opinion] that [MacDonald] was telling the truth.”

Colonel Rock filed a 90-page report, summarizing more than 2,000 pages of transcript produced during the investigation. He observed: “Considering all known facts about the life and previous history of [MacDonald] up to and including 17 February no logical motive was established

for [MacDonald] to have committed such brutal murders, either singly or in any combination.”²⁶ His report included two dramatic recommendations that should not be lost upon this Court in examining the newly discovered evidence in the context of “the evidence as a whole”:

1. That the charges against Dr. MacDonald should be dismissed because they were “not true.”
2. That the appropriate civilian authorities should be requested to investigate Helena Stoeckley.

On 23 October 1970, the charges against Dr. MacDonald were dismissed. After all the charges against MacDonald were dropped, he was honorably discharged. At that point, then FBI Director J. Edgar Hoover sent a telex to the Charlotte office stressing:

UNDER NO CIRCUMSTANCES SHOULD WE BECOME INVOLVED IN THIS MATTER SINCE THE ARMY HANDLED THIS CASE POORLY FROM ITS INCEPTION. IF THERE IS ANY INDICATION THAT THE USA ANTICIPATES AUTHORIZING PROSECUTION, SUCH A MOVE WILL BE OPPOSED BY THE BUREAU AND TAKEN UP WITH THE DEPARTMENT

Office of Director Hoover, telex to SAC Robert M. Murphy, Oct. 28, 1970 (emphasis added).

VII. Summary of Trial Evidence

The evidence the government adduced at trial to support this bizarre theory was exclusively circumstantial evidence from the crime scene. It included evidence such as the following: in which rooms certain blood types were found; where the murder weapons were found; where MacDonald’s pajama fibers were and were not found; where a pajama pocket was found and on which side it was

²⁶At the time of MacDonald’s trial, almost a decade later, the government still had not established a motive for the crime.

bloodied; and evidence of possible ways ice-pick holes were made in MacDonald's pajama top. Much of the evidence was speculative. The evidence offered by the government was designed primarily to disprove MacDonald's version of events of the night of the murders, thereby casting suspicion on him as the murderer. The government's entire case rested upon the theory that, given MacDonald's version of events, there should have been ample physical evidence of intruders, and the lack of such evidence proved MacDonald's guilt.

During the trial, the prosecution introduced blood evidence from various places within the MacDonald home. It claimed that no blood of MacDonald's blood type was found where he claimed to have struggled and been stabbed by intruders. (Tpp. 6881-830) During closing arguments, the prosecutors argued no blue pajama fibers and no trace of MacDonald's blood was found in the area where MacDonald claimed he struggled, suggesting that this proved his account was untrue. (Tp. 7123) Yet in addition to the bunch of blue fibers found at the intersection of the living room and hallway (which was exactly where MacDonald said he struggled), laboratory reports obtained through Freedom of Information Act (FOIA) requests in the mid-1980s show that "Type B" blood was found precisely where MacDonald said he struggled. [DE-126-1 at 23]

A. Stoeckley-Related Trial Evidence

Mica, one of the first two military policemen to arrive at the crime scene on the morning of February 17, took charge of caring for the injured MacDonald. He asked for information concerning the persons who had committed the crimes. MacDonald described the three men and a woman intruder he had seen in his home. The woman, he said, was wearing a floppy hat, had long blond

hair and was wearing boots.

At trial, MacDonald called Helena Stoeckley as a witness. (Tp. 5513) She testified at the time of the murders she had a floppy hat which she wore all the time. She also testified that while her hair was brunette, she owned and wore a shoulder-length blond wig. Finally, she testified that at the time of the murders she owned boots. Two days after the murders she burned her wig and threw away one pair of her boots. (Tpp. 5603-04) When shown an artist's drawing²⁷ of a woman with shoulder-length blond hair wearing a floppy hat, Helena Stoeckley admitted that the picture resembled the way she appeared in 1970 when she had her wig and hat on. (Tp. 5609)

On the day and evening of the MacDonald family murders, Stoeckley admitted she had consumed various hallucinogenic drugs. (Tp. 5554) Although she remembered with precision her activities at moments before midnight (Tp. 5552) and at 4:30 a.m. February 17, recalling that she returned home in an automobile (Tp. 5555), she claimed no memory of where she had been or what she had done between these times, other than that she had been with two or three men. (Tp. 5556)

Stoeckley remembered having conversations with several people about the MacDonald murders but claimed no memory of the content of these conversations. She remembered where and when she conversed with Posey (Tp. 5558) and at times talked with him about the MacDonald family murders. (Tp. 5560) However, she testified she did not recall what she said to Posey about her whereabouts during the early hours of February 17. (Tp. 5560)

She testified she remembered speaking to Zillioux in 1970 about the murders when Zillioux

²⁷This drawing was done by a police artist using MacDonald's description of his assailant that he gave while under hypnosis. (Tp. 6893)

visited her during a bout with hepatitis. But she claimed no memory of the contents of the conversation. (Tpp. 5562-63) She remembered Underhill, one day late in 1970, knocked at her door and later left her apartment but she had no memory of conversations with him regarding the MacDonald family murders. (Tpp. 5565-66) She remembered speaking with Officer Gaddis of the Nashville police, even recalling to which division of the department he was assigned. She remembered talking with him several times about the MacDonald murders, but claimed no recall of the conversation's contents. (Tpp. 5567-68) She remembered having "MacDonald-related" conversations with Detective Beasley. She recalled the name of the CID agent who had accompanied him. (Tp. 5573) But she claimed no recollection of the content of these conversations (Tp. 5574) She remembered a conversation with CID Agent Robert A. Brisentine, Jr. on 24 April 1971, about the MacDonald family murders but again professed no memory of its contents. (Tp.5569) The defense tried to introduce Stoeckley's statements in 1970, 1971, and 1979 showing she herself knew:

1. She was in the MacDonald home at the time of the murders;
2. She was part of the group of intruders that committed the murders; and
3. She knows the identity of the other persons involved.

This testimony tended to show that Helena Stoeckley testified falsely when she said she had no memory of her activities or whereabouts between midnight and 4:30 a.m. on February 17.

Outside the presence of the jury, Brisentine testified Stoeckley told him she thought she had been in the MacDonald home during the murders, but that she did not believe she herself had

actually killed anyone. [Defense Exhibit 5050] While discussing the weather conditions of February 17, Stoeckley told him it did not start to rain hard until after the murders. When pressed on this point, she said "I have already said too much." *Id.* Stoeckley repeatedly told Brisentine she knew the identity of the persons who killed the MacDonald family. She even offered to reveal their names and explain the circumstances surrounding the murders, provided she received a grant of immunity from prosecution. *Id.* She subsequently denied she knew who committed the murders, saying she had "talked too much." *Id.*

Gaddis also testified in the absence of the jury that Stoeckley expressed to him her belief that she had been involved in the murders. (Tp. 5704) She also told Gaddis she had witnessed the murders and that she knew who had committed them. (Tp. 5708) Whenever she spoke to Gaddis about the MacDonald murders, Stoeckley became very depressed. (Tp. 5704)

Beasley also testified on *voir dire* about statements Stoeckley had made to him. He had known Helena Stoeckley for several years and had frequently used her as a police informant in drug cases. In fact, Beasley stated that Stoeckley was the most reliable informant he ever had. (Tp. 5740) On the day following the murders, Beasley confronted Stoeckley with the fact that she and her friends matched the description MacDonald had given of the intruders who attacked him and his family. She replied, "In my mind, it seems that I saw this thing happen... I was heavy on mescaline." (Tp. 1222-23) Not long after that, Beasley went to Stoeckley's home and observed several funeral wreaths around the yard and on the front door. When asked about them Stoeckley replied she was mourning the MacDonald murders. (Tp. 5743)

Stoeckley's confessions are corroborated by other evidence. She owned the clothing MacDonald described his female intruder wore. (Tpp. 5583, 5588, 5589) She discarded this apparel shortly after the murders, as an act which could be considered consciousness of guilt. (Tpp. 5603-04) She possessed an "insider's" knowledge of the crime scene. (Tp. 5760) She "went into mourning" on the day of the MacDonald family funeral although she had no personal relationship with them. She could identify herself in a drawing executed by a police artist according to MacDonald's description of the woman whom he said was part of the group of his assailants. (Tp. 5609) She had a black male companion who regularly wore an Army fatigue jacket with E-6 stripes, matching MacDonald's description of one of his assailants. (Tpp. 5831-32)

Stoeckley's statements are unquestionably against interest and in a very real sense self-incriminatory, just as are her statements to Jerry Leonard and her mother. Her statements are adverse to her penal interests.²⁸ Not only would her statements raise a reasonable doubt in the minds of the jurors about MacDonald's guilt, but her statements, coupled with the other evidence presented by MacDonald, might be sufficient to convict her beyond a reasonable doubt if she had been tried for the crimes.

²⁸"Among the most prevalent of these [hearsay] exceptions is the one applicable to declarations against penal interest—an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made." *Chambers v. Mississippi*, 410 U.S. 284, 299 (1973). *Chambers* found the out of court admission trustworthy because it was made to a close acquaintance, was corroborated by other evidence in the case, and was "in a very real sense self-incriminatory and unquestionably against interest." *Id.* at 300-01. Stoeckley stood "to benefit nothing by disclosing [her] role" in the deaths of Colette, Kristen, and Kimberly and she "must have been aware of the possibility that disclosure would lead to criminal prosecution." *Id.* at 301.

Stoeckley's statements inculcate her by words that she saw specific items in the MacDonald house. She saw a rocking horse in one of the children's rooms and the couch in the living room (Tpp. 5932, 5945) She recalled blood at the crime scene. She remembered standing at the couch holding a candle. (Tpp. 5937, 5945) She remembered a change in the weather around the hour the crimes were committed. (Tpp. 5722, 5723)

All these statements tend to subject Helena Stoeckley to criminal liability. They would have probative value if offered against her were she on trial for the MacDonald family murders.

In almost all instances Stoeckley spoke spontaneously. There was no formal questioning in a custodial setting. There was no pressure of a prosecutor's probing. Some of the declarations were unprompted such as those she made to her neighbor, Jane Zillioux. Others were in response to queries that were conversational and social. When Stoeckley made her admission to six of the witnesses she was subject to criminal prosecution, for no statute of limitations had run and no plea had been entered by her in answer to charges.

There are other corroborative indicia of trust-worthiness unique to this case:

1. There is no evidence to contradict the factual content of her statements. No witness has come forward in nine years to provide Stoeckley with an alibi for the evening of February 17 or to suggest that Stoeckley admitted fabricating her prior declarations.

2. Stoeckley possessed a conscious, subjective awareness that her statements subjected her to liability because she told investigator Brisentine at the conclusion of his interview that she had "already said too much" and would say no more. [Defense Exhibit 5050] Further, she begged

Zillioux to keep her admissions secret. (Tp. 5605)

3. Stoeckley's declarations narrate cogently what she did and knew on a first-hand basis. These declarations do not contain information from a potentially misleading secondary source.

4. Corroboration is found in the facts to which Stoeckley herself and witness Beasley had testified: that she owned the white boots and white floppy hat that MacDonald described the female intruder as wearing; that she owned a blond wig with hair long and straight; that she habitually wore this garb of boots, hat, and wig until immediately after the murders when she ceased to wear them; that she placed floral wreaths on her door the day of the MacDonald family funerals and dressed herself in black; that she consumed a large quantity of drugs on the night of the murders and that the phrases "acid is groovy" and "kill the pigs" – phrases that MacDonald indicated were chanted by his female assailant – were regular parts of her idiom in 1970. In addition, she testified that the picture of a woman, drawn by a police artist according to Dr. MacDonald's description, appeared as she did in 1970.

Finally, MacDonald had described to crime scene personnel one of his assailants as a black male wearing an Army fatigue jacket with E-6 stripes on the sleeve. (Tp. 1503) Beasley regularly saw Stoeckley in the company of a black male who wore such a jacket. (Tp. 5833)

B. Questionable Nature of Trial Evidence

In its order denying MacDonald's post-trial motions to vacate and for a new trial, the trial judge enumerated what he considered to be the most significant evidence against MacDonald at trial. He listed the following as significant: (1) the murder weapons, (2) the pajama top and pajama top

demonstrations, (3) the pajama top pocket, (4) MacDonald's eyeglasses, (5) the bloody footprint, (6) the latex gloves, (7) the blood splatterings and the government's reconstruction of the crime scene, and (8) the absence of physical evidence consistent with MacDonald's account. *See United States v. MacDonald*, 640 F.Supp. at 310-15. But much of this evidence is hardly compelling.

I. MacDonald's pajama top

MacDonald claimed that he had used his pajama top, at one point, as a shield. During his struggle, it had been pulled or ripped over his head and was partially bound around his wrists. Later, he put it on his wife's chest to keep her warm. The government introduced threads matching the pajama top that were found in the master bedroom, in the children's bedrooms, and on the club found outside, arguing that these proved the lie to his account. Similar threads were also found under Colette's body. Yet the government contended no threads were found in the living room where MacDonald was attacked. This was considered, at the time, as strong evidence that MacDonald's story was fabricated. Perhaps overlooked in this conclusion was the fact that MacDonald was wearing at all times in his home his pajama *bottoms* that were ripped from ankle to crotch, thereby exposing threads. (Tpp. 2661-62)

When MacDonald was trying to revive his wife, and moved her from against a chair and onto the floor, and gave her mouth-to-mouth resuscitation, and when he was frantically trying to breathe life back into his children, threads from his ripped pajama bottoms would likely have been scattered wherever he went. It is not surprising, given MacDonald's account, that threads from his torn pajama bottoms would be in the children's beds, all around the house, and even under his wife.

MacDonald moved his wife. So did Dr. Neal, who rolled her over to examine her. (Tp. 6921)

The government also relied heavily on its pajama top experiment, where its experts sought to prove that the holes in the pajama top could be lined up with the puncture marks in Colette's chest. This test was badly flawed. A fair reading of the transcript showed the experts failed to consider vitally important information in conducting their experiment. They failed to even try to line up the holes in the defendant's pajama top with the thirty-odd puncture holes in Colette's pajama top. If MacDonald had laid his pajama top on top of her, and then stabbed her through it as the government contended, then the holes would have gone through both articles of clothing in the same pattern. The government experts also failed to line up the knife cuts in the pajama top with the knife cuts in Colette's torso. In this regard, if the knife holes were not lined up at the same time as the puncture holes, the experiment is obviously flawed.

These same experts also failed to consider the directionality of the thrusts, which could have been detected from the threads. Given that the experts claimed that the pajama top was folded when the stabbing occurred, according to their theory, depending on the folds of the garment, the thrusts or directionality would have to match up with the way the garment was folded. But they ignored the directionality of the threads. Even with all this, the experts could not offer an opinion that the thrusts were made through the pajama top into Colette as the government contended. Their opinions were only that it was *possible* that this *could* have happened. (Tp. 4371) Of course, it was equally possible that it did not happen that way. The testimony was no more than guesswork or speculation.

With no foundational showing, the government introduced an experiment conducted by the

FBI that the defense argued had no basis in science or in logic. This experiment was virtually the only item of “evidence” presented by the government at trial that was not introduced during the Article 32 investigation. In 1971, MacDonald’s blue pajama top was examined by Paul Stombaugh. Stombaugh determined it contained 48 puncture holes that could have been made by an ice pick. He stated in a report a number of the holes had the appearance of having been made by a sharp instrument stabbed into the garment from the outside (so-called “entrance holes”), while others had the appearance of having been made from the inside (so-called “exit holes”). He opined the holes had been made while the pajama top was stationary. (Tpp 3989-4423)

By 1974, when Stombaugh, assisted by laboratory technician Shirley Green, again examined the pajama top, the directionality of the holes was no longer evident. Stombaugh and Green were asked to determine if there was some way in which the pajama top could be arranged so that the holes in it aligned with the 21 puncture wounds in Colette MacDonald’s chest. They eventually found what they considered to be one way to so arrange the pajama top.

In its 1985 memorandum opinion, the district court stated, “MacDonald’s own pajama top was perhaps the most incriminating evidence offered against him during the trial.” *MacDonald*, 640 F. Supp. at 312. Accepting this statement at face-value underscores just how thin the circumstantial evidence was and reveals how the newly discovered evidence, in the context of the evidence as a whole, would have established compelling reasonable doubt.

ii. MacDonald’s eyeglasses

The government adduced evidence that MacDonald’s eyeglasses, which he was not wearing

and which were found in the living room, had a speck of dried blood on them of the same blood type as that of his daughter, Kristen, blood type O. MacDonald was an emergency room doctor at the time. He treated wounded patients daily with various blood types. It is entirely plausible that the speck was blood from an earlier hospital patient. In fact, an FBI Report, discovered as part of a post-trial FOIA request, indicated that the FBI had investigated the patients MacDonald had treated the day before the murders and discovered that several had type O blood, including one patient treated for a puncture wound to his foot who would have been bleeding. Moreover, it is also possible the intruders attacking MacDonald had already attacked and bloodied Kristen and their weapons, such that a blood speck flew from their weapons to his glasses as they were swinging clubs and knives at him, weapons previously used on Kristen.²⁹

VIII. Items Described in MacDonald's 1984 Post-Trial Motion

In his 1984 motion,³⁰ MacDonald argued the government suppressed exculpatory evidence including (1) a bloody syringe half-filled with liquid found in a hall closet in the MacDonald house by a CID investigator which was destroyed and never tested; (2) photographs taken by police of the letter *G* written on the wall of Helena Stoeckley's apartment in 1970, the handwriting of which one government investigator believed matched the handwriting of the letter *G* in the word *PIG* found written in blood on the MacDonald headboard the night of the murders; (3) evidence that a Stoeckley friend, Cathy Perry, was given blood-stained clothing and boots by Stoeckley shortly after

²⁹MacDonald has requested DNA testing of the speck of blood found on his eyeglasses as part of his motion for additional DNA testing pursuant to the Innocence Protection Act.

³⁰Some of this evidence and information has been previously noted.

the murders which were destroyed; and (4) skin found under Colette MacDonald's fingernail, which was lost by the CID.

Regarding the syringe, the court was presented with a statement made by a CID investigator, Hilyard O. Medlin, on February 21, 1970 (four days after the crime) that "a half-filled syringe that contained an as yet unknown fluid was located in a hall closet, which also contained some evidence of blood." Presented with contrary affidavits of other investigators by the government at the time of the hearing, (affidavits prepared in 1984, fourteen years after the investigation), the court ruled that the evidence of the existence of a bloody syringe was insufficient, and its exculpatory value was thus unproven. Regarding the photographs of the letter *G*, the defense claim rested on a note written by a CID photographer, Frank Toledo, that the letter *G* in words written on Stoeckley's apartment walls resembled the letter *G* written in blood on the MacDonald headboard. Presented with evidence from an FBI analysis that the letters did not bear enough individual characteristics for a meaningful comparison, the court ruled that the evidence was insufficient and thus not exculpatory. Regarding the blood-stained clothes and boots, the government denied that any clothes ever came into the possession of the government, and denied that the boots turned over to the CID ever had any blood on them. The court agreed with the government and ruled that these items were thus not exculpatory. Regarding the skin found under Colette's fingernail but lost by the government, the court found that, based on the evidence produced against MacDonald at trial, the skin was probably his and was not likely to exculpate him.

In his 1984 motion, MacDonald asked the court to consider additional new evidence

discovered post-trial, including (1) an extensive detailed confession given by Helena Stoeckley to two law enforcement officers; (2) affidavits presented to the court of various witnesses, each who saw a group of people matching the description MacDonald had given of the intruders in close proximity to the MacDonald house either late the night of and just before the crime, or in the early morning hours just after the crime had occurred;³¹ (3) the statement of a witness, Jimmy Friar, who telephoned the MacDonald home at 2:00 a.m. the night of the murders and spoke with a woman and also heard someone in the background ordering the woman to hang up the phone (Stoeckley admitted to having answered a ringing phone in the MacDonald home that night, including her recounting of this fact to her attorney in 1979); (4) a declaration by Reverend Randy Phillips that a man he identified from a photo array as Greg Mitchell had confessed to the murders; (5) a declaration by Ann Cannaday who also identified Greg Mitchell from a photo array as the man who told her he had been part of a cult in Fayetteville, North Carolina and had murdered people; and (6) statements Greg Mitchell made to Bryant and Norma Lane that he had done something too horrible to talk about. (Greg Mitchell was Helena Stoeckley's boyfriend at the time of the murders and was implicated by Stoeckley in the crimes).³²

³¹One of these affidavits was from Joan Sonderson, a waitress, who arriving at work the morning following the murders saw a vehicle occupied by three sleeping people, including a white woman with blond hair and wearing a floppy hat and beige boots that were muddy, and a man wearing an army fatigue jacket. The woman in the floppy hat asked Sonderson if she knew that members of the MacDonald family had been murdered that night. Sonderson, of course, had no way of knowing about the murders.

³²Since 1984, additional witnesses have come forward to whom Greg Mitchell directly confessed. Affidavits from three of these witnesses accompanied a Memorandum in Support of his Motion to Vacate. These include affidavits from Donald Buffkin, Everett Morse, and a new affidavit from Bryant Lane. [Defense Exhibits 5029, 5030, 5031] Lane has clarified in his affidavit that Greg Mitchell directly confessed

The trial judge, in regard to the new Stoeckley detailed confession, again found that even if believed by her to be true, her confession was unreliable as it was the product of a drug-addled mind. In so ruling, he stressed the importance of the fact that “no physical evidence was uncovered at the crime scene which would support Stoeckley’s confessions.” Regarding the statements of the various corroborating witnesses, the judge ruled that the statements were no more than weak circumstantial evidence that Stoeckley and her cohorts were in the area of crime which was also the area where they lived. As to the Greg Mitchell admissions, the judge ruled that they were “speculative and circumstantial.” He ruled that there was insufficient proof that it was, in fact, Greg Mitchell who confessed to Reverend Phillips and Ann Cannaday and that the statements Mitchell made to the Lanes were unpersuasive because Mitchell made no specific reference to being involved in the MacDonald slayings. Not persuaded by this evidence, the court denied the motion. *Id.* But the district court did not have the new evidence now available. Had it been available, the ruling would have been different.

to him that he committed the MacDonald murders, and that he so confessed within two weeks of his death, and that he did so while aware of the fact that he was dying.) These affidavits are powerful corroboration of the Stoeckley confessions and of MacDonald’s actual innocence. Unless they were actually the murderers of MacDonald’s family, that from this small group of four suspects matching the description given by MacDonald – suspects who lived close to the murder scene and were involved in drugs and cult-like activities – the fact that two of them directly and specifically have confessed to numerous people of committing such a heinous crime, confessed independently of each other, years after they knew each other, and while geographically separated by several states, is an astonishing coincidence.

IX. Items Described in MacDonald's 1990 Habeas Petition

In 1990, MacDonald filed a second post-trial motion seeking a reversal of his conviction based on newly developed evidence, gleaned from the over 10,000 documents obtained through numerous FOIA requests. Within these documents, the defendant found the following, never before turned over by the government: (1) handwritten lab notes of CID investigator Janice Glisson (who testified at trial) that revealed that numerous blond synthetic hairs, up to 22 inches in length, had been found in a hairbrush in the MacDonald home, and the hairs could not be matched to any known items in the MacDonald Home;³³ and (2) the results of a 1978 reexamination of critical fibers found on the body of Colette MacDonald and on a wooden club believed to be a murder weapon. Three FBI investigators had re-examined certain crime-scene evidence and found black wool fibers in the debris taken from around the mouth area of Colette MacDonald, on the bicep area of her pajama top, and on the club that the government believed was the murder weapon and which was found outside the home. FBI investigator Kathy Bond, in her hand-written notes, reported that at least some of the purple cotton fibers previously identified on the murder weapon as matching the sewing threads on MacDonald's pajama top were not such, in fact, but were black wool fibers. These black wool fibers were never matched to any known fabric in the MacDonald home.³⁴

Additional witnesses aver Greg Mitchell confessed to murdering the MacDonald family.

³³The government countered the 1991 motion by submitting an affidavit from an FBI agent, Michael P. Malone, that the blond synthetic hairs were not wig hairs. Later, defense lawyers learned that the affidavit was incorrect, as discussed above.

³⁴Despite this reexamination in 1978, prosecutors elicited testimony from selected experts of the 1979 trial that the murder weapon had on it the blue cotton fibers of MacDonald's pajama top without also disclosing the presence of unmatched black wool fibers.

[Petitioner's Memorandum in Support of his Motion to Vacate, Exhibit 7, Affidavits of Everett Morse, Bryant Lane, Donald Buffkin] Morse swears that he was told by Greg Mitchell that Mitchell murdered the MacDonald family. Lane, in an amplification of his earlier deposition, swears that he was told by Mitchell that Mitchell murdered the MacDonald family. Buffkin swears Mitchell told him he murdered the MacDonald family. Mitchell died in 1982. Taken in conjunction with the Stoeckley confessions, the record now contains direct admissions made by two of the people identified as those most likely to have been the intruders that killed MacDonald's family. Two of the four suspected intruders have confessed. The statistical probability that each of these two somehow suffered independently from the same psychotic delusion is not tenable. Both Helena Stoeckley and Greg Mitchell independently confessed, and did so long after their association ended. These statements of Helena Stoeckley and Greg Mitchell were declarations against penal interest and presumptively trustworthy.

Since his trial in 1979, a steady flow of exculpatory evidence has come to light that tends to show that MacDonald did not commit the murders. A significant amount of this evidence relates to a key defense witness at trial, Helena Stoeckley, who almost immediately was identified by police as a suspect. She was a woman local to the area, heavy into the drug scene, who routinely wore a long blonde wig and a floppy hat. Between the murders in 1970 and MacDonald's trial in 1979, Stoeckley made incriminating statements to numerous persons implicating herself, her boyfriend Greg Mitchell, and others in the killings. At trial, however, Stoeckley testified when called by the defense that she could remember nothing about the four-hour period during which the murders

occurred, despite her many statements otherwise. After this occurred, the trial judge refused to permit MacDonald to call six witnesses that he had present, who would have testified to Stoeckley's admissions made to each of them, prior to trial, of being present in the MacDonald home at the time of the murders with the killers. (Tpp. 5508-5799) But in reality, she had given a compelling, trustworthy statement admitting her involvement to her attorney while she was sitting in a witness room in the federal courthouse where MacDonald was being tried.

In addition to the evidence relating to Stoeckley, MacDonald uncovered other evidence after the trial probative of his innocence. Most of this evidence relates to, and greatly discredits, the physical evidence heavily relied upon by the government at trial in its entirely circumstantial case. This evidence includes the presence of unsourced fibers (1) on the murder weapon that were dark purple and black (Stoeckley testified she wore purple and black) and (2) at the murder scene that were inconsistent with the government's representations at trial that there was no evidence of intruders, and the presence of wig hairs in the MacDonald home (Stoeckley testified that she owned a blond wig that she destroyed because it connected her to the murders) unmatched to any synthetic fiber found in the MacDonald home.

The government's theory at trial was that MacDonald, an army physician with no history of violence and no record of prior arrests, got into a fight with his pregnant wife because his youngest daughter, Kristen, had wet the bed, that he picked up a club to strike his wife and accidentally struck and killed his daughter, Kimberly, who was trying to intervene; and that then, in order to cover up his accidental misdeed, killed his wife and then mutilated and killed his youngest daughter and tried

to make it look like a cult slaying. (Tpp. 7138-41) Prosecutors claimed MacDonald either wounded himself to defer suspicion or was wounded when fighting with his wife.

The evidence adduced at trial to support this theory was exclusively circumstantial physical evidence from the crime scene. It included evidence such as in what rooms certain blood types were found, where the murder weapons were found, where MacDonald's pajama fibers were and were not found, where a pajama pocket was found and on which side it was bloodied, and evidence of possible ways ice-pick holes were made in MacDonald's pajama top. Much of the evidence was speculative. It was designed primarily to disprove the version of events given by MacDonald as to what happened on the night of the murders, thereby casting suspicion on him as the murderer. This strategy hinged on the constant theme that there should have been ample physical evidence of intruders, given MacDonald's version of events. Accordingly, the supposed lack of evidence of intruders proved MacDonald's guilt. In his previous motion, MacDonald has analyzed this evidence in detail and shown that each of these items of evidence is either consistent with the account given by MacDonald of the murders or has been proven false by newly discovered evidence. [DE-115 at 10-27] This material is encompassed in the "evidence as a whole."

Moreover, some evidence introduced at trial from the crime scene supported MacDonald's account that intruders committed the murders. While there was significant quarrel at trial regarding the handling of the crime scene, there was evidence that 44 useable latent fingerprints and 29 useable palm prints had been lifted from the scene of the crime, but that of these, only 26 fingerprints and 11 palm prints were matched with MacDonald family members or other

investigators or individuals whose prints were available for comparison. (Tpp. 3116, 3141) There was evidence showing the presence of wax drippings of three different kinds of wax, one taken from a coffee table in the living room, one from a chair in daughter Kimberley's bedroom, and one from the bedspread in Kimberley's bedroom. None of these samples matched any candles found in the MacDonald home. (Tpp. 3837-43)

Evidence of two dark purple cotton fibers found on one of the murder weapons, an old wooden board found by police outside the house, were introduced. An expert testified the fibers on the club matched the fibers used to sew MacDonald's pajama top. (Tp. 3784) This evidence is in no way inconsistent with MacDonald's account, as he said he had been repeatedly struck by a club or clubs and fibers from the pajama top or pajama bottoms could have stuck to the club while he was being struck. However, the government suppressed the fact that FBI analysts in 1978 reexamined the fibers from the club and determined there were also black wool fibers on it, fibers that did not match any fabric in the MacDonald home. And not only were these inexplicable black wool fibers found on the murder weapon, similar black wool fibers were found on the mouth and body of Colette MacDonald. Also, synthetic blond wig hairs of up to 22 inches in length were found in the MacDonald home. Without an evidentiary hearing, the district court, relying in part on an affidavit by now discredited FBI agent Michael Malone that the synthetic blond hairs were not used in wigs but only in dolls, denied the motion. In 1997, MacDonald sought to reopen the matter after obtaining evidence that Malone's affidavit was false, but the district court concluded MacDonald failed to show fraud by clear and convincing evidence. However, all of this evidence is significant

corroboration of MacDonald's account of intruders that has now been established by Helena Stoeckley's reliable and trustworthy confessions to her attorney and to her mother.

At trial, MacDonald sought to underscore through cross-examination how equivocal and speculative was the government's physical evidence and to expose the lack of any real evidence of guilt on MacDonald's part. The defense presentation of evidence sought to reinforce these themes. In addition to presenting MacDonald's testimony, the defense called numerous character witnesses to testify about MacDonald's good character.

The most important facet of the defense strategy, however, was to bring before the jury the significant evidence pointing to Helena Stoeckley's involvement in the crime. This plan included evidence of her possession of a blond wig, which she burned shortly after the crime (Tpp. 5602-04); evidence of the clothes she routinely wore, which matched the clothes of the woman MacDonald described seeing in his house the night of the murders, i.e. a blond wig, floppy hat, and boots. (Tpp. 5583-90); evidence of her participation in a drug cult that ingested LSD, worshiped the devil, used candles, and killed cats (Tpp. 5525, 5542-43); evidence of her obsession with the MacDonald murders, such that she had hung wreaths all along her fence the day of the burials (Tpp.5633-34); evidence that a woman matching her description had been seen by several unbiased witnesses near the crime scene at or around the time of the murders, i.e. testimony of Mica (Tpp. 1453-54), testimony of James Milne (Tpp. 5454-56); and of critical importance, evidence Stoeckley actually admitted to her participation in the crime to numerous people. (Tpp. 5508-5799).

But this evidence did not come to pass. MacDonald has now discovered, however,

Stoeckley's reliable admissions to her attorney and her mother. This new evidence would have turned the tables at the trial.

The newly discovered evidence of Stoeckley's inculpatory statements to her attorney, her mother, and to a federal marshal provide significant evidence of her involvement in the crimes or at least her presence at the scene, and her being an eyewitness to the crimes. Had she so testified in 1979, and told the jury, as she told Jane Zilloux, that she was concerned about her blond wig the night of the murders, because it was wet from the rain, and had blond wig hairs then been introduced as having been discovered in a hairbrush in the kitchen of the MacDonald home, those hairs would have taken on more importance, as corroboration of Stoeckley's confession and of her presence in the MacDonald home. Hence the discovery of those hairs should now be considered by this court, along with the evidence supporting the fact that they were very likely "wig hairs." This evidence must be included in the "evidence as a whole" in support of the present motion to vacate. It is thoroughly set forth in the affidavit of Phil Cormier and the attached exhibits. [Defense Exhibit 5025, including and particularly Tabs 15-23 containing affidavits of various industry specialists]

This Court must consider the items of new evidence submitted in the 1990 and 1997 proceedings, along with the 22 inch-long blond wig hairs and their import, along with the evidence adduced in the present litigation in the context of the "evidence as a whole." The existence of the 22 inch-long blond synthetic hairs, found in a clear-handled hairbrush in the MacDonald home, is not in dispute, as these subject hairs were the partial basis for MacDonald's 1990 habeas petition and 1997 motion. The government's responses to these motions admitted to the existence of the

hairs, and had attached to its various responses affidavits concerning these hairs. Consequently, the extensive lab notes of Janice Glisson, the CID technician who first noted the presence of the hairs, which were included in the Affidavit of John J. Murphy, submitted as part of MacDonald's 1990 habeas motion, must be reviewed as part of the "evidence as a whole."

Also as part of his 1990 motion, MacDonald submitted various affidavits and lab notes, the fact that other lab notes discovered post-trial as part of a FOIA request demonstrated that government investigators had found "one black wool fiber and one white wool fiber in the debris taken from the right biceps area of Colette's pajama top, two black wool fibers and one green wool fiber in the debris removed from the wooden club murder weapon, and two black wool fibers in the debris removed from the mouth area of Colette, none of which were matched to any known source in the MacDonald home." *See MacDonald*, 778 F. Supp. 1342, 1347-49 (E.D.N.C 1991). He advanced this new evidence as proof that intruders were in the home and as corroboration of the many Stoeckley confessions. The trial court analyzed this new evidence (as well as the blond wig hair evidence discussed above) considering whether it would have changed the outcome of the trial. ("[T]he ultimate question that the court must address ... is whether the jury's verdict would have been different had the defense been aware of the allegedly suppressed evidence at the time of trial.") *Id.* at 1349; ("With these various standards of materiality in mind, the court turns to the effect that the allegedly suppressed evidence would have on the trial and the jury's verdict.") *Id.* at 1350. In analyzing the evidence this way, the court found that the new fiber evidence was "insufficient to warrant habeas relief." *Id.* at 22.

The present analysis before this Court is a different one, however. MacDonald now can prove Helena Stoeckley admitted her participation by a preponderance of the evidence and DNA results show evidence of intruders. All of this evidence must be considered, including the evidence adduced at trial and presented in any previous submission.

X. Concluding Summary of Newly Discovered Evidence

The instant motion is based upon dramatic new evidence that establishes the participation of the Stoeckley group in the murders and demonstrates the government manipulated the physical evidence to preclude the presentation of physical evidence which supported MacDonald's innocence. Other evidence to be considered includes the statements of twenty-two (22) witnesses corroborating Stoeckley's statement in detail, including

- (a) The statements of two former associates of the Stoeckley group and several neighbors that Stoeckley associated with Mitchell, Don Harris, and a black man who wore an Army fatigue jacket with E-6 stripes;
- (b) Three new witnesses to the admission by Mitchell that he participated in the murders;
- (c) Evidence that Mitchell, whom Stoeckley said assaulted Colette MacDonald, was a left-handed person and MacDonald is right-handed;
- (d) Forensic evidence that the blow which killed Colette MacDonald was inflicted by a club swung in a left-handed swing and was consistent with a blow inflicted by a left-handed person;
- (e) The statement of a person who knew the Stoeckley group as to admissions made several days after the murders by Stoeckley, a black male wearing an Army fatigue jacket with sergeant stripes and a man matching Don Harris' description;
- (f) The statement of a former associate of the Stoeckley group as to an admission made a few months after the murders by Stoeckley in the presence of a man matching Don Harris' description that they had participated in the MacDonald murders;

(g) The statement of a witness to whom Stoeckley admitted scissors were used in the murders;

(h) Forensic evidence that six of the wounds inflicted on Kristen MacDonald were consistent with scissor wounds;

(i) The statement of a witness who saw a black male, a white male identified as Mitchell, and a woman wearing a floppy hat and boots and resembling Stoeckley at a drive-in eatery on Ft. Bragg on February 15 or 16, 1970;

(j) The statement of a witness who saw a white female with a floppy hat, a black male and two white males together in a van in Fayetteville at 6:30 p.m. on February 16, 1970, a few hours before the murders;

(k) The statement of a witness who saw persons, including a man matching Mitchell's description, speaking with Colette MacDonald at approximately 9:40 p.m. on February 16, 1970 outside a class at the North Carolina State University Extension;

(l) The statements of two witnesses who saw the Stoeckley group in the Dunkin' Donuts restaurant in Fayetteville from approximately midnight until approximately 1:30 a.m. on February 17, 1970. When the group left Dunkin' Donuts they left in a dark-colored van going in the direction of Ft. Bragg with the driver of the van telling a man on a motorcycle, "We'll see you there";

(m) The statement of a witness who inadvertently called the MacDonald residence around 2:00 a.m. on February 17, 1970 and spoke with a woman who was told by a voice in the background to hang up the phone;

(n) A witness who saw a group of three men, including a man identified as Harris, run out of a wooded area approximately a block and a half from the MacDonald residence at about 2:15 a.m. on February 17, 1970 and enter a dark van similar to the one which was seen leaving Dunkin' Donuts going towards Ft. Bragg at 1:30 p.m.;

(o) The statement of a witness who saw a woman matching Stoeckley's description and two men, one of whom was black and was wearing an Army fatigue jacket, sleeping in an automobile near the Ft. Bragg Army base at approximately 8:00 a.m. on February 17, 1970. The woman matching Stoeckley's description asked the witness if she heard that the MacDonalds had been murdered the previous evening;

(p) The statement of a witness who saw a white female with stringy blonde hair, floppy hat and boots, a black male with an Army jacket and two white males all of whom appeared to have slept in their clothes, at approximately noon on February 17, 1970 in Raleigh, North Carolina;

(q) The statement of a police witness who heard Detective Beasley of the Fayetteville Police Department ask for assistance on the police radio after having stopped several persons in connection with the MacDonald murders at approximately 2:30 a.m. on February 18, 1970. (The trial judge had discredited Detective Beasley's statement that he had made such a stop of Stoeckley and others and made such a request for help.);

(r) Evidence that Stoeckley's friend Cathy Perry left two bags containing bloody clothing and bloody boots with a friend shortly after the MacDonald murders and that her parents requested that the clothes be destroyed; and

(s) The statement of a psychologist who examined Helena Stoeckley in 1980 and concluded that she was capable of both recollection and cognition and understood the difference between truth and falsity. (The trial judge had concluded Stoeckley was unworthy of belief because of her drug usage.)

The newly discovered evidence also includes evidence previously suppressed by the government that corroborates Stoeckley's presence, along with drug seeking associates, at the crime, including:

(a) A bloody syringe half-filled with an unknown fluid found in a hall closet in the MacDonald house by a CID investigator during the crime scene investigation.

(b) Photographs of the letter "G:" similar to that found in the word "PIG" which was written in blood at the MacDonald residence, written on the wall in Stoeckley's apartment in 1970.

(c) Evidence that Cathy Perry was in possession of bloodstained boots which she attempted to conceal from law enforcement officers a few days after the MacDonald murders. (Stoeckley has stated that she asked Perry to hold her boots and clothes after the murders.)

There are also numerous other items of evidence within the scope of the "evidence as a whole," previously submitted to the court, including:

(a) Keith Bowen and Gary Mitchell have provided sworn statements that in late 1969 and

early 1970 they associated with a group of soldiers or ex-soldiers and other young men and women who lived in the Fayetteville area. According to Mr. Bowen, everyone in the group used LSD and speed at that time on a regular basis. Among the people in the group were Greg Mitchell, Helena Stoeckley, a black man who wore an Army jacket with E-6 stripes who was known to Mitchell and Bowen as "Moses," Shelby Don Harris, Cathy Perry, Jackie Don Wolverton and others. Both Mr. Bowen and Mr. Mitchell selected photographs of Greg Mitchell, Helena Stoeckley, Don Harris and the black man from a photo spread. According to Mitchell and Bowen, the group had two major hangouts in the Fayetteville area, the Village Shoppe Restaurant and Rowan Park which was also known as Skag Park. In 1979, Debra Lee Harmon was a teenager living in Fayetteville. She knew Stoeckley and some of her associates, including Mitchell and Cathy Perry. She saw them together on occasion in Rowan Park.

(b) Shelby Don Harris has admitted that he associated with Helena Stoeckley and Greg Mitchell in Fayetteville in 1970. Harris also admitted frequenting the Village Shoppe and Dunkin' Donuts restaurants in Fayetteville and knowing a black man nicknamed "Smitty" at that time.

(c) Either on 16 February 1970 or a day or so before, Mabel Campbell observed two white males, one black male and a white female wearing a floppy hat and boots standing next to a dark colored vehicle at a drive-in on Ft. Bragg. Campbell picked out a photograph of Mitchell from a photo spread as one of the men she had seen (Exhibit A to Mabel Campbell Declaration) and stated that the female in the floppy hat depicted in a police artist's sketch resembled the woman she had seen on that occasion. On February 16, between the hours of 6:00 and 7:00 p.m. three men, two

white and one black, entered a shop on Bragg Boulevard in Fayetteville owned by John Humphries, a former military policeman and member of the police reserve. The three men matched the descriptions of Mitchell, Harris and "Smitty" and appeared to be high on drugs. Mr. Humphries believed that they were attempting to set him up for a robbery. Mr. Humphries displayed a pistol and when he did the group of three men left the store and got into a light colored van which was parked outside. In the van there was a girl wearing a white floppy hat. The day after the MacDonald murders, Mr. Humphries contacted both the FBI and CID to report what he had seen. He did not receive a response from either agency. He discussed his observations with the attendant at the Texaco station in Ft. Bragg the next morning and the attendant stated he has seen the same people in the van about midnight as they stopped to get gas at the station. [Defense Exhibit 5067]

(d) Edith Boushey, who was coordinator of the Modern Language program at North Carolina State University Extension at Ft. Bragg, left her office about 9:40 p.m. on February 16, 1970. As she left, she observed a group of young people who did not appear to be students standing by the staircase near the entrance to the building where her office was located. A woman in the group wore an off-white floppy brim hat, and another a brown floppy brim hat. Boushey saw a young man matching Mitchell's description push Colette MacDonald against the wall and overheard him say to her something to the effect "if you go along, I think it will be all right," to which Mrs. MacDonald replied, "I dread . . ." Boushey reported her observations to two Army investigators within a few days of the murders.

(e) At approximately 11:15 p.m. on February 16, Frankie Bushey and some friends stopped

to get something to eat at Dunkin' Donuts. At about midnight a white female, wearing a light colored floppy hat, a light colored jacket and carrying a large shoulder bag, and three white males entered Dunkin' Donuts and sat in the booth behind Bushey. One of the men was unshaven, husky and rough looking; one had a dark complexion and slanted eyes and the third was short, fair complected, had squinted eyes and walked with a slouch. From their actions, it appeared to her they were waiting for somebody to arrive. Bushey was attentive to the group because of their appearance and because the woman in the group appeared to be high on drugs. When Bushey left Dunkin' Donuts at approximately 12:55 a.m., the four people were still seated in the booth behind her. Bushey identified police sketches of a woman with a floppy hat as resembling the woman she saw that evening and sketches of two white males with short hair as strongly resembling the short white male. She also identified a police sketch of a man with pock marks and shaggy short hair as resembling the unshaven man. (Exhibit E to Bushey Declaration);

At approximately 12:50 a.m. on February 17, Marian L. Campbell and her husband stopped at the Dunkin Donuts restaurant on their way home. While she was seated in the restaurant she heard some rustling behind her and looked to see a white man, a black man and a white woman walking out the aisle. Campbell watched them attentively because of their unusual appearance. The woman was about 19 years old with blond hair pulled behind her ears and hanging to her mid-back, was wearing a white cotton skirt, a white blouse and a lightweight sweater, white boots which came to just below the knee, a floppy brim hat and carried a large purse which she clutched tightly.

The white man appeared drugged. The black man was wearing a dark sweater, dark trousers

and an olive drab field or fatigue jacket and appeared to be more aware of his surroundings than the other two. Campbell watched the group carefully as they went out, as she was suspicious that they were engaged in improper conduct. A few seconds later a dark colored van stopped parallel to the window where Campbell was sitting. The black man was driving the van and motorcycle driven by a white man pulled alongside the van next to the window where the black man was sitting. The window was down and the black man leaned out and said loudly to the motorcycle driver, "We'll see you there." Campbell checked the time and noted that it was 1:30 a.m.

Archie Malloy, previously a baker at Dunkin' Donuts, has stated that a black man who he knew as "Smitty" used to hang out at Dunkin' Donuts. "Smitty" wore an Army fatigue jacket, and did not own a car but sometimes borrowed a friend's motorcycle. Malloy stated that "Smitty" left the Fayetteville area at about the time of the MacDonald murders.

(f) Carlos Torres was a member of the Military Police stationed at Ft. Bragg. He had a moonlighting job at the NCO Club at Ft. Bragg where he worked evenings, with his shift ending at 2:00 a.m. Shortly after 2:00 a.m. on February 17, Torres left his job and drove down Honeycutt Road to Bragg Boulevard, where he had to turn left to leave the base. As Torres waited for a red light at the intersection of Honeycutt Road and Bragg Boulevard, he saw a dark blue van parked on Bragg Boulevard to his left, about 60 to 75 yards from the intersection of Honeycutt and Bragg. The side doors to the van were open; the inside lights were on. Torres saw three white men come running out of the woods toward the van. They were coming from the same side of the road on which the van was parked. He watched them get in the van. Torres then drove slowly past the van.

Two of the men had long hair; one had a military-type haircut and wore a dark brown jacket. Torres identified a photograph of Shelby Don Harris as resembling the man with the military haircut. [Defense Exhibit 5075, Declaration of Raymond Shedlick, Exhibit B]

The wooded areas from which the men ran abuts the MacDonald neighborhood. The distance from the MacDonald residence on Castle Drive to the woods is approximately 40 yards. There is a path through the woods which leads to the place where the van was parked and that distance is approximately 30 yards. [Defense Exhibit 5075, Declaration of Raymond Shedlick]

(g) On February 17, Joan Sonderson worked as a waitress at a drive-in restaurant on Ft. Bragg. When she arrived at work between 8:00 and 9:00 a.m. that morning, she saw a vehicle in which three people had been sleeping. One of the people was a white woman with blond hair and a floppy hat who was wearing beige boots that appeared to be muddy. Sonderson talked to the young woman, who asked Sonderson whether she knew some of the MacDonald family had been murdered the previous night. Sonderson had not heard of the murders at that time. While Sonderson was speaking with the woman, a black man wearing an Army fatigue jacket and dark civilian pants got out of the right rear passenger door of the automobile and went to the men's room. Sonderson identified the black male depicted in the artist's sketch as identical to the black male she saw morning. [Defense Exhibit 5020, Declaration of Joan Sonderson, Exhibit B] Sonderson has stated the young woman resembles the woman depicted in the 1979 police artist sketch. [Defense Exhibit 5020, Declaration of Joan Sonderson, Exhibit A] Sonderson did not get a good view of the white male who was sleeping behind the steering wheel.

At noon on February 17, Addie Willis Johnstone saw four individuals standing at the intersection of Hillsborough and Western Boulevards in Raleigh, North Carolina. Johnstone has described the group as a white woman with blond stringy hair wearing a beige coat, a beige floppy hat and boots, a black man in an Army fatigue jacket and two white males. The black male had fairly short hair while the two white males had medium length hair. One of the white males had on a dark colored jacket and all four appeared to have slept in their clothes. [Declaration of Addie Willis Johnstone]

At approximately 2:30 a.m. on February 18, twenty-four hours after the murders, Detective-Beasley observed a car pull into the driveway at Helena Stoeckley's apartment in Fayetteville with Stoeckley, two white males and one black male in the car. Detective Beasley spoke with Stoeckley who said she thought she had been at the MacDonald residence the prior morning.

At about 2:30 a.m. on February 18, Deputy Sheriff Blaine O'Brian of Cumberland County, North Carolina heard Detective Beasley contact the Fayetteville police dispatcher on a police radio concerning persons whom Detective Beasley reported as possibly involved in the MacDonald murders. Because the dispatcher advised Detective Beasley that he (the dispatcher) would call the Army CID, Sheriff O'Brian did not respond. He thought the matter was under control. [Defense Exhibit 5032, Declaration of Blain O'Brian].

(h) In 1970, Cathy Perry, a friend of Helena Stoeckley, lived in the Fayetteville area. Sometime before the MacDonald murders, Perry was befriended by Betty Garcia. Shortly after the MacDonald murders, Perry brought a bundle of clothing and other items to Garcia, who had taken

care of her when she had a drug problem. Perry asked Garcia to keep the items for her. Perry said she was in trouble with the law and would return at a later time to pick up the items. [Defense Exhibit 5034, Statement of Cathy Perry Williams] After Perry left, Garcia looked through the items and found a pair of beige woman's boots wrapped inside a sweater and heavy jacket. The clothes appeared to have bloodstains on them and the boots appeared to have bloodstains on them as well. Perry stayed with Mrs. Garcia for a while and later returned to her family's home in Florida. Several weeks later, Perry's parents called Garcia and asked her to destroy the clothing Perry had with her. Garcia destroyed the clothing but kept the boots and some other items and later turned them over to the CID. [Defense Exhibit 5038, Affidavit of Raymond Shedlick; Defense Exhibit 5035, Declaration of Prince Beasley; Defense Exhibit 5063, Affidavit of James R. Nance, Jr.]

(I) Sometime in March 1971, a young blonde man approximately 20 years old arrived at The Manor, a ministry in Fayetteville providing counseling and assistance to young people having alcohol and drug problems and asked for help. Several days after he arrived the young man attended the regular Saturday prayer session at The Manor and during the prayer service asked for forgiveness for having been a drug user who had murdered people.

The following morning, the young man was gone. Later that day, Reverend Randy Phillips, a minister who worked at The Manor, and two women who were working at The Manor, Ann Cannady and Juanita Sisneros, drove together to the farmhouse operated by The Manor. As they pulled up to the house, they saw the young man who had made the confession the night before run out the back door and into the wooded area behind the house. Cannady and Sisneros called the

sheriff's department to ask for assistance. A deputy sheriff arrived and went into the house with Cannady and Sisneros. In a bedroom adjoining the living room, the words "I killed MacDonald's wife and children" were written in bright red paint in four rows across the wall. The paint was still wet and was dripping. Cannady and Sisneros asked the sheriff to take a photograph of the writing. He said he would do so later as he did not have a camera with him. Cannady later identified the young man as Greg Mitchell. [Defense Exhibit 5022, Declarations of Randy Phillips; Defense Exhibit 5023, Declaration of Ann Cannady]

The following week, Sisneros, Cannady, and Reverend Phillips went to the farmhouse in order to do some repair work and saw that the entire wall had been painted over and the words were no longer visible. Cannady, Sisneros and Reverend Phillips all positively identified a photograph of Greg Mitchell as the young man who had been to The Manor house and who was seen running from the farmhouse in the early part of 1971. [Defense Exhibit 5022, Declaration of Randy Phillips; Defense Exhibit 5023, Declaration of Anne Cannady]

According to Greg Mitchell's widow,³⁵ Mitchell was discharged from the military in February 1971 and was stationed at Ft. Bragg from 1968 until November 1970. He remained in the Fayetteville area, where he sought rehabilitation for drug problems he developed while in the Army. [Defense Exhibit 5047, Declaration of Pat Mitchell, ¶¶ 3, 4, 5] Mitchell owned a blue Mustang convertible and was left-handed.³⁶ [Defense Exhibit 5047, Declaration of Pat Mitchell, ¶¶ 7, 10]

(j) Dr. Ronald K. Wright, a licensed physician and the Chief Medical Examiner for Broward

³⁵Mitchell died from cirrhosis of the liver

³⁶Macdonald is right-handed.

County, Florida has conducted thousands of autopsies or autopsy reviews to determine causes of death. Based upon his examination of the autopsy photographs and protocol of Colette, Dr. Wright explained the fatal blow to her was inflicted by a left-handed person swinging a club while facing her. Given the force of the blow, Dr. Wright concluded it was consistent with a swing by a person who was left-handed. [Defense Exhibit 5049, Declaration of Dr. Ronald R. Wright] Pat Mitchell has confirmed Greg Mitchell was left-handed. [Defense Exhibit 5047, Declaration of Pat Mitchell] Stoeckley has stated it was Mitchell who assaulted Colette. Dr. MacDonald is right-handed.

(k) Approximately one week after the MacDonald murders, Debra Harmon was in Rowan Park in Fayetteville when Helena Stoeckley began to speak with a group of eight or nine men and women, including a black man wearing an Army field jacket with sergeant stripes on the sleeve and a white man who looked like a man Harmon knew as "Don." The black man was approximately 5' 10" with a stocky build and short hair. The man who looked like "Don" was well built and muscular, was wearing a gold chain with a cross around his neck and had brown hair which she remembers as curly. She overheard a conversation involving Stoeckley, the black male and "Don." The black male made a statement about "the ritual" and of things having been "avenged." Stoeckley made a statement about candles and Ms. Harmon heard "Don" say "shed blood cleanses." [Defense Exhibit 5040, Declaration of Debra Harmon]

(l) Sometime between August and October 1970, Richard Comisky, whom Stoeckley knew, was in Rowan Park when he was approached by Stoeckley and a white man with a straggly mustache. Comisky identified two sketches as resembling the man who was with Helena Stoeckley

at Rowan Park. [Defense Exhibit 5016, Declaration of Richard Comisky, Exhibits A and B] Comisky also identified two photographs as resembling the man he saw with Stoeckley that day. [Defense Exhibit 5016, Declaration of Richard Comisky, Exhibits C and D] In addition, before he looked at the artist's sketches, Mr. Comisky executed his own freehand drawing of the man he had seen in the park that day. [Defense Exhibit 5016, Declaration of Richard Comisky, Exhibit E]

Comisky spoke with Stoeckley and her companion. During the conversation, Stoeckley said, "We did the MacDonald thing." When Comisky asked what she meant, Stoeckley replied, "We did the killings." The man with Stoeckley told her to be quiet, but Stoeckley reassured him Comisky could be trusted. She told Comisky she was wearing the same clothes she wore during the murders-- including a wig, a hat and boots-- when the police questioned her. During the conversation, the man told Stoeckley to "be cool" and not "put our business on the streets." Stoeckley asked the man, "Do you think we should have brought the 'spade' with us?" During their conversation, Stoeckley asked Comisky if he knew whether the police could obtain fingerprints from wax. [Defense Exhibit 5016, Declaration of Richard Comisky]

(m) Stoeckley told her husband, Ernest Davis, the group left the MacDonald house after the murders quickly leaving all the weapons behind, except for a pair of scissors. [Defense Exhibit 5018] Dr. Ronald Wright examined the autopsy photographs of Colette Kimberly and Kristen MacDonald. He concluded at least six (6) of the stab wounds inflicted on Colette MacDonald were consistent with wounds inflicted by a scissors. He also found a number of the puncture wounds inflicted on Kristen MacDonald were consistent with scissors wounds. [Defense Exhibit 5049,

Declaration of Dr. Ronald Wright]

(n) During trial in 1979, when Stoeckley was still in Raleigh but after her court appearance in the MacDonald case on August 17, she was taken to the waiting room at a hospital in Raleigh where Lynn Markstein had gone for treatment following a traffic accident. Stoeckley told Markstein she had been in the MacDonald house at the time of the murders and remembers standing over a child in a bed. The child was uncovered and blood was all over the child. Stoeckley said to Markstein, "Can you imagine someone like me doing that to those babies?" Stoeckley made unusual hand motions at the time she made this statement to Markstein. [Defense Exhibit 5017, Declaration of Lynn Markstein]

(o) On 7 December 1980, Dr. Rex Julian Beaber, a forensic psychologist on the faculty at the University of California Medical School, examined Helena Stoeckley. [Defense Exhibit 5041, Interview with Dr. Beaber; Defense Exhibit 5042, Resume of Dr. Beaber] Based upon his examination, Dr. Beaber concluded Stoeckley was fully competent and capable of perceiving events, understanding them, and remembering them. [Defense Exhibit 5043]

In summary, the evidence discovered by post-trial investigations includes statements of Dr. Rex Julian Beaber, Edith Boushey, Keith Bowen, Addie Willis Johnstone, Frankie Bushey, Mabel Campbell, Marian Campbell, Ann Sutton Cannady, Richard Comisky, Ernest Davis, Betty Garcia, Shelby Don Harris, John Humphries, Jimmie Friar, Debra Harmon, Dr. Elizabeth Loftus, Lynn Markstein, Archie Malloy, Gary Mitchell, Pat Mitchell, Blaine O'Brian, Rev. Randy Phillips, Joan Green Sonderson, Helena Stoeckley, Carlos Torres, and Dr. Ronald Wright. Since then there have

been numerous additional witnesses and experts presented in various pleadings, all of which are within the ambit of the “evidence as a whole.” Distilled together, the statements of those witnesses establish that the Stoeckley group wounded Dr. MacDonald and killed Colette MacDonald and their two children during their effort to persuade Dr. MacDonald to protect drug abusing soldiers and to provide drugs to the Stoeckley group.

Stoeckley described the group’s decision to approach MacDonald, the group’s surveillance of MacDonald and Colette, and the group’s activities in the hours leading up to the murders. Stoeckley described the approach to Colette at North Carolina State University Extension several hours before the murders, the use of narcotics by group members in the hours immediately preceding the murders, and the group’s visit to the Dunkin’ Donuts restaurant immediately before and after the murders. Stoeckley also gave a detailed account of the murders themselves stating that Colette was murdered by Greg Mitchell. She identified “Smitty” and Shelby Don Harris as participants in the murders. Stoeckley gave detailed descriptions of certain portions of the interior of the MacDonald residence which were accurate descriptions. Stoeckley also stated that approximately twenty-four hours after the murders she arrived at her apartment in a car with Mitchell, Harris and “Smitty”. Stoeckley stated that she gave her blood-stained boots and clothes to Cathy Perry to dispose of. Moreover, Stoeckley provided new evidence concerning a murder weapon which had previously not been discovered: a scissors. And now, of course, the Court is aware she gave credible and inherently trustworthy admissions of her involvement to both her attorney and her mother. If a reasonable juror had heard all of this evidence, she would never have voted to convict.

Stoeckley's association with Greg Mitchell, Shelby Don Harris and "Smitty" is corroborated by several former colleagues, Keith Bowen, Gary Mitchell, Debra Harmon and Harris himself. Stoeckley's statements concerning the Stoeckley group's activities in the hours leading up to the murders are corroborated by the statements of several witnesses: (1) Mabel Campbell and John Humphries corroborate that the Stoeckley group was seen on February 16 during the day and in the early evening hours; and (2) Edith Boushey corroborates Greg Mitchell's confronting Colette MacDonald at North Carolina State University Extension. Additionally, Frankie Bushey and Marian Campbell observed the Stoeckley group at Dunkin' Donuts at the approximate time Stoeckley said they were at Dunkin' Donuts. Bushey's and Campbell's descriptions of the Stoeckley group were very specific and matched the descriptions of Stoeckley, Harris, Mitchell and "Smitty".

The timing of the Stoeckley group's departure from Dunkin' Donuts, as observed by Marian Campbell, was consistent with the timing of the MacDonald murders. Campbell observed at least four members of the group leave in a dark colored van and a motor cycle at 1:30 a.m. headed toward Ft. Bragg.

Stoeckley's account of having received a telephone call from a man with a soft voice is corroborated by the statement of Jimmy Friar that he called the MacDonald residence shortly after 2:00 a.m. on February 17.

Carlos Torres' observation of three men, including one resembling Shelby Don Harris running from the woods contiguous to the MacDonald neighborhood and entering a dark colored van at approximately 2:15 a.m. places persons matching the description of the Stoeckley group

leaving the MacDonald neighborhood under highly suspicious circumstances. Torres' sighting was at a time consistent with the involvement of the Stoeckley group in the murders, as the group had left Dunkin' Donuts some 45 minutes before headed for Ft. Bragg in a van of the same description as the one Torres saw. Torres' observation is also consistent with the presence of the Stoeckley group in the MacDonald house at approximately 2:00 a.m. when Jimmy Friar has stated he made his telephone call to the MacDonald residence. The timing is also consistent with the Stoeckley group having been frightened by the Friar call and abruptly leaving the MacDonald residence.

Stoeckley recalled leaving the crime scene with two people who participated in the murders in an automobile but did not remember what happened to the other members of the group at the time they left the crime scene. Thus, Torres' observation is also consistent with Stoeckley's statements about the group's departure from the crime scene as the others apparently left in the van.

Stoeckley, "Smitty," and an unidentified white male were seen sleeping in an automobile on Ft. Bragg at approximately 8:00 a.m. the morning after the murders. And Joan Sonderson, the woman who saw the van, Stoeckley said to her, "The MacDonalds were murdered last night. Did you know that?" The automobile matched the description provided by Stoeckley of the automobile in which she, Mitchell, and "Smitty" left the crime scene. The presence of the Stoeckley group on Ft. Bragg sleeping at approximately 8:00 a.m. is consistent with the observation by Mica of a woman matching Stoeckley's description standing on a street corner approximately one-half mile from the MacDonald residence. It is consistent with the disorientation that might be expected from excessive drug usage resulting in Stoeckley becoming separated from her group and some members of the

group's later contacting her and sleeping off the effects of drugs in the above-referenced vehicle.

Stoeckley's statement that the group was frightened at the crime scene and left hurriedly leaving all weapons except a scissors is corroborated by the statement of Dr. Ronald Wright that many of the numerous stab wounds on Colette and Kristen MacDonald were consistent with scissors wounds. It is known from trial testimony that Colette was fatally wounded by blows to the head with a club and that the stab wounds on her body were inflicted after she had been clubbed. Thus, the Stoeckley statement concerning scissors, and the corroboration by Dr. Wright that many of the stab wounds were consistent with scissors wounds, suggests that one of the intruders inflicted the stab wounds after Colette had been rendered unconscious.

The presence of stab wounds in Kristen MacDonald, which were consistent with scissors wounds, suggests an intruder murdered Kristen MacDonald. The evidence is consistent with a statement made by Stoeckley to Lynn Markstein that she remembered standing over a child in the bed and that blood was all over the child. Stoeckley said to Ms. Markstein in that context "Can you imagine someone like me doing that to those babies?"

Stoeckley's statement that Greg Mitchell murdered Colette MacDonald is corroborated by Mitchell's admissions to multiple witnesses, including close friends and clergy, that he participated in the MacDonald murders. Stoeckley's statement is further corroborated by Dr. Wright's opinion that the blows which killed Colette were inflicted by the left-handed swing of a club. Greg Mitchell was left-handed; MacDonald is not.

Similarly, Stoeckley's statement that Harris and "Smitty" were involved in the murders is

corroborated by the admissions of Stoeckley, "Smitty," and Harris a few days after the murders, concerning a ritual of vengeance which involved candles as to which Harris observed "Shed blood cleanses." "Smitty" and Harris' participation were also corroborated by Stoeckley's statement, some months after the MacDonald murders, in the presence of a man matching Harris' description that "We did the MacDonald thing", "We did the killings", and Harris' urging Stoeckley not to "Put our business on the streets." Stoeckley's question to Harris in that conversation, "Do you think we should have brought the 'spade' with us?", suggests by the racial epithet that a black person was involved in the murders.

Stoeckley's statement that after the murders she gave her bloodstained clothes and boots to Cathy Perry to hide is corroborated by Betty Garcia's statement that Perry brought her a bundle of clothing several days after the MacDonald murders and asked if she could keep the clothing with Garcia to hide it. Garcia observed that both the boots and the clothing were bloodstained. That Perry was conscious of the incriminating nature of the bloodstained clothes is seen from her urging Garcia to hide the items and from her parents' later request that the clothes be destroyed.

X. No Reasonable Juror Would Convict in Light of All the Evidence, Particularly Helena Stoeckley's Credible Admissions to Her Lawyer and Her Mother.

The new evidence amassed since the trial, and augmented by the compelling testimony at the evidentiary hearing, is remarkable. Because of the detail of this evidence and because of the reciprocal corroboration provided by these various witnesses statements, a jury hearing the newly discovered evidence from Jerry Leonard, Gene Stoeckley, Mary Britt, and Wade Smith, as well as the DNA evidence of the unsourced hairs, would undoubtedly acquit MacDonald based on this

evidence alone.

The observation of the revered Justice Holmes is apropos with its compelling logic in the factual circumstances of the instant case:

the confession of Joe Dick, since deceased, that he committed the murder for which [Donnelly] was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it could be proved that the confession was really made, and that there was no ground for connecting Donnelly with Dick. . . [T]he exception to the hearsay rule in the case of declarations against interest is well known [and] is far more calculated to convince than dying declarations, which would be let in to hang a man . . . [and] we ought to give [the defendant] the benefit of a fact that, if proved, commonly would have such weight.

Donnelly v. United States, 228 U.S. 243, 277-78 (1913) (Holmes, J., dissenting), *abrogated by Chambers v. Mississippi*, 410 U.S. 284 (1973) (adopting practice consistent with Justice Holmes' dissent). Not only does the new evidence have trustworthiness because Helena Stoeckley's statements subjected her to criminal liability, but they were made under sets of facts where they are deemed reliable. Likewise, the DNA result speaks for itself. Whether naturally shed or forcibly removed, these unsourced hairs are undisputed evidence supporting a claim of intruders.

Given this new evidence, in light of the evidence as a whole, there was a compelling showing of reasonable doubt as to guilt. No reasonable juror would have convicted, especially given the concerns expressed by the late Judge Depree and the late Judge Murnaghan. MacDonald has carried his burden.

CONCLUSION

Based on the compelling evidence from Helena Stoeckley, given under circumstances the law deems trustworthy and reliable, that she was in the MacDonald house when the crimes occurred and that the men with her killed Jeffrey MacDonald's family and seriously injured him, coupled with the newly revealed DNA evidence that soundly supports the defense theory of intruders coming in the house when the crimes occurred, considered in light of the evidence as a whole, no reasonable juror would have been convinced of guilt beyond a reasonable doubt. Thus, no reasonable juror would have voted to convict him had this evidence been presented. Accordingly, the motion to vacate must be granted.

WHEREFORE, Jeffrey R. MacDonald respectfully requests that this Court grant the motion and vacate the judgment.

This the 10th day of June, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on 10 June 2013, I electronically filed the foregoing Defendant's Substitute Post-Hearing Memorandum with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record in this matter.

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