UNITED STATES DISTRICT COUR
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 3:75-CR-26-F
No. 5:06-CV-24-F

UNITED STATES OF AMERICA	)	
	)	GOVERNMENT'S
v.	)	POST-HEARING MEMORANDUM
	)	
JEFFREY R. MacDONALD,	)	
Movant	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this Post-Hearing Memorandum in accordance with this Court's Order of September 27, 2012 [DE-305], and respectfully shows unto the Court the following:

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I. SUMMARY OF ARGUMENT

MacDonald's 28 U.S.C. § 2255 "Britt claim" should be dismissed. The Court has made the "more searching inquiry" required by the Fourth Circuit and has considered the expansively defined "evidence as a whole," with due regard for its probable reliability and likely credibility. It is clear that MacDonald has fallen far short of the required showing under § 2255(h)(1), that is, that the newly discovered Britt evidence, even if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty. Moreover, Britt's assertions themselves have been shown to be devoid of reliability and credibility. As an alternative basis for denying relief, this Court should rule that the Britt claim fails on the merits because MacDonald has failed to prove his factual claim, i.e., the constitutional violations he alleged based on Britt's assertions, by a preponderance of the evidence. Indeed, Britt's assertions have been shown to be false.

MacDonald's § 2255 unsourced hairs claim should likewise be dismissed. MacDonald has failed to support his exaggerations with respect to these unsourced hairs (bloody, forcibly removed, found under Kristen MacDonald's fingernail). The actual newly discovered evidence that forms the basis of this claim is the DNA test results, and these are not exculpatory. Thus, MacDonald has completely failed to show that this newly discovered evidence, viewed in the light of the evidence as whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty, and therefore this claim cannot survive § 2255(h)(1) gatekeeping. Even if it could, MacDonald could not meet the "extraordinarily high burden" which would be required to obtain collateral relief on this

freestanding claim of actual innocence. Finally, the Supreme Court has expressed doubt as to whether any prisoner can ever obtain habeas relief based on such a claim.[1]

II. FACTS ADDUCED AT THE EVIDENTIARY HEARING

A. Helena Stoeckley at the 1979 Trial

Trial in the case of United States of America v. Jeffrey R. MacDonald began on Thursday July 19, 1979, in Raleigh, North Carolina, with the Honorable Franklin T. Dupree presiding. TTr. 1200.[2] The parents of Helena Stoeckley were subpoenaed by the defense in an unsuccessful effort to try to locate their daughter on Monday, August 13, 1979. TTr. 4846. AUSA Jim Blackburn informed the Court that the Government had issued a subpoena for Helena Stoeckley and had the Federal Bureau of Investigation looking for her, but that she had not yet been located. TTr. 4849. At that time, Judge Dupree issued a material witness warrant for the arrest of Helena Stoeckley, and the FBI was instructed by AUSA Blackburn to apprehend her. GX 2000, 2001.

While in Raleigh, the parents of Helena Stoeckley were interviewed by the defense team. GX 2201.2; HTr. 961-964. Mrs. Stoeckley informed the defense team, "[s]he called up, must have been a year and a half ago, four o'clock in the morning, all befuddled. She said somebody was chasing her and had taken her car keys. Then it turned out she'd had a stroke. We got her home, she was like a vegetable. She couldn't talk, couldn't eat, her face quivered, saliva would

[1] MacDonald's motions under the Innocence Protection Act ("IPA") for a new trial and for new DNA testing (DE-176) were not part of the evidentiary hearing and thus are beyond the scope of this memorandum. See Order DE-266. The Government renews its request that both motions be denied for the reasons explained in DE-212, DE-227, and DE-265. The factual showings in those Government filings and the affidavits filed with them are an important part of the evidence pertaining to the § 2255 unsourced hairs claim. The Government relied on them at the evidentiary hearing and also does so in this memorandum.

[2] For purposes of this memorandum, citations designated "TTr." reference the original trial transcript and those designated "HTr." reference the evidentiary hearing transcript. "GX" citations refer to physical or documentary Government exhibits, and "GXP" citations refer to photographic Government exhibits. "DX" citations refer to defense exhibits.

run out of her mouth … after about three weeks she was improved, but still she was not quite right." HTr. 963; GX 2201.3. She continued, "[s]he's not at all like she used to be. She's a physical and mental wreck. She's not even a human being anymore. You find her now, sure she'll talk. She'll always talk. But I'm telling you, she's gonna talk all kinds of nonsense." Id. They discussed the MacDonald murders and Helena's reaction to them. HTr. 964. Mrs. Stoeckley said that Helena was very hurt by the murders and told her that no hippie would do such a thing. Id. At that time, Mrs. Stoeckley believed that it was Prince Beasley who had put the idea of Helena's involvement in the murders into her head. Id. She told the defense, "Beasley was her daddy image. He had a terrific amount of influence over her. She told me he had been up to talk to her right after it happened and then she said 'Yeah, I've been thinking, and I don't really know where I was that night. I might have been there.' And I just knew right then that Daddy Beasley had talked her into it." Id.

On August 14, 1979, FBI Special Agents Thomas Donohue and Special Agent Frank Mills located Helena Stoeckley at the Oakway Trailer Community in Oconee County, near Walhalla, South Carolina, arrested her, and interviewed her. HTr. 474-475; GX 2002. Helena told the agents that she had consumed so many different drugs on the day of the MacDonald murders that she had no recollection of where she was or what she did that day. Id. Special Agents Mills and Donohue transported Helena Stoeckley to the Pickens County Jail for booking. HTr. 477-489. No one else was in the car with Helena Stoeckley and Agents Mills and Donohue. Id. She was logged into the jail by Special Agent Donohue at 6:32 p.m., and fingerprinted. Id.; GXP 2006-2009, 2053-2074. Special Agent Mills sent a teletype to the FBI's Charlotte field office relaying the details of the arrest. HTr. 483-484; GX 2003. Helena Stoeckley spent that night at the Pickens County Jail, and on August 15, 1979, was released to the United States Marshals Service

in the custody of Deputy U.S. Marshal Vernoy Kennedy. HTr. 487, 508-514; GX 2066; GXP 2010-2011. DUSM Kennedy is described as being a black male, approximately 6'2'' tall and having a medium build. HTr. 488.

DUSM Kennedy collected Helena Stoeckley at the Pickens County Jail at 2:30 p.m. on August 15, 1979, and drove her approximately two hours to Charlotte, North Carolina to meet the USMS representatives from the Raleigh office. HTr. 487, 508-514; GX 2066; GXP 2010-2011. The only other person present in the car during this time was a female guard. Id. DUSM Kennedy met DUSM Dennis Meehan and his wife, Janice Meehan, at the intersection of I-77 and I-85 in Charlotte, in order to transfer Helena Stoeckley into their custody. HTr. 512-513, 521; GX 2066. DUSM Meehan and his wife drove Helena Stoeckley directly to the Wake County Jail. No one else was in the car with them during this transport. HTr. 522, 539.

After Helena Stoeckley's arrest, the parties discussed the matter in court. Upon request by the defense to interview Stoeckley, Judge Dupree instructed his law clerk to tell the Magistrate in South Carolina that Stoeckley was to be held with no bond and she was to be brought to Raleigh and made available to defense counsel. TTr. 5257-5259. He also decided that Stoeckley would be interviewed by each side in turn on the following day, August 16, 1979. Id.

Helena Stoeckley spent the night in the Wake County Jail and, on the morning of August 16th, was transported approximately six blocks from the Wake County Jail to the federal courthouse by DUSM Jimmy Britt and Geraldine Holden. HTr. 526-531, GX 2074. At approximately ten o'clock that morning, the defense team interviewed Helena Stoeckley in an office the defense was using on the seventh floor of the Federal Building. HTr. 969; GX 2201. Wade Smith and Bernard Segal conducted the defense interview of Helena Stoeckley in the presence of Joe McGinniss, who had an exclusive agreement with the defendant to chronicle the

trial. HTr. 78-89, 969-981; GX 2201. Helena told the defense team that she was not in the MacDonald house, nor did she have anything to do with the murders. Id. Mr. Segal had each of the "Stoeckley witnesses[3]" confront Helena one by one about the statements that she had allegedly made to them, but she did not change her story. Id. Helena was given a bologna sandwich and left by Segal and Smith with notebooks containing all of the crime scene photographs while the defense team left to give a status report to Judge Dupree.[4] Id. at 977.

At one o'clock, court reconvened and Wade Smith informed Judge Dupree that the defense would need more time to finish interviewing Helena. TTr. 5496-97. Because the Government had yet to meet with Stoeckley, Judge Dupree released the jury, to reconvene on August 17, 1979, at nine o'clock in the morning. Id. The defense did not further interview Helena Stoeckley, and she was brought to the United States Attorney's Office on the eighth floor of the Federal Building at approximately two o'clock for her government interview. HTr. 980-81, 605.

Present for the government interview were United States Attorney George Anderson, First Assistant United States Attorney Jim Blackburn, Assistant United States Attorney Jack Crawley, and Department of Justice Trial Attorney Brian Murtagh. HTr. 607-08, 721. No one else was present during the interview, nor was it customary for a Deputy United States Marshal to sit in during an interview of a trial witness. Id. Helena Stoeckley told the prosecution team the same thing she had told the defense team, that she was neither present for, nor involved in the MacDonald murders. HTr. 248-249, 610, 722-725. At no time during the prosecution interview was Helena Stoeckley threatened. HTr. 248, 610-611, 912, 940, 947, 1124-1126; GX 2332,

[3] Jane Zillioux, Prince Beasley, James Gaddis, Red Underhill, Robert Brisenstine, and William Posey.

[4] In an interview with Errol Morris, Wade Smith described Stoeckley as saying in the defense interview: "'I don't know anything about it. I certainly wasn't there. And I think he did it. And you promised me some food. And no one has given me any food. And you promised me I'd get something to eat.' It had gone from sublime hope to deepest of ridiculous statements. And she sat there, as she ate her sandwich, and leafed through the bloody photographs that were exhibits in the case and seemed completely and totally unmoved by them….And we had hoped that after she had some food, we would be able to persuade her. But we never were. We never were. She stuck to that story. And she certainly stuck to it when she testified." GX 7001.

6076; DX 5113 at ¶10. At the conclusion of her interview by the prosecution, Helena Stoeckley was returned to the Wake County Jail for the night because Judge Dupree refused to release her from custody pending her trial testimony. TTr. 5506.

On Friday August 17, 1979, Helena Stoeckley testified before the jury from nine o'clock in the morning until almost one-thirty in the afternoon. TTr. 5512-5678. During this time, she detailed her extensive history of drug use. Id. at 5554. In her testimony, Stoeckley explained that the course of the day and night on February 16, she had six or seven intravenous injections of a mixture of heroin and opium, had used marijuana all day, and had taken a "hit" of mescaline shortly before midnight, which had been given to her by Greg Mitchell, with whom she had conversed in her driveway. TTr. 5552-52. The next thing she recalled was returning to her house in a car driven by other soldiers at approximately 4:30 a.m. TTr. 5555-57. She denied any involvement in the murders and admitted that her knowledge of the killings was the result of what she heard on the radio news bulletin and what others had told her. TTr. 5652-54. Helena told the jury about her involvement in witchcraft and the rituals she had performed involving the use of a candle. Id. at 5542-47, 5654-55. Stoeckley told the jury that she did own a blond wig, a floppy hat, and pairs of both white and brown boots of varying heights, but that she started to wear them less and less and eventually got rid of them altogether because they tied her to the murders, and people continuously approached her about being involved. Id. at 5588-5604, 5644-5646.

She recounted for the jury her various interviews with Army CID and Detective Beasley in both Fayetteville and Nashville, Tennessee. Id. at 5604-5613. She was questioned about her recollection of conversations with each of the "Stoeckley witnesses." Id. at 5557-5578, 5663-64. At that time, she admitted to talking with her neighbor William Posey about the MacDonald

murders back in 1970, and stated that she could not recall her whereabouts on the night they were committed. Id. She recalled talking with Jane Zillioux, Red Underhill, Officer James Gaddis and CID Agents Dick Mahon and Robert Brisenstine in Nashville about the MacDonald murders, but did not remember what she said during those conversations. Id. Helena told the jury that each of the many times she spoke with the CID she told them the same thing: that she could not remember where she was during the murders. Id.

She was shown several crime scene photographs while on the stand, including those depicting what she described as a "hobby horse," those of Kristen MacDonald's body in her bed after having been murdered, and a photograph of the MacDonald's living room. Id. at 5579-5582. Mr. Segal tried to get Helena to say that she recognized the photographs and the people and places therein, but she did not. Id. Helena told the jury that, when she had viewed the photograph of the "hobby horse" the day before her testimony during the defense interview, that it had appeared broken to her in the photograph, even though Segal openly challenged her on this fact in court. Id. at 5624-27. Helena told the jury that she had never been to 544 Castle Drive before and had never seen the "hobby horse" in person. Id. After Helena Stoeckley denied recognizing those items or being at 544 Castle Drive, Mr. Segal asked to approach the bench, where he moved to treat her has a hostile witness and proceed as if on cross-examination. Id. at 5614-5618. At that time, Mr. Segal made representations to the Court that, during the defense interview the previous day, Helena had said that she had ridden the rocking horse and that she remembered standing at the end of the MacDonalds' couch with a candle. Id. Segal also told Judge Dupree that Helena had stated she remembered standing outside of the MacDonald house and saying "My God, the blood; oh my God, the blood." Id. at 5616. Mr. Blackburn then told the Court that not only had Helena said nothing of that sort during the prosecution interview, but

also that he had run into Wade Smith after both interviews the previous day and Mr. Smith had relayed to him that she had, similarly, said nothing helpful to the defense case during the defense interview. TTr. 5617; HTr. 102-103, 109-114, 612-620. Mr. Smith then responded to the Court that Mr. Blackburn was correct, that generally Helena had told the defense that she didn't remember, but that several things that she said would give an "interesting insight into her mind."[5] Id. No other member of the defense team reported hearing any of the things Mr. Segal represented to the Court regarding Helena Stoeckley's statements during the defense interview. HTr. 78-89, 102-103, 109-114, 969-981, 986-991; GX 2201. Judge Dupree then asked Helena, in the presence of the jury, whether she had told the same thing to both the prosecution and the defense, and she stated that she had. HTr. 5618-19. When direct examination resumed, Stoeckley told the jury that she had had a dream where she saw a body on MacDonald's sofa and she was holding a candle. Id. at 5631-32. She admitted to hanging funeral wreaths outside her home the week after the murders. Id.

During cross-examination, Stoeckley told the jury that she had never been in the MacDonald apartment, did not know any member of the MacDonald family, and did not participate in the murders. HTr. 5646-5648. She further stated that her neighbor, William Posey, had tried to get her to say things about the murder that she didn't want to say, and that he had offered to give her an alibi. Id. at 5663-64.

[5] When Mr. Smith was questioned about this exchange at the evidentiary hearing he stated: "Let me just put it this way, I was absolutely devoted to this case and upheld my role as counsel and I'm still devoted to this case, but I did not hear Helena Stoeckley say useful things for us. It is certainly possible. And I mentioned a while ago, maybe I was out of the room. I do not know the answer. But I can only speak for myself and that is that when I was present she did not say things that helped us." HTr. 114. This is corroborated by the testimony of author Joe McGinniss as well. Mr. McGinniss stated: "You know, I talked to Wade Smith after the trial and he told me he felt that he had been between a rock and a hard place because he couldn't stand up there and undermine his co-counsel by telling the court Mr. Segal's not telling the truth, but on the other hand, he's not – as an officer of the court, he's not going to participate in trying to fabricate anything or put up – you know, say anything that was not true … he walked a fine line and he was very happy when he got to the other end." HTr. 990.

Once Helena Stoeckley finished testifying, she was released from federal custody, but placed under subpoena by the defense. TTr. 5677-78, 5686-88. The Court then proceeded to conduct a voir dire of the "Stoeckley witnesses," in order to make a determination as to the admissibility of their testimony. TTr. 5688-5774. The first to testify was Jane Zillioux, a neighbor of Helena Stoeckley's in Nashville. TTr. 5688-5703. Zillioux testified that Helena had told her she had been involved in "some murders" but that she didn't know whether she committed them or not, and that she had been a drug user for so long that she couldn't remember. TTr. 5693-94. Helena allegedly told Zillioux that she remembered being in the rain with three boys and being terrified. Id. Helena had told her that she looked down and saw the blood on her hands and then went home and got rid of her clothing. TTr. 5697. Zillioux also testified that Helena had told her she was wearing her wig and white boots, and remembers both of them getting wet in the rain. TTr. 5699. Zillioux detailed for Judge Dupree her conversation with another neighbor, Bonnie Hudgins, and how Bonnie had told her that she knew it was the Green Beret murders that Helena had been involved in. TTr. 5695. On cross-examination, Zillioux admitted that Helena was shaky and almost incoherent at times during their conversation, and that she never said she committed the murders, only that she was "involved." TTr. 5701.

The second of the "Stoeckley witnesses" to testify was James Gaddis, a Nashville narcotics detective. TTr. 5704-5710. He told the Court that Helena had told him on different occasions both that she thought she had been there but had tripped out on mescaline and LSD, and also that she knew who had done it but wasn't there. Id. at 5704. Several of the times she gave him information about the MacDonald murders she was under the influence of drugs. Id. at 5707. On cross-examination, Mr. Blackburn drew out the inconsistencies in Stoeckley's statements to Gaddis; that sometimes she said that she witnessed the murders but was not involved, sometimes

she told him she knew who was involved but couldn't give him names, sometimes she said that she only had suspicions of who was involved, and sometimes she told him that Dr. MacDonald himself committed the murders. TTr. 5708.

Next, Red Underhill testified. TTr. 5711-5715. Underhill knew Helena Stoeckley from her time in Nashville and testified about an interaction that he had with Helena one day when he went to her house. He told the Court that he had found Helena crying hysterically and all she could say to him was "they killed her and the two children." Id. at 5712-13.

Robert A. Brisenstine was an Army Polygrapher who interviewed Stoeckley about the MacDonald murders twice in April of 1970. He testified that, during these interviews, Stoeckely vacillated between believing she was involved and denying any involvement. TTr. 5715-5737. He told Judge Dupree that Helena "was convinced that she participated in the murder of Mrs. MacDonald and her two children; that she presently is of the opinion that she personally did not actively participate in these homicides, but may have been physically present at the time of the murders; [and] that prior to the homicide she had heard the hippie element was angry with Captain MacDonald as he would not treat them by prescribing methadone for their addiction to drugs." Id. at 5717. Helena then retracted those statements and denied any knowledge of MacDonald, telling Brisenstine that she had been admitted to the hospital for drug addiction and "she was not always oriented as regards time, dates, and surroundings." Id. at 5718. She further went on to explain the dreams she had been having were caused, she believed, by the large quantity of drugs she was consuming. Id. These dreams included seeing the word "pig" on a bed headboard, and a vision of MacDonald pointing at her and holding an icepick that was dripping blood. Id. at 5719-20. She told Brisenstine that she owned, at the time of the murders, a pair of white boots, a floppy hat, and a blond wig; and that she did display wreaths and wear

black the week after the homicides.[6] Id. She claimed to know the identities of the persons who killed the MacDonald family, and then later told him that she had been lying when she told him that because "four hippies could not have entered Captain MacDonald's home without being observed by neighbors or causing dogs to bark." Id. at 5722. The individuals she named as potentially having been involved were Don Harris, Bruce Fowler, Janice Fowler, Joe Kelley, and a black man named Eddie.[7] Id. Brisenstine testified that during both interviews Stoeckley was under the influence of drugs. Id. at 5724-25. He told Judge Dupree that, during these interviews, Stoeckley never told him anything about the crime scene or murders that he didn't already know, or that would indicate an insider's knowledge. Id. at 5729.

After Brisenstine, the Court heard from Prince Beasley, the Fayetteville narcotics detective who Helena's mother felt was responsible for putting the idea in Helena's head that she had something to do with the MacDonald murders. TTr. 5738-5751; see supra, at 3. Beasley went to Helena's apartment on the night after the MacDonald murders to ask her if she was involved. He told Judge Dupree that when he asked Helena whether or not she had participated in the crime she said to him, "in my mind, it seems that I saw this thing happen; but... I was heavy on mescaline." TTr. 5742. He later went to Nashville to interview her again, at which time she told him "basically the same thing" that she had told him in Fayetteville. Id. at 5744. On cross-examination, however, the prosecution brought to Beasley's attention the statement that he had written after his Nashville visit. In this statement, dated March 1, 1971, Beasley wrote:

> "She stated that she did not remember anything that happened on the night of the murders except that she did remember getting into a blue car she thought

[6] These are all things that Helena, herself, had already told the trial jury during her testimony earlier that day.

[7] The FBI conducted an investigation into these and other individuals that Helena Stoeckley claimed had been involved in the MacDonald murders. They were able to determine that none were viable suspects for a host of reasons. See generally, HTr. 880-949 (Testimony of former FBI Special Agent Raymond Madden detailing his efforts to locate these named individuals), Government's Response to Motion for New Trial: Memorandum of Points and Authorities, filed 7/13/84; Affidavit of Richard J. Mahon, filed 7/20/84; Government's Response to Motion for New Trial, Appendix Volume I, Appendix Volume II, filed 7/20/84. DE 117-4.

> was a Mustang and it belonged to one Bruce Fowler … She again told me she had no knowledge of this night after 12:30 a.m. and that she does not know for sure what happened … It is ***my conviction*** that she is involved in the MacDonald case or at least she thinks she is or that she is doing this just to get all the attention she possibly can."

TTr. 5747 (emphasis added).

The last of the "Stoeckley witnesses" was William Posey, Helena's neighbor in Fayetteville. TTr. 5751-5774. He told the Court that, on the night of the MacDonald murders, he had seen her come home in a blue mustang; knew her to wear white boots, a floppy hat and a blond wig; and saw the funeral wreaths outside her apartment the week of the MacDonald funerals. Id. at 5753-5755. Approximately two days before his testimony at the Article 32 hearing he went to see Helena and she told him that all she did was "hold the light,[8]" and that she remembered a "kid's horse thing" that wouldn't "roll." Id. at 5759-5760. She also told him that she was involved in witchcraft but that she was a "good witch." Id. at 5763. On cross-examination, however, it was established that Posey had actually sought out Bernie Segal at his hotel during the Article 32 hearing to tell his story. Id. at 5765-5766. After his Article 32 testimony, he was given $150.00 by MacDonald's army lawyer to help with his "moving expenses."[9] Id. at 5771; GX 2330.

After hearing arguments regarding the admissibility of alleged out-of-court statements by Stoeckley to the "Stoeckley witnesses," Judge Dupree stated that he would issue his ruling on Monday morning, and recessed court. Id. at 5799.

[8] At the Article 32 Hearing, Posey testified that he is the one who suggested to Helena "well, you could have just been holding the light, you know." GX 2338.31-32.

[9] On June 13, 1971, Posey was polygraphed to determine if he had been telling the truth during his Article 32 testimony. The polygraph examiner determined that several of Posey's polygraph answers were untruthful and confronted him with that fact during a post-polygraph interview. At that time, Posey admitted that he did not actually see Helena Stoeckley on the night of February 17, 1970, and the reason that he testified as such was that a month or two after the murders he had a dream that he saw her in that car. He also admitted that the basis of his opinion that Stoeckley was involved in the murders was the way she talked about the murders, the fact that she was on drugs that night, the fact that she could not account for her whereabouts, and her manner of dress. See GX 2331.

At the close of court on Friday August 17, 1979, Mr. Segal provided Helena Stoeckley with a subpoena and check for witness fees for subsistence over the weekend. TTr. 5951. Helena called Segal on Friday night to inform him that she was staying at the Downtowner Motel. Id. She had seen a television story about the testimony on Friday and wanted to ask Segal whether people had really said such things about her. Id. at 5952. Segal informed Stoeckley that the defense team and witnesses were moving to the Downtowner on Saturday, and that she would need to move to a different hotel, because it would be inappropriate for her to be in the hotel with the defense team. Id.

On Saturday morning, August 18, 1979, Ernest Davis, Stoeckley's fiancé, called Segal to inform him that they were moving to a different hotel, but did not tell him where they were going. Id. That evening, Helena Stoeckley called Judge Dupree at home and told him that she was "living in mortal dread of physical harm by Bernard Segal, counsel for the Defendant, and that she wanted a lawyer to represent her." TTr. 5980. She told Judge Dupree that she was staying at the Journey's End Motel. Id.

Red Underhill also learned that Helena Stoeckley was staying at the Journey's End Motel. TTr. 5919. At that time, he got information from the motel manager that Helena had been involved in an altercation in the swimming pool with Ernest Davis, and had a black eye. TTr. 5953. He called Mr. Segal to inform him of what he had learned. TTr. 5952. Mr. Segal then decided to send a member of the defense team, Wendy Rouder, to check on Helena. TTr. 5954; HTr. 346.

On Sunday, August 19, 1979, Wendy Rouder and Red Underhill went to the Journey's End Motel. TTr. 5897-5899, 5908, 5929; HTr. 346. When they arrived, Helena had a black eye, and was disheveled. TTr. 5898, 5908-5911; HTr. 347, 1075-1079; GX 2201. Ernest was still

present, but left shortly thereafter to return to South Carolina. TTr. 5930. Because Ernest did not have any money for his return bus ticket, Red Underhill loaned him the bus fare. TTr. 5926.

Underhill and Rouder were told by the manager at the Journey's End that, due to the disturbance, Helena was no longer welcome to stay there. TTr. 5909, 5935; HTr. 347. While Mr. Segal's secretary made arrangements for Helena to check into the Hilton Hotel, Rouder stayed with Stoeckley at the Journey's End. TTr. 5931-5935; HTr. 347-349. During that time, they discussed a variety of things related to the MacDonald murders. Helena allegedly told Rouder that she thought she could have been there that night and that after seeing the photographs of the rocking horse and of Kristen in her bed that the scene looked familiar. Id.

Once the reservations were made at the Hilton, Rouder and Underhill drove Helena there and checked her in. TTr. 5912, 5936; HTr. 349. It was decided that Rouder could not stay at the Hilton with Helena, but Red Underhill would. TTr. 5912, 5936. Once Helena was checked in, the three drove back to the Downtowner so that Mr. Underhill could get his clothes. TTr. 5937; HTr. 349-351. While waiting for him in the car, Stoeckley and Rouder discussed the MacDonald murders again, at which time Helena allegedly said that she remembered standing at the end of MacDonald's couch holding a candle that was not dripping wax, but dripping blood. TTr. 5937. When Rouder asked Stoeckley why she didn't say that in court, Stoeckley told her that she couldn't with those "damn prosecutors sitting there." TTr. 5937; HTr. 350-351.

Wendy Rouder then drove Stoeckley and Underhill back to the Hilton and dropped them off, but it was not fifteen or twenty minutes before she was called back to the Hilton to take Stoeckley to the hospital to get her nose treated. TTr. 5944. While there, Stoeckley allegedly met Lynn Markstein, a woman who was also being treated at the hospital Sunday evening. DE-126-2 at 13. Markstein told defense investigators that Stoeckley had told her that evening that

she was at the MacDonald house on the night of the murders. Id. The defense, though they were aware of these alleged statements, chose not to produce Markstein at trial. TTr. 6896-97. After being treated at the hospital, Stoeckley returned to the Hilton, where she spent the night. TTr. 5899-5900, 5913-5916, 5921. While at the Hilton Sunday night, and again on Monday morning before court, she and Red Underhill discussed the MacDonald case. Id. Underhill later testified that Stoeckley had told him during this time that she could name three individuals involved in the MacDonald case, but that she was afraid for her life so she would not.[10] TTr. 5914.

As Rouder and Underhill were helping Stoeckley change hotels on Sunday, Steve Coggins, law clerk for Judge Dupree, was busy trying to find a lawyer for Stoeckley. TTr. 5980-5981. It proved difficult to do on a Sunday afternoon, but he was able to secure the services of Jerry Leonard, who appeared in court on Monday to represent Stoeckley.[11] Id.

On Monday morning, August 20, 1979, Judge Dupree issued his ruling as to the admissibility of the testimony of the "Stoeckley witnesses" at trial. TTr. 5806-5815. After careful consideration of the transcript of the witnesses' testimony, the briefs of both parties, and all of the relevant case law he could find on point, he ruled "that these proposed statements do not comply with the trustworthy requisites of [Federal Rule of Evidence] 804(b)(3) or (b)(5); that far from being clearly corroborated and trustworthy, that they are about as unclearly trustworthy – or clearly untrustworthy, let me say – as any statements that I have ever seen or heard." TTr. 5807.

[10] This is the third time in less than 24 hours that Helena Stoeckley had told someone she was afraid. Each time, it was fear of a different person, but none of them were members of the prosecution team.

[11] Jerry Leonard wrote an affidavit prior to his testimony at the September 2012 evidentiary hearing in this case, which was later filed as DX 5113. In that affidavit, he stated that he was responsible for securing lodging for Helena Stoeckley on Sunday, August 19, 1979. This is in direct contravention to the testimony of Wendy Rouder and Red Underhill at trial, and the representations of Bernie Segal as established by the trial transcript. See supra at 13-15. During his testimony at the evidentiary hearing, Leonard went into some detail about how he had picked Helena up at the federal building, and how she had spent Sunday night on a recliner chair in his living room. HTr. 1110. He further stated that he checked her into the Hilton hotel himself on Monday August 20, 1979. Id. Again, this assertion is disproven by the testimony of the defense witnesses at trial regarding the events of that weekend. See supra at 13-15. Leonard admitted as much during his testimony at the evidentiary hearing in September of 2012. HTr. 1177.

He noted that her statements, both in court and out of court, were "all over the lot." Id. at 5807-5808. Importantly, Judge Dupree also held that any hearsay testimony of the "Stoeckley witnesses" would be cumulative given that "[Stoeckley] has told everything – she told this jury everything that [the defense] proposed to show by these witnesses that she told them." Id. at 5809. He did permit the defense to call several of the "Stoeckley witnesses," however, who had information regarding Stoeckley's whereabouts and actions around the time of the MacDonald murders. Id. at 5816-5821. The defense proceeded to call Beasley, Zillioux, Underhill, Posey, and Gaddis, five of the six who testified on voir dire.[12] TTr. 5822-6031.

Prince Beasley told the jury that he had seen Helena Stoeckley often during the relevant time period wearing a blond wig and floppy hat, and associating with two white men and a black man wearing a fatigue jacket with E-6 stripes. TTr. 5831-5833. He testified that he was unable to locate Stoeckley on the night of the murders after receiving MacDonald's description of the alleged intruders, but that he saw Helena at her house on the night after the murders and she was with at least three males in a car. TTr. 5836. Beasley stated that he called dispatch and told them he had some suspects in custody regarding the MacDonald murders and to come take a look, but that no one ever came. TTr. 5839. He also told the jury that Helena had, in fact, later given him the floppy hat and blond wig. Id. at 5840. Further, he identified a drawing of an individual Helena had named as a suspect in the MacDonald murders as Alan P. Mazzarole.[13] Id. at 5859. Judge Dupree asked Beasley what the names of the individuals were who he saw with Stoeckley that night, but he could only name Greg Mitchell. TTr. 5862.

Next, the defense called Jane Zillioux to testify before the jury. TTr. 5867. After covering some preliminary topics, how she knew Stoeckley and what her demeanor was like in Nashville,

[12] Only Army Polygrapher Robert Brisenstine was not re-called to testify in front of the jury.
[13] Later investigation by the FBI revealed that Mazzarole could not have been present for the murders because he was incarcerated at the time. HTr. 926-929. See infra at 52.

Segal proceeded to ask Zillioux a series of questions about what happened during the portion of the defense interview of Helena Stoeckley that Zillioux witnessed on Thursday, August 16, 1979. TTr. 5872-5885.

Red Underhill was called to testify about his interaction with Stoeckley in Nashville, and more recently in Raleigh during trial. TTr. 5890-5900. Unable to get into evidence any of Stoeckley's statements to Underhill in Nashville, Segal switched tactics and started having Underhill explain the events of the preceding weekend. Id. at 5897. Underhill explained when he had first seen Helena that weekend at the Journey's End Motel, and the time he spent with her at the Hilton, but when Segal began to ask him what Stoeckley said to him, the prosecution objected and the jury was sent out. Id. at 5900. Underhill detailed for Judge Dupree the events of the weekend and the things that Stoeckley said to him. See supra at 13-15.

Segal then called Wendy Rouder to expound upon Underhill's description of events and tell the Judge what statements Stoeckley had allegedly made in her presence. Id. After hearing the arguments of both sides, Judge Dupree further excluded this hearsay testimony and said, "but the picture emerges, though, of a person whose mind is so far impaired and distorted by this drug addiction that she has become and remains in an almost constant state of hallucination. That she is extremely paranoid about this particular thing, and that what she tells here in court and what she tells witnesses, lawyers in a motel room, simply cannot have attached to it any credibility at all in my opinion. I think it is not as required by [Federal Rule of Evidence] 803(b)(3) clearly trustworthy. It is perhaps the most clearly untrustworthy evidence that I have had put before me." TTr. At 5976-5977. He went on to say that the jury, having heard Stoeckley testify and having heard most of the "Stoeckley witnesses" themselves, are in the best position to evaluate her credibility. Id. At a bench conference after this ruling, Judge Dupree informed counsel that

Helena had called him on Saturday night, and that he had, therefore, appointed Jerry Leonard to represent her. TTr. 5980.

Even though the alleged out-of-court statements of Stoeckley to Underhill and Rouder had been excluded, Judge Dupree permitted the defense to call two additional "Stoeckley witnesses" to testify before the jury. William Posey testified, as he had during voir dire, that he saw Helena the night of the MacDonald murders, and told the jury about Helena's manner of dress and actions after the murders.[14] TTr. 5983-6031. He also told the jury about Helena's interest in witchcraft and her association with Alan Mazzarole. Id. at 6000-6002.

The final "Stoeckley witness" heard by the jury was James Gaddis. TTr. 6069-6077. After having Gaddis describe the nature of his relationship with Stoeckley, namely that she was his criminal informant, Segal began a series of questions carefully crafted so as to convey the answer within the question. Id. at 6073. Objections were sustained as to most of the questions before Gaddis could answer, and so the examination proceeded more like a narrative by Segal of his own version of events. TTr. 6074-6077; see also DE-150 at 14. The prosecution did not cross-examine Gaddis, and the defense moved on to its other witnesses, unrelated to Helena Stoeckley. Id. at 6077.

Helena Stoeckley and her lawyer, Jerry Leonard, remained in the courthouse, subject to recall, until Monday, August 27, 1979. TTr. 6898-6899. During this time, neither side was allowed access to Stoeckley, but Leonard did have conversations with Wade Smith regarding whether the defense would recall her as a witness.[15] TTr. 6647; GX 7000.7. Closing arguments

[14] The majority of Posey's testimony was discredited by his own confession subsequent to a polygraph examination. See supra at 12 n. 9.

[15] The defense included DX 5084 in its pre-hearing submission. It is the statement of a woman named Kay Reibold who was a friend of Jerry Leonard at the time of the MacDonald trial. The statement claims that Reibold was asked by Leonard to chaperone Stoeckley in the courthouse during the trial. It claims that, during that time, Stoeckley made incriminating statements to her. She allegedly gave this statement to defense investigator Ted Gunderson in 1980, witnessed by the office manager at Wade Smith's office. The defense, although aware of this statement for

were heard on August 28 and 29, 1979. After only six and a half hours of deliberation, the jury found MacDonald guilty of two counts of second degree murder and one count of first degree murder.

B. Stoeckley's 1982 statements to her mother

Helena Stoeckley died on January 9, 1983, from pneumonia and cirrhosis of the liver. HTr. 500. The investigation into her statements, however, continued after her death. As a part of this investigation, Special Agent Raymond "Butch" Madden contacted Mrs. Helena W. Stoeckley (Helena's mother), and interviewed her on July 19, 1984. HTr. 942; GX 2332-2334. He interviewed her at her residence and she did not have any difficulties with her memory or sight. HTr. 946. Mrs. Stoeckley told SA Madden that "when Helena came home after the MacDonald murders, [she] told her in a perfectly sober and non-drug state that [she] did not know anything about the MacDonald murders." Id. She also relayed that her husband, Mr. Stoeckley, had questioned Helena after the MacDonald murders and told her to tell the truth, but that Helena told him, too, that she did not know anything about the murders. HTr. 944; GX 2332. It was Mrs. Stoeckley's opinion that Helena could not have been involved because she was not violent and loved children. Id. Mrs. Stoeckley did not believe that Helena had been treated fairly by Ted Gunderson and Prince Beasley. Id. She told SA Madden that Helena's mind was "gone," especially when she was drinking or doing drugs, and that when she was under the influence she often thought about the case but she was not involved. Id. It was Mrs. Stoeckley's opinion that Helena was "used," but she did not say by whom. Id. at 945. Mrs. Stoeckley said that, during the trial, "they" wanted her to take drugs to help her remember the details. Id. Mrs. Stoeckley

more than 32 years, never sought to use it as part of its post-conviction claims of innocence. The statement bears no signature or notarial acknowledgement. Notably, the defense included it in the Pre-hearing Order, but chose not to argue it at the hearing or in its post-hearing brief after the affidavit and testimony of Jerry Leonard made no mention of any third party present during his representation of Stoeckley. This statement should be given no weight.

had saved all the newspaper articles about the MacDonald trial, and when Helena returned home she allowed her to read them. Id. Helena struggled with drugs throughout the '70's, and was committed to Dorothea Dix Hospital for mental health treatment. Id. When she was released from treatment in 1977 she moved home and she was "never right." Id. Mrs. Stoeckley told SA Madden that she believed Helena enjoyed the attention that the MacDonald case had brought her, and that the only reason these issues kept arising is because Prince Beasley would not leave Helena alone. Id. Helena told her mother that her testimony at trial was the truth and that it was the extent of her knowledge. Id. at 946. Not long before her death, Helena was in terrible physical shape and that is when she gave a statement to private investigators in California, and told them that she thought she was at the murder scene. Id. At no time during this conversation did Mrs. Stoeckley ever tell SA Madden that Helena had been threatened by Jim Blackburn or any other member of the prosecution team. Id. at 947. She also did not mention Helena telling her anything about a hobby horse. Id. at 948.

C. Jimmy Britt

1. Personal life

In the decades between the trial and his affidavits in 2005-2006, much occurred in the life of Jimmy Britt, a Deputy United States Marshal who was present during parts of the MacDonald trial. At the time of the trial, Jimmy was married to Mary Britt. HTr. 222. In the late 1980's, Mary and Jimmy began to have marital troubles. Mary found out that Jimmy had been cheating on her with another woman at the United States marshals Service, named Nancy Williams. GX 2131. Mary and Jimmy divorced in 1989, but the equitable distribution of their assets remained ongoing. HTr. 241, 254-255; 2127, 2128. On November 1, 1990, Jimmy Britt applied for retirement with the USMS, and in doing so, signed a 'Statement Regarding Former Spouses,'

where he swore under oath that he had no living former spouse to whom a court order had given an annuity. HTr. 250-251, 259; GX 2125-2126. This was not true, however, as the proceedings regarding division of assets had not yet been settled, and Jimmy had been ordered by the Superior Court of Johnston County to include any retirement benefits in the calculation of that settlement. HTr. 255-257; GX 2130, 2132, 2133, 2134. In September of 1991, almost two years after having been ordered to provide the information regarding his retirement to the court for the equitable distribution proceedings, Jimmy Britt was ordered to show cause why he should not be held in contempt for failing to comply with the Court's order. HTr. 258; GX 2136.

On February 1, 1992, Jimmy Britt married Nancy Williams. HTr. 260; GX 2015. Nancy was also employed by the USMS in Raleigh. Her mother, Hazel Williams, owned a good deal of land in Chatham County, and in 1995, created a will in which she left much of this land to Nancy. GX 2024. Hazel Williams modified the will, however, in 1996, to hold Nancy's portion in trust until one of two conditions was satisfied: Nancy's death, or her divorce from Jimmy Britt. GX 2023. To address this inheritance problem, Jimmy and Nancy got divorced in 2000. GX 2016-2021. In order to accomplish this, Jimmy had to move to Las Vegas and take up residence at the Budget Suites there. GX 2016. He signed an affidavit swearing that he and Nancy were no longer compatible, would no longer live together, and that there was no chance of reconciliation. GX 2017. This sworn statement under oath, like the one he made in 1990, was untrue. Jimmy and Nancy continued to reside together until Jimmy passed away in 2008, and he included her as his "non-filing wife" on his 2005 bankruptcy petition. HTr. 260; GX 2123.

During their marriage, Nancy was employed at the USMS, and her duties included sending arrest warrant records to the Records Center. In 2002, the USMS changed the number of years that records were to be maintained (the retention period) from 50 to 25. GX 2039-2042. As

Nancy was the agency liaison who transferred the records to the Federal Records Center, she was aware of this change as of April 2002. Id. As it relates to the MacDonald case, this means that all records from the USMS in Raleigh regarding the transport and housing of Helena Stoeckley, including who had transported her, were destroyed in 2004. Jimmy Britt created his first affidavit regarding allegations in the MacDonald case in February of 2005. GX 2085-2089.

2. The Britt affidavits

Between February 23, 2005, and February 28, 2006, Britt created five different sworn statements containing allegations regarding Helena Stoeckley and her involvement in the MacDonald trial. GX 2085-2089. The affidavits are internally inconsistent with one another on their face. In his February 23, 2005, "Statement of Facts[16]," notarized by former Deputy US Marshal Lee Tart, Britt claims that there were certain "irregularities" during the MacDonald trial that he wanted to bring to light. HTr. 165-166; GX 2085. Britt alleged that the individuals involved in the "irregularities" were Judge Dupree, Rich Leonard[17], John Edwards[18], and Jim Blackburn. Id. He noted that he had an appointment with Wade Smith, counsel for MacDonald, the next day, February 24, and that he would provide details at that time. Id.

Britt did, in fact, go to Wade Smith's office the next day and give a sworn statement. HTr. 166. Present for the statement were Wade Smith, Attorney Timothy Junkin, and Lee Tart. In this "Interview Under Oath," Britt told Smith that he had kept silent until now out of respect for

[16] This first sworn statement was not included in the filing of the 2255 motion in this case, and the Government did not become aware of it until August 22, 2012, at a pre-hearing meeting with Lee Tart. Subsequent to that meeting the Government requested again, and were provided, the additional affidavits and statements of Jimmy Britt by the defense on August 24, 2012.

[17] J. Rich Leonard served as a law clerk to Judge Dupree from September of 1976 through August of 1978. HTr. 583. After a short time in private practice, he became the Clerk of Court for the Eastern District of North Carolina on July 6, 1979. Id. at 583-584. While Clerk of Court, he also served as a part-time magistrate judge. He was appointed a U.S. Bankruptcy Judge in 1981. HTr. 584. Jerry Leonard (no relation to J. Rich Leonard) served as law clerk to Judge Dupree from January of 1971 to January of 1972. HTr. 1107. He practices law in Raleigh, North Carolina. Id.

[18] John Edwards was a law clerk for Judge Dupree from 1977 to August of 1978. HTr. 586. He left his two-year clerkship one year early to take a job in private practice in Nashville, TN, and thus he was not clerking during the MacDonald trial. Id. He later returned to North Carolina to practice law and was elected to the U.S. Senate in 1998.

Judge Dupree, now Judge Rich Leonard, and then Senator John Edwards. HTr. 169; GX 2086. Britt said that he was asked to travel to the United States Marshals Office in Charleston, South Carolina, to pick up Helena Stoeckley. HTr. 172; GX 2086 at 11-12. He stated that when he arrived to pick her up, her boyfriend Ernest was with her and she was wearing the floppy hat that was described at trial. HTr. 173; GX 2086 at 13. According to Britt, he took Geraldine Holden with him to pick up Stoeckley, and Stoeckley's boyfriend Ernest rode with them back to Raleigh. Id. During the ride, Britt stated that Stoeckley told him she was at Jeffrey MacDonald's home and that a hobby horse was in the living room. HTr. 175; GX 2086 at 14-15. He continued that when they got to Raleigh he checked her in at the Holiday Inn, and then came back there the next morning to pick her up for court. HTr. 176; GX 2086 at 16. When they got to the courthouse, he said he escorted Stoeckley first to the defense interview, and then to Jim Blackburn's office who, according to Britt, was the United States Attorney at the time. HTr. 177; GX 2086 at 17. At that time, Britt stated that Blackburn asked him to stay for the interview, and that no one was present other than Blackburn, Stoeckley and Britt. HTr. 178; GX 2986 at 18. According to Britt, Stoeckley then proceeded to tell Blackburn that she had been inside the MacDonald house and had seen the hobby horse; it was at that time that Britt claimed Blackburn threatened to indict Stoeckley with murder if she testified that way in front of the jury. HTr. 179; GX 2086 at 19-21. When the interview was over, Britt claimed he immediately took Stoeckley down to the courtroom, at which time he saw Blackburn going into Judge Dupree's chambers, and then the two of them coming back into the courtroom approximately ten to fifteen minutes later[19]. HTr. 180; GX 2086 at 22-23.

[19] It is incontrovertible that Helena Stoeckley was never in Charleston, and Jimmy Britt was not the person who picked her up and transported her to Raleigh. Also, she was housed in the Wake County Jail prior to her testimony, and not the Holiday Inn. See supra at 4.

The next affidavit was signed on October 26, 2005, and notarized by a woman working for Wade Smith. HTr. 187; GX 2087. In this affidavit, Britt stated that he did not come forward earlier out of respect to Judge Dupree, but he omitted reference to Rich Leonard and John Edwards on this occasion. HTr. 187-188; GX 2087 at ¶ 10. The location from which he had retrieved Helena Stoeckley had also changed; in this affidavit, Britt claimed to have picked her up at the County Jail in Greenville, South Carolina, and there is no mention of the floppy hat[20]. HTr. 188; GX 2087 at ¶ 11. Britt still maintained in this affidavit that Geraldine Holden accompanied him, noting that Holden was, by the time of the affidavit, deceased so that no one could corroborate this account with her. HTr. 190; GX 2087 at ¶13. In this version of events, however, Britt left out the presence of Ernest Davis, and where he took Stoeckley upon their return to Raleigh. Id. In paragraph 15, however, Britt reverted to Charleston as Stoeckley's place of origin, rather than Greenville, as mentioned in paragraph 11 of this same affidavit. GX 2087 at ¶ 15. Facts had changed with respect to the interview of Stoeckley by the Government, as well. Britt now stated that he had been asked by the US Attorney's Office to be present for many interviews in the course of his career, and that it is possible that the US Attorney at the time, George Anderson, and Brian Murtagh may have both been present, but may have left at some point. HTr. 193; GX 2087 at ¶¶ 20, 26. He also now recalled Stoeckley asking the prosecution for a sandwich at this time.[21] Id. The method by which Stoeckley had gotten from the U.S. Attorney's office on the eighth floor to the courtroom on the seventh floor had also now changed; Britt stated in paragraph 27 that he took her down the stairs, whereas, in his 'Interview Under Oath' he stated that they used the elevator. GX 2086 at 22, GX 2087 at ¶ 27. Finally, in

[20] There is a reference to Greenville, South Carolina, present in the trial transcript, which may account for this alteration in Britt's affidavit. TTr. 5257-5259.

[21] Stoeckley's request for a sandwich actually came during the defense interview, which was conducted from approximately 10:00 a.m. until 2:00 p.m. that day. See supra at 5.

this October affidavit, Britt stressed the supposedly unethical conduct of Judge Dupree in accepting cakes baked by the jurors in the MacDonald case[22]. HTr. 194-195; GX 2087 at ¶ 28.

Britt's affidavit created on November 3, 2005, was the affidavit filed with his January 17, 2006, petition for relief pursuant to 28 U.S.C. § 2255. DE-111; GX 2088. No other affidavits or statements were mentioned or disclosed at that time. This affidavit was in substantially the same format as the October 26th affidavit, but a few key facts had changed. This version of events consistently cited Greenville, South Carolina, as the location from which Helena Stoeckley was retrieved. HTr. 196-197; GX 2088 at ¶¶ 11, 15. Additionally, any reference to the cake incident had been removed from the new affidavit. HTr. 196-198. Britt asserted that "Ms. Stoeckley told Mr. Blackburn the same things [regarding her presence at the MacDonald murders] she had stated to me on the trip from Greenville to Raleigh." GX 2088 at ¶ 22.

The last of Britt's averments came in the form of an "Addendum to Affidavit," which Britt completed on February 28, 2006. GX 2089. This one was notarized by Laura Redd, assistant to one of MacDonald's attorneys, Hart Miles. HTr. 199; GX 2089 at 2. The addendum contained many facts not present in any of the earlier affidavits and statements. Britt now claimed that he and Geraldine Holden had transported Helena Stoeckley to the courthouse on August 15 (sic), 1979 for her interviews with the parties. HTr. 200; GX 2089. The addendum also rearranged the facts of the prosecution interview, now stating that it started at noon, that George Anderson and Brian Murtagh were definitely present for the entire interview, and that Blackburn threatened to indict her as an "accessory to murder." Id. at 202. Britt averred that after Stoeckley testified on

[22] During her testimony at the hearing, Jimmy Britt's ex-wife Mary noted that these cakes were a source of major distress for him. HTr. 246-247.

Friday, August 17, 1979, he took her and checked her in to the Journey's End Motel.[23] HTr. 204; GX 2089. He further stated that Chief Deputy Eddie Sigmon contacted him on Sunday August 19, and told him that someone from the hotel had called Judge Dupree and said that Helena and her boyfriend had to leave because they were fighting, and asked him to check her out of the Journey's End and into the Holiday Inn.[24] HTr. 204-205; GX 2089. The addendum stated that on Monday August 20, 1979, Judge Dupree announced that he would not allow Helena Stoeckley to testify again because her brain was "scrambled like an egg," and that he directed the jurors not to consider any of her Friday testimony.[25] HTr. 205-206; GX 2089. Finally, Britt averred that he was asked by U.S. Marshal Hugh Salter to go to see USMS employee Maddie Reddick and get a check for Stoeckley's subsistence during the trial, take it to her, and put her on a bus back to Charleston, South Carolina, which he did on August 20, 1979.[26] HTr. 206-207; GX 2089.

In 2005, Wade Smith decided that he needed to obtain a waiver from Jim Blackburn so that he could further represent MacDonald with regard to the Britt allegations. HTr. 642; GX 2013. This is because Smith had assisted Blackburn in a legal matter in the years following the trial. Id. Smith provided this waiver to Blackburn via an email exchange in late September of 2005. At that time, Blackburn signed the waiver indicating that Smith could further represent MacDonald, but made very clear that by allowing him to do so he was, in no way, agreeing with the suggestion that he ever said anything improper to Helena Stoeckley. HTr. 643-647; GX 2013

[23] Stoeckley actually checked in that night to the Downtowner, and was moved by the defense team to the Journey's End the next day because the defense team was moving into the Downtowner that Saturday. HTr. 204; See supra p. 11.

[24] Eddie Sigmon never asked Jimmy Britt to go to Helena's aid at any time that weekend, and, in fact, the Marshals Service would not have been involved at all with a witness who was not in Government custody. HTr. 557. Jimmy Britt never went to Helena Stoeckley's hotel, and it was members of the defense team – Wendy Rouder and Red Underhill – who moved Helena to the Hilton on Sunday August 19th. See supra at 13-15.

[25] Judge Dupree never made any such ruling, and Stoeckley was held under subpoena until almost a week later in case any party wanted to recall her as a witness. See supra at 15-16, 18.

[26] See also HTr. 557-559, 573-575; see supra at 18.

at 3. The day after Blackburn signed the waiver, Smith called him and told him he could come by his office and read the affidavit that the defense was going to file. HTr. 645. Blackburn didn't even finish reading the affidavit before he confronted Smith with the falsity of the allegations and asked him how he could file such a thing. Id. at 646. Blackburn reminded Smith of Bernie Segal's blatant misrepresentations to Judge Dupree at trial and asked him how he could just stand by. Several hours after that conversation, Smith called Blackburn and told him he was going to withdraw from the case. Id. Blackburn later consented to one of Smith's law partners, Hill Allen, representing MacDonald. GX 2013 at 5.

D. FBI interview of Jerry Leonard

On March 22, 2006, after the filing of the § 2255 motion based on the Britt affidavit, the FBI interviewed Jerry Leonard, Helena Stoeckley's attorney during the trial. HTr. 1126; GX 6076. Leonard told the FBI that while Helena had gotten into a fight with her boyfriend and had reported to Judge Dupree that she had been harassed by Bernie Segal, she, at no time, informed him of any threats made to her by any member of the prosecution team. Id. Additionally, Leonard knew Jimmy Britt, and told the FBI that he never came to Leonard to report any threats made to his client, nor was it his understanding that Britt sat in on Helena Stoeckley's interview. HTr. 1126-1128; GX 6076 at 2. Leonard conveyed that he was a former law clerk to Judge Dupree and had a relationship with him such that if anything had been amiss during trial he could have reported it to him. Id.

E. Affidavit of the elder Helena Stoeckley

In early 2007, Eugene Stoeckley allegedly had a conversation with his mother, the elder Helena Stoeckley, about his sister's involvement in the MacDonald murders. HTr. 284-285. At this time, the elder Mrs. Stoeckley was in an assisted living facility and suffering from macular

degeneration, in need of oxygen therapy, and had ongoing heart problems. HTr. 302. According to Gene Stoeckley, it was then that his mother told him his sister had confided in her (during Helena's last visit home in the fall of 1982) that she was present at the scene of the MacDonald murders.[27] Instead of calling the FBI or any other law enforcement official with this information, Gene Stoeckley contacted Kathryn MacDonald, the defendant's current wife, via the Jeffrey MacDonald website. HTr. 306. The two exchanged phone numbers and Gene called Kathryn during his lunch break on Friday, March 30, 2007. Id. at 307. Kathryn drove from Maryland down to North Carolina that same day, and on Saturday, March 31, 2007, Gene and Kathryn spent several hours over lunch discussing the case. Id. at 308. In the late afternoon, they got in the car together and drove to Fayetteville so that Kathryn could speak to Mrs. Stoeckley. Id. at 309. While they were en route to the assisted living facility, Gene's wife called his brother Clarence to tell him what was going on. Id. Clarence was not supportive of this undertaking and encountered Gene and Kathryn at the assisted living facility and protested their being there. Id. at 310. Gene and Kathryn persisted, however, and went in to speak with Mrs. Stoeckley. Kathryn requested that a statement be prepared, and called attorney Hart Miles in Raleigh, who drove down immediately with his paralegal, Laura Redd. Id. at 311. While waiting on Mr. Miles and his paralegal, Kathryn MacDonald typed a draft of Mrs. Stoeckley's affidavit on the assisted living facility's computer. HTr. 312-313. Once Mr. Miles and Laura Redd arrived, Redd and Kathryn MacDonald took turns typing on the computer in the facility's office until an affidavit was completed. HTr. 413-414. The affidavit was a total of 3 pages; the first two pages were typed in numbered paragraphs, 1 to 15. DX 5051. Neither of the first two pages was initialed by the elder Mrs. Stoeckley, nor were they numbered. The third page was a

[27] This encounter between Helena and her mother occurred mere months before Mrs. Stoeckley's interview with the FBI in which Mrs. Stoeckley was adamant that Helena was not involved in the murders. See supra at 19-20.

signature page with the word "Untitled" centered at the top of the page, and "Page 1" centered at the bottom of the page. Id. There are no staple holes on the pages of the affidavit. HTr. 698, 700. Gene allegedly read the affidavit to his mother and then allowed her to make corrections. HTr. 315. According to Gene, "[s]he had the pen in her hand and I just placed her hand in the general area of the document where the line is."[28] HTr. 320. The affidavit was signed by the elder Helena Stoeckley, Gene Stoeckley, and Grady Peterson, and notarized by Laura Redd. DX 5051. Mrs. Stoeckley's signature was not on the signature line, rather, it was above and to the right, signed at an angle.

Gene and Kathryn had arrived at the nursing home between three and four in the afternoon, and Hart Miles and Laura Redd arrived around six or six-thirty in the evening. HTr. 320, 411. The time period from that the call to Hart Miles (after Gene and Kathryn had separately interviewed Mrs. Stoeckley) until the time the affidavit was completed was about six or seven hours, making the time of completion somewhere between nine and ten o'clock. HTr. 416.

On May 6, 2007, the defense filed a Motion to Supplement Applicant's Statement of Itemized Material Evidence, attaching Mrs. Stoeckley's affidavit (DE-144-1) in support of their previously filed 2255 motion. DE-111. Upon becoming aware of this new affidavit by the elder Helena Stoeckley, the FBI requested a second interview with her. HTr. 328. Gene Stoeckley requested to be present during this interview. HTr. 329. During an interview on April 25, 2007, Mrs. Stoeckley told Special Agent Jim Cheroke that Helena loved children and old people, and that she believed Helena would do whatever Prince Beasley told her to do. HTr. 329. Mrs. Stoeckley told Agent Cheroke that she had never made up her mind about MacDonald's guilt.

[28] At the time of the affidavit, Gene Stoeckley was the one responsible for the care of his mother and often got her to sign documents that he needed. HTr. 319-320.

HTr. 331. At that time, Gene Stoeckley told Agent Cheroke that this interview was going quite differently than the earlier interview with Kathryn MacDonald and Hart Miles. Id. at 332

F. Other events prior to evidentiary hearing

On May 21, 2007, Jerry Leonard wrote a letter to the Court regarding potential attorney-client privilege issues with respect to Helena Stoeckley.[29] HTr. 1215-1217; GX 7017. The impetus for this letter was an ethics inquiry made by Hart Miles to the North Carolina State Bar. GX 7015. This was the first time in the nearly 28 years since trial that any question had arisen as to Stoeckley's confidential communications being relevant to this case. HTr. 1221.

Jimmy Britt died on October 28, 2008. DE-149-2. On November 4, 2008, the Court issued a detailed Order denying defendant's motion to add an additional predicate and motion to supplement the statement of itemized evidence for failure to apply for, and receive, a pre-filing authorization from the Fourth Circuit. DE-150 at 19. The Court also denied MacDonald's Motion to Expand the Record (DE-126), leaving only the original 2255 motion or 'Britt claim' for the Court's gatekeeping consideration. DE-150 at 21-22. With regard to the Britt claim, the court held that "MacDonald has not demonstrated that the Britt affidavit, taken as true and accurate on its face and viewed in light of the evidence as a whole, could establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found MacDonald guilty of the murder of his wife and daughters." DE-150 at 46.

On April 19, 2011, the Fourth Circuit reversed and remanded the case for further proceedings. See infra at 165-166, 180-181, 190-191. Subsequently, the defense filed a Request for Hearing as to both the Britt and DNA claims on September 20, 2011. DE-175. The Government concurred with the request for hearing as to the Britt claim, but requested that the Court hold the issue of hearing on the DNA claim in abeyance until the Government responded

[29] The Government was not provided with a copy of this letter and did not learn of its existence until April 2012.

to the new defense motions. DE-229. A hearing as to the Britt claim was ordered for October 31, 2011. DE-180. On September 30, 2011, Hart Miles withdrew as MacDonald's attorney, and the defense moved to continue the hearing. DE-183, 184. After a series of attorney changes and requested delays by MacDonald, the hearing was rescheduled for September 17, 2012. DE-277.

As the parties were preparing for the September hearing, Errol Morris was at work on his book about the MacDonald case, entitled "A Wilderness of Error."[30] As a part of his research, he interviewed several of the witnesses who would later testify at the evidentiary hearing. Specifically, Morris spoke to Wade Smith, Wendy Rouder, Gene Stoeckley, Jerry Leonard, and Jim Blackburn. GX 7000-7005.

Also in anticipation of the hearing, the Government conducted an interview with Jerry Leonard on August 24, 2012. HTr. 1228. During the interview, the Government provided Leonard with a sealed letter in its possession that Leonard had mailed to Jim Blackburn. Id. Leonard opened the letter in the presence of Government attorneys, which turned out to be a handwritten poem that Helena Stoeckley had written and given to Jerry Leonard during trial on August 23, 1979. HTr. 1227; GX 6077. Leonard told the Government that he had the poem framed and put it on his office wall. Id. at 1228. It read:

> I'm a bad actor,
> in a hard-to-act-in play
> written by a lot of callous people
> who sit in the audience
> and laugh
> because I forget my lines
> when in the end
> I finally fall
> off the stage

[30] Much of Mr. Morris' book is factually inaccurate when compared to the trial transcript and the actual evidence in the case. Certain excerpts purport to be transcriptions of interviews of witnesses by Morris. The Government used some of these excerpts to cross-examine witnesses who testified at the evidentiary hearing. The statements were introduced by the Government only to assist the Court in evaluating the "likely credibility and probable reliability" of hearing witnesses' testimony.

they all cheer
and go out to
buy more popcorn!
H.W.S.
8-23-79

GX 6077. Also during that meeting, Leonard told the Government that he got the call to represent Stoeckley on Saturday night from Steve Coggins, not on Sunday night. HTr. 1139-1140. Leonard said that he did not recall ever talking to Wade Smith during the trial, and that during the trial he didn't feel like he needed to talk to anybody about anything related to the case. HTr. 1206-1207.

G. The evidentiary hearing

The evidentiary hearing regarding the Britt and DNA claims began on September 17, 2012. The defense, bearing the burden of proof, called its witnesses first.

1. The movant's case

a. Wade Smith

The first defense witness to testify was Wade Smith, one of Jeffrey MacDonald's attorneys at trial. Mr. Smith testified about the defense's theory of the case at trial, and about his meetings with Jimmy Britt when he first brought forth these allegations. Specifically, with regard to the Britt affidavits, Smith testified on direct that there were several pieces of information that differed from affidavit to affidavit, particularly the location from which Britt alleged that he retrieved Helena Stoeckley, and allegations of misconduct on the part of the Court for receiving a cake from jurors. HTr. 46-48, 50-52. Mr. Smith testified that Joe McGinnis was embedded as a part of the defense team during the MacDonald trial, and that he was present to record what went on from the defense perspective, in order to later write a book. HTr. 59. In discussing the process of locating Helena Stoeckley at trial, Smith testified that it was his impression that

Stoeckley had an initial appearance in South Carolina and that Judge Dupree had requested that she be given no bond and transported forthwith to North Carolina for trial. HTr. 69-70. Once Stoeckley arrived in Raleigh, Smith and Bernie Segal interviewed her, in the presence of Joe McGinnis. HTr. 77. Smith testified that, in the interview, Stoeckley made no indication that she was ever in the MacDonald house, and that Segal adjusted his interviewing tactics to try to obtain admissions from her, to no avail. HTr. 78-79. Smith testified that, even though Segal told her that the statute of limitations had run, Stoeckley still maintained that she could not help the defense. HTr. 84. He recalled that Segal went on to confront Helena with crime scene photographs and the "Stoeckley witnesses," who all claimed that Helena had made various inculpatory statements to them over the years, but that Helena still said that she was not involved in the murders. HTr. 87-89. Smith confirmed that MacDonald was a non-indigent defendant at trial and so the defense was responsible for paying witness fees for Helena Stoeckley once she was released from her material witness custody and placed under subpoena by the defense. HTr. 100. After the interview of Helena Stoeckley, Smith recalled a conversation with Jim Blackburn at the courthouse where he told Blackburn that Stoeckley had not said anything of note to the defense, and Blackburn confirmed the same for the prosecution. HTr. 102-103. In response to questioning about Bernie Segal's representations to Judge Dupree about what Helena Stoeckley had told the defense team, Smith said:

> "It was - - It was certainly - - let me just put it this way, I was absolutely devoted to this case and upheld my role as counsel and I'm still devoted to this case, but I did not hear Helena Stoeckley say useful things for us. It is certainly possible. And I mentioned while ago, maybe I was out of the room, I do not know the answer. But I can only speak for myself and that is that when I was present she did not say things that helped us."

HTr. 114. Smith went on to testify that Segal asked many questions of the Stoeckley witnesses in front of the jury that would lead the jury to believe that Helena had, in fact, made out of court

admissions to the witnesses. HTr. 148. Regarding his conversations with Jerry Leonard during trial, Smith clarified that, of the many "tantalizing" things that she had said to witnesses, none of them came from Jerry Leonard, but rather, from Wendy Rouder. HTr. 153. Smith recalled discussing his conversations with Jerry Leonard with Errol Morris in an interview for his book, and telling Morris that he would run into Jerry from time to time over the years and kid about whether Leonard had something helpful to tell him about this case, but that Leonard never made any disclosures to him about what Stoeckley might have told Leonard. HTr. 154.

Regarding the Britt affidavits, Smith testified that, before the evidentiary hearing, he had never seen Britt's first affidavit, dated February 23, 2005. HTr. 165-167; GX 2085. Smith could not specifically recall if Britt first brought forth these allegations to the defense team before or after January 17, 2005. HTr. 171. Smith relayed his efforts to contact Geraldine Holden, stating that he learned her health was very bad and never got a chance to talk to her. HTr. 171-172. With regard to his efforts to have Mr. Britt polygraphed, Smith testified that he was aware that the polygrapher, Steve Davenport, had suffered a stroke near the time of the Britt polygraph, did not have any records associated with the polygraph, and was now unavailable to answer questions as to whether he established a baseline for truthfulness before conducting the examination. HTr. 184-185.

b. Mary Britt

The second defense witness was Mary Britt, former wife of Jimmy Britt. She discussed how emotionally invested Britt was in the trial. HTr. 225, 252, 265. Mary Britt also said that Jimmy had told her the night before he went to get Stoeckley that he was going to South Carolina the next day to pick up a witness.[31] HTr. 242. She said that, while the trial was ongoing, Britt

[31] There was no direction from the Court to bring Stoeckley to Raleigh until the morning of August 15, 1979, when Segal requested she be brought "forthwith." TTr. 5256-57. This was the same day as the transport.

told her he went to Stoeckley's hotel room to get her and her boyfriend had "beaten her to a pulp." HTr. 245-246. He told her that the Judge said they could not use Stoeckley's testimony because her brain was fried from drugs. HTr. 225. Mary Britt testified that, to Jimmy, it was a big deal that Judge Dupree had accepted a cake from the jurors, and that he was very upset about it, but that she did not see what the big deal was. HTr. 247. Jimmy told her that he had spent time with MacDonald on Ft. Bragg, but stated he was only in the Army from 1957 to 1959.[32] HTr. 250-251. She relayed that Jimmy felt that MacDonald was a brilliant man who related well to people from all walks of life. HTr. 252. Britt stated that, at the end of the trial, Jimmy had refused to lock MacDonald up when Marshal Salter directed him to do so. HTr. 243. Mary Britt testified that Jimmy told her he had seen the movie version of *Fatal Vision* and that it was inaccurate. HTr. 234, 244. He told her that it showed him standing in the hallway, when he was actually in the room during the interview.[33] She further testified that Britt's allegations had a profound effect on her family, and that she had a really hard time understanding why he waited so long to come forward. HTr. 239. Of all the things that Jimmy told Mary about the trial, however, he never once mentioned to her that Jim Blackburn had threatened Helena Stoeckley. HTr. 248.

c. Gene Stoeckley

Next to testify was Gene Stoeckley, younger brother of Helena Stoeckley. Gene testified on direct that Helena's repeated statements regarding the MacDonald case had put a tremendous strain on the family, saying "[i]t came to a head at one point. I don't know if she was living in South Carolina at the time, but I just remember there at the house in Fayetteville that it just sort

[32] MacDonald didn't enter the army until 1969.

[33] The scene depicting the interview in *Fatal Vision* is actually the scene of the defense interview, because author Joe McGinniss was not present for the Government interview and therefore did not write about it. HTr. 1016-1017. According to Smith and McGinniss, Britt was not present for the defense interview. HTr. 76, 970.

of came to a boil and I just told her, you know, that I was fed up with what we had gone through because of her nonsense and we just had a heated argument." HTr. 270-271. He also stated that, in the fall of 1982, when Helena came home to visit with her son David, that she had gained some weight but didn't appear to be overly sickly. HTr. 275, 303. He talked about his mother's health problems, including macular degeneration, emphysema, heart problems, and being in and out of the hospital. HTr. 277-282, 302. He relayed the details surrounding his contacting Kathryn MacDonald, and their subsequent visit to his mother in the nursing home to obtain an affidavit from her. See supra at 27-30. On cross-examination, Gene Stoeckley told the Court that on the day of the MacDonald murders, his eleventh birthday, Helena came to the house and had cake and ice cream, and did not appear to be on drugs at all. HTr. 301. He admitted that nothing that Helena had told his mother was any different than what his sister had been telling people for years, including in an interview given to *60 Minutes* on May 22, 1982. HTr. 305.

On cross-examination, Gene Stoeckley could not remember having told Agent Cheroke that while Hart Miles was driving down, Kathryn MacDonald was busy drafting the affidavit on the nursing home's computer. HTr. 312-313. In any event, he admitted that within twenty minutes of Hart Miles' arrival at the nursing home, there was a draft affidavit to be reviewed. HTr. 314-315. When it came time to sign the affidavit, he "placed the pen in her hand and … just placed her hand in the general area of the document where the line is." HTr. 320. Having his mother's power of attorney, he had gotten her to sign things before. HTr. 319. When questioned about paragraph 14 of the affidavit, in which Mrs. Stoeckley purportedly states that she does not believe MacDonald should be in prison, Gene could not recall that he told Agent Cheroke on April 21, 2007, that he didn't recall his mother saying that. HTr. 325. He was able to recall, however, that his mother had told him that Prince Beasley had an undue amount of influence

over Helena. HTr. 328. He recalled the FBI interview of his mother after the completion of the affidavit, where she told Agent Cheroke that Helena loved kids and old people, and could not have hurt them. HTr. 329 - 330. He could not recall that his mother told Agent Cheroke that Helena never told her she was afraid of the prosecutor, but he did recall telling Agent Cheroke that the interview was going much differently than the one with Hart Miles and Kathryn MacDonald. HTr. 332. Gene Stoeckley testified that he was unaware of the interview that his mother had given to the FBI in 1984. HTr. 336-341.

d. Wendy Rouder

The next defense witness to testify was Wendy Rouder. She was a member of the defense team during the trial. HTr. 345. Rouder testified that she received a phone call indicating that Helena Stoeckley would need to be moved from her current hotel to another hotel during the trial. HTr. 346. Rouder said that she went to the Journey's End Motel with Red Underhill, picked up Stoeckley, and moved her to the Hilton. HTr. 348-349; See supra at 13-15. During this time, Stoeckley allegedly made statements to Rouder implicating herself in the MacDonald murders. Id. Rouder testified about an affidavit created in 2005 in response to Kathryn MacDonald informing her of the Britt Allegations. HTr. 351-357. She admitted that the affidavit was somewhat different from her voir dire testimony at trial. HTr. 357. On voir dire, she had testified that Helena told her she couldn't tell the truth because of "those damn prosecutors sitting there," but in her affidavit, she added "they'll fry me" or "burn me" or "hang me," stating that she didn't remember those additional words until Kathryn MacDonald contacted her. HTr. 357. She admitted that she made notes about her conversation with Helena, and used them to testify on voir dire at trial, but that the phrases "fry me," "burn me," and "hang me," did not appear in her voir dire testimony, even though Segal would likely have asked her

about them had they been in her notes. HTr. 376, 388. Rouder testified that she did not prepare the affidavit herself, rather, Kathryn MacDonald prepared it and faxed or mailed it to her. HTr. 366. She testified that the only thing on the last page of her affidavit, DX 5080, is her signature line and the notary seal, and that she did not make any amendments to the affidavit once she received it, she just signed it as is. HTr. 367. She could not say that she was certain that the contents of the affidavit, as they appear on DX 5080, are like they were when she signed it. HTr. 368. Additionally, Rouder admitted that her memory was likely better when she testified on voir dire the day after the alleged events occurred than it was when she signed the affidavit in 2005. HTr. 368-369.

e. Laura Redd

Laura Redd, the paralegal for Hart Miles who notarized Mrs. Stoeckley's affidavit, testified next. She recalled leaving Raleigh to drive to Fayetteville around two or three o'clock in the afternoon on the day of the interview. HTr. 401. Redd testified that when she arrived, it was a joint effort between her and Kathryn MacDonald to get the affidavit typed. HTr. 403-404. On cross-examination, Redd admitted that the first two pages of the affidavit were prepared on one computer and the signature page on another. HTr. 414. She testified that from the time that she got involved until the affidavit was completed was six or seven hours. HTr. 416.

f. Sara McMann

The next defense witness was Sara McMann. Mrs. McMann and her husband allowed Helena Stoeckley to live with them for a time just after Helena's son was born. HTr. 420-421. At some point, Mrs. McMann realized that she was Helena Stoeckley from the MacDonald case that had been in the newspapers. HTr. 422. During direct, McMann was adamant that she and Helena both knew MacDonald was not guilty and that McMann wanted to see him freed. HTr.

424. McMann testified Helena and three men went to "rough MacDonald up" and told her that she could become a wizard in an occult group if she went with them. HTr. 435-436. On cross-examination, McMann admitted to writing to the defendant and telling him that she knew he was innocent prior to her testimony at the hearing. HTr. 439. She testified that she was in court to do her part to help him. HTr. 440

2. Bench conference regarding Jerry Leonard

Next, the defense called Jerry Leonard to the stand. HTr. 443. A bench conference was held at which Mr. Widenhouse informed the Court that his understanding was that Mr. Leonard would assert the attorney-client privilege. HTr. 444. A discussion ensued about the relevant case law and the Government requested that, in light of the First Amendment, that the conversation regarding the law of attorney-client privilege be held in open court. HTr. 447, 452, 461. Additionally, the Government made clear that it did not have any opposition to the privilege being lifted and Mr. Leonard being allowed to testify regarding his conversations with Helena Stoeckley. HTr. 448, ln. 18-19. The hearing was recessed for the evening so that the Court could have an opportunity to read the relevant case law. HTr. 462. The next morning, the Court, having reviewed Swidler & Berlin v. United States, 524 U.S. 399 (1998), ruled that the privilege survived Helena Stoeckley's death. HTr. 467.

3. The Government's case

a. Frank Mills

Frank Mills, a retired Special Agent for the FBI, testified that he was assigned to the Greenville, SC, office at the time of the MacDonald trial in 1979. HTr. 470. He received a phone call from the U.S. Attorney's Office in Raleigh and a teletype from the FBI Office on August 13, 1979, informing him of the bench warrant for Helena Stoeckley. HTr. 471; GX

2001. On August 14, 1979, SA Mills and SA Tom Donohue located Helena Stoeckley at a trailer in Oconee County, South Carolina and transported her to the Pickens County Jail. HTr. 475-476. They did not take her to Greenville to be housed because, at the time, Greenville was not a federally approved facility for prisoners. HTr. 479-480. Mills testified that he interviewed Stoeckley on the way to Pickens, and that she told him she had been a heavy drug user for a long time and that she was using drugs on the night of the MacDonald murders. HTr. 481; GX 2002. She couldn't remember anything about that night, and could not figure out how any band of hippies could have gotten through the officers barracks unnoticed. HTr. 491-493; GX 2002. She told Mills that she was interviewed by Prince Beasley and Dick Mahon and told them both that she didn't have any recollection of where she was or what she was doing. Id. Mills testified that Stoeckley told him she had dreams about candles and the words "acid is groovy, kill the pigs," but that she said that it could very well be based on information she had read about the murders in the newspapers. Id. There was no Deputy U.S. Marshal with them at any point. HTr. 482-483. Mills said that he relayed news of Stoeckley's arrest via return teletype, and via a phone call to the U.S. Attorney's Office on August 15, 1979. HTr. 483; GX 2003. Mills and Donohue booked Stoeckley into the Pickens County Jail, where she was held overnight. HTr. 484-487; GX 2006, 2007, 2064. Mills testified that Stoeckley was picked up the next day by Vernoy Kennedy, a tall black man he knew to be a Deputy U.S. Marshal. HTr. 488; GX 2066.

Mills further testified that he had another occasion to interview Helena Stoeckley on September 10, 1981, along with Special Agent Butch Madden. HTr. 496. At that time, he spoke with her about interviews she had given to Prince Beasley and Ted Gunderson. Id. Stoeckley told Mills and Madden that she was not happy with Gunderson and Beasley because they were harassing her. HTr. 497.

Finally, Mills testified about the investigation into Helena Stoeckley's death in 1983. HTr. 498. He contacted a detective in Seneca, South Carolina, who told him that Helena had died in early January of 1983 and that she had been in her apartment, dead, for five days before anyone found her. HTr. 500. When her body was located, her infant son was also found, alive, underneath his crib. Id. The cause of death was pneumonia with cirrhosis as a contributing factor. Id.

b. Sworn statement of Vernoy Kennedy

After Mills' testimony, the Government read into the record portions of the sworn statement of DUSM Vernoy Kennedy, who transported Helena Stoeckley from the Pickens County Jail to the meeting spot in Charlotte, North Carolina. HTr. 508; GX 2010.[34] During his testimony, DUSM Kennedy identified his signature on Helena Stoeckley's USMS release form from Pickens County Jail on August 15, 1979. HTr. 511-512; GX 2010. He stated that he, along with a female guard, transported Stoeckley to the intersection of Interstate 85 and Interstate 77 in Charlotte, North Carolina, where he met a DUSM from the Eastern District of North Carolina and made the prisoner transfer. Id. DUSM Kennedy did not interview Helena Stoeckley, nor did she make any statements to him about the MacDonald case. HTr. 513-514; GX 2010.

c. Dennis Meehan

Next, the Government called Dennis Meehan, the former Deputy U.S. Marshal who took custody of Helena Stoeckley from DUSM Kennedy's custody in Charlotte. HTr. 519. Meehan testified that on August 15, 1979, he and his then wife, Janice, were asked by Chief Deputy Sigmon to pick Helena Stoeckley up in Charlotte and transfer her to the Wake County Jail in Raleigh. Id. Because he was transporting a female inmate, he had to take a matron along. HTr.

[34] The defense raised an objection based on the Confrontation Clause, which was overruled in light of the Fourth Circuit's mandate to consider the "evidence as a whole." HTr. 508-509. Kennedy died on June 11, 2007.

520-521. While Meehan could not remember the DUSM's name from whom he received Helena Stoeckley, he remembered that he was a tall black male. HTr. 522.

They took Stoeckley into the Wake County Jail in Raleigh via Salisbury Street and drove into the underground parking area. HTr. 523. When they pulled in it was early evening, and there was a white male waiting for them who tried to approach their car. HTr. 524. The media were also waiting for them. HTr. 525. Meehan recalled seeing footage of himself and his wife booking Helena Stoeckley that night on the local news. HTr. 525. There were no other DUSMs involved in the transport and booking of Helena Stoeckley on August 15, 1979. HTr. 526. Meehan recalled that the next morning, August 16, 1979, Jimmy Britt and Geraldine Holden transported Helena Stoeckley from the Wake County Jail to the Federal Building. Id. Meehan testified that it was roughly six blocks from the Wake County Jail to the Federal Building. HTr. 527. He confirmed that the picture of Helena Stoeckley, Ernest Davis, and Jimmy Britt that was published in the Raleigh News & Observer on August 17, 1979, depicted them exiting the Federal Building on August 16, 1979, because Stoeckley was never at the Federal Building on August 15. HTr. 528-531; GX 2074. Meehan testified that, in all his years as a DUSM, he had never been asked to sit in on a witness interview by an Assistant U.S. Attorney. HTr. 532.

d. Janice Meehan

Janice Meehan, DUSM Meehan's former wife, also testified. She recalled riding with her husband to pick up Helena Stoeckley and that they picked her up from another DUSM in a parking lot that was two to three hours from Raleigh. HTr. 537-538. Janice Meehan testified that Stoeckley did not make any statements related to the MacDonald trial during transport. HTr. 539. She testified that the Meehans took Stoeckley directly to the Wake County Jail, where a

white man with dark hair, and members of the media were waiting for them. Id. Meehan recalled later seeing herself on the local news. HTr. 540.

e. Eddie Sigmon

Next, Eddie Sigmon, former Chief Deputy United States Marshal for the Eastern District of North Carolina, testified. HTr. 543. Sigmon was the longest serving Chief Deputy in the history of the US Marshal Service. HTr. 544. He testified that he would have sent a DUSM with a wife available to act as matron to pick up Helena Stoeckley before sending one of his clerical staff, like Geraldine Holden, because he needed them in the office. HTr. 548. Sigmon stated that if one of his Deputies overheard a confession during their transport of a prisoner it would have been their duty to report it to him, and that Jimmy Britt did no such thing with respect to Helena Stoeckley. HTr. 549. As an employee, Sigmon characterized Jimmy Britt as an "attention seeker." HTr. 550.

Sigmon testified that once a material witness is released from custody, the Marshals do not have any more involvement with their transportation or housing, and further that he did not call Jimmy Britt on August 19, 1979 and tell him to go get Helena Stoeckley from the Journey's End Motel. HTr. 557. Additionally, he stated that Marshal Salter would not have asked Jimmy Britt to take a subsistence check to Helena Stoeckley because that, too, would not be the responsibility of the USMS. HTr. 559.

f. William Berryhill

Bill Berryhill, former United States Marshal for the Eastern District of North Carolina, testified next. HTr. 562. In that capacity, he supervised Jimmy Britt, and during that time found him to be "rather large in ego and rather small when it came to veracity." HTr. 564.

g. Maddie Reddick

Next, Maddie Reddick testified for the Government. Ms. Reddick was the supervisory administrative assistant at the U.S. Marshal's Office in Raleigh for almost thirty years. HTr. 571-572. At the time of the MacDonald trial she was the disbursing officer, in charge of salaries for federal employees, as well as witnesses and jurors. HTr. 572. Reddick testified that she did not remember writing Britt a subsistence check for Stoeckley, and for her to have done so would have been highly unusual because she would have had to have a discharge form from the US Attorney's Office first. HTr. 573. Reddick testified that material witnesses did not receive subsistence, because that fee would have been paid to the jail for housing and feeding the witness. HTr. 574. In addition, she would only have been responsible for issuing checks to a defense witness if the defendant was indigent. HTr. 575. Finally, Reddick testified that sometime around 2004 she received a call from Jimmy Britt, inquiring if she knew where Geraldine Holden was living. HTr. 577.

h. Judge J. Rich Leonard

J. Rich Leonard, United States Bankruptcy Judge for the Eastern District of North Carolina, testified next. He told the Court that he was a law clerk for Judge Dupree from 1976 to 1978. HTr. 586. During the second year of his clerkship, his co-clerk was John Edwards. Id. Edwards' clerkship ended at the same time as Leonard's. HTr. 586. During the MacDonald trial, Steve Coggins and William Pappas were Judge Dupree's law clerks. HTr. 587. During the MacDonald trial, Judge Leonard had just taken a position as the Clerk of Court. HTr. 584. Judge Leonard testified that during a recess, the courtroom would have been locked to maintain chain of custody on the large number of exhibits in the MacDonald trial. HTr. 589. He relayed that Judge Dupree had a strict aversion to ex parte communication. HTr. 591.

i. Jim Blackburn

Next, Jim Blackburn testified. He described the set-up of the room for the Stoeckley interview, and that he, Brian Murtagh, George Anderson and Jack Crawley were present. HTr. 607-608. When the interview began, Blackburn asked Helena "words to the effect, Helena, are you involved in this case? Were you there? Did you participate in these murders?" and she told him very clearly in response that she was not there. HTr. 610. He testified that Helena asked him if he had any evidence that she was there, and that he told her that he did not, with the exception of some of the things she had said over the years. Id. Blackburn never threatened Helena Stoeckley. HTr. 611. Blackburn testified that the interview lasted about an hour and that when it was done, he bumped into Wade Smith and discussed the two interviews with him. HTr. 612. Blackburn told Smith that Helena had told the prosecution she was not present and didn't participate in the murders. Id. He recalled that, the next morning in court, he brought up the idea of getting an attorney for Helena Stoeckley, but that the defense wanted to proceed without one. HTr. 614. Blackburn noted that, during his time as an Assistant United States Attorney, he had never asked a DUSM to sit in in a witness interview; that Jimmy Britt was not in the prosecution interview of Helena Stoeckley; and that Jimmy Britt never approached him with any concerns about the MacDonald trial. HTr. 640-641.

j. Ruling on attorney-client privilege

After Blackburn testified, the Government asked the Court to reconsider the matter of waiver of attorney-client privilege with regards to Jerry Leonard's testimony, in light of footnote three in the Swidler & Berlin case regarding exceptional circumstances. HTr. 706-707; 524 U.S. 399, 409 n. 3 (1998). The Government requested that Mr. Leonard give an in camera proffer of his testimony to inform the Court's decision. The Court decided that the proper procedure at that

point would be for Mr. Leonard to prepare an affidavit, which it would review in camera and then make a determination about the privilege. HTr. 708-709.

k. Jack Crawley

Jack Crawley testified next for the Government. During the MacDonald trial, AUSA Crawley served as an advisor on trial procedure and evidence, due to his prior trial experience. HTr. 714. Crawley testified that he was present for the interview with Helena Stoeckley, along with Brian Murtagh, Jim Blackburn and George Anderson. HTr. 721. Crawley stated that no DUSM, and particularly not Jimmy Britt, was present during the interview. Id. He testified that Helena Stoeckley told the prosecution that she was not involved in the MacDonald murders, and that if she had confessed he would have had a duty pursuant to the Brady decision to report it to the defense. HTr. 722-723.

l. Bill Ivory

The next witness was William "Bill" Ivory, the original Army CID Investigator assigned to the MacDonald case. HTr. 759. Ivory testified about the crime scene search at the MacDonald house and the CID's evidence collection process. He stated that there were three photographers who took part in photographing the scene. HTr. 764. The first photographer was Staff Sergeant James Alexander, who didn't bring any color film with him, which Ivory wanted to accurately portray the scene. Id. Alexander had not seen many violent crime scenes and started feeling ill, so Ivory sent him home before he got sick and contaminated the crime scene. HTr. 765. The second photographer was Mr. Squires from the photo lab on Ft. Bragg, who arrived within 10-15 minutes of Alexander's departure, and the third photographer came up from the Army CID Crime Lab at Ft. Gordon, Georgia. Id. Ivory then proceeded to testify as to a number of the crime scene photographs and their importance with regards to the collection of evidence at the

crime scene. HTr. 766. He first testified about several photographs depicting the outside of the MacDonald quarters and the floor plan inside the residence. HTr. 766-768; GXP 161, 164, 165, 165A, 652, 652A. Ivory explained that Government's Exhibit 2138 depicts the blood distribution throughout the house, of the four different blood types of the four MacDonald family members, the locations of the bodies, and the locations of the weapons. HTr. 769. He then described a series of photographs of the interior of the MacDonald residence. HTr. 770-771; GXP 21, 22, 28. Ivory drew the Court's attention to the greeting cards depicted in Government's Exhibit 28, which were still standing up on the sideboard in the dining room. HTr. 771. He explained that blood stains, matching the type of Jeffrey MacDonald, were located on the kitchen floor and cabinet, and that latex gloves were located under the kitchen sink. HTr. 772 - 773; GXP 30, 33. When describing the state of the living room, Ivory noted that the coffee table was overturned and resting on top of a partially concealed *Esquire* magazine, found to have a "configuration of what looked like a finger…a bloody finger," that was a mixture of Type A and Type AB Blood (the same as that of Collette and Kimberly respectively); and a pair of glasses belonging to the defendant with a speck of Type O blood (the same as that of Kristen) on the floor by the window. HTr. 773-775; GXP 75, 25, 26, 27. Ivory testified that, during the crime scene search, they focused extensively around the area where the couch was, looking for debris and signs of a struggle, since that is where MacDonald claimed he was attacked. HTr. 775-777; GXP 23. Nothing was found in the deep pile carpeting, particularly none of the blue threads that were found in other rooms throughout the house, the lamp was upright and the pictures were hanging straight on the walls. Id.

Moving into the hallway, Ivory described the pile of clothing on the hallway floor consisting of children's pajama robes. HTr. 777; GXP 38. In looking at the photographs of the master

bedroom, Ivory described Government's Exhibit 39 as depicting the position of Colette MacDonald's body, the blue pajama top across her chest, and the Hilton bath mat across her abdomen, and pointed out that the torn pocket from the pajama top was located by Colette's foot. HTr. 778; GXP 39, 40, 40A. Ivory noted that, while the rest of MacDonald's pajama top was soaked in blood, the torn pocket was not. HTr. 780. He next described the pile of bedding located on the master bedroom floor, which contained a sheet and a bedspread that, when opened by crime scene investigators, were found to contain a large number of threads matching the pajama top, hairs, and a whole finger section of a bloody latex glove. HTr. 779; GXP 39. The chair in the master bedroom and the wall underneath the window were spattered with blood, the Geneva Forge knife was located under the master bedroom dresser, and another piece of latex glove was located on the carpet near Colette's body. HTR 780-782; GXP 41, 43, 43A, 50. Ivory testified that the word "PIG" was visible on the headboard, that blood spatters were on the wall behind the headboard, and that many blue pajama threads were found between the wall and the headboard. HTr. 784; GXP 46. Once Colette's body was removed from the crime scene, Ivory stated that many blue pajama fibers and wood splinters were located within her body outline on the carpet, collected in pill vials, and marked with initials and the date. HTr. 785-786; GXP 71, 71A. Also present on the shag carpet in the master bedroom was a large pool of Kimberly MacDonald's blood type. HTr. 801; GXP 211, 211A.

Ivory testified about the evidence collected in the girls' bedrooms. Kimberly's body was found in her bed, with the sheets tucked around her as though it were made to appear that she never woke up. HTr. 791-793; GXP 55, 56, 57, 215. When her body was removed, more pajama threads were located under the bedding that had been tucked around her, and behind her pillow investigators located a long bloody splinter that was later matched to the club found

outside. Id. Kristen's body was also located in her bed. HTr. 794-795; GXP 59, 60, 70. The majority of the blood depicted on the bed was found to be Kristen's, but some of it was also found to be Colette's. Id. Colette's blood spatters were also found on the walls above Kristen's bed. Id. Also captured in the photo is a rocking horse on springs, and the open venetian blinds in the bedroom that allowed a photograph to be taken of the rocking horse that later appeared in *The Fayetteville Observer*. HTr. 794-795; GX 2318.4. None of the springs of the rocking horse ("Wonderhorse") appear to be broken in the crime scene photographs, nor did they appear that way in person. HTr. 797, 823-832; GXP 63, 145, 2118, 2119, 2121, 2122, 2320, 2321, 2332. Ivory demonstrated this for the Court at the evidentiary hearing using GX 2118, a Wonderhorse similar in construction to the one found in Kristen's room. HTr. 830-832. Also located in Kristen's bedroom were two bloody footprints in Colette's blood type, one that had markings consistent with the defendant's footprint. HTr. 798–799; GXP 65. Outside the residence, Ivory testified that the CID located a 31 inch piece of two-by-two wood, an icepick, and an Old Hickory paring knife. HTr. 802-803; GXP 79, 80, 81.

Ivory also testified about the ongoing investigation after the crime scene search. On May 25, 1971, he interviewed Greg Mitchell, who denied any involvement with the MacDonald murders and said that his girlfriend at the time, Helena Stoeckley, was not involved either. HTr. 804-807; GX 2199. Ivory explained the importance of a polygraph as a law enforcement tool; that it was not only the results themselves that were important, but also how those results were used in a post-polygraph interview to obtain admissions from the subject. HTr. 810. After his interview, Greg Mitchell was polygraphed, and Ivory testified that the results of Mitchell's polygraph showed that he was truthful in his denial of involvement in the MacDonald murders. HTr. 811-816; GX 2200. Similarly, Ivory told the court that William Posey, one of the Stoeckley

witnesses, was also polygraphed by the CID, which detected deception when Posey said that he did not lie at MacDonald's Article 32 hearing. HTr. 818-21; GX 2331. Ivory testified that Posey, during his post-polygraph interview, admitted that he did not actually see Helena Stoeckley on the night of the murders, as he had previously testified. HTr. 821-822.

Ivory also testified about his tape-recorded interview with Jeffrey MacDonald on April 6, 1970, and how MacDonald said that he was the one who put the pajama top on top of Colette's chest. HTr. 872-873. With regard to the unknown fibers and hairs, Ivory testified that an investigator would generally be unable to determine when any fiber came to be present in the house, but that with respect to the threads from the pajama top, they were able to say for certain that they were deposited there the night of the murders given the evidence of the struggle and the testimony of the defendant that the shirt was his and it was ripped that night. HTr. 877-878.

m. Raymond "Butch" Madden

After Ivory, the Government called former FBI Special Agent Raymond "Butch" Madden to testify. Madden explained that he was tasked with investigating information given to the FBI by the MacDonald defense team during post-conviction proceedings. HTr. 881. This mainly involved investigating various statements of Helena Stoeckley naming individuals who may have participated in the MacDonald murders—Greg Mitchell, Dwight Edwin Smith, Shelby Don Harris, Bruce Johnny Fowler, and Allen Mazerolle. HTr. 882-883. Madden testified that he also interviewed both Helena Stoeckley and her mother, the elder Helena Stoeckley, as well as defense investigators Ted Gunderson and Prince Beasley. HTr. 883. The interviews with Helena Stoeckley occurred over a two-day period in September of 1981. HTr. 884. During the first interview, Helena told Madden, along with SA Frank Mills, that Beasley had arrested her fiancé Ernest Davis in South Carolina and taken him to Fayetteville, and that he had promised to

bail Ernest out if Helena would go with him to Ted Gunderson's office in Los Angeles and give a statement. HTr. 887-888. He also promised her that they would pay to relocate Helena and Ernest to California and that they would find them jobs, financing, and new identities. Id. Madden testified that Helena told him she was interviewed in California for a period of three to four days from the early morning into the late evening for more than twelve to fifteen hours a day. HTr. 889. Madden further testified that, as an experienced investigator, this type of interrogation would be considered unethical, if not illegal, because it could lead people to say things that were untrue. Id. During his first interview with her, Stoeckley told Madden that she was not involved in the MacDonald murders and signed a statement to this effect.[35] HTr. 891. The next day, Helena gave Madden a second interview, at which time she told him that the statements she made to Ted Gunderson were things she thought or dreamed happened, not things she recalled, and further, that she still does not know where she was during the murders. HTr. 892. Madden testified that Stoeckley informed him that Beasley brought Fred Bost to see her and that the two of them were working on a book deal related to the MacDonald case. HTr. 910. The profit split for the book deal was supposed to be twenty percent for Helena, twenty percent for Beasley, and the rest divided between Bost and a publisher. Id. At that time, Beasley told Helena only to deal with him and not to talk to anyone from the FBI or the Department of Justice. Id. Madden testified that Helena felt used by Prince Beasley and Ted Gunderson, At no time during their conversations did she ever mention being threatened by the prosecution or Jim Blackburn. HTr. 912. Helena gave Madden copies of letters she had written to Ted Gunderson telling him that she felt he had used her as a pawn and coerced her into signing the defense statements. HTr. 913-915.

[35] All of the documents discussed in SA Madden's testimony are available in the Joint Appendix to the Fourth Circuit at the citations given in the hearing transcript.

Madden also conducted an interview, audio-recorded and later transcribed, of Ted Gunderson and Prince Beasley regarding the statement they took from Helena Stoeckley. HTr. 917. Madden testified that Gunderson admitted to spending a day and a half interviewing Stoeckley for hours on end before she would agree to give them a written statement, and that her statements were disjointed and disorganized so he retyped them and had her sign the 53-page statement. HTr. 920-923. During the interview with Gunderson, Madden stated that Gunderson told him he had contacted several individuals about a book or movie deal regarding the MacDonald murders. HTr. 935-936. Madden testified that he also talked to Beasley about the book deal with Fred Bost that Helena had told him about, and Beasley confirmed the percentage split that Helena had quoted. HTr. 937. The interview Madden conducted with Beasley and Gunderson was seventy-eight transcribed pages, but at no time during that interview did either of them mention that Helena had reported any threat to her by Jim Blackburn. HTr. 940.

Gunderson had given Madden the names of individuals Helena had implicated in the MacDonald murders (Bruce Fowler, Greg Mitchell, Don Harris and Allen Mazerolle) but told him that he had not run down those leads because he had not been paid to do so. HTr. 926. Madden testified that he then conducted an independent investigation into the possibility of these individuals being involved and was able to learn that during the MacDonald murders Allen Mazerolle was in jail. HTr. 926-929. With regards to Dwight Edwin Smith, Madden was able to interview him and he denied any involvement in the murders and stated that he did not know the other named individuals. HTr. 929-931. Madden testified that Shelby Don Harris was interviewed and said that he knew Helena Stoeckley, but that he had nothing to do with the murders and volunteered to take a polygraph examination. HTr. 932- 934; See infra at 135, 140.

Madden also had occasion to interview the elder Helena Stoeckley on July 19, 1984, as a part of his investigation. HTr. 940; GX 2333, 2334, 2332. This interview was conducted after the death of her daughter Helena. HTr. 942. He testified that Mrs. Stoeckley told him that the younger Helena told her, her husband, and Bernie Segal that she didn't know anything about the murders. HTr. 943-944; GX 2332. Mrs. Stoeckley believed that Helena could not have been present because she was nonviolent and loved children, and that she was not treated fairly by Gunderson and Beasley. Id. Mrs. Stoeckley told Madden that Helena's mind was "gone," especially when she was under the influence of drugs, and that when doing drugs she thought about the case but that she was not involved. HTr. 945; GX 2332. Mrs. Stoeckley said that she saved all the newspaper clippings regarding the trial and allowed Helena to read them. Id. She also believed that Helena enjoyed all the attention from the MacDonald case and that when she asked her why she gave a statement to defense investigators, Helena told Mrs. Stoeckley that she thought she was at the murder scene. HTr. 945-946; GX 2332. Madden testified that, at the time of the interview, Mrs. Stoeckley was in good health, living at home, and appeared to have all her faculties. HTr. 946. At no time during their conversation did Mrs. Stoeckley ever mention a threat to Helena by Jim Blackburn. HTr. 947.

n. Joe McGinniss

The last witness for the Government was Joe McGinniss, author of *Fatal Vision*, the 1984 book about the MacDonald trial. McGinnis was approached by MacDonald to come to the trial and write a book about it, in exchange for MacDonald receiving a percentage of the royalties. HTr. 954-955. He was given unfettered access to any "incidents, characters, dialogues, action scenes and situations" that he desired in connection with the publication of the book. HTr. 955. He joined the trial team and lived with them at a fraternity house in Raleigh during the trial.

HTr. 956. McGinnis testified about the interview of Helena Stoeckley's parents by the defense team, and how Mrs. Stoeckley characterized her daughter. HTr. 962-964; See supra at 2-3; GX 2201.2. He was present for, and wrote about, the defense interview of Helena Stoeckley, because Segal wanted to make sure that McGinniss was there to record the "great moment of triumph." HTr. 965; GX 2201.3. During his testimony, McGinniss read the excerpt from *Fatal Vision* describing the interview, where Segal paraded the "Stoeckley witnesses" into the interview room to confront Helena, but she always maintained that she had no memory of being present or involved in the murders. HTr. 969-977; GX 2201.3. McGinniss testified that even though Segal told Judge Dupree that he needed time to clarify a few matters and he would turn Stoeckley over by two o'clock, the interview did not continue after Segal returned from court. HTr. 981.

McGinnis had received a trial transcript from Bernie Segal, which included bench conferences, but the bench conference where Segal told Judge Dupree about the things Stoeckley had allegedly said during the defense interview was not among the materials given to McGinniss. HTr. 989. McGinnis testified that the things Segal represented to Judge Dupree during that bench conference were not the things that Helena Stoeckley said during the defense interview. HTr. 986-990. He stated that he had later talked about that bench conference with Wade Smith, and that Smith told him he was between a rock and a hard place because he couldn't undermine his co-counsel, but he wouldn't participate in such a fabrication. HTr. 990.

After the trial was over, McGinniss continued to be in touch with Jeffrey MacDonald while he was writing his book HTr. 993. He flew out to California to visit MacDonald at Terminal Island where he was being housed, and MacDonald gave him the run of his condo and all of the relevant materials in it so that McGinniss could continue working on the book. Id. Among the

items in the condo, McGinniss located the handwritten notes of Jeffrey MacDonald, that he had made for his military lawyer during the Article 32 hearing in 1970. HTr. 995; GX 4000, 4002. MacDonald himself had told Prosecutor Victor Woerheide that these notes were the most complete and accurate account of what occurred the evening of the murders, but he would not turn them over to the Grand Jury. HTr. 996; GX 4000, 4002. In these notes, MacDonald wrote that, on the evening of the murders, he had possibly taken one fifteen milligram capsule of Eskatrol Spansule, which he called "speed," and that the CID did not know about it but that it was possible his urine and blood could have some residue. HTr. 997-998, 1080-1081; GX 4000, 4002. McGinnis further testified that when he was finished writing the book, he sent the notes and his manuscript to *60 Minutes*, who confronted MacDonald with the information regarding his amphetamine use during the interview. HTr. 1014; GX 4001. McGinniss also testified about the Fatal Vision mini-series, and that the Helena Stoeckley interview that was depicted in the movie was the interview with the defense, and not with the prosecution. HTr. 1016-1017. Finally, McGinniss told the Court about the psychiatric report of Dr. Hirsch Silverman, the doctor who had examined Jeffrey MacDonald during the trial. HTr. 1083. He read into the record portions of Silverman's report, including his conclusion that:

> MacDonald may well be viewed as a psychopath subject to violence under pressure, rather effeminate as an individual, and given to overt behavior when faced with emotional stress. He is no less subject to blotting out that past of what to him is convenient and truly essential to block out for his own emotional preservation. As a sociopathic individual with troublesome psychopathy with an overlay of submerged and confused sexuality Dr. MacDonald, despite his hedonism, seems self-destructive, naïve, superficial, and even illogical at times. A man who seeks freedom and emancipation only for personal removal from constraint, controls, and restrictions. To suit his whim, he has the faculty to manufacture and convolute circumstances. He seeks attention and approval and is given to denial of truth. He can be critically sarcastic. As a seriously emotional man, he gives evidence of secretiveness with questionable moral standards. He is detailistic and lacks insight in seeing the gestalt, the whole quality of things and events and

> persons, as well as circumstances… In essence, then, Dr. MacDonald, in personal and social adjustment is in need of continuous consistent psychotherapeutic intervention coupled with psychiatric attention.

HTr. 1085-1086; GX 6075.

On cross-examination, McGinniss was asked whether he had read the psychiatric evaluation of Dr. Sadoff, prepared for the defense at trial, in which he stated that he could not see anything in MacDonald's make-up that could account for the homicide. HTr. 1088. McGinniss testified that he had actually talked to Dr. Sadoff after the trial and Sadoff told him that if he had known then the things that he learned later about MacDonald's Eskatrol use and other matters, that his opinion would have been very different. HTr. 1089.

4. Jerry Leonard testimony

After McGinniss testified, the Government rested its evidence, and Mr. West, attorney for Jerry Leonard, made another plea to the Court to take Leonard's testimony in camera or in a closed courtroom. HTr. 1096. The Government opposed this motion, and requested that the testimony be taken in open court. HTr. 1096-1106. The Court agreed, and Jerry Leonard was then called as a defense witness. HTr. 1106.

Leonard testified for the defense on direct that he was called by Judge Dupree's office one weekend during the MacDonald trial and asked to represent Helena Stoeckley, who was a material witness. HTr. 1108-1109. He testified that he picked her up late on a Sunday afternoon, and couldn't recall from where, but thought that it might have been the federal building. HTr. 1109. Leonard claimed that he had to find her lodging and so he took her to his house, and she slept on a recliner chair at his house that night. HTr. 1109-1110. Leonard stated that he had to drive her to court on Monday morning and that, on the way there from his house, he checked her in to the Hilton Hotel. HTr. 1110. He testified that he stayed with her in the

assigned room in the courthouse almost all day, but couldn't remember if they went out for lunch. HTr. 1111. Leonard couldn't remember if he brought up the issue of the statute of limitations or if Stoeckley did. HTr. 1112. They also discussed what her testimony would be if she were to take the stand, and she told him that she did not remember anything about the evening of the murders. HTr. 1112-1113. Leonard alleged that, later that day, Stoeckley asked him what he would do if she told him she were at the MacDonald house, and then she told him she had been there. HTr. 1114. He claimed that she told him that while she was in the MacDonald house that the phone rang and she answered it, and she told him about a hobby horse. HTr. 1115-1116. He did not give any further specific details from memory during his testimony, rather, Mr. Widenhouse pulled Leonard's affidavit up on the courtroom monitor and had Leonard read it into the record. HTr. 1116-1124. After reading his affidavit into the record, direct examination abruptly ended and the Government proceeded to its cross-examination. HTr. 1124; DX 5113.

Leonard was first asked whether Stoeckley, at any time, represented to him that a member of either the defense or prosecution teams had threatened her, and he said that she did not. HTr. 1124-1125. He recalled speaking with the FBI in 2006 and telling them that Stoeckley had not told him of any threats. HTr. 1125-1126. Leonard could not remember, however, the exact timeframe of this interview, nor did he recall that its purpose was to ask about whether Jimmy Britt ever came to him and told him about threats to Helena Stoeckley by the prosecution. HTr. 1126-1127. He testified that he never received any information that Jimmy Britt sat in on any interview with Helena Stoeckley. HTr. 1127-1128.

Leonard stated that it is his opinion that MacDonald did not receive a fair trial because of how Bernie Segal conducted himself in front of the jury. HTr. 1129-1131. He was then shown a

copy of Government's Exhibit 7000.1, an excerpt from Errol Morris' book detailing a conversation between Jerry Leonard and MacDonald defense investigator John Dolan Myers about five months after the MacDonald trial. HTr. 1132. Leonard did not recall the date of this interview, nor did he recall telling Myers that he did not feel the prosecution had proved its case and that MacDonald had been "screwed." HTr. 1134-1135; GX 7000.1. Leonard was then questioned about statements he made to Errol Morris concerning the composition of the MacDonald jury and Wade Smith's chances of winning the trial, but could not specifically recall making those statements to Errol Morris, even though he admitted that the interview with Morris had taken place only six months prior to his testimony.[36] HTr. 1136-1137.

Leonard was questioned about how he came up with the date of August 19, 1979, as the day he was appointed to represent Helena Stoeckley and said that he "put it together." HTr. 1139-1140. He admitted that when he met with the Government in preparation of the evidentiary hearing on August 24, 2012, that he did not know at that time what date his representation began, but thought it was Saturday night. HTr. 1139-1140. He further stated that he went back to try to determine the date when he was asked to prepare his affidavit for the evidentiary hearing. HTr. 1142. When he spoke with author Errol Morris, Leonard speculated as to the reasons Judge Dupree appointed him to represent Helena Stoeckley. GX 7000.2; but see TTr. 5980-81.

[36] Leonard told Morris that given that the jury was composed of people from Eastern North Carolina, that would mean "farmers" and "rednecks." HTr. 1136-37; GX 7000.2. Even though his interview with Morris was less than six months before the evidentiary hearing, Leonard could not remember telling Morris about the jury, however, he did admit that it "sounds like something I might have said." HTr. 1136. The jury was actually composed of mostly educated individuals, including an accountant, a chemist, the son of a prominent doctor, a Green Beret Sergeant, and a retired North Carolina State policeman. HTr. 957.

Leonard was next questioned about his interview with FBI Special Agents Jim Cheroke and Andy Thomure. He did not recall telling them that the statute of limitations may have been a factor in Judge Dupree appointing him to represent Stoeckley. HTr. 1143; GX 6076. He was next asked about the statement in his affidavit that, at the time of his appointment, Stoeckley had already testified in front of the jury, and whether that was his clear recollection. HTr. 1147. Leonard responded that he only recently found out she had actually testified in front of the jury. Id. He could not recall telling agents Cheroke and Thomure that he did not remember Stoeckley testifying in open court. HTr. 1148. He admitted that the first time he heard that Stoeckley had testified in front of the jury was when Hart Miles told him that during the course of Miles' representation of Jeffrey MacDonald, which began in 2005. HTr. 1149. He could not recall the date of his interview with Hart Miles, and thought that it was after his interview with the FBI, but then conceded it must have been before, since he told the FBI agents that he had been interviewed by Hart Miles. HTr. 1149.

Leonard was questioned about additional statements made to Errol Morris. HTr. 1151. He said that it was possible he had told Morris that Judge Dupree would not let Stoeckley testify because of her past drug use. He said "I could have. You know, what happens is you find out stuff later and then you confuse that with what actually you knew at a particular time." HTr. 1152; GX 7000.5. When asked about his presence in the courtroom during Judge Dupree's ruling on the Stoeckley witnesses, Leonard could not recall being present but said that he "apparently" was because he appears in the transcript at a bench conference that day. HTr. 1154. Additionally, he admitted that, as recently as his conversations with Errol Morris, he was under the impression that Stoeckley had testified outside the presence of the jury, but then admitted that he told Morris she had not testified at all. HTr. 1157; GX 7000.8. He did recall telling Morris

that he just remembered sitting there and it "seemed pretty boring." HTr. 1159; GX 7000.8. The following colloquy ensued between Mr. Leonard and Government counsel:

> Q. All right. So, at the time that you were speaking to Errol Morris in 2012, you seem to be wondering whether you knew she had testified at all, whether you knew in 1979 that she had testified at all.
>
> A. I don't – I can't testify to you that I knew then that she had testified.
>
> Q. All right.
>
> A. My – ***and then you hear things*** and obviously I heard that she had testified and I was thinking surely she did not testify before the jury. And Judge Dupree's statements could have been – well, I'm making explanations, but just because it was said at a bench conference where there were as many lawyers as you have here or maybe as many, that I heard it. I mean, I could have been sitting over where the clerk sits, you know.
>
> Q. So, as I understand your testimony, you're saying that it's sometimes difficult to distinguish what you learned in 1979, and what you've learned since?
>
> A. ***Yeah, and that's the danger. And I haven't talked to – I've tried real hard not to talk to people about this***. I've tried real hard not to – I mean, I'm talking about the trial in general, although I have obviously. ***And what happens is you hear stuff at a later date and it all becomes part of what you know and it's hard to peel away the context that you heard one thing from the other.***

HTr. 1159-1160 (emphasis added).

Leonard agreed that he told Agents Cheroke and Thomure in 2006 that he had to secure lodging for Stoeckley at the Hilton, and that Judge Dupree provided a court allowance to cover the duration of her stay. HTr. 1161-1165; GX 6076. When confronted with portions of the trial transcript proving that it was Wendy Rouder and Red Underhill of the defense team who checked Stoeckley in to the Hilton on Sunday, Leonard stated that it was still his memory that he had done so. HTr. 1165-1178. When confronted with the fact that Stoeckley was already

staying at the Hilton when he was appointed he stated: "I don't remember that, I really don't." HTr. 1175.

Next, Leonard was asked about the statement in his affidavit concerning his conversation with Stoeckley about the statute of limitations and how he remembered telling her it was "up in the air." HTr. 1178. He did recall telling Agents Cheroke and Thomure in 2006, and telling Errol Morris in 2012, that there was a potential ten-year statute of limitations, six months of which would have been left at the time of trial, but stated that he has since realized that what he told Cheroke, Thomure, and Morris was an incorrect legal proposition. HTr. 1178-1181; GX 7000.8. He recalled wanting to keep Stoeckley off the stand because she was "all over the place." HTr. 1182. When asked if Monday, August 20, 1979, was the first day of his representation of Helena Stoeckley, he replied that based on the transcripts he had read, that was correct. HTr. 1184-85.

Leonard was next questioned about the preparation of his affidavit, and he testified that he prepared it himself, only a few days before the evidentiary hearing began. HTr. 1186-1188. He stated that Stoeckley's mention of the hobby horse was not necessarily connected to her presence at the crime scene, but just a random statement. HTr. 1188. He also mentioned that he had been given access to the crime scene photographs himself during the trial, and saw the photograph of the horse, and that in the photograph it appeared broken to him. HTr. 1189-1190. Leonard was then asked to recall the specifics of what Helena Stoeckley had told him, without the aid of his affidavit on the courtroom monitor, and was able to say that she told him she was a member of a cult who went to the MacDonald house, but was unable to give the level of detail present in his affidavit. HTr. 1191-1194. Leonard further testified that Stoeckley had told him that there were four or five males with her at the MacDonald house, but that he did not put that in his affidavit

and that he "just added that number" to his testimony at the evidentiary hearing. HTr. 1199. He stated that although he did not put it in his affidavit, he had conversations with Stoeckley about how she could help herself by giving information to the government. HTr. 1201.

Leonard testified that at the time Stoeckley allegedly made these admissions to him, he never brought it up with the Court or asked the State Bar for guidance on the issue. HTr. 1201-1203. He admitted that during his interview with the Government in August of 2012, he stated that he didn't remember needing to talk to anybody about Stoeckley's statements at the time of the trial. HTr. 1207. He did not recall ever having a conversation about the case with Wade Smith. HTr. 1206; GX 7000.7. Leonard testified that he did try to contact the State Bar in 2007, but then admitted that it was actually Hart Miles, attorney for MacDonald, who had made the inquiry. HTr. 1214-1215; GX 7017, 7015. Similarly, Leonard stated that he was aware that Helena Stoeckley died in 1983 but that her death did not change his opinion regarding attorney-client privilege and whether he should come forward with any information. HTr. 1212. He testified that neither the decision regarding the Supreme Court case involving Vince Foster[37], nor the North Carolina case involving Raleigh attorney Rick Gammon[38] caused him to feel that he needed to come forward with any information regarding Stoeckley's statements. HTr. 1217-1221. Leonard testified that his representation of Stoeckley "seemed boring," and the fact that she had allegedly made admissions to him in one of the most famous murder cases in North Carolina did not trigger a response in him because she had told so many conflicting stories. HTr. 1222.

Leonard admitted the truth of statements made to author Errol Morris, specifically, the following: "Honestly, my memory is not a hundred percent and for anything that I say to be

[37] Swidler & Berlin v. United States, 524 U.S. 399 (1998)
[38] In re Miller, 358 N.C. 364 (2004)

reliable, even as I'm trying to fill in the facts for you, is fairly dangerous I think because honestly I'm wrong on some key facts" and "I'd like to be a little shining light but I just don't know that I can." HTr. 1223; GX 7000.7, 7000.8.

The Government then asked to approach the bench and tendered an exhibit to the Court, without asking Mr. Leonard about it in open court, offered as part of the evidence as a whole in considering the likely credibility and probable reliability of Mr. Leonard's evidence. HTr. 1225. This was GX 7010, the North Carolina Supreme Court decision in 1995 publicly censuring Leonard for:

> "(1) his behavior while publicly intoxicated in Key West, Florida which resulted in his arrest and a negotiated plea of *nolo contendere* to the criminal offense of trespass after warning; (2) his behavior while publicly intoxicated in Raleigh, North Carolina which resulted in his conviction of the criminal offense of indecent exposure; and (3) his continuing refusal, even after admitting to psychological dependency, to abstain from the consumption of alcohol, the use of which caused the aforementioned incidents and conduct."

Finally, Leonard was asked about a poem that Stoeckley had written for him during the trial, and admitted that he had it framed and put it on his wall, and later mailed a copy to Jim Blackburn. HTr. 1227-1228; GX 6077. He testified that he opened that sealed letter to Blackburn in front of Government attorneys during his interview in preparation for the evidentiary hearing, and allowed the Government to keep a copy. HTr. 1228.

On redirect, Leonard stated that he believed the things Stoeckley had told him were no different than the things to which she had already testified, and had already told other people with regards to the case, and so it didn't trigger a need to tell anyone about them. HTr. 1231.

5. Exhibit of MacDonald's statements

At the conclusion of Leonard's testimony, the Government offered an exhibit; a compilation of MacDonald's statements during his testimony at trial, to be considered with

regards to the evidence as a whole, and in conjunction with GX 1141, a compilation of the defendant's pre-trial statements, already in evidence at trial. HTr. 1237; GX 6073.

6. The unsourced hairs claim

See Section IV.D. infra at 171-178.

III. THE EVIDENCE AS A WHOLE

A. The Crime scene

At approximately 3:40 a.m. on the morning of February 17, 1970, Jeffrey MacDonald, then a Captain in the U.S. Army Medical Corps assigned to the Special Forces at Ft. Bragg, North Carolina, called the operator from his on-post quarters to report "a stabbing." TTr. 1254. He was connected with the Military Police ("MP") desk Sergeant, who dispatched MP patrols to the Corregidor Courts housing area on Ft. Bragg. Arriving at 544 Castle Drive, the MPs found that both the front door of the MacDonald quarters and the kitchen door in the rear were locked. Ultimately, the MPs gained entrance through the unlocked utility room door at the rear of the ground level apartment. TTr. 1260, 1274. Upon entering the master bedroom, which is immediately adjacent to the utility room, MP Sergeant Richard Tevere and Specialist-Four Kenneth Mica observed Jeffrey MacDonald, clad only in his pajama bottoms, lying on the shag rug adjacent to, and partially covering, his wife's body. TTr. 1260, 1274, 1281; GX 652. MacDonald immediately described an attack by four hippie intruders consisting of two Caucasian males, one Negro male, and a blond female wearing a floppy hat, carrying a candle, and saying "acid is groovy; kill the pigs." TTr. 1270. MacDonald identified himself as a doctor and convinced the MPs to have him removed to the Army hospital. TTr. 1323. At approximately 4:00 a.m., Army Criminal Investigation Detachment (CID) Duty Agent William

F. Ivory ("WFI")[39] arrived at the quarters as MacDonald was being removed by Army medics on a gurney. TTr. 1607-11. Agent Ivory walked through the apartment and observed the body of Colette lying on the rug of the master bedroom. A blue pajama top, later identified as belonging to Jeffrey MacDonald, and a Hilton Hotel bath mat, had been placed on Colette's chest and abdomen, respectively. TTr. 1612-13, 1693-94; GXP 40-45. Ivory observed the body of Kimberly (age 5 ½) tucked into her bed in the front (or south) bedroom, and the body of Kristen (age 2 ½) in her bed in the back (or north) bedroom. TTr. 1614-16; GX 652; GXP 54-59, 62. In addition to the body of Kristen, Ivory observed flecks or spatters of blood on the west wall above Kristen's bed. Id. It was later determined that these blood spatters (GX 378/D-69NB, GX 379/D70/NB), and the large soaking stain on the top sheet of Kristen's bed (GX 371/D60NB), adjacent to Kristen's right hip, were all in Type A blood, the same type as Colette. GX 982[40]; GXP 60. Stain #2 on the bottom sheet (GX 371/D-64NB) was also in Colette's Type A blood. Id. Stains in both Colette's Type A (GX 365-366) and Kimberly's Type B (GX 367) blood were found on the green bedspread (GX 364/D-56NB) on Kristen's bed. GX 982. A knotted and broken thick green acrylic yarn (GX 357/Q126/D-36NB), identical to those used by Colette to tie her hair (GX 381/K28**)**, and stained with Kristen's Type O blood, was found on the multi-colored throw rug (GX 358/D-37NB) in Kristen's room. TTr. 4611; GX 982; GXP 45, 59.

In addition, Ivory observed two bloody bare footprints on the floor exiting Kristen's room. GXP 64-65, 74. One of these bloody footprints, depicted in GXP 65 and 74, was later identified "in situ" by fingerprint examiner Hilyard Medlin, as having been made by MacDonald's bare left

[39] Ivory's initials, "WFI," and those of Robert Shaw, "RBS," appear in the chain of custody for the collection of evidence at the crime scene.

[40] Each member of the MacDonald family had a different blood type: Colette = Type A, Jeffrey = Type B, Kimberly = Type AB, Kristen = Type O. TTr. 3382-3383, GX 638, DE-132-16 at 2. As we have previously explained (See, DE-227 at 21-23), the presence or absence of antibodies and antigens (specific factors) detected in dried blood stains enables a serologist to identify or eliminate a particular blood group, or narrow the donor of the stain down to one of two groups.

foot. TTr. 3106, 3675-76. It was made in Type A blood, Colette's blood type. None of the other bloodstains on the floor of Kristen's room were in Type A blood; all other stains, including the large pool on the floor beside Kristen's bed, were in Kristen's Type O blood. GX 648.

Returning to the master bedroom, Ivory observed blood spatter on the walls and ceiling, later determined to be in Colette's Type A blood. GX 643, 645. The bottom sheet of the master bed had a large wet stain on the right hand side, later identified as urine, and was partially pulled up as if the bed were being changed. GXP 47. Ivory also observed a pile of bedding on the floor adjacent to the doorway into the hall, which consisted of the top sheet from the master bed (GX 103), and the bedspread (GX 104) inside the sheet, both bloodstained. TTr. 1626-28; GXP 210-212.

Prior to beginning the collection of evidence, Ivory had the crime scene photographed to record how it appeared upon his arrival. The first photographs were taken by MP Staff Sergeant James Alexander, who had been summoned by Ivory and arrived at the crime scene at approximately 4:20 in the morning. TTr. 1607, 1635. Alexander began photographing the crime scene using a Polaroid camera with black and white film. TTr. 1639-40; GXP 20, 20A. Alexander then began photographing the scene using 4x5 inch black and white negative film. Id.; GXP 144, 146, 147, 151, 152, 153, 154, 155, 156, and 157. Not long after beginning the scene photography, Ivory became concerned that Alexander, who was ill that night and not used to this sort of trauma scene, was becoming nauseated. TTr. 1638-39. Ivory deemed it best if Alexander exit the crime scene. Id. Ivory immediately requested additional photographic assistance, and Mr. Hugh Squires, the Chief of the Post Photo Lab, arrived at the crime scene between 4:30 to 4:40 in the morning. TTr. 1677. Squires photographed the interior of the crime scene using color film. TTr. 1660-62; GXP 21-63.

It was only after Squires had completed photographing the bodies in situ that Dr. Neal, an Osteopath and the Professional Officer on duty in the Emergency Room at Womack Army Hospital that night, was permitted to examine the bodies to determine if "there was death indeed." TTr. 6911-6913. Neal had initially refused to respond to the crime scene, and did so reluctantly only after he "received a call from the Provost Marshal's Office requesting [him] to come out and examine bodies that were thought to be murdered". TTr. 6940. According to Ivory, he was with Mr. Squires, when at approximately 5:00 a.m. he was notified that Neal had arrived at the front door. TTr. 1673. Squires finished the series of photographs they were working on before Ivory went to the front door to meet Neal. Before entering any of the rooms Ivory "advised [Neal] that there were blood stains on the floor, and would he be careful where he was stepping and not to disturb anything." TTr. 1674. "We went first to the bedroom of Kristen MacDonald." Id. "He [Neal] went to her, looked at the body; picked it up slightly; pulled it toward him, looking at the back where there were injuries on the back of the body; and then replaced it in generally the same position it was in." Id. Ivory described for the jury his reaction to Neal's movement of Kristen's body. "It upset me quite a bit, and I told Dr. Neal not to move the bodies unless it was absolutely necessary, unless he saw that there was some sign of life, and then of course the body should be moved. He [Neal] said he wanted to tell me...what the cause of death was; and I said, "Doctor, at this point, I am really not interested in what caused the death, only that there is death present in the body," and that he should not move any of the other bodies." He [Neal] said "fine." TTr. 1675.

Ivory described what happened next. "We moved then to the bedroom of Kimberly MacDonald. He [Neal] went over to the side of the bed...on the south side of the bed, viewed the body, reached across, touched the inside of the left wrist searching for a pulse. I saw him

looking down into the injuries-the head injuries and the throat injuries of the body–and pronounced her dead." Id.*;* GXP 56-58. "We went from there to the master bedroom to the body of Colette, where he [Neal] kind of–he didn't kneel down, because his knees never really touched the floor–but he kind of stooped down, if I could use the word, and looked at the body. One eye was open, and he reached and lifted the eye lid of the other eye; looked into it; touched the outstretched left arm at the wrist searching for a pulse; stood up and went around so he was standing above the head and shoulder area of the body; again kind of bent down; felt around the neck; didn't move the body–nor did he move the body of Kimberly–and made his announcement that Colette MacDonald was dead." TTr. 1676, 2334-35. Neal was then escorted from the house by Ivory. Id. Then Ivory had Mr. Squires re-photograph Kristen's body. Ivory identified the position where it had been after it had been moved by Dr. Neal. Id. Ivory identified GXP 70, "[i]t is a photograph, again exposed by Mr. Squires the morning of 17 February 1970, which shows the body of Kristen MacDonald in the position it was placed after it had been moved by Dr. Neal."[41] TTr. 1694. No post-Neal photographs were taken of the bodies of Colette and Kimberly because, notwithstanding his testimony to the contrary, he followed Ivory's strong admonishment not to move either body, and it was not necessary to re-photograph them. TTr. 6919-26, 1675.

Prior to the removal of Colette's body, Ivory and CID Agent Robert B. Shaw ("RBS") collected MacDonald's blood stained pajama top (GX 101), and the blood stained Hilton bath mat (GX 314), from the chest and abdomen, respectively, of the body. TTr. 1682. Also collected was the pocket torn from MacDonald's pajama top (GX 102/Q13/D-232), which was found on the upturned side of the throw rug (GX 322), adjacent to the left foot of Colette. TTr.

[41] This photograph, GXP 70, should be compared with photographs GXP 20 (taken by Alexander), and GXP 59-60 (taken by Squires), which were taken before Neal moved Kristen's body. TTr. 1691-92.

1683, 4088-89; GXP 39-40. Subsequent examination of the pajama pocket by CID Chemist Terry Laber revealed that the staining in Colette's type A blood on the outer surface of the pocket (area "1") had to have occurred before the pocket was torn off, because the corresponding area of the pajama top from which the pocket had been ripped was soaked in blood, but the inner surface of the pajama pocket was not stained with blood. TTr. 3607-12, 3613-14; GXP 613A, 614. Further, Laber testified that the Type A staining in area "1" on the pocket was a smear type stain, not a spatter, and was consistent with a contact stain. TTr. 3606-07. The defense did not cross-examine Laber. TTr. 3625.

As Colette's body was lifted onto to the gurney, Ivory noticed a dark thread (GX 126) sticking out of a blood clot on the rug directly under the head region. TTr. 1687; GXP 71, 77. The presence of the blue pajama top on top of the body, and the observation of a dark thread under the body led to the discovery of additional dark threads both within and near Colette's body outline, and to a search of the entire crime scene for similar threads and yarns. TTr. 1689-90. See infra at 117-119.

At trial, it was uncontested that the fabric of MacDonald's blue pajama top (GX 101) was made of polyester yarns, which were a blend of 65% polyester and 35% cotton fibers; the top was sewn at the seams with purple cotton "two ply Z twist" thread; and the white piping (or beading) on the sleeve cuffs was sewn with a blue–black cotton thread. TTr. 4089-91; GXP 783-784.[42] MacDonald's pullover-type pajama top had been torn from the yoke of the "V" neck through the midline of the front panel, as well as through the left in-seam, left shoulder, and left sleeve seams to the white piping on the left cuff. GXP 604, 607. The pajama top had been torn

[42] Although some witnesses, and defense counsel, incorrectly use the terms "fibers" and "threads" interchangeably, in this Memorandum, the Government will use the terms consistently with the testimony of FBI Examiner Paul M. Stombaugh: "fiber" refers to a single filament, "yarn" refers to a fabric made up of multiple fibers, and a "thread" is a group of filaments or fibers twisted together by the spinning process into a continuous strand.

either by downward force exerted at the left portion of the yoke (assuming that the garment was being worn and was stationary), or by someone grasping the yoke and the individual wearing the pajama top spinning to his right. TTr. 4069-70.

Although MacDonald claimed at trial, as he does now, that the pajama threads and yarns could have come from the discarded pajama bottoms (TTr. 7210-11)**,** there was uncontested testimony from FBI expert Paul Stombaugh that three purple sewing threads were found in the debris under Colette's head. TTr. 4100; GX 126/Q81/E24. Twelve purple cotton sewing threads and one blue-black two ply Z twist sewing thread were found in the debris from the rug in the vicinity of the left hand and arm of Colette. TTr. 4099; GX 325/Q78/E301; GXP 44. Fifteen purple cotton sewing threads and three blue polyester cotton warp yarns were found in the debris from the rug within the body outline of the trunk and legs of Colette. TTr. 4100; GX 327/Q79/E-303. Three purple cotton sewing threads and four blue polyester-cotton warp yarns were found on the underside of the upturned throw rug adjacent to Colette's foot (GX 322), and the torn, blood-stained pocket from MacDonald's pajama top (GX 102) was located on top of the throw rug. All of these matched MacDonald's pajama top. TTr. 4099; GX 116/Q95/E-16; GXP 39-40. Additionally, three matching purple cotton seam threads were found on the rug in the master bedroom, in the area near the largest bloodstain. TTr. 4098; GX 125/Q84/D23; GXP 71, 77-78. Located in the debris from the master bedroom rug, in the area of the north corner of the footboard of the master bed, were two matching purple cotton threads. TTr. 4101; GX 326/Q101/E-302; GXP 41. The debris from the bottom sheet on the master bed contained fifteen matching purple cotton threads and seven matching blue polyester cotton yarns. TTr. 4101-02; GX 119/Q85/E-19a; GXP 45.[43] The debris from the pillowcase on the master bed contained four

[43] Also included in this specimen were two head hairs that had been forcibly pulled out, and which microscopically matched Colette's head hairs. TTr. 4110-4111.

matching purple cotton threads and two blue polyester cotton yarns. TTr. 4103; GX 121/Q97/E-20a; GXP 45. In the debris located on the multi-colored bedspread (GX 104) found inside the sheet (GX 103) in the pile of bedding on the floor of the master bedroom, were two matching purple cotton seam threads and one matching blue polyester cotton yarn. TTr. 4103; GX 107/Q96/E-229; GXP 211-212.[44] On the master bedroom floor, by the east wall corresponding to the location of the headboard upon which "PIG" had been written in Colette's Type A blood, was one purple cotton sewing thread matching those of MacDonald's pajama top. TTr. 4101; GX 324; GXP 45-46. In total, seventy-nine pieces of MacDonald's pajama top were found in the master bedroom: sixty-one sewing threads (including the blue-black thread used to sew the piping on the cuff), seventeen blue polyester-cotton yarns from the fabric, and the bloodstained and torn pocket. Thirty-four of these items matching components of MacDonald's pajama top were found on the rug where Colette's body had lain: thirty purple cotton seam threads; three blue polyester cotton yarns; and one blue-black cotton sewing thread. GX 126, GX 325, GX 327.

In Kristen's bedroom, on the green bedspread, investigators located one purple cotton thread and one blue polyester cotton yarn matching MacDonald's pajama top.[45] TTr. 4097; GX 362/Q87/E-52NB.

In Kimberly's bedroom, in the debris from the bedding that had been pulled back, the search yielded two polyester cotton warp yarns and one purple cotton sewing thread, both matching MacDonald's pajama top. TTr. 4094; GX 345/Q121/E-118; GXP 56-58. In the debris from the bottom sheet, investigators found two matching purple cotton sewing threads. TTr. 4094-95; GX

[44] Entangled with one of the seam threads matching MacDonald's pajama top was a head hair which microscopically matched Colette's hair exemplar. TTr. 4109-10.

[45] Also found in this bedspread were two naturally shed head hairs, neither bloodstained, one of which (later AFDIL 58A(2)) has a mtDNA sequence matching that of Jeffrey MacDonald, and the other (AFDIL 58A(1)) has a mtDNA sequence which doesn't match any other sample tested. See DNA Stipulation, ¶¶26, 28 and 35; and infra, at 175.

347/Q123/E-119; GXP 215. Two matching blue polyester-cotton yarns and ten matching purple cotton sewing threads were found on Kimberly's purple bed cover. TTr. 4095; GX 356/Q86/E-123; GXP 57. Finally, in the debris removed from the north pillow of Kimberly's bed, investigators collected one matching purple sewing thread and one blue polyester-cotton yarn. TTr. 4093; GX 346/Q122/D-118; GXP 57. In total, nineteen pieces matching MacDonald's pajama top, fourteen threads and five yarns, were found in, or on, Kimberly's bed.

Ivory, assisted by Hilyard Medlin from the CID Laboratory, conducted an "extensive search" for evidentiary items in the living room, including the area surrounding the couch, the middle of the room, the east wall, from the outer wall into the dining room area, and the general area around the entryway to the hall. TTr. 1727-28. This search involved getting down on their hands and knees and going through the short pile of the carpet in front of the couch with their fingers, and with the aid of a magnifying glass. Id. As Ivory testified, "nothing of evidentiary value was found;" no fibers or threads, no bloodstains, and no splinters. Id.

At approximately 6:30 a.m., it started to get light outside, and while other CID agents were continuing to process the interior of the crime scene, CID Agent Shaw was asked to conduct a search of the exterior perimeter of the quarters. TTr. 2337-38. A wide sandy strip of dirt ran all the way around the house inside the paved walkway, and using his flashlight, Shaw searched this area for the presence of footprints, but found none. TTr. 2338. He even made a test print in the sandy soil to make sure he could, in fact, leave a footprint. TTr. 2338-39. As he was searching the area, an MP behind the house drew his attention. Shaw found the MP close to the utility room door pointing at the ground and saying, "here's something". TTr. 2339-40. Shaw observed a long piece of wood (milled lumber) lying on the ground, and when he crouched down he saw "red stains and what looked like hairs and fibers." TTr. 2338-39. Shaw sent for the

photographer to record the piece of wood in place, but was advised that the photographer (Sgt. Alexander) had run out of flashbulbs. Id. Because it had been raining off and on, Shaw made the decision to collect the piece of wood (GX 306), mark the location where the club had been with tongue depressors, and secure it in the trunk of his CID vehicle. TTr. 2340-42; GXP 79.

Subsequently, the club would be determined to have bloodstains in both Colette's (Type A) and Kimberly's (Type AB) blood groups. GX 306/Q14/A, 639. The club also bore, *inter alia*, two purple cotton seam threads (GX 307/Q89/E-205) matching those of MacDonald's pajama top, and numerous rayon fibers (GX 307/Q89/E-205) matching the composition of the throw rug in the master bedroom (GX 322/K30/D-227) (where the bloodstained pajama top pocket was found), and three matching purple cotton sewing threads. TTr. 3534-37, 4097-98; GX 981, DE 132-17 at 4.

Shaw returned to the sandy strip near the utility room door, and while shining his flashlight under a large bush at the corner of the quarters, observed an "Old Hickory" brand paring knife (GX 313) and an icepick (GX 312). After these items were photographed in situ, Shaw collected them as evidence. TTr. 2342-43; GXP 80-81, 1162, and 262**.** Benzidine testing of the blade of the Old Hickory knife was negative for the presence of blood, however, when Craig Chamberlain removed the handles he observed red brown crusts which gave positive benzidine and precipitin test results, indicating the presence of human blood. TTr. 3419. Further testing revealed the anti-B antibody and the A antigen, consistent with Colette's Type A blood. Id.; GX 638, DE-132-16 at 2. Similarly, when Chamberlain tested the "pick" portion of the icepick, the benzidine test for blood was negative. TTr. 3419. After removing the metal fitting of the icepick he found red crusts or stains on the wooden portion of the icepick handle, which tested positive for the presence of human blood. TTr. 3419.

After returning to the interior of the crime scene, Shaw continued to assist in the collection of evidence. In the master bedroom, in the area of the rug adjacent to the low dresser on the north wall, Shaw collected the "Geneva Forge" paring knife with a bent blade (GX 311). TTr. 2364; GXP 11, 50, 1160-61. This knife is also visible in a photograph depicting Colette's body. GXP 41. Subsequently, a CID chemist scraped a speck of blood from the Geneva forge knife which proved to be consistent with Colette's Type A blood. TTr. 3428, GX-638.

Although no splinters had been found in the living room area where MacDonald said he had been attacked, a large splinter, bearing Colette's Type A blood, was found in the area where Colette's head had lain and where three matching purple cotton seam threads had also been found. TTr. 1700-01, 3404-05, 3426-27, 3657-58; GX 125/Q84/D-23; GXP 77. This same splinter was later fitted back into the club. TTr. 3802-04; GXP 435, 438. Another splinter, identical in composition to the club, was found in the debris from the rug where the trunk and legs of Colette MacDonald had lain in the master bedroom. TTr. 3806; GX 327/E303. Additionally, splinters identical in composition to the club were found in the debris removed from the bottom sheet on Kristen's bed, although there is no evidence that Kristen was struck with the club. TTr. 3806-07; GX 372/E63NB.

The debris from the north pillow on Kimberly's bed, which also contained one matching purple cotton sewing thread and one matching blue polyester-cotton yarn, yielded splinters which were identical to the club and could have originated from it. TTr. 3808; GX 346/Q122/D-118. It should be noted that Kimberly was struck with the club on both sides of her face. The location of this bloodstained club splinter (GX 346) in relation to the spatters in Colette's Type A (GX 349/D-136) and Kimberly's Type AB (GX 348/D-134) blood on the north wall seven feet above the bed in Kimberly's room, suggests that Kimberly was struck again with the club in her

own room, after the club had been used on Colette, and that the centrifugal force as the club was being swung in a downward direction caused the blood to leave spatter on the wall. TTr. 3670-3672; GX 2138, GX 983, DE-132-17 at 1.

Deep soaking stains in Kimberly's Type AB blood were found on the rug at the hall entrance to the master bedroom (GX 309/D-207B), spattered on the top sheet from the master bedroom (GX 978), and on the front of MacDonald's pajama top. TTr. 3649-50, 3664, 3668-69; GX 984, DE-132-16 at 3; GXP 39.

On the rug of the master bedroom, adjacent to the left elbow of Colette MacDonald, a piece of bloodstained latex was found. TTr. 1729-30; GXP 43. A finger section of what appeared to be a latex glove (GX 105), also bloodstained with Colette's Type A blood, was found inside the sheet (GX 103) in the pile of bedding on the floor of the master bedroom. TTr. 1730-31; GX 978, DE-132-16 at 5. Packages of Perry brand disposable latex surgeon's gloves were found in a cabinet below the kitchen sink. TTr. 1743, 1760-61. Leading to this cabinet was a series of blood droplets (GX 136-137) in Jeffrey MacDonald's Type B blood. TTr. 3443, 3682-83; GXP 30, 33. Additionally, on the underside of the sink where the surgeon's gloves were kept, there was a stain in human blood. TTr. 3683; GX 132.

Jeffrey MacDonald's type B blood was also found on the sliding door of the linen closet (GX 344), where a large quantity of medical supplies, including disposable scalpel blades (GX 1149) and hypodermic syringes (GX 1148) were kept. TTr. 3670; GXP 521. Blood of Jeffrey MacDonald's type was also found on the rim of the sink beneath the mirror in the hall bath. TTr. 3670; GX 338-339; GXP 76, 213, and 534.

In the living room, blood was found on the *Esquire* magazine (GX 139/"L") on the top of the pages above the letters "Q" and "U" in "Esquire," although that area was covered by the box

from the child's game "Wonders of Animal Kingdom." GXP 25. Subsequent serology testing revealed a mixture of Types A and AB, Colette and Kimberly's blood types, respectively, but eliminated Jeffrey and Kristen as the possible source of these stains. GX 139, 651. The March 1970 edition of *Esquire* magazine contained articles about the Manson killings in September of 1969 and various bizarre witchcraft activities involving blonds, candles, and LSD. GX 139; GXP 256. The *Esquire* magazine contained numerous latent fingerprints matching those of Jeffrey MacDonald. DE-227-14 at 27-28. Portions of the pertinent articles were read aloud to the jury at trial. TTr. 4628-64. MacDonald's eyeglasses were also found lying on the floor near the living room window. GXP 24B, 27. A red speck, believed to be blood, was visible on the outer surface of one of the lenses, which was removed by a CID chemist at the scene. TTr. 3132. Later examination of the glasses would also reveal a pink fiber caught in the hinge of one of the ear pieces. See infra at 106-107. A suspected blood stain was collected from the hall floor at the entrance to the living room just before the step down, and the area was marked as "#144". GXP 510. At the time the crime scene was first photographed, this "#144" area on the floor was covered with clothing, later moved to permit removal of the bodies. Compare GXP 510 with GXP 75 and GXP 191. Stain "144" would later be described in the "Evidence Examined" section of the CID Laboratory Preliminary report of April 6, 1970, as "Exhibit D-144-Portion of hall floor at west entrance bearing red-brown stains." DE-123-2 at 43. The serology testing results for D-144 reflect that it was human blood that was indicated to be blood group type B (Jeffrey) or O (Kristen). DE-123-2 at 50; DE-123-3 at 6, 16.

A diligent search for possible blood on the wall above the living room couch was conducted, and three stains were collected. TTr. 3410-11; GX 341-343. Testing of these exhibits using benzidine determined that these stains "were not blood." TTr. 3482-84. Accordingly, in the

living room proper, human blood was only found on the cover pages of the Esquire Magazine, and the outer surface of the lens of MacDonald's eyeglasses, which were found lens side down on the floor.

B. The hospital and the morgue

MacDonald was first seen in the Emergency Room of Womack Army Hospital by Michael Newman, a Senior Clinical Technician and combat medic, who had performed triage on casualties while serving with the First Air Cavalry Division in Viet Nam. Newman testified that MacDonald's vital signs were stable, he had wounds on his right chest, upper left arm ("a superficial laceration"), and upper left abdomen. TTr. 2644-49. MacDonald had "an abrasion" or "lump" on the left forehead which, although not bleeding, was seeping fluid. Id. Newman, who was also familiar with stab wounds, including those caused by an icepick, testified: "I did not see any icepick wounds." TTr.2649-50. When MacDonald initially came into the hospital, he only had on a pair of pajama bottoms, which were immediately taken off him so he could be further examined. TTr.2651. "[T]here was blood on the pajama bottoms. The inseam of the pajama bottoms was ripped out from about the mid-thigh all the way across." TTr.2661. It was Newman who threw away the pajama bottoms during the process of cleaning up. Id.

When asked if his examination of MacDonald revealed any wounds on his back, Newman testified: "I did not see any on his back." Id. Newman, whose service in Viet Nam had made him familiar with the signs of physical shock, testified that "[he] did not consider him [MacDonald] to be in shock." TTr.2654.

During his treatment, MacDonald told Newman that "there was a white woman, two black males, and one white male." TTr.2653. (emphasis added). The woman was stating, "Acid is groovy; kill the pigs." Id.

Further examination by the surgical resident, Dr. Jacobson, and an X-ray revealed that MacDonald had a laceration type wound on the right side of his chest at the seventh intercostal space (between the 7th and 8th ribs). TTr. 2858. This wound caused a small pneumothorax (air between the lung and the inner wall of the chest), a condition which is "well-tolerated" by someone of MacDonald's "relative good health and robustness." TTr. 2865-66.

At trial, while on cross-examination, Dr. Jacobson was asked a hypothetical question, as he had been during his Article 32 testimony, about whether a doctor who inflicted a stab wound on himself at this location would have been able to control the depth of the wound. Dr. Jacobson responded that his opinion at the Article 32 hearing had been that "if one were to grab the handle of a knife and stab himself, he wouldn't be able to control the depth of how far you stab simply because you don't know how sharp the knife is, you don't know how tough your skin is, and sometimes you don't know how hard your muscles are working." TTr.2877. Dr. Jacobson continued, "[s]ince then I have had a chance to reflect simply because of the procedures we do—biopsy procedures—we can control the depth; and the way we do it such as doing a spinal tap, is we set a little depth gauge ahead of time, and we go in that far and that is as far as we go. Reflecting on that, I thought that if one were to grab a knife carefully, one could by grabbing the handle and grabbing part of the blade, just go only up to your thumb and you would only go into as far as you wanted to go. Your thumb would stop you." TTr.2877-78.

Dr. Jacobson further testified: "I recall that he had a pair of pants or a pair of pajama bottoms, I have mentioned this before, that they seemed to be more like pants because the material in them was rather dense, and as I recall, nice material. I don't know why I recall that." TTr.2850-51.

MacDonald was also attended in the Intensive Care Unit by Dr. Merril Bronstein, who had previously met MacDonald while both were moonlighting at local hospitals. TTr.2951-52. Dr. Bronstein gave MacDonald "a pretty thorough examination because I was very upset—he was upset. He was tearful and very obviously anxious and I guess I was very intent on relieving his discomfort—his general agitation and I wanted to give him medication to calm him down." TTr. 2954-55. Because MacDonald said he had been "knocked out," Dr. Bronstein wanted to make sure he was not medically compromising MacDonald by administering narcotics or sedatives and "felt that he should examine his head very carefully." Id. After examining MacDonald's head and only finding one bruise, Dr. Bronstein gave MacDonald medication. TTr.2955. Dr. Bronstein "looked him over pretty carefully" for other wounds. TTr. 2956. He described one of the three wounds as follows: "he had a cut on his left upper abdomen. In medical terms, it is below his costal margin, below the edge of the ribs, maybe two inches down. And it was about an inch and a half or two inches long, and it was through the skin and the fat." Id. "It went through the fat. You could see the fascia. It is kind of a flat tendon of the middle muscle of the belly called the rectus muscle–rectus abdominus. I could see the white fascia, but it wasn't bleeding. It was not superficial, in that it went through the skin and through the subcutaneous tissue, but was not through the fascia."[46] TTr.2957.

The first CID agent to interview MacDonald was Paul Connolly. Connolly attempted to get a better description of the alleged intruders. TTr.2681. MacDonald described being attacked by four individuals in the living room, one of whom he said struck him with a club. TTr.2684. When asked by Connolly to describe the club, MacDonald said: "Well, I think it was a baseball bat...When I reached up to grab it, it was slippery like, you know, it had blood on it." TTr. 2684.

[46]Given the precision of Dr. Bronstein's description of this abdominal wound, the Court should accord no weight to the misstatement in movant's Reply: "And Dr. Bronstein testified at trial that MacDonald suffered...a two inch *deep* wound in his abdomen that went through both the skin and fat." DE-142 at 9, ¶11. (Emphasis added).

Connolly asked: "are you sure it was a baseball bat?" and MacDonald replied: "Well, I am not sure. I thought it was a baseball bat."[47] Id.

On the afternoon of February 17, 1970, MacDonald was interviewed as a victim/witness by FBI Special Agent Robert Caverly. TTr.2885. MacDonald gave an account of an attack in the living room by four intruders. TTr. 2888-91. In describing this "struggle," MacDonald told agent Caverly that "...the Negro and white male continued fighting with him and he pushed them away from the couch into the hallway, with both the black and the white male tearing at his pajama top." TTr.2891. Additionally, "...he did not know how long he was unconscious, but when he awoke, he was on the floor in the hallway with the pajama top torn, bloody, and twisted around his wrist." TTr. 2891.

On February 18, 1970, Agent Caverly again interviewed MacDonald, who basically furnished the same information as on the previous day, but volunteered additional information. MacDonald had not checked either the front or back door, and he may have gone into the hall bath to stop his bleeding. TTr.2899-2900. Further, one of the assailants (the shorter white male with the icepick) had been wearing what he thought were light weight gloves that might have been surgical gloves. Id.

Early on the morning of February 17, 1970, a decision was made to remove the bodies of Colette, Kimberly, and Kristen to the mortuary at Womack Army Hospital (WAH). None of the victims' hands were "bagged" or otherwise protected from contamination. TTr. 2600-01. Both Kimberly and Kristen were placed on the same canvas stretcher. GXP 773-808. All of the bodies were covered with sheets taken from the ambulances prior to being removed from the crime scene. GX 3050-51.

[47] No one who has ever played baseball could mistake the feel of the 2x2 club (GX306), which was once part of a 2x4, was virtually square in shape, and was very irregular on the side which was split from the 2x4, for a baseball bat—even in the dark. See GXP 421-22, 424-428.

Upon arrival at the WAH mortuary, the victims' clothing was removed by mortuary attendants and the bodies placed in refrigerators. TTr.2600. Subsequently, the bodies were removed upon the arrival of the pathologists Major (Dr.) George E. Gammel and Captain (Dr.) Franklin Hancock. Id. The autopsies of all victims was preceded by a detailed visual examination of the exterior of the bodies, and the collection of any potential evidence (e.g."debris from the hands-fingernail scrapings"). GX3053.9. What the pathologists saw and collected was dictated simultaneously into an overhead microphone, as the examinations and collections occurred. Subsequently, the dictations were used in the preparation of the Autopsy Protocols for each victim, which were entered into evidence at trial. TTr. 2511, 2566, 2575; GX 398 (Colette), GX 399 (Kimberly), and GX 400 (Kristen).

Dr. Gammel, who performed the autopsy on Colette, on February 17, 1970, testified that he took scrapings from the hands of Kristen and Kimberly as well. GX 3053.9. The Investigating Officer asked Dr. Hancock if, on that same day, he collected debris from the bodies. GX 3055.16. His response was: "Dr. Gammel and I were there at the same time that he—I know in specific reference to fingernail scrapings he [Gammel] took them, and I [Hancock] labeled the slips and put them in the bottles and handed them." GX 3055.16.

On the morning of February 17, 1970, after the autopsies were completed, CID Agent Bennie J. Hawkins (BJH), arrived at the autopsy suite to obtain fingerprints from the body of Colette. TTr.3041. Hawkins identified a number of exhibits that he had taken custody of, including the items collected from Colette's hands. TTr. 3042. On cross-examination, Hawkins was asked if he had seen where Colette's wedding ring (GX 294) came from when he was in the morgue. Hawkins responded that he did not. TTr. 3049. When asked then if he could tell the jury how it came into be in his possession, Hawkins responded: "Okay, sir. As I stated earlier, I went down

to the morgue for the purpose of obtaining fingerprints and palm prints of Mrs. MacDonald. While I was there, the pathologist [Dr. Hancock] mentioned that these items had been collected and were there and wanted to know if I were to pick them up. I picked them up at that point. They were all like this [in plastic containers and vials] when I picked them up." TTr. 3049-50 (emphasis added). Upon receiving the vials, Hawkins marked them "BJH, 17 February, 70." TTr. 3051. Later on February 17, 1970, Hawkins prepared a typewritten Military Police Property Receipt, DA Form 19-31, reflecting, inter alia, a description of the "plastic vials containing fingernail scrapings..." received from William Hancock. GX 6001, DE-214-2 at 1. Dr. Hancock signed the DA-19-31, and his signature was witnessed by CID Agent James A. King. Id. On February 21, 1970, Hawkins relinquished custody of all the items listed on the DA-19-31 to Craig S. Chamberlain (not Janice Glisson) at Ft. Bragg, who transported them to the Criminal Investigation Laboratory at Ft. Gordon for analysis. Id.

The autopsy of Colette MacDonald revealed that, although the cause of death had been loss of blood due to stab wounds, she had also sustained massive blunt trauma injuries which, but for the subsequent stab wounds, she could have survived. TTr. 2507-08. Dr. Gammel testified that her blunt trauma injuries, two broken arms, and at least five separate lacerations to her forehead and scalp which exposed the skull, and in one place fractured it, were consistent with a frontal assault and could have been caused by a blunt instrument such as the club. TTr. 2491-98; GXP 760-71, 768. Some of the injuries, the broken arms and the lacerations to the back of the hands, Dr. Gammel characterized as "defensive wounds". TTr. 2494-95; GXP 765-67. Colette also had "a pattern bruise with sharp margins and angulations" on her chest, resulting from blunt force, and consistent with the side or end of the club. TTr. 2498; GXP 771-772, 422. Colette sustained sixteen deep penetrating stab wounds to her neck and chest, which had been inflicted in a

perpendicular manner while she was flat on her back. TTr. 2500-02; GXP 763. In Dr. Gammel's opinion, these gaping incisional stab wounds were cause by a single-edged sharp knife, and were "very consistent" with the Old Hickory paring knife found outside the rear of the quarters. TTr. 2502-03; GXP 261. The knife wounds went into the chest cavity and there were lacerations of both lungs and the pulmonary artery. TTr. 2501.

In addition to the sixteen lethal stab wounds, Colette had sustained twenty-one puncture wounds to her chest, inflicted in a perpendicular manner, such as would be caused by the icepick found outside the rear of the house. TTr. 2503-04; GXP 262, 763. The twenty-one icepick wounds were in two distinct groups: sixteen on the left side and five on the right side of Colette's chest. TTr. 2520; GXP 763. On cross-examination, Dr. Gammel testified that the absence of tearing of the skin in the areas where the punctures were found indicted that Colette's body was not moving at the time the icepick wounds were inflicted. TTr. 2545.

Like her mother, Kimberly (age 5½) had sustained blunt trauma injuries consistent with the club, and lethal incisional stab wounds. GXP 811-12. Kimberly sustained at least two blows to the head, one on either side of her face. TTr. 2565-67. The blow to the right side of her face fractured her skull. TTr. 2567; GXP 808-812. Kimberly's eight to ten incisional wounds to the throat and neck could have been inflicted by the Old Hickory knife. TTr. 2568. There was no evidence that Kimberly was stabbed with the icepick.

Kristen (aged 2½) did not sustained any blunt trauma injuries, but had five gaping incisional stab wounds to her chest and twelve incisional stab wounds to her back. TTr. 2577-78; GXP 776-777. Some of these stab wound penetrated her heart. Id. The stab wounds were consistent with having been inflicted by the Old Hickory knife. TTr. 2589. Kristen also sustained approximately ten superficial puncture wounds to her chest, consistent with having been inflicted

by the icepick. TTr. 2576, 2589. Because seven puncture holes were found in the front of Kristen's undershirt and four in the back of the undershirt, but none were found in her pajama top, investigators concluded that Kristen's assailant lifted her pajama top before inflicting the icepick wounds. TTr. 4039-40, 4043-44, 4048-50; GXP 597.

Dr. Hancock did not state that Kristen "struggled" with her attacker. What Dr. Hancock said was: "There [were] multiple minor lacerations–cuts basically–on both hands if I recall from reading my protocol and, in addition, there was a more significant wound. I think it was on … the right hand on either the ring or middle finger. There was a fairly large—it looked like an incised or cut wound—approximately an inch and a half or so on the side of the finger. But the hand also had some minor cuts on it in other places which basically did not cause any bleeding, but the large wound that I described was down basically to the bone.[48] TTr. 2576-77 (emphasis added). When asked by AUSA Blackburn about his opinion as to the type or classification "...of the wound that was on her finger," Dr. Hancock responded, "I would say as a general reference these could be defined as defensive wounds or these could be wounds incurred in the process of other types of wounds happening." TTr. 2577. Dr. Hancock said nothing about this wound having been incurred when Kristen "grabbed or scratched back at an intruder." DE-123 at 3. Rather, what Dr. Hancock posited was that either Kristen's hand was extended to protect her from the knife blows of an assailant, or Kristen's right hand was resting on her chest when one of the multiple gaping incisional wounds was inflicted. GXP 776. In any case, this wound was on Kristen's right hand, and does nothing to prove the presence of a hair under the fingernails of the left hand.[49]

[48] This wound on the third finger of Kristen's right hand is depicted in GXP 778.

[49] In this § 2255 proceeding, MacDonald offered no prior testimony from Drs. Gammel or Hancock from the Article 32 Hearing, the Grand Jury, or the trial to the effect that either pathologist had observed the presence of a hair under Kristen's fingernails and collected it. GX 3053-3056. Nor did MacDonald call either pathologist to testify at the

C. MacDonald's pretrial statements

On April 6, 1970, MacDonald appeared voluntarily at the Ft. Bragg CID Field Office, and after being advised of his privilege against self-incrimination and right to counsel under the under the Uniform Code of Military Justice, he waived his privilege against self-incrimination, and the presence of counsel. GX 1135. MacDonald was asked by the CID to "just go ahead and tell us your story." GX 1116. The interview was tape recorded (GX 1116), later transcribed (GX 1135), and the tape was ultimately played for the jury at trial.

MacDonald told CID agents Franz Joseph Grebner, Robert B. Shaw, and William F. Ivory his version of the events of February 16-17, 1970. Id. Colette returned home from a class she had attended, they watched television, and she retired first. GX 1135 at 93. At approximately 2:00 a.m., he decided to retire and, upon entering the master bedroom, he found that his youngest daughter Kristen had gotten into bed with his wife and had wet his side of the bed. Id. at 3. MacDonald described returning Kristen to her own bed, and then going to sleep on the living room couch. Id. The next thing he knew, MacDonald heard his wife screaming "Jeff, Jeff, why are they doing this to me?" and his daughter Kimberly screaming "Daddy, Daddy, Daddy." GX 1135 at 48-49. MacDonald saw four individuals, one of whom was a girl, with a wavering light on her face, who was chanting, "acid is groovy; kill the pigs." Id.

MacDonald proceeded to give the CID a blow-by-blow account of "the struggle" in the living room, with the alleged intruders:

> "Well, all I know is that when I was struggling -now after I had been hit the first time, I was struggling with these guys; and my - somehow, my pajama top – I don't know if it was ripped forward or pulled over my head. I don't think it was pulled over my head. I don't remember actually - like backing

evidentiary hearing, or submit affidavits from them, notwithstanding the Government's stated contentions in the Pre-hearing Order that: "There was no hair under the fingernails of Kristen MacDonald's left hand;" and "...no hair was observed or removed from under a fingernail of Kristen MacDonald's left hand at either the crime scene or autopsy." DE-292 at 5.

> my head through it. But all of a sudden, it was around my hands and it was in my way. And I remember that I was holding this thing in my hand - the guy's hand – that I couldn't maneuver very well. My hands were kind of wrapped up in the thing. And as they were punching me, I was kind of using that a little bit, you know holding it - right exactly – cause this guy, I thought was really punching me in the chest, you know, and in the stomach 'cause I was getting hit across here [pointing to the mid-section of his body]. So in effect, I was blunting everything by, you know, holding this up; and I couldn't get my hands free of this thing. And I remember I ended up, when I was laying (sic) on the floor - I forgot to say that - when I woke up on - it was still around my hands and everything, and I took it off going in the bedroom. And after I took this [Geneva Forge] knife out of my wife's chest, I – you - know, keeping her warm. You know, to treat shock, that would be (inaudible) and keeping them warm."

GX 1135 at 12-13.

MacDonald was asked to explain how the pocket from his pajama top (GX 102) found on the throw rug by Colette's feet, had only a very minute amount of Colette's Type A blood on it, when the pajama top was soaked with her blood. He provided the following explanation:

> "I laid it [the pajama top] – I laid it over her... I am sure I took the thing off... I'm sure I took this thing off the first time. I don't –I didn't make a circuit with this jacket on, I don't think. I came down the hallway– I know that– and I took it off to get my hands free–basically– and sometime while I was in there the first time, I –you know, I put it over my wife."

GX 1135 at 69.[50]

MacDonald was asked if he recognized the club (GX 306), found outside the utility room door, as something that might have come from around the house, but he said he "never saw it." GX 1135 at 45; DE-132-1 at 17. Although he "...always had some extra lumber laying (sic) around in the little well [crawl space under the house] outside, back of my house, but I don't – how long is this?" Id. Upon being told that the three foot long piece of lumber was about 1 5/8 inches by 1 1/2 inches, MacDonald immediately designated it as a "two-by-two," and then

[50] MacDonald subsequently testified, essentially to the same effect, about this event on direct at the Article 32 hearing, and twice before the Grand Jury. His testimony changed in that upon first entering the master bedroom he "dropped" or "threw" the pajama top on the floor and then picked it up and covered Colette with it. See DE-132-21 at 12-15.

stated: "I didn't have any two by two's. I used four – two-by-four's that I took out of the old Third [Special Forces] Med Supply area." Id.

When asked if he had an icepick as depicted in a photograph of GX 312, MacDonald replied: "no, I didn't have an icepick." GX 1135 at 47; DE-132-21 at 17. When pressed on this point later in the interview, MacDonald reiterated: "we had no icepick. I'm lazy and I buy cubes." DE-132-21 at 18. Upon being shown photographs of the Geneva Forge knife (GX 311), which MacDonald claimed to have pulled from Colette's chest, MacDonald stated "I know we didn't have one lying around because, you know I would throw something like that out." GX 1135 at 41. Upon being shown a picture of the Old Hickory paring knife (GX 313) and asked if it could have come from the house, MacDonald denied that it came from his home: "I don't know this one. I'd have seen the "Old Hickory sign if we had that around. I don't know that one." GX 1135 at 43.

MacDonald recounted to the CID his movements throughout the house after covering Colette with his pajama top, in which he touched everybody checking for pulses, washed his hands in both the kitchen and hall bath, and used the master bedroom and kitchen telephones. GX 1135 at 84-86. He was adamant that he did not go outside the utility room door, although that door was open and he did look out. Id.

MacDonald was asked why he had a lot of drugs in the house. His explanation was that when the Third Special Forces Group disbanded, "they had boxes and boxes of stuff they were just going to burn ... so I just took a couple of boxes of everything." GX 1135 at 60-62. Asked whether he had been "sending anything to anybody around here that would suggest" - MacDonald interjected that he had been sending items to his relatives. Id. "My – my moth – my mother-in-law was on diet pills, but that's controlled in the Army so I haven't got many through

the Army for her." Id. Asked what kind of diet pills, MacDonald replied, "Amphetamine sulphate, 15 milligrams. But, you know, you got to sign your life away in the Army so I — she's had to get her own since I got in the Army."[51] Id. at 62.

During the afternoon session of the April 6th interview, MacDonald learned for the first time that many threads and yarns identical to those of his pajama top were found in the master bedroom (including under Colette's body), that Kimberly's blood type was found soaked into the rug at the entrance to the master bedroom, and on the master bedroom top sheet. Further, he learned that the investigators believed Kimberly had been struck in the master bedroom, and they suspected that the sheet had been used to move one of the bodies. GX 1136 at 9-10.

MacDonald first testified on August 13-15, 1970, at the Article 32 Hearing, to essentially the same account he had provided the CID on April 6th. See GX 2339, 2340. MacDonald testified that he was not wearing his eyeglasses when he was awakened and attacked by the intruders. GX 2339.135-136. On redirect, Mr. Segal, MacDonald's counsel, brought out that MacDonald had worked at Hamlet Hospital "from 6 a.m. on February 15 to 6 a.m. February 16 treating 'wounds.'" GX 2339.151-52. MacDonald recalled "suturing at least one patient" which he thought was from an automobile accident, and probably "several other minor sutures." Id. MacDonald told Segal that he had been wearing his glasses during his shift that day. GX 2339.152. Asked whether he had ever had his glasses contaminated with any matter while on hospital duty, MacDonald answered, "absolutely," and further described the contamination as

[51] There is no evidence that Mildred Kassab, who weighed less than 100 pounds, ever took diet pills supplied or prescribed by MacDonald. It should be noted that MacDonald did not tell the CID on April 6, 1970, *that he had been taking diet pills.* Shortly thereafter, however, when MacDonald was describing his "activities" for the evening of February 16, 1970, for his military defense counsel, the first thing he wrote was, "It is possible I had 1 diet pill at this [dinner] time." MacDonald further described how he "had lost 12-15 lbs in the prior 3-4 weeks, in the process using 3-5 capsules of Eskatrol Spansule 15 mg Dextroamphetamine ("speed") and 7.5 mg Prochlorperazine (Compazine) to combat the excitibility (sic) of the speed." See GX 4000 (internal quotation marks and parentheses in original).

"dirt, dust, blood, anything." Id. The Investigating Officer asked MacDonald where his glasses were when he went to bed. MacDonald initially said they were on the coffee table, but then did not remember them being there, "as a matter of fact, they could have been on the table behind my head at the end of the couch, but I think more likely they were on the coffee table." Id. The Investigating Officer asked MacDonald a series of questions about his glasses. MacDonald did not recall using his glasses at any time after the struggle with the assailants, nor did he know how Type O blood got on his glasses. GX 2339.155. He did not remember approaching the coffee table at any time after the assailants had departed. GX 2339.152-155.

On August 15, 1970, during cross-examination, MacDonald was shown a photograph of Helena Stoeckley, although it was not identified to him as such at that time. GX 2339.141. He firmly denied ever having seen the girl depicted in that photograph (G-105 [GX 952]). Id.

Following the dismissal of the charges under the Uniform Code of Military Justice on October 23, 1970, by the convening authority on grounds of insufficient evidence, MacDonald remained at Ft. Bragg pending his hardship discharge from the Army in December, 1970. See United States v. MacDonald, 531 F.2d 196, 201 (4th Cir. 1976). Sometime in late November 1970, MacDonald spoke to Alfred "Freddy" Kassab, Colette's step-father and MacDonald's staunchest supporter before the Article 32 Hearing, by telephone. See DX 5076. During this conversation and in subsequent letters, MacDonald told Kassab that he had caught one of the "assailants" in a bar in Fayetteville, dragged him out of the bar, beaten a confession out of him and then "terminated him with extreme prejudice." TTr. 6706-10. Of course, MacDonald's encounter with one of the alleged hippie intruders was a complete fabrication, as he was quick to bring out on direct examination at trial. Id. He told the jury, "[i]t was a lie of incredible

proportions that I should never have told them, and I was doing it to try to give myself some space to rebuild my own life and to keep Freddie and Mildred off my back." Id.

During the period of time between the dismissal of the UCMJ charges in 1970, and the return of the federal indictment on January 25, 1975, Army CID and FBI laboratories conducted extensive additional examination of the physical evidence. DE-217-14 at 1-30; GX 3060-61, 3063. The results of the key examinations were not disclosed to MacDonald until he returned to testify before the Grand Jury on January 21, 1975. During his initial appearance before the Grand Jury from August 12-16, 1974, MacDonald described essentially the same sequence of events—the attack in the living room, and his actions subsequent to regaining consciousness—as he had previously, and continued to deny any recognition of the murder weapons as having come from the household. See GX 1141, DE-132-21.

By consent, on August 14, 1974, MacDonald was photographed from the waist up by the FBI, in the presence of his defense counsel. MacDonald would point to an area of his body with a felt tip pen, and would then describe the injury, how it was allegedly inflicted, and whether or not it had left a scar. FBI Special Agent Donald M. Murray would take substantially verbatim notes, and the photographer (FBI Special Agent Edward J. Brennan) would take "location shots" with one camera and close-up shots with another camera. This procedure, with and without the pointer, was utilized to document fourteen locations on MacDonald's upper body. TTr. 2616-20; GXP 708-757. Significantly, during this session MacDonald did not claim to have sustained any injuries to his back—including from an icepick—that he was aware of. DE-132-21 at 37.

When MacDonald returned to the Grand Jury on January 21, 1975, he was pressed by DOJ Criminal Division Attorney Victor Woerheide about any contact he might have had with the sheet found in the pile of bedding on the floor of the master bedroom. GXP 210-12. Woerheide

said, “I am going to ask you again, did you handle that sheet that night? Did you touch it? Did you have anything to do with it?” MacDonald replied. “[n]ot that I remember.” DE 132-21 at 24. MacDonald denied taking Colette from Kristen’s bedroom and covering her with the sheet and subsequently laying her on the floor in the master bedroom. DE-132-21 at 25. When asked about the bloody prints on the sheet and any possible contact between him (or Colette) with the sheet, MacDonald responded: “I don’t even remember the sheet,” and “I don’t even remember seeing the sheet,” respectively. DE-132-21 at 26.

D. Laboratory examinations

Among the first significant forensic discoveries following MacDonald’s discharge from the Army was the fact that the club (GX 306) had once been part of a 2x4, which was later used as a bed slat (GX 141) for Kimberly’s bed. TTr. 3812-17; GXP 424-427, 440. As pictured in GXP 421 and GXP 428, the club (GX 306 (USACIL Exhibit A)) is stained in some areas with paint. The chemical composition of the two layers of white and cream color paint on the club were compared to the two layers of paint on another piece of wood (GX 328) located in a locked storage shed behind the house. They were found to have identical chemical compositions. TTr. 3822; GXP 428. Further chemical comparisons were done between the cream-colored paint found on a pair of “Perry” “number 8" rubber gloves (GX 329), the piece of wood from the locked storage shed, and the club. The cream-colored paint on all three specimens was identical in chemical composition. TTr. 3821-22; GXP 100. A photograph, identified by Mildred Kassab as depicting Colette painting shelves in one of the bedrooms, also shows her wearing latex gloves. TTr. 3823-24; GXP 2. Further comparisons were made between the paint on the headboard of Kimberly’s bed (GX 637), the paint on the club, and the board from the storage shed; the chemical composition were again found to be identical. TTr. 3230. As depicted in

GXP 428, the configuration of the paint stains on the club and the board are roughly square shaped. When the paint stains on the bottom of the legs of Kimberly's headboard are compared to the chemically identical paint stains on the other two pieces of wood, it is obvious that one leg of Kimberly's headboard rested on the club, and the other leg rested on the board, when the headboard was painted. GXP 429-430.

The Army CID lab also performed serology tests on the "Hilton" bath mat (GX 14) that MacDonald claimed to have placed on Colette's abdomen, which revealed the presence of blood stains in Kimberly's Type AB blood in stain area "B" (on the bottom side), and Colette's Type A blood in stain area "L" (on the top side). TTr. 3646-47; GX 640. Further examination of the configuration of these stains by the FBI Lab revealed that blood stain area "B" matched the shape of the "Old Hickory" knife (GX 313) and the bloody impression could have been caused by it. TTr. 4118-4123; GXP 1065-66. The FBI also determined that stain area "C" on the bath mat has the general shape of the icepick (GX 312), and the bloodstains resulted from the items either being placed on the bath mat or the bath mat "... was used to wipe the items off." TTr. 4124-25; GXP 446-7, 1067. Combining this information with the fact that both the Old Hickory knife and the icepick had no blood on the blade and pick, respectively, but blood was found underneath the handles of both weapons, it is highly likely that they were wiped off on the Hilton bath mat. See supra at 73.

Serology testing was also performed on twenty-seven separate areas of MacDonald's blue pajama top (GX 101) and revealed the presence of three blood groups—AB, A, and B. TTr. 3654; GX 640. Stain area "2," on the left front panel of the pajama top was in Kimberly's Type AB blood. TTr. 3649-50. Area "16", on the left front part of the sleeve of the pajama top, was in MacDonald's Type B Blood. The remaining twenty-five areas tested were in Colette's Type A

blood, including stain area "26" from the right sleeve of MacDonald's pajama top. TTr. 3648-54, 3653; GXP 784-85.

Serology testing of eight areas on Colette MacDonald's blood soaked pajama top (GX 270) were determined to be of her own Type A blood. TTr. 3654-55; GX 641; GXP 227. Although Colette had sustained no bleeding injuries to her legs, fourteen stained areas on her pajama bottoms (GX 271) were in her own Type A blood. TTr. 3655-56; GX 641; GXP 225-26. The inference is clear that at some point after Colette sustained bleeding injuries to her upper body, she was in an upright position and bled onto her pajama bottoms.

Serology testing was performed on twenty-eight separate areas of the top sheet from the master bed (GX 103) found in the pile of bedding on the master bedroom floor (GX 644). Stain area "11" at the edge of the sheet revealed the presence of Kimberly's Type AB blood, as did testing of stain area "13". TTr. 3663-64. All the remaining stains tested, including the very large blood stains, were in Colette's Type A blood. TTr. 3662-66; GXP 817. Testing of the finger section of the latex glove found inside the sheet (GX 105) revealed the presence of Colette's Type A blood. Testing of the large blood stain found on the multicolored bedspread (GX 104), also found inside the sheet, revealed the presence of Colette's Type A blood. TTr. 3667. A head hair with a blood-like deposit (GX 388), which was microscopically identical to the head hair of Colette, was found entangled with a purple cotton seam thread matching those of MacDonald's pajama top, both adhering to the bedspread. TTr. 4103-10.

Further examination by the FBI of the configuration of the stains in Colette's blood on the sheet revealed that they were fabric impressions. Area "F" was made by blood transferred from the left sleeve of Colette's pajama top (GX 270). TTr. 4133; GXP 781, 819. Blood stain area "G" was made by the right sleeve of Colette's bloody pajama top. TTr. 4134; GXP 782, 819.

According to the FBI examiner, bloodstain areas "A" and "B" on the sheet were made by bloodstains (previously established to be in Colette's Type A blood) transferred from the right sleeve of MacDonald's pajama top. TTr. 4146-52; GX 825, 1077-78; GXP 785. Blood stain areas "C" and "D" on the sheet had the general appearance of having been made by bloody left and right hands. TTr. 4138-39; GXP 820-821. A portion of blood stain area "E" on the sheet was compared to the torn left cuff of MacDonald's pajama top, and the stain conformed in size, shape and blood type to the left cuff area. TTr. 4136; GXP 783, 819. Immediately above stain area "E" there is rounded portion of a stain that has the general appearance of a bare left shoulder. TTr. 4136-37. MacDonald's pajama top was torn exposing the left shoulder. GXP 606. On direct examination MacDonald's experts contested the FBI examiner's conclusion with respect to stain areas "C," "D," "E," and "G," however, they agreed that stain areas "A" and "B" were made by the right sleeve of MacDonald's pajama top, and that area "F" was made by the left sleeve of Colette's pajama top. TTr. 5173, 5192. The evidence revealed by the top sheet (GX 102) and the bedspread (GX 104) contained within the sheet, long prior to the existence of DNA testing, was summarized on a chart. GX 978.

In June 1971, the FBI Lab was asked to conduct examinations of the clothing of the victims, as well as MacDonald's pajama top, in order to determine the number of cuts or punctures, and whether they could be associated with any of the knives or the icepick found at the crime scene. TTr. 4031-33. Paul M. Stombaugh ("PMS"), of the FBI Lab, examined the Geneva Forge knife (GX 311), which MacDonald claimed to have pulled from Colette's chest, and determined that this knife had a dull, bent blade. TTr. 4033-34. In contrast, examination of the "Old Hickory" knife (GX 313) revealed a "very sharp" blade. TTr. 4034.

Stombaugh's examination of Colette MacDonald's pajama top (GX 270) revealed a total of thirty puncture holes in the front of the garment, which were consistent with having been made by the icepick (GX 312), and a total of eighteen clean cuts, also in the front of the garment, which were consistent with having been made by the Old Hickory knife. TTr. 4051-53; GXP 595. In Stombaugh's opinion, the dull test cuts produced by the Geneva Forge knife (GX 311) made it "extremely doubtful" that this knife could have made the cuts in Colette's pajama top. TTr. 4054; GX 598. With respect to his examination of the two cuts in MacDonald's pajama top (GX 101), it was Stombaugh's opinion that these cuts could have been made by the Geneva Forge knife because they were not clean cuts (as produced by the Old Hickory knife), but were more or less tearing cuts. TTr. 4063.

Stombaugh had also been asked by the CID in 1971 to try to determine whether MacDonald's pajama top had been torn before or after it became stained with Colette's blood. TTr. 4076. Stombaugh explained that in examining an object to determine this sequence, "you look for a stain that has been placed on an object and then torn through. The contours of the edges [of the stain] would be the same." Id. Stombaugh testified that, "we found stained areas where such had occurred. In other words, there had been some blood on the stain on the pajama top prior to its being torn and then torn through. These areas were up here in the left shoulder and down the sleeve area down at the cuff, and the cuff area and the left seam." TTr. 4077. Stombaugh pointed to these areas on MacDonald's pajama top. TTr. 4077-79. He agreed that it was his testimony that the blood got on the pajama top in those areas before it was torn. TTr. 4079. Subsequently, Stombaugh used an enlarged photograph of the left sleeve of the pajama top to illustrate his testimony. TTr. 4087; GXP 617A; DE-132-20 at 2.

In addition to the examination of the composition of the pajama top, and the manner in which it was torn, Stombaugh also determined that MacDonald's pajama top had forty-eight puncture holes, none of which were in the torn left panel or sleeve, and all but nine of which were in the back and right shoulder of the garment. TTr. 4056-58; GXP 600-602, 604, 609-10. All forty-eight puncture holes were consistent with having been made with the icepick, although some varied in size. TTr. 4056-58.

The biggest puncture hole measured 1/8th of an inch, which conformed to the maximum width of the icepick. Id. Asked his opinion as to whether the pajama top had been stationary when the forty-eight puncture holes were made, Stombaugh testified, "had the garment been in motion when a sharp instrument was stuck into it, the holes would not be perfectly symmetrical like they are. There would be tearing of the yarns in the area from the force of the garment being moved. I found no such tearing and therefore concluded that the garment itself was stationary at the time the punctures were made." TTr. 4074-75. All forty-eight icepick holes were circled in white marker and numbered 1-48 on the inside of the pajama top. GXP 600-602.

In 1974, Stombaugh was furnished photographs of the crime scene, as well photographs taken at Colette's autopsy, and asked to ascertain whether or not the puncture wounds to her chest could have been made through MacDonald's pajama top. TTr. 4187.

Working with Physical Science Technician Shirley Green, Stombaugh determined that when MacDonald's pajama top was turned right sleeve inside-out, and the left front panel is draped alongside, as both are depicted in the photo of Colette with the garment on her chest, twenty-one puncture holes were visible on the upper most layer of the pajama top. TTR. 4185-87, 4192; see GX 43. Starting with the twenty-one puncture holes visible on the top layer of MacDonald's pajama top, Shirley Green was able to insert simultaneously twenty-one probes (GX 1140)

through all forty-eight puncture holes in the pajama top. TTr. 4429-4431; GXP 787(a). The exact sequence and directionality of the probes through the puncture holes—referred to as "the reconstruction"—was reflected on a chart, GX 1142, as testified to by Shirley Green. TTr. 4431-36. Chart GX 1142 also contained a small photograph (GX 764(b)), previously identified as depicting the icepick wounds on Colette's chest, which Green used to explain the correlation between the pattern made by the inserted probes and the pattern made by the icepick wounds. TTR. 4436-39. Using her notes, Green was able to replicate the reconstruction of the twenty-one probes through the forty-eight icepick holes. Using push pins numbered 1-21, Green first inserted the pins through the forty-eight holes in the pajama top, which was placed right sleeve inside-out, on a cardboard box covered with graph paper. The resulting pattern of the numbered push pins through the pajama top was then photographed in juxtaposition to photographs of Colette's chest, which also depicted twenty-one push pins inserted through the twenty-one icepick wounds previously identified. GXP 789-791. The push pins were then removed from MacDonald's pajama top, and reinserted in the same order into the holes previously made on the graph-paper-covered "reconstruction" box (marked "PC-L2082 JV Q12"). GXP 792. Next, the "Q12 pajama top reconstruction box" was photographed in juxtaposition to a similar box on which twenty-one push pins had been inserted through the icepick wounds depicted in a photograph of Colette's chest. GXP 786, 793. The push pins were then removed from the photo of Colette's chest and reinserted into the corresponding holes in the box marked "PC-L2082 JV Photo." GXP 795. When the "reconstruction" box (GX 792) and the "photo" box (GX 795) are juxtaposed side by side, the pattern of the twenty-one push pins through the forty-eight pajama top holes corresponds exactly to the pattern made by the twenty-one icepick wounds on Colette's chest depicted in the autopsy photo. TTr. 4159-4474; GXP 794, 796.

Based upon his own examination of MacDonald's pajama top, coupled with the "reconstruction" done by Shirley Green at his direction, Paul Stombaugh testified that, "based upon our findings the puncture damage to her [Colette's] chest could have been made through this pajama top while it was on her body." TTr. 4197. When asked, Stombaugh did not say that the pajama top "was in exactly the precise position on Colette's chest" when this puncture damage occurred, as depicted in the photographs, rather, he went on to explain that, "in the photographs the pajama top is lower down on the chest [than the icepick wounds] and it appears to have been moved." TTr. 4197.

E. The trial

1. The Government's case

During its case-in-chief, the Government introduced the evidence from the crime scene, the events at the hospital, MacDonald's pre-trial statements, and the results of the analysis of the physical evidence through the testimony of expert witnesses. Virtually all of the physical evidence was memorialized on numerous charts. It was the Government's theory that MacDonald's account—that he was being attacked in the living room while his wife and children were being murdered in their respective bedrooms—was a false exculpatory statement evidencing consciousness of guilt. It was further the Government's theory that MacDonald's account of his movements throughout the crime scene after purportedly regaining consciousness, were in fact attempts to account for otherwise incriminating physical evidence (e.g., his wife's blood on his pajama top), and to rearrange the crime scene so as to make it correspond to his false account. The Government adduced evidence which could not be accounted for by the actions of intruders, but rather could only be attributed to MacDonald, and therefore identified him as the only possible criminal agent. No one else could have stabbed Colette through his

pajama top, nor tracked Colette's blood out of Kristen's room. In essence, the Government proved that MacDonald's account was—to use his phrase—"a lie of incredible proportions." TTr. 6710

a. The icepick

MacDonald had glibly told the CID he didn't have an icepick. He bought ice cubes. The Government proved this was not true through the testimony of Pamela Kalin Cochran, his next door neighbor, who "often" babysat in the MacDonald's apartment. TTr. 3555. Her duties required her to go throughout the apartment. She testified that in the utility room they kept tools and "old scraps" of wood. TTr. 3559. On occasion, Pamela Kalin would need to get popsicles out of the refrigerator freezer for the children. "They used to keep a lot of food in the freezer. It would always be packed, and because of it, the frost would get over the food. And I would have to, once in a while, get the icepick to chop away the ice to get my popsicles for the kids or food for me to eat–-the ice cream." TTr. 3560. "It was a smooth-handled icepick in a light color." Id. Pamela Kalin didn't know where the icepick was always kept. "I remember reaching for it on top of the refrigerator." Id. Pamela Kalin also recalled that "most of the time" Kimberly would want to sleep "in her parents bed," and that Kristen wanted to sleep "in Kim's bed." TTr. 3558-59.

Colette's mother, Mildred Kassab, also testified that at Christmas 1969 she needed space in the refrigerator for hors d'oeuvres, and finding no place cold enough; "had to use an icepick to jimmy some ice trays out." TTr. 3266. She got the icepick "out of the kitchen drawer." Id.

b. Officer Mica

Being aware of the defense put on by MacDonald at the Article 32 Hearing, at trial the Government presented in its case-in-chief evidence to rebut these defenses, e.g., the testimony of MP Spec-4 Kenneth Mica.

At approximately 3:40 a.m. on the morning of February 17, 1970, while responding to a "domestic disturbance" radio call on Castle Drive, Mica was in a clearly marked "Military Police" jeep with an illuminated red fender light, driven by his partner Spec-4 Morris. TTr. 1400-03. Mica testified to what he saw when the jeep braked for a red light before proceeding through the intersection: "I observed what I feel was a female standing on the corner of—it would have been Honeycutt Road and South Lucas." TTr.1400-01. This observation took place through a canvas side curtain with heavy plastic, as Mica's military jeep did not have windows like a civilian vehicle. Id. Mica continued: "To the best of my recollection, she had on a dark-colored raincoat and what appeared to be a type of a dark colored rain hat, and I believe I could see part of her legs below the raincoat." TTr.1401-02. "As I recall, sir, this hat was a sort of a wide, like a rain-type hat that women wear. I don't know what it is called." TTr.1402. "It was dark. I believe it matched her raincoat." Id. Asked what color her hair was, Mica replied: "I don't know, sir." Id. Asked whether the girl he saw had on muddy white boots, as MacDonald had described to him, Mica replied: "I don't recall them, no, sir." TTr. 1596-97.

Mica testified that on the corner where he saw the girl there was a gas station, and directly across the street was a small "PX type" shopping center. TTr.1403. Although these businesses were closed at that hour, Mica testified that if someone were seeking to buy something, there were a number of vending machines in front of the gas station. TTr. 1595. Asked on cross-examination if he customarily saw people like this at that time of the morning, Mica answered: "It was unusual—it was not uncommon." TTr.1451. Asked by Segal if the girl "was somewhere

between the ages of 18-25 or so," Mica answered, "I was under the general impression that she was in the 20's to 30-year range." TTr. 1452-53. Segal attempted to get Mica to change his description of the woman's rain hat to a "floppy hat". Mica would only go so far as to say, "I would say it was wide-brimmed and it was full-sized—it appeared to be somewhat 'floppy' – yes, sir." TTr. 1453. Asked on cross about his testimony on direct that the distance from the intersection where the woman was located to the MacDonald house "was something about ½ mile," Mica corrected Segal, "I believe I said it was something in excess of a half mile." TTr.1454. Segal then tried to get Mica to agree that the distance was "about five blocks," Mica replied, "I would say at least five country blocks." TTr. 1455. Mica was not shown any photograph of Helena Stoeckley, nor asked by Segal to look at either artist's sketch drawn from MacDonald's description of the girl in the floppy hat.[52] TTr. 1445-1994, 1597-1599.

c. The debris in Colette's hand

FBI Examiner Paul Stombaugh testified to his examination of the hairs found in Colette's hands. Stombaugh's examination of the blond hair in Colette's right hand (GX 280/E-4/Q118) revealed that it was a hair that microscopically matched the known exemplars of hair removed at exhumation from Colette's head, and in his opinion could have come from Colette.[53] TTr.4157. Stombaugh's examination of the hair found in Colette's left hand (GX 281/E-5/Q119) revealed that was the tip [distal] portion of a Caucasian limb hair and did not have enough points of comparison to be of value for comparison purposes. TTr. 4157-60. Because it was a limb hair, Stombaugh could not identify it as belonging to anyone. TTr.4158. In his final argument, Segal claimed that this was evidence of intruders. "Unidentified hair—there is hair in this case. The

[52] MacDonald claims that en route Mica had seen a woman "who bore a striking resemblance to the woman described by MacDonald." DE-126 at 4. Clearly this overstated assertion is not supported by Mica's trial testimony.

[53] This hair was later labeled by AFDIL as 52A. See infra at 170, 176.

Government has found and they have had MacDonald's sample which was given to them and they still, to this day, cannot ascribe it to any member of the family."[54] TTr. 7266.

Other debris found in Colette's left hand included a green single strand nylon fiber identical to the green fiber of the multicolored rug (GX 358/D37NB) from Kristen's bedroom, and a piece of wood that was microscopically identical to the wood of the club (GX 306). TTr. 3893-94.

d. The debris on the hall steps

Through the cross examination of the investigators who processed the crime scene, Segal sought to adduce testimony to corroborate MacDonald's account, in particular, that he had been attacked in the living room, notwithstanding the absence of pajama top threads and yarns at that location. During his cross-examination of Agent Shaw, Segal elicited testimony that Shaw had seen, but had not collected, threads and fibers from the south side of the hallway near the entrance to the living room. TTr. 2410-2411. Segal asked, "[y]ou did see, as a matter of fact, fibers and threads which you eventually came to believe came from the blue pajama top quite near to the entrance of the living room in the MacDonald house, didn't you?" Id. Shaw replied, "[t]hat is not quite correct, Counsel. I saw some threads there; yes." Id. Shaw went on to explain that at the time he used the terms "fibers" and "threads" "synonymously," but had since learned the difference. TTr.2413. Shaw did not recall who collected these threads, but at some point during the processing of the crime scene, he became aware that they had been collected. TTr.2412-2416. On redirect, AUSA Blackburn tried to establish how many fibers or threads

[54] That statement may have been true in 1979, but by 2006 this hair (labeled by AFDIL as 51A(2)) had been ascribed to MacDonald by virtue of DNA testing. This hair had been touted for years by the defense as proof of intruders, but in 2006 MacDonald claimed that the DNA results were "in no way inculpatory given that Jeff MacDonald testified that he repeatedly tried to revive his injured wife, and gave her mouth to mouth resuscitation, moved her body, etc." DE-122 at 3 n.5. This limb hair is "bloody" and has a "broken end," but no root. DE-217-3 at 3; GXP 3431-33, 3501. It is hard to conceive how checking for a pulse on a dead body would result in a limb hair being broken off at the root. See infra at 177.

Shaw had seen at the end of the hallway. Shaw stated, "I remember seeing a tangled bunch or ball of threads or fibers. As I recall they were a blue color." TTr. 2480-81.[55]

During cross-examination Ivory was asked if there was a speck of blood on the step leading to the hallway, and stated that there was. TTr. 2056-2057. On direct examination, Shaw described searching the living room for possible blood stains with Craig Chamberlain. "There was a spot on the entrance to the hallway—that would really be the hallway floor. There was a spot there we collected. TTr. 2377. During the cross-examination of Chemist Craig Chamberlain, Segal sought to adduce that there was a "place in the living room in the MacDonald house where there was blood recovered and which was later on subject to examination for dried blood stains in the laboratory." TTr. 3474. Segal could not recall the exhibit number, which Chamberlain needed in order to find the results in his notes. TTr. 3474. Chamberlain also asked Segal to define what he meant by "living room." TTr. 3475. After much back and forth, Segal asked Government counsel to supply the exhibit number. TTr. 3476-3478. Prosecutor Murtagh stated, "I believe counsel is referring to D-144, which... Mr. Chamberlain would know by the same number." TTr. 3478. Chamberlain then testified, "[t]here was a stain on the hall floor as I described it at the west entrance to the living room." TTr. 3479. Segal then had Chamberlain mark on the crime scene model (GX 1) where Exhibit D-144 was

[55] MacDonald now points to the Government's final argument that "no blue pajama top threads and yarns" and "no Type B blood" were found in the area of the living room, where MacDonald claimed to have been attacked, as being an improper suggestion "that proved the lie to [MacDonald's] account." DE-126 at 7, 23; DE-343 at 87. MacDonald's claim is based on two assertions: that based upon Shaw's testimony, supra, MacDonald's pajama top "fibers" were found on floor of the hall at entrance to the living room, and post-trial release of USACIL reports under FOIA "show that 'Type B' in Exhibit D-144 was found precisely where Macdonald said he struggled." Id. Neither of these factual assertions withstands close scrutiny. There was no further testimony elicited at trial to establish what these threads or fibers described by Shaw were made of or whether any of them matched the composition of MacDonald's pajama top. In 1974, Specimen Q94 (#32), described as a "Vial w/ yarns from hall," was examined at the FBI Lab by Shirley Green. GX 3062.99. As her notes reflect, she mounted 1 slide of fibers, and placed in a pillbox "1 long drk blue yn (9", 1 ply Z, del acrylic-not like Q12)." Id. (emphasis added). "Q12" was the FBI's exhibit number for MacDonald's pajama top (GX 101). In other words, Green found a 9 inch long dark blue delustered acrylic yarn which was dissimilar to MacDonald's pajama top. Id. Regarding D-144, see supra at 76, and infra at 104 n.56.

found. TTr. 3480. Segal never established what the serology results were for D-144 through any of the four serologists who testified, including Terry Laber, who actually tested D-144. GX 3021.19.[56]

e. MacDonald's eyeglasses – the Type O blood

On cross-examination, Segal challenged Ivory's testimony that there was no blood found in the living room near the sofa. When asked if a pair of eyeglasses were found by the sofa, Ivory said, "I would consider that more by the window than by the sofa. Yes, sir. It did have some blood." TTr. 2056; GXP 24B. Ivory recalled that the blood was on the outer surface of the lens of MacDonald's glasses, the side in contact with the floor. TTr. 2056; GXP 27. On direct examination, Craig Chamberlain had not been asked anything about MacDonald's eyeglasses or the collection of any blood from them. TTr.3367-3451. On cross, Segal sought to establish there was another place in the living room where blood was found. TTr. 3473. Chamberlain replied, "there were some eyeglasses on which a small portion of apparent blood stain was recovered." TTr.3473. Chamberlain had not found the eyeglasses himself, nor had he collected them, and he wasn't sure he had transported the glasses—as opposed to the suspected blood stain—to the laboratory. TTr. 3473-74. Segal sought to have Chamberlain mark the location on the model where the eyeglasses had been found based upon a photograph but did not seek to adduce from Chamberlain the serology test results for D-33. TTr. 3481, 3482-99.

On redirect, Chamberlain testified, "I performed the crust test and found a weak indication of anti-A, a weak indication of anti B." TTr. 3507-08. MacDonald's claim that "it is unclear even what blood type was on the glasses," misrepresents Chamberlain's testimony, changing it to "a

[56] Thus, MacDonald's claim that he only discovered through post-trial FOIA releases that blood was found on the hall floor at the west entrance to the living room (Exhibit D-144) is false. DE-126 at 23; DE-336 at 78. He also overstates that testing of D-144 revealed the presence of "Type B blood". DE-343 at 87. In fact, the results for D-144 "indicated same to be the International Blood Group B or O." DE-123-2 at 50, ¶14; DE-123-3 at 16.

weak indication of antigen A and antigen B. [Tr.3507-08]." DE-142 at 6. As Chamberlain testified, the crust test is a test for the presence of antibodies, and only Kristen's Type O blood contained both the antibodies "anti A and anti B". TTr. 3379-3385; GX 638. Antigens (A, AB, B, and H) are detected by the absorption-elution test. Id. There is no question that Chamberlain's use of the terms "anti A" and "anti B" refers to the antibodies found in Type O blood. TTr. 3381; GX 638.[57]

In closing argument and in an attempt to show the presence of MacDonald's blood in the living room corroborating his account of the struggle, Segal pointed to the eyeglasses;

> There was also blood someplace else. There were spectacles of Dr. MacDonald found in the room with a speck of blood, but in all these hints—these dark hints by the Government that maybe he got it the night he worked at Hamlet Hospital. Well, you know he worked in the hospital and he treated the young lady there and the suggestion was from the question that maybe that is how it got to be there. If anything you have learned physically about Dr. MacDonald is what—is he a sloppy man? Is he a man likely to walk around with a blood spot on his reading glasses having to read for several hours? It does not seem to me that there is evidence to sustain such a conclusion. It is an equally likely inference in this case that the blood spot is a product of the struggle that he had in the living room. Even if you cannot say that you accept that, you have to say to yourself … that the Government has not proved beyond a reasonable doubt that there was no blood of Dr. MacDonald's in that room.

TTr. 7217-18.

[57] On re-cross, Segal established how stain D-33 came to be collected. Chamberlain testified- "A pair of eyeglasses was shown to me. I took the suspected blood stain, placed it between two glass slides, put the slides together, sealed them, and put it in a plastic evidence bag, and this was placed in a larger box, and it was transported along with most of the other evidence." TTr. 3517. In response to a question as to how he had removed the speck of blood from the glasses to the slide, Chamberlain testified, "It was pried off with a sharp point of a knife. A laboratory knife, and placed on a slide. TTr. 3518. Chamberlain had been handed the glasses by Shaw, who returned them to the floor, after Chamberlain had removed the spot of suspected blood. TTr. 2377.

In his initial argument AUSA Blackburn referred to the blood on the eyeglasses in passing, and then only in the context of Segal's attack on the processing of the crime scene. "... if you believe that Bob Shaw in picking up the glasses and looking for a fleck of blood–interestingly enough found to be consistent with the same type as that of Kristen– if you believe that these things–along with letting the garbage can be emptied before they looked into it– if you think that all of these things are so important and so bad that you have got no choice but to acquit the Defendant, then I think you ought to do it–-smoke a cigarette and do it." TTr.7119.

In closing argument, AUSA Blackburn responded to Segal's argument, "[h]e even spoke about the glasses again today and said there was blood on them. Yes, there was blood and the testimony was that it was consistent with that of Kristen and inconsistent with that of the Defendant. He said that we were talking about the hospital at Hamlet and perhaps that is where it got there. I don't recall that testimony ever coming or that argument ever coming from the Government—maybe you do." TTr.7299.[58] [59]

f. MacDonald's eyeglasses – the pink fiber

The jury first heard about this fiber during the cross-examination of Dillard Browning. Segal was apparently under the misapprehension that Browning had examined it. "Were you also

[58] In fact, the Government had never offered the Hamlet Hospital explanation for the presence of Type O blood on his eyeglasses, but MacDonald had done so during his testimony before the Article 32 Hearing. Supra at 88-89. This explanation was expressly rejected by Segal in final argument in 1979. The issue of the origin of the Type O blood on his glasses has long been settled. See United States v. MacDonald, 456 U.S. 1, 5 n.2 ("The police were able to identify the bloodstains of each victim, and their location did not support MacDonald's story. Blood matching the type of the children was found on MacDonald's glasses [Kristen's] and pajama top [Kimberly's]."). At the evidentiary hearing in September 2012, however, MacDonald's current counsel cross-examined Bill Ivory about the FBI's 1974 attempts to determine the blood types of the patients MacDonald had attended at Hamlet Hospital the weekend prior to the murders. HTr. 850-52. MacDonald had not subpoenaed the Hamlet records prior to trial, as he could have, but rather now relies on a copy of an FBI report he received under FOIA on July 20, 1983. DE-111, Ex. 8; DX 5045. Counsel asked Ivory if he had any reason to disbelieve that "one of those five patients [with Type O blood] that [MacDonald] treated at the Emergency Room had ripped his foot in an accident, okay and that patient had Type O blood." Hr. Tr. 851. Ivory, who had never seen the records, had no basis to dispute this assertion. Id. In fact, there was no evidence that the patient with Type O blood "had ripped his foot in an accident," rather, the FBI report relied upon by MacDonald reflects that he "swabbed out his puncture wound in his left foot and placed something similar to iodine in the wound." DX 5045 at 10. This would not be the type of hemorrhaging wound likely to spurt blood onto a physician's eyeglasses, for as Segal told the jury, in an attempt to explain the absence of MacDonald's blood in the living room, "puncture injuries...were the least likely to produce profuse bleeding. We have learned that from all the pathological evidence." TTr.7215. The Court should accord no weight whatsoever to the Hamlet Hospital explanation currently being offered, because this was a scenario expressly offered through MacDonald's testimony in 1970 at the Article 32 hearing, but not at trial and was expressly disavowed by Segal in final argument. TTr. 7217-18.

[59] In recognition of the vulnerability of his Hamlet Hospital explanation, MacDonald proffers an even more implausible explanation, "[m]oreover, it is also possible the intruders attacking MacDonald had already attacked and bloodied Kristen and their weapons, such that a speck flew from their weapons to his glasses as they were swinging clubs and knives at him, weapons previously used on Kristen." DE-343 at 97 (footnote omitted). Besides being wholly speculative, this scenario is inconsistent with indisputable forensic facts: Kristen wasn't hit with any blunt object, no type O blood was found on the only club, and consequently no Type O blood flecks "flew" off any club. Secondly, in the absence of any other blood spatters on the wall above the couch, a single speck of Type O blood landing initially on the outer surface of MacDonald's eyeglasses—which by his account he was not wearing and which were found lens side down—is simply too fantastic to be believed. A far more plausible explanation is the one the jury likely accepted: (1) MacDonald was wearing his glasses when he stabbed Kristen, and (2) that when one of the five stab wounds was inflicted into her chest, one penetrating her heart, her blood spattered on his glasses.

asked at some point to examine a fiber that was taken from a pair of eyeglasses in the living room, I think it was identified as E-33 on your list?" Browning: "No, I was not." "Do you know whether there was such an exhibit as E-33 that represented a fiber found on the glasses? Browning: "I don't have an E-33 listed in my notes." "Which would mean what, Mr. Browning?" "It would mean that I did not receive such an exhibit." "And you are unable to tell us from your notes who else would have worked on E-33?" Browning: "No." TTr. 3879. The four USACIL reports from 1973, furnished in pretrial discovery, clearly identify Janice Glisson as the chemist who tried to identify the pink fiber.

Notwithstanding the fact that Segal never established that an unidentified pink fiber was found on MacDonald's eyeglasses, he argued to the jury that it was evidence of intruders. "What about the fiber found on Jeff's glasses in the living room? They have tried and tried and they cannot find any source from within the MacDonald house where that fiber came from. Where do they think it came from? It flew in the window? You have a right to believe that fiber is one more piece of physical evidence that supports an opposite inference from what the Government wants." TTr. 7266.[60]

g. Unidentified fingerprints

In Defendant's Substitute Post-Hearing Memorandum, filed June 10, 2013 (DE-343), MacDonald asserts for the first time that "[a] significant number of fingerprints taken from key locations in the apartment including the headboard and footboard of the bed in the mater (sic) bedroom, as well as the backdoor in the master bedroom, remain unidentified." DE-343 at 53.

[60] MacDonald has again raised the issue of the unidentified pink fiber found on his glasses. HTr. 850-54. If the jury had found this fiber proved the presence of intruders, they would have acquitted MacDonald. That they didn't so find may be attributed to the fatal flaw in Segal's argument, namely, that the fiber could only have become attached to the glasses inside his house during an attack by intruders, even though MacDonald wore the glasses outside the house—at Hamlet Hospital, for example—and said he was not wearing his glasses when we was awakened from sleep and attacked. MacDonald's current posture with regard to the presence of the blood and the fiber on his glasses is internally inconsistent: the blood got on the lens at Hamlet Hospital, but the fiber on his glasses could only have resulted from pink clad intruders inside the house.

MacDonald also reveals that the locations "included unidentified fingerprints and a bloody hand print on the footboard of the MacDonald master bed." Id. at 54. No citation to the record is provided for any of these factual assertions. Id. at 53-54.

Although this is the first time that the alleged bloody hand or palm print has surfaced in this § 2255 proceeding, it was first described in 1997—not in Cormier Affidavit No.2—but rather in MacDonald's Memorandum filed in the Court of Appeals on September 17, 1997. *Memorandum in Support of Jeffrey R. MacDonald's Motion For an Order Authorizing the District Court For the Eastern District of North Carolina to Consider A Successive Application for Relief Under 28 U.S.C. § 2255*, filed September 17, 1997, USCA-4, No. 97-713 at 3. At that time, MacDonald told the Court of Appeals that there was "[e]vidence that is of the sort which traditionally has been considered to be the most powerful exculpatory evidence imaginable...a bloody palm print, not MacDonald's deposited on the footboard of the master bed... [which] has never been considered by any court." Id. at 2-3. Having waited almost 14 years, until after the evidentiary hearing and the filing of his first Post-Hearing Memorandum (DE-336) on April 1, 2013, MacDonald now presents this belated, overstated, and erroneous claim. DE-343 at 53-54.

Regarding the headboard, there are no unidentified fingerprints, palm prints, or other latent areas on the headboard of the MacDonald master bed, which did bear the word "PIG" written in Colette's blood type. DE-217-14 at 26, ¶ 8, and 18, ¶ 8; GX 130. The footboard of the bed revealed "one *latent* partial palm print." Id. (emphasis added). This partial latent palm print, designated as "XXX-30, is depicted in GXP 1003 as being located several inches from the left hand corner of the top edge of the footboard. DE-217-14 at 26, ¶ 8. Visible in the extreme left hand corner of the footboard (top and exterior side edges) is a red stain (D-29), which indicated

the presence of Type A (Colette) or Type O (Kristen) blood. See GXP 41, 42, 47; DE-217-14 at 19, ¶ 17.

As can be seen by comparing the photograph depicting the placard marked "XXX-30" with an arrow pointing to the area of the footboard darkened with fingerprint powder where the latent palm print was developed (GXP 1003), and the photographs of the bloodstains (GXP 41-42), these are two contiguous but different areas. This is a partial latent palm print, which is not in blood; otherwise it would be described in the USACIL report as a "patent" or "bloody" palm print. DE-217-14 at 26, ¶ 8. The latent partial palm print remains unidentified, and there is no evidence as to when it was deposited on the footboard—it could have come from the movers, for example. Located adjacent to latent area XXX-30 is what the USACIL Consolidated Lab Report lists as D-29, D-29b, and D-29c, which it described not as a bloody hand or palm print, but as "[r]ed-brown stain(s) from footboard in east bedroom." DE-217-14 at 6. There is no "bloody" hand print or palm print on the footboard of the MacDonald master bed. DE-343 at 54.[61]

MacDonald also claims that there are "unidentified fingerprints … on the back door of the master bedroom, among other places." DE-343 at 54. Again, there is no citation to the record in support of this assertion, including to any testimony by Hilyard Medlin, pertaining to any latent image on this door. Id. At trial, MacDonald called former New York Police Department crime scene technician, Professor James W. Osterberg, who testified to his examination of the crime scene, and that, in his opinion, "the crime scene was grossly under processed" for fingerprints. TTr. 4965. Using photographs that were taken in his presence on August 11, 1979 (D-59-64), Osterberg explained in detail how the swinging door between the utility room and the master

[61] This legerdemain is an attempt to overcome the fatal flaw that exists in all of MacDonald's arguments that unidentified or unsourced items indicate the presence of intruders on February 17, 1970. As has been apparent to the jury and every court to consider this case, there were scores of unsourced items in the MacDonald apartment that accumulated over the years. They would only be probative if shown to have been deposited there during the murders. So, MacDonald tries to create the impression that this unidentified latent palm print was made in the blood of the victims. It simply was not.

bedroom, and in particular the back of that door had been, in his opinion, inadequately dusted for fingerprints. TTr. 5006-5014. Osterberg did not testify that he developed any latent prints, or otherwise identified any such prints, on this door. Id. There is no unidentified latent finger or palm print on the swinging door between the utility room and the master bedroom. Moreover, as depicted in GXP 51, this door was found in the open position on the night of the murders, with the back pushed up to the utility room wall.

At trial, the Government called Hilyard Medlin, the USACIL fingerprint examiner who processed the crime scene. The problems encountered, what was developed, what was lost, what was identified, and what remained unidentified were fully explored during his cross-examination. TTr. 3085-3123, 3129-31, 41, 3142-3228, 3250-3233, 3234-3235. In summation, Segal contended that the unidentified fingerprints were evidence of intruders. "There are fingerprints. We talked about the ones that were found and what was not lifted properly, the ones that were found and were not identified or partially or not complete, the ones that were never found because they did not process the crime scene." TTr. 7265-67. Significantly, MacDonald does not link the unidentified fingerprints to the weapons or any other item of relevant evidence. DE-343 at 98-99.

h. MacDonald's footprint

MacDonald falsely claims that the Government suppressed the opinions of two investigators which were consistent with the defense's position that the bloody footprint was not his. DE-343 at 52. Not only is this claim false, but it is one that he expressly abandoned at the oral argument on his Motion to Set Aside Judgment of Conviction, on January 14, 1985, as both the hearing transcript and Judge Dupree's Memorandum of Decision reflect. Mr. Smith stated, "[a]nd in going through the Freedom of Information material, your Honor, we came across some items.

Upon reflection, we think that we were wrong about two (2) or three (3) of them and that–and this morning we will want to abandon our motion as to a couple of them." DE-136 at 19-20. Wade Smith described the four items they were not abandoning, and then stated, "[t]here were some negatives of fingerprints which were lost and there was evidence about a bloody footprint. We made–we raised those points in our motion that we think the Government's position is well taken as to those and we do not this morning rely upon those matters in this motion to set aside." DE-136 at 23. Judge Dupree's decision, quoting Mr. Smith's statement, reflects, "[t]he court concludes from this statement that MacDonald has abandoned his claims of suppression with respect to any evidence other than the bloody half-filled syringe, bloody clothes and boots, missing piece of skin, and photograph of the letter "G." Unites States v. MacDonald, 640 F. Supp. 286 n.8 (EDNC 1985).

MacDonald now claims that he disputed at trial that he was the person who left the bare footprint in Colette's blood exiting from Kristen's room. DE-343 at 52. In fact, MacDonald never disputed that it was his footprint. "I am sure I had bloody feet," he told the Grand Jury. DE-132-21 at 22. At trial he said, "well I would probably agree that was my footprint since I was there." TTr. 6870. Moreover, the Government proved that it was Jeffrey MacDonald's bare left footprint in Colette's blood type. As explained during the Evidentiary Hearing, Hilyard Medlin compared the ridge lines in the bloody footprint in situ with MacDonald's record footprint (GX 668-69) and made the identification. HTr. 1342-43. Medlin testified that after being asked by the FBI to identify the footprint he made a direct examination. "This is what I did using a 200-watt light bulb in a lamp. I move it around until I could see impressions in the bloody footprint at which time I got down on my hands and knees with my viewing [magnifying] glass and using the record footprint ... I made a direct comparison … I found more than 14 points

of comparison between the fixed footprint in the blood and the record footprint of Jeffrey MacDonald's left foot." TTr.3104-3106. He then testified to his opinion the left footprint exiting from Kristen's bedroom belonged to Jeffrey MacDonald. Id. Medlin next explained that he asked USACIL Photographer Harold Page to photograph the bloody footprint, but because the light bulb would shine directly into the camera lens, "[e]very time he would snap the shutter, it would pick up the light bulb." TTr. 3106-07. Eventually, Page was able to take a scale photograph of the bloody footprint in situ, from which a photo transparency (GXP 569) was made for comparison with a similar transparency of MacDonald's record footprint (GXP 669,670). TTr. 3106, 3112-14.

Contrary to MacDonald's abandoned 1984 claim that the Government suppressed the contrary opinions of two other CID investigators, Medlin explained on direct that the policy of the CID lab was not to base a fingerprint identification on the opinion of a single examiner. TTR. 3109-10. "I was the only one who could see the footprint as it was in the room at that time because I was the only examiner there. So later when the planks were sawed up to be removed to the laboratory they came apart. The photographs that were taken did not show all of the ridge detail which I could see myself … the other two when they looked at the print, could only see one or two characteristics, but they did not see the 14 or more that I saw. So therefore, I believe the way that the chief of the section said the report would be written was that the size, design, and shape of the foot was that of Jeffrey MacDonald." TTr. 3110. The Consolidated USACIL Report at ¶12 states, "[t]he foot impression, appearing on Exhibit D-215, matches in general shape, outline, and size, the record footprint of CPT. J. MacDonald. However, due to the absence of individual ridge characteristics in the photograph taken of this Exhibit, a positive identification could not be made by the examiner." DE-217-14 at 27. On cross-examination

Segal covered the same ground with Medlin. TTr. 3202-11. Segal took the above-quoted language from the USACIL report and had Medlin "read every single word at the bottom there so no one misunderstands what people were signing." TTr. 3207.

The issue at trial was never really about the identity of the defendant as the person who made the bloody footprint in Colette's blood type, the issue was when and how the footprint was made. Where did MacDonald get Colette's blood on his foot—if he didn't track it in, how did he track it out? As stated in the Government's initial summation, "If you find, as we would argue, that footprint could only have been made during the commission of the crime between the time when Colette was in the north [Kristen's] bedroom, as we contend the physical evidence shows, and the time when she wound up on the floor of the master bedroom, it [character testimony] doesn't matter." TTr. 7060.

i. The unsourced wax

MacDonald's counsel again points to the presence of three different deposits of unsourced wax found in the crime scene as proving the presence of intruders. DE-343 at 53. In the process, he overstates MacDonald's contention about the alleged female intruder. MacDonald described the female as having a "flickering light," but never went so far as to state that "she appeared to be carrying one or more lit and dripping candles." Id.

At trial, the jury heard from Dillard Browning that three wax samples were collected from the arm of a chair and a bedspread in Kimberly's room, as well as from the coffee table in the living room. TTr. 3389. The questioned wax samples were "more or less brittle and flaky." Id. Browning testified that, ultimately, he compared the questioned samples with 14 candles found in the MacDonald house, and none of the three questioned samples matched each other, or the known candles. TTr. 3842-45. In closing, Segal suggested that the unsourced wax was proof of

intruders. "What about the wax? Three different candles produced three different types of wax. They went and they rounded up everything in the MacDonald house. They found 14 candles. They took it to the lab. When they got done with their best efforts, what did they find? That the wax was found in the MacDonald house–in the living room where Jeff says that he remembers a woman with a flickering light—which I think is a reasonable conclusion where they are talking about a woman with a candle...What I am saying to you is that the reasonable conclusion that you ought to draw is that the wax found in the house unidentified to this day is consistent with Jeff's story of the flickering light in the hand of the woman."[62] TTr. 7266-67. However, the jury could reasonably have inferred that the presence of the 14 candles proved the MacDonalds liked candles, had candles in the house, that candles by their very nature are consumed by burning, that the three different deposits of unsourced wax came from three different candles which the MacDonald's had previously lit, and either consumed entirely, or discarded the remnants.

j. The latex gloves

Through the testimony of Wade Smith at the evidentiary hearing, MacDonald sought to show that the pieces of latex rubber found in the master bedroom "did not come from the rubber in the gloves under the sink," and therefore proved the presence of intruders. HTr. 22. MacDonald, without any citation, incorrectly ascribes to the Government the "inconceivable" theory that MacDonald, having committed the first act of violence against Colette, "stopped to go to the kitchen and put on a pair of rubber gloves while Colette waited for the violence to continue." DE-343 at 48.

At trial, the Government offered the testimony of Michael Hoffman, an expert employed in the ATF lab. Hoffman testified that he performed Neutron Activation Analysis (NAA) on the

[62] Since it was proven at trial that the murder weapons were already present in the house prior to the murders, is the Court to assume that the gang of attackers came to the apartment with their own candles but did not bring any weapons?

questioned pieces of latex found at the crime scene as well as on samples from the Perry Latex Surgeon's gloves found in package under the kitchen sink. He found that the questioned and known latex samples were consistent in trace elements (zinc, copper, gold, sodium), although in somewhat different concentrations. TTr. 1743, 3914-15. Based upon NAA analysis, and microscopic observations, Hoffman concluded that, "the samples had no significant differences and they were consistent with products of the same manufacturer." TTr. 3914. The questioned samples could have originated from Perry Pure-Brand Latex Disposable Surgeon's Gloves. TTr. 3915. On cross-examination, Wade Smith established that Hoffman had not found the following trace elements: magnesium, aluminum, sulfur, chlorine, calcium, and silver. TTr. 3920-21.

Subsequently, the defense called its own NAA expert, Dr. Vincent Guinn. TTr. 4883. Using more advanced technology in 1979 than Hoffman had available in 1971, Dr. Guinn found additional trace elements and in different concentrations, and concluded, "I would say it would be extremely unlikely—I can't say it's impossible—but it is extremely unlikely, that those samples—the exemplars and the evidence, in this case, could possibly have been made by the same manufacturer in the same production batch." TTr. 4910-11 (emphasis added). On cross-examination, however, Dr. Guinn conceded that variations in concentration of trace elements existed among all eight Perry Brand latex exemplars. TTr. 4921-27.

In summation, the Government addressed this issue: "[y]ou also remember we have got a piece of latex rubber with group A blood on it. Mr. Hoffman, the ATF chemist, testified that in his opinion, it was consistent with trace elements that were consistent with the Perry-brand surgeon's gloves and that in his opinion, they were of the same manufacture. You may recall that the Defense expert testified after using a different procedure in 1979 that he found some 11 trace elements of which ten were common to both the exemplars and the evidence, and that in his

opinion, they were not of the same manufacturing batch as I recall. I would ask you to bear in mind that we are talking about parts per million and that differences are very slight and that the exemplar pieces of which—it was Dr. Guinn who tested it–there were eight pieces of rubber cut from three gloves. On no two pieces of rubber either from the same manufacturer or from parts of the same glove were any of the trace elements-that is the compositional or the number–would have been the same. I think that accounts for the difference. I would ask you to find that the Perry-brand latex gloves matched the pieces of rubber finger section that was found in the sheet. Besides, what is the finger section doing in the sheet on the floor anyway?" TTr. 7077-78.

During his closing, Segal attacked Hoffman's opinion and overstated Guinn's testimony. TTr. 7222-2226. "These are not likely from the same manufacturer or the same batch. It is just not proven beyond a reasonable doubt by the Government under any circumstances." TTr. 7226. Segal returned to the latex gloves, and in fact put them at the top of his list supporting the presence of intruders. "First of all, the latex glove. I stand on Dr. Guinn's testimony. I stand on the gauntlet that he threw down to the Government as to, 'Why, if you think I am wrong, you don't go out today in '79 and check my findings?' It is an unanswered challenge. Where did they come from? They came from some other source than Jeff's MacDonald's home." TTr. 7266.

Clearly, the jury did not accept Segal's argument. Likely, it was because of the inherent flaw in his premise: that MacDonald could only have had Perry-brand latex gloves from the same batch as the package under the sink in the apartment on February 17, 1970, and no latex glove from a different manufacturer or different batch. It was not necessary for the Government to prove the same manufacturer/same batch beyond a reasonable doubt for the jury to connect

MacDonald to the finger section of latex found in the sheet (even if it was of a different production batch), and for which he had no explanation. TTr. 7134-35.[63]

k. Source of pajama threads and yarns

As he did at trial, MacDonald argues that the incriminating threads and yarns matched to his pajama top could have come from his pajama bottoms that were, he overstates, "ripped from ankle to crotch," and which "he was wearing at all times in his home … thereby exposing threads." DE-343 at 94. According to his logic, if the threads and yarns came from the pajama bottoms rather than the top, then all the incriminating inferences fall by the wayside. Id.

During cross-examination of USACIL Chemist Browning, Segal established that Browning could not tell whether the "threads and fibers" came from the pajama top or "the pajama bottoms related to that top." TTr. 3876-77. This was a hypothetical question that assumed a fact not in evidence—that the pajama bottoms were identical in composition to the pajama top. Browning's answer was also hypothetical because he never examined the pajama bottoms.

On cross-examination, MacDonald was asked hypothetically to assume "that the jury should find from the evidence that in the master bedroom as a whole, there were 60 or more purple cotton threads found which microscopically match your blue pajama top and 18 blue polyester cotton yarns which microscopically matched the pajama top and one blue-black sewing thread which matched the pajama top. Assume for a moment that the jury should find that evidence to be true, do you have, sir, any explanation for that?" MacDonald answered, "[w]ith the understanding that they have not matched those fibers and threads against the pajama bottoms, no, I don't have any explanation for it." TTr. 6855.

[63] It is not surprising that the jury found it more plausible that the latex glove pieces found at the crime scene were attributable to physician Jeffrey MacDonald rather than a gang of drug-crazed hippie attackers who brought with them their own latex gloves (and candles), but no weapons.

There was, and is, no evidence as to the composition of the pajama bottoms, but even if it is assumed they were identical, the pajama-bottoms-as-the-source-of-all-threads hypothesis still does not withstand rigorous analysis. This hypothesis does not account for the presence in the master bedroom of the bloodstained pocket (GX 102) torn from the pajama top, nor for the blue-black cotton thread used to sew the white beading on the pajama top cuff (GX 325), both of which originated from the pajama top. If the pajama bottoms were in fact "ripped from ankle to crotch," then it should have been shedding threads and yarns wherever MacDonald went in the house. This hypothesis doesn't explain the absence of any pajama threads or yarns in the living room couch area, nor in places like the kitchen, where he says he used the phone and washed his hands.[64]

MacDonald's pajama-bottoms hypothesis also fails to reckon with the fact that, in some instances, whether the thread or yarn came from the pajama top or the bottoms, its presence is equally inculpatory. For example, consider GX 107/Q96, the purple cotton thread entangled with Colette's bloody hair found in the bedspread, which MacDonald claims never to have touched on the night of the murders, and for whose presence he had no explanation. TTr. 6854-55; DE-132-21 at 24. It would make no substantive difference whether the cotton pajama fiber in the actual fingernail scrapings from Kristen's left hand, found by Dillard Browning on March 9, 1970, came from the pajama bottoms or the top. DE-215 at ¶¶8-11.

[64] Further, hypothecating the pajama bottoms as the exclusive source of the threads and yarns found inside the house requires an incredible leap of faith: none of the recovered threads and yarns came from the pajama top-but all came from the bottoms. First it requires the acceptance that a total of 81 pajama top threads and yarns in the master bedroom came not from the top, but from the pajama bottoms. The same is true for Kimberly's room where 19 threads and yarns were recovered. For all the threads and yarns found inside Kimberly's bedding to have come from MacDonald's pajama bottoms, he would have had to climb into her bed. Conversely, this hypothesis, involving a pajama top that has approximately 5 feet of torn seams (GXP 600, 607), and approximately 2 feet of torn fabric (GXP 602, 604), demands an explanation as to where the seam threads and fabric yarns from the top went, if not in the bedrooms.

Whether the pajama threads and yarns came from the pajama top or bottoms was an issue that was fully litigated at trial and resolved against MacDonald by the jury's verdict. He has proffered no new evidence calling into question the trial evidence on this point. The Supreme Court appropriately treated is as a settled issue in 1982, stating "[t]hreads from MacDonald's pajama top, supposedly torn in the living room, were found in the master bedroom, some under his wife's body, and in the children's bedroom, but not in the living room." United States v. MacDonald, 456 U.S. 1, 4 n.2 (1982).

l. The pajama top reconstruction

As he has since the trial, MacDonald contests the pajama top reconstruction, which demonstrated the identical pattern made by inserting 21 probes through the 48 puncture holes in his pajama top with the pattern made by the 21 icepick wounds in Colette's chest. DE-343 at 95-96; DE-115 at 35-36; DE-142 at 2-3. All of the alleged flaws in the methodology employed by Paul Stombaugh and Shirley Green set forth in these recent pleadings, were previously explored during the lengthy and vigorous cross-examination of these witnesses at trial. TTr. 4198-4303, 4310-4409, 4418-4419, 4475-4539, 4550-4594. Also, defense expert Thornton testified that, because Green had not followed Stombaugh's 1971 bench notes on exit and entry holes, this "negates the validity of this reconstruction." TTr. 5311-17. Thornton had to concede on re-cross that Stomabugh's 1971 report reflected that the frequent handling of the specimen Q12 had caused the yarns surrounding the holes to return to their original positions, thus preventing a definite conclusion as to whether each hole is an entry or exit hole. TTr. 5322.

In summation, Segal stated that the pajama top reconstruction was "not scientific evidence. That is sheer fakery. There is no basis for that." TTr. 7240. Referring to the directionality issue (the exit versus entry holes), he called Shirley Green's alleged failure to follow Stombaugh's

1971 findings, "[t]he third and final coup de gras (sic) of this piece of pseudo-science." TTr. 7241. "[N]ow, that is supposed to come to you as part of a scientific deduction in this case to lead to this theory that Jeff MacDonald stabbed his wife in some pointless and absolutely motiveless—absolutely ludicrous statement that he stabbed through his pajama top putting aside that there is no explanation and no rationality to the whole idea." TTr. 7242. This argument was not persuasive to the jury.

On direct appeal, MacDonald claimed that Judge Dupree committed reversible error in allowing the Government to introduce the pajama top reconstruction. Consuming 27 pages of MacDonald's brief, Segal set forth every conceivable flaw in the reconstruction, including those raised again in the current pleadings. On remand from the Supreme Court, the Fourth Circuit rejected this claim of abuse of discretion after a detailed review of the facts in which it noted, "[t]he resulting array, 5 holes on the right side and 16 on the left bore a striking resemblance to the pattern of the icepick wounds suffered by Mrs. MacDonald." United States v. MacDonald, 688 F.2d 224, 228-29 (4th Cir. 1982). Referring, in particular to the defense contention that the pajama top was moved by the MPs in the process of administering first aid to MacDonald who was rolled off his wife's body before the scene could be photographed, the Court stated, "[a]lthough some variation of the posture of the shirt may have been occasioned by this act, we think it unlikely that the most crucial aspect of the shirt's configuration—that is, the right sleeve being turned inside out—would be affected noticeably by this movement." Id. at n.8.[65]

[65]Senior Circuit Judge Albert V. Bryan, writing for a unanimous panel which included the late Judge Murnaghan, addressed the other issues raised then, and now, of alleged shortcomings in the methods employed by the Government investigators in the pajama top reconstruction. Id. at 229. "Each of these points merits scrutiny, and each was advanced, without limitation, before the jury. Our task is not to decide this dispute...our inquiry now is, baldly, only whether that Court abused its discretion by finding this demonstration more probative than prejudicial...We think the District Court's decision that this evidence was not unduly prejudicial was acceptable.[citations omitted] … We therefore do not think its ruling was an abuse of discretion." Id. (footnote omitted). As Judge Dupree later wrote, "MacDonald's own pajama top was perhaps the most incriminating evidence offered against him during the trial." United States v. MacDonald, 640 F.Supp. at 312. Contrary to

m. The Government rests

On August 10, 1979, the sixteenth day of trial and the date upon which the Government rested, numerous summary exhibits were received in evidence, including GX 1141, the jury booklet containing the subject matter of MacDonald's statements on various topics. TTr. 4707; DE-132-21 at 1-40. GX 1145, a floor plan with an acetate overlay numbered to correspond to MacDonald's testimony before the Grand Jury concerning his movements in the crime scene, was also received. TTr. 4749. Additionally, published to the jury with a cautionary instruction, were various summary charts compiling the evidence previously heard on a room by room basis, "South Bedroom, Kimberly MacDonald, ABO Blood Group AB" (GX 983; TTr. 4749-50; DE-132-17 at 1); "East (Master) Bedroom, Colette MacDonald ABO Blood Group A" (GX 984; TTr. 4750-51; DE-132-16 at 3); "East Master Bedroom, Colette MacDonald ABO Group A" (GX 985; TTr. 4750-51; DE-132-16 at 4); "North Bedroom, Kristen Macdonald, ABO Type O" (GX 982; TTr. 4752-53; DE-132-17 at 2); "Items found in pile of bedding on floor of master bedroom" (GX 978; TTr. 4752-53; DE-132-16 at 5); GX 437, a series of crime scene photos showing a splinter (GX 125) found in the master bedroom came from GX 306, the club found outside the house (TTr. 4752; DE-132-17); and "Exit to Hall From Kristen's Room" (GX 980; TTr. 4753-54; DE-132-17 at 3).

2. The defense case

MacDonald's defense began with calling Dr. Vincent Guinn who testified to his NAA examination of the questioned and known latex specimens, and his conclusions as previously described. Supra at 115. Next, MacDonald called Professor James Osterberg, who testified on

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MacDonald's recent assertion, see DE-343 at 96, this was a statement of the strength of the Government's case, not its supposed weakness.

direct that, in his opinion, the crime scene was "grossly under processed" for the presence of latent fingerprints. TTr. 4969.

MacDonald's principal expert witness was Dr. John Thornton who was offered as an expert "in the area of criminalistics and forensic science." TTr. 5138. As previously described, Dr. Thornton testified to his opinions regarding the origin of the bloody fabric impressions on the top sheet.

Thornton testified to his observations when he tore pieces of polyester cotton bolt cloth. When fabric that had not been sewn together was ripped, the loss of yarns or fibers was minimal. TTr. 5203-04. When panels of cloth were sewn together and ripped along the seams, the number of threads that fell out depended on the amount of force applied in tearing the seam. TTr. 5207. "I think it makes a big difference whether we are talking about tearing the garment along a seam or tearing a garment along an area where there is no seam." TTr. 5211. Thornton conceded that it would not be possible to violently rip a seam and have no threads fall out. TTr.5285.

Thornton testified that he disagreed with the conclusion of Paul Stombaugh that the puncture holes in MacDonald's pajama top were made while the garment was stationary. TTr. 5154-52. "I conducted a series of experiments in which I put a target in motion and stabbed at it with an icepick. I then examined the holes resulting from those puncture and found that the holes were circular in appearance despite the fact that the target was in motion." TTr. 5152. Thornton then illustrated his conclusion using a number of photographic slides depicting a 3/4 inch piece of plywood ("the sled"), to which screw eyes had been attached at either end, and then pieces of clothes line affixed to the screw eyes. Id. "By whipping the loose end of the cord...the sled can be placed in motion to and fro. On the sled is affixed a target. Over the target is placed a piece of cloth which is 65 percent polyester and 35 percent cotton...When the sled was in motion,

approximating the maximum motion of a human, the thrashing around, say on the floor, I made a number of test punctures [with an icepick] into the target material. Then I removed the fabric and examined it under the microscope, looking for the configuration of the margins of the puncture. The second slide illustrates essentially a circular puncture mark in the fabric." TTr. 5158-59. Thornton repeated this procedure of stabbing the target on the moving sled approximately 50 times with the same results. TTr. 5163. Thornton found no significant difference in the puncture holes in MacDonald's pajama top from those produced during his experiment. TTr. 5165. Using bloodstained test material resulted in no significant difference in the shape and size of the holes. TTr. 5167. Thornton further explained that: "In stabbing into this target with an icepick, there is a circular hole made in the fabric and a circular hole made in the tissue. Then as the target is moved relative to the icepick, there is a great deal of resistance to tearing the icepick through the tissue. TTr. 5169.

On cross-examination, Thornton revealed that the "target material," also called the "resilient material," supporting the cloth into which he had plunged the icepick was "a piece of ham," and that the ham prevented the fabric from tearing. TTr. 5223, 5251-52. Thornton also conceded that his ham on a sled experiment had been done only in response to Stombaugh's testimony and not to reconstruct or verify MacDonald's account. TTr. 5227-28. When asked, "if the pajama top is pulled over your head and you are using it as a shield and someone is trying to kill you with an icepick, is it your opinion that the pajama top could be used in that fashion and still not sustain torn areas," Thornton answered. "I don't know." TTr. 5231. After Thornton conceded that he had not done any experiment as described above, and Government counsel informed the Court and counsel at a side bar, an experiment was performed as part of Thornton's cross-examination. TTr. 5231-36. Using a demonstration pajama top (GX 1081), which Murtagh

placed on his wrists, Blackburn was asked to "flail away with an icepick," as Murtagh moved his arms. TTr. 5234. Although not "part of the act," Blackburn hit Murtagh in the arm with the icepick. Id. The demonstration pajama top sustained a number of tears. Id.

a. James Milne

MacDonald called James A. Milne, who had come forward for the first time in early 1979. Milne was a former Army pilot who had served in Viet Nam and testified, without further explanation, "that my service was terminated in April of '70." TTr. 5446-47. From March 1969 to April 1970, Milne was stationed at Ft. Bragg while awaiting the termination of his service, and resided at 232 North Dougherty Street in a duplex apartment facing onto a courtyard. TTr. 5447. Castle Drive runs into North Dougherty Street, and the line of sight across the courtyard of Milne's duplex to the MacDonald quarters was "virtually unobstructed." TTr. 5449. Milne estimated the distance to be approximately 120 yards. TTr. 5450; GXP 968.

On the morning of February 17, 1970, Milne observed the MP, and "knew something was going on, but I did not know what." TTr. 5463. Milne then went to work in his capacity as the "buildings and grounds officer ... an additional duty... in charge of individuals maintaining the [Aviation] company area." TTr. 5451. During a discussion with one of these individuals about "the incident" involving "the death of three people," someone within the group "mentioned the fact that somebody had entered the rear door." TTr. 5451. Milne testified that when he was told "three individuals had entered the rear door, an impact on me was tremendous, from the standpoint that I had previously seen three individuals the night before." TTr. 5451-52.

Milne explained that on the night of February 16, after his wife had gone to bed, he was constructing model airplanes in his "workshop" in an unused bedroom in the front of his duplex. Id. Sometime between 11:45 p.m. and 12:15 a.m., while he was waiting for the "epoxies" to dry,

"all of a sudden I just heard voices." TTr. 5453. Milne further explained that because of the "obnoxious odors" of the epoxies "which I did not care to smell nor did my wife who is really the commandant of that outfit...I had to cross ventilate. My window … was open and the rear door was open. The cross-ventilation I would get would take the fumes right on out the window and the reverse would go out the back door." TTr. 5453-54. Milne continued, "[p]rior experience, particularly in Viet Nam... an instinct—an alarm system went off within me. I immediately rushed to the rear door...I pulled [the door] open and looked out and three people are standing ten or 15 feet from me going up the walk—up the chart away from me but out far enough so I could kind of see abreast of them." Id. "These three individuals were wearing white sheets, and I specifically saw the center individual to be a girl and two males on either side and they were all carrying candles. The girl, I specifically saw holding a candle. She was holding it in her right hand and cupping it from the movement of walking up the walk with her left." TTr. 5454-55.

Milne continued, "[t]hese three individuals continued to talk, and I distinctively respond to that visual effect when I opened that door what I saw. Looking to the left, 'Gee, where is the parade?' I looked back to the left, 'No, not a parade, choir practice." TTr. 5455. Milne continued to watch these individuals until he lost sight of them, so he returned back to his "hobby room." Id. Subsequently, he saw these people emerge and continue walking. "At that particular point, I did not pay too much attention to what they were doing except walking." Id. "I recall the last instance I glanced again to see what had happened and they were near the end of the courtyard on the walkway approaching North Dougherty Street. That is the last that I ever saw of these three individuals." TTr. 5455-56. "I would estimate about 40 yards from the MacDonald home." He described the woman's hair as slightly below shoulder-blade length in

the middle of her back, straight "light brown—almost to a blondish color down the middle of her back." TTr.5457. Milne was never shown a photograph of Helena Stoeckley nor the artist's sketch of the alleged female intruder for purpose of identification.

Asked by Wade Smith why he had not come forward and let the CID or the MPs know this information, Milne went into a lengthy explanation about his pressing military duties, the many issues he faced in leaving the Army "for termination of service," and adjusting to entering college. TTr. 5461. "I had never been in civilian life with a family. I had deep responsibilities, and I had deep thoughts about what I was going to do in the future … I felt that I was overloaded virtually with problems, and the CID or the FBI were professionals in this area in reviewing the matter that was concernable (sic) to the case. I felt possibly if anything was relevant, they would surely come by and ask–particularly living this close to the area." TTr. 5461-62.

Asked on cross-examination how the investigators could know what was relevant until he came forward and disclosed what he knew, Milne responded, "[w]ell, sir, the aspect of what I saw, I drew an analogy to. The aspect of what these three people were doing made no attempt whatsoever to hide from my view. They were very obvious in their walking behind my house as well as along the side of the courtyard. The analogy was—was that I drew—was that if somebody had possibly done this to the MacDonalds, then these people could have done the same to me. As far as relevancy as to whether or not they actually did anything, I don't know, sir." TTr. 5465-70. Asked about whether the item the girl was wearing was a sheet or a choir robe, Milne responded, "[i]t resembled a choir robe with folds in the back—that could have possibly been." TTr. 5473. They didn't have hoods. TTr. 5474. All three individuals were white. Id. All three were carrying lit candles. Id. The girl didn't have anything on her head, including a floppy hat, nor did either of the two males. TTr. 5475, 5483. They weren't carrying

weapons, and he didn't see anybody carrying the club, or any club. TTr. 5479. He didn't recall what the girl was wearing on her feet. TTr. 5483. The jury apparently did not credit Milne's testimony.[66]

b. Helena Stoeckley and the Stoeckley witnesses

The salient facts concerning the trial testimony of Helena Stoeckley and the Stoeckley witnesses is set forth supra, at 6-19.

c. The Rock Report

MacDonald unsuccessfully sought to introduce before the jury the report of Colonel Warren Rock, the Article 32 Investigating Officer, who failed to find probable cause to recommend forwarding the charges for trial before a court-martial under the UCMJ, citing Fed. R. Evid. 803(8)(c). Forty-two years later, MacDonald again lodges the Rock Report (DX 5076) with this Court, and offers it and Colonel Rock's justifications as further evidence of MacDonald's innocence. DE-343 at 84-86. In light of the Fourth Circuit's mandate, this Court should consider the report and the evidence as a whole, and ascribe whatever weight to it the Court deems appropriate. [67]

d. Jeffrey MacDonald on direct

MacDonald took the witness stand in his own defense. He was carefully led by Segal through his account of "the struggle" with the intruders, and his movements through the crime scene after they had allegedly fled. TTr. 6533-6742. In contrast to his statement of April 6,

[66] Citing Milne's testimony, and that of MP Mica, MacDonald now claims that "trial testimony established that a woman matching her [Stoeckley] had been seen by several people near the crime scene at or around the time of the murders." DE-126 at 10. Clearly, Milne's hatless, bed sheet-clad chorister, carrying a lighted candle doesn't match Mica's woman in a dark raincoat and rain hat that he claims to have seen over 3 hours later, and in excess of a half mile away. Nor does either description match that of Stoeckley.

[67] The Rock Report is not to be considered a prior adjudication of MacDonald's innocence. See United States v. MacDonald, 585 F.2d 1211, 1212 (4th Cir. 1978).

1970, to the CID, MacDonald's account regarding what he did with his pajama top, and where and how it was torn, was very vague on direct. Compare GX 1141 and GX 6073.

In contrast to his April 6 statement that "sometime while I was in there the first time, I – you know, I put it over my wife," MacDonald now claimed to have covered Colette with his pajama on his second time in the master bedroom, after he had checked Kimberly for a pulse. TTr. 6604, 6605; GX 6072.1. This subtle change in the sequence of events was meant to provide a possible explanation for the presence of Kimberly's blood on his pajama top.

MacDonald identified Defense Exhibits 89, 90, 91 and 92 as being artist composite drawings made in 1979 from his description of the assailants he alleged attacked him. TTr. 6625. He identified DX 91 as being the black male wearing the fatigue jacket with E-6 stripes, who had a club. TTr. 6627-28. DX 90 was the taller of the two white males, and is depicted with the cross around his neck that MacDonald claimed to have seen him wearing. Id. DX 92, according to MacDonald, is the shorter of the two white males, and is depicted as wearing a hooded sweatshirt. TTr. 6628. DX 89 depicts the female with the hat to the best of MacDonald's recollection. TTr. 6628-29. Later in his direct examination, MacDonald acknowledged the drawings of the individuals in DX 104 (white male with mustache), DX 105 (white male without cross), DX 106 (black male), and DX 107 (female in floppy hat) were made from his descriptions in 1970 at the time of the Article 32 Hearing by an artist in Philadelphia. TTr. 6679-80. MacDonald explained that the 1970 composites, particularly that of the female "just didn't give the sense of the person which the later artist did." TTr. 6679-81. MacDonald acknowledged that at the Article 32 Hearing, while on cross-examination, he was shown a photograph that the prosecution labeled as being of Helena Stoeckley, but the photograph was

not a full front picture, the woman didn't have blond hair, and she wasn't wearing a hat. TTr. 6679.

Segal showed MacDonald the four weapons, the club, the bent bladed knife, the straight knife, and the icepick, and then read the three counts of the indictment to MacDonald and he denied ever striking Colette, Kimberly or Kristen with any of these weapons. TTr. 6739-40.

e. Jeffrey MacDonald on cross

On cross-examination, MacDonald continued to disclaim knowledge or ownership of any of the weapons. After being handed the club (GX 306) and asked whether or not he knew whether this club came from his house, MacDonald answered, "I don't know." TTr. 6752. MacDonald denied any "specific knowledge" of the club once having been part of a board subsequently used as a bed slat on Kimberly's bed, or used to support the bed when it was painted. TTr. 6752-53. He thought that the first time he ever saw the club was when Shaw showed it to him on April 6, 1970. Id. "I have no specific recollection of seeing that particular piece of wood," but went on to explain that there was wood in the well behind the house, in the locked shed behind the house, and in the utility room. TTr. 6754. "I do not specifically recall that piece of wood." Id. Asked if he would recognize the club he claimed to have been hit with, MacDonald answered no. TTr. 6790. Nor did he know what kind of club it was "I don't know. My recollection when I had a hold of it was that it was smooth. I did not recall a rough surface as the one you showed me." Id. AUSA Blackburn asked, "in other words, this particular club [GX 306] you don't believe is the one that struck you," and MacDonald replied, "[n]o, it does not fit my recollection of holding on to the club." TTr. 6791 Blackburn then asked if the club that hit MacDonald was something like a baseball bat and MacDonald replied, "[t]hat is what I would have guessed." Id.

Having disclaimed being hit with GX 306—and thereby attempting to explain the absence of splinters from the club in the living room—MacDonald had no answer to the next question: "Dr. MacDonald, can you tell me, sir, how two threads—two threads microscopically identical to the purple sewing threads in your pajama top—got on this club outside the door of the utility room area, when you stated yesterday that you never went outside the house?" MacDonald replied, "I cannot." Id. The defense now claims that the presence of the two purple cotton sewing threads from MacDonald's pajama top "is in no way inconsistent with MacDonald's account, as he said he had been repeatedly struck by a club or clubs and his pajama fibers (sic) stuck to the club while he was being struck." DE-343 at 105. But this argument is totally inconsistent with MacDonald's testimony, because he only claimed to have been struck with one club (singular), and it wasn't GX 306, because it was more like a baseball bat.

MacDonald didn't know the location where his pajama top was ripped, and when asked "did you rip it," responded, "I may have." TTr. 6808. MacDonald testified that the puncture holes in his pajama top got there "[f]rom the assailants," and while the pajama top had been around his wrists and he "was fending off blows." TTr. 6808. He presumed that all 48 puncture holes got in the pajama top at this time. TTr. 6810. Asked if he could tell the jury why those holes were circular round holes and not tearing holes, he explained, "I was fending off blows that were coming straight at me, and I was pushing out against them. I see no reason why the fabric should be torn and not have circular holes." TTr. 6810-11. MacDonald acknowledged that he had not received any icepick wounds to his hands and arms, but could not say why. TTr. 6821.

Asked about his testimony on direct to the effect that he had covered Colette with his pajama top on his second time in the master bed room, MacDonald initially replied, "I am not sure when I first put it on Colette." TTr. 6832-33. When pressed further, and read his April 6, 1970,

statement on this point, he ultimately conceded that his best recollection was that he covered her with his pajama top on his first trip into the master bedroom. TTr. 6832-6835. MacDonald claimed that, to his knowledge, Colette had not bled on his pajama top before it was torn. TTr. 6845. He said that he didn't struggle with Colette, and she did not tear his pajama top. TTr. 6846. MacDonald claimed no memory or knowledge of whether his pajama top was torn when he placed it on Colette's chest. TTr. 6847. Asked "was there any blood on that pajama top, whatsoever, before you placed it on Colette's chest," MacDonald answered, "I have no idea." Id. Asked how the pocket from his pajama top got on the throw rug, and when the Type A [Colette's] blood was deposited on it, MacDonald's answer to both questions was, "I have no idea." TTr. 6848. Asked if he ever touched the bed sheet and bedspread, MacDonald answered, "I have no recollection." He refused to say if he did or didn't—"I am saying neither." TTr. 6848.

MacDonald had no explanation for the presence of a fabric impression made by the right cuff of his pajama top on the sheet. TTr. 6851. MacDonald had no explanation for the presence of the latex in the bundle of bedding. Id. MacDonald had no answer for the presence of 15 purple cotton sewing threads and 7 polyester cotton yarns identical to those of his pajama top found on the bottom sheet on the master bed. TTr. 6853-55. Asked if he had an explanation if jury should find that no purple cotton threads, or blue polyester cotton yarns, matching his pajama top were found in the living room, MacDonald replied that would indicate the pajama top was pulled over his head rather than ripped from around the back. TTr. 6856. MacDonald claimed no memory of the pajama top being pulled over his head, and "neither do I remember it being torn." TTr. 6856. Confronted with his April 6, 1970, statement on this point, MacDonald changed his prior version of the struggle. TTr. 6856-58. Blackburn asked, "[a]re you stating then, that you do not

know whether or not the pajama top was ripped in the struggle in the living room?" MacDonald replied, "[t]hat is what I have always stated." TTr. 6859. MacDonald's only explanation for the presence of Kimberly's Type AB blood on his pajama top, which he claimed not to have been wearing when he went into her room, was: "pure conjecture." TTr. 6862.

He was asked to assume that the jury should find from the evidence that all the blood on the floor of Kristen's room was Type O, with the exception of the footprint, and further that it was his footprint exiting the room made in Type A blood. Asked for an explanation, MacDonald answered, "[w]ell, I would probably agree that was my footprint since I was there. As far as the blood typing, again assuming the CID accurately typed the blood … I have no explanation for the blood typing patterns, assuming they are correct." TTr. 6867-68. Asked, should the jury so find, if he could tell us where he got the Type A blood on his foot from, MacDonald responded, "I have no idea." TTr. 6870. MacDonald denied taking the bedspread and sheet from the master bedroom, placing Colette on the bedspread, stepping on the bedspread, picking up Colette and then carrying her out of Kristen's room. TTr. 6871

MacDonald did not recall covering Colette with the Hilton bath mat, but admitted he could have done that. TTr. 6877. MacDonald denied that he had wiped the blood off the Old Hickory knife and the icepick using the Hilton bath mat. Id. If the jury should find the blood on these weapons had been wiped off onto the bath mat, MacDonald had no explanation, "unless the assailants did that." Id.

MacDonald's explanation, should the jury find that there was no Type B blood in the living room in the areas where the struggle with the intruders allegedly occurred, and where he was allegedly stabbed, was, "[n]othing, other than the obvious ones. The wounds weren't bleeding very much." TTr. 6881-82.

Asked about the FBI pajama top reconstruction, and if the jury should find from the evidence that the 48 puncture holes in his pajama top correspond with the 21 punctures holes in Colette's chest, if he had any explanation for that, MacDonald answered, "No." TTr. 6895.

F. The 1984 New Trial motion

1. The "confessions" of Helena Stoeckley

On April 5, 1984, and in conjunction with his two motions filed under 28 U.S.C.§ 2255, MacDonald filed a Motion For A New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure ("New Trial Motion"), citing newly discovered evidence, primarily the post-trial confessions of Helena Stoeckley. Unites States v. MacDonald, 640 F. Supp. at 309-310. Following extensive briefing, an evidentiary hearing, and a second hearing at which oral argument was heard, Judge Dupree denied the motions under § 2255, and the Motion For A New Trial. Id. In affirming this ruling, the U.S. Court of Appeals for the Fourth Circuit stated, "[i]n much greater detail than we, the district judge considered every contention that MacDonald advanced. The care with which it was done is evident, and we may conclude this much briefer opinion with the statement that there is no basis upon which any ruling in this case by a meticulous district judge can be overturned." Unites States v. MacDonald, 779 F.2d 962, 966 (4th Cir. 1985).[68] Because Judge Dupree's canvas of the record was so meticulous, we

[68] MacDonald now contends that if Judge Dupree had the newly discovered evidence submitted in 2006 and 2012, the result would have been different. DE-343 at 100. For the reasons explained below, there is no basis for this argument because the subsequent "confessions" attributed to Stoeckley, if they existed at all, are as untrustworthy as those previously offered. These prior rulings still stand, and were not vacated or even questioned by the Fourth Circuit's 2011 decision.

Stoeckley's bare bones "I was there" confession, allegedly made to her mother, is merely cumulative to other such statements she made—some in much greater detail—that were considered and rejected by Judge Dupree. At the evidentiary hearing, and in his memorandum, MacDonald went to great lengths in an effort to equate Stoeckley's alleged statements to her mother in October 1982 with a dying declaration. HTr. 1277; DE-343 at 35, n.15. Whatever Stoeckley may have said does not constitute a dying declaration for purposes of admissibility as a hearsay exception. Her death wasn't imminent within the meaning of the rule, and "I was there," referring to events in 1970, had nothing to do with the cause or circumstances of her death from pneumonia and cirrhosis in 1982. See Fed. R. Evid. 804(b)(2) ("…a statement that declarant, while believing the declarant's death to be imminent, made about its cause and circumstances.") Not only had Stoeckley been making such statements since at least October of 1980, but

incorporate by reference the factual portions of his Memorandum of Decision, found at 640 F. Supp. 318-327, 332-334, only some of which is repeated in this memorandum.

The primary basis of the New Trial Motion was the assertion that during the period October 1980 to May 1982, Stoeckley had confessed to being present during the commission of the murders by a "group of young drug-abusers, including Greg Mitchell, Shelby Don Harris and a black male nicknamed 'Smitty' or 'Zig Zag'" but no actual statement of Stoeckley was appended to the motion. DE-2 at 1. Instead, MacDonald relied upon the "Declaration of Prince E. Beasley," executed March 27, 1984 (now DX 5019), and the unsigned, unsworn "Declaration of Ted L. Gunderson" (now DX 5015), as the evidence of the inculpatory statements Stoeckley was alleged to have made to them.

The best evidence of what Stoeckley actually said to Gunderson and Beasley are the statements she signed or the transcripts of her tape-recorded interviews (DX 5015, 5019).[69] At the time of the evidentiary hearing in September 1984, most of the tape-recorded statements of Stoeckley to Beasley, Gunderson, and Bost had not been transcribed, nor had the videotape of the May 1982 interview of Stoeckley for *Sixty Minutes*. Ultimately, as Judge Dupree's decision reflects, almost 1000 pages of transcripts of "confessions" allegedly made by Helena Stoeckley and others to private investigators were filed. 640 F.Supp. at 309.

As Judge Dupree noted, Stoeckley's "statements contain numerous inconsistencies rendering it impossible to reconcile them into one cohesive statements of events." 640 F.Supp. at 321, n.22. "At trial, Stoeckley testified that she could not remember where she had been or what she

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also she told *Sixty Minutes* "I was there" on May 22, 1982, while she was pregnant and not apparently ill, eight months before she died on January 9, 1983. 640 F.Supp. 286, 321; See also DX 5078.

Regarding Stoeckley's statements allegedly made to Jerry Leonard following her testimony, involving a drug cult bent on teaching MacDonald to be more solicitous in treating drug addicts, in which things got out hand, there is remarkable similarity between the averments in Leonard's affidavit and the statement Stoeckley signed for Ted Gunderson on October 25, 1980. Compare DE-302 and DE-136 at 36.

[69] See supra at 50-53 (conditions under which these "confessions" were given to Gunderson and Beasley).

had done on the night of the murders. Although she has since alternated between lack of memory and almost total recall, on at least ten occasions she has recanted her trial testimony." Id. at 332. On these ten occasions, in addition to all sorts of other contradictory statements, Stoeckley claimed "I was there."

In her October 25, 1980, statement given to Gunderson and Beasley in Los Angeles, Stoeckley stated, "Bruce Fowler, Greg Mitchell, Don Harris, Dwight Smith (also known as Zig Zag, Smitty), Allen P. Mazerolle and I were all at the scene of the MacDonald Murders at Ft. Bragg, North Carolina on 2/17/70." DE-136 at 1. Judge Dupree singled out Stoeckley's statement concerning Mazerolle's participation as indicative of the "contradictions and inaccuracies that predominate the statements." 640 F.Supp. at 322. "For instance she states on several occasions that Allen Mazerolle was in the group on the night of the murders but prison records confirm that he was in jail from January 29, 1970 to March 10, 1970." Id.

Judge Dupree found that: "Shelby Don Harris was with [Stoeckley's roommate] Diane Cazares at her apartment while she was painting the bathroom until about 5:00 a.m. the next morning, and Bruce Fowler was with Kathy Smith at her trailer until late in the morning of February 17, 1970 … Dwight Edwin Smith does not recall where he was on February 16-17, 1970, but denies any participation in or knowledge of the murders … Greg Mitchell also does not recall where he was on the night of the murders. He denies being with Stoeckley that night but cannot remember for certain whether he had gone out or was at home with his parents." Id. at 323.

In paragraph 15 of Gunderson's declaration (DX 5015), he states "[w]hile Stoeckley said that a man named Allan Mazerolle was also with the group, investigation since her death discloses that he was not." It became clear at the evidentiary hearing, held September 19-20, 1984, that

the FBI had investigated this prior to Stoeckley's death, and had determined that Mazerolle had been in jail from the three weeks prior to three weeks after the murders. DE-136 at 31-36. But Gunderson had reported that his investigation had determined that Mazzerole, although previously arrested by Beasley, had been out on bail on February 16-17, 1970. Id. Gunderson had to admit at the evidentiary hearing that he had actually relied on what he had been told by newspaper reporter Fred Bost. Id. Bost, who had been given Mazerolle's name as an associate of Stoeckley by Beasley, misread the court records which reflected the release on bail of co-arrestee Thomas Rizzo, as being applicable to Mazerolle, and provided that information to Gunderson. DE-136 at 3-8. Gunderson, notwithstanding his prior FBI investigative experience, never checked the records himself. DE-136 at 31-32.

At the 1984 Hearing, Beasley was confronted with his prior tape-recorded interview by the FBI on December 27, 1981, in which he had been sure that Mazerolle was in Stoeckley's company when he stopped her early on the morning of February 18, 1970. DE-136 at 27-28. Beasley acknowledged his prior statement, but immediately began to backtrack, "I recall making the statements to – but you're getting to Mazerolle now. I – if I said – if I definitely identified him it was out of context, because I don't recall – as I told … [Agent] Madden, that I wasn't sure about Mazerolle. The reason I basically went with Mazerolle being there is because Stoeckley said that he was there." DE-136 at 28. Beasley acknowledged that he had no independent recollection of Mazerolle being there, stating it's "[b]ecause Stoeckley told me - he was there." Id. at 28-29.

Other reasons why Beasley was absolutely unreliable as a witness to corroborate Stoeckley were also revealed at the 1984 hearing. Starting with his World War II service, when he was hospitalized for combat fatigue, and continuing until his disability retirement from the

Fayetteville Police circa 1973, Beasley was in and out of Veterans hospitals for treatment of alcoholism and anxiety neurosis. DE-136 at 31-39. As reflected in Government's Hearing Exhibit 26, read into the record, the Veterans Administration advised the Fayetteville Police Department on July 16, 1973, that:

> Mr. Beasley is service connected fifty percent (50%) for a nervous condition psychoneurosis. This acknowledges an appreciable impairment of his capability of nervous system function and that is related to his wartime service. Mr. Beasley has been a patient here several times and seems to have deteriorated progressively with respect to his comprehension and general impairment of intellectual functioning. Psychological evaluation by our consultant, Dr. Mary Huse … Duke University, summarizes her findings as follows: Thus on all tests of intellectual functioning administered at this time, Mr. Beasley scores against an impairment of intellectual functioning of the kind that accompanies organic brain damage. He also displayed several qualitative or behavioral signs (confabulation, confusion and helplessness) that often accompany brain damage … Our diagnosis, therefore, is on a purely clinical findings and the impairment is not expected to improve. Our diagnosis is 'nonpsychotic organic brain syndrome pre-senile brain disease.' The undersigned knows of no occupation for which Mr. Beasley would competently qualify at this time. Sincerely, yours T.H. Gridley, MD Chief of Psychiatry Service.

DE-136 at 55-56. These conditions were present in 1973, six years before his trial testimony, and nine years before his declaration, DX 5019.

In assessing the reliability and credibility of Beasley for purposes of corroborating Stoeckley's confessions, Judge Dupree stated, "[w]hile the court does not believe this seriously ill man to be lying, medical records introduced by the prosecution clearly show that he cannot consistently distinguish fact from fiction. See Government's Evidentiary Hearing Ex. 23-26. For this reason, the court attaches no significance to Beasley's statements and concludes that they are insufficient to corroborate Stoeckley's 'confessions'." 640 F. Supp. at 325.

2. Stoeckley never alleged threat by prosecution

Stoeckley's numerous statements to Gunderson and Beasley are relevant to the current litigation, however, for what she did not say. Stoeckley never said that she had confessed to any

U.S. Marshal while en route to Raleigh; she never said she confessed to any prosecutor when interviewed in the U.S. Attorney's Office in Raleigh; and she never said that AUSA Blackburn (whose name she never even mentioned during four years of interviews) threatened her with indictment if she testified to being in the MacDonald house on the night of the murders.

Nor can MacDonald now claim that she previously disclosed any such purported confession to, or threats by, law enforcement officials. MacDonald gave a sworn declaration on May 1, 2006, saying:

> During the trial (both before and after witness Helena Stoeckley testified) my lawyers Bernard Segal and Wade Smith, and Segal's legal assistant Wendy Rouder, interviewed Helena Stoeckley at length and numerous times trying to get Stoeckley to candidly tell the entire truth of what she knew. While Stoeckley did tell Wendy Rouder she was afraid of the prosecutors, despite efforts of my legal team to get Stoeckley to tell the whole truth, Stoeckley never divulged that she had admitted to participating in the crimes to a deputy U.S. Marshal, or to prosecutor James Blackburn, or that prosecutor James Blackburn had threatened and intimidated her into changing her testimony and claiming amnesia as to her whereabouts on the night my family was murdered.

DE-142-2 at 14-16. It was not only to MacDonald's lawyers that Stoeckley failed to "incriminate" Blackburn. MacDonald continues:

> Several of these individuals [Ted Gunderson, Prince Beasley, and Homer Young] working on my behalf spent many days interviewing Stoeckley trying to learn all that she knew. While Helena Stoeckley did admit to Gunderson and Beasley, and other investigators on several occasions that she was present when others in her group killed my wife and two daughters, despite the significant efforts of my investigators to get her to tell all, Stoeckley never divulged that she told these facts to deputy U.S. Marshal Jim Britt during her trip to Raleigh, N.C. to testify. She also never divulged to anyone that the day before she testified, she admitted her involvement in the crime to prosecutor James Blackburn and that he threatened her with a murder prosecution if she so testified, and that as a result of that threat, she changed her testimony and claimed to have amnesia concerning her whereabouts at the time the murders of my family occurred.

Id. at ¶5. Thus, the Court need not scour the Stoeckley transcripts to determine if she made any such statements to Gunderson, et al., regarding Britt (because he never

transported her to Raleigh), or regarding and alleged confession to, or threat by, Blackburn.

3. Declarations of witnesses offered to corroborate the Stoeckley "confessions"

MacDonald appended to his 1984 Motion For a New Trial the declarations of 26 individuals offered to corroborate the alleged involvement of Stoeckley and her associates, including Greg Mitchell and Cathy Perry in the murders. On April 24, 1984, MacDonald filed his Addendum to Motion For New Trial, to which the declarations of Norma and Bryant Lane were appended. At the evidentiary hearing in September, 1984, in addition to the testimony of Gunderson and Beasley previously referenced, MacDonald called Dorothy Averitt, Fred Bost, and Carlos E. Torres to testify. In his meticulous Memorandum of Decision, Judge Dupree addressed these witnesses in the context of the alleged confessions of Stoeckley, Perry, or Mitchell. 640 F. Supp. at 324-327.[70]

MacDonald then includes within the category of newly discovered evidence three of the four items which he claimed the Government suppressed in his 1984 Motion To Set Aside Conviction, and which we have addressed infra at 147-150. DE-343 at 111. Next, MacDonald informs the Court that "[t]hat there are also numerous other items of evidence within the scope of 'the evidence as a whole,' previously submitted to the court include (sic)," and then for many pages, in some paragraphs which are numbered and others which are not, he repeats again and again what he contends numerous witnesses have said that exculpates MacDonald. DE-343 at 111-122. Most of these assertions are not supported by citations to the record, and no effort has

[70] In his "Concluding Summary of Newly Discovered Evidence" in DE-343, MacDonald states that "the instant motion for new trial is based upon dramatic new evidence which establishes the participation of the Stoeckley group in the murders ... Other evidence to be considered includes the statements of twenty-two (22) witnesses corroborating Stoeckley's statement in detail." DE-343 at 109-111. MacDonald then sets forth in 19 subparagraphs, (a) through (s), what he represents the new evidence to be, but does not identify any of the witnesses by name, nor provide any citations to the record. Id. All of the information reflected in subparagraphs (a) through (s) was before Judge Dupree in 1984-85. See 640 F. Supp. 286.

been made to link the identified witnesses in pages 111 to 122 to the 22 unidentified "corroborating witnesses" referenced in subparagraphs (a) through (s).[71]

As to other proffered corroboration of Stoeckley's involvement in the murders, we incorporate the factual findings of Judge Dupree found in his 1985 decision: with respect to Dr. Rex Julian Beaber, Ph.D., see 640 F.Supp. at 324, n.24; with respect to Keith Bowen, Gary Mitchell, Deborah Lee Harmon, Shelby Don Harris, Mabel Campbell, John Humphries, Frankie Bushey, Marian Campbell, Joan Green Sonderson, Addie Willis Johnstone, and Dorothy Averitt, see 640 F.Supp. at 324-25; with respect to the reliability and credibility of Prince Beasley, see 640 F.Supp. at 325; concerning Edith Boushey's alleged sighting of Greg Mitchell talking to Colette MacDonald at the Ft. Bragg North Carolina University Extension program on February 16, 1970, see 640 F. Supp. at 325-27; concerning Carlos Torres' lack of credibility, see 640 F.Supp. at 326-27.

4. The "confessions" of Greg Mitchell

As Judge Dupree noted in 1985, Stoeckley implicated Greg Mitchell as being present and participating in the MacDonald murders, including killing Colette MacDonald, in her statements of October 24 and 25, 1980 (DE-136 at 36), given to Gunderson. 640 F.Supp. at 327. MacDonald also claimed "to have newly discovered evidence which shows that Mitchell confessed to the murders and expert testimony proving that Colette MacDonald was struck by a club wielded by a person who, like Mitchell, was left handed." Id.

Judge Dupree described the events that Ann Cannaday, Randy Phillips, and Juanita Sisneros said transpired in March 1971, at "The Manor," a facility for counseling young people with

[71] It is the Government's position that there is nothing in the 2006 and subsequent MacDonald filings which is newly discovered with respect to the information contained in the 1984 declarations, and the alleged involvement of Helena Stoeckley, Don Harris, Bruce Fowler, Dwight Edwin Smith, or Cathy Perry. Accordingly, although this Court must consider the 1984 declarations as part of the evidence as a whole, in the absence of any newly discovered evidence calling into question Judge Dupree's determinations about their efficacy to corroborate Stoeckley, this Court should reach the same conclusions as to their lack of weight.

alcohol and drug problems, involving a young man alleged to be Greg Mitchell, who allegedly told only Cannaday that he was part of a cult in Fayetteville and that he had murdered people. Id. "Following the departure of the man resembling Mitchell, Cannaday and Juanita Sisneros went with Randy Phillips to a farm house owned by the Manor ... Upon arriving at the farmhouse, the group saw two people running away from the house toward a wooded area. Cannaday and Sisneros went into the house and in one of the bedrooms found written in bright red paint on a wall 'I killed MacDonald's wife and children' … When they went back to the farmhouse later in the week, someone had painted over the wall." Id. Judge Dupree declined to "accept this one statement to Cannaday over fourteen years ago by a man she did not know as evidence of any substance that Greg Mitchell confessed to the MacDonald murders. Similarly, the fact that two unidentified men were seen running from a farmhouse which had been vandalized is only weakly connected to Mitchell if he was indeed the young man who stayed at the Manor." Id. at 328. The evidence that this was in fact Mitchell remains weak and speculative. Mitchell never admitted that he was this person, including to Lane, Buffkin, or Morse. See infra at 142-145.

Judge Dupree wrote in 1985 that, "Mitchell lived in Charlotte, North Carolina, in the 1970's and became friends with Norma and Bryant Lane. The Lanes recall an incident in 1977 when Mitchell came to their house and seemed depressed and told them after they asked him what was wrong that something was bothering him that was too horrible to talk about. In 1982, Mitchell again told them that something happened while he was in the service and if anyone found out about it he would have to leave the country. … Mitchell died soon afterwards at the age of 31 of cardiopulmonary arrest and alcoholic liver disease." 640 F. Supp. at 327. Judge Dupree held that, "[t]he affidavits of the Lanes are equally unpersuasive because Mitchell made no specific

reference to having been involved in the MacDonald slayings and voluntarily appeared at the Charlotte, North Carolina office of the FBI in late 1981 where he denied any knowledge of the murders." Id. at 328 (citations omitted). Judge Dupree also accorded no evidentiary value to the affidavit of Dr. Ronald K. Wright concerning his opinion that Colette MacDonald was struck by a left-handed person, because he subsequently reversed himself. Id.

On July 15, 1988, Bryant Lane executed a second declaration for defense investigator Raymond Shedlick, apparently designed to remedy the shortcomings identified by Judge Dupree. DE-129-8 at 24-29. Lane now recalled that sometime in the 1970's, while Mitchell was under the influence of alcohol and depressed, Mitchell told Lane that he "personally knew that MacDonald is innocent because I was the one that killed the MacDonald family." Id. at ¶2. Lane further recounted that he called Mitchell one night and Mitchell told him he was being harassed by the FBI. Mitchell told Lane to be careful because he thought the phone was bugged. Id. at ¶4. On another occasion, while working on Lane's boat, Lane's wife [Norma] told Mitchell if he was not guilty he shouldn't have anything to worry about. "Tears welled up in his eyes and he [Mitchell] said, '[w]ell that's it, I did do it, I am guilty.'" Id. at ¶5. A few months before Mitchell died in 1982, he told Lane's wife that "[h]e was guilty of a crime he committed at Fort Bragg years ago, and he might have to go away to Haiti or somewhere to live." Id. at ¶11. Lane acknowledged his failure to previously provide this information either to defense investigator Shedlick or FBI Agent Brendan Battle in 1984. Id at. ¶¶ 13-15. Regarding his interview by the FBI, Lane explained that Agent Battle was being "so sarcastic and judgmental that I also didn't tell him." Id. at ¶15. Lane continued, "I had just opened a beer. I asked agent Battle if he minded if I had this beer. He said sarcastically that he didn't mind as long as I could keep my mind on what I was doing. I said, '[w]ell, I don't think one beer's going to affect me.'

My blood was boiling, but I kept my cool." Id. at ¶14. Lane's 1988 Declaration was filed in 1991 as part of MacDonald's second habeas. DE-129-8 at 22. That motion was denied on both abuse of the writ grounds and on the merits. United States v. MacDonald, 778 F.Supp. 1342, 1360 (EDNC 1991); aff'd (on abuse of the writ grounds), 966 F.2d 854 (4th Cir. 1992).

On March 1, 2005, Lane executed the "Affidavit of Bryant Lane" for MacDonald's then attorney, Timothy Junkin, which was subsequently filed with the instant § 2255. DE-115-3 at 56-58. In this 2005 affidavit, Lane repeats the statements previously attributed to Mitchell in his 1988 declaration. Id. at ¶¶ 7, 10. In addition, he added for the first time that six months before Mitchell's death in 1982, Mitchell told him that, in 1970, he was addicted to heroin and that "MacDonald could have helped him." Id. at ¶8. "Mitchell thought MacDonald knew an intermediary who could supply Mitchell with methadone, in order to kick hard drugs. Mitchell stated to me that he and his friends went to the MacDonald home on February 17, 1970, to 'teach him a lesson' and intended to 'whup 'em.' ... 'Things got bad' ... Mitchell told me that Jeff Macdonald being alive was simply 'lucky' because the group 'didn't know what they were doing' and 'didn't mean to kill anyone.'" Id.

MacDonald filed two additional affidavits related to Greg Mitchell. The affidavit of Donald Buffkin, another habitué of the Hull Bar in Charlotte, N.C., was executed for Timothy Junkin on June 14, 2005. Buffkin stated that he knew Mitchell from 1980 until his death in 1982. DE-115-3 at 59-61. Buffkin described Gregory Mitchell as a "definite alcoholic and pot smoker." Id. at ¶7. Buffkin explained that the reason he did not contact MacDonald's attorney until May 22, 2003, concerning Mitchell's statements was because "at the time Mitchell made them I believed them to be 'bar talk' and 'exaggeration'." Id. at ¶1. During their encounters at the Hull Bar, Mitchell stated to Buffkin on at least two occasions that he was "involved" in the MacDonald

murders and that "he was there." Id. at ¶6. Mitchell also told Buffkin that what they [the government] said about MacDonald isn't true." Id. Mitchell further told Buffkin that the reason for his involvement in the murders was that Jeffrey MacDonald 'wouldn't do what they [Mitchell and his friends] wanted." Id. Mitchell also stated that he was "mad" at Jeffrey MacDonald because he [Mitchell] and some of his friends from Viet Nam were involved in sending heroin back to the United States in body bags and he believed MacDonald was "on the receiving end." Id. Mitchell told Buffkin he went to the MacDonald home to demand money or "dope." Id.

MacDonald also filed in 2006 the affidavit of Everett Morse, executed on July 25, 2003. DE-115-3 at 54-55. During the period between 1972 and 1974, Morse lived in a Charlotte apartment complex in which Mitchell also resided. Id. at ¶3. Sometime in 1973, Morse mentioned to Mitchell that he needed some golf balls. Mitchell then produced a case of new golf balls and demanded that Morse pay for them. When Morse refused, Mitchell got angry and told Morse that if he didn't pay for the golf balls "[h]e would murder me as he had murdered Jeffrey MacDonald's family." Id. at ¶¶ 4-5. Mitchell also threatened Morse that if he ever mentioned Mitchell's involvement in the MacDonald murders to anyone, he would kill him. Id.

More than ten years before Mitchell was engaging in "bar talk" with Buffkin and Lane, or trying to peddle stolen golf balls to Morse, he gave a sworn statement to CID Agent Bill Ivory on May 25, 1971. GX 2199. Mitchell wasn't sure where he had been on the night of February 16-17, 1970, but thought he might have been home with his parents as he had to get up early for work at Ft. Bragg, and consequently was usually home in bed by 9:00 p.m. Id. at 2199.1-2. He denied being with Stoeckley that night because he recalled talking to her the next day or shortly after the murders. Id. On that occasion he described Stoeckley as being "scared to death about being questioned about the murders." Id. at 2199.2. Mitchell did not believe that Stoeckley had

already been questioned by the police, but thought she said that Beasley had told her she was going to be questioned. Id. Stoeckley told Mitchell that she was not involved in the murders. Id. When asked by Ivory if he was involved in the MacDonald murder or knew who was, he answered, "No, I was not … I think MacDonald did it himself. It's my opinion from what I have read." Id. Mitchell stated he was not acquainted with MacDonald. Id. In conclusion, when asked if he had anything to add, Mitchell answered, "no, except I didn't have anything to do with it." Id. at 2199.3.

On May 27, 1971, Mitchell voluntarily took a polygraph examination administered by Robert Brisenstine. GX 2200. As part of the standard pre-test protocol, on May 26th, Mitchell provided Brisenstine with biographical information including that he was addicted to heroin until January 1971, but had no heroin or drugs since January of 1971; and he had served in Viet Nam on two occasions before receiving an honorable discharge in February, 1971. Id. at 2200.1. In terms of injuries, he had sustained a "[b]ooby trap wound to [the] right ankle, shrapnel in right hand and head." Id. During the actual polygraph examination, Mitchell was asked all relevant questions relating to his participation in, or knowledge of the murders. Mitchell answered "no" to all such questions, and Brisenstine concluded, based upon the polygraph examination, that Mitchell was truthful when he denied involvement in the murders, or knowledge of the identity of the perpetrator(s). Id. at 2200.2-3. Mitchell's finger and palm prints were compared by the FBI against the unidentified fingerprints found at the crime scene and no identifications were made. GX 3063.10.

By the early 1980's, based on the sworn statements of Lane, Buffkin, and Morse, and the declaration of his wife Pat, Greg Mitchell had become an alcoholic, may have been suffering from post-traumatic stress disorder relating to his combat service in Viet Nam with the 82nd

Airborne Division, and was exhibiting the classic symptoms of paranoia which often accompanies alcoholism and PTSD. Unfortunately for Mitchell, this period when his life was spiraling out of control coincided with intense scrutiny from defense investigators and the media. By the fall of 1982, Mitchell had drunk himself to death.

Even in death, there was no relenting in MacDonald's efforts to link Mitchell to the murders. MacDonald's then-attorney, Junkin, obtained a biopsy sample of Mitchell's liver from the University of Virginia where Mitchell died and requested that it be included in the DNA testing then being conducted by AFDIL. The DNA test results eliminated Mitchell, like Stoeckley, as the donor of any of the unsourced hairs or other samples tested. DE-306 at ¶28.

The record set forth above supports the conclusion that when Mitchell was not under the mind-altering influence of drugs or alcohol, he was a credible witness when he denied involvement in the murders in 1971. But when Mitchell was drunk, or in a paranoid or depressed state, he said bizarre things that were not credible. We don't know precisely what prompted him to do so, but the attention thrust upon him as a result of Stoeckley's unreliable accusations cannot be discounted. In a sense they had a lot in common: they were both alcoholics, both linked to the Fayetteville hippie drug scene, both alternated between paranoia and seeking attention, and they knew each other. In addition, due to the relentless publicity, the case had for both Mitchell and Stoeckley a fatal attraction, which Judge Dupree noted, "Helena Stoeckley, Cathy Perry Williams, and, to a lesser extent, Greg Mitchell, were drawn to the case and have contributed to a factual charade which has allowed it to continue for more than a decade and a half [as of 1985]." 640 F.Supp. at 334. Even MacDonald's own attorney, Brian O'Neill, acknowledged this phenomenon at the 1985 oral argument. Government counsel, in an effort to compel an election among incompatible confessions, enumerated some of the

confessors, such as Neil Braswell, and prison inmates Shields and Rhodes, who had also said "I was there." DE-136-12 at 59-60. Judge Dupree invited O'Neill to respond, "Mr. Murtagh is correct. There is a phenomenon of aberrant mental patients, people who read about an event and are looking to take part in this event through this bizarre phenomenon of claiming. Wacky as it is, we know it exists." Id. Stoeckley, Mitchell, and Perry, are all examples of this phenomenon, and they all have the common denominator of substance abuse.

Accordingly, the Court should regard the affidavits of Lane, Buffkin, and Morse, with due consideration for the probable reliability and likely credibility of the unavailable declarant Mitchell, (and in the case of the alleged statements to Bryant Lane, Mitchell's auditor as well), and assign no weight to those statements.

G. The 1984 Motion to Set Aside Judgment of Conviction

In 1984, MacDonald also moved pursuant to 28 U.S.C. § 2255 to set aside his conviction, based upon four items of allegedly newly discovered evidence: "the half-filled bloody syringe," "the bloody clothes and boots," "the skin found under Colette MacDonald's fingernail," and "the photograph of the letter 'G'." 640 F.Supp. at 300-09. Following an evidentiary hearing in September 1984, and oral argument in 1985, Judge Dupree ruled, "[a]fter reviewing the evidence and arguments on both sides, the court concludes that the government did not suppress evidence and, in any event, there has been an insufficient showing that the four items would have been favorable to the defense if introduced at trial." 640 F.Supp. at 300. Now, 29 years later, MacDonald recycles these claims based upon the same evidence from 1984, contending that they constitute "newly discovered evidence" "previously suppressed" by the Government, "which corroborates the presence of Ms. Stoeckley and drug seeking associates at the crime." DE-343 at

46-47, 70, 97-98, 117-119.[72] The Government incorporates by reference that ruling as set forth at 640 F. Supp. at 300-309, and repeats only so much of it as is necessary. Nothing that Helena Stoeckley ever said, or now is purported to have said to Britt, Leonard, or her mother changes the evidence upon which Judge Dupree ruled in 1984. Nor does MacDonald even attempt to make a showing that it does.

Further, under the rubric of the evidence as a whole, MacDonald attempts to re-litigate the very existence of contested evidence, the allegedly half-filled bloody syringe, for example, which Judge Dupree determined did not exist. MacDonald asserts that there was "a bloody syringe half filled with a liquid found in a hall closet in the MacDonald house by a CID investigator which was destroyed and never tested." DE-343 at 97. As Judge Dupree's decision makes clear, this assertion is false. No CID Investigator ever found such a syringe, and its alleged existence is based upon a misinterpretation of second hand information reflected in an ambiguous statement contained in an FBI report. Judge Dupree found that:

> [t]he only evidence that a 'half-filled bloody syringe' ever existed is contained in Medlin's somewhat ambiguous statement to [FBI] Agent Tool … He [Medlin] had no first-hand knowledge of the contents of the closet and denies ever seeing a half-filled syringe which bore blood stains. The implication of his statement and its secondhand nature is that Medlin misunderstood what the other investigators told him about the contents of the closet. In fact this is what must have occurred, for investigative agents having firsthand knowledge of the contents of the hall closet state, or would state if called to testify at trial, that no 'bloody half-filled syringe' or other half-filled syringe was found in the closet. (citations omitted) Measured against these statements by four witnesses having first-hand knowledge of the evidence gathered at the crime scene, MacDonald's argument, based as it is upon the statement of one witness summarizing information conveyed to him by others, that the government has suppressed evidence of a 'half-filled bloody syringe' is simply not plausible.

[72] The mislabeling of these claims as "newly discovered evidence" must be rejected, as should the attempt to re-litigate the previous claims of suppression of this evidence by the Government, in the absence of any truly newly discovered evidence that calls into question Judge Dupree's prior ruling.

640 F. Supp. 286, 301-302 (citations omitted). The Court found that MacDonald "failed to offer enough evidence from which the court could find that the syringe, assuming its existence, or evidence derived therefrom, would have been of value to him either before or during his trial." Id. at 302. "Similarly, even if the government suppressed Medlin's statements to Agent Tool...knowledge of Medlin's statements would have been to no avail to MacDonald since the underlying evidence did not exist." Id.

MacDonald also offers up as purported corroboration of Stoeckley's "confessions" Cathy Perry, described as a "member of Stoeckley and Mitchell's group" and as an alternative suspect who confessed. DE-343 at 70. Further, Perry is alleged to have been in possession of blood-stained boots and clothing belonging to Helena Stoeckley, which she had been asked by Stoeckley to hold for her, and which the Government ultimately suppressed. DE-343 at 70, 76-77, 111.

MacDonald provides no citations for the assertions that Perry was a member of Helena Stoeckley's group nor for the statement, attributed to Stoeckley, that she asked Perry to hold her boots and clothes after the murders. DE-343 at 111. In these instances relating to Perry, the only source we have been able to find is the Declaration of Prince Beasley. See DX 5019 at ¶ "o"; DE-126-2. Judge Dupree wrote of Beasley that he "cannot consistently distinguish fact from fiction." 640 F.Supp. at 325.

Judge Dupree carefully reviewed the convoluted history of Perry's possessions. "Summarizing, a pair of beige boots was undoubtedly received by the CID on January 6, 1971. Similarly, it is clear that the CID did not take custody of any clothing and the boots were unstained by blood or any other substance connecting them to the MacDonald murders. Accordingly, the court finds that there was never any reason for CID agents to suspect the boots

were relevant to the case and they properly returned them to Mrs. Garcia after testing [for blood]. Although MacDonald in his filing is unsure who owned the boots, Stoeckley or Cathy Perry Williams, it makes no difference for the court has been unable to find that the government suppressed the evidence." 640 F.Supp. at 305.

Next, MacDonald claims that "on November 17, 1984, Perry stated to the FBI that she was involved in the murders of the pregnant wife and two female children of a doctor who turned on drug users." DE-343 at 70; DX 5034. Perry had indeed given a statement to the FBI, in which, inter alia, she told the agents that two young boys were killed, and that it took place "upstairs." Judge Dupree considered this FBI interview of Perry in the context of MacDonald's Motion For A New Trial, and observed, "[t]his statement is yet another example of the bizarre behavior that the case has evoked from people who for some reason find it fascinating and see themselves as having played a part in the gruesome story. Apparent from the most superficial reading of Williams' statement is that the facts retold by her are completely at odds with the known facts and those MacDonald claims were confessed to by Stoeckley. For example, (1) there was no evidence that MacDonald received an injection of any kind on that night; (2) the front door to the MacDonald apartment was not tampered with; (3) the weather that night was rainy and cold, not warm and clear; (4) the MacDonald apartment did not have an upstairs; (5) Colette MacDonald was not stabbed in the leg or abdomen; and (6) the MacDonalds had two daughters, not sons." 640 F. Supp. at 329.

H. The "black wool" fibers on the club

For the second time, MacDonald makes mutually inconsistent claims regarding the presence of black wool fibers on the club (GX 306), which he further asserts could only have come from Helena Stoeckely, whom he claims always wore black wool. Compare DE-343 at

49-50 and DE-343 at 101 with DE-126 at 21-22. In DE-343, MacDonald states that "the government suppressed the fact that the 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." DE-343 at 49, n.19 (emphasis added) "Despite this reexamination in 1978, prosecutor's (sic) 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." Id.

But in 2006, in describing this same "reexamination," Junkin represented to this Court that "[t]he FBI found no fibers matching Jeff MacDonald's pajama top." Junkin claimed that "[t]he defense was not aware of this FBI report at the time of the trial and had no way to dispute or call into question the inaccurate testimony regarding the fibers found on the murder weapon outside the MacDonald home." DE-126 at 21-22. The only authority cited for this claim that the Government had knowingly elicited false testimony from Dillard Browning (TTr. 3784) was the affidavit of defense investigator Ellen Dannelly and its exhibits. DE-126 at 21; DE-126-2 at 63-90. Junkin further asserted that in final argument, the Government exploited this misidentification by telling the jury that the presence of the two pajama top threads was one of the most critical pieces of evidence. DE-126-2 at 22; TTr. 7136-37.

In DE-343, MacDonald also claims that "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 [the wooden club] as matching the sewing threads on MacDonald's pajama top were not such, in fact they were black wool fibers. These black wool fibers were never matched to any known fabric in the MacDonald home." DE-343 at 101. No citation to the record or copies of any laboratory notes identified by "Kathy Bond" and containing this astonishing

discovery have been provided to the Court. The reasons for this omission are straightforward: Kathy Bond played no role in these examinations, the notes previously misidentified by Gunderson as being from "Kathy Bond" were "unequivocally" identified in 1991 by Shirley Green as her own, and they say nothing about any misidentification of pajama top threads. DE-138-12 at 8, ¶ 2. Consequently, there is no evidentiary support for "Kathy Bond's" alleged discovery of pajama top thread misidentification touted in MacDonald's Memorandum. DE-343 at 101. [73]

Junkin had previously relied not upon Kathy Bond, but rather upon the Affidavit of defense investigator Ellen Dannelly to support his claims of misidentification and false testimony. DE-126 at 22. Dannelly's affidavit makes no mention of any pajama top threads or yarns, much less the misidentification of them. DE-126-2 at ¶¶1-9. Rather, all Dannelly says is that based upon her review of FBI bench notes from 1979, attached as Exhibit 2 to DE-126-2, the corresponding typed FBI Laboratory dated March 14, 1979, (Exhibit 3) "had omitted any reference to its findings of black, green, and white wool fibers in the debris taken from the body of Colette MacDonald and the wooden club murder weapon." Id. at ¶¶7-8. In other words, all Dannelly's affidavit talks about is alleged suppression of fiber evidence and, like the notes of Kathy Bond, provides no evidentiary support for the alleged misidentification and related false testimony claim.

The "black wool" arguments, based solely on the alleged suppression of laboratory bench notes pertaining to the club (Q89), and other similar arguments involving black wool in the area

[73] MacDonald's 1990 habeas claim asserted that there were black wool fibers found on the club in addition to the purple cotton seam threads which the Government matched to MacDonald's pajama top and the Government suppressed the black wool fiber evidence. This claim was rejected by the District and Circuit Courts. Starting in 2006 and continuing with his recent memorandum (DE-343), MacDonald has morphed his previous argument into a totally unsupported claim that the purple cotton seam threads were not on the club at all because the black wool fibers were misidentified as purple cotton threads. This Court should reject this sleight of hand as not reliable or credible.

around (not "in" or "on") Colette's mouth (Q100) and biceps area of Colette's pajama top (Q88), were first raised in MacDonald's second petition for post-conviction relief pursuant to 28 U.S.C. § 2255, filed in 1990. 778 F.Supp. at 1351. The Government responded not only to the claims of suppression of the bench notes, but also addressed the actual physical evidence, based upon additional examinations by the FBI Laboratory. See DE-10.

After further briefing, MacDonald, through his attorney Harvey Silverglate, expressly declined Judge Dupree's invitation to hold an evidentiary hearing stating "there is no conflict of material fact in the record" and instead expressly requested an opportunity to appear "for the purpose of conducting an oral argument." See DE-22. Oral argument was held on June 26, 1991. DE-117-4 at 22. Judge Dupree, in a meticulous opinion, addressed all of MacDonald's claims—suppression, deprivation of due process etc.—and found them to be without merit and denied relief under 28 U.S.C.§ 2555. 778 F.Supp. 1342. As an alternative grounds for denying relief, Judge Dupree found that MacDonald's claims predicated upon the bench notes, allegedly released subsequent to MacDonald's 1984 § 2255 petition, constituted an abuse of the writ under McCleskey v. Zant, 499 U.S. 467 (1991). 778 F.Supp. at 1359-1360 (In 1984, "MacDonald either possessed or could have discovered through reasonable investigation the information upon which the [1990] petition is based.")

In the process of rejecting MacDonald's black wool and other fiber claims, Judge Dupree made some findings which, 22 years later, have relevance to MacDonald's pending claims. Contrary to his recent assertions that "not only were these inexplicable black wool fibers found on the murder weapon but similar black wool were found on Colette's mouth and body" (DX 5027), Judge Dupree found that "no two of these fibers appear to be from the same source." 778 F.Supp. at 1351. Further, Judge Dupree noted that the reason these woolen fibers could not be

matched "to any known source in the MacDonald household [was] in part due to the fact the MacDonald family's possessions are no longer available for forensic comparisons." Id. In fact, by 1990, when this issued was first raised, there were no black woolen exemplars at all available for comparison purposes, even though Colette was photographed wearing a black wool sweater and stocking cap. See DE-10 at 9, photographs 116-118. Consequently, for MacDonald to now claim that these black wool fibers "did not match any fabric in the MacDonald home" is misleading. DE-343 at 49.

As the Government has previously explained in much greater detail in its Memorandum In Support of the Response of the United States To Petitioner's Motion to Expand the Record, DE-139 at 11-16, as well as in Volume X of the Appendix of the United States, DE-138-2, DE-138-6 at 1-10, DE-138-7 at1-10, DE-138-8 at 1, DE-138-9 at 1-6, DE-138-10 at 1-4, DE-138-11 at 1-8, DE-138-12 at 1-39, and DE-138-13, there were unidentifiable black woolen fibers on the club in addition to the two purple cotton threads (Q89) which matched MacDonald's pajama top, and numerous rayon fibers which matched the throw rug (K30) in the master bedroom (upon which other pajama top threads and the torn pajama pocket were also found). Id.[74]

In substance, Dannelly ignored the 1974 FBI Laboratory Report reflecting the match of the two purple cotton threads in Q89 (DE-138-9 at 6) and Shirley Green's related bench notes (DE-138-12 at 18, DE-89-13 at 1), despite the statement in her affidavit that, "I collected and organized all of the information that the CID and FBI lab technicians had recorded for each CID and FBI exhibit number." DE-126-2 at 64, ¶4. Instead, Dannelly focused entirely on the 1979 Lab Report (DE-138-10) and the related bench notes (DE-138-12 at 28), while ignoring that in those notes Green wrote that the Q89 "Pillbox contains 2 short pc's sew. thr (like Q12 [the

[74] The Government presented this same information to this Court at the evidentiary hearing, without any challenge or proffered evidence to the contrary from defense counsel. HTr. 1347-48.

pajama top])." Most importantly, Dannelly ignored the express statement in the 1979 FBI Lab report pertaining to examinations of "specimens retained in but not previously examined by the FBI Laboratory," which shows that the 1979 report did not in any way constitute a re-examination of the specimens previously identified in 1974. GX 3064. Dannelly and MacDonald's counsel (past and present) all ignore the fact that the Government had also elicited the same testimony from Paul Stombaugh about the two purple cotton threads on the club matching the seam threads of MacDonald's pajama top. TTr. 4098. To have acknowledged this fact would have undercut their misidentification contention by recognizing that there were two distinct examinations conducted by the FBI: one in 1974 by Stombaugh involving the comparison of the questioned purple cotton threads and polyester cotton yarns to MacDonald's pajama top; and the other in 1978-79 by James C. Frier involving the examination for the first time of residual fibers from some of the same exhibits, which had not been previously compared to anything. GX 3064. Shirley Green was the Evidence Technician for both examinations. DE-138-12 at 7-10. Consequently, this Court should reject as unsupported by any reliable or credible evidence, the preposterous defense claim that the purple cotton threads from the club were actually black wool and were thus misidentified by both the CID and the FBI Labs, or that the Government elicited false testimony from both Browning and Stombaugh.[75] This Court should find that on the club (GX 306), in addition to two purple cotton threads matching MacDonald pajama top (GX 3207) and numerous rayon fibers (matching the multi-colored throw rug (GX 322)) in the master bedroom (TTr. 4612), were black wool fibers—not threads—which did not match any other questioned sample, and could not be identified due to the absence in

[75] Judge Dupree rejected the notion any Government experts testified falsely at the trial, 778 F.Supp. at 1355, and noted that "the jury was told by Browning that 'there were many single fibers or loose fibers' found in the MacDonald home…" Id.

1990 of known exemplars. DE-138-12 at 2-4, ¶¶ 6-7. These facts are not new and not exculpatory in any way.[76]

The Court should further consider that the presence of both the pajama top seam threads and the rayon fibers from the throw rug support the inference that the club (GX 306), stained with Colette and Kimberly's blood, came in contact with the throw rug after MacDonald's pajama top was torn in the master bedroom, and before he threw the club out the back door. The throw rug (GX 322) is further linked to the assault on Colette in the master bedroom because its rayon fibers were not only found on the club, but also in the debris (Q88) removed from the right biceps area of Colette's pajama top, in the debris removed from her left hand (Q128) (the same hand in which MacDonald's broken limb hair (AFDIL-51A(2)) was also found), and on MacDonald's pajama top. GX 111, 3062.92, 3064.1.

I. The blond synthetic (saran) fibers

In DE-343 at 50, MacDonald attempts, for at least the third time, to re-litigate his claim, based upon laboratory bench notes of USACIL Chemist Janice Glisson obtained under FOIA in 1983-84, that the presence of synthetic fibers in Colette's clear-handled hairbrush could only have come from a wig worn by Helena Stoeckley. In his initial Post-Hearing Memorandum (DE-336), MacDonald alleged that these synthetic hairs "had been found in a hairbrush in the dining room of the MacDonald home." DE-336 at 42. In his substitute Post-Hearing Memorandum (DE-343 at 50), MacDonald now claims that the blond synthetic hairs had "been found in a hairbrush in the kitchen of the MacDonald home." This hairbrush was on a table in the dining room. See GXP 28. Further, he argues that the Government's evidence to the

[76] The Court should consider that MacDonald denied that the club marked GX 306 was the smooth club or "bat" he said he was struck with; testified that he was wearing his pajamas (top and bottoms) when he first went into the master bedroom after "the struggle" and a period of unconsciousness; and said he never went outside the house. DE-132-1 at 17; See GX 1135 at 12-13, 45, 84-86. If the club used in the murders of Colette and Kimberly had already been placed outside the house by the "real killers" before MacDonald awoke and wore his pajamas into the master bedroom, how did the two seam threads from his pajamas get on the club?

contrary was false and constituted a fraud upon the court. DE-343 at 50-52, 105-106. In contrast to the task faced by this Court in 1997, when first confronted with the saran fiber issue in the context of alleged suppression by the Government, MacDonald says the Court must now consider the presence of saran fibers as part of the evidence as a whole. DE-343 at 107-109. The present analysis is different, according to MacDonald, because "MacDonald now can prove Helena Stoeckley admitted her participation by a preponderance of the evidence and DNA results that are reliable show evidence of intruders."[77] Id.

The Court is not required, in the absence of any relevant newly discovered evidence, to entertain again the suppression and fraud on the court claims of 1990 and 1997. 778 F.Supp. 1342; Unites States v. MacDonald, 979 F.Supp. 1057 (EDNC 1997); aff'd per curiam, 161 F.3d 4 (4th Cir. 1998). Similarly, the Court is not required to entertain again MacDonald's 1997 Motion For New Trial, based upon his post-1992 investigation involving the locating of several individuals who aver that saran fibers were manufactured in tow form and were used in wigs prior to 1970. This new trial motion was contained within MacDonald's Motion To Reopen, which this Court properly transferred to the Fourth Circuit for certification as required by 28 U.S.C. § 2255. 979 F.Supp. at 1067-68. On October 17, 1997, the Fourth Circuit, while granting MacDonald's motion for DNA testing, and in an order entered at the direction of Judge Russell, with the concurrence of Judge Murnaghan and Senior Judge Butzner stated: "[i]n all other respects, the motion to file a successive application is denied." Nor is the Court required to entertain additional collateral attacks on the credibility or competency of FBI Examiner Michael Malone, based upon pre-September, 2012, newspaper accounts which are not in the record. DE-

[77]Of course, there is nothing in Stoeckley's alleged admissions to Britt, her mother, or to Jerry Leonard that pertains to wigs or saran fibers. Certainly, she never told anybody that during the commission of the triple homicide and while holding a candle, she took off her floppy hat and brushed her wig with Colette's hair brush that was on the dining room sideboard next to Colette's purse. 640 F.Supp. at 315-323.

343 at 50-51.[78] In 1997, when similar articles and official documents referring to unrelated cases in which Malone had been a witness were offered in support of the fraud on the court claim, this Court accorded little weight to "[t]his thin and collateral 'evidence'". 979 F.Supp. at 1067.

MacDonald repeats his refrain that the "numerous blond synthetic hairs ... could not be matched to any known items in the MacDonald home." DE-343 at 50. What he fails to tell the Court is that some of the synthetic fibers (Q48) in this same clear-handled hairbrush, which were composed of acrylonitrile and vinyl chloride/vinylidene chloride (also known as "modacrylic") did match Colette's hair piece or fall (K47). See 778 F.Supp at 1350. Modacrylic fibers matching Colette's fall (K47) were also recovered from the blue-handled hairbrush (Q132/E-322) found on the master bedroom floor under the green armchair, when Colette's body was removed. See GXP 44 (with body), GXP 71 (after removal of body); DE-10(8). Malone also examined two black polyvinyl chloride (PVC) fibers (Q43 and Q44) which had been removed from this blue-handled hair brush (Q132/# J/ E-322) found under Colette's body, and opined that "these fibers are consistent with the type of fibers which were once used in the production of wigs. The source of these PVC fibers (Q43, Q44) is unknown at this time." Id. at ¶13. Thus, the Government's expert clearly states that unsourced wig hairs were found in a hair brush under

[78]This is particularly applicable to the allegations made against Malone in the case of Donald Gates. DE-343 at 51. What neither the Washington Post article, nor MacDonald, informed the reader was that the "key" to the *Motion To Vacate Convictions On Ground of Actual Innocence* filed on Gates' behalf in the Superior Court of the District of Columbia, Crim. No. F-6602-81, was the following statement contained in the motion: "The results of DNA testing [attached] definitively exclude Mr. Gates as the source of the sperm left in the victim by the perpetrator. This new evidence clearly and convincingly establishes that Mr. Gates is actually innocent of the June 22, 1981, rape and murder of Catherine Schilling for which he has served twenty-eight years in prison." Id. at 1. It is true that the motion filed by the DC Public Defender takes Malone to task for his "erroneous" testimony that "two 'Negroid' pubic hairs combed from Ms. Schilling's body at the crime scene were microscopically identical to Mr. Gates pubic hair." Id. at 5-8. But it is quite clear from the motion that the physical evidence later subjected to DNA testing was not these hairs Malone testified about, but rather "vaginal slides ... located at the D.C. Medical Examiner's Office." Id. at 2. Of course, a reader of the article relied upon by MacDonald would not know this fact, and would draw the intended conclusion that Malone falsely or negligently testified the hairs were microscopically identical when they in fact weren't, and the DNA test results proved it. As we have previously demonstrated through the Affidavit of Joseph A. DiZinno, the occurrence of microscopically identical hairs which could have, but in fact didn't, originate from a suspect is the result of different technologies with different discriminating powers. DE-218 at ¶¶18-19.

the body of the murder victim. The dilemma for the defense is that these are black wig hairs and that doesn't fit their Stoeckley-brushing-her-blond-wig hypothesis, so no mention of these wig hairs appears in any pleading filed by MacDonald, because it would reveal the weakness of his contention that all unsourced fibers could only have come from a wig worn by an intruder who paused to brush her wig during a frantically violent triple-murder while the unconscious Jeffrey MacDonald lay a few feet away.[79]

MacDonald also claims the Government countered the blond synthetic hairs 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." DE-343 at 50. No citation to the record has been provided for these assertions. Malone did not opine that the blond synthetic fibers were "saran." That determination was made by SA Robert F. Webb, who used "a Fourier Transform Infrared Spectrophotometer (FTIR) with a Bach-Shearer FTIR Microscope accessory attachment and Sirius 100 computer controller" to determine that fibers Q46 and Q49 were composed of polyvinylidene chloride, also known as "saran." See DE-10(8).

What Malone actually said regarding these and other saran fibers he removed from the clear-handled hair brush, was, "[a]ll of these saran fibers (Q-46, Q49, Q131A) are consistent with the type of fibers normally used in the production of doll hair and are similar to a known sample of saran doll hair from the FBI Laboratory reference collection (See Photo Exhibit 12)." Id. at 7. "These fibers (Q-46, Q-49, Q-131A) are not consistent with the type of fibers normally

[79] There are far more plausible explanations for the presence of saran fibers in the clear-handled hair brush. The most likely is that one of the MacDonald girls used her mother's hairbrush to comb a doll's hair, either within or outside the MacDonald apartment. The clear-handled hairbrush was quite portable and was found next to Colette's purse in the dining room, not in a bathroom or bedroom. See GXP 28. If MacDonald's unlikely contention that the fiber came from a wig for humans is true, then the probable explanation is that Colette or one of her friends used it to brush a wig—within or outside the apartment. Recall that black wig fibers in the blue-handled hairbrush, not cited by MacDonald as evidence of intruders because they were not blond, also could not be sourced to anything in the MacDonald apartment. DE-10(8).

used in the manufacture of wigs, and based on my comparisons, are not like any of the known wig fibers currently in the FBI Laboratory reference collection."[80] Id. There has never been any evidence proffered contesting those statements. Given this Court's detailed exposition of the saran fiber controversy, there is no need here to repeat the arguments here. See 979 F.Supp. at 1057. Now, as in 1997, "MacDonald histrionically mischaracterizes both the nature and magnitude of the dispute now before the court." Id. at 1068.

In considering whether saran was manufactured in tow form and was regularly used in cosmetic wigs worn by humans in the period prior to 1970, as MacDonald claims, the Court should give due consideration to the extensive efforts by the defense, reflected in Cormier Affidavit No.1 (DE-48), to establish this hypothesis, which culminated in the discovery of a manikin of an Indian woman wearing a black wig made of saran, found in the Mexico City Museum of Anthropology and History in 1993. DE-48 at ¶¶ 65-69. This discovery was the result of a telephone interview on November 24, 1993, of Jaume Ribas, the deceased as of 1997 former chief executive officer of Fibras Omni in Mexico City, and MacDonald defense counsel Philip Cormier and Harvey Silverglate. DE-48 at ¶¶ 65-66. According to Cormier, Ribas said that his company manufactured saran during the period 1955 to 1975 pursuant to a license from Dow Chemical. Id. at ¶66. "Ribas told us that while he considered Saran to be too hard and too course a fiber to have been used extensively in commercial wigmaking, he knew for a fact that wigs had been made with Saran.[81] Ribas explained that in 1967 he assisted the Museum of Anthropology and History in Mexico City by making approximately 100 wigs for what he called 'dummies' in various diorama types of exhibits." Id. at ¶66. "[Ribas] also told us that

[80] "In this regard, my use of the term 'wig' unless otherwise specified, means a head covering made of synthetic fibers or human hair, which substitutes for the wearer's own hair, and which is worn by a human being, usually female, for cosmetic purposes." DE-27.

[81] Significant by its absence is any statement attributed to Ribas that saran wigs were exported to the United States in the period 1955-1970.

occasionally Saran wigs were made for pageants, and he stated that he had a couple of dozen wigs made for school plays and theaters. As an example [ ] for a 'pastorela' (Christmas pageant) at the Museum of Colonial Art, he had Saran wigs made for all the angels and shepherds in the pageant, and the wigs for the angels contained blond Saran fibers. Ribas further told us that he had no way of determining whether any of these Saran wigs still exist." Id. at ¶67. Leaving aside the issue of the reliability of defense counsel's account of a telephone interview with a now-dead witness, and viewing this information in the light most favorable to MacDonald, all it establishes is, at best, that on at least one occasion in 1967 black saran fibers were used to make wigs for manikins ("dummies") used in dioramas by the Museum of Anthropology and History in Mexico City. And "occasionally," but on unspecified dates, blond saran fibers were used for wigs (which are no longer extant) worn by the angels who appeared in Christmas "pastorelas" put on by the Mexican Museum of Colonial Art. Of course, there is no evidence that Stoeckely was ever in Mexico. The current state of the evidence is that the blond saran fibers do match the FBI's doll hair exemplar. DE-10(8). The defense has been unable to match any of the saran fibers to any blond wig worn by any manikin, and certainly not by any human being, in the United States. DE-48. There has never been any nexus established between the saran fibers from the hairbrush and any wig Stoeckley ever wore.[82] Similarly, if saran wigs were actually manufactured "routinely" as MacDonald claims, no exemplar has ever been offered by the defense.[83] DE-343 at 52.[84]

J. MacDonald's pajama bottoms

[82] This issue is illustrative of how far afield MacDonald has gone in the vain search for truly exculpatory evidence. The only reason he wants to discuss wigs is that he described the female "intruder" as having long blond hair. This is one of the many ways in which his description of the "intruder" did not match Helena Stoeckley. So, he must posit that she wore a blond wig and stretch to argue that a probable doll hair in the hairbrush of the mother of two young daughters actually came from Stoeckley's wig and was deposited there on February 17, 1970.
[83] No evidence was offered on this issue at the evidentiary hearing.
[84] "The most that can be said about the evidence is that it raises speculation concerning its origins." 966 F.2d at 860.

MacDonald claims for the first time that because his 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 that he did not commit the crimes." DE-343 at 48. This is so, MacDonald claims, because "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 the blood was shed. Id. (citing 1984 Defense Motion to Set Aside the Judgment, Exhibit O - Declaration of Richard Fox). The defense then speculates that, "[i]f 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." Id. This contention is listed as item "v." under the heading "V. Evidence of Intruders from Previously Submitted Materials, A. Physical Evidence of Intruders." DE-343 at 44, 48. If we understand MacDonald's argument correctly, the potential absence of blood spatter on his pajama bottoms, which were in any case discarded before any forensic examination could take place, affirmatively proves the presence of intruders.[85]

The claim is speculative at best. The absence of blood spatter as exculpatory evidence was apparently rejected by the jury in the context of MacDonald's pajama top. MacDonald's expert, Dr. John Thornton testified that "[i]f someone beats on another human being with a blunt object, there will be this very fine dispersion of blood—many hundreds, many thousands of droplets of blood." TTr. 5197. These droplets are on the order of 25,000th of an inch. Id. Thornton testified that this would be the case if someone was wearing a garment such as the blue pajama top and struck another individual with an item such as the club. TTr. 5198-99. Thornton then

[85] Whether MacDonald's pajama bottoms "matched" his pajama top is an issue which remains in dispute, because there is no reliable evidence that they did. This Court need not resolve that 43 year old question. See supra at 78.

testified to his examination of MacDonald's pajama top (as well as the top sheet) for the presence of such fine blood droplets. "No, I found no such indication. I found a good deal of blood on the garment, but not the very fine aerosol, the very fine droplets of blood that we see on the sheet, and that I would expect from a beating of this type." TTr. 5200. The jury was able to evaluate this testimony for whatever it was worth, particularly in light of the extensive tears in MacDonald's pajama top, which would have left him essentially bare chested. See GXP 607. On cross-examination, Thornton conceded that some bare portions of the arms or torso of the wearer of the pajama top could have absorbed the aerosol spray. TTr. 5278-79. Obviously, the jury did not believe the absence of an aerosol pattern of blood exculpated him.

IV. THE UNSOURCED HAIRS CLAIM

A. Procedural history

In 1997, MacDonald sought DNA testing from the Fourth Circuit, telling the court of appeals, inter alia, that in the district court: "MacDonald sought access to this highly specific and crucial category of evidence (described in Cormier Aff. No. 2) for the purpose of subjecting these unsourced hairs and blood debris to DNA testing in an effort to further establish MacDonald's innocence by demonstrating definitively that these hairs did not originate from any MacDonald family member nor from MacDonald himself, but instead originated from one or more of the intruders whom MacDonald described seeing in his home on the night of the murders."[86] As an example of a hair which could further establish MacDonald's innocence MacDonald pointed to the hair in Colette's left hand[87] "which the government is unable to source." Id. at 13. In addition, MacDonald pointed to the "unmatched brown body hair of

[86] *Memorandum in Support of Jeffrey R. MacDonald's Motion For an Order Authorizing the District Court For the Eastern District of North Carolina to Consider A Successive Application for Relief Under 28 U.S.C. § 2255,* filed September 17, 1997, USCA-4, No. 97-713 at 7.
[87] This hair was later labeled by AFDIL as 51A(2).

Caucasian origin [Q125/E-211] which was forcibly removed and which appears to have a piece of skin tissue attached to the basal area of the hair," from the "blue top sheet found on the floor of the master bedroom."[88] Id. at 13, ¶ B. "If this hair and piece of skin were subjected to DNA testing, and were such testing to result in a determination that this item did not originate from either Jeffrey MacDonald, his wife, or daughters, it would be highly persuasive evidence of MacDonald's innocence, for there is little, if any possibility that this hair and skin found their way into the bedding in the master bedroom other than as a result of a struggle between the victims and the person who committed the murders." Id. at 16-17 (footnote omitted).

On October 17, 1997, the Fourth Circuit granted MacDonald's motion with respect to DNA testing, and remanded the issue to this Court. While the DNA testing was being conducted by the Armed Forces Institute of Pathology's DNA Identification Laboratory ("AFDIL"), on January 17, 2006, MacDonald filed his fourth motion to vacate his conviction based upon alleged newly discovered evidence set forth in the November 3, 2005 Affidavit of Jimmy Britt. DE-111.

On March 10, 2006, the results of court ordered DNA tests were reported by AFDIL. DE-119. On March 22, 2006, MacDonald filed a motion to add an additional predicate to his pending § 2255 motion. DE-122. In the accompanying memorandum (DE-123), he asserted as an independent ground for vacating his conviction a freestanding claim of actual innocence, based upon the DNA test results regarding three hairs that didn't match any other sample tested. The specific averments regarding each of the three unsourced hairs were:

> 75A
>
> Thus, it is clear that this unidentified hair was found underneath where Colette's body lay at the crime scene, and that it was a full length body or pubic hair. The fact that it had both the root and follicular tissue attached is indicative that it was pulled from someone's skin and lends great weight to this specimen as

[88] This hair was later labeled by AFDIL as 46A.

> probative that there were unknown intruders in the home with whom Colette struggled and from whom she extracted a hair.

DE-123 at 3-4.

> 91A
>
> Found with its root intact along with blood residue underneath the fingernail of three year old Kristen MacDonald, who at the crime scene was found murdered in her bed ... and it is noted that chemical analysis of the hair indicated a finding of blood on the hair … Thus, to find an unidentified hair, mixed with blood residue, with root intact, underneath one of her fingernails, strongly suggests that while she was defending herself against blows from an intruder she grabbed at or scratched back at the intruder such that as a result, the intruder's hair came to reside under her fingernail.

DE-123 at 1-3.

> 58A(1)
>
> According to the [AFDIL] laboratory notes, it is a hair with root intact, and measured approx. 5mm in length. [Appendix 1, tab 5, (p.3).] Thus, this unidentified hair was found on the bedspread on the bed where Kristen MacDonald was found murdered.

DE-123 at 4.

Although a number of AFDIL and CID documents were contained in the accompanying Appendix One, no affidavit from any expert or other witness was offered to support the contentions that the hairs were bloody, forcibly removed, or, as to Specimen 91A, found under Kristen's fingernail. The Government opposed this motion on jurisdictional grounds. DE-135.

On November 4, 2008, this Court entered an order denying, inter alia, MacDonald's motion to add an additional predicate based on DNA test results, citing lack of jurisdiction in the absence of a Prefiling Authorization (PFA) from the Fourth Circuit. MacDonald appealed. On April 19, 2011, the Fourth Circuit remanded the case for further proceedings. United States v.

MacDonald, 641 F.3d 614, 617 (4th Cir. 2011). Regarding the DNA claim filed in 2006, the Fourth Circuit granted MacDonald a PFA so that this Court could proceed directly to § 2255(h)(1) gatekeeping evaluation.[89] Id. at 616.[90]

After the remand and in response to DE-176,[91] the Government refuted MacDonald's overstated factual claims about the characteristics and provenance of the unsourced hairs contained in DE-122 and DE-123, using the affidavits of USACIL chemists Craig Chamberlain (DE-214), Dillard Browning (DE-215), Janice Glisson (DE-217), AFIP Analyst Grant D. Graham, Sr., as well as FBI Examiners Dr. Joseph A. DiZinno (DE-218), and Robert Fram (DE-219) (hereinafter "Government's Forensic Affidavits").[92]

Read together, the affidavits of Chamberlain, Browning, and Glisson demonstrate that the actual fingernail scrapings from Kristen's left hand were further contained in a receptacle (most likely a folded piece of paper marked "L. Hand Chris"), which was designated, but not marked, "D-237." When examined on March 9, 1970, by Browning at Ft. Gordon, Ga. (having been transported there by Chamberlain), it did not contain any hair but did contain a cotton fiber matching MacDonald's pajama top. Id. Serology testing on the fingernail scrapings contained in "L. Hand Chris" by Janice Glisson, also on March 9, revealed the presence of blood, but no serology testing was performed on any hair, because none was present. Id. These items were returned to Ft. Bragg on April 11, 1970.

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[89] The Fourth Circuit also stated that this Court should consider the 2006 DNA test results as part of the "evidence as a whole" in its gatekeeping analysis of the Britt claim. 641 F.3d at 614.

[90] On September 20, 2011, MacDonald filed new motions relating to DNA and the Innocence Protection Act. See DE-175 and DE-176. The IPA claims were not the subject of the evidentiary hearing and are not the subject of this post-hearing memorandum. See DE-266 at 3; see also Section V, infra, at 195 n.131.

[91] The Government's response (DE-212) to MacDonald's IPA-based request in DE-176 for a new trial based on the 2006 DNA results, and the Government's Forensic Affidavits filed therewith, are highly relevant to a factual analysis of MacDonald's freestanding unsourced hairs claim—originally filed as DE-122 and as to which the Fourth Circuit issued a PFA in 2011—that along with the Britt claim were the subjects of the evidentiary hearing to which this memorandum is addressed. See Orders DE-266 at 3 and DE-305. These affidavits were the focal point of the Government's presentation regarding the unsourced hairs claim at the evidentiary hearing. See infra at 171-178.

[92] Regarding AFDIL Specimen 91A, see DE-212 at 22-30, ¶¶ 38-46; AFDIL Specimen 75A, see id. at 30-32, ¶¶47-51; and AFDIL Specimen 58A(1), see id. at 32-33, ¶¶52-54.

When the vial which had previously contained the actual fingernail scrapings from Kristen's left hand was transported from Ft. Bragg and received on July 27, 1970, by Janice Glisson, at USACIL, at Ft. Gordon, the paper receptacle marked "L. Hand Chris" was no longer present. Id. Glisson removed a small hair from the vial which she mounted on a slide that she marked "#7," to correspond to the vial which she also marked #7. Id. Glisson performed no serological testing on the hair from vial "#7," and did not record the presence of blood or any indication that the hair had been forcibly removed. Id. The hair mounted on the slide marked "# 7" would later be marked for identification by FBI Special Agent Fram as "Q137," and "91A" by AFDIL. DE-306 at 10, ¶37. Slide #7/Q137/91A was examined microscopically by Robert Fram and Joseph DiZinno, prior to the DNA testing, and both recorded that the hair had a "club root," indicating that it had been naturally shed, and neither recorded the presence of blood on the hair. Id.

Similarly, both Fram and DiZinno examined the Caucasian pubic hair designated 75A (Q79/E-303); neither recorded the presence of blood, and both noted that the hair had a "club" root. DE-219 at 11, ¶ 16; DE-218 at 14, ¶ 23; DE-218-3 at 1. Both opined that the presence of some follicular tissue on the root was not uncommon in the case of naturally shed pubic hairs, and this did not indicate that the hair had been forcibly removed. Id.

Dr. DiZinno, who was a qualified hair examiner, had also examined the 75A/Q79 hair in 1991, and confirmed that Malone's determination that the Q79 pubic hair "exhibits the same individual microscopic characteristics as the pubic hair of Jeffrey MacDonald, and accordingly, is consistent with having originated from Jeffrey MacDonald," was consistent with the results of his own examination.[93] DE-218 at ¶17. Dr. DiZinno, the former FBI Assistant Director in charge of the Laboratory Division, earlier in his career had developed the FBI's mitochondrial (mtDNA) program. He explained in his 2011 affidavit that he did not find the 2006 AFDIL

[93] This 1991 comparison played no role in the 1979 trial.

result—that 75A did not contain the mtDNA sequence of Jeffrey MacDonald—at odds with his 1991 determination because microscopic comparison of hairs and the subsequent development of DNA sequencing are based upon entirely different technologies, with different capabilities to discriminate between donors, and it has long been recognized by the FBI that hair associations are not an absolute basis for personal identification. DE-218 at ¶18. Citing sources, Dr. DiZinno stated that "although not common, as later research has shown, it is possible for two hairs to exhibit the same microscopic characteristics, although subsequent DNA comparison demonstrates they originated from different donors." Id. at ¶19.

The Affidavit of Grant Graham established that he made no determination that any of the three hairs (75A, 91A, and 58A(1)) were bloody or forcibly removed, and further that defense counsel Junkin had misquoted his bench notes regarding these hairs. DE-216 at ¶¶ 15-21.

In DE-237, MacDonald asserted that "the [DNA test] results constitute additional evidence to be considered in conjunction with MacDonald's assertion of actual innocence ... ."[94] DE-237 at 1. No affidavit from any fact or expert witness contesting the Government's Forensic Affidavits accompanied MacDonald's reply. In fact, these affidavits aren't even mentioned in the reply. Instead, MacDonald noted that while AFDIL's "report of DNA test results released in 2006 did not conclusively state that the hairs tested were 'bloody or forcibly removed and not naturally shed' [DE-212 at ¶35], the opposite—that the hairs were naturally shed—was also not stated."[95] DE-237 at 3, ¶ 4. "Thus, the Government's conclusion that the hairs were naturally shed, as

[94] MacDonald made this assertion in his Reply to Government's Response to Motion for New Trial Pursuant to 18 U.S.C. § 3600, as part of an attempt to argue that his IPA motion was timely, but also stated that the DNA results "are to be considered as part of the 'evidence as a whole' with respect to MacDonald's successive petition for writ of habeas corpus." DE-237 at 1. It is in the latter context, that is, the unsourced hairs claim and the "evidence as a whole" relating to the Britt claim, that MacDonald's assertions in DE-237 are addressed here.

[95] The IPA new trial motion (DE-176) had cited nothing but the AFDIL March 10, 2006, report in support of its contentions that the hairs were bloody and forcibly removed. In its Response, the Government had pointed out, in pertinent part, that "[t]he AFDIL DNA test results reported in 2006...do not and cannot, prove when, where, and by whom the three unsourced hairs were found (the so called 'critical places'). Nor can the AFDIL Report prove that the hairs were bloody or forcibly removed and not naturally shed." DE-212 at 21, ¶ 35.

indicated by its reference to the hairs as 'naturally shed unsourced hairs' [DE-212 at ¶36], is incorrect and unsupported by AFDIL's report."[96] Id. Insisting that the fact that the hairs were naturally shed "has not been proven," MacDonald pronounced that "[t]he appropriate time to argue the issues of whether the hair was naturally shed or forcibly removed and when the hair was deposited in the crime scene is during an evidentiary hearing." DE-237 at 4.

On June 8, 2012, this Court entered an order stating that MacDonald's § 2255 unsourced hairs claim and his § 2255 Britt claim would be the subject of the evidentiary hearing. DE-266 at 3. MacDonald was given the opportunity to depose Government experts but did not do so. See DE-273.

B. The DNA stipulation

The parties entered into a detailed stipulation which covered the results of the DNA testing conducted by AFDIL, and limited agreements on chain of identification of the 29 specimens tested by AFDIL[97], and the photographic and digital images generated in the process by Master Sergeant Grant D. Graham, Sr. DE-306. Ultimately, this stipulation was filed as Exhibit 1 of the Corrected Proposed Joint Pre-Hearing Order on September 15, 2012. DE- 292, pending final approval of the movant.[98] Summarized simply, the parties' stipulation means that:

1. A hair found on Kristen's bedspread (58A(1)), the hair from the rug within the body outline of Colette (75A), and the hair that MacDonald has alleged was recovered from under the fingernail of Kristen (91A) did not originate from a common source, from Helena Stoeckley, from Greg Mitchell, or from any member of the MacDonald

[96] Of course, the Government had just expressly stated in the previous paragraph that the AFDIL Report was silent on these issues. Obviously, the Government was relying on its Forensic Affidavits to support its contention that the hairs with "club roots" were naturally shed.
[97] MacDonald states that AFDIL tested "28 specimens," in fact, 29 specimens were tested. HTr. 1251-52
[98] Jeffrey MacDonald, along with counsel, signed the Stipulation which was then filed in open court on September 17, 2012. DE-306.

family. These three hairs have come to be known in this litigation as "the unsourced hairs."

2. The hair found in Colette's left hand (51A(2))[99], an additional hair from Kristen's bedspread (58A(2)), and one of the hairs removed from the bedspread on the floor of the master bedroom (112A(3)) are all consistent with each other and originated from Jeffrey MacDonald.

3. The forcibly removed hair adhering to the top sheet in the pile of bedding on the master bedroom floor (46A) is consistent with originating from Colette, and Kimberly and Kristen are excluded as sources of this hair.[100] The blond hair found in Colette's right hand (52A) originated from Colette. The hair found adhering to the bedspread on the master bedroom floor (112A(5)) has the same mtDNA sequence as Colette, Kimberly, and Kristen.

C. The Pre-Hearing Order

On September 15, 2012, the parties filed a "Corrected Proposed Joint Pre-Hearing Order."[101] DE-292. Included by the Government as part of the Joint Pre-Hearing Order were extensive indices of documentary and photographic exhibits pertaining to the unsourced hairs claim. See GX 3019-3488. Of particular relevance are three summary exhibits in the form of PowerPoint slides: GX 3499, "Unsourced Hairs 75A, 91A, and 58A(1)," corresponding to the hairs which are the basis of MacDonald's unsourced hairs claim; GX 3500, "Q-137/91A," which details the chain of evidence in regard to the hair claimed to have been found under Kristen's fingernail; and GX 3501, "DNA Results of Government's Trial and New Evidence," which sets forth the

[99] This hair was cited at trial by the defense as evidence of "intruders." See TTr. 3646-48, 7266.
[100] In 1997, MacDonald argued to the Fourth Circuit that if this hair were found to have originated from someone outside the MacDonald family, this would be persuasive evidence of MacDonald's innocence. See, supra, at 163.
[101] This final document, approved by the Court, was filed on September 17, 2012, as DE-307.

DNA test results that weaken MacDonald's trial claims regarding other then-unsourced hairs and thus now strengthens the Government evidence. No objection to any of these DNA-related exhibits was lodged, nor was any objection made to any of the Government's Forensic Affidavits filed with DE-212. See DE-292 at 43-44.

In the Pre-Hearing Order, MacDonald identified 8 witnesses he intended to call at the hearing, none of whom were expert or fact witnesses proposed to testify about any of the contested issues involving the unsourced hairs claim. DE-292 at 44-45. MacDonald listed 109 documentary exhibits, only 8 of which pertained to the unsourced hairs claim (DX 5102-09), 7 of which had been previously filed (DX 5102-08).[102] DE-292 at 11.

D. The evidentiary hearing on the unsourced hairs claim

During the evidentiary hearing held between September 17-25, 2012, the defense called no fact or expert witnesses to meet MacDonald's burden of proof in relation to his unsourced hairs claim under 28 U.S.C. § 2255, or to refute the Government's contentions.

1. 91A

MacDonald did not offer any prior testimony of Drs. Gammel or Hancock from the Article 32 Hearing, the Grand Jury, the trial, or by affidavit to the effect that either pathologist had observed the presence of a hair under Kristen's fingernails, in her fingernail scrapings, or otherwise in her hand, or collected a hair from such a location. The only evidence that the defense presented as to whether there was an unsourced hair found in any of these places was to project parsed portions of the trial testimony of Dr. Hancock (TTr. 2533, 2562, 2602), CID Agent Bennie J. Hawkins (TTr. 3042, 3050-51), and the first page of Janice Glisson's July 27,

[102] The only new exhibit was DX 5109, a letter dated 12/20/04 from AFDIL, informing counsel for the parties that the same mtDNA sequence found in AFDIL Specimen 75A was also the mtDNA sequence of an AFIP staff member who was not involved in the handling or testing of the specimens. As mtDNA sequences are not unique, this disclosure has no relevance to the issues before this Court.

1970, bench notes (DE-217, Ex. 2). HTr. 1252-55. These projected images were accompanied by argument of defense counsel in an attempt to show that the fingernail scrapings from Kristen MacDonald went from Dr. Hancock, who collected them in a vial, to Bennie Hawkins, who was present, and then directly and without any intervening examinations to Janice Glisson, who received the vial on July 27, 1970. HTr. 1252-54. The narrative continued that Glisson then marked the vial identified as "fingernail scrapings, left hand, smaller female MacDonald" as "number 7," and found that it contained a hair "that came from the autopsy." "That hair becomes number seven. It's later marked AFDIL 91A, when it's tested by AFDIL. The results of hair seven, the results of 91A, was that it didn't match Jeffrey MacDonald. It did not match Colette, Kimberly or Kristen, it didn't match Helena Stoeckley or Greg Mitchell it is, therefore, an unsourced hair." HTr. 1254-55.

In response, SAUSA Brian Murtagh began by drawing the Court's attention to the 1970 Article 32 testimony of Drs. Gammel (GX 3053) and Hancock (GX 3055), in which Dr. Gammel testified that he took the fingernail scrapings from all of the victims prior to the autopsy of Kristen, and Dr. Hancock testified that he assisted in the process by putting little slips of paper in the vials identifying the origin of the scrapings. HTr. 1298. Next, Murtagh used GXP 778, a photograph of the wounds on Kristen's right hand, and Dr. Hancock's trial testimony to refute the contention that Dr. Hancock had, in effect, testified that Kristen had struggled with her assailant. HTr. 1299-1300.[103] Next, Murtagh addressed the contention that CID Agent Bennie Hawkins had witnessed the autopsies and had taken custody of the fingernail scrapings directly. Rather than going through Hawkins' entire trial transcript, Murtagh represented to the Court that

[103] Dr. Hancock testified that Kristen had several small wounds on her right hand as well as one large incised wound on her right ring or middle finger. HTr. 1298-1300; GX 775, 778. Hancock testified at trial that this was consistent with defense wounds if she had been fending off a knife, or it could be consistent with being stabbed through her hand and into her chest. Id. Neither such action would be consistent with scraping her attacker with the fingers of her right hand, let alone her left hand.

an examination of Hawkins' testimony would show that he arrived after the autopsies. Hawkins took custody of items that had been collected during the autopsy, but he was not the agent who had been present during the autopsy itself.[104] HTr. 1301.

Murtagh then projected GX 6001, the Military Police Property Receipt, DA-Form 19-31, which Hawkins had typed up reflecting his receipt of the items from Dr. Hancock, and the subsequent chain of custody. HTr. 1301-02. Murtagh pointed out that, contrary to the defense contention that Kristen's fingernail scrapings had gone directly from Hawkins to Janice Glisson on July 27, 1970, Hawkins had, in fact, relinquished custody of the autopsy items on February 21, 1970, to chemist Craig Chamberlain for transportation to USACIL, Ft. Gordon. Id.; GX 6001. Next, Murtagh projected GX 6002, which is also Exhibit Two of Chamberlain's affidavit reflecting his February 26, 1970, inventory of items in his custody that he was going to distribute to other chemists at USACIL. Id. In particular, Murtagh drew the Court's attention to the designation by Chamberlain of "D-237: vial c/fingernail scrapings marked 'L. Hand Chris.'"[105] Id. Murtagh then displayed GX 3499, the "Unsourced Hairs" PowerPoint, with particular emphasis on the defense contentions that hair 91A was bloody and forcibly removed. HTr. 1303-1304. Murtagh drew the Court's attention to the March 9, 1970, bench note of Janice Glisson in GX 3499 that reflects the results of serology testing on "L. Hand Chris" and reveals the presence of blood[106], but makes no mention of the presence of a hair. HTr. 1304; see also Exhibit 1, DE-217-2 at 1. Murtagh further pointed to the bench note of Dillard Browning, also dated March 9, 1970, reflecting his examination of D-237, which states: "fingernail scrapings from Christine's left hand, vial contained one microscopic piece of multi-strand polyester cotton

[104] As stated at 81-82, supra, and in the trial transcripts of Hawkins at 3041-42, 3049-51, Hawkins had indeed come to the morgue after the autopsies to obtain fingerprints, and was asked by Dr. Hancock to take custody of the various items, including vials containing fingernail scrapings.
[105] Chamberlain did not physically mark the vial with "D-237" or anything else.
[106] Chamberlain wrote "D-237" beside this entry on Glisson's serology notes. HTr. 1304; GX 3499.

fiber, identical to pajama top material, bloodstained but washed." HTr. 1305; see also Exhibit 3, DE-215-3 at 1. Again, there is no mention of a hair.

Regarding Janice Glisson's July 27, 1970, bench note, which Movant's counsel had offered for the proposition that Hawkins took custody of the vials from the autopsy and sent them directly to Glisson, Murtagh explained, "[i]n point of fact, the vials had already been to the CID Lab [at Ft. Gordon], had been examined by Browning, and at least the fingernail scrapings contained in "L. Hand Chris" had been tested for blood by Janice Glisson." HTr. 1307.[107] On July 27, 1970, Glisson receives 13 vials from Ft. Bragg with Hawkins' initials on them, so she numbers them 1 through 13. HTr. 1307; GX 3499. Vial number 7 is "fingernail scrapings left hand smaller female McDonald (not labeled by Browning) 1 hair ? 2 fragments." HTr. 1307; GX 3499. "So, this is the origin of the 91A hair. It has no provenance before July 27, 1970. Glisson finds it in the vial, which she apparently has not examined before, and mounts it on a slide number seven." HTr. 1308. "[T]he actual fingernail scrapings were in some piece of paper, something that was capable of being marked "L. Hand Chris," because Chamberlain has it in quotes, and that's where the blood was. Whatever was actually in those fingernail scrapings was in "L. Hand Chris." It appears to have been consumed in analysis, certainly by April 6, 1970,[108] and it doesn't exist as of July 27th 1970."[109] HTr. 1311; GX 3499.

Murtagh also explained that 91A was shown to be a naturally shed hair by FBI Expert Robert Fram, as is evidenced by the photomicrographs taken by Grant Graham of AFDIL. HTr. 1312;

[107] The vials were then returned to Ft. Bragg in April 1970 and then, after several changes of evidence custodians, transported back to Ft. Gordon in July 1970. GX 6001.
[108] This is the date of the preliminary CID lab report reflecting, inter alia, the serology results.
[109] Glisson clearly states in her affidavit that there was no paper marked "L. Hand Chris" present in the vial when she received it on July 27, 1970. DE-217 at 13, ¶ 17.

GX 3499. Moreover, it is unlikely that the hair was ever under Kristen's fingernails because they were covered in blood, and no blood was found on 91A. HTr. 1315.[110]

2. 58A(1)

Concerning AFDIL Specimen 58A(1), the defense presentation was limited to the argument by counsel: "58A.1 (sic) is collected from Kristen's bedspread. It's unsourced ... and even if it's naturally shed, as opposed to forcibly removed, it could have been shed by an intruder while that intruder was attacking Kristen in her bedroom." HTr. 1258-59.

With regard to AFDIL Specimen 58A (FBI Q87), Murtagh explained that this was collected from the Kristen's bedspread in the north bedroom. HTr. 1318; GX 3499. When Graham examined the slide (Q87) he discovered that there were actually two hairs on it, which he designated 58A(1) and 58A(2). Id. Hair 58A(1) is a naturally shed hair with a mitochondrial DNA sequence not matching any other sample tested (the MacDonald family, Helena Stoeckley, Greg Mitchell, or the other unsourced hairs), while 58A(2) is also a naturally shed hair with an mtDNA sequence consistent with that of Jeffrey MacDonald. HTr.1319; GX 3499, GXP 3417. Murtagh pointed out that the "defense has failed to prove when this hair got on the bedspread. And I think that's the key issue with respect to all of the unsourced hairs, when did they get there … And it's their burden." HTr. 1322. Also located on Kristen's bedspread were hundreds—if not thousands—unsourced fibers of "every color in the rainbow," as well as black dog hair. HTr. 1320-1322; GX 3499; GXP 3469-76.[111]

[110] The most likely explanation is that this small hair got into the vial on one of the occasions that it was opened prior to July 27, 1970. It is possible that a hair from emergency personnel or the environment stuck to one of Kristen's fingers as her body was removed from the crime scene, since her hands were very bloody and not bagged during this process, see HTr. 1315, but this is unlikely because no blood was found on hair 91A. See supra at 167-168.

[111] The MacDonalds did not own a dog. If every unsourced hair found in the MacDonald apartment is indicative of an intruder on February 17, 1970, then the evidence points to this black dog as one of the intruders. MacDonald's account of the murders contains some bizarre details, as do some of the various "confessions" of Helena Stoeckley,

3. 75A

Movant's counsel argued: "Finally, 75A, the hair that was found in the trunk leg areas of the body outline of Colette MacDonald on the rug in the master bedroom. So, that's where it was found. You've got the body outline, the hair is there in the body outline, in the trunk and legs area of the outline. It's unsourced, meaning it didn't come from Jeffrey MacDonald, didn't come from anybody in the MacDonald family. And again, whether it's naturally shed or forcibly removed, it is a piece of evidence that an intruder could have shed while attacking Colette MacDonald." HTr. 1259.

Murtagh explained that hair 75A was indeed found within Colette's body outline. HTr. 1323; GX 3499. This naturally shed pubic hair did not yield an mtDNA sequence matching any other sample tested. HTr. 1323-25; GX 3499; GXP 3404. There was a lot of other debris found on the rug where 75A was found, and other than the threads and yarns from MacDonald's pajama top, which indisputably was torn on February 17, 1970, there is no way to determine when any of the unsourced hairs and other household detritus were deposited on the rug. HTr. 1325-26; GX 3499.

4. "Sourced" hairs

Murtagh also explained that other DNA test results had actually strengthened the Government's case. HTr. 1329. Using PowerPoint GX 3501 "DNA Results of Government's Trial and New Evidence," Murtagh pointed out that DNA testing had confirmed the microscopic comparison testimony that the hair in Colette's right hand (52A/E-4/Q118/GX 280) was her own. HTr. 1331-32; GXP 3427.

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but none of them contain a claim that a dog was part of the band that supposedly invaded the MacDonalds' small apartment that night.

Next, Murtagh explained how the previously un-comparable Caucasian limb hair found in Colette's left hand (GX 281/E-5/Q1190), which Segal had pointed to as proof of intruders[112], now designated AFDIL 51A(2), was shown to have Jeffrey MacDonald's mtDNA sequence. HTr. 1332-33; GX 3501; GXP 3428-3432. Murtagh then addressed MacDonald's current stance that the presence of this hair in Colette's hand was "in no way inculpatory, because he touched her body, gave her mouth to mouth, etc." HTr. 1333; DE-122 at 3, n 5. "The problem is that it is a broken hair and it's broken off at the root end ... it has debris in the tissue which appears to be blood and unknown debris … [w]e believe it is inculpatory. You've got ... MacDonald's broken bloody hair in the victim's hand, we certainly think that ... does not support the theory of intruders at all, but rather points to MacDonald." HTr. 1333; GX 3501, GXP 3431-33. Describing MacDonald's argument, Murtagh said: "For ... 30 odd years this was the hair of the murderer clutched in the victim's hands. When it turns out to be his hair, it's suddenly innocuous." Id.

Projecting trial summary chart GX 978 ("Items found in pile of bedding on floor of master bedroom"), Murtagh pointed out that the microscopic identification of Colette's broken head hair, entwined with a seam thread from MacDonald's pajama top, both found adhering to the bedspread which MacDonald claimed never to have touched, is still intact because the DNA results were inconclusive. HTr. 1334-35; DE-292-2; DE-307-2, ¶ 23(e); GX 3501; GXP 3440-44.

Murtagh next addressed the hair in AFDIL Specimen 46A, as depicted in GXP 3457, which was found adhering to the sheet on the floor of the master bedroom (GX 978). HTr. 1335. Because AFDIL had been able to do nuclear DNA testing, they were able to exclude Kimberly and Kristen as the source of the STR DNA sequence and to conclude this was Colette's hair. Id.;

[112] See TTr. 3846-48, 7266.

DE-292-2; DE-307-2, ¶27. Murtagh explained how FBI Expert Robert Fram had determined that because of the presence of the root with sheath and follicular tag and attached tissue depicted, the 46A (Q125/E-211) hair was consistent with having been forcibly removed.[113] HTr. 1335; GXP 3458.

Murtagh addressed the results of the DNA and microscopic examinations of AFDIL hair 112A(5)[114] (Q96.5), which was also found adhering to the bedspread on the floor of the master bedroom. HTr. 1336. Using the photomicrograph of the root of this hair (GXP 3453), Murtagh explained how the mtDNA sequence for 112A(5) was the same as that of Kimberly, Kristen, and Colette, but that the hair microscopically matched Kimberly's known exemplar. Id. Further, FBI Expert Robert Fram had determined that the Q96.5 hair—which is stipulated to be the same as the AFDIL 112A(5) hair—had been forcibly removed. Id.

5. MacDonald rebuttal argument on unsourced hairs claim

MacDonald's counsel did not challenge any Government assertion made concerning the DNA evidence, including the Forensic Affidavits. HTr. 1396-1398. In response to a question from the Court, he conceded that none of the unsourced hairs were bloody or forcibly removed:

> Mr. Widenhouse: I'm not saying that they're forcibly removed.
>
> * * *
>
> The Court: I'm asking you whether they have blood on them.
> Mr. Widenhouse: No, they don't seem to have blood on them.

HTr. 1397. Counsel further noted that "it's not as good [evidence of an intruder], I admit, as if it's a forcibly removed hair . . . or if there's blood on it . . .," yet maintained that "it is still positive evidence of an intruder . . . ." HTr. at 1398.

E. Movant's Post-Hearing Memorandum

[113] This is the same hair which MacDonald told the Court of Appeals was the "result of a struggle between the victims and the person who committed the murders." Supra at 164.
[114] Also referred to as "112A.5" and "112A#5".

In relation to the alleged newly discovered evidence resulting from the DNA test results, MacDonald contends in DE-343 that he now has "DNA evidence substantiating the presence of intruders when the murders occurred." DE-343 at 20. He lists hairs 91A, 58A(1)[115], and 75A. "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 defense 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 it with other information in the 'evidence as a whole,' it would have led a reasonable jury to find MacDonald not guilty." DE-343 at 11. No citation other than the reference to Dr. Hancock's description of the wound to Kristen's right hand (TTr. 2577) is provided for either the previous contention that the 91A hair was found in the fingernail scrapings from Kristen left hand, or the new contention that the hair "was found in her hand."[116] MacDonald repeats his contention that the fingernail scrapings went from Bennie Hawkins to Janice Glisson, but omits any reference to the prior erroneous assertion Glisson examined the fingernail scrapings for the first time on July 27, 1970. DE-343 at 11-12.

MacDonald also claims that the other two unsourced hairs 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

[115] MacDonald refers to the hair found in Kristen's bedspread as "58A.1." The precise designation employed by AFDIL is 58A(1).

[116] Apparently realizing that he has failed to prove that hair 91A came from under Kristen's fingernails, MacDonald for the first time appears to argue that the hair may have come from Kristen's hand. DE-343 at 11 ("found in the fingernail scrapings or from the hand of Kristen…"); id. at 41 ("lodged under her fingernail or found in scrapings from her hand"); but see id. at 42 ("most powerful DNA evidence is the hair from the fingernails scrapings of the left hand of Kristen"). There is no evidence that a hair was recovered from Kristen's hands, which were covered with blood. Moreover, after asserting—without proof—for seven years that hair 91A was found " … underneath one of [Kristen's] fingernails," DE-129 at 9, abruptly changing the assertion to "found in her hand" constitutes an implicit admission that MacDonald has failed to prove what he claimed in 2006. This new, even weaker position has no support in the record.

attached, indicative that it was pulled from someone's skin." DE-343 at 43. No citation is provided for the renewed assertion of forcible removal, which is in stark contrast to counsel's concession at the evidentiary hearing. HTr. 1397.

Nowhere in his Post-Hearing Memo does MacDonald address any of the other DNA results which strengthened the evidence of MacDonald's guilt, see supra, at 176-178. These results are an important part of "the evidence as a whole" which the Court is obliged to consider in its gatekeeping function regarding the unsourced hairs claim.

V. LEGAL ARGUMENT

A. Overview

In the section of the prehearing order (DE-292) on issues and contentions, the Government set forth the legal road map from the Fourth Circuit for consideration of MacDonald's two pending 28 U.S.C. § 2255 claims. With regard to the "Britt claim,"[117] the Government stated that the Court should:

> . . . consider the proffered evidence . . . –with due regard for "the likely credibility" and "the probable reliability" thereof . . .–to determine if it, in combination with the newly discovered Britt evidence [if proven], would be sufficient to establish [by clear and convincing evidence] that no reasonable juror would have found MacDonald guilty. If so, MacDonald would merely pass the procedural bar [gatekeeping] to having the Britt claim considered on the merits, and he would yet be obliged to prove the constitutional violation alleged in that claim before obtaining any § 2255 relief thereon.

DE-292 at 2, citing United States v. MacDonald, 641 F.3d 596, 614 (4th Cir. 2011). See also 28 U.S.C. § 2255(h)(1). Similarly, as to the "unsourced hair claim,"[118] the Government stated:

[117] The "Britt claim" was originally filed on January 17, 2006 (DE-111), supported by a memorandum filed on January 19, 2006 (DE-115) and numerous exhibits. The newly discovered evidence that formed the basis of the claimed constitutional violation was the November 3, 2005, Affidavit of Jimmy B. Britt. DE-115-1, Ex. 1. See Order DE-266 at 2-3 and n.2.

[118] The "unsourced hairs claim" was originally filed as a motion to add an additional predicate to Movant's previously filed § 2255 Britt claim. See DE-122 and DE-123. For the ensuing procedural history of this claim, see supra at 163-69. See also Order DE-266 at 2-3 and n.2.

> This Court must consider whether the DNA claim (which this Court has now labeled more accurately "the unsourced hair[s] claim") "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 [MacDonald] guilty of the offense." 28 U.S.C. § 2255(h)(1). In so doing, the proffered "evidence as a whole" is the same evidence that must be considered with regard to the Britt claim and, thus, must be considered "with due regard for 'the likely credibility' and 'the probable reliability' thereof." 641 F.3d at 614.

DE-292 at 4.

The Court framed the parameters of the evidentiary hearing in its Order of June 8, 2012, directing that the unsourced hairs claim and the Britt claim would both be the subject of the evidentiary hearing and stating:

> The evidentiary hearing necessary for the court to perform the "more searching inquiry" will include *both* aspects of the § 2255 claim as remanded by the Court of Appeals – the "newly discovered evidence/Britt claim" aspect *as well as* the add-on "unsourced hairs" aspect. MacDonald, who bears the burden of proving his § 2255 claims, will present his proof first. . . . Of course, the Government is entitled to present whatever relevant evidence it has in response to the proffered affidavits, depositions, live witnesses, and the arguments arising therefrom.

DE-266 at 5-6. In the prehearing order, as to the Britt claim, the Government forecast that, "[a]t the conclusion of the hearing, the Government will respectfully request the Court to find (1) that the gatekeeping standard has not been met and (2) in the alternative, the Britt claim was not proven by the Movant, the party with the burden of proof." DE 292 at 2-3. The Government made a similar forecast with respect to the unsourced hair claim. DE 292 at 4 ("At the conclusion of the hearing, the Government will respectfully request the Court to find (1) that the gatekeeping standard has not been met and (2) in the alternative, the unsourced hairs claim was not proven my MacDonald.").

The Court noted again at the beginning of the evidentiary hearing that it would entertain evidence bearing on gatekeeping and the merits, pointing out that the two were "intertwined" (HTr. at 11) and would be "somewhat conflated" in the hearing. HTr. at 5.[119]

In his Post-hearing Memorandum ("DE-343"), the Movant asks the Court, as to both claims, to find that the claims survive gatekeeping and further to decide the merits by granting the motion to vacate. DE-343 at 127-129. This memorandum renews the Government's prayer for relief stated at the conclusion of the hearing (HTr. at 1394-95) with respect to both the Britt claim and the unsourced hair claims.

With respect to the Britt claim, having now been presented with what each party considers to be the "evidence as a whole" and having made the "more searching inquiry" required by the Court of Appeals, the Court should reach the same result it did in 2008, when it found that MacDonald has not demonstrated that the Britt claim, viewed in the light of the evidence as a whole, could establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty, and thus does not survive § 2255(h)(1) gatekeeping. Moreover, having received all of MacDonald's evidence in support of the merits of the Britt claim, the Court should find that the factual allegations in the claim based on Britt's affidavit filed with it have not been "proven" by MacDonald by a preponderance of the evidence. Thus, he has failed to prove any constitutional violation and there is no basis for the vacatur of his conviction.

With respect to the unsourced hairs claims, the Court should likewise find that MacDonald has, even after consideration by the Court of every item of evidence that MacDonald sought to have considered, failed to meet the § 2255(h)(1) gatekeeping burden. Moreover, MacDonald has

[119] Neither party objected to the Court entertaining evidence simultaneously bearing on both gatekeeping and the merits. See HTr. at 5 (Movant's counsel states that the Court has "to take a peek at the merits to do the gatekeeping step" and agrees with Court that the two are "somewhat conflated."); HTr. at 11 (Government counsel states that Court can suspend ruling on gatekeeping "until the end of the hearing and the Court can rule on the merits and gatekeeping ...; Court agrees and Movant's counsel does not object.)

failed to "prove" by a preponderance of the evidence the material allegations of his 2006 unsourced hair claim, i.e., that any of the three unsourced hairs were bloody, forcibly removed, or found under the fingernail of victim Kristen MacDonald, or that the hairs constitute "evidence of intruders" in the MacDonald apartment on February 17, 1970. Finally, even if MacDonald could survive gatekeeping as to the unsourced hairs and even if he could prove that the hairs constitute materially exculpatory evidence, he is not eligible for habeas corpus relief solely based on a freestanding claim of "actual innocence" untethered to any allegation of a constitutional violation, which MacDonald has not even alleged with respect to the unsourced hairs. See infra at 193-195.

B. The Britt claim

Following the evidentiary hearing, the "evidence as a whole" clearly shows that all material allegations in the Britt affidavit, filed in support of the Britt claim, are false. This is meaningful in two ways. First, it is applicable to gatekeeping. Britt's assertions about Helena Stoeckley during the trial are the "newly discovered evidence" on which the Britt claim is based, and this Court must consider "the likely credibility" and "probable reliability" of Britt's statements. These statements have now been shown to have no credibility or reliability. Second, it is relevant to the merits in that, after a full hearing and receipt of all the evidence MacDonald can marshal, the truth of Britt's statements has not been proved by MacDonald; indeed, they have been proved false, though it was not the Government's burden to do so.[120]

1. Gatekeeping

The gatekeeping standard of 2255(h) is a stringent one, "more stringent than the pre-AEDPA gateway standard for filing a successive petition, which itself was quite difficult to satisfy and

[120] In addition, Britt's assertions, because of their lack of credibility and reliability, add nothing to the evidence as a whole for MacDonald's unsourced hairs claim, which is discussed infra at 191-195.

met only in the most 'extraordinary case[s].'" United States v. Ferranti, 480 Fed.Appx. 634, 2012 WL 1701514 at *2, citing Schlup v. Delo, 513 U.S. 298, 332 (1995) and House v. Bell, 547 U.S. 518, 539 (2006). See also infra at 192-193.

The Fourth Circuit was careful to point out that its 2011 decision did not "signal any belief that the Britt claim passes muster under § 2255(h)(1) …" 641 F.3d at 614. Neither did that Court's grant of a prefiling authorization in 2006. Id. at 603-04. See also United States v. Villa-Gonzalez, 208 F.3d 1160, 1164 (9th Cir. 2000) ("court of appeals' grant of permission to file a second section 2255 motion is 'tentative in the following sense: the district court must dismiss the motion that we have allowed the applicant to file . . . if the court finds that the movant has not satisfied the requirements for the filing of such a motion'"), citing Bennett v. United States, 119 F.3d 468, 470 (7th Cir. 1997); Reyes-Requena v. United States, 243 F.3d 893, 899 (5th Cir. 2001); United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003). See also Order DE-150 at 25. "[A] district court must conduct a thorough review of all allegations and evidence presented by the prisoner to determine whether the motion meets the statutory requirements for the filing of a second or successive motion." Villa-Gonzalez, 208 F.3d at 1165. See also MacDonald, 641 F.3d at 613 (after prefiling authorization, incumbent on district court to make a more searching assessment of claim to determine whether it passes muster under § 2255(h)(1)).[121]

In 2008, this Court, assuming arguendo the truth of the "newly discovered evidence", i.e., the Britt affidavit (DE-115-2 at 2-5; GX 2088), analyzed MacDonald's § 2255 Britt claim in three parts: the confession claim, the fraud claim, and the threat claim. As to the confession claim, the Court found that Britt's assertion that Stoeckley confessed to him while he was transporting her

[121] This Court made such "thorough review" in 2008 and found that the Britt claim did not pass muster under § 2255(h)(1). The review is the same now, except that the Fourth Circuit has required this Court to consider a wider array of evidence in making its assessment. MacDonald asserts in DE-343, at 1, that the Fourth Circuit directed this Court to conduct an evidentiary hearing. There was no such direction in the Court of Appeals' opinion, but both parties asked for an evidentiary hearing and the Court set aside ample time for it, allowing the parties to present any evidence they wished.

to Raleigh was "merely … cumulative evidence of *exactly* the same nature as the excluded testimony of the Stoeckley Witnesses, half of whom were active or former law enforcement officers." DE-150 at 28. " … Stoeckley's 'confessions' were untrustworthy in 1970, in 1979, in 1990, and in 2005, and they remain so in 2008." The Court found that the Britt confession claim, "taken in light of all the circumstances and the other competent evidence of record," failed to meet the gatekeeping standard. Id. at 30. As to the fraud claim, this Court found that even if Blackburn had "misrepresent[ed] to Judge Dupree that Stoeckley's trial testimony was consistent with the gravamen of the Government's interview, …" that had no effect on MacDonald's counsel's opportunity to question her in the presence of the jury at great length. Id. at 35. As to the threat claim, this Court found MacDonald's theory that Stoeckley was ready to testify to her participation in the MacDonald murders but for Blackburn's alleged threat could not be sustained because proof of causation was lacking and the theory was speculative and futile. Id. at 38-42. The Court thus found that no aspect of the "newly discovered" evidence in the Britt claim could establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty. Id. at 46.

The Court, having considered the expanded "evidence as a whole," can now even more confidently make identical findings. Putting aside the now-demonstrated falsity of the Britt affidavit, assuming its truth would not save this claim. The evidence as a whole has further weakened the probative value of Britt's assertions. For example, the evidence adduced at the hearing showing that the affidavit of the elder Helena Stoeckley was not reliable or credible[122] has also further demonstrated the untrustworthiness of the younger Stoeckley's "confessions."

[122] The Government asks that the Court make a factual finding that the elder Stoeckley's affidavit (DE-143-1; DX 5051) is neither probably reliable nor likely credible due to the circumstances of its execution (supra at 27-29, 36-37, 38), her health at the time (supra at 27-28, 36), and the extent to which it is contradicted by the testimony of Butch Madden (supra at 19-20, 53) and Joe McGinniss (supra at 2-3, 54) as to the elder Stoeckley's statements about her daughter's lack of involvement in the MacDonald murders, made at a time closer to the events when the elder Stoeckley was in better health.

See supra at 2-3, 53. The fraud claim has been further weakened by testimony of Blackburn and Crawley to the effect that Stoeckley did not confess during the prosecution interview on August 16, 1979 (supra at 5, 54-55), and the testimony of Wade Smith (supra at 5, 33) and Joe McGinniss (supra at 5, 54) that Stoeckley did not confess during the defense interview that day and that her trial testimony was not at variance with her statements in that interview.[123] This evidence also weakens the threat claim, as does the fact that no person to whom Stoeckley spoke, or allegedly spoke, about this subject, from the completion of the prosecution interview on August 16, 1979 to her death in 1983, reported that Stoeckley told him or her about a threat from Blackburn and its supposed impact on her trial testimony. This includes Judge Dupree (supra at 8, 13), Wendy Rouder (supra at 14, 37-38), Red Underhill (supra at 15), Lynn Markstein (supra at 14-15), Jerry Leonard (supra at 27, 57), Kay Reibold (supra at 18-19 n.15), the elder Helena Stoeckley (supra at19-20, 27-30, 53, DX-5051), Gene Stoeckley (supra at 27-28, 35-37), Ted Gunderson, Prince Beasley, and Homer Young (supra at 52, 137-39), Butch Madden (supra at 50-51), and Sara McMann (supra at 38-39).

Of course, now the truth of Britt's affidavit need not be assumed. By whatever standard it is measured[124], the evidence before the Court now establishes that Britt's affidavit is false in every

[123] In 2008, the Court left open the question of whether Segal misled Judge Dupree as to whether Stoeckley made statements during the defense interview admitting presence at the MacDonald murders. DE-150 at 33-35. The Government asks that the Court now find as a fact that Segal did so mislead the trial judge. Blackburn described to Judge Dupree that Stoeckley had consistently denied presence at the MacDonald murders in the prosecution interview, that he had talked to Smith afterwards, and that he thought prior to Segal's claims that Stoeckley had told the defense team the same thing. TTr. 5517. In his hearing testimony, he confirmed that this statement in the trial transcript from August 17 was a reference to his conversation the previous day with Smith. HTr. 618. In Smith's hearing testimony, he confirmed this. HTr. 102-103. Smith further admitted that he did not agree with Segal's characterization of the defense interview to Judge Dupree, supra at 8 n.5, and McGinniss confirmed this. Id.

[124] At the merits stage, MacDonald is obliged to prove his factual claims by a preponderance of the evidence. Higgs v. United States, 711 F.Supp.2d 479, 509 (D.Md. 2011), citing Miller v. United States, 261 F.2d 546, 547 (4th Cir. 1958). At the gatekeeping stage, the Court may assume the truth of the "newly discovered evidence," as the Court did in 2008. But now that the expansive evidence as a whole has been considered and an evidentiary hearing conducted, it seems appropriate in conducting gatekeeping to assess "likely credibility" and "probable reliability" of the Britt affidavit. 641 F.3d at 614. Then, in the final gatekeeping analysis of the Britt claim, the Court must decide whether Britt's assertions, in the light of the evidence as whole, persuade the Court by clear and convincing

material respect, and the Government asks that the Court make such a factual finding. The summary exhibit GX-2367 shows that every material assertion of fact in the affidavit filed with the Britt claim (GX 2088) and his other sworn statements on this subject (GX-2085-2087, 2089) are demonstrably false, and many of them are inconsistent with each other. Most significantly, the essence of Britt's story, and of the Britt claim, i.e., that he transported Helena Stoeckley from South Carolina to Raleigh during which time she gave him a detailed confession, which she later repeated in the prosecution interview, has been shown to be utterly false. See supra at 39-43.

Other items of the "evidence as a whole" argued by MacDonald do not help meet his gate-keeping burden. The alleged confessions of Greg Mitchell, reported in additional affidavits filed in 2006, accurately described as "bar talk," supra at 143, do not constitute reliable or credible evidence (supra at 140-147), are cumulative of previous similar affidavits that were found unpersuasive in prior habeas proceedings (supra at 141-143), are unsupported by the DNA test results (supra at 169, infra at 192), and are contradicted by Mitchell's statements under more reliable circumstances (supra at 144-46). The DNA test results, to be considered as part of the evidence as a whole in addition to constituting a separate claim, have no exculpatory value and indeed are inculpatory. See supra at 163-180 and infra at 191-93. The existence of "blond synthetic hair-like fibers" found on Colette's hairbrush has been found in two previous post-conviction proceedings to have little or no exculpatory value because, inter alia, the fibers most likely came from a doll, and nothing new has been presented on this matter during these proceedings. See supra at 156-61.[125]

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evidence that no reasonable factfinder would find the defendant guilty. Clearly, Britt's assertions fail to meet each of these standards.

[125] MacDonald presented no evidence at the hearing regarding the matters mentioned in this paragraph. Neither did he present evidence pertaining to many other "evidence as a whole" matters that were mentioned either in closing argument at the hearing or in his post-hearing memorandum. These matters are dealt with in detail in Section II of this memorandum, e.g., the black wool fibers on the club (supra at 151-157). For the reasons explained there, none of them helps him meet his gatekeeping burden.

The item of "evidence as whole" most touted in DE-343 is the hearing testimony of Jerry Leonard, likely because it was the only thing MacDonald presented that was new. The Government respectfully submits that Leonard's admissions on cross-examination and the documents admitted as impeachment of his testimony demonstrate that Leonard's newly-disclosed recollections of events occurring 33 years before he first recounted them do not meet the test of "probable reliability" and "likely credibility." Leonard plainly admitted that he could not distinguish actual memories from things he later learned later about the case.[126] Supra at 59-60, 62-63. Many of the details he claimed to remember are contradicted by other, more reliable evidence.[127] Supra at 13-15, 43-44, 60-61. He had no notes or records of any kind to refresh his recollection or corroborate his account. HTr. 1186-1187. The details of the version of Stoeckley's confession he claimed to have received were not similar to those allegedly made during Stoeckley's time in Raleigh to people associated with the MacDonald defense, supra at 13-15, 18-19 n.15, and were similar to post-trial "confessions" of Helena Stoeckley about which no doubt Leonard later learned. See 640 F.Supp. at 321-323. He lacked an explanation for not

[126] A key example of Leonard's demonstrably poor memory of the events of August 1979 relates to his client's trial testimony. Leonard told the FBI in 2006 that he did not recall his client Helena Stoeckley had testified in open court during the MacDonald trial, saying on that occasion that MacDonald's then counsel (Hart Miles) "is of the impression that she did." GX 6076. At the hearing, he admitted to his lack of memory that Stoeckley had testified before the jury prior to Hart Miles telling him this during Miles' representation of MacDonald in 2005-06. He admitted that when he talked to author Errol Morris, Leonard was under the impression that Stoeckley testified outside the presence of the jury, but then admitted that he told Morris that she did not testify at all. See supra at 59-60. Yet, he claimed in his affidavit of September 20, 2012, that he recalled "that she had already testified before the jury," GX-5113 at 1, that he planned for her "to refuse to answer any questions if re-called as a witness" and that she "was not re-called as a witness." Id. at 4 (emphasis added). When an attorney is appointed to represent a witness during a jury trial, and claims to have talked to the witness in depth about her involvement in the case and legal issues such as the statute of limitations (about which his memory was also incorrect, supra at 61), it would be very important to know whether the client had already testified in the trial. If Leonard indeed remembered anything of substance regarding his representation of Stoeckley, he would remember whether she had testified.

[127] Perhaps the most far-fetched aspect of Leonard's account was his claim that after his appointment on Sunday (which he had previously erroneously recalled as being on Saturday, supra at 32, 58), he was responsible for Stoeckley's lodging. Supra at 56, 60-61, DX-5113. He claimed that he took her to his home on Sunday night and she slept there on a chair. Supra at 56. It is incontrovertible that this did not happen. The MacDonald defense team was responsible for her lodging and Segal, Rouder, and Underhill combined to arrange for such lodging at the Hilton Inn and take her there. Supra at 13-15. Rouder's attention to Stoeckley that Sunday night also included a hospital visit, supra at 14, about which Leonard recounts nothing. This gigantic error in recollection is enough to render Leonard's entire account of events at the trial unreliable and incredible.

acting sooner to ascertain whether he should bring this information forward. Supra at 62. The Government asks that the Court make a factual finding that Leonard's recollections of what Stoeckley allegedly told him are neither reliable nor credible.

Even if Leonard's recollections were reliable, the "confession" that Stoeckley made to him is no more trustworthy than any other "confession" that she has made over the years. See DE-125 at 29. Moreover, Leonard admitted that Stoeckley told him nothing about "confessing" to Jimmy Britt or to the prosecution, or about being threatened with prosecution by Blackburn. See supra at 27, 57. Leonard's affidavit and testimony add no support to the Britt claim.

It has been shown conclusively that the Britt assertions have no reliability or credibility. Likewise, the matters in the evidence as a whole advanced by MacDonald to help persuade the Court that the Britt claim passes gatekeeping either lack credibility and reliability, or have no real exculpatory value. This Court found in 2008 that the newly discovered evidence contained in the Britt claim did not meet the gatekeeping standard of § 2255(h)(1). Now, after carefully considering the evidence as a whole, as expansively defined by the Fourth Circuit, there is even more reason to reach the same conclusion.

2. Merits

The Court of Appeals clearly stated that even if the Britt claim survived § 2255(h)(1) gatekeeping, "MacDonald would yet be obliged to prove the constitutional violation alleged in that claim before obtaining any § 2255 relief thereon." 641 F.2d at 614. ("We emphasize, however, that today's decision is not intended to signal any belief that the Britt claim passes muster under § 2255(h)(1) or ultimately entitles MacDonald to habeas corpus relief.") Indeed, the 2006 filings supporting the Britt claim contain lengthy arguments asserting constitutional violations surrounding the prosecution's alleged actions regarding Helena Stoeckley. See DE-

111 at 9; DE-115 at 32-37. At the evidentiary hearing, counsel for MacDonald conceded this point. HTr. at 1412 ("And the way I read the Fourth Circuit opinion, they talk about the gatekeeping is this and then the second step is proving constitutional violation.")

In DE-343, however, MacDonald claims that he "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." DE-343 at 15. He cites at great length authorities which point out the differences between the gatekeeping statute for federal prisoners (28 U.S.C. § 2255(h)(1)) and the one for state prisoners (28 U.S.C. § 2244(b)(2)(B)(ii)). DE-343 at 15-20. This analysis ignores that the Fourth Circuit has already addressed this issue as it pertains to MacDonald's case. The opinion of the Court of Appeals noted that this Court had erred in its 2008 order by applying the standard of § 2244(b)(2)(B)(ii) rather than 2255(h)(1), but noted that this error was probably harmless because those provisions are materially identical. 941 F.3d at 610, citing In re Dean, 341 F.3d 1247, 1249 n.4 (11th Cir. 2003). In remanding the case for a new § 2255(h)(1) assessment, the Court of Appeals also clearly stated that success on gatekeeping would mean only that MacDonald could move on to try to prove the constitutional violation on which his claim was based. 641 F.3d at 614.

As thoroughly analyzed by this Court in 2008, MacDonald's Britt claim is that the prosecution suppressed the fact that Stoeckley confessed to them during the trial, threatened Stoeckley with reprisals if she so testified, and committed a fraud on the court by lying about Stoeckley's confession, thus violating MacDonald's Fifth and Sixth Amendment rights. DE-150 at 26. Even if true, these facts have no relevance unless they are for the purpose of showing constitutional violations in MacDonald's trial. The jury trial was not about the conduct of the prosecutors. The facts alleged in the Britt claim are not in and of themselves relevant to

MacDonald's guilt or innocence; rather, MacDonald has advanced them to show that these actions by the prosecution prevented him from learning of and presenting exculpatory evidence, in violation of constitutional protections. It borders on the absurd to claim now that success on the Britt claim does not require proof of a constitutional violation.[128]

C. The unsourced hairs claim

1. Gatekeeping

MacDonald's showing with respect to the unsourced hairs is far short of that required to survive gatekeeping under § 2255(h)(1), even upon consideration of the evidence as a whole, that is, the massive record of this case and every bit of evidence that MacDonald has chosen to put before the Court.

In 1997, MacDonald argued to the Fourth Circuit that DNA testing of then-unsourced specimens found in the apartment after the murders "would establish MacDonald's innocence by demonstrating definitively that these hairs did not originate from any MacDonald family member . . ., but instead originated from one or more of the intruders whom MacDonald described seeing in his home on the night of the murders." *Memorandum In Support of MacDonald's Motion For An Order Authorizing The District Court To Consider A Successive Application For Relief Under 28 U.S.C. § 2255*, No. 97-713 (4th Cir. , September 17, 1997) at 7. Indeed, this is the only way in which DNA test results could constitute materially exculpatory evidence in this case, that is, showing that some biological material found at the crime scene was attributable to a known person who would at least roughly fit into the role of a hippie intruder in MacDonald's account of the murders and who is not likely to have ever visited the MacDonald apartment for some reason unrelated to the murders. The only "suspects" whose known DNA MacDonald

[128] If MacDonald is trying to convert the Britt claim from a one of constitutional error to one of actual innocence, he may find that to be counterproductive. See infra at 193-95.

asked to test were Stoeckley and Mitchell. None of the tested specimens were found to have originated from Stoeckley or Mitchell. DE-306 at 8, ¶ 28.

In 2006, faced with long-awaited DNA results that did not help him, MacDonald pointed to three hairs found not to have originated from any member of the MacDonald family (or Stoeckley or Mitchell), i.e., 58A(1) (found on Kristen's bedspread), 75A (found on the rug in Colette's body outline), and 91A (alleged by MacDonald to have come from the post-mortem scrapings from Kristen's fingernails). In an effort to enhance their evidentiary value, MacDonald's counsel claimed that 75A and 91A were forcibly removed indicating a struggle with the victim and that 91A was bloody. See supra at 164-65. It is not necessary in this memorandum to argue the degree to which these facts might enhance MacDonald's argument about the exculpatory value of these hairs, because after seven more years of litigation, there is no support in the record for these assertions. MacDonald has utterly failed to produce any evidence, let alone any reliable or credible evidence, that any of the unsourced hairs were bloody or forcibly removed, and he has failed to demonstrate that 91A came from under Kristen's fingernail.[129] See supra at 171-76, 178.

So, MacDonald is left with just three unidentified hairs, two of which have been shown to have been recovered from the MacDonald apartment after the murders.[130] There is no indication whatever that they were shed there on February 17, 1970. That the source of these hairs cannot be determined in no way calls into question the evidence used to convict MacDonald. Cf. House v. Bell, 547 U.S. 518, 554 (2006) ("central forensic proof connecting [defendant] to the crime–the blood and the semen–has been called into question" by new evidence, supporting finding that defendant meets Schlup gateway standard that "it is more likely than not that no reasonable juror

[129] Or from her hand, as he belatedly argues. See supra at 179 n. 116.
[130] If anything, the DNA results were inculpatory to MacDonald in that the hair he had pointed to as having been contributed by "intruders" (51A(2)) was shown to have originated from him. See supra at 176-178.

viewing record as a whole would lack reasonable doubt" but not enough to meet "extraordinarily high" burden of hypothetical freestanding innocence claim). Contrary to the defense claim, the Government's case did not rely on the notion that every particle in the apartment could be traced to a member of the MacDonald family, or that the apartment was sterile prior to the night of the murders. Even though Segal told the jury that "the Government says there was no evidence of intruders," (TTr. 7265-66), neither government counsel ever made such an argument. The jury was well aware that the crime scene investigators collected many items that could not be matched to a member of the MacDonald household or a source within the apartment, e.g., fingerprints, hair, fibers, candle wax. See TTr. 7266-72; see also 778 F.Supp. at 1347.

MacDonald would fall well short of the pre-AEDPA gateway standard articulated in Schlup v. Delo, 513 U.S. 298, 327 (1995) ("petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence") (emphasis added). He is even further short of the higher post-AEDPA standard he must meet to survive § 2255(h)(1) gatekeeping: showing by clear and convincing evidence that in the light of the newly discovered evidence no reasonable factfinder would have found him guilty.

As explained earlier regarding gatekeeping as to the Britt claim, the "evidence as a whole" MacDonald has offered has no real exculpatory value and therefore cannot help him meet the high gatekeeping burden as to the unsourced hairs claim. See infra at 187-89.

2. Merits

If somehow MacDonald could survive gatekeeping on his unsourced hairs claim, he would yet face "a daunting burden ahead in seeking to establish that he is eligible for habeas corpus relief solely because of his 'actual innocence.'" 641 F.3d at 616.

"[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution–not to correct errors of fact." Herrera v. Collins, 506 U.S. 390, 400 (1993). In Herrera, the Fifth Circuit had held that the petitioner's claim of actual innocence was not cognizable. Id. at 398. The Supreme Court expressed grave doubt about the existence of a freestanding habeas claim of actual innocence. See id. at 404-05 ("We have never held that [the fundamental miscarriage of justice gateway exception to overcome procedural bars] extends to freestanding claims of actual innocence."). The Court disposed of Herrera's case by assuming for the sake of argument that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution unconstitutional, and holding that Herrera had not met the "extraordinarily high" threshold showing to make such a claim. Id. at 417-19. See also District Attorney's Office for Third Judicial District v. Osborne, 557 U.S. 52, 71 (2009) (stating that whether such a claim exists is an "open question" and "noting the difficult questions such a right would pose and the high standard any claimant would have to meet."); McQuiggin v. Perkins, 569 U.S. ___, no. 12-126, Slip op. at 7 (May 28, 2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); Spencer v. Murray, 5 F3d 758, 765 (4th Cir. 1993) ("[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."), quoting Herrera, 506 U.S. at 404.

The reasons for this limitation on habeas authority are evident. In a criminal trial, "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." 506 U.S. at 401, quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977). "[T]he passage of time only

diminishes the reliability of criminal adjudications. . . . When a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." 506 U.S. at 403-04 (internal quotations and citations omitted). These principles are particularly apt when the crime occurred 43 years ago and the trial occurred 34 years ago.

Even if a freestanding claim of actual innocence were held to exist, Movant would have to meet an "extraordinarily high" burden of proof, requiring "more convincing proof of innocence" than the Schlup standard, House v. Bell, 547 U.S. at 555, and presumably higher than the gatekeeping standard of § 2255(h)(1). See Spencer, 5 F.3d at 766 (Supreme Court did not articulate a standard for "extraordinarily high burden" but court has little trouble concluding that defendant would not meet it); MacDonald, 641 F.3d a 616 ("The Court has yet to come across any prisoner who could make the "extraordinarily high" threshold showing for such an assumed right."). MacDonald has clearly fallen well short of meeting this burden.[131]

VI. CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court find that Movant's § 2255 Britt claim does not meet the gatekeeping standard of § 2255(h)(1) and, alternatively, that the constitutional violation has not been proven on the merits; and that Movant's § 2255 unsourced hairs claim does not meet the gatekeeping standard of § 2255(h)(1),

[131] On September 20, 2011, MacDonald filed a motion under the IPA for a new trial based on DNA testing results. DE-176. The Government has responded in opposition to this. DE-212. MacDonald does not mention this in his Post-Hearing Memorandum, DE-343, as a basis for his motion to vacate his conviction, and he has now conceded the error of his initial timeliness argument that was based on the theory that his 1997 request for DNA testing constituted a request for testing under the IPA. Order DE-266 at 7. For all the reasons stated in DE-212, MacDonald is not entitled to a new trial under the IPA based on the 2006 DNA results, the same evidence that forms the basis of his § 2255 unsourced hairs claim. Even if MacDonald could overcome the procedural and timeliness issues with such a claim, he has not shown that "the DNA test results, when considered with all the other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal ..." 18 U.S.C. § 3600(g)(2). The "other relief" sought in DE-176, i.e., new DNA testing, see Order, DE-266, at 2-3, has been thoroughly responded to in opposition by the Government in DE-227 and DE-265. MacDonald's request for new DNA testing was not part of the evidentiary hearing, see Order, DE-266, at 4, 8, and is therefore is not discussed in this memorandum.

has not met the extraordinarily high burden as to the merits, and, alternatively, as a freestanding claim of actual innocence, does not state a cognizable claim on collateral review.

Respectfully submitted, this the 1st day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the defendant in this action either electronically or by placing a copy of same in the United States mail, postage prepaid, and addressed to counsel for defendant as follows:

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