UNITED STATES DISTRICT COURT
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 POST-HEARING
v.	)	SUR-REPLY
	)	
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 Sur-Reply to Defendant's Reply to Post-Hearing Memorandum in accordance with this Court's Order of July 8, 2013 [DE-346], and respectfully shows unto the Court the following:

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I. Attachments To MacDonald's Reply And The Government's Sur-Reply

At the evidentiary hearing in September 2012, the Government took the position that the evidence in this matter should be closed at the conclusion of the hearing. HTr. 6, 1408. MacDonald had six and a half years to marshal evidence to support the claims he filed in early 2006. The parties had many months to prepare for the evidentiary hearing, which was delayed several times at MacDonald's request, and the parties prepared a lengthy pre-hearing order, identifying exhibits for the hearing. In the pre-hearing order, the parties agreed that all documents that were part of the record of this case in the district court and the circuit court were part of the evidence for this Court to consider in its disposition of the pending claims. DE-307 at 8, 12. Neither party attached any new documents to its post-hearing memoranda. See DE-336, DE-343, DE-344.

When MacDonald filed his Reply, he attached seven new exhibits. Three are new affidavits: Hart Miles (DE-351-2, GX 5115); Wade Smith (DE-351-3; GX 5116); Robert L. Sadoff (DE-351-4; GX 5117). One is a photocopy of a magazine article (DE-351-1; GX 5114). Three are excerpts from some sort of published material as to which the source is not clear. (DE-351-5-7; GX 5118-5120). None of these exhibits were in the record of the case prior to the filing of MacDonald's Reply on August 22, 2013.

Hart Miles was on both the Government and defense witness lists in the pretrial order. DE-307 at 44, 48. Either party could have called him, but chose not to. The content of this new affidavit, dated August 21, 2013, (DE-351-2) relates exclusively to the circumstances surrounding the affidavit of Helena Stoeckley, Sr. (DX-5051). The preparation and execution of Mrs. Stoeckley's affidavit were discussed extensively at the hearing. See HTr. 285-300, 306-342, 401-417. If Mr. Miles had anything probative to add on this point, he should have been

called as a witness at the hearing where he would have been subject to cross-examination by the other party. The purpose of the Reply, which MacDonald sought leave to file (DE-345), was to respond to the Government's Post-Hearing Memorandum (DE-344), not to submit additional testimony regarding issues litigated at the hearing. Under the evidence-as-a-whole standard, the Court may elect to consider Mr. Miles' affidavit, but because of its belated submission, it should be given little weight.

The same is true of the affidavit of Wade Smith (DE-351-3). Mr. Smith testified at great length on direct and cross-examination. HTr. 20-220. Either party could have recalled him during the two weeks the Court set aside for the hearing. Instead, MacDonald solicits an affidavit from him almost a year after the hearing (August 5, 2013). The stated purpose of the new affidavit is to respond to "actions or words attributed to" Mr. Smith by witnesses at the hearing, DE-351-3 at 1, but neither the affidavit itself nor MacDonald's Reply tells the Court what hearing testimony the affidavit is responding to. If the point of the affidavit is to establish that Mr. Smith did not knowingly aid in the preparation of a § 2255 claim supported by a false affidavit by Jimmy Britt, then it is responding to an allegation that has never been made. During the time that Mr. Smith worked on what became the "Britt claim," prior to his withdrawal from the case, Mr. Smith could not have been able to fully anticipate the mountain of evidence that would later be marshaled to contradict Britt's assertions. For instance, Mr. Smith had no personal knowledge of how Helena Stoeckley was transported by the United States Marshals Service to Raleigh in August 1979, and could not know in advance that evidence would be produced conclusively establishing that Britt's account was false. The Government did not assert at the hearing, or in its post-hearing memorandum, that Mr. Smith testified falsely at the hearing. On the contrary, the Government asserted that Mr. Smith's testimony helped the

Government establish some key points. See, e.g., DE-344 at 11 n.5, 189 n.123. Mr. Smith's new affidavit does not cast doubt on any evidence the Government presented at the hearing. See infra at 24 n. 29. Finally, the Government has searched in vain to find any hearing testimony stating that Mr. Smith appeared before the grand jury investigating the MacDonald matter in 1975 (DE-351-3 at 2).

As to Dr. Sadoff, again, his opinion might be due some weight in the present litigation if he had been called as a witness at the hearing so he could be subjected to cross-examination. As it stands, his affidavit is merely a rehash of his testimony proffered at the trial, which was strongly contradicted by the government's psychiatric expert. Judge Dupree ruled that neither side's psychiatric evidence would be helpful to the jury, and his ruling was affirmed. United States v. MacDonald, 485 F. Supp. 1087, 1094-95 (EDNC 1979); aff'd (on remand), 688 F.2d 224, 227 (4th Cir. 1982).

If the Court exercises the most liberal possible interpretation of the "evidence as a whole," the Court may decide to consider the published opinion material attached to MacDonald's Reply, but it should be given no weight. DE-351-1 is a magazine article written by Harvey Silverglate, one of MacDonald's former counsel. The article sets forth Mr. Silverglate's opinions about issues litigated years ago and resolved by the courts in the Government's favor. The last three exhibits (DE-351-5-7) appear to bear dates in 1997 and 2005. Their origin and authorship is unclear. To call them "evidence" would be a stretch. The Court should accord them no weight.

These materials are in no way comparable to the book excerpts marked and introduced at the evidentiary hearing. GX 2201, 4002. Joe McGinniss, author of *Fatal Vision*, testified as a witness regarding issues about which he had personal knowledge from being imbedded in the

MacDonald defense team at trial. He authenticated the excerpts from his book, and they constituted prior recollection recorded as to him. Cf. Fed. R. Evid. 613. He was subjected to vigorous cross-examination. To the extent that other witnesses were questioned about the excerpts from *Fatal Vision*, the witnesses were shown the exhibits and the adverse party was able to cross-examine with respect to the excerpts. The Government also used certain excerpts from Errol Morris' 2013 book entitled *A Wilderness of Error*. Errol Morris, A Wilderness of Error: The Trials of Jeffrey MacDonald (Penguin Group 2012). These excerpts contain lengthy quotes and "Q-and-A's" with persons who were witnesses at the hearing. Each time that a witness who was quoted in the book was questioned about a quote, it was shown to them and they had an opportunity to admit, deny, or explain the quotation.

To this sur-reply, the Government has appended twelve exhibits. Seven of these (Exhibits 3, 7, 8, 9, 10, 11, and 12) are already in the record of the case and are appended for the court's convenience in locating them. Exhibits 4 and 5 are purely demonstrative exhibits, based on documents already in evidence, that Government counsel have authored to explain points in the text of the Sur-reply and are submitted only for that purpose.

The only non-demonstrative exhibits that are new to the record are Exhibits 1, 2, and 6. Exhibit 1 is a disc containing an excerpt from the television miniseries *Fatal Vision*. See infra at 5 n.1. This is not offered to prove the truth of the matters asserted therein. It is only offered, in response to MacDonald's Reply at 25-26, to support a point testified to by Joe McGinnis at the hearing, i.e., that only the defense interview—and not the prosecution interview—of Helena Stoeckley is depicted in the television program. See HTr. at 1017. Exhibit 2 is a disc containing the entire miniseries. It also is not offered to prove the truth of the matters asserted therein, but only out of an abundance of caution in case the Court or the defense wishes to examine the entire

program to see if the prosecution interview is depicted anywhere in the program. Finally, Exhibit 6 is a copy of an article from the Raleigh *News & Observer* from August 22, 1979, regarding events at the trial. It also is not offered to prove the truth of the matters asserted in it, but only to show its possible effect on the knowledge or state of mind of persons present at the trial in Raleigh during that time. See infra at 29, 38. If the Court decides to give any consideration to the new material appended to MacDonald's Reply, then the Government respectfully requests that the Court also consider Exhibits 1, 2, and 6 filed herewith.

II. Jimmy Britt

A. Fatal Vision Mini-series

The Fatal Vision miniseries referenced at the evidentiary hearing and in Defendant's Post-Hearing filings contains only two scenes involving a Deputy United States Marshal.[1] The first of the two scenes takes place outside the Federal Courthouse. Helena Stoeckley is depicted on the sidewalk being escorted into the courthouse by a U.S. Marshal (played by Steven James), and by her boyfriend. Stoeckley, who has her arm in a cast, drops her purse, which is picked up by her boyfriend. The marshal then opens the door to the courthouse for Stoeckley, who enters.

The second scene, which immediately follows the exterior scene described above, begins in the interior of an office, facing the closed door of the office. There is a knock on the outside of the door and Bernie Segal (played by Barry Newman) opens the door from the inside. The scene then depicts Helena Stoeckley in front of her boyfriend who, in turn, is in front of the marshal; all are standing in the hall. Segal says, "Oh, Ms. Stoeckley, won't you please come in."

As Helena Stoeckley enters the office, her boyfriend attempts to follow her inside. Segal says, "Oh no, no, thank you." Segal then pushes the boyfriend back and the marshal who is

[1] See Exhibit 1 attached hereto, Video Recording of "Fatal Vision" Mini-series – Relevant Excerpt. The mini-series aired nationwide on November 18 & 19, 1984, and was a product of NBC Productions. See also Exhibit 2 attached hereto, Video Recording of "Fatal Vision" Mini-series – Complete Copy.

standing directly behind the boyfriend in the hall puts his hand on the boyfriend's shoulder to indicate he can't go into the office. Segal then closes the interior door to the office in the face of the boyfriend, and the marshal standing behind him in the hall.

The scene continues with the interview of Helena Stoeckley by Segal in the presence of the defense team, but without the marshal or Stoeckley's boyfriend.

It is clear, after reviewing the mini-series video, that the scenes involving a DUSM do not depict the prosecution interview of Helena Stoeckley. The defendant asserts that Mary Britt's testimony regarding her conversation with Jimmy Britt about this mini-series is credible evidence supporting the allegation that Jim Blackburn threatened Helena Stoeckley. DE-351 at 25-26. Mary Britt testified that she could not recall exactly when this conversation took place, but that it was sometime after she and Jimmy Britt divorced in February of 1989. HTr. 226-227. During her testimony, Mary Britt stated that Jimmy Britt was talking about "the room that Helena Stoeckley was in with the District Attorney." HTr. at 234. Review of the video directly contradicts this assertion. It was clear throughout her testimony that Mary Britt was often unsure of dates and was shaky on many details. See generally, HTr. 221-266. [2] Whether this is because she simply cannot recall the details, or that she was given false information by Jimmy Britt is unknown, but in any event, it is incontrovertible that the *Fatal Vision* mini-series did not depict the prosecution interview of Helena Stoeckley. Either Mary Britt is hopelessly confused on the point, in which case her testimony is valueless, or Jimmy Britt exaggerated his role to her by falsely claiming to have been present during the defense interview, just as he later did by claiming to have been present during the prosecution interview. Notably, Mary Britt did state that, at no time, either during the trial or during the conversation regarding the mini-series, did

[2] Mary Britt also testified that Jimmy Britt told her he was at Fort Bragg with MacDonald during his time in the Army, which is clearly false. HTr. 250-251.

she recall Jimmy Britt stating that Jim Blackburn had threatened Helena Stoeckley. HTr. 248.

B. Transport of Helena Stoeckley

Without any reference to the Government's Post-Hearing Memo (DE-344), MacDonald suggests this Court disregard the sworn statement of Vernoy Kennedy, as well as the sworn testimony of Dennis and Janice Meehan. DE-351 at 22. He claims that the only document in evidence (GX 2003) states that Helena Stoeckley was transported "directly" from Pickens County Jail to Raleigh, and what the Meehans and Kennedy described is a "two-stage" transport, not a direct transport. Id. Further, he asserts that the only person who described a "direct" transport of Stoeckley (although not from the Pickens County Jail) was Britt, and GX 2003 supports what he said.[3] Id. MacDonald does not even attempt to demonstrate why these three individuals would have provided false evidence under oath.[4]

In fact, Britt did not describe a "direct" transport from any place in South Carolina. What Britt eventually said in his November 3, 2005 affidavit filed in support of the instant § 2255 was: "I picked Ms. Stoeckley up at the County Jail in Greenville, South Carolina, and drove her back to Raleigh." GX 2088 ¶8.[5] Of course, no records or other evidence was offered by MacDonald to show that Stoeckley was ever in the Greenville County Jail.[6]

[3] GX 2003 is an FBI teletype sent by SA Frank Mills of the FBI's Columbia Division, Greenville Resident Agency, to inform the FBI's Charlotte Division of the completion of the lead (GX 2001) from the Raleigh Resident Agency to secure Stoeckley's presence at the trial. In pertinent part it states: "On August 15, 1979, U.S. Marshal Joe Neeley, Greenville, S.C., advised that subject has been transported directly from Pickens County Jail to Raleigh, N.C. on August 15, 1979."

[4] Retired DUSMs Kennedy and Meehan didn't know each other, only met briefly in 1979, and had no intervening contact. Janice Meehan had been divorced from Dennis Meehan for years, but when contacted by the FBI the same day that they spoke to her ex-husband, and advised of Britt's claim that he transported Stoeckley, she immediately stated that information was incorrect and that she and her ex-husband had picked up Stoeckley and transported her back to Raleigh. DE-152 at 1-3. She had no reason to fabricate information.

[5] The previous iteration of Britt's Affidavit executed on October 26, 2005 says the same thing in ¶11, but in ¶15 reverts to a Charleston-to-Raleigh route, as Britt had described in the transcript of his Interview Under Oath on February 24, 2005. See GX 2087 at ¶¶11, 15; GX 2086 at 14.

[6] In 1979, the Greenville County Jail was not approved for the lodging of federal prisoners. DE-152-13 at 11; HTr. 479-480.

MacDonald asserts that not a single item of evidence supports the testimony of the Meehans DE-351 at 22. He contends that there are no records supporting their account, specifically, none reflecting their use of a government vehicle.[7] Id. It should be noted that there were absolutely no records from South, or North, Carolina corroborating Britt's claim that he transported Stoeckley to Raleigh from Charleston or Greenville or any place in South Carolina on August 15, 1979. It is also literally true that there were no records from the USMS-EDNC still extant in 2006, reflecting Stoeckley's detention at the Wake County Jail, in Raleigh, simply because by 2005, when Britt belatedly came forward, those 1979 records had been destroyed by the Federal Records Center. As the Government demonstrated at the evidentiary hearing, in 2000, the USMS changed the retention period for paper copies of arrest warrant records from 55 to 25 years. Britt's wife Nancy, then employed in an administrative capacity in the Office of the USM-EDNC, learned of this change as early as 2002. HTr. 580-82; GX 2039, 2040. Consequently, warrant records generated in 1979 would have reached the end of their retention period by 2004.[8] It may not be a coincidence that Britt waited until 2005 to come forward with his allegations.

Britt miscalculated, however, when he assumed that with Geraldine Holden not available to contradict him, and USMS records destroyed, there would be no records, and no witnesses, in 2005 to contradict his false account. Similarly, MacDonald overstates when he claims there are no records supporting the Meehans' account. DE-351 at 22. It is not just the Meehans' account, it is also the account of SA Frank Mills and DUSM Vernoy Kennedy. Further, there are ample records from South Carolina which support their independently consistent accounts. This

[7] As retired DUSM Dennis Meehan testified on cross examination, no vehicle logs were kept, rather the use of a government vehicle would have been noted in the individual deputy's daily log. HTr. 534. Defense counsel then challenged Meehan for not having with him on September 19, 2012, a copy of his log for August 15, 1979. Id.
[8] MacDonald offered no evidence on the retention period, if any, for daily logs.

evidence utterly destroys Britt's false assertions. In particular, there are records in evidence whose authenticity and accuracy are unchallenged, which prove beyond any doubt that Helena Stoeckley was detained at the Pickens County Jail, in Pickens, South Carolina, following her arrest on August 14, 1979 by FBI Special Agents Frank Mills and Thomas Donohue.[9] Further, the records irrefutably demonstrate that Stoeckley remained at the Pickens County Jail until August 15, 1979, when she was released to DUSM Vernoy Kennedy for "transport to Raleigh." See GX 2053, 2055, 2057, 2058, 2059, 2006, 2062, 2066.[10]

The most important record relating to Stoeckley's transportation is not GX 2003; rather, it is the "Release," USMS Form 103, for Helena Stoeckley signed by DUSM Vernoy Kennedy, on August 15, 1979, in order for him to obtain custody of Stoeckley from the Pickens County Jail, where the FBI had lodged her the previous night in order to transfer her to Raleigh. See GX 2060. As the Government counsel asked rhetorically at the evidentiary hearing: Why isn't Jimmy Britt's signature on the bottom of this form from Pickens County? HTr. 1356. There has been no answer forthcoming from MacDonald either at the hearing, or in any post-hearing memoranda. See DE-366; DE-343; DE-351. The answer is that Jimmy Britt did not transport Helena Stoeckley, directly or indirectly, from Pickens or anywhere else in South Carolina. He simply fabricated this whole episode.[11]

[9] Proof that Stoeckley was lodged at the Pickens County Jail on the evening of August 14, 1979, by the FBI is not dependent on records alone; SA Frank Mills testified to this fact based upon his direct knowledge. HTr. 484. Mills also identified GX 2064, the August 14, 1979, USMS "Commitment" form for Helena Stoeckley at the Pickens County Jail signed by his associate SA Thomas Donohue. HTr. 486-87.

[10] Further proof of Stoeckley's detention from August 14-15, 1979, is provided by internal Pickens County Jail records: GX 2068-2072 (Jail Book); GX 2008 (Booking Report); GX 2009 (Booking Photo of Helena Stoeckley); and GX 2006, GX 2007 (Fingerprint Cards for Helena Stoeckley).

[11] See GX 2367, the chart which lists the numerous documented false statements in Britt's conflicting accounts.

Recognizing this problem, MacDonald attempts a belated attack on the credibility of Vernoy Kennedy.[12] Citing DE-152-13 (introduced at the hearing as GX 2010), MacDonald asserts: "Vernoy Kennedy said he took Stoeckley South Carolina to Charlotte (sic)," but immediately attempts damage control. DE-351 at 22. In footnote 15, MacDonald states: "Curiously, Kennedy did not recall this incident. He only gave a sworn statement about it after the prosecutors told him what had happened. [DE-152-13, Exhibit 12, Sworn Statement of Vernoy Kennedy at 6]." DE-351 at 22. (emphasis added). [13]

Retired DUSM Vernoy Kennedy was first contacted by FBI Special Agents Thomure and Cheroke on March 13, 2006, after they had learned for the first time on March 10, from retired DUSM Dennis Meehan, that he and his ex-wife Janice Meehan had taken custody of Helena Stoeckley near Charlotte, N.C., from a black male DUSM, name not recalled, and had transported Stoeckley to the Wake County Jail in Raleigh. DE-152 at 2. On March 13, 2006, five months before he ever met with the prosecutors, Kennedy told the FBI that he had been the DUSM who transported Helena Stoeckley to North Carolina in 1979. Id. at 3. Kennedy further advised that, accompanied by a female guard, he transported Stoeckley across the South Carolina line into North Carolina where he handed her over to a DUSM from North Carolina. Id. Kennedy did not recall the identity of the N.C. DUSM (Dennis Meehan) nor of the female (Janice Meehan) with that DUSM. Id. Kennedy told the FBI that he knew former DUSM

[12] This attack is doomed at the outset because of MacDonald's reliance on GX 2003, which also states that, following her arrest by the FBI, "Stoeckley was incarcerated at the Pickens County, S.C. Jail. U.S. Magistrate and U.S. Marshal, Greenville, immediately notified." Further, MacDonald's reliance on GX 2003 (DE-351 at 22) constitutes an admission through counsel that Stoeckley was detained in Pickens, S.C., and not Greenville or Charleston. MacDonald is correct in a sense when he states: "It does not matter if Britt said he went to Charleston or Greenville," because Britt did not go to either location, and Stoeckley was not at either one. DE-351 at 21. Stoeckley was irrefutably in Pickens, where Britt never even claimed to have gone. DE-351

[13] This transcript was entered into evidence at the hearing as GX 2010. The MacDonald Reply cites it as DE-351 at 22, n.15. It is the same transcript.

Jimmy Britt from other assignments, and if Britt had been the DUSM who picked up Stoeckley, he would have recalled that since he knew him. Id. at 4.

On August 23, 2006, Kennedy gave a sworn statement to the prosecutors before a court reporter in Greenville, S.C. GX 2010. Regarding MacDonald's contention that Kennedy did not recall this "incident," an examination of the transcript reveals that MacDonald's claim has been overstated.[14] When Kennedy's attention was directed to 1979, and he was asked if he was "given the task of picking up a prisoner by the name of Helena Stoeckley," he responded: "The name doesn't ring a bell, but you have filled me in on some details, and I concurred that I did." Id. at 6. Although the name "Helena Stoeckley" may not have rung a bell with Kennedy on August 23, 2006, he did, in fact, recall the incident. He recalled that at the time he was the only African American Deputy U.S. Marshal in Greenville. Id. He got the assignment from his supervisor to go pick up a female prisoner in Pickens. Id. at 6-7. He further recalled that he and a female guard went to Pickens County to pick up the prisoner. Id. at 7-8. Most significantly, he identified his signature "Vernoy Kennedy, DUSM" on a photocopy of the USMS Release Form dated August 15, 1979, for Helena Stoeckley that reflected she was being released from the "Pickens County Jail" to his custody for "Transfer to Raleigh, N.C." Id. at 8-9; GX 2060.[15] Kennedy agreed that this document reflected that he had in fact picked up Helena Stoeckley at the Pickens County Jail on August 15, 1979. GX 2010 at 9. Further, he testified that he and the

[14] The Reply continues this tendency to overstate the facts. For instance, MacDonald refers to "blond wig hairs in a hairbrush near the telephone." DE-351 at 4. As demonstrated in the Government's Post-Hearing Memorandum, the evidence shows that the blond synthetic fibers likely came from a doll, and MacDonald has not come close to proving that they came from a human cosmetic wig. DE-344 at 156-61; see also DE-351 at 33 n. 22 (exaggerating Kenneth Mica's testimony regarding woman he saw with regard to "fitting Stoeckley's description," the hat Mica described as compared to MacDonald's description of female intruder's hat, and the proximity of the woman to the MacDonald house), refuted in DE-344 at 102-104; DE-351 at 34 (citing "a syringe found in a [hallway] closet," an apparent reference to previous allegation of "half-filled bloody syringe"), refuted in DE-344 at 151-52 (existence of described syringe found implausible by Judge Dupree).

[15] This is a copy of the same USMS Release form depicted in GX 2060. MacDonald cites to a previously filed copy, DE-152-14 at 1.

female guard transported Helena Stoeckley to the intersection of I-85 and I-77 in Charlotte, per the arrangement conveyed to him by his Supervisor in Greenville. Id. at 9,12. Once at the pre-arranged spot, Kennedy delivered the prisoner to a DUSM from Raleigh. Id. at 12.

MacDonald also belatedly attacks the Meehans' credibility because Janice Meehan described seeing themselves on the evening news ("Action Eleven") arriving with Stoeckley at the Wake County Jail, but "the only photographic evidence of Stoeckley with a marshal involved Britt [Defense Exhibit 5060]." DE-351 at 22 n.16; HTr. 540.

Defense Exhibit 5060 is a still photo depicting three individuals descending the ramp from the loading dock in the Federal Building in Raleigh. This is the same photographic image as that depicted in GX 2074, a photograph taken by Raleigh *News & Observer* photographer Dixie O. Vereen, and captioned "Deputy Marshal Jim Britt escorts Helena Stoeckley–her fiancé, Ernest Davis is in background." GX 2074 (DX 5060). This photo appeared in a Friday, August 17, 1979, article by staff writer Ginny Carroll captioned "MacDonald defense to call woman to testify today," which describes Judge Dupree's recess of the trial for the day on Thursday (August 16) to allow defense attorneys and government prosecutors to interview Miss Stoeckley. GX 2074. The article further describes what Segal told reporters about his interview of Stoeckley and his plans to call her as a witness. Id. The article also states: "Assistant U.S. Attorney James Blackburn declined to comment on his interview with Miss Stoeckley."[16] Id.

Dennis Meehan testified, when shown GX 2074, that the loading dock was used by the USMS to transport prisoners. HTr. 529. Meehan identified the three individuals depicted in GX 2074 as follows: in the forefront, Helena Stoeckley; the male behind her as Jim Britt; and the male in the background as either her husband or her boyfriend, but in any case the same

[16] MacDonald now claims, without citation, that Wendy Rouder "...did not even know the prosecutors had interviewed Stoeckley." DE-351 at 28. If this is so, she was not paying attention to events in the trial closely, or reading the newspaper coverage.

individual who approached the car when they pulled into the basement of the Wake County Jail on August 15, 1979. HTr. 528-529. From GX 2074, Meehan could tell that what was depicted was the entrance to the loading dock at the Federal Building in Raleigh, and that, by the way the railing slants down in the photo, the people depicted are leaving the building. HTr. 529-530. Meehan testified that he did not take Stoeckley to the Federal Building on August 15, 1979, after he booked her into Wake County Jail, and the photograph (GX 2074) could not have been taken on that day. HTr. 530-531. On cross-examination, counsel attempted to get Meehan to agree that it was possible somebody else could have transported Stoeckley into the Federal Building, to which Meehan replied "I highly doubt that." HTr. 534.[17]

At the Evidentiary Hearing there was no evidence offered by the defense that the photograph GX 2074 (DX 5060) was taken other than on August 16, 1979, the same day of Stoeckley's interviews, and depicts her in Britt's company leaving the courthouse at the end of that day. The Court should find from all the evidence that the photograph in GX 2074 (DX 5060) was taken on August 16, 1979, as Britt was escorting Stoeckley from the Federal Building after the defense and prosecution interviews had been completed. This in no way corroborates Britt's claim that he transported Stoeckley from South Carolina, or otherwise escorted her, on August 15, 1979.

MacDonald is also wrong when he claims that DX 5060 is the only photographic evidence depicting Stoeckley with a marshal. DE-351 at 22 n.16. MacDonald omits that in 2006, as an exhibit to Petitioner's Statement of Itemized Material Evidence (Appendix 2, Tab 13), and as "additional corroboration for Jim Britt's claim that he was the deputy marshal

[17] The state of the evidence is that Meehan is quite clear that he didn't bring Stoeckley to the Federal Building on August 15, 1979, and there is absolutely no evidence that anybody else—especially Britt—signed her out of Wake County, brought her to the Federal Building for some unknown purpose, and then was photographed leaving the building to take her back to the jail on August 15, 1979.

assigned to accompany Stoeckley," he submitted video footage contained in the 1989 documentary *False Witness***,** "which has actual news footage of Stoeckley appearing at the Raleigh courthouse during the trial, and shows that she was accompanied by a much younger Jim Britt." See DE-126 at 12 n.3. And indeed this TV news footage in *False Witness* does depict Britt, accompanied by Geraldine Holden, escorting Stoeckley *up the ramp into* the courthouse.[18] There are two problems for MacDonald with this news clip: first, he has offered no evidence as to when the news coverage was recorded, and second, Britt is depicted wearing the exact same sports coat, dark shirt and tie combination as he is depicted wearing when photographed leaving the courthouse with Stoeckley and her boyfriend later that same day, Thursday, August 16. GX 2074.[19]

The only evidence, photographic or otherwise that Britt ever escorted Stoeckley while she was in custody on a material witness warrant pertains to his escort duties on August 16, 1979. The *False Witness* news video was most likely also shot on August 16, 1979, when Stoeckley was first brought into the Federal Building by Britt, and the Court should so find. That Britt was photographed escorting Stoeckley into, and later, out of the courthouse on August 16, 1979, in no way refutes the testimony of the Meehans that they were photographed with Stoeckley on August 15, 1979 at the Wake County Jail.[20]

MacDonald seizes upon SA Frank Mills' use of the term "directly" in reference to Stoeckley's transportation from Pickens to Raleigh in the August 15, 1979 FBI teletype (GX 2003), as if it were a talisman that negates the testimony of Kennedy and the Meehans. DE-351 at 22. At the evidentiary hearing, Mills was shown the teletype on direct examination and asked

[18] In the video still images from *False Witness* contained in Volume X, Appendix Of the United States, Stoeckley's left arm (the one in the cast) is closest to the railing of the ramp. See DE-138-14.
[19] In contrast to the *False Witness* video still image DE-138-14, in the *News & Observer* photo, the downward sloping rail noted by Dennis Meehan is closest to Stoeckley's right arm. HTr. 529-30; GX 2074.
[20] The video footage of this August 15, 1979 event was no longer obtainable by the FBI in 2006—in contrast to the situation in 1989 when *False Witness* was produced.

about it in relation to his knowledge of Stoeckley's arrest and detention at the Pickens County Jail. HTr. 483-84. On cross-examination, defense counsel asked Mills about the FD-302 of his post arrest interview of Stoeckley (GX 2002). But after establishing that Mills had no knowledge of who transported Stoeckley from Pickens to Raleigh, defense counsel had no further questions for him, including none about the teletype (GX 2003). HTr. 506-07.

When Dennis Meehan testified on cross-examination, defense counsel had GX 2003 projected on the screen, and directed him to read a highlighted passage. HTr. 533. Meehan read the passage: "On August 15th 1979, U.S. Marshal Joe Neeley, Greenville, S.C., advised that the subject had been transported directly from Pickens County Jail to Raleigh, N.C., on August–it appears to be a 15 or a 13, 1979." Id. Defense counsel then had Meehan confirm his direct testimony about receiving the assignment to pick up Helena Stoeckley from the Chief Deputy, and traveling to the prearranged location at the intersection of I-85 and I-77. Id. Counsel then asked: "And then you brought her back to Wake County Jail? To which Meehan answered: "Directly back, yes." Id. If counsel wanted to quibble about Neeley's use of the term "directly," this was the opportunity to do so.

MacDonald attempts to define the term "directly" as only encompassing a one stage, no stops, straight-line route from the Pickens County Jail to the Wake County Jail. But MacDonald has offered no evidence from Neeley as to his use of the term. Nor has MacDonald cited any dictionary or reference source for the proposition that the term "directly" only has the direct line-one stage meaning in American usage. In fact there are several standard dictionaries that define

the word "directly" as "without delay". Webster's Collegiate Dictionary, Eleventh Edition, copyright 2011, by Merriam-Webster, Inc.[21]

The evidence demonstrates that Stoeckley was in fact transported directly from Pickens County Jail to the Wake County Jail on August 15, 1979, no matter how many DUSMs (none of them Jimmy Britt) were involved. Shortly after court convened at 9:30 a.m. on Wednesday, August 15, 1979, Judge Dupree called counsel to a side bar and told them that Stoeckley was in custody. TTr. 5257-58. After a brief discussion as to her whereabouts, Segal requested that "she be brought here forthwith to Raleigh" so that she might be interviewed. TTr. 5259. Judge Dupree responded to this request: "That is all we needed to know. [speaking to his law clerk] Just tell the magistrate that there is no bond and just bring her here and make her available to the Defense Counsel." Id. At this point it was up to the USMS in the two districts involved to get Stoeckley to Raleigh "forthwith." And as a practical matter, there was not then, nor is there now, a straight line road that runs from Pickens, S.C. to Raleigh N.C. Whether it was one Marshal team driving all the way to Pickens, and then back to Raleigh, or two teams splitting the driving time and meeting midway, the most direct route goes through Charlotte. See maps: GX 2100, GX 2102, GX 2103, GX 2103(2) and GX 2103(3). The two Marshals Offices worked it out and Vernoy Kennedy—not Britt—signed Helena Stoeckley out of Pickens County Jail; a couple of hours later Dennis Meehan took custody of Stoeckley at the intersection near Charlotte; a few hours later Stoeckley was being filmed arriving at the Wake County Jail. All these events occurred on the same day that Judge Dupree ordered her brought to Raleigh from hundreds of miles away in South Carolina. Stoeckley was not driven by way of Charleston; she was not lodged at any other facility between Pickens and Wake County; she had been transported without

[21] See also: "directly," "at once, without delay," Collins English Dictionary- Complete and Unabridged, copyright Harper Collins Publishers, 2003; "directly," "at once; instantly: *Leave directly*," The American Heritage Dictionary of the English Language, Fourth Edition, copyright 2000, Houghton Mifflin Company.

delay—"directly"—from Pickens to Raleigh, as U.S. Marshal Joe Neeley conveyed to SA Frank Mills. Seizing on this word in a teletype written by someone not personally involved in the transport is a desperate, but unavailing, attempt to salvage Britt's story.[22]

The Government has presented the testimony of the Meehans, the sworn statement of Vernoy Kennedy, the corroborating testimony of Eddie Sigmon[23] and a surprising amount of documentation, considering that it only learned of Britt's claim in 2006, over 26 years after the trial. If it had been the Government's burden to prove beyond a reasonable doubt that DUSMs Kennedy and Meehan—and not Britt—transported Stoeckley from Pickens—not Charleston or Greenville—to Raleigh on August 15, 1979, the Government would have met such burden. But the burden is on MacDonald to prove, by preponderance of the evidence, that Britt handled the transport. MacDonald has clearly failed to do so.

III. Jerry Leonard

A. Overview

MacDonald has made clear in all three of his post-hearing filings (DE-336, DE-343, and DE-351) that he considers the most important items of the "evidence as a whole" to be the affidavit of Jerry Leonard filed on September 20, 2012, and Leonard's testimony on behalf of Jeffrey MacDonald at the evidentiary hearing on September 24, 2012. In conducting a gatekeeping analysis of the two § 2255 claims before the Court—the Britt claim and the

[22] The evidence before this Court shows that the only time that Britt transported Stoeckley prior to the prosecution interview of Stoeckley that Britt claimed to have witnessed, was during the 5-minute ride from the Wake County Jail to the Raleigh Federal Building on the morning of August 16, 1979. MacDonald realizes that this destroys Britt's account, in which he claimed to have had an in-depth conversation with Stoeckley on "the long (5 hour) journey from Greenville, S.C.…", see DE-142 at 12-15, about her involvement in the MacDonald murders and that it was this detailed account that Stoeckley repeated to prosecutor Jim Blackburn in Britt's presence the next day. GX 2088 ¶22. Rather than make the absurd claim that Stoeckley blurted out a detailed confession to a law enforcement officer she had never met during a five-minute car ride, MacDonald tries the desperate tactic of trying to discredit the overwhelming evidence that Britt was not involved in the transport of Stoeckley from South Carolina.

[23] Sigmon, the chief deputy, made the personnel assignments for the transport of Stoeckley. He testified that he would have preferred to send a DUSM's wife as a female matron for the long trip, rather than a needed clerical person from the USMS office, like Geraldine Holden. HTr. 548.

unsourced hairs claim—this Court must consider the "likely credibility" and "probable reliability" of the evidence from Jerry Leonard. For the reasons stated below, and in our Post-Hearing Memorandum (DE-344 at 59-66, 191-92), this Court should find that this evidence is neither likely credible nor probably reliable.

Jerry Leonard's account in September 2012 was based strictly on his recollection at that time, without the benefit of any notes or documents from his work on the matter in August 1979, 33 years prior to his testimony. HTr. 1187-88.

He said that he recalled that he was appointed to represent Helena Stoeckly after she had testified before the jury. He said that he spent several hours with her on the first day of his appointment, which he said was Sunday, August 19, 1979. He said the court had basically placed her in his custody, and that he had to arrange lodging. DX 5113 at 1-2. He said that she spent Sunday night (August 19) at Leonard's home, sleeping on a chair, and that on Monday morning, he checked her into the Hilton Hotel. HTr. 1109-10. He said he discussed with Stoeckley the statute of limitations with respect to the MacDonald murders. DX 5113 at 2; HTr. at 1178. He said that at first Stoeckley told him that she could not remember anything about the night of the MacDonald murders, but sometime on Monday afternoon (August 20), Stoeckley gave him a detailed confession about her participation in the murders. DX 5113 at 3-4. One of the details that Stoeckey gave him was that, "during the violence, the MacDonalds' home phone rang and [Stoeckley] answered the phone." Id. at 4. He said he advised her to invoke her Fifth Amendment rights if recalled to testify and he prepared a script for that purpose. Id. He stated that he had "never done anything" with the information that Stoeckley imparted to him because he considered it to be "part of the attorney-client privilege." HTr. at 1203. He said he did not

recall talking to Wade Smith about the matter (HTr. 1206-08) or "having any contact whatsoever with the . . . defense during the trial." HTr. 1160.

The other evidence in the record of this case calls into questions every material assertion by Leonard set forth in the preceding paragraph.

In statements prior to September 2102, Leonard did not recall whether Stoeckley had testified before the jury or even testified at all. See DE-344 at 191 n.126.

On August 24, 2012, when Leonard met with Government attorneys and an FBI agent who were preparing for the evidentiary hearing, his recollection was that he had been appointed to represent Stoeckley on Saturday, August 18, 1979. HTr. 1139-40. By September 20, 2012, he had "put that together" and now recalled that he was appointed on Sunday, August 19, 1979. HTr. 1138. The trial transcript reveals for certain that Judge Dupree appointed Leonard no earlier than Sunday afternoon, prompted by Stoeckley's two calls to Judge Dupree on Saturday night saying that "she was living in mortal dread of physical harm by Bernie Segal . . . and wanted a lawyer to represent her." TTr. 5980-81. After researching the Criminal Justice Act, Judge Dupree tasked his law clerk with finding a lawyer to appoint, who then found Leonard after calling many others on Sunday afternoon. Id. It is very doubtful that Jerry Leorard spent any time with Stoeckley on Sunday despite his claim that he "spent several hours in conversation with her on . . . Sunday, August 19th." DX 5113 at 2. As other portions of the trial transcript reveal, Stoeckley's Sunday was consumed with a fight with her boyfriend, several car trips with Wendy Rouder and Red Underhill in connection with the transfer from the Journey's End to the Hilton, a trip to the hospital for treatment of her injuries, and further discussions about the MacDonald case with Red Underhill at the Hilton, where Stoekley spent the night. See DE-344 at 16-18, 191 n.127.

The record of this case is clear that Helena Stoekley was not in Jerry Leonard's "custody" and that he had no role in securing, or paying for, lodging for her. See DE-344 at 16. It is also abundantly clear that Helena Stoeckley did not spend the night of Sunday, August 19, on a recliner chair at Leonard's house. See id. at 14-15, n.11, 188 n.127. When a witness recounts something that just did not happen, the reliability of his entire testimony is called into question.

Leonard claimed to have explained the implications of the statute of limitations to Stoeckley with respect to any criminal liability she might have for the MacDonald murders. DX 5113 at 2. In his hearing testimony, he admitted that he told the FBI in 2006 that there was a 10-year statute of limitations on the MacDonald murders and that in August 1979 there would have been approximately six months left to pursue any type of action against Stoeckley. GX 6016 at 2; HTr. 1178. He also admitted that he told author Errol Morris in the spring of 2012 that "there was a ten-year statute of limitations on murder in the federal system." GX 7000.8; HTr. 1180. But, in fact, either the crimes were subject to a five-year statute of limitations or they were considered capital crimes, subject to no statute of limitations at all. See 18 U.S.C.A. § 3281 (no limitation period for capital offenses; provision not impacted by only post-1979 amendment, Pub.L. 103-322, § 330004(16) (1994)); 18 U.S.C.A. § 3282 (five-year limitation period for non-capital offenses; provision not impacted by only post-1979 amendments, Pub.L. 108-21, §§ 610(a)(1) – (2) (2003)). When pressed on this discrepancy, Leonard said he "looked it up about a month and a half" prior to his hearing testimony. HTr. 1181-82. It is probable that Leonard's recently acquired knowledge about the federal statute of limitations was the basis of his testimony on this point, not any actual recollection of conversations with Helena Stoeckley in 1979. See HTr. 1160 (Leonard admits it's difficult to distinguish what he'd learned in 1979 from what he's learned since).

Careful analysis of Leonard's September 2012 account of the detailed confession he claims Stoeckley gave him on August 20, 1979, reveals that Leonard's September 2012 affidavit virtually mirrors the statements attributed to Stoeckley—during the lengthy interrogations of her from 1980 to 1982—in the Declaration of Ted Gunderson. See infra at 23 n.26.[24] When MacDonald made the Gunderson report a central part of his motion for a new trial in 1984, these allegations about Stoeckley's "confessions" would have been well-publicized in Raleigh, NC, where Leonard lived and worked. Moreover, they were summarized in a published opinion denying MacDonald's motion, written by Judge Dupree, for whom Jerry Leonard had once served as a law clerk. See United States v. MacDonald, 640 F.Supp. 286, 321-23 (EDNC 1985).[25] With regard to Leonard's September 2012 account of what Stoeckley told him in August 1979, this Court should find that Leonard was right when he characterized his own testimony in these words:

> You know, what happens is you find out stuff later and then you confuse that with what actually you knew at a particular time.
>
> * * *
>
> And what happens is you hear stuff at a later date and it's hard to peel away the context that you heard one thing from the other.

HTr. 1152, 1160.

MacDonald's reply touts the claims of Jimmy Friar as "powerful corroboration" of Leonard's September 2012 account of Stockley's "confession" to him. DE-351 at 13-14. As explained more fully in Section III.B., infra, Friar's bizarre story was so unreliable and incredible that the defense chose not to call him as a witness in the trial. In any event, Leonard could have

[24] As a demonstrative exhibit, the Government has prepared a comparison chart showing the striking similarity between the details that Gunderson attributes to Stoeckley from his team's post-trial interviews of her and the details that Leonard put in the affidavit he created from memory in September 2012. Exhibit 4 attached hereto. These details bear little resemblance to the testimony of the "Stoeckley witnesses" regarding Stoeckley's alleged pre-trial and mid-trial statements to them. See DE-344 at 13-18, 188.

[25] See Exhibit 5 attached hereto (demonstrative exhibit comparing details in Leonard's affidavit regarding Stoeckley's "confession" to those set forth in published opinion in 1985).

heard of Friar's story from many different sources other than his discussions with Stoeckley in August 1979. See infra at 27 n.33, 31 n.40.

Leonard's contention that he had prepared Stoeckley to plead the fifth if recalled, and that he carefully kept secret whatever revelations Stoeckley made to him on Monday, August 20, never revealing them until September 2012, is belied by other evidence in the record. There are repeated references in the trial transcript for the week of August 20-24 to the defense's ongoing deliberations as to whether to recall Stoeckley. See TTr. 5980-81, 6467-68, 6647, 6898-99. On Thursday, August 23, 1979, Judge Dupree inquired as to why Leonard was still present in the courthouse, because the judge thought Stoeckley had been released from her subpoena after court on Wednesday. In explaining to the judge why the defense needed to keep Stoeckley present and under subpoena, Wade Smith said:

> I talked to Jerry Leonard at great length, Your Honor, this morning—talked to him for a long time, and this woman continues to say things that tie her to this case. I will be frank with Your Honor, we have no plans to use her at this moment, but we have got too much at stake. It is too important a case, and she has said too much for us to just, you know, out of hand say, "Oh, sure, go on. Go away. We will never see you again. Go back in hiding and let the years roll by." She is here. The Defendant is on the stand, and we feel that we need to be able to talk with Jerry and have her available at least for this afternoon.

TTr. 6647 (emphasis added). The court relented and Stoeckley was kept in Raleigh under subpoena at least through Friday, August 24, 1979. TTr. 6896-6900.

On January 23, 1980, just five months after the trial, when Leonard's recollection of the trial is certain to have been better than it was 33 years after the trial, Leonard spoke to MacDonald defense team investigator John Dolan Myers. Myers prepared a memorandum of the interview. Among other things, Leonard told Myers:

> Mr. Leonard stated that he received permission from Ms. Stoeckley to discuss the things she told him with attorney Wade Smith. Mr. Leonard stated that he had a conference with Mr. Smith and told him what Helena told him. He stated that he also gave Mr. Smith some insight as to his impressions of Ms. Stoeckley. He stated that he did not have permission to discuss these matters with anyone else.[26]

Exhibit 3 attached (emphasis added). During his hearing testimony, Leonard was asked about this interview, while being shown GX 7000.7, in which the complete text of Myers' interview report is set forth by author Errol Morris. See HTr. 1132-35.[27] Leonard admitted that he has been interviewed by Myers after the MacDonald trial, though "he thought it was a couple of years later" than 1980. HTr. at 1131. At the time of Myers' interview of him, Leonard knew that Myers was working for Wade Smith and the MacDonald defense team.[28] HTr. 1133.

The contemporaneous statements of Wade Smith to the trial judge and the interview report of defense investigator Myers, prepared just five months after the trial, are reliable evidence of the nature of any conversations between Stoeckley and Leonard during the trial and his actions with respect to such conversations—far more reliable than the affidavit Leonard put together from his memory 33 years after the trial. Therefore, it is likely that, as Myers reported, Leonard received permission to tell Wade Smith what Stoeckley had told him and did just that on

[26] Investigator Ted Gunderson compiled a series of reports detailing the investigation he and others conducted on behalf of the defense. At the September 19, 1984 evidentiary hearing the Government introduced Volume I of Gunderson's reports as Government Exhibit 9, which is referred to in the transcript of the September 19, 1984 evidentiary hearing. Vol. I at TR-00000130, see also DE-136 at 30. The report of Investigator John Dolan Myers, who interviewed Jerry Leonard on January 23, 1980, regarding Leonard's conversations with Helena Stoeckley was included in GX 9 at 370. See Exhibit 3, Report of Myers Interview of Leonard, 1/23/1980, attached hereto. References to items contained in 1984 evidentiary hearing GX 9 are hereinafter referenced as "Gunderson Report" and include page number citations.

[27] As noted in the citation above, Myers' signed report of his January 1980 interview of Leonard is a part of the record of this case. It was not marked as an exhibit at the September 2102 hearing. Instead, government used GX 7000.7 to question Leonard about Myers' interview of him.

[28] During this interview, Leonard revealed his bias toward the defense in the MacDonald case. Leonard opined that "he did feel that the prosecution did not prove their case" and that "he thought MacDonald had been screwed." Ex. 3 attached hereto; GX 7000.7. Leonard held this opinion even though he only observed about one hour of the 9-week trial (HTr. 1130, 1135), "never saw any of the Government's presentation," (HTr. 1131), and does not "even know what the Government's case was." (Id.).

at least one occasion on Thursday, August 23, 1979, as Smith told Judge Dupree. This was three days after Monday, August 20, which is when Leonard now recalls that Stoeckley "confessed" to him. If Stoeckley's statements to Leonard consisted of the detailed confession that Leonard set forth in his September 2012 affidavit, and he reported this to Smith, then the defense certainly would have recalled Stoeckley, because this would have been the polar opposite of the complete denials in her testimony before the jury on Friday, August 17, 1979. This would be the testimony that the defense was seeking all along. See HTr. 78; GX 2201.5. MacDonald is surely not now arguing Smith's statement to the Court in 1979 and Myers' affidavit included in the Gunderson report are false. See DE-351 at 21 n.14 (MacDonald citing Smith's credibility as a witness).[29]

In order to square the documented statements of Smith and Myers—demonstrating that Leonard shared Stoeckley's confidential statements with Smith in 1979—with Leonard's September 2012 assertions that he had never told anyone about Stoeckley's alleged confidential statements to him, MacDonald's would have to argue that Leonard only shared with Smith part of what Stoeckley said to Leonard, perhaps just some "things that tie her to this case" (TTr. 6647) and not the detailed confession recounted in GX 5113. But it does not make sense for an attorney for a witness to get his client's permission to tell a party's lawyer what the witness has confided, and then withhold from the party's lawyer the most important information from such

[29] The Government is not questioning the veracity of Mr. Smith and, contrary to the implication in MacDonald's reply, id., there is no conflict of testimony between Jim Blackburn and Wade Smith as to Blackburn's waiver of the conflict of interest and Smith's later withdrawal from representing MacDonald. Compare HTr. 642-47, GX 2013 with DE-351-3 at 2. But Mr. Smith's memory of events that are 33 years old is probably not perfect because no one's would be. When he was questioned at the hearing about his statements to Judge Dupree at TTr. 6647, he might well have forgotten that Leonard had received permission from Stoeckley to divulge to Smith statements she made to Leonard during the week of August 20-24. So, Smith, the first witness in the hearing, sought to interpret his own statements reflected in the trial transcript consistent with the attorney-client privilege, not recalling that Stoeckley had waived the privilege for purposes of the Leonard/Smith conversations during the trial. HTr. 153. Government counsel did not have at the hearing a copy of Myers' report (Ex. 3 attached hereto). Had government counsel been able to anticipate the startling assertions that Leonard would make later in the hearing, counsel could have used GX 7000.7 (containing the verbatim text of Myers report) to refresh Smith's recollection about Leonard's discussions with Smith during the trial.

confidences. If the confidences constitute an incriminating confession from the client, which the attorney wishes to keep secret unless and until prosecution of his client is not possible, the attorney would not disclose any part of his client's statements about the case. Indeed, this is exactly what the September 2012 Jerry Leonard claims he did. But this is flatly contradicted by the more credible statements of Smith and Myers made at or near the time of the events.

The most likely explanation is that Stoeckley did make some statements to Leonard that were of the same vague, dreamlike nature that she made to Wendy Rouder. See DE-344 at 17. Leonard secured her permission to share these statements with Wade Smith. Apparently, whatever the statements were, neither Stoeckley nor Leonard were concerned that they were particularly incriminating to Stoeckley. Otherwise, Leonard would not have asked her for permission to pass these on to Smith, Stoeckley would not have given it, and Leonard would not have disclosed these confidences to Smith. The statements were obviously not probative enough to persuade the defense team to recall Stoeckley. Whatever the exact nature of the statements, of one thing this Court can be certain, based on all the evidence on this point: Leonard's stated September 2012 recollections that "I feel real sure that I didn't talk to Wade [Smith during the trial] (HTr. 1207) and "I don't remember having any contact whatsoever with . . . the defense during this trial" (HTr. 1160) are inaccurate.

The Government respectfully requests that this Court find that the affidavit and testimony of Jerry Leonard, offered by MacDonald as part of the evidence as a whole to support his Britt and unsourced hairs claim, is neither likely credible nor probably reliable. As Mr. Leonard himself put it:

> Honestly, my memory is not one hundred percent, and for anything that I say to be reliable even as I'm trying to fill in the facts for you, it's fairly dangerous, I think, because honestly I'm wrong on some key facts.

GX 7000.7; HTr. 1223 (emphasis added).

B. Jimmy Friar

Leonard, in his 2012 affidavit, alleges that Helena Stoeckley told him that during the violence in the MacDonald home, the phone rang, she answered it, and one of the group yelled at her to hang up the phone. DE-351 at 13-14; See also HTr. 1123 (Leonard reads into the record ¶15 of his Affidavit of September 20, 2012).[30] This assertion is similar to statements made by Jimmy Friar on July 25, 1983, in which he describes being inadvertently connected to Jeffrey MacDonald's quarters where a laughing woman answered the phone, and Friar could hear someone in the background say "hang up the God-damned phone," whereupon the call was disconnected. DX 5021. The Declaration of Jimmy Friar (DX 5021) is not new.[31] As demonstrated below, not only was Friar available to the defense at trial, but also Friar's declaration has been previously litigated during the 1984 habeas proceedings where MacDonald claimed, as he does now, that it corroborates the statements of Helena Stoeckley. Because Friar himself is an inherently unreliable witness and both Jerry Leonard and Helena Stoeckley had access to his claims during the trial and for years afterwards the Court should find that Leonard's inclusion of these statements in his affidavit does not support its likely credibility or probable reliability.

[30] At the evidentiary hearing, defense counsel attempted to adduce on direct examination of Leonard the discrete statements attributed to Stoeckley in Leonard's Affidavit. Other than the hypothetical (what would you do if I told you I was there?), Leonard was only able to recall that she claimed that while she was in the MacDonald house the phone rang and she answered it, and she told him about a hobby horse. HTr. 1112-1116. When Leonard was unable to recall further details, defense counsel had Leonard read his affidavit from the monitor into the record. HTr. 1116-1124.

[31] In 2006, MacDonald recycled Friar's 1983 declaration as part of his Motion To Expand The Record. See DE-126-2 at 34-35. On September 15, 2012, MacDonald renumbered this same declaration of Friar as DX 5021. In his Substitute Post-Hearing Memorandum, DE-343 at 68**,** MacDonald cited DX 5021 as evidence corroborating Stoeckley. Friar's July 25, 1983 declaration will, hereinafter, be cited as DX 5021.

MacDonald cites the declaration of Jimmy Friar as "powerful corroboration" of Leonard's testimony because it was obtained in 1983, and, therefore, was "[l]ater information developed which Leonard would have no knowledge, regarding a telephone call to the MacDonald residence in the middle of the night." DE-351 at 13-14. Without citation to the Government's Post-Hearing Memorandum, MacDonald observes that "[t]he best the government can do is speculate that Leonard must have heard about Frier's (sic)[32] affidavit. But this speculation is without any evidentiary basis in evidence." Id. The Government's argument is detailed in the Government's Post-Hearing Memorandum (DE-344 at 59-66) and in the evidence of the case as set forth below.

In order to rely upon Friar's assertions, MacDonald must establish that Friar actually called, or was connected by the "post operator" to Jeffrey MacDonald's residence in the early morning hours of February 17, 1970, before the "fact" of this alleged call can be considered as corroborative of either Stoeckley's or Leonard's statements. He has not done so. Short of actual evidence, in order to believe that the call took place, the Court must make a determination that Jimmy Friar was a reliable and credible witness when he contacted the defense more than nine years after the alleged event and provided his account. MacDonald has failed to prove that Jimmy Friar is a reliable witness.

The critical issue is when Friar's account became known, or could have become known, to the defense, to Stoeckley herself, or to Jerry Leonard.[33] In this regard, MacDonald must prove when Stoeckley first described the telephone incident, and that at that point in time Stoeckley could not have previously learned of Friar's claim from the media, a member of the defense

[32] MacDonald incorrectly refers to this individual as "Jimmy Frier," but as his signature to the captioned "Declaration of Jimmy Friar" reflects, he spells his name "F R I A R".

[33] MacDonald knew of Friar's claim no later than July 24, 1979; both Stoeckley and Leonard could have, and probably did, learn of Friar's claim when a news account was published by the Raleigh, *News & Observer* during the trial on August 22, 1979. See Exhibit 6, "Witnesses Attest to MacDonald's Trust, Compassion," *News & Observer*, 8/22/1979, attached hereto.

team, or while being interviewed. As for Leonard, MacDonald must prove that when Leonard sat down to craft his affidavit on September 20, 2012, without any contemporaneously made notes, he was a reliable and credible witness who had an actual and accurate memory of events that occurred 33 years previously. For the alleged Friar call to help MacDonald on this point, he must prove that Leonard could not have learned of Friar's claim from the media, or from any of Stoeckley's post-trial confessions, which were publicized, especially in Raleigh, N.C., where Leonard has practiced law for decades. MacDonald has not been able to meet these burdens with respect to Friar's, Stoeckley's, or Leonard's statements.

Stoeckley never made mention of any phone call until after Ted Gunderson interrogated her non-stop for several days in October 1980. See DE-344 at 9-22, 53-55. Similarly, Leonard never mentioned Stoeckley's claim of answering the phone until September 20, 2012, long after Stoeckley's and Gunderson's post-trial statements were publicly available to anyone who was interested.

Jimmy Friar was incarcerated in Marion, North Carolina, when, on July 24, 1979 (during the MacDonald trial), he was interviewed on the phone by defense investigator John Dolan Myers. See DE-208, Affidavit of John D. Myers, August 16, 1979, at 1. At that time, Friar told Myers that on the night of February 16-17, 1970, he was in Fayetteville, and sometime between 1:30 and 3:00 a.m. he called the MacDonald residence where a woman answered the telephone. Id. He asked if Dr. MacDonald was in, the woman began laughing, and he heard "two or more male voices in the background." Id. A male voice said, "hang the damn phone up," at which point he was disconnected. Id.

On August 16, 1979, the same day that Helena Stoeckley was interviewed by the defense, MacDonald's attorneys filed a "Motion For Writ of Habeas Corpus Ad Testificandum To

Command Jimmy Friar To Appear For Testimony In Open Court and Affidavit of John D. Myers. 1c: U.S. Atty. & Judge Dupree." See DE-209, DE-117-3.[34] On August 17, 1979, in response to the defense motion for the writ, Jimmy Friar was interviewed at the McDowell County Prison Unit by SA Stephen P. White, FBI, after contacting Attorney Wade Smith for consent to interview Friar.[35] That same day, Helena Stoeckley was called by the defense to testify, but was not asked anything about answering a phone call for "Dr. MacDonald." TTr. 5513-5642, 5672-5676. Similarly, none of the "Stoeckley witnesses" testified that Stoeckley ever claimed to have answered the phone at the MacDonald house.[36] On Wednesday August 22, 1979, an article by reporter Ginny Carroll entitled "Witnesses Attest to MacDonald's Trust, Compassion" appeared in the Raleigh *News & Observer*. See Exhibit 6, attached hereto. The article described the defense filing a writ to obtain Friar's testimony and quoted the Myers affidavit. Id. Notably, the news article stated that:

> Friar told an investigator for Mr. MacDonald that about 3 a.m. on the morning of Feb. 17, 1970, he was in Fayetteville looking for another doctor named MacDonald. According to an affidavit filed by defense investigator John Myers, a woman answered the phone and began laughing when Friar asked for Dr. MacDonald. A male voice in the background said, "hang the damn phone up," according to the affidavit … Judge Dupree late Tuesday had not ruled on the request to bring Friar to Raleigh for possible testimony. Id.

When this article was published, Helena Stoeckley was still under defense subpoena and subject to recall; she and her attorney Jerry Leonard were sitting in the courthouse in a private room, and remained there at least through Friday August 24, 1979. TTr. 6467-68, 6898-6899. The defense withdrew their motion and Friar was never called to testify at trial. See, infra at 35-36.

[34] See Exhibit 7, Motion for Writ re: Jimmy Friar, 8/16/1979; and Exhibit 8, Affidavit of Myers in Support of Motion for Writ, 8/16/1979, both attached hereto.
[35] See Exhibit 9, Report of Interview of Friar by FBI, 8/17/1979, attached hereto.
[36] Jane Zillioux TTr. 5688-5703, Prince Beasley TTr. 5738-5751, James Gaddis TTr. 5704-5710, Red Underhill TTr. 5711-5715, Robert Brisenstine TTr. 5715-5737, and William Posey TTr. 5751-5774.

Friar's name next appears during Gunderson's post-trial investigation on behalf of the defense. After repeating Friar's prior claim, Gunderson reported his unsuccessful attempt to interview Friar between January 8-18, 1980. Gunderson Report at 218; see supra at 23 n.26. According to Gunderson, Friar had escaped from custody on January 13, 1980. Id.

On January 21, 1980, John Dolan Myers signed a statement for Gunderson in which Myers elaborated on what Friar had told him on July 24, 1979. Gunderson Report at 124; see supra at 23 n.26. Myers added that during 1970, Friar had been under the mental care of Dr. Richard MacDonald. Id. at ¶1. Friar told Myers that the night of the murders he was in a bar in Fayetteville, and decided he wanted to talk to his doctor. Friar stated he "knew that at one time his doctor had been at Womac (sic) Army Hospital, and he thought they could help locate Dr. Richard MacDonald. Id. at ¶ 2. Friar then called Womack to try to reach his doctor, but was told that he was off duty and the hospital would not give out his phone number. Id.[37] Friar continued drinking and then called back, pretending to be a doctor, and was given Jeffrey MacDonald's home number. Id. Sometime between 2 and 3 a.m. Friar claims to have called the MacDonald residence, at which time his conversation proceeded as previously detailed. Id.

On October 25, 1980, while Stoeckley was in the "custody" of Ted Gunderson and Prince Beasley in California, Stoeckley signed a 16-page typewritten statement which Gunderson had prepared for her.[38] United States v. MacDonald, 640 F.Supp. 286, 319 (EDNC 1985); see also

[37]Jeffrey MacDonald was never assigned to Womack Army Hospital, a permanent facility, at Fort Bragg, N.C. After arriving at Fort Bragg on August 29, 1969 he was assigned initially to the Third Special Forces Group, and starting in December 1969 he was re-assigned to the Sixth Special Forces Group, as the Preventive Medicine Officer, at the Group Surgeon's Office, Headquarters and Headquarters Company, 6th Special Forces Group (Airborne), 1st Special Forces. TTr. 6235; DX-5076 at 1648, 1718. While there is no dispute that MacDonald "moonlighted" at the civilian Cape Fear Valley Hospital in Fayetteville, and the civilian Hamlet Hospital in Hamlet, North Carolina, there is no evidence that he ever was assigned to Womack Army Hospital—which would have been organizationally impossible since he was in a tactical unit and would be deployed with it, when it deployed from Fort Bragg. Id. Nor is there any evidence that MacDonald moonlighted at Womack Army Hospital. Id.

[38] The first reference to the alleged phone call in a statement attributed to Helena Stoeckley is found in Prince Beasley's account of her "confession" at the Bordeaux Motor Inn, in Fayetteville, N.C., allegedly on "October 23, 1980," but the circumstances suggest that this document was created much later. At the evidentiary hearing held on

Defendant's Exhibit 2 at the 1984 evidentiary hearing, supra at 23 n.26.[39] In pertinent part the statement alleged: "At approximately 2:30 a.m. on 2/17/70 while in the MacDonald residence, the phone rang. Everyone heard it and I was designated to answer. The other person on the line had a soft voice and could have been male or female. I began to laugh when I answered and do not remember what the other party said. I said 'you must have the wrong number.' One of the members of our group yelled something like 'hang up' or 'get off the god damn line.' I was laughing and I placed the phone in the cradle. After using the phone, I used my blouse to wipe the phone clean of my finger prints." Id. at 5.[40]

On March 23, 1983, SA Madden interviewed inmate Jimmy Friar at the Psychiatric Unit of the South Carolina Department of Corrections facility in Enoree, South Carolina. Affidavit of Raymond Madden, Jr., #5.[41] Friar told Madden that he had a lengthy criminal history (including

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September 20, 1984, Beasley conceded that the "October 23, 1980" date on the statement was wrong because by that date they were in Los Angeles, and further, that the bill for the Bordeaux Motor Inn was for the night of October 21, 1980. DE-136 at 48-49, 11-12. On July 25, 1981, Stoeckley attested to the accuracy of the misdated statement before a notary in Oconee County, South Carolina. This fact, in conjunction with Beasley's concession and his diagnosed organic brain syndrome condition (See DE-344 at 136-137), suggests that Stoeckley's statement was actually typed on or about July 25, 1981, long after Stoeckley's October 25, 1980 typed confession.

[39] This statement was prepared under duress and coercion as detailed by Special Agent Butch Madden and by Judge Dupree in his 1985 opinion. 640 F. Supp. at 319 ("Assuming Young's allegations are correct, such tactics can only serve to call into question the voluntariness and truth of Stoeckley's confessions, despite her statements to the contrary."); see also HTr. 916-925. On July 30, 1981, Stoeckley wrote to Gunderson complaining that she had been used as a "pawn" and that she had been "coerced into signing a so called confession." 640 F. Supp. at 320. On September 9, 1981, Stoeckley provided a signed statement to FBI Agents Madden and Mills disclaiming her October and December 1980 confessions to Gunderson, and stating that the facts asserted in these confessions are what "[she] thinks happened or dreamed happened and not a positive recollection of events on February 16-17, 1970." Id.

[40] Stoeckley's October 25, 1980 statement to Gunderson contained 13 assertions common to Leonard's September 20, 2012 affidavit. See Exhibit 4, attached hereto. Many case documents containing information that appears in Leonard's affidavit are publicly available on websites regarding the MacDonald case and can be readily accessed by conducting a Google search. See http://www.thejeffreymacdonaldcase.com/html/scanneddocuments.html.

[41] This particular affidavit of Butch Madden was originally filed with this Court on July 13, 1984 in Appendix Volume I, at Tab E, to the Government's Response To Motion For New Trial: Memorandum Of Points And Authorities And Attached Declarations, also filed on the that date. On appeal, Madden Affidavit #5, and numerous other Madden Affidavits were compiled in Joint Appendix Volume III. In the Joint Pre-Hearing Order the parties stipulated that all portions of the record of the case could be used in the instant litigation. DE-292 at 8, 12. Although the underlying documents contained in the 1985 Joint Appendix filed in the court of appeals were all originally filed with this Court in 1984-85, we do not believe that the Court has a copy of the Joint Appendix compilation cited during the testimony of SA Madden at the Evidentiary Hearing in 2012. If the Court needs copies of the entire Joint Appendix, upon request of the Court, the Government will prepare a disk and send it to the Court

6 or 7 felonies), was recently arrested while on parole for another crime, was charged and convicted of mail fraud despite his plea of insanity, and that he suffers from grand mal epilepsy, is prone to seizures, and takes Valium and Dilaudid on a fairly regular basis. Id. Although at the time of his March 23, 1983 interview Friar denied ever having been treated or hospitalized for mental illness (with the exception of epilepsy and "nerve problems"), on April 18, 1983, SA Madden received a letter from Friar in which he listed nine "mental hospitals" in which he had been treated "in the mental wards," on multiple occasions, including Walter Reed and Womack Army Hospitals. Id. at ¶¶14, 18.

Concerning the events of February 16-17, 1970, Friar's account to Madden was similar to the account given to John Dolan Myers. Friar added that he had missed the last bus returning to Fort Bragg, and decided to call Dr. Richard M. MacDonald, who had treated him at Walter Reed, from a public phone booth. Id. Friar told Madden that "[h]e was pretty drunk at this occasion, and once he got the information operator, he was put through to the 'post' operator at which time he asked to speak to Dr. MacDonald (phonetic) and was allegedly told that Dr. MacDonald was not on duty." Id. Friar detailed calling back and pretending to be a doctor and being patched through to the MacDonald home, but could not remember the exact time of this call. Id. The account of the call was also similar, but Friar added that he hung up and hitchhiked back to Womack Army Hospital. Id. Friar recalled reading the newspapers about Dr. MacDonald's family being killed before he was transferred back to Walter Reed Hospital. Id. He also remembered being interviewed by both Myers and Wade Smith during the MacDonald trial. Id. at ¶9.[42]

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and defense counsel. "The Affidavit of Raymond Madden, Jr., #5 re: Interview of and Letter from Friar" is attached hereto as Exhibit 10.

[42] Like many of the attention-seekers who have latched on to the MacDonald case, Friar alleged to SA Madden that he had been threatened in connection with these statements. Friar told Madden that while incarcerated in the Marion

In July of 1983, only after these interviews with John Dolan Myers, Wade Smith, SA White, and SA Madden did Friar purportedly execute the "Declaration of Jimmy Friar" for Brian O'Neill's investigator Raymond Shedlick (who replaced Gunderson), used by the defense as DX 5021. From its type, style, and general format, the declaration had been prepared in advance by MacDonald's California attorney, Brian O'Neill. Id. Many of the assertions were similar to prior iterations of Friar's statements, with a few notable additions. Friar now stated that "when [he] was a patient at Walter Reed Hospital, [he] had gotten drunk on a couple of occasions and needed to get help to get back to the hospital" and Dr. Richard MacDonald and he helped [him] out. Id. at ¶4. Friar stated: "On the evening of February 16, 1970 I persuaded an orderly [NFI] to let me out [of Womack Army Hospital] and cover for me so that I could go to Fayetteville to drink and shoot pool." Id. at ¶5. When Friar decided to go back to Fort Bragg, the buses had stopped running, and he had no money left for a taxi. Id. at ¶6. That is when he tried to call Dr. Richard MacDonald for help getting back to base. Id. at ¶7. When interviewed by FBI SA Stephen White on August 17, 1979, Friar could not recall the name of the old hotel with the pay phones in the lobby, but on July 25, 1983, stated: "I tried to call Dr. Richard MacDonald from the Wade Hampton Hotel." Id. at ¶8. Friar said: "I was disoriented at the time and thought I could contact Dr. MacDonald by phone, thinking I was still in Washington, D.C. I called the base operator and represented myself as a doctor who was a friend of Dr. MacDonald, without

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Prison Unit in January, 1980, he allegedly received two phone calls from an anonymous male individual who threatened his life and inferred to him it was in his best interest to forget about the MacDonald case. Exhibit 10 at ¶16. "[Friar] also advised while on work release from the Marion Prison Unit, he was working third shift one night in January, 1980, and was pushed around the parking lot by four or five masked men." Id. Also like others in the MacDonald case, Friar was courted by the media. He related that following his release on parole in June, 1982, he was contacted through his parole officer by an associate and employee of columnist Jack Anderson. Id. at ¶10. Friar was subsequently furnished a round-trip plane ticket to Washington, D.C., and on approximately August 17, 1982, flew to Washington, met Jack Anderson, and was eventually taken to a producer's home where he was interviewed on video tape. Id. at ¶¶10, 11. That same day, Friar returned to South Carolina, without meeting Helena Stoeckley who was to fly in the next day for additional taping sessions with Goldberg. Id. at ¶¶ 11, 12. No recording of any interview of Friar has ever been filed by the defense.

specifying Dr. MacDonald's first name.[43] Friar then went on to explain the circumstances of the phone call.

With an eye to a future challenge that Friar's statement was not newly discovered evidence, the drafter of Friar's declaration had typed: "I did not tell this to anyone until after Dr. Jeffrey MacDonald was tried and convicted for the murders of his wife and children." Id. at ¶10. Friar was apparently not so disoriented on this occasion as to have forgotten that he had provided the substance of this same information to SA White in 1979 during the trial, and to SA Butch Madden only months before, and apparently refused to sign the declaration with this statement in it. Consequently, the sentence was crossed out and initialed "RSS" (Raymond S. Shedlick, the investigator who replaced Gunderson). Id. In its place, "I spoke with the FBI about this incident" had been printed in block letters, initialed "RSS," and signed by "Jimmy Friar." Id. On April 3, 1984, Ted L. Gunderson crossed out and initialed what had been ¶ 13 of the "Declaration of Ted L. Gunderson".[44]

The alleged phone call between Jimmy Friar and Helena Stoeckley was previously litigated at the 1984 evidentiary hearing and in briefs in anticipation of the hearing. See MacDonald's April 5, 1984 Motion For New Trial; Memorandum of Points And Authorities; And Attached Declarations, including Gunderson's declaration regarding Stoeckley's statements and the July 25, 1983 "Declaration of Jimmy Friar" described above. DE-2; DX 5021; DE-126-2.[45] This memorandum sought to corroborate Stoeckley's statements using the statements of

[43] One wonders that if Friar was so disoriented as to think he was in Washington, D.C., why he did not call Walter Reed, instead of calling Womack?

[44] The undated Declaration is also unsigned, and although it bears a notary's stamp, the attestation portion is blank. See DX-5015.

[45] The Gunderson Declaration included averments which corresponded to 13 of the 17 points attributed to Stoeckley in Leonard's affidavit. The three exceptions were: What would I do if she had actually been there; she was scared to tell the truth, but the truth was not as bad as everybody thought; and Mrs. MacDonald was pregnant and the cult associated newborn babies with the devil. See Exhibit 4, attached hereto**.** Of these three exceptions, the first is a question, not an admission of guilt; the second is an ambiguous statement; and the third is to be found in Stoeckley's

other witnesses, purportedly discovered post-trial. One such item of alleged corroboration was the declaration of Jimmy Friar. DE-2 at 20. The defense stated that they "had learned of the identity of Jimmie (sic) Friar before trial and had subpoenaed him to testify. However, Mr. Friar did not respond to the subpoena and hence his testimony was unavailable." Id. at 35.

In its Response, the Government addressed this misrepresentation by clarifying that, "as docket entry 209 reflects, the defense initially sought a Writ of Habeas Corpus Ad Testificandum for Friar, who was in jail. However, following the Court's ruling on the Stoeckley witnesses, there was a hold put on the motion by the defense. Subsequently, after a direct inquiry from Judge Dupree as to whether Friar was still wanted, Attorney Wade M. Smith, in open court made a 'thumbs down' gesture in response. (See Affidavit of Brian M. Murtagh, #3, App. Vol. II, Tab F.)" DE-16 at 11. The Government formally contested that Friar's declaration constituted newly discovered evidence and moved for an evidentiary hearing at which the defense would be required to prove, inter alia, that at trial the defense was unaware of Friar and other witnesses. Id. at 12.

During the evidentiary hearing held September 19-20, 1984, MacDonald did not call Friar to testify, and offered no evidence to contradict the Government's assertion that Friar and his bizarre story were known to the defense at the time of the trial. DE-136. Further, the defense offered no evidence from telephone operators, duty officers, or "Dr. Richard MacDonald," to corroborate Friar's improbable account of reaching Jeffrey MacDonald's residence by phone.[46]

On September 19, 1984, Gunderson did testify about Stoeckley's October 25, 1980 typed statement. Vol. I at TR-00000163-166; see also DE-136 at 13-16. He pointed to "the phone call

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October 25, 1980 statement to Gunderson in which she describes how the fact of Colette's pregnancy was noted during the cult's "ritual." See DX-2 at 6.

[46] It is noteworthy that none of Jeffrey MacDonald's own accounts of the murders contain an assertion that a phone call came in to the residence phone during the mayhem.

from Jimmy Friar" as corroborative of Helena Stoeckley's statements. Id. at 15. Gunderson testified that it took three times for Helena to "remember" the phone call but denied "putting ... those words in her mouth," and added: "[b]ut an affidavit had previously been filed by Jimmy Friar with almost that same identical conversation on Jimmy Friar's part which matched almost to the word exactly what Helena said." Id. at 17.[47]

In its Proposed Findings of Fact And Conclusions of Law following the hearing, the defendant requested that Judge Dupree find that the telephone conversation between Stoeckley and Friar did take place. DE-66 at 17 ¶s. On January 14, 1985, Judge Dupree heard oral argument from the parties. DE-136, DE-136-12 through 14. At this argument, MacDonald was represented by Wade M. Smith and Brian O'Neill. Judge Dupree inquired of the defense whether anyone had ever interviewed Jimmy Friar, to which O'Neill responded that Friar was interviewed by a defense investigator, post-trial. DE-136-12 at 49 (emphasis added). Acknowledging that the Government contended Friar was not newly discovered, O'Neill attempted to explain the defense's failure to call Friar at trial: "[a]t that time, all we had available was Stoeckley's half-baked admissions to her friends that I may have been involved, et cetera. We didn't have anything about Friar—her saying about this call. We had Friar who said he made a call."[48] Id. at 50. Government counsel responded by reminding the Court about the defense's Motion for Writ for Friar and that he was available to be called at trial, so what he would have said is not newly discovered. Id. The Government further reminded the Court that

[47] Gunderson had the sequence wrong: Friar's Declaration had been executed on July 25, 1983; Stoeckley's statement to him had been initialed on October 25, 1980.

[48] The MacDonald defense team knew of Friar's tale prior to its interview of Helena Stoeckley on August 16, 1979, and her testimony as a defense witness on August 17, 1979. Nothing prevented them from asking about it if they thought it was probative.

Friar had admitted to being drunk during the alleged phone call, which made him an unreliable witness in any case. Id. at 55.[49]

In his order of March 1, 1985 denying MacDonald's Motion For A New Trial, Judge Dupree includes in his canvas of Stoeckley's statements her account of answering the phone. 640 F.Supp. at 322. Although Judge Dupree did not mention Friar by name he wrote: "[t]he court has also reviewed the other affidavits which MacDonald filed in support of Stoeckley's confessions. These affidavits, like those previously discussed, suffer from either factual inaccuracies or contradictions which render them of no use to MacDonald in proving that Stoeckley and her group committed the murders." Id. at 327.

As the foregoing exposition demonstrates, notwithstanding the tactical decision by the defense not to call Friar at trial, the Friar "evidence" as proffered corroboration of Stoeckley has been fully litigated. Friar was, and remains, an unreliable witness spinning a belated tale of improbable coincidences, that is riddled with contradictions and uncorroborated by any reliable and credible evidence. Accordingly, this Court should find that Friar is neither reliable nor credible in his account of an "inadvertent" phone call to the MacDonald residence.

There is no reliable evidence that Stoeckley ever described answering a phone call for "Dr. MacDonald" to any of the "Stoeckley witnesses," or anyone else until October 25, 1980, when she was interviewed by Gunderson under circumstances that were coercive and suggestive. Further, in light of Stoeckley's well-documented history of personalizing any information about the crime of which she became aware (e.g. the presence of a rocking horse in the house), Stoeckley could have simply incorporated what she learned from the newspaper into her

[49] The Government submits that nothing has changed regarding Friar. Whether his implausible and contradictory statements are again offered to corroborate Stoeckley, or belatedly offered to corroborate Leonard, the Court must first determine that Friar is a reliable and credible witness.

fantasized account. This Court should find that her statements regarding the phone call are, therefore, similarly devoid of reliability and credibility.

The Court should also find that both Stoeckley and Leonard could have learned of the substance of Friar's account of the alleged phone call from a public source, including the August 22, 1979 article by Ginny Carroll published during the trial. See Exhibit 6. The fact that Leonard never made any contemporaneous notes, and sat down 33 years later and drafted an affidavit that virtually mirrored the statements attributed to Stoeckley in the Declaration of Ted L. Gunderson (See Exhibit 4) and the 1985 published opinion of Judge Dupree (See Exhibit 5), confirms what Leonard himself stated at the 2012 evidentiary hearing—that Leonard has subsequently found out "stuff," and that has become part of what he knows—or thinks he knows—and he is unable, as he admits, "to peel away the context that [he] heard one thing from the other." HTr. 1159-1160. Any statements regarding the alleged phone call by Jimmy Friar should be found to lack probable reliability and likely credibility, and should not be considered as support for MacDonald's § 2255 Britt claim.

IV. Statements of the elder Helena Stoeckley

MacDonald argues that the affidavit of Helena Stoeckley's mother, prepared at the direction of Gene Stoeckley and Kathryn MacDonald in 2007, is compelling newly discovered evidence created "under circumstances indicating trustworthiness." DE-351 at 3 n.2. This could not be further from the truth. Not only is the affidavit irregular on its face, but the circumstances of its execution are such that it is neither probably reliable nor likely credible. See DE-344 at 30-33.

The affidavit was completed while the elder Helena Stoeckley was residing in an assisted living center and in poor health. Id. Mrs. Stoeckley was suffering from macular degeneration, in

need of oxygen therapy, and had ongoing heart problems. Id. at 28. She was 86 years old at the time of the affidavit, had emphysema, and was in and out of the hospital in the months preceding the affidavit. HTr. 279-282. On the day that the affidavit was created, Gene Stoeckley and Kathryn MacDonald were with Mrs. Stoeckley from three or four in the afternoon until nine or ten at night when the affidavit was finalized. DE-344 at 32; HTr. 320, 411, 416. That is a very long period of time, and a very late hour, for someone in such poor health to be focused on and attentive to something like the creation of an affidavit. These circumstances were certainly not conducive to reliability or credibility, and there likely was an atmosphere of suggestibility to which Mrs. Stoeckley may have fallen victim. See DE-351 at 19 (describing the affidavit as "a joint effort").

The affidavit is also irregular on its face. It is a total of 3 pages; the first two pages are typed in numbered paragraphs, 1 to 15. DX 5051. Neither of the first two pages is initialed by the elder Mrs. Stoeckley, nor were they numbered. The third page is a 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.

In touting the reliability of the 2007 affidavit, MacDonald completely ignores at least three other statements of the elder Helena Stoeckley, the content of which directly contradicts the assertions now put forth by the defense. The elder Mrs. Stoeckley first commented on the reliability and credibility of her daughter when she was subpoenaed by the defense to appear at the 1979 MacDonald trial. DE-344 at 5-6; TTr. 4846; GX 2201.2; HTr. 961-964. While describing the physical ailments of the younger Helena Stoeckley to the defense team, Mrs. Stoeckley stated, "[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." GX 2201.2; HTr. 961-964. The elder Stoeckley reiterated that Helena did not know where she was on the night of the murders and stated that she believed that it was Prince Beasley who had put the idea of Helena's involvement in the murders into Helena's head. Id.; DE-344 at 6.

The second statement of the elder Helena Stoeckley that MacDonald ignores is the one given to Special Agent Butch Madden of the FBI in 1984. GX 2332-2334. This interview was conducted a year and a half after the death of the younger Helena Stoeckley. HTr. 500, 942. Mrs. Stoeckley relayed to Agent Madden that Helena had told Mrs. Stoeckley that she did not have anything to do with the murders. Mrs. Stoeckley further stated that it was her opinion that Helena was not involved because Helena was nonviolent and loved children. GX 2332; HTr. 944; DE-344 at 22. Mrs. Stoeckley reiterated that Helena's mind was gone and that Mrs. Stoeckley believed that Helena had been used by others, including Prince Beasley and Ted Gunderson, to advance their personal interests in the MacDonald investigation. Id. Both of these statements have a greater indicia of reliability than the affidavit created in 2007 because they were given closer in time to the period during which Mrs. Stoeckley had been interacting with her daughter prior to the younger Helena's death. Moreover, Mrs. Stoeckley was in better physical and mental condition in 1979 and in 1984 than she was in 2007.

Finally, MacDonald ignores the interview of the elder Helena Stoeckley conducted by the FBI in 2007 as a result of the filing of her affidavit. Mrs. Stoeckley was interviewed by Special Agent James Cheroke on April 25, 2007. She told him that Helena loved children and old people, and that she believed that Helena would do whatever Prince Beasley told her to do. HTr. 328-329; DE-344 at 32. At the conclusion of the interview, Gene Stoeckley, who was present,

told Agent Cheroke that this interview had gone much differently than the one with Kathryn MacDonald. HTr. 332.

MacDonald asserts that the 2007 affidavit of the elder Helena Stoeckley, DX 5051, is compelling newly discovered evidence and corroborates the statements given by Jimmy Britt and Jerry Leonard. 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, her health at the time, and the extent to which it is contradicted by the testimony of Butch Madden and Joe McGinniss as to the elder Stoeckley's statements about her daughter's lack of involvement in the MacDonald murders as cited above.

V. The Unsourced Hairs Claim

The Government's Post-Hearing Memorandum sets forth in considerable detail the evidence refuting the overstated claims MacDonald has made in relation to DNA in his initial filing (DE-122, DE-123), at the Evidentiary Hearing (HTr. 1252-55), and in his Post-Hearing and Substitute Post-Hearing Memoranda (DE-336, DE-343). See DE-344 at 166-183.

The section of MacDonald's Reply dealing with his unsourced hair claims addresses none of the Government's refutation, and contains not a single challenge or citation to the Government's Memorandum. See DE-351 at 29-32. Instead, MacDonald merely repeats his arguments from the Evidentiary Hearing. HTr. 1252-55. MacDonald ignores the reality of his demonstrated failure to meet his burden of proof, and the Government's refutation evidence in respect of his 2006 unsourced hairs claim (DE-122, DE-123), and proceeds to argue, without citation to the record, as if there were no disputed factual issues. DE-351 at 29-32.

Additionally, MacDonald makes no mention of the Government's evidence with respect to the hairs which DNA testing identified a source: 46A, 112A(5) and in particular 51A(2), the

broken, bloody hair found in Colette's left hand which matches MacDonald's DNA. DE-344 at 179-181.

MacDonald begins by misstating that: "[t]he parties stipulated to the DNA evidence." Id. at 29. This is not the case. As the Stipulation expressly provides: "[t]he parties stipulation to the AFDIL-AFIP DNA test results set forth in paragraphs 21-28, inclusive, are subject to agreement and adherence by the parties to each of the following conditions set forth below in paragraphs 30-35." DE-306 at 8 ¶29 (emphasis added). In pertinent part, ¶ 34 of DE-306 provides that: "[n]either party may rely on any statement in the AFDIL Report of March 19, 2006 ...(DE-119)... for any assertion with respect to the identity or provenance of any item examined by the Army CID or FBI laboratories prior to delivery of said item examined, or test performed or not performed by the Army CID or FBI laboratories prior to delivery of said item(s) to AFDIL on May 17, 1999, except as reflected in Exhibit 1 to this stipulation ..."[50]

With respect to the 91A hair he claims came from underneath Kristen's fingernail, the stipulation expressly provides that: "the hair removed from the unnumbered pill vial on July 27, 1970, by USACIL Chemist Janice Glisson, a vial which she marked "#7 JSG" and subsequently mounted on a glass microscope slide, which she numbered to correspond to the vial as "#7 fibers Hair," is the same hair on the same slide the FBI marked as Q137, and AFDIL subsequently marked and tested as AFDIL Specimen 91A." DE-306 at 10, ¶37. There is no further stipulation or other agreement with respect to the provenance before July 27, 1970, of the 91A hair or its

[50] The Government insisted on the insertion of this provision because at the court of appeals in 2010, in his Supplemental Reply Brief, MacDonald raised for the first time a claim that the AFDIL report established that the 91A hair was the same as the CID's exhibit D-237. Case No.08-8525, Document-108 at 25 n.6. We have previously explained why the CID never referred to the hair from Vial #7 as D-237, that "D-237" was USACIL's designation for blood residue and the pajama top fiber. DE-212 at 22-30. When MacDonald requested a stipulation to avoid having to call witnesses to prove the DNA testing results, the Government made sure that the stipulation did not support the erroneous claims MacDonald made about D-237 at the Fourth Circuit. We note that following remand from the Fourth Circuit, MacDonald has not reasserted this claim in this Court, probably because it would have been inconsistent with his claim that the autopsy vial went directly from Hawkins to Glisson.

characteristics. By no stretch of the imagination did the Government stipulate to any of the "DNA Evidence" claims MacDonald made previously, at the evidentiary hearing, or in his subsequent memoranda.

MacDonald proclaims: "[t]he parties do not dispute what was examined." Id. at 29. By persisting in maintaining that "[t]here were 28 specimens available for testing", despite having previously stipulated that AFDIL tested "29 questioned hair and vial contents specimens", and having twice been corrected by the Government, MacDonald perpetuates a further dispute between the parties as to even the number of questioned specimens examined. See DE-351 at 29; DE-306 at ¶¶ 22, 24, 26; HTr. 1251-52; and DE-344 at 172 n.97.[51]

MacDonald begins his attempt to prove that the 91A hair was collected from under Kristen's fingernail by Dr. Hancock with a reference to Dr. Gammel's trial testimony on cross-examination, when Gammel was being asked by Wade Smith whether, ideally, the hands of the bodies should been protected by plastic bags to prevent contamination. DE-351 at 30. Dr. Gammel was then asked if he had discovered "material under the fingernails of Colette MacDonald?" To which Dr. Gammel replied: "I did what would be a routine fingernail scraping. I just took a fingernail file and scraped out any material that was there. I thought on the left small finger [of Colette MacDonald] there might have been a little fragment of skin there and I collected that and put it in one of the vials. TTr. 2533. MacDonald then transitions to Dr. Hancock testimony about performing the autopsies "on the two children, Kimberly and Kristen." DE-351 at 30. Without citation, MacDonald tells the Court: "He [referring to Dr. Hancock] took fingernail scrapings." Id. The false impression MacDonald seeks to create, once again, is that

[51] Not knowing which of the 29 questioned specimens MacDonald may dispute AFDIL tested, the following are the 29 specimens that AFDIL reported testing in the March 10, 2006, report MacDonald has filed as part of his Motion to Add An Additional DNA Predicate, see DE-123-2 at 19: 46A; 48A; 51A(2); 52A; 58A(1); 58A(2); 71A(1); 71A(2); 71A(3); 75A; 91A; 93A; 97A(1); 98A; 101A(1); 101A(2); 104A(2); 104A(1); 104A(2); 112A(1); 112A(2); 112A(3); 112A(5); 112A(6); 112A(7); 112A(8); 112A(9); 112B(2); and 113A.

Dr. Hancock collected the fingernail scrapings from Kristen MacDonald. The Government addressed this mis-impression at the evidentiary hearing (HTr. 1298), and in its Post-Hearing Memorandum (DE-344 at 174-176), by drawing the Court's attention to the 1970 testimony of both Drs. Gammel and Hancock, in which Dr. Gammel testified 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. Dr. Hancock's 1979 trial testimony supports this account. "I was working with Dr. Gammel at that time. We collected various things like fingernail scrapings–that was the item I distinctly remember. These were collected separately and turned over to investigators, as I recall." TTr. 2564.

Without proper citation, MacDonald persists in his assertion that CID Agent Hawkins was present during the autopsy and was given the fingernail scrapings at the autopsy. DE-351 at 30. Hawkins' trial testimony couldn't be clearer: he arrived at the mortuary at Womack after the autopsies to take fingerprints, and Dr. Hancock asked him to take custody of the evidence that had been previously collected from the bodies. TTr. 3041-42, 3049-50; see also HTr. 1301-02; DE-344 at 175-76.

Further, immediately following a description of the receipt and marking of the autopsy pill vials by Bennie J. Hawkins, MacDonald states: "[t]he vials were sent to Janice Glisson, who received them on 27 July 1970. [D.E.217, Exhibit 2]." DE-351 at 30.[52] The implication being that Hawkins sent them directly from Fort Bragg. At the evidentiary hearing, defense counsel put

[52] At the evidentiary hearing, defense counsel used the identical words: "The vials are then sent to Janice Glisson, who received the on July 27, 1970." HTr. 1255.

it in even stronger terms.[53] These statements and inferences are unsupported by the evidence, and in fact have been refuted by the Government's evidence.

The Government has clearly and repeatedly pointed out that the actual fingernail scrapings from Kristen MacDonald's left hand were further contained within the pill vial, in a folded piece of paper marked "L. Hand Chris". DE-212 at 22-30. The contents of "L. Hand Chris" were examined on March 9, 1970, by USACIL Chemists Dillard Browning and Janice Glisson and neither reported the presence of a hair. Browning did find a bloody polyester cotton fiber in the fingernail scrapings which matched MacDonald's pajama top. See DE-344 at 166-183, and Government's Forensic Affidavits DE-215, DE-217.

The contents of "L. Hand Chris" having been consumed in serology testing on or about March 9, 1970 (certainly before April 11, 1970), the paper container marked "L. Hand Chris" was discarded sometime prior to the return of the 13 pill vials to Fort Bragg. Id.[54] Once returned to Fort Bragg, the pill vials, with no marking on the outside of the vials as to contents or exhibit number, went through three changes of evidence custodians between May and July, 1970.[55] On July 20, 1970, Fort Bragg CID Evidence Custodian Blalock transferred custody of "Item No. 1" to "David L. Weiss, MPC" for the stated purpose of "Hand Carry to CI Lab, SV-1." GX 6001.[56] There is absolutely no evidence that Hawkins had anything to do with the vials being

[53] "So, we know that she now has vials that agent Hawkins took from the autopsy in this case. And that's important because it shows that what she's going to be examining on July 27, 1970, are evidence, physical items, *fingernail scrapings and whatever might be included in those scrapings*, that came from the autopsy in this case." HTr. 1255 (emphasis added).

[54] See GX 6001, DE-214-2 at 1, the sub-voucher ("SV") to the DA Form 19-31, reflecting that on April 11, 1970, Craig Chamberlain relinquished custody of Items "1-6" to William F. Ivory for the purpose of "Return to Fort Bragg." "Item 1" was the description of the "13 Plastic vials containing fingernail scrapings...Marked BJH 17 Feb 70." Ivory retained custody of Items "1-6" until May 2, 1970, when he relinquished custody to "CWO W.W. Blalock," CID Evidence Custodian at Fort Bragg, N.C. Id. at 2.

[55] On June 7, 1970, W.W. Blalock transferred custody to Willard A. Spessert; on July 1, Spessert transferred custody back to Blalock. Id.

[56] Citing this same exhibit (GX 6001; DE-214-2 at 1-2) and Craig Chamberlain's February 26, 1970 inventory note (DE-214-3, Ex. 2) MacDonald told the Fourth Circuit in his 2010 Supplemental Reply Brief, that: "These same documents establish that the scrapings were in the custody of the Army CID from the time of their collection in

hand carried from Fort Bragg, to USACIL at Fort Gordon, Georgia in July of 1970. On July 27, 1970, as her bench notes reflect, Janice Glisson received the "13 plastic vials cont. fingernail scrapings, hair samples." See DE-217-3, Exhibit 2 at 1.

When Janice Glisson received this unmarked pill vial on July 27, 1970, the fingernail scrapings from Kristen MacDonald, i.e the folded paper labeled "L. Hand Chris" and its former contents, were no longer present in the vial. DE-217 at 13, ¶17. Consequently, whatever remained in the vial subsequently marked "#7 JSG" was not, as MacDonald claims: "... fingernail scrapings and whatever might be included in those scrapings, that came from the autopsy in this case." HTr. 1255. A naturally shed hair with no evidence of blood, and whose presence had not been previously detected by Browning's microscopic examination of the actual fingernail scrapings, was likely an artifact. In that sense, it was akin to the piece of paper in the vial upon which Dr. Hancock had written "Fingernail scrapings, left hand smaller female McDonald," which had found its way into the vial after the fingernail scrapings had been placed there. See photo DE-217-8, Ex. 7.

While we do not dispute the AFDIL DNA test results for the hair designated 91A, we most emphatically have disputed, and do dispute, that the 91A hair was ever under a fingernail of Kristen's left hand, in the fingernail scrapings marked "L. Hand Chris," or otherwise in or on her left hand. Consequently, the Government disputes that AFDIL ever performed any DNA testing of a hair whose provenance has been established to have come from the body of Kristen MacDonald, and which was ever described as Exhibit D-237, in any USACIL report or document.

February 1970 until July 20, 1970 when they were "hand carri[ed] to CID Lab" at which time CID Chemist Glisson performed her analysis and noted the presence of the exculpatory hair." See Case 08-8525, Document 108 at 27, and Addendum 1-3.

Nevertheless, MacDonald has remained obdurate in his contention that the vial went directly from Hawkins to Glisson, without any intervening examinations, for reasons which are self-evident. By this device, MacDonald seeks to avoid having to deal with any of the evidence contained in the Government's Forensic Affidavits, and presented at the evidentiary hearing, which prove that when Glisson received the vial on July 27, 1970, the actual fingernail scrapings ("L. Hand Chris") were no longer present. MacDonald made a tactical decision in the current phase of the litigation not to introduce evidence supporting his previous contention that USACIL "Exhibit D-237" refers to a hair, and that it is the same hair as "AFDIL 91A," because it would have required an acknowledgment that the actual fingernail scrapings from Kristen's left hand were examined at USACIL in March, 1970. Acceptance of this indisputable fact would have been totally inconsistent with his claim that Kristen's fingernail scrapings went directly from the autopsy to Glisson via Hawkins on July 27, 1970. To follow this stratagem is MacDonald's prerogative, but it comes at a price. That price is that he should be deemed to have waived the "D-237" = "91A" claim, so as to preclude him from raising it again, should there be a subsequent appeal.

MacDonald's failure to reply to the "L. Hand Chris" evidence should be taken as a tacit admission that he has no evidence to rebut the Government's evidence on this point. But he has the burden of proving not only that the hair is unsourced, but also the provenance of the 91A hair as originating from under Kristen's fingernail, as well as the temporal aspect that this occurred during a struggle with an intruder. He has failed to prove any of these things. Further, MacDonald asserts that "whether MacDonald accurately describes this hair as coming from Kimberly's (sic Kristen's) fingernail or hand... the distinction is unimportant. The significance is it is an unsourced hair associated with Kimberly (sic, Kristen) and is circumstantial evidence of

intruders." Id. at 31 n.19. This position represents a considerable retreat from MacDonald's starting point (bloody, forcibly removed hair under Kristen's fingernail), and his Substitute Post-Hearing Memorandum (hair found "in the fingernail scrapings *or* in the hand of Kristen"). Now apparently it is sufficient that the hair simply be *associated with Kristen* in order to prove intruders. While MacDonald is certainly free to argue that an unsourced, naturally shed hair could only have come from an intruder, it is an argument without any merit in light of the evidence as a whole. For MacDonald to prove that any of the 91A, 75A, or 58A(1) hairs is "positive evidence of intruders," as he claims, then MacDonald must adduce reliable and credible evidence that establishes that each hair could only have come from an intruder during the commission of the crime. In other words, not only must he prove provenance of the particular hair, but he must prove when it got to the location in which it was later found, and also how it got there. All these burdens he has failed to meet regarding the 91A hair and, although it is not in dispute where the 58A(1) and 75A hairs were found, MacDonald has failed to prove the requisite "when" and "how."

As we have previously explained, the absence of any indication of blood on the 91A hair is inconsistent with this hair having ever been under Kristen's fingernail, or even on her hand, given the fact that her hands were totally covered in blood.[57] HTr. 1315; DE-344 at 167-68, 175, n.110. Assuming for the sake of argument, however, that MacDonald had been able to prove that the unsourced 91A hair had been collected from the left hand of Kristen MacDonald at autopsy—which he failed to do—that circumstance alone would not have been exculpatory. He would still have to eliminate the possibility that the hair was artifact resulting from environmental or other contamination in order to prove that it could only have come from an

[57] This is in contrast to the "bloody" polyester-cotton fiber matching MacDonald's pajama top that Browning found in the fingernail scrapings from the left hand of Kristen on March 9, 1970. See DE-215 at ¶¶8-11.

intruder. First, it is a naturally shed hair which could have been shed weeks or months before, and second, as MacDonald himself brought out during the cross-examination of Drs. Gammel and Hancock, Kristen's hands were not covered with plastic bags at the crime scene before she was taken to the mortuary. TTr. 2533, 2600-01. As Dr. Gammel testified on cross-examination, when there has been such a failure to protect the hands they are "apt to either lose material or collect material on the way in." TTr. 2533. MacDonald has failed to prove that Kristen's hands could not have collected a hair from the stretcher, the sheet with which she was covered, or otherwise during the process of being undressed in the mortuary. Consequently, MacDonald has failed to prove that the 91A hair could only have come from an intruder.[58]

For all these reasons, as well as those previously stated, we ask the Court to reject MacDonald's unsourced hairs claim. In particular with respect to the 91A hair, we ask the Court to reject the contention that the fingernail scrapings from Kristen's left hand went directly from the custody of CID Agent Bennie J. Hawkins to USACIL Chemist Janice Glisson, without any intervening examination of the vial and its contents between February 17, 1970 and July 27, 1970. Rather, we ask the Court to find, based upon the unchallenged affidavits of Craig Chamberlain (DE-214**),** Dillard Browning (DE-215), and Janice Glisson (DE-217): (1) that the actual fingernail scrapings from the left hand of Kristen MacDonald were further contained within the pill vial in a container marked "L. Hand Chris;" (2) that the contents of the vial, as well as the contents of "L. Hand Chris" were examined for the presence of hairs and fibers (by Browning) and blood residue (by Glisson) between February 26, and March 9, 1970; (3) neither examiner recorded the presence of a hair; (4) that when Janice Glisson examined the contents of

[58] As stated in the Government's Post-hearing Memorandum, the only way that the DNA results could constitute materially exculpatory evidence would be if one of the tested samples had matched the DNA of Stoeckley or Mitchell. See DE-344 at 194-95, citing Memorandum in Support of Response of the United States to Petitioner's Motion to Add an Additional Predicate to his Previously Filed Motion for Relief Under 28 U.S.C. § 2255, and Suggestion in the Alternative, to Transfer to the Court of Appeals, filed 4/17/06, at 7, attached hereto as Exhibit 11. None did. See DE-306 at 6-7 (¶ 21), 8 (¶ 28).

the vial which she labeled "# 7 JSG" on July 27, 1970, the container "L. Hand Chris" was not present. With respect to the 91A, 75A, 58A(1), 51A(2), 113A, 46A, and 112A(5) hairs we ask the Court to make findings of fact as set forth, respectively, in the Government's Contentions of the Pre-Hearing Order, DE-292 at 5-8.

VI. Legal Argument

In his Reply, MacDonald argues that he need not show a constitutional violation to obtain vacatur of his convictions. See DE-351 at 7-11. In doing so, he confuses that gatekeeping process[59] with a decision on the merits of his § 2255 claims. See DE-344 at 180-81, citing United States v. MacDonald, 641 F.3d 596, 614 (4th Cir. 2011). MacDonald's suggestion that he need not prove a constitutional violation in order to succeed on the merits of his Britt claim, however, defies logic, has no basis in law, and is contrary to his litigation position prior to the filing of his post-hearing memorandum on April 1, 2013.

MacDonald has conceded that proof of a constitutional violation is required on several occasions. He first did this in his Motion to Vacate pursuant to § 2255 filed on January 17, 2006 (DE-111). The standard § 2255 form requests that the applicant "state every ground on which you claim that you are being held in violation of the Constitution, laws or treaties of the United States," for which he or she is entitled to relief. See DE-111 at 6, ¶12. MacDonald appropriately completed this section by asserting what he believed constituted a constitutional violation, and at

[59] MacDonald's Reply also creates confusion regarding application of the gatekeeping process under 18 U.S.C. § 2255(h)(1) to his § 2255 claims. See DE-351 at 2 n. 1 (arguing that items such as the affidavit of the elder Helena Stoeckley and the testimony of Jerry Leonard are the "newly discovered evidence" on which his § 2255 Britt claim rests). While these items are to be considered as part of the "evidence as a whole" in conducting the gatekeeping analysis, it is the "Britt evidence" that constitutes the "newly discovered" evidence on which the Britt claim rests, and the "evidence as a whole" in combination with the "Britt evidence," if proven, must be sufficient to establish by clear and convincing evidence that no reasonable juror would have found MacDonald guilty. United States v. MacDonald, 641 F.3d 596, 614 (4th Cir. 2011). MacDonald may now wish it were not so, but to survive gatekeeping on his Britt claim, he must show that Britt's material assertions were reliable and credible, and to prevail on the merits he must prove the truth of those assertions by a preponderance of the evidence.

no time in this filing did he suggest that he would not be required to prove such a violation. Id. at 6-9.

In seeking a Pre-Filing Authorization, MacDonald told the court of appeals: "that the applicant has newly discovered evidence that could not have been discovered previously through the exercise of due diligence which proves the existence of a constitutional error ..." "Jim Britt provided information ... that the federal prosecutor who led the prosecution of Jeffrey MacDonald in 1979, James Blackburn, violated the defendant's constitutional rights by secreting exculpatory evidence from a defense witness at trial and committed a fraud on the court." "It [the newly discovered evidence concealed by government officials] consists of facts that unquestionably demonstrate egregious government misconduct of the most profoundly disturbing sort, actions that amount to a clear constitutional violation." See Motion Under 28 U.S.C.§2244 For Order Authorizing District Court To Consider Second Or Successive Application For Relief Under 28 U.S.C. Section 2255, Supplement Answer to Question 17, pp.3a,3c., United States of America v. Jeffrey R. MacDonald, USCA-4, No. 05-548, filed December 13, 2005.

Next, in his Application for a Certificate of Appealability and Memorandum in Support (DE-155, 156), MacDonald again presented a case for alleged constitutional violations as is required by 28 U.S.C. § 2253(c)(2). DE-156 at 2. At no point in this filing does he suggest that he is exempted from proving a constitutional violation in order to obtain relief.

Moreover, 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."). It is surprising that he now, after

failing to prove his alleged constitutional violations, suggests that he need not prove a constitutional violation to succeed on the merits of his § 2255 Britt claim.

The Government reasserts its previous arguments with regard to the standard of proof detailed in its Post-hearing Memorandum (DE-344 at 183, 186).

VII. 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), 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 23rd day of September, 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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