

APPENDIX C

No. 3:75-CR-00026-F
No. 5:06-CV-00024-F

ORDER

-4389-

PROCEDURAL BACKGROUND

Although this order presumes some familiarity with this long-running case, the court nevertheless finds it necessary to review some of the procedural background.

In the early morning hours of February 17, 1970, Jeffrey MacDonald's pregnant wife, Colette, and his two young daughters, Kristen and Kimberly, were murdered in their home. MacDonald, a physician and Captain in the Army Medical Corps, sustained non-life threatening injuries. From that date, MacDonald has consistently maintained that his Fort Bragg apartment was invaded by a band of drug-crazed hippies, including a woman with long blonde hair who wore a floppy hat and boots.

Law enforcement initially accepted MacDonald's story. However, as the investigation continued, physical evidence was discovered which cast doubt on MacDonald's version. In fact, investigators came to believe that MacDonald had killed his wife and daughters and staged the crime scene to cover up their murders.

The Army eventually charged MacDonald with the murders of his family. The Army's charges were ultimately dismissed on October 23, 1970, following a formal pre-court martial investigation and hearings conducted pursuant to Rule 32 of the Uniform Code of Military Justice. The investigating officer recommended that civil authorities investigate Helena Stoeckley as a possible suspect. Stoeckley was a Fayetteville, North Carolina, resident who was known to be a heavy drug user, and known to wear clothing similar to that described by MacDonald. Stoeckley had also, on numerous occasions, given conflicting statements as to whether she participated in the murders of MacDonald's family.

Just as the statute of limitations was about to expire, MacDonald was indicted by a grand jury for the Eastern District of North Carolina for the murders of his wife and his two daughters. The seven-week trial of MacDonald's case was held during July and August of 1979. The Honorable Franklin T. Dupree, Jr., United States District Judge, presided over the trial.³³ The Government's case against MacDonald was presented by James L. Blackburn, Assistant United States Attorney for the Eastern District of North Carolina, and Brian Murtagh, an attorney with the Department of Justice. MacDonald's defense team included Wade M. Smith of Raleigh, North Carolina, and Bernard Segal of the San Francisco, California bar.

The trial included testimony from both MacDonald and Stoeckley, the latter of which is detailed more fully later in this order. Stoeckley's testimony at trial was not what MacDonald or his defense team wanted or expected to hear. In short, she denied any involvement in the murders, and could not recall anything from shortly before midnight on February 16, 1970 until approximately 4:30 a.m. on February 17th due to the large amounts of drugs she had ingested. At the conclusion of the 29-day trial, it took the jury only six hours of deliberation to find MacDonald guilty of second degree murder of his wife and his daughter Kimberly and first-degree murder of his daughter Kristen. MacDonald was sentenced to three consecutive life sentences.

Thereafter, MacDonald filed a direct appeal to the Fourth Circuit Court of Appeals raising a number of issues. *See United States v. MacDonald*, 632 F.2d 258 (4th Cir. 1980). A divided panel reversed MacDonald's convictions, on the basis that his Sixth Amendment right to a speedy trial had

³ Judge Dupree presided over the trial and all subsequent proceedings in the MacDonald case held in the District Court until his death in December of 1995.

been violated. *Id.* at 267.⁴ The Supreme Court, however, reversed the Fourth Circuit and remanded for further proceedings. *See United States v. MacDonald*, 456 U.S. 1, 9-11 (1982). On remand, the Fourth Circuit assessed MacDonald's remaining appellate arguments, found no error, and affirmed his convictions. *United States v. MacDonald (MacDonald II)*, 688 F.2d 224 (4th Cir. 1982). In the following years, MacDonald filed several motions in this court for post-conviction relief. The first two of these were denied. *United States v. MacDonald (MacDonald III)*, 640 F. Supp. 286 (E.D.N.C. 1985) (denying motions for a new trial and for a writ of habeas corpus), *aff'd (MacDonald IV)*, 779 F.2d 962 (4th Cir. 1985) (affirming denial of motions for recusal, new trial, and habeas relief), *cert. denied*, 479 U.S. 813 (1986); *United States v. MacDonald (MacDonald V)*, 778 F. Supp. 1342 (E.D.N.C. 1991) (denying MacDonald's second motion for habeas relief), *aff'd (MacDonald VI)*, 966 F.2d 854 (4th Cir. 1992), *cert. denied*, 506 U.S. 1002 (1992).

In 1997, MacDonald filed a motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to reopen the proceedings on his second post-conviction motion which was filed in 1990. MacDonald alleged fraud by the Government concerning the 1990 motion, and sought an order permitting new DNA testing of certain evidence that had been collected from the crime scene. This court denied the motion insofar as it sought to reopen the 1990 motion, and transferred the remaining matters to the Fourth Circuit Court of Appeals for consideration as a petition for leave to file a successive § 2255 motion. *See United States v. MacDonald (MacDonald VII)*, 979 F. Supp. 1057, 1069 (E.D.N.C. 1997).

⁴ Prior to trial, MacDonald filed an interlocutory appeal, and the Fourth Circuit found that his speedy trial rights had been violated. *United States v. MacDonald*, 531 F.2d 196 (4th Cir. 1976). The Supreme Court later reversed the Fourth Circuit, on the basis that the argument was not ripe for review prior to trial. *United States v. MacDonald*, 435 U.S. 850 (1978).

There were two appeals to the Fourth Circuit from this court's 1997 decision. In the first appeal, the Fourth Circuit denied MacDonald authorization to file a successive § 2255 motion, but remanded the matter to this court to oversee mitochondrial DNA testing. *See In re MacDonald (MacDonald VII)*, No. 97-713 (4th Cir. Oct. 17, 1997) (unpublished). With regard to the second appeal, the Fourth Circuit affirmed this court's denial of MacDonald's Rule 60(b) motion to reopen the proceedings. *See United States v. MacDonald (MacDonald IX)*, No. 97-7297, 161 F.3d 4 (4th Cir. Sept. 8, 1998) (unpublished) (per curiam).

On remand, this court entered orders setting the parameters for DNA testing. It took nine years for the testing protocol to be agreed upon by the parties, the tests to be conducted, and the results submitted. The DNA report from the Department of Defense Armed Forces Institute of Pathology was issued on March 10, 2006.

Just before the DNA report was issued, MacDonald sought and received a pre-filing authorization from the Fourth Circuit, pursuant to 28 U.S.C. § 2244(b) and § 2255, permitting him to submit his proposed successive § 2255 motion to determine whether he meets the requirements for a successive § 2255 motion. MacDonald promptly filed his proposed successive § 2255 motion [DE-111] in this court on January 17, 2006.

This proposed successive § 2255 motion asserted what has become known as the "Britt claim." Specifically, MacDonald sought to have his convictions vacated and set aside on the grounds of "newly discovered evidence," the 2005 affidavit of former Deputy United States Marshal Jim Britt, the presentation of which MacDonald asserts would result in his acquittal. In brief summary, Britt averred that Stoeckley confessed to him in 1979 that she had been present in the MacDonald home on the night of the murders. Britt also declared that he was the only witness to an exchange

between AUSA Blackburn and Stoeckley when, after Stoeckley made the same statement to Blackburn that she made to Britt, Blackburn threatened to indict her for first degree murder if she so testified. In this proposed motion, MacDonald contends that Britt's affidavit proves AUSA Blackburn's threat of prosecution intimidated Stoeckley into changing her intended trial testimony. MacDonald also asserts that Blackburn lied to Judge Dupree at trial the following day by representing that Stoeckley told the Government she had *not* been involved in the MacDonald murders, and could not remember where she had been on the night the crimes took place. MacDonald contends that Britt's withholding this evidence for almost 30 years must be attributed to the Government, and that its suppression of the facts revealed in the affidavit constitutes prosecutorial misconduct requiring that his conviction be vacated and set aside. In addition to the Britt affidavit, this motion incorporated numerous other exhibits, including the affidavits of three other witnesses swearing that Stoeckley's boyfriend at the time of the MacDonald murders, Greg Mitchell, had confessed to murdering the MacDonald family.

On March 22, 2006, after the results of the DNA testing became available, MacDonald filed a "Motion to Add an Additional Predicate to His Previously Filed Motion Under 28 U.S.C. § 2255" [DE-122], or what has become known as the "DNA claim." In this motion, MacDonald sought to add a new claim for relief to his proposed successive § 2255 motion, based on the newly discovered results of the mitochondrial DNA testing. Specifically, MacDonald sought to raise a freestanding actual innocence claim based on the DNA evidence, as well as having the court consider the DNA evidence as part of the "evidence as a whole" in assessing the Britt claim.

Just one day after MacDonald filed his DNA motion, he filed a "Motion, Pursuant to Rule 7 of the Rules Governing Section 2255 Proceedings, to Expand the Record to Include the Itemized

Authenticated Evidence Set Forth Herein” [DE-124]. MacDonald requested that the court expand the record to include specific authenticated evidence as part of the court’s duty to assess his § 2255 motion viewing the evidence “as a whole.” This itemized statement of evidence included, in part (1) evidence which was excluded at trial, which included the testimony of witnesses offered to impeach Stoeckley’s testimony; (2) evidence which was submitted (and rejected) in connection with prior post-conviction motions, including evidence of blond synthetic hair-like fibers found at the crime scene, and (3) more recently discovered evidence, e.g., the DNA test results and the three affidavits detailing the confessions allegedly made by Mitchell. Thereafter, the Government filed a motion to strike the affidavits concerning the alleged Mitchell confessions.

Months later, MacDonald filed a “Motion to Supplement Applicant’s Statement of Itemized Material Evidence” [DE-144]. Therein, he sought to add to the body of “evidence as a whole” by adding the March 31, 2007 affidavit of Helena Stoeckley’s mother,⁵ wherein she related that her daughter twice confessed to having been present during, and having participated in, the murders of MacDonald’s family members.

In an order filed November 4, 2008 [DE-150], this court (1) allowed the government’s motion to strike the Mitchell confession affidavits from the § 2255 motion; (2) denied the DNA motion; (3) denied MacDonald’s motions to expand the record with itemized evidence and to supplement that evidence, and (4) denied MacDonald leave to file the § 2255 motion, i.e., the Britt claim.⁶ *See MacDonald X*, 2008 WL 4809869. As to the Government’s motion to strike the Mitchell

⁵ Helena Stoeckley’s mother also was named Helena Stoeckley. For this reason, the court will refer to her as the “elder Stoeckley.”

⁶ The Government subsequently filed a motion to publish and modify the Opinion on November 24, 2008. This court allowed for some minor revisions on “clerical, non-substantive matters.” *United*

confession affidavits, the court agreed with the Government's assertion that such evidence should be excluded because (1) MacDonald's claims relating to Mitchell's confessions previously were considered and rejected in the court's earlier post-conviction orders, and (2) because the evidence was untimely. *Id.* at *11.

With regard to the DNA claim motion, as well as MacDonald's motion to supplement his proposed statement of itemized material evidence with the affidavit of the elder Stoeckley, this court viewed the motions as "seek[ing] to add discrete factual bases to" the § 2255 motion raising the Britt claim. *Id.* at *12. This court found that because "[t]he only grounds upon which MacDonald sought or obtained [pre-filing authorization] are contained in his [§ 2255 motion] concerning the Britt affidavit," MacDonald's "DNA and the elder Stoeckley affidavit motions are bootstrapping, 'piggybacking' attempts." *Id.* Accordingly, this court concluded that the claims in the DNA and the elder Stoeckley affidavit motions were "untimely, successive and independent, and this court lacks subject matter jurisdiction over them." *Id.* The court observed, however, that "MacDonald is free to seek authorization from the Fourth Circuit Court of Appeals to raise these grounds in yet another successive § 2255 motion." *Id.*

As to MacDonald's motion to expand the record, the court observed that MacDonald's apparent intent in the motion was "to assemble in one filing a relatively concise statement of his theory of the case," specifically, the "'Itemized Statement of Material Evidence' [DE-126] consist[ing] of 48 numbered paragraphs of text setting forth his version of what is proved by the universe of evidence he has compiled to date—old and new, admitted and rejected." *Id.* at *13. This court rejected MacDonald's "suggestion that this court is required, under the circumstances

States v. MacDonald, No. 75-CR-26, slip op. at 2 (E.D.N.C. Jan. 9, 2009).

presented by the case, to expand the record and to consider every manner of supplementary material he deems supportive of his position, regardless of its source or competence.” *Id.* Accordingly, the court denied the motion to expand the record.

Finally, this court considered MacDonald’s proposed successive § 2255 motion concerning the Britt claim. In so doing, this court noted that “[a] movant must pass through two ‘gates’ before the merits of a successive § 2255 motion may be entertained in the district court.” *Id.* at *15 (citing *Bennett v. United States*, 119 F.3d 468, 470 (7th Cir. 1997)). This court found that MacDonald had passed through the first gate – as to the Britt claim only – by having obtained pre-filing authorization from the Fourth Circuit Court of Appeals. *Id.* As to the second gate, this court observed that its role is to “examin[e] each claim of the proposed successive application without reaching the merits, and dismiss[] those that fail to satisfy the ‘requirements for the filing of such a motion’ under 28 U.S.C. § 2244(b)(4) or § 2255.” *Id.* (citing Rule 4(b), Rules Governing § 2255 Proceedings). This examination is required to be thorough. *Id.*

In conducting this examination, this court determined that the applicable standard was that found in 28 U.S.C. § 2244(b)(2)(B). *Id.* Under § 2244(b)(2)(B), the movant must open two “locks” to pass through the second gate. Specifically, the movant must show (1) that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence,” § 2244(b)(2)(B)(i), and (2) that “the facts of the underlying claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the [movant] guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B)(ii). As to the first lock, this court “afford[ed] MacDonald the assumption that he exercised due diligence in discovering Britt’s assertions.” *Id.* at * 17. This court

found, however, that MacDonald could not open the “second lock” because he failed to demonstrate “that the Britt affidavit, taken as true and accurate on its face and viewed in light of the evidence as a whole, could establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found MacDonald guilty of the murder of his wife and daughters.” *Id.* at *28. Accordingly, MacDonald’s motion for leave to file a successive § 2255 petition was denied.

On appeal, the Fourth Circuit vacated this court’s November 4, 2008, Order. *See MacDonald XI*, 641 F.3d 596. In its opinion, the Fourth Circuit first concluded that this court erred by applying the standard set forth in 28 U.S.C. § 2244(b)(2)(B)(ii), as opposed to § 2255(h)(1), to the Britt claim. *Id.* at 609. The Fourth Circuit explained that § 2244(b)(2) is applicable to state prisoners, while § 2255(h) sets forth the standard applicable to those prisoners who are in federal custody. *Id.* Even so, the Fourth Circuit determined that the error in identifying the applicable standard was “probably harmless” because of the similarities between the standard in § 2244(b)(2)(B)(ii) and that set forth in § 2255(h)(1). *Id.* at 610.

The Fourth Circuit did conclude, however, that this court committed prejudicial error by taking an overly restrictive view of the “evidence as a whole,” and denying MacDonald’s motions to expand the record. According to the Fourth Circuit: “Simply put, the ‘evidence as a whole’ is exactly that: all the evidence put before the court at the time of its § 2244(b)(2)(B)(ii) or § 2255(h)(1) evaluation.” *Id.* Interpreting “the evidence as a whole” standard, the Fourth Circuit further explained:

[A] court must make its § 2244(b)(2)(B)(ii) or § 2255(h)(1) determination—unbounded by the rules of admissibility that would govern at trial—based on all the evidence, including that alleged to have been illegally admitted [and that] tenably claimed to have been wrongly excluded or to have been available only after the trial. Or, to say it another way, the court must consider all the evidence,

old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under [evidentiary rules].

Id. at 612 (internal quotations and citations omitted; alterations in original). Importantly, however, the Fourth Circuit qualified that although a district court must consider “all the evidence,” this does not mean that a movant “is to be accorded the benefit of every doubt.” *Id.* Rather, “the court must give due regard to the unreliability of the evidence . . . and may have to make some credibility assessments.” *Id.* at 612-13 (internal quotations and citations omitted). Indeed, because such an evaluation “involves evidence the trial jury did not have before it,” a district court must “assess how reasonable jurors would react to the overall, newly supplemented record.” *Id.* at 613 (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)).

Because this court refused to consider an expanded record of the evidence, the Fourth Circuit remanded this matter “for a fresh analysis of whether the Britt claim satisfies the applicable standard of § 2255(h)(1).” *Id.* at 614. The Fourth Circuit instructed this court that any such assessment must include the DNA test results, the affidavit of the elder Stoeckley, evidence of blond synthetic hair-like fibers, and three affidavits describing confessions by Greg Mitchell, as well as “other evidence not mentioned, if it is part of the ‘evidence as whole’ properly put before the court.” *Id.* That is, the court must consider “the proffered evidence – with due regard for the likely credibility and the probable reliability thereof . . . – to determine if it, in combination with the newly discovered Britt evidence, would be sufficient to establish that no reasonable juror would have found MacDonald guilty.” *Id.* (internal quotations and citations omitted). “If so, MacDonald would merely pass the

procedural bar to having the Britt claim considered on its merits, and he would yet be obliged to prove the constitutional violation alleged in that claim before obtaining any § 2255 relief thereon.”

Id.

As to the issue of whether this court lacked jurisdiction over the freestanding DNA claim as a result of MacDonald’s failure to receive pre-filing authorization, the Fourth Circuit concluded that this court erred in deeming itself to be without jurisdiction. *Id.* at 615. Specifically, the Fourth Circuit explained that “because we granted 28 U.S.C. § 2244(b)(3) pre-filing authorization for the § 2255 motion raising the Britt claim, the district court possessed jurisdiction over the separate DNA claim insofar as MacDonald had timely and appropriately sought to add it to the pending § 2255 motion.” *Id.* at 615. Accordingly, where a prisoner seeks to assert additional claims after receiving a prefiling authorization from a circuit court of appeals, the district court must assess whether the proposed amendments to the § 2255 motion are proper under Federal Rule of Civil Procedure 15(a), which provides the standards for amending pleadings. *Id.* at 616. Because this court did not perform such an analysis, the Fourth Circuit vacated the denial of MacDonald’s DNA claim and remanded for further proceedings. Rather than instructing this court “to conduct a belated Rule 15(a) assessment of MacDonald’s request to add the DNA claim to the pending § 2255 motion, presumably to be followed by an evaluation of the DNA claim under the standard of § 2255(h)(1),” the Fourth Circuit found it to be “a more efficient use of judicial resources . . . to simply grant MacDonald prefiling authorization for the DNA claim so that [this court] may proceed directly to the § 2255(h)(1) evaluation.” *Id.*

After the Fourth Circuit issued its mandate in this case, the court scheduled the matter for hearing. One day prior to the scheduled hearing, MacDonald filed a Motion Pursuant to the

Innocence Protection Act of 2004, 18 U.S.C. § 3600, for New Trial based on DNA Testing Results and Other Relief [DE-176].⁷

In September 2012, after a series of briefing and motions by the parties, the undersigned conducted an evidentiary hearing. At the hearing, the Government was represented by First Assistant United States Attorney John S. Bruce, Assistant United States Attorney Leslie K. Cooley, and Special Assistant United States Attorney Brian M. Murtagh. MacDonald was represented by M. Gordon Widenhouse, Jr., from Chapel Hill, North Carolina and Keith Williams, from Greenville, North Carolina. The evidentiary hearing lasted seven days, and the court heard testimony from 19 witnesses and received numerous exhibits as evidence. The evidence received by the court is more fully detailed later in this order. At the conclusion of the hearing, and with the parties' agreement, the court directed MacDonald to file his post-hearing memorandum within 60 days of the filing of the official transcript of the evidentiary hearing, and directed the Government to file its memorandum within 60 days thereafter [DE-305].

After extensions of time for both MacDonald and the Government, the parties' post-hearing briefing is now complete. MacDonald has filed a Post-Hearing Memorandum [DE-336], Substitute Post-Hearing Memorandum⁸ [DE-343], and a Reply [DE-351]. The Government has filed a Post-Hearing Memorandum [DE-344] and a Sur-Reply [DE-352]. This matter is now ripe for disposition.

⁷ The Innocence Protection Act motion is not addressed in this Order. A separate order ruling on that motion will be forthcoming.

⁸On April 1, 2013, MacDonald filed a Post-Hearing Memorandum [DE-336]. The court later granted MacDonald's Consent Motion to file a Substitute Post-Hearing Memorandum to correct what MacDonald's counsel characterized as a "sizable number of non-substantive technical, formatting, and grammatical errors and omissions in the pleading." [DE-341]

STANDARD OF REVIEW

Title 28, United States Code Section 2255 provides, in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by the law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

28 U.S.C. § 2255(a). A prisoner is limited, however, in the number of motions he may make under § 2255. Specifically, under 28 U.S.C. 2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 (1996) (“AEDPA”):

[n]o circuit or district judge shall be required to entertain an application for writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

28 U.S.C. § 2244(a); *see also In Re Vial*, 115 F.3d 1192, 1194 (4th Cir. 1997) (“Under the AEDPA, an individual may not file a second or successive . . . § 2255 motion to vacate [his] sentence without first receiving permission to do so from the appropriate circuit court of appeals.”). Section 2255, in turn, provides in pertinent part as follows:

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

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C § 2255(h).

As the court already has recounted, the Fourth Circuit has certified, pursuant to § 2244(b)(3), that MacDonald has made a prima facie showing that his Motion to Vacate [DE-111] meets the requirements for successive motion. The task on remand for this court, therefore, is to “conduct a more searching assessment of whether that motion satisfies” the standard set forth in § 2255(h). *MacDonald XI*, 641 F.3d at 604. The parties agree that only subsection (h)(1) is implicated in this case.

Accordingly, the court must determine whether MacDonald has proffered newly discovered evidence, that if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty. 28 U.S.C. § 2255(h)(1); *MacDonald*, 641 F.3d at 614. In making this assessment, the court must consider “all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the [evidentiary rules].” *MacDonald XI*, 641 F.3d at 612 (internal quotations and citations omitted; alterations in original). In so doing, “the court must give due regard to the unreliability of the evidence . . . and may have to make some credibility assessments” and must “assess how reasonable jurors would react to the overall, newly supplemented record.” *Id.* at 612-13 (internal citations and quotations omitted).

If the court determines that MacDonald has met his burden of proving, by clear and convincing evidence, that no reasonable juror would have found him guilty, then he will have cleared the procedural, gatekeeping bar set forth in § 2255(h), which will allow the court to consider his § 2255 claim(s) on the merits.

EVIDENCE AS A WHOLE

Any attempt to capture in writing every piece of the evidence as a whole that the undersigned

has reviewed in this long-running case likely is a futile task. Nevertheless, the court will attempt, to the best of its ability, to highlight the portions of the evidence as a whole that are relied upon by the parties in making their arguments.

A. The Crime Scene

At approximately 3:45 a.m. on February 17, 1970, military police (“MP”) were summoned to the apartment of Jeffrey MacDonald, then a Captain in the U.S. Army Medical Corps assigned to the Special Forces at Ft. Bragg, North Carolina. Ttr. 1254. Once arriving at 544 Castle Drive, the MPs found that the front door of the MacDonald residence was locked, but they were able to gain entrance through the unlocked utility room door at the rear of the ground-level apartment. Ttr. 1258-59. Upon entering the master bedroom, which was immediately adjacent to the utility room, MP Sergeant Richard Tevere and Specialist-Four Kenneth Mica observed Jeffrey MacDonald, clad only in his pajama bottoms, lying on the shag rug adjacent to, and partially covering, his wife’s body. Ttr. 1260, 1274, 1281. Initially Specialist Mica thought MacDonald was dead Tr. 1406. After MacDonald regained consciousness, he repeatedly asked the MPs about his children, and in response to questions from the MPs, told them that intruders had come into his house; specifically, a band of four hippies, including a blond female wearing muddy boots and floppy hat and carrying a candle, two white males, and an African-American male wearing an Army field jacket with sergeant stripes. Ttr. 1270, 1323, 1500-01. MacDonald reported that the female said, “Acid is groovy; kill the pigs.” Ttr. 1270, 1503-04. MacDonald reported that he had been stabbed, and that he may go into shock. The MPs began performing mouth-to-mouth resuscitation on him. Ttr. 1265.

The MPs also walked through the apartment to check on MacDonald’s children. They found MacDonald’s daughter Kimberly, age 5 ½, tucked into her bed in the front (or south) bedroom. Ttr.

1271, 1327-28. Kristen, age 2 ½, was found in the back (or north) bedroom. Ttr. 1272-73; 1337-38.

One of the MPs, Mica, while responding to the crime scene, had observed a woman standing outside in the rain or mist on a street corner approximately one-half mile from the MacDonald residence. The woman had shoulder-length hair and was wearing a wide-brimmed hat. Had he not been responding to an emergency, Mica would have stopped to investigate this woman. Ttr. 1450-54. In any event, upon hearing the description MacDonald gave of his alleged assailants, Mica advised his supervisors of the woman he had seen and suggested that a patrol be sent to find her. Ttr. 1598.

About ten minutes after the MPs arrived at the MacDonald residence, an ambulance came and transported MacDonald to Womack Army Medical Center. Ttr. 1285.

The investigation of the crime scene by Army Criminal Investigation Detachment (“CID”) agents and the MPs, after MacDonald was removed from the scene, showed the following. Colette’s chest was partially covered by MacDonald’s blue pajama top, and her abdomen was partially covered by a Hilton Hotel bath mat. Ttr. 1613-14. Inside the master bedroom, the investigators observed blood splatter on the walls and the ceiling in Type A blood, the same as Colette.⁹ GX 643, 645. The word “PIG” was written in blood, later determined to be Type A, on the headboard of the master bed. Ttr. 1268. The bottom sheet on the bed in the master bedroom had a large urine stain on the right-hand side, and was partially pulled up as if the bed were being changed. GXP 47. Lying adjacent to the doorway was a pile of bedding, consisting of the top sheet from the master bed and the bedspread inside the sheet, both bloodstained. Ttr. 1626-28, GXP 210-212. A pocket torn from MacDonald’s pajama top was found on the upturned side of the multi-colored throw rug adjacent to Colette’s left

⁹ It is undisputed that each member of the MacDonald family had a different blood type: Colette=Type A, Jeffrey=Type B, Kimberly=Type AB, Kristen=Type O. Ttr 3382-3383.

foot. Ttr. 1683. The pocket was stained in what was revealed to be Type A blood, and later testing indicated that the staining occurred after the pocket was torn off, because the corresponding area of the pajama top from which the pocket had been ripped was soaked in blood, but the inner surface of the pajama pocket was not stained with blood. Ttr. 3606-14.

In Kristen's bedroom, they found blood splatters on the wall above her bed, a large soaking stain on the top sheet adjacent to her right hip, and a stain on the bottom sheet. All these stains were Type A blood. A knotted and broken thick green acrylic yarn, identical to those typically used by Colette to tie her hair, and stained with Type O blood (like Kristen's) was found on the throw rug. Ttr. 4611. A large pool of blood, also Type O blood, was found beside the bed. Additionally, MPs observed two bloody bare footprints on the door exiting Kristen's room. These prints were later determined to be in Type A blood, like Colette's, and a fingerprint examiner, Hilyard Medlin, identified them as having been made by MacDonald's bare left foot. Ttr. 3106, 3675-76.

CID agents also found dark threads both within and near Colette's body outline, which prompted a search of the entire crime scene for similar threads and yarns. Ttr 1689-90. Later examination of MacDonald's blue pajama top showed that it was made of polyester yarns, which were a blend of 65% polyester and 35% cotton fibers. The top was sewn at the seams with purple cotton "two ply Z twist" thread; and the white piping on the sleeve cuffs was sewn with a blue-black cotton thread. Ttr. 4089-91, 4095. His pajama top had been torn from the yoke of the "V" neck through the midline of the front panel, as well as through the left inseam, left shoulder, and left sleeve seams to the white piping on the left cuff. Ttr. 4069-70. The search of the scene for threads yielded the following findings.

In the master bedroom, seventy-nine pieces of material that could have originated from

MacDonald's pajama top were found: sixty-one sewing threads, seventeen blue polyester-cotton yarns from the fabric, and the bloodstained and torn pocket. Specifically, three purple sewing threads were found in the debris under Colette's head. Ttr. 4100. Twelve purple cotton sewing threads and one blue-black two ply Z twist sewing thread were found in the debris from the rug in the vicinity of the left hand and arm of Colette. Ttr. 4099. Fifteen purple cotton sewing threads and three blue polyester warp yarns were found in the debris from the rug within the body outline of the trunk and legs of Colette. Ttr. 4100. Three purple cotton sewing threads and four blue polyester-cotton warp yarns were found on the underside of the upturned throw rug adjacent to Colette's foot, and the torn, stained pocket was found on top of the throw rug. Ttr. 4099. Additionally, three matching purple cotton seam threads were found on the rug in the master bedroom, in the area near the largest bloodstain. Ttr. 4098. Located in the debris from the master bedroom rug, in the area of the north corner of the footboard of the master bed, were two matching purple cotton threads. Ttr. 4101. The debris from the bottom sheet on the master bed contained fifteen matching purple cotton threads and seven matching blue polyester cotton yarns. Ttr. 4101-02. The debris from the pillowcase on the master bed contained four matching purple cotton threads and two blue polyester cotton yarns. Ttr. 4103. In the debris located on the multi-colored bedspread found inside the sheet in the pile of bedding on the floor of the master bedroom, were two matching purple cotton seam threads and one matching blue polyester cotton yarn. Ttr. 4103. On the master bedroom floor, by the east wall, was one purple cotton sewing thread. Ttr. 4101.

In Kristen's bedroom, on the green bedspread, investigators located one purple cotton thread and one blue polyester cotton yarn that could have come from MacDonald's pajama top. Ttr. 4097.

In Kimberly's bedroom, nineteen pieces consistent with MacDonald's pajama top – fourteen

threads and five yarns – were found in or on Kimberly’s bed. Specifically, in the debris from the bedding that had been pulled back, the search yielded two polyester cotton warp yarns and one purple cotton sewing thread, both matching MacDonald’s pajama top. Ttr. 4094. In the debris from the bottom sheet, investigators found two matching purple cotton sewing threads. Ttr. 4094-95. Two matching blue polyester-cotton yarns and ten matching purple cotton sewing threads were found on Kimberly’s purple bed cover. Ttr. 4095. Finally, in the debris removed from the north pillow of Kimberly’s bed, investigators collected one matching purple sewing thread and one blue polyester-cotton yarn. Ttr. 4093.

Despite what investigators characterized as an “extensive search,” they found “nothing of evidentiary value” in the living room. Ttr. 1727-28. Specifically, no fibers, threads, bloodstains or splinters were found. *Id.* CID agent Shaw did find, however, a bunch of tangled blue fibers at the south side of the hallway at the entrance to the living room. Ttr. 2410-12, 2480-81.

Once it started to get light outside, CID agents and MPs began to search the exterior perimeter of the quarters. Ttr. 2337-38. They did not find footprints, but they did find a piece of long wood lying on the ground with what looked like red stains, hair and fibers on it. Ttr. 2238-40. Subsequently, the club would be determined to have bloodstains in both Colette’s (Type A) and Kimberly’s (Type AB) blood groups. The club also bore two purple cotton seam threads like those in MacDonald’s pajama top, numerous rayon fibers matching the composition of the throw rug in the master bedroom, and three matching purple cotton sewing threads. Ttr. 3534-37, 4097-98.

CIDs also found an “Old Hickory” brand paring knife and an icepick under a large bush at the corner of the quarters. Ttr. 2342-43. Inside the master bedroom, a “Geneva Forge” paring knife with a bent blade was found. Ttr. 2364.

No splinters were found in the living room where MacDonald said he was attacked; however, a large splinter, bearing Type A blood like Colette's, was found in the area where Colette's head had lain and where three matching purple cotton seam threads had also been found. Ttr. 1728, 3404-05, 3426-27, 3657-58, 4098. This same splinter was later fitted back into the club. Ttr. 3802-04. Another splinter, identical in composition to the club, was found in the debris from the rug where the trunk and legs of Colette had lain in the master bedroom. Ttr. 3806. Additionally, splinters identical in composition to the club were found in the debris removed from the bottom sheet of Kristen's bed, although there was no other evidence suggesting that Kristen was struck with the club. Ttr. 3806-07.

Deep soaking stains in Type AB blood, like Kimberly's, were found on the rug at the hall entrance to the master bedroom, spattered on the top sheet from the master bedroom, and on the front of MacDonald's pajama top. Ttr. 3648-50, 3664, 3668-69.

On the rug of the master bedroom, adjacent to the left elbow of Colette MacDonald, a piece of bloodstained latex was found. Ttr. 1729-30. A finger section of what appeared to be a latex glove, also stained with Type A blood, was found inside the sheet in the pile of bedding on the floor of the master bedroom. Ttr. 1730-31, 3667. Packages of Perry brand disposable latex surgeon's gloves were found in a cabinet below the kitchen sink. Ttr. 1743, 1760-61. Leading to this cabinet was a series of blood droplets in Type B blood like Jeffrey MacDonald's. Ttr. 3443, 3682-83.

Type B blood also was found on the sliding door of the linen closet, where a large quantity of medical supplies, including disposable scalpel blades and hypodermic syringes, were kept. Ttr. 3670. Type B blood also was found on the rim of the sink beneath the mirror in the hall bath. Ttr. 3670.

In the living room, blood was found on an *Esquire* magazine, and later testing revealed a

mixture of Types A and AB, Colette and Kimberly's blood types, respectively. MacDonald's eyeglasses were found lying on the floor near the living room window, with a red speck, believed to be blood, visible on the outer surface of one of the lenses. Ttr. 3133. A blood stain from the hall floor at the entrance to the living room was also found, and later testing indicated that it was either Type B or Type O blood. No other evidence of blood was found in the living room.

The scene also was processed for fingerprints. In total, forty-four useable latent fingerprints and twenty-nine useable palm prints were lifted from the scene. Ttr. 3116. Of these, twenty-six fingerprints and eleven palm prints were matched with MacDonald family members or other investigators or individuals whose prints were available for comparison. Ttr. 3141. A fingerprint that could not be matched with any known comparison print was found on a drinking glass located on a table directly at the head of the sofa. Ttr. 3132-33.

The physical evidence collected at the scene also included wax drippings taken from three different locations: the coffee table in the living room; the chair in Kimberley's bedroom, and the bedspread in Kimberley's bedroom. Ttr. 3838. None of these samples matched any of the candles found in the MacDonald home and submitted by investigators for comparison, nor did they match each other. Ttr. 3841-43. Hilyard Medlin, a CID examiner, testified that the three wax samples were brittle and dry, which indicated to him that the wax was at least several weeks old when he received it. Ttr. 3889-90. He received the samples approximately three weeks after the murders. Ttr. 3899.

B. MacDonald's treatment at the hospital

MacDonald was first seen in the Emergency Room of Womack Army Hospital by Michael Newman, a Senior Clinical Technician and combat medic. According to Newman, MacDonald's vital signs were stable, he had wounds on his right chest, upper left arm, and upper left abdomen.

Ttr. 2644-49. MacDonald had a lump or abrasion on his left forehead which was not bleeding, but seeping fluid. *Id.* Newman did not observe any wounds on MacDonald's back, or icepick wounds on any part of MacDonald's body. Ttr. 2649-50, 2661.

Further examination by a surgical resident and an X-ray revealed that MacDonald had a laceration type wound on the right side of his chest at the seventh intercostal space (between the 7th and 8th ribs). Ttr. 2858-59.

MacDonald also was attended in the Intensive Care Unit by Dr. Merrill Bronstein, who found one bruise on MacDonald's head. Ttr. 2956. Dr. Bronstein described the wound on MacDonald's upper left abdomen as being "below his costal margin, below the edge of the ribs, maybe two inches down" with it being "about an inch and a half or two inches long, and it was through the skin and fat." Ttr. 2956. Dr. Bronstein explained that the wound "was not superficial, in that it went through the skin and through the subcutaneous tissue, but [it] was not through the fascia." Ttr. 2957.

MacDonald was treated for a punctured lung and other knife and stab wounds. He suffered at least a 20% and perhaps a 40% collapse of his right lung. MacDonald remained in the intensive care unit for several days and then in the hospital for nine days.

The first CID agent to interview MacDonald was Paul Connolly, who attempted to get a better description of the alleged intruders. Ttr. 2681. MacDonald told Connolly he had been attacked by four individuals in the living room, one of whom he said had struck him with a club. Ttr. 2684. MacDonald told Connolly the club was like a baseball bat, and when he reached to grab it, it was slippery like it had blood on it. *Id.*

On February 17, 1970, MacDonald was interviewed as a victim/witness by FBI Special Agent Robert Caverly. Ttr. 2885. MacDonald told Caverly that during his struggle with the four intruders,

he pushed the African-American intruder and a white male away from the couch into the hallway, and both of the men tore at his pajama top. Ttr. 2891. MacDonald reported that when he awoke from being unconscious, he was on the floor in the hallway with his pajama top torn, bloody, and twisted around his wrist. Ttr. 2891-92.

On February 18, 1970, Agent Caverly again interviewed MacDonald, who provided some additional information. Specifically, MacDonald told Caverly that he had not checked either the back or front door, and that he may have gone into the hall bath to stop his bleeding. Ttr. 2899-2900. He also thought that the shorter white male intruder, who was wielding an icepick, was wearing light weight gloves that may have been surgical gloves. *Id.*

C. Autopsies of Colette, Kimberly and Kristen

Major (Dr.) George E. Gammel performed the autopsy on Colette on February 17, 1970. The autopsy revealed that, although the cause of death had been loss of blood due to stab wounds, she had also sustained massive blunt trauma injuries which, but for the subsequent stab wounds, she could have survived. Ttr. 2507-08. In Dr. Gammel's opinion, Colette's blunt trauma injuries, two broken arms, and at least five separate lacerations to her forehead and scalp, were consistent with a frontal assault and could have been caused by a blunt instrument such as the club. Ttr. 2491-98. Dr. Gammel characterized some of the injuries – the laceration to the back of the hands and the broken arms– as defensive wounds. Ttr. 2494-95. Colette also had a “pattern bruise” with “sharp margins and angulations” on her chest, resulting from blunt force, and consistent with the side or end of the club. Ttr. 2498-99. She sustained sixteen deep penetrating stab wounds to her neck and chest, which had been inflicted in a perpendicular manner while she was flat on her back. Ttr. 2500-02. Dr. Gammel opined that these stab wounds were caused by a single-edged sharp knife, and were

consistent with the Old Hickory paring knife found outside the rear of the quarters. Ttr. 2502-03. Additionally, Colette sustained twenty-one puncture wounds to her chest, inflicted in a perpendicular manner, such as would be caused by an icepick. Ttr. 2503-04.

Kimberly also sustained blunt trauma injuries consistent with the club, and lethal incisional stab wounds. She sustained at least two blows to her head, one on either side of her face. Ttr. 2565-67. The blow to the right side of her face fractured her skull. Ttr. 2567. Kimberley's eight to ten incisional wounds to her throat and neck could have been inflicted by the Old Hickory knife. Ttr. 2568.

Kristen did not sustain any blunt trauma injuries, but had five gaping incisional stab wounds to her chest and twelve incisional stab wounds to her back; some of the stab wounds penetrated her heart. Ttr. 2577-78. The stab wounds were consistent with having been inflicted by the Old Hickory knife. Ttr. 2589. Kristen also sustained approximately ten superficial puncture wounds to her chest, consistent with having been inflicted by the icepick. Ttr. 2576, 2589. Seven puncture wounds were found in the front of her undershirt and found in back of the undershirt, but none were found in her pajama top. This led investigators to conclude that Kristen's assailant had lifted her pajama top before inflicting the icepick wounds. Ttr. 4039-40, 4043-44, 4048-50. Kristen also sustained minor lacerations on both hands and a significant wound on her right hand, which the CID pathologist characterized as either "defensive wounds or these could be wounds incurred in the process of other types of wounds happening." Ttr. 2577.

D. MacDonald's pretrial statements

On April 6, 1970, MacDonald appeared voluntarily at the Ft. Bragg CID Field Office, and waived his privilege against self-incrimination and his right to the presence of counsel. What he told

the CID during this interview was tape-recorded and later transcribed.

MacDonald told CID agents that on the evening of February 16, 1970, Colette returned home from a class she had attended, they watched television, and Colette retired to bed first. GX 1135 at 33-35. At approximately 2:00 a.m., he decided to retire and, upon entering the master bedroom, he found that his youngest daughter Kristen had gotten into bed with his wife and had wet his side of the bed. *Id.* at 3. MacDonald returned Kristen to her own bed, and then went to sleep on the living room couch. *Id.* The next thing he knew, MacDonald heard Colette screaming, “Jeff, Jeff, why are they doing this to me?” and his daughter Kimberly screaming, “Daddy, Daddy, Daddy.” *Id.* at 3, 48-49. MacDonald saw four individuals, one of whom was a girl, with a wavering light on her face, who was chanting, “acid is groovy; kill the pigs.” *Id.* at 3-5. MacDonald also described his struggle in the living room, including the fact that his pajama top was removed from his body:

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

But all of a sudden, it was around my hands and it was in my way. And I remember that I was holding this thing in my hand — the guy’s hand —that I couldn’t maneuver very well. My hands were kind of wrapped up in that thing.

And as they were punching me, I was kind of using that a little bit, you know holding it — right exactly — cause this guy, I thought was really punching me in the chest, you know, and in the stomach ‘cause I was getting hit across here (pointing to the mid-section of his body).

So, in effect, I was blunting everything by, you know, holding this up; and I couldn’t get my hands free out of this thing. And I remember I ended up, when I was laying on the floor — it was still around my hands and everything, and I took it off as I was going in the bedroom. And after I took this knife out of my wife’s chest, I — you know, keeping her warm. You know, to treat shock, that would (inaudible) and keeping them warm.

GX 1135 at 12-13.

During the interview, MacDonald recounted his movements throughout the apartment. He

indicated that he lost consciousness after the struggle in the living room, and when he came to, he went the master bedroom where he found Colette, removed a knife from her chest, and performed artificial resuscitation on her and covered her with his pajama top. GX 1135 at 6-7. He checked on both his daughters, and then called an operator from the phone in the master bedroom. GX 1135 at 23-24. He then checked Colette and his daughters for a pulse, and then used the telephone again, this time in the kitchen. GX 1135 at 24. At some point during his movement throughout apartment, he washed his hands in the hall bath sink. GX 1135 at 80. He looked out the back door, which was open, once. GX 1135 at 84.

At one point in the interview, MacDonald was asked how the pocket from his pajama top found on the throw rug by Colette's feet had only a very minute amount of Colette's Type A blood on it, while the pajama top was soaked with her blood and also had Kimberly's blood on it. He answered:

I laid it – I laid it over her. . . . I'm sure I had blood all over my hands from everyone, when I was checking for pulses and stuff. . . . I mean, I had blood all over me, you know. I mean I checked – I know I checked carotid pulses in everyone, and I'm sure I got some blood on me from everyone. And I went back in to see my wife again.

Id. at 69-70. He also hypothesized that the intruders tracked the pocket into the bedroom after his struggle with them. *Id.* at 74.

MacDonald denied recognizing the club, and stated his family did not have an icepick. GX 1135 at 45, 47. He also denied that his family owned a Geneva Forge knife or an Old Hickory paring knife. *Id.* at 41, 43, 45, 47. MacDonald himself learned during this interview that many threads and yarns identical to those of his pajama top were found in the master bedroom, including under

Colette's body. GX 1135 at 68. He also learned that investigators believed Kimberly had been struck in the master bedroom. GX 1135 at 95.

E. Article 32 Hearing

On May 1, 1970, the Army formally charged MacDonald with murder. On May 15, 1970, a formal investigation commenced pursuant to the requirements of Article 32, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 830. The Government presented twenty-seven witnesses. MacDonald called twenty-nine witnesses in his defense and testified himself.

At the conclusion of the evidence, the investigating officer, Colonel Warren V. Rock, filed a 90-page report, summarizing more than 2,000 pages of transcript testimony, and recommending that the charges against MacDonald be dropped, and that the appropriate civilian authorities investigate Helena Stoeckley. DX 5076. In his report, Colonel Rock noted:

There is conflicting evidence as to the degree the crime scene was preserved from the time the first MP arrived on the scene and until photographs were taken some minutes later. The controversy specifically relates to the fact of whether or not the white towel or blue pajama top were on Colette's body when first seen by the MPs, the location of the handset in the [master] bedroom, the relocation of the white flower pot holder in the living room by some unknown individual and the number (12 to 14) of military police, CID agents, and medical personnel initially in the apartment and their movements through the rooms with the chance of inadvertently altering the crime scene.

DX 5076 at 1674.

Following the dismissal of the charges under the UCMJ, MacDonald remained at Fort Bragg pending his hardship discharge from the Army in December 1970. Sometime prior to this discharge, MacDonald spoke to Alfred "Freddy" Kassab, Colette's step-father, by telephone. During this conversation and in subsequent letters, MacDonald told Kassab that he had caught one of the "assailants" in a bar in Fayetteville, dragged him out of the bar, beaten a confession out of him, and

then “terminated him with extreme prejudice.” Ttr. 6700-10. MacDonald later admitted that this “was a lie of incredible proportions that I should never have told them, and I was doing it to try to give myself some space to rebuild my own life and to keep Freddie and Mildred¹⁰ off my back.” Ttr. 6710-11.

F. Post-hearing forensic evidence and additional MacDonald statements

After MacDonald’s discharge, both the Army CID and FBI laboratories conducted additional examination of the physical evidence. The examinations revealed that one of the alleged weapons, the club, had once been part of a 2x4, which was later used as a bed slat for Kimberly’s bed.

The Army CID lab also performed serology tests on the “Hilton” bath mat that MacDonald stated he placed on Colette’s abdomen. The tests revealed the presence of blood stains in Type AB (the same type as Kimberly) on the bottom side and Type A (the same type as Colette) on the top side. Ttr. 3646-47. Later examination by the FBI Lab led the examiners to believe that the stain with the Type AB blood could have been caused by the Old Hickory knife. Ttr. 4118-23. The examiners also determined that another stained area on the mat had the general shape of the icepick, and the bloodstains resulted from the items either being placed on the bath mat or the bath mat being “used to wipe the items off.” Ttr. 4124-25. Notably, when the Old Hickory knife and icepick were found, no blood was found on either blade or pick, but blood was detected underneath the handles of both weapons. Ttr. 3419.

In June 1971 the FBI Lab conducted examinations of the clothing of the MacDonald family in order to determine the number of cuts or punctures, and whether they could be associated with any of the knives or the icepick found at the crime scene. Ttr. 4031-33. Paul M Stombaugh of the FBI

¹⁰ Mildred Kassab was Colette’s mother.

Lab examined both knives found at the crime scene, and determined that the Geneve Forge knife, which MacDonald stated he pulled from Colette's chest, had a dull, bent blade. Ttr. 4033-34. He determined that the Old Hickory knife, however, had a very sharp blade. Ttr. 4034.

Stombaugh's examination of Colette's pajama top showed a total of thirty puncture holes in the front of the garment, which he found to be consistent with having been made with the icepick. Ttr. 4051-53. He also found a total of eighteen clean cuts on the front of the garment, which he determined were consistent with having been made by the Old Hickory knife. *Id.* Stombaugh opined that it was extremely doubtful that the Geneva Forge knife could have made the cuts in Colette's pajama top, given its dull blade. Ttr. 4054. As to MacDonald's pajama top, Stombaugh found two cuts, and opined that these cuts could have been made by the Geneva Forge knife because they were not clean cuts, but more or less tearing cuts. Ttr. 4063. Stombaugh also determined that MacDonald's pajama top had forty-eight puncture holes, with all but nine holes being in the back and right shoulder of the garment. Ttr. 4056-58. Stombaugh noted that none of the puncture holes were in the torn left panel or left sleeve. Ttr. 4062. All puncture holes were consistent with having been made by an icepick, although some varied in size. Ttr. 4058.

In 1974, Stombaugh was furnished photographs of the crime scene, as well as photographs taken at Colette's autopsy, and was asked to ascertain whether or not the puncture wounds to her chest could have been made through MacDonald's pajama top. Working with Physical Science Technician Shirley Green, Stombaugh determined that when MacDonald's pajama top was turned right-sleeve inside-out, and the left front panel is draped alongside – as both are depicted in the photo of Colette with the garment on her chest – twenty-one puncture holes were visible on the upper most layer of the pajama top. Ttr. 4185-87, 4192-93. Starting with the twenty-one puncture holes visible

on the top layer of MacDonald's pajama top, Green was able to insert simultaneously twenty-one probes through all forty-eight puncture holes in the top. Ttr. 4429-4431. A comparison of the Green's "reconstruction" of the probe through the puncture holes corresponded exactly to the pattern made by the twenty-one icepick wounds on Colette's chest depicted in the autopsy photo. Ttr. 4193-96. Accordingly, Stombaugh concluded that the puncture damage to Colette's chest could have been made through the pajama top while it was on her body. Ttr. 4197.

By consent, on August 14, 1974, MacDonald was photographed from the waist up by the FBI, in the presence of defense counsel. MacDonald would point to an area of his body with a felt tip pen, and would then describe an injury, how it was inflicted, and whether or not it had left a scar. One FBI agent would take notes, and another agent took "location shots" with one camera and close up shots with another camera. Ttr 2616-20. This procedure was utilized to document fourteen locations on MacDonald's body—but MacDonald did not indicate that he had suffered any injuries to his back. *See* "Subject Matter of Statements" [DE-132-21] at 37.

G. Trial

On January 24, 1975, the grand jury indicted MacDonald for the murders of his family. After a series of pretrial motions and interlocutory appeals, the seven-week trial commenced in July of 1979. In the Government's own words, its case-in-chief consisted of:

evidence from the crime scene, the events at the hospital, MacDonald's pre-trial statements, and the results of the analysis of the physical evidence through the testimony of expert witnesses. . . . It was the Government's theory that MacDonald's account—that he was being attacked in the living room while his wife and children were being murdered in their respective bedrooms—was a false exculpatory statement evidencing consciousness of guilt. It was further the Government's theory that MacDonald's account of his movements throughout the crime scene after purportedly gaining consciousness, were in fact attempts to account for otherwise incriminating

physical evidence (e.g., his wife's blood on his pajama top), and to rearrange the crime scene so as to make it correspond to his false account.

Gov't Post-Hearing Mem. [DE-344] at 98. Much of the Government's evidence consisted of testimony the court already has recounted in this Order. As Judge Dupree later observed, "the prosecution . . . introduced an almost overwhelming amount of physical and circumstantial evidence in support of its theory of the case." *MacDonald III*, 640 F. Supp. at 310.¹¹ In summary, "[t]he government was able to prove through laboratory analysis and expert testimony that the club, two knives and icepick were the murder weapons," and although MacDonald denied any knowledge of the weapons, "the government offered evidence from which the jury could have found that the weapons came from the MacDonald home." *Id.* at 311; *see also* Gov't Post-Hearing Mem. [DE-344] at 99. The Government also proffered evidence, through the pajama demonstration and testimony about the pajama top pocket, that "supported the Government's theory that MacDonald had put the garment on his wife and then stabbed her with an icepick to make his account of the murders more believable." *MacDonald III*, 640 F. Supp. at 313. Proffering evidence that the pieces of latex glove found in the master bedroom were stained by blood of Colette's type and were similar to latex surgeon gloves found near the kitchen sink, the Government contended that "MacDonald had worn latex gloves while murdering his family to avoid fingerprints and had written the word "PIG" in his wife's blood on the master bed headboard while wearing the gloves since there were no ridge lines in the writing as there would have been had the writing been made by a bare finger." *Id.* The Government also introduce evidence about blood the same type of Kristen's being found on MacDonald's eyeglasses, MacDonald's footprint in blood outside of Kristen's bedroom, and

¹¹ The reader would be well-served to review Judge Dupree's meticulous summary of the trial.

extensive testimony regarding blood splatterings and the Government's reconstruction of the crime scene.

As Judge Dupree observed, the physical evidence collected by investigators at the apartment yielded little evidentiary support for MacDonald's account of events:

There were no threads, yarns, splinters, or blood, except on the Esquire magazine, found in the living room, the area where MacDonald said he struggled with the intruders. Although approximately seventy different medicines were found in the hall linen closet, the "intruders" did not take any of the drugs nor did they ransack the family's closets because the clothes in these closets were undisturbed. Similarly, although MacDonald had claimed that he was attacked by club-wielding assailants who stabbed at him while his pajama top was wrapped about his hands, he sustained only very limited injuries and, most importantly, no head wounds nor icepick wounds on his hands. Furthermore, despite MacDonald's contention over the years that four people which he later identified in some detail had been the assailants on the night of the murders, none of their fingerprints were ever found in the apartment.

Id. at 314-15.

MacDonald's defense "consisted primarily of his own testimony, character witnesses, and impeachment of the integrity of the crime scene and evidence offered by the prosecution." *MacDonald III*, 640 F. Supp. at 290.

MacDonald also presented the testimony of James Milne, who resided across the street from the MacDonald family at the time of the crime. Milne testified that on the night of February 16, 1970, he was constructing model airplanes in his workshop, an unused bedroom in the front of his duplex. Ttr. 5451-53. Sometime between 11:45 p.m. and 12:15 a.m., he heard voices, and opened the rear door of the duplex to investigate. Ttr. 5453-55. He saw three Caucasian individuals – two males and one female – walking behind his residence. All were wearing white sheets, and were carrying lit candles. Ttr. 5454-55, 5474. The female had hair which "was slightly below shoulder-blade length in the middle of the back, straight" and a "light brown—almost to a blondish color." Ttr.

5457. He testified that the sheet the female was wearing resembled a choir robe with folds in the back. Ttr. 5473. None of the individuals were carrying weapons. Ttr. 5479. When Milne last saw the individuals, they were approximately 40 yards from the MacDonald residence. Ttr. 5456. Milne did not report what he saw to any authorities, even after learning of the crime at the MacDonald residence.

1. Testimony of Helena Stoeckley

During the course of the trial, Judge Dupree issued a material witness warrant for Helena Stoeckley's arrest, and FBI Special Agents were able to locate her in South Carolina. Later in this order, the court will detail the evidence about the Stoeckley's arrest, transportation to Raleigh, and her communication with the prosecution, defense, and her own attorney during the trial. At this juncture, the court will simply note that Judge Dupree suspended the trial on Thursday, August 16, 1979, while Stoeckley was first interviewed by the MacDonald defense team in the Raleigh federal building for more than three hours. She then was interviewed by the prosecution.

Before Stoeckley was called by the defense to testify the next morning, AUSA Blackburn inquired of Judge Dupree whether an attorney should be present to represent Stoeckley's interests. Ttr. 5513. Defense counsel Smith responded, "We will do whatever Your Honor wishes to do – but I feel that we will just go ahead with her and see what happens." *Id.* Stoeckley did not have the benefit of counsel before or during her interviews by the parties or her testimony at trial, but was appointed counsel over the weekend, after she had completed her testimony. Ttr. 5980-81.

Defense counsel Bernie Segal began the examination of Stoeckley. During that examination, Segal showed Stoeckley photographs of the crime scene, repeatedly reminding her that he had discussed them with her the day before. *See, e.g.*, Ttr. 5532-34. The form of his questions concerning

the photographs plainly conveyed the message that Stoeckley's in-court responses were not consistent with what she had led the defense team to believe the day before, and were not what the defense wanted to hear.

During one bench conference at which Segal sought leave to question Stoeckley as a hostile witness, Judge Dupree responded, "I have detected nothing in the demeanor or answers or anything else in this witness to indicate any hostility whatever to your questioning." Ttr. 5538. He later commented, "You [Segal] are up here just to see if you may vary the form of the questioning, so that you may give her the answers in the question, and that is what I am precluding your doing right now under the present circumstances, so ask your question." Ttr. 5540.

Segal continued his direct examination of Stoeckley, during which she testified that around the time of the murders, she wore a blond wig as a joke at times. Ttr. 5588-89. She also testified that around February 17, 1970, she owned a pair of brown boots that went up to her knee, and a pair of white boots which went up to her thigh. Ttr. 5589-5590. She also testified that at that time she owned an old floppy hat, but it was stolen six or seven months later. Ttr. 5599, 5602. She got rid of the wig around February 19 or 20, 1970, because she felt the wig connected her to the murders. Ttr. 5602-03. She also testified that during the week of February 17th through 21st of 1970, she set up several funeral wreaths along a fence near her house. Ttr. 5633. She noted, however, that it was probably just a coincidence that she did so because she frequently picked up discarded wreaths and flowers from a florist located up the street. *Id.* at 5634.

Segal continued the direct examination, and after he thoroughly had established that Stoeckley had been addicted to heroin and opium, and was a heavy, regular user of all manner of hallucinogenic drugs during the period in question, and had quizzed Stoeckley about Charles

Manson, witchcraft, and the effects of her drug use, Segal sought another bench conference, detailed below:

MR. SEGAL: I represent to the Court that during the interviews with me and with other persons present she stated that when she looked at the [photograph] she had a recollection of standing over a body holding a candle, seeing a man's body on the floor.

I also may say, Your Honor, we are now down to the bottom five or six critical things that she revealed yesterday. I have a feeling, based upon her answer to this one now, that when and if I ask her in direct fashion, that I may get negative answers.

I had no anticipation of that, because yesterday throughout the time that she made these statements, we accepted them, did not expect contrary.

We have not had any different statements from her and we feel that we are entitled to the plea of surprise as well as the fact, I think, at this point – the extent of her hostile relationship not in terms of manner but the hostility of her interest to the Defendant.

I am going to tell Your Honor the other things that she has said. . . .

.

The photograph that I showed her of the bedroom of Kristen MacDonald: during the interview yesterday, she stated that she remembered riding the rocking horse when she looked at that picture.

She also stated yesterday she remembered standing at the end of the sofa holding a candle. She also said when she saw the body of Kristen MacDonald – the one when she was clothed, with the baby bottle – that that picture looked familiar to her.

. . . . She also said when she was shown the photograph of Colette MacDonald – the same one I showed her today – that she said that the face in that picture looked familiar, except that the chin was broken and made it a little hard.

She also stated . . . that she was standing of [sic] the corner of Honeycutt across from Melony Village.

She has a recollection of standing there during the early morning hours of February 17th, 1970. She further stated yesterday, and I intend to ask her now, that she has a recollection of standing outside the house looking at her hands and saying, "My God, the blood; oh my God, the blood."

She said that took place February 17, 1970. There are witnesses to each of these things. I must say, Your Honor, there were persons present the entire time this [interview] took place.

Ttr. 5614-16.

Segal went on to explain to Judge Dupree that he intended to question Stoeckley again on the stand concerning each of these representations, and if she denied having made the representations to him the previous day, he would impeach her "under the rules." Ttr. 5616. AUSA Blackburn spoke up:

MR. BLACKBURN: Of course, I was not there when she talked with the Defense yesterday, but in her interview with the Government none of those statements were made. She specifically told us –

THE COURT: (Interposing) Did you ask her any?

MR. BLACKBURN: Yes, sir. She specifically told us that she had been shown the photographs and we asked her, "Did you recognize any of the scenes in those photographs?"

The answer was no. I asked her, "Have you even been in that house?" She said no. I said, "Do you know anything about that?" "No." "Who do you think did it?" "Dr. MacDonald." You know, it just went one right after the other.

I discussed – I told [defense attorney] Mr. Smith last night what she told us. I was under the impression to this very moment that what she told us was essentially what she told them.

It is difficult for me – you know– I am not saying that they are not saying what she said. I just don't know what way it is, because she has not indicated anything to the Government.

[DEFENSE COUNSEL] MR. SMITH: Judge, here I think is where we are. Generally, she said to us the same thing and that is, "I don't remember." But in two or three or four instances – whatever the list would reveal – she says something which would give an interesting insight into her mind. . . .

....

THE COURT: I am not going to cross the hostility thing until there is a reason shown to indicate it; but I am going to ask the witness a question myself.

(Bench conference terminated.)

Ttr. 5617-18. Among the questions Judge Dupree asked Stoeckley was, “Now, did you tell both sides the same story?” to which Stoeckley answered, “As far as I know, yes, sir.” Ttr. 5619.

Upon further questioning by Segal, Stoeckley reiterated that she did not recognize the crime scene photographs, and denied stating that she had touched or used a rocking horse depicted in one of the photographs, commenting that it appeared in the photograph to be broken. She also denied having discussed the rocking horse with defense counsel. Ttr. 5621-27.

On cross examination by AUSA Blackburn, Stoeckley continued to claim failure of recollection, and testified consistently with her testimony on direct examination. She testified that she did not have the blond wig on when she was talking with her boyfriend, Greg Mitchell, in the driveway on February 16, 1970, because Mitchell did not like when she wore it. Ttr. 5645. She also testified that as a result of not having a recollection of her whereabouts the night of the murders, but after being questioned a number of times, she eventually became worried about her involvement in the murders. Ttr. 5659.

2. The Stoeckley Witnesses

When Stoeckley was excused for the day, Segal sought to call a number of witnesses (hereinafter, the “Stoeckley Witnesses”)¹² who Segal explained would impeach Stoeckley by relating that she had confessed some personal knowledge or belief to them at some time in the past. Some were

¹² The “Stoeckley Witnesses” were Jane Zillioux, James Gaddis, Charles (“Red”) Underhill, Robert Bristentine, Jr., Prince E. Beasley, and William Posey.

persons who purportedly had attended the defense team's interview of Stoeckley the previous day. Segal argued that the Stoeckley Witnesses' hearsay testimony was admissible to impeach Stoeckley because it contained statements against her penal interests. Ttr 5780-85.

Judge Dupree excused the jury and permitted Segal to *voir dire* the six Stoeckley Witnesses, *see* Ttr. 5689-5774, concerning what Stoeckley had said about the MacDonald murders in the relatively distant past, then recessed for the weekend to consider whether to allow Segal to examine them in the presence of the jury. The pertinent portions of each Stoeckley Witness *voir dire* is set forth below.

a. Jane Zillioux

The first to testify was Jane Zillioux, a neighbor of Helena Stoeckley in Nashville. Ttr. 5688-5703. Zillioux testified that in November 1970, when Stoeckley was suffering from hepatitis, Zillioux went to check on her. During Zillioux's visit, Stoeckley told her that she had been involved in "some murders" but that she didn't know whether she committed them or not, and that she had been a drug user for so long that she couldn't remember. Ttr. 5693-94. Stoeckley allegedly told Zillioux that she remembered being in the rain with three boys and being terrified. *Id.* Stoeckley had told her that she looked down and saw the blood on her hands and then went home and got rid of her clothing. Ttr. 5697. Zillioux also testified that Stoeckley had told her she was wearing her wig and white boots, and remembers both of them getting wet in the rain. Ttr. 5699. Zillioux detailed for Judge Dupree her conversation with another neighbor, Bonnie Hudgins, and how Bonnie had told her that she knew it was the Green Beret murders that Helena had been involved in. Ttr. 5695. On cross-examination, Zillioux admitted that Stoeckley was shaky and almost incoherent at times during their conversation, and that she never said she committed the murders, only that she was "involved." Ttr. 5701.

b. James Gaddis

The second of the “Stoeckley witnesses” to testify was James Gaddis, a Nashville narcotics detective. Ttr. 5704-5710. He told the court that Stoeckley had told him on different occasions both that she thought she had been there but had tripped out on mescaline and LSD, and also that she knew who had done it but wasn’t there. Ttr. 5704. At times, when she gave him information about the MacDonald murders she was under the influence of drugs. Ttr. 5707. On cross-examination, Gaddis testified to inconsistencies in Stoeckley’s statements to Gaddis; sometimes she said that she witnessed the murders but was not involved, sometimes she told him she knew who was involved but couldn’t give him names, sometimes she said that she only had suspicions of who was involved, and sometimes she told him that Dr. MacDonald himself committed the murders. Ttr. 5708.

c. Red Underhill

Red Underhill knew Helena Stoeckley from her time in Nashville and testified about an interaction that he had with Helena when he went to her house one day in December, 1970. Ttr. 5711-15. He told the court that he had found Helena crying hysterically and all she could say to him was “they killed her and the two children.” Ttr. 5712-13.

d. Robert Brisenstine

Robert A. Brisenstine was an Army Polygrapher who interviewed Stoeckley about the MacDonald murders twice in April of 1970. He testified that, during these interviews, Stoeckley vacillated between believing she was involved and denying any involvement. Ttr. 5715-37. He told Judge Dupree that during an interview on April 23, 1970, Stoeckley stated that:

during a period of three to four months subsequent to the homicides in the MacDonald residence, she was convinced that she participated in the murder of Mrs. MacDonald and her two children; that she presently is of the opinion that she personally did not

actively participate in these homicides, but may have been physically present at the time of the murders; [and] that prior to the homicide she had heard the hippie element was angry with Captain MacDonald as he would not treat them by prescribing methadone for their addiction to drugs.

Ttr. at 5717. Stoeckley then retracted those statements and denied any knowledge of MacDonald, telling Brisenstine that she had been admitted to the hospital for drug addiction and “she was not always oriented as regards time, dates, and surroundings.” Ttr. at 5718. She further went on to explain the dreams she had been having were caused, she believed, by the large quantity of drugs she was consuming. *Id.* These dreams included seeing the word “pig” on a bed headboard, and a vision of MacDonald pointing at her and holding an icepick that was dripping blood. Ttr. 5719-20. She told Brisenstine that she owned, at the time of the murders, a pair of white boots, a floppy hat, and a blond wig; and that she did display wreaths and wear black the week after the homicides. *Id.*

In another interview on April 24, 1970, she claimed to know the identities of the persons who killed the MacDonald family, and then later told him that she had been lying when she told him that because “four hippies could not have entered Captain MacDonald’s home without being observed by neighbors or causing dogs to bark.” Ttr. 5722. The individuals she named as potentially having been involved were Don Harris, Bruce Fowler, Janice Fowler, Joe Kelley, and a black man named Eddie. Ttr. 5721-22. Brisenstine testified that, at least during the interview on April 23, she was under the influence of drugs. Ttr. 5724-25. He told Judge Dupree that, during these interviews, Stoeckley never told him anything about the crime scene or murders that he didn’t already know. Ttr. 5729. Brisenstine also told the court that “she honestly believed in her mind that what she was telling me was true.” Ttr. 5737.

e. Prince Beasley

After Brisenstine, the Court heard from Prince Beasley, a retired Fayetteville narcotics detective. Ttr. 5738-5751.¹³ Beasley went to Helena's apartment on the night after the MacDonald murders to ask her if she was involved. He told Judge Dupree that when he asked Helena whether or not she had participated in the crime she said to him, "in my mind, it seems that I saw this thing happen; but . . . I was heavy on mescaline." Ttr. 5742. He later went to Nashville to interview her again, at which time she told him "basically the same thing" that she had told him in Fayetteville. *Id.* at 5744. On cross-examination, however, the prosecution brought to Beasley's attention the statement that he had written after his Nashville visit. In this statement, dated March 1, 1971, Beasley wrote:

She stated that she did not remember anything that happened on the night of the murders except that she did remember getting into a blue car she thought was a Mustang and it belonged to one Bruce Fowler She again told me she had no knowledge of this night after 12:30 a.m. and that she does not know for sure what happened. . . . It is my conviction that she is involved in the MacDonald case or at least she thinks she is or that she is doing this just to get all the attention she possibly can.

Ttr. 5747.

f. William Posey

The last of the Stoeckley Witnesses was William Posey, Helena's neighbor in Fayetteville. Ttr. 5751-5774. He told the court that, on the night of the MacDonald murders, he had seen her come home in a blue mustang; knew her to wear white boots, a floppy hat and a blond wig; and saw the funeral wreaths outside her apartment the week of the MacDonald funerals. *Id.* at 5753-5758. Approximately two days before his testimony at the Article 32 hearing he went to see Helena and she told him that all she did was "hold the light," and that she remembered a "kid's horse thing" that wouldn't "roll." *Id.*

¹³ It is undisputed that Stoeckley served as an informant for Beasley when he worked for the Fayetteville Police Department. *MacDonald III*, 640 F. Supp. at 325.

at 5759-5760. She also told him that she was involved in witchcraft but that she was a “good witch.” *Id.* at 5763. On cross-examination it was established that Posey had actually sought out Bernie Segal at his hotel during the Article 32 hearing to tell his story. *Id.* at 5765-5766. After his Article 32 testimony, he was given \$150.00 by MacDonald’s army lawyer to help with his moving expenses when he felt unsafe after testifying at the hearing. *Id.* at 5771, 5773.

On Monday, August 20, 1979, having observed Stoeckley’s testimony and that of the proffered Stoeckley Witnesses, Judge Dupree denied Segal’s motion to introduce Stoeckley’s out-of-court statements through the Stoeckley Witnesses under Rule 804(b)(3) (“statements against interest”) because he concluded, “the defense failed to sufficiently show that [Stoeckley’s statements] were trustworthy when made and the testimony would only have served to confuse the jury.” *MacDonald III*, 640 F. Supp. at 318 (citing Ttr. 5806-10; Fed. R. Evid. 403 and 804(b)(3); *United States v. MacDonald (MacDonald I)*, 485 F. Supp. 1087, 1091-94 (E.D.N.C. 1979), *aff’d MacDonald II*, 688 F.2d at 230-34, *cert. denied*, 459 U.S. 1103 (1983)). Three of the Stoeckley Witnesses – Prince Beasley, Jane Zillioux, and William Posey – later were permitted to testify in the presence of the jury concerning their prior relationships with Stoeckley, but were not permitted to repeat anything Stoeckley allegedly said to them concerning the MacDonald case. Nevertheless, the transcript reflects that the defense team was able to craft many of its questions to these witnesses so that the Government’s objections were rendered useless. For instance, Segal asked Jane Zillioux:

SEGAL: Did Ms. Stoeckley say anything to you within the time that you were in the room – witness room with her – about having carried a lighted candle in February of 1970?

MR. BLACKBURN: Objection.

THE COURT: Sustained.

Ttr. 5885-86.

Additionally, after Judge Dupree made his ruling about the Stoeckley Witnesses, he also heard additional *voir dire* testimony from Underhill and an attorney working as a law clerk for Segal, Wendy Rouder. The impetus for this *voir dire* testimony were statements Stoeckley had made over the course of August 18-19, 1979, during a weekend recess from the MacDonald trial.¹⁴ The circumstances surrounding these statements are as follows.

After Stoeckley had completed her testimony on Friday, August 17th, the defense team served her with a subpoena so that she could be released from the bench warrant, and had provided her with the means to rent a motel room over the weekend, with the instruction that she return to court on Monday. Ttr. 5951. Mid-morning on Sunday, August 19, 1979, Segal dispatched Rouder to the Raleigh motel where Stoeckley was staying. Ttr. 5929. The motel management had complained of a disturbance involving Stoeckley and the complaint had gotten back to Segal. Rouder explained, “Mr. Segal had informed me that Ms. Stoeckley had been beaten and possibly had been subjected to a drowning. He asked me to check into her well-being. The rumor or the hearsay as you might say had been that her fiancé had inflicted this attack upon her and it would be best if in some way I could help separate them for her own safety.” *Id.* Rouder drove to the motel with Underhill, *see id.*, located and talked with Stoeckley, who had acquired a black eye and bloody nose since she had been in court.¹⁵ Stoeckley

¹⁴ In addition to making statements to Underhill and Rouder, Stoeckley also called Judge Dupree during the weekend recess. Judge Dupree informed the attorneys during a bench conference: “I want you to know that among others called by Helena, she called me twice Saturday night stating that she was living in mortal dread of physical harm by Bernard Segal, counsel for the Defendant, and that she wanted a lawyer to represent her.” Ttr. 5980.

¹⁵ Rouder believed Stoeckley had been assaulted by her then-boyfriend, Ernest Davis, who also was present at the original motel. Red Underhill also testified on *voir dire* that he observed the black eye and bloody nose. Ttr. 5907-08. Stoeckley had told him that an unknown person had approached her at the motel and punched her in the face, blackening her eye. Ttr. 5925. Stoeckley told both Underhill and

wanted her fiancé, Mr. Davis to leave, and she packed his suitcase. Ttr. 5930.

Rouder arranged for Stoeckley to relocate to the Hilton, and drove her and Underhill there. Ttr. 5929-30; 5935, 5943-44. Stoeckley told Rouder that she was afraid and wanted someone to stay with her.¹⁶ Ttr. 5931; 5936. While the packing, driving and relocating took place, Rouder talked privately with Stoeckley about the substance of Stoeckley's trial testimony. Ttr. 5932-34, 5937; 5939-42.

According to Rouder's *voir dire* testimony in 1979, with the aid of her notes made at Segal's request, *see* Ttr. 5932, Stoeckley had said she still thought she "could have been there that night," *see* Ttr. 5932; 5938-39, because of the rocking horse, *see* Ttr. 5939; that when she saw the crime scene photographs of one of the children she "knew" she had seen her somewhere before, *see* Ttr. 5932; that she remembered being on that concrete driveway, *see id.*; and that she had a memory of "standing at the couch, holding a candle, only – you know – it wasn't dripping wax. It was dripping blood." Ttr. 5937, 5945. Rouder had remarked, "It must have been difficult living with the guilt all these years," to which Stoeckley allegedly responded, "yes Why do you think I've taken all those damned drugs?" Ttr. 5941. Rouder asked Stoeckley, "Isn't there anything you think you can do to help get rid of the guilt," to which Stoeckley allegedly suggested, "I just want to take sodium pentothol or hypnosis or something." Ttr. 5934. When Rouder asked Stoeckley why she didn't say this in court, Stoeckley responded: "I can't with those damn prosecutors sitting there." Ttr. 5937.

Rouder that she had fallen in the bathroom and bloodied her nose. Ttr. 5925, 5944.

¹⁶ Underhill related during *voir dire* that Stoeckley had wanted him to stay with her over the weekend because she was afraid. She had told him that, "her life would not be worth five cents out on the street, because, said [sic], 'They'll kill me for sure.'" *Id.* at Ttr 5922; *see also id.* at Ttr. 5913-22. Underhill also testified that Stoeckley was "deathly scared" of Allen Mazzarole, *id.* at Ttr. 5924, whose name had been tossed around during the trial suggesting he might have been one of the "hippies" who had committed the MacDonald murders.

Blackburn cross-examined both Underhill and Rouder, but neither he nor the defense team ever called Stoeckley back as a witness. Judge Dupree refused to permit either Rouder or Underhill to testify in the presence of the jury concerning the weekend's activities and Stoeckley's alleged statements. *See* Ttr. 5976-77.¹⁷

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

H. Evidence presented in 1984 new trial motion

MacDonald filed a series of motions in 1984, including a motion for new trial pursuant to Rule 33 of the Federal Criminal Rules of Procedure. The new trial motion was premised on alleged confessions made by Stoeckley to various individuals, including a series of confessions she gave to

¹⁷ Specifically, Judge Dupree remarked:

I also remain of the opinion, gentlemen – let me say this: this Stoeckley girl I think is one of the most tragic figures that I have ever had to appear in court.

A girl coming out of high school at 15 years of age and going on into the drug culture, and absolutely burning her mind out with opium, heroin, mescaline, LSD, and marihuana, and having gone, now, what must 11 or 12 years in this –one of the most tragic figures that I have ever seen in a courtroom.

But the picture emerges, though, of a person whose mind is so far impaired and distorted by this drug addiction that she has become and remains in an almost constant state of hallucination.

That she is extremely paranoid about this particular thing, and that what she tells here in court and what she tells witnesses, lawyers in a motel room, simply cannot have attached to it any credibility at all in my opinion.

. . . . It is perhaps the most clearly untrustworthy evidence that I have had put before me. . . .

I think this jury having heard her for the better part of a day would be in a good position now to evaluate her and her story, and everything about it, as they'll ever be if you brought not just these Friday's six witnesses, or these three who have testified today, but if you brought a wagon load of people—everybody that you ever talked to about this thing.

I still think this jury has got and should have a clear picture of this particular witness as they will ever have.

Ttr. 5975-77.

Prince Beasley and private investigator Ted Gunderson during the period of October 1980 to May 1982. MacDonald also proffered statements by Greg Mitchell and Cathy Perry, as well as affidavits of other witnesses which allegedly corroborate the involvement of Stoeckley, Mitchell, and Perry in the murders. Judge Dupree denied MacDonald's motion for new trial, reasoning that the new evidence would not produce a different result in a new trial. *MacDonald III*, 640 F. Supp. at 333. The evidence supporting the MacDonald's motion for a new trial is recounted below.

1. Stoeckley's confessions

Judge Dupree summarized¹⁸ the substance of Stoeckley's confessions,¹⁹ in the light most favorable to MacDonald,²⁰ as follows:

Stoeckley was a member of a satanic cult which was angry with military physicians, MacDonald among them, because they refused to help drug users with their problems. The leader of the cult decided to approach MacDonald in an attempt to obtain drugs from him and persuade him to treat drug addicts.

Stoeckley was assigned responsibility for determining the whereabouts of Colette MacDonald on the night of February 16, 1970 and made a pretext phone call to the MacDonald residence at about 6:30 p.m. that evening and learned that Colette would be attending school at a North Carolina State University Extension at Fort Bragg that evening. She and several other members of the cult later went to the North Carolina State University Extension and spoke with her in an unsuccessful attempt to persuade her to talk to her husband about the cult's concerns.

¹⁸ The court reiterates that it has independently reviewed the record as whole. Given Judge Dupree's succinct and accurate summary of Stoeckley's statements, the court sees no reason to reinvent the wheel in laying out the record in this case.

¹⁹ Judge Dupree was not presented with the recordings or transcripts of Stoeckley's statements; rather, MacDonald submitted the declaration of Beasley and the unsigned unsworn declaration of Gunderson.

²⁰ Judge Dupree noted that Stoeckley's statements "contain numerous inconsistencies rendering it almost impossible to reconcile them into one cohesive statement of events," but in order to give MacDonald "the benefit of all doubts" he chose "to recite in large part what MacDonald claims Stoeckley's statements prove occurred on the night of the murders and thereafter." *MacDonald III*, 640 F. Supp. at 321. n.22.

Later that evening, at approximately 10:30 p.m., Stoeckley, Greg Mitchell, Shelby Don Harris, Bruce Fowler, and Dwight Edwin Smith met at Stoeckley's apartment where they discussed their plans to go to MacDonald's apartment to seek his cooperation. Stoeckley thereafter took some mescaline offered to her by Greg Mitchell and the group went to two local restaurants where they stayed until the restaurants closed.

The Stoeckley group left a Dunkin Donuts restaurant at about 2:00 a.m. and drove to the MacDonald residence. Bruce Fowler then parked the car nearby and the group walked along the sidewalk to the rear of MacDonald's apartment and entered the home through a utility room door. It was dark inside the house and Stoeckley lit a candle to help the group find their way. They walked through the house and into the living room where they found MacDonald asleep on the living room couch with a book across his chest and a Valentine's Day card on the couch next to him. Stoeckley noticed that the television was on but there was no picture because there was no programming that late.

Some members of the group shook MacDonald to awaken him so that they could talk to him about drugs but upon awakening he became excited and began to fight with them. During the fight, Stoeckley chanted "acid is groovy; kill the pigs." When the group finally subdued MacDonald, they told him that they wanted drugs and he agreed to call a friend of his to see if he could get some. He went to a wall telephone in the kitchen but instead of calling a friend, he attempted to call the military police. The group overheard the conversation and again assaulted MacDonald, this time knocking him unconscious.

According to Stoeckley, things "got out of control" at this point and she heard Colette MacDonald calling to her husband for help from the master bedroom. Stoeckley went to the room where she saw Colette being assaulted by Greg Mitchell and another member of the group. She noted that one of the MacDonald children was in the master bedroom with her mother but appeared to be asleep. Stoeckley left the master bedroom and went into one of the children's bedrooms where she saw a record player, some books and a hobby horse which she noted was broken. She then heard the sound of running water in a bathroom and looked in to see Greg Mitchell washing his hands at the sink.

Stoeckley then heard a telephone ring and another member of the group told her to answer it. She answered the telephone and heard a soft voice ask for "Dr. MacDonald" whereupon she began to laugh until someone in the group ordered her to hang up the telephone. The group became scared and left in a hurry, leaving all of the murder weapons behind except for a pair of scissors.

After leaving MacDonald's apartment, the group went to a Dunkin Donuts where Stoeckley went inside and washed her hands. She was eventually taken home at about 4:30 a.m. When asked by her roommate a few days after the murders why she had participated in the crimes, Stoeckley told her roommate that the MacDonalds deserved to die. She disposed of her floppy hat which she had been wearing during the murders and gave her blood-stained clothes and boots, which she had also worn, to a friend of

hers, Cathy Perry. She told Perry to dispose of all of these items. The members of her cult eventually moved away from the Fayetteville, North Carolina area and lost contact with each other.

Called to testify at MacDonald's trial nine years later, Stoeckley perjured herself in order to escape prosecution. She eventually decided to confess to the crimes to clear her conscience.

MacDonald III, 640 F. Supp. at 321-22. Judge Dupree observed that Stoeckley's numerous statements were predominated by contradictions and inaccuracies, including: (1) varying the size and composition of the group of intruders from statement to statement; (2) changing whether the events took place at all depending on whether she was speaking to MacDonald's investigators or the FBI; (3) stating on several occasions that an individual, Allen Mazerolle, was with the group of intruders when prison records confirmed that he was in jail the three weeks before and after the murders; (4) claiming that the group talked with MacDonald for eight minutes after awakening him, which was inconsistent with MacDonald's own version of events; and (5) stating she had been in the apartment prior to the murders and had stolen jewelry. *Id.* at 322-23. Judge Dupree also took note of the conditions under which Stoeckley rendered her confessions to Beasley and Gunderson. *Id.* at 319 n. 20 (referencing evidence showing that "Gunderson and Beasley interviewed Stoeckley for hours upon hours, day after day" and observing that the "heavy-handed tactics . . . call into question the voluntariness and truth of Stoeckley's confessions despite her statements to the contrary").

2. Greg Mitchell's statements

MacDonald also proffered the declarations of individuals who claimed that Greg Mitchell – someone Stoeckley implicated in her statements to Beasley and Gunderson – also confessed to the murders.

a. The Manor

The Manor was a ministry in Fayetteville, North Carolina, in the 1970s that provided counseling and help to young people who had problems with alcohol and drugs. Anne Sutton Cannady, who worked at the Manor, stated that a man fitting Greg Mitchell's description arrived at The Manor, on a Wednesday in the early part of March 1971. Several days after his arrival, the man attended a prayer session, where he said he was part of a cult in Fayetteville and had murdered people. Decl. of Anne Sutton Cannady, DX 5023. Reverend Randy Phillips, who worked at the Manor, stated in a declaration that he understood that the man "said something to the effect that he was partly responsible for the MacDonald slayings." Decl. of Randy Phillips, DX 5022. The man left the following day after having stolen clothes belonging to Phillips.

Following the man's departure, Phillips, Cannady and another individual went to a farmhouse owned by The Manor to make sure it was secure. Upon their arrival, they saw the man who had confessed run out the backdoor with another person and into a wooded area. Inside the house, Cannady saw the phrase "I killed MacDonald's wife and children" written on one of the bedroom walls in red paint. When Phillips and Cannady later returned to the farmhouse, someone had painted over the walls.

Anne Sutton Cannady later identified, from a photo array, a photograph of Greg Mitchell as showing the man who had confessed to the murders and painted on the farmhouse wall.

When ruling on the 1984 motion, Judge Dupree characterized this evidence as "at best speculative and circumstantial," noting that neither Cannady nor Phillips "personally knew Mitchell and only Cannaday [sic] heard the statement by a young man to the effect that he had 'murdered people.'" *MacDonald III*, 640 F. Supp. at 328. Judge Dupree declined to "accept this one statement to Cannaday [sic] over fourteen years ago by a man she did not know was evidence of any substance that

Greg Mitchell confessed to the MacDonald murders” and he also found the statement that “two unidentified men were seen running from a farmhouse which had been vandalized” to be “only weakly connected to Mitchell.” *Id.*²¹

b. The Lanes

MacDonald also submitted the declarations of Norma and Bryant Lane, a couple Greg Mitchell befriended in Charlotte, North Carolina, in the 1970s. Both Norma and Bryant stated that they recalled a incident in 1977 where Mitchell was depressed and when they inquired about what was bothering him, Mitchell replied that he could not tell anyone because it was too horrible to talk about. Later, in 1982, Mitchell, visibly upset, visited the Lane’s house, seeking money to leave the country because the FBI was after him. He told Norma Lane that he was guilty of a crime that happened a long time ago at Fort Bragg. DX 5024A, DX 5024B.

Judge Dupree found the Lane declarations to be unpersuasive “because Mitchell made no specific reference to having been involved in the MacDonald slayings and voluntarily appeared at the Charlotte, North Carolina office of the FBI in late 1981 where he denied any knowledge of the murders.” *MacDonald III*, 640 F. Supp. at 328.

3. Cathy Perry’s statements

On November 17, 1984, Cathy Perry,²² who was a resident of Fayetteville, North Carolina in the early 1970s, gave a statement to an FBI agent. At the time she gave the statement, she had been diagnosed as a schizophrenic and was under a doctor’s care. In her statement, Perry said that on the

²¹ Judge Dupree’s characterization of the evidence before him and the rulings thereon are not now binding on the court.

²² At the time she gave the statement, Cathy Perry was known as “Cathy Perry Williams.” The court will refer to her as Cathy Perry in this Order.

evening of February 16, 1970, she was outside a “head shop” in Fayetteville when she was persuaded to get into a white stationwagon with two white females and five or six white males. The group broke into the front door of a house, where the group found a white male lying on the couch. Someone in the group shot the white male up with some sort of narcotic and the male collapsed. Perry was not permitted to leave, and she was forced to take a pill. She said that a male in the group said the man who lived in the house was a doctor and he turned people in who used drugs.

Perry told the FBI that everyone went upstairs, and some of the group started beating a baby in a blanket. Perry said she tried to hide another male child in a closet while the baby boy was killed in the bathroom. Perry also described trying to wake the mother of the children and persuade her to jump out a window to escape, but eventually being forced to kill the mother. Perry reported that after murdering the mother, she wrote in blood on the wall, “Fuck you pigs from all of us to you,” along with the year. She reported being in the house from approximately 11 p.m until 4 or 5 a.m., and described the weather as being warm with no rain. *MacDonald III*, 640 F. Supp. at 329. *See also* DX 5034.²³

4. Additional statements

MacDonald also presented the declarations of more than 20 witnesses and offered testimony from several witnesses to corroborate the involvement of Stoeckley, Perry, and Mitchell in the murders. Of particular note, MacDonald offered the declarations of Keith Bowen, Mable Campbell, John Humphries, Frankie Bushey, Marion Campbell, Joan Sonderson, Addie Willis Johnstone, Edith Boushey, Carlos Torres, Dorothy Averitt, Prince Beasley, Jimmy Friar, Lynne Markstein and Richard Comisky.

²³ Judge Dupree observed that “[a]pparent from the most superficial reading of [Perry’s] statement is that the facts retold by her are completely at odds with the known facts and those MacDonald claims were confessed to by Stoeckley.” *Id.*

a. Keith Bowen

In a declaration, Keith Bowen stated that Stoeckley associated with a group of people which included Cathy Perry, Shelby Don Harris, Greg Mitchell, Jackie Don Wolverton, and a black man who wore an Army jacket with E-6 stripes known as “Moses.” According to Bowen, everyone in the group used LSD on a regular basis. DX 5068.

b. Mable Campbell

Shortly before February 17, 1970, Mable Campbell was on her way to work when she observed four individuals – two white males, one black male, and one white female – standing next to a dark colored vehicle at a drive-in, in Fayetteville. The female was wearing a floppy hat and boots. Campbell later picked out a photograph of Greg Mitchell from a photo array as one of the men she had seen and said that a female in a floppy hat depicted in a police artist’s sketch resembled the woman. DX 5070.

c. John Humphries

John Humphries, a former military policeman, owned a rock shop on Bragg Boulevard in Fayetteville. On the evening of February 16, 1970, between 6 and 7 p.m., three men –two white and one black – came into his shop. Humphries could tell the men were high. After Humphries displayed his gun, the group left his store and got into an eggshell white van parked outside. He saw a woman sitting in the van wearing a big white floppy hat. Humphries reported what he saw to both the FBI and the CID, but he received no response from either agency. DX 5067.

d. Frankie Bushey

At approximately 11:15 p.m. on February 16, 1970, Frankie Bushey and some friends stopped to eat at a Dunkin’ Donuts. Around midnight, four “hippies” – a white female and three males – entered the restaurant. The female had blond hair and wore a light colored floppy hat and a light colored jacket.

She carried a large shoulder bag and appeared to be on drugs. A husky, unshaven, bushy-haired man was holding on to the woman. The second man had a dark complexion and slanted eyes, and the third was short, had a fair complexion, squinted eyes, and walked with a slouch. When Bushey left Dunkin' Donuts at approximately 12:55 a.m., the four people were seated in a booth behind her. DX 5046.

e. Marion Campbell

Marion Campbell also was at the Fayetteville Dunkin' Donuts. She arrived with her husband at approximately 12:50 a.m. on February 17, 1970. While she and her husband were eating, she saw a group composed of a white man, black man, and white woman walking out the aisle. The woman wore a white mini-skirt and a white blouse with a light sweater, white boots which came to just below her knee that had clay-like stains on them, and a white straw-like hat with a floppy brim. The woman was blond, and appeared to be 19 years old and dazed. The white man also appeared to be dazed. The black man had on an olive drab field or fatigue jacket.

After the group left the restaurant, Campbell saw a black or blue van stopped parallel to the window near where she was sitting. The white woman was in the passenger seat, and the black man was driving. A white man on a black motorcycle pulled up near the van, and the black man said to him, "We'll see you there." The black van pulled out of the parking lot and headed in the direction toward Fort Bragg around 1:30 a.m. DX 5071.

f. Joan Sonderson

Joan Sonderson worked as a waitress at a drive-in restaurant on Fort Bragg. When she arrived at work between 8:00 a.m. and 9:00 a.m. on the morning on February 17, 1970, she noticed a two-tone car parked in her service area, apparently passengerless. She later discovered that three individuals, including a white woman and a black male, had been sleeping in the car. The white woman had long

hair and wore a floppy hat and boots. The woman asked Sonderson if she knew that the MacDonalds had been murdered the previous night. While the woman was talking with Sonderson, the black male exited the vehicle to use the restroom. He wore an army fatigue jacket. DX 5020.

g. Addie Willis Johnstone

MacDonald represents that Addie Willis Johnstone saw four individuals standing at the intersection of Hillsborough and Western Boulevards in Raleigh, North Carolina, at noon on February 17, 1970. The group included a white woman with stringy blond hair, wearing a beige floppy hat and boots; a black man in an Army fatigue jacket, and two white males.²⁴

h. Edith Boushey

In February 1970, Edith Boushey taught English and coordinated the Modern Languages program at the North Carolina State University Extension program at Fort Bragg. Boushey stated that at about 9:40 p.m. on February 16, 1970, she walked past a group of people near a stairwell of a building on campus and saw a man whom she identified as Greg Mitchell talking to a woman she identified as Colette MacDonald. As Boushey walked by, she heard Greg Mitchell say: "If you go along, I think it will be alright." She heard Colette reply, "I dread . . ." but could not hear the remainder of the response. Boushey stated that the group included at least three other women, including two wearing floppy hats. DX 5044.

Judge Dupree noted that Boushey's account was directly contradicted by the affidavit of Elizabeth Ramage, who accompanied Colette to class on the evening of February 16, 1970, and was with her at all times until Colette dropped Ramage off on the way home from class. Ramage stated that she and Colette left between 9:20 and 9:30 p.m. *MacDonald III*, 640 F. Supp. at 326. Judge Dupree

²⁴ No declaration or affidavit of Johnstone was submitted in the latest filings with the court.

also noted the inconsistencies between Stoeckley's version of the meeting with Colette and Boushey's declaration. Accordingly, the court found Boushey's statements to be "of no corroborative value." *Id.*

i. Carlos Torres

As Judge Dupree recounted, Torres testified at the hearing on MacDonald's motion for new trial that

he was stationed at Fort Bragg, North Carolina, in February of 1970 and was working part-time at the post NCO club. Torres left the club about 2:00 a.m. and proceeded up Bragg Boulevard until he stopped at a stoplight near Castle Drive. While stopped at the light, he noticed a blue 1962 or 1964 Volkswagen stationwagon parked on the side of the road. He observed one person in the van, one outside the van, and two other people walking toward the van from a wooded area but was unable to identify any of the four people.

MacDonald III, 640 F. Supp. at 326-27; *see also* September 19, 1984 Hearing Transcript [DE-136-4] 14-25. Judge Dupree found Torres' testimony to be not credible as corroboration of Stoeckley's confessions, noting that Stoeckley said her group was riding in a Ford Mustang, and not a Volkswagen van, on the night of the murders. Judge Dupree also noted that on cross-examination, Torres admitted that in early 1970 he had just returned from Vietnam, was in the process of a divorce, and "'wasn't in a condition to reveal this and get any more nervous and attention.'" *Id.* at 327.

j. Dorothy Averitt

MacDonald also offered the testimony of Dorothy Averitt, who stated that on February 17, 1970, she drove to a grocery store at 4625 Murchison Road in Fayetteville. *See* September 19, 1984 Hearing Transcript [DE-136-3] at 25. When she pulled into the parking lot, she saw two men sitting in the backseat of a dark car parked outside the store. *Id.* at 26. Upon entering the store, Averitt saw a woman who was wearing a blond wig that was falling off and exposing her dark hair, a wide-brimmed weather hat, a light cream colored plastic coat, a dark skirt, and 3/4 length white boots

covered by a dark substance. *Id.* at 28-30. According to Averitt, the woman smelled like a “hog killing” and seemed to be in a fog. *Id.* at 31. When Averitt attempted to speak with her, a black man in an Army field jacket directed the woman to leave with him. *Id.* at 32-33.

k. Prince Beasley

In addition to offering Prince Beasley’s testimony as to the substance of Helena Stoeckley’s confessions, MacDonald also offered Beasley’s testimony and statements to corroborate Stoeckley’s confessions. Specifically, Beasley stated that on February 16, 1970, he was on duty as a Fayetteville police detective, and saw Stoeckley and a black male exit a blue Ford Mustang near the Village Shoppe restaurant around 10:50 p.m. He said that Stoeckley was wearing a blond wig, a floppy hat, and was carrying a light colored hand bag. He said the black male was wearing an Army jacket with E-6 insignia. Beasley also stated that he stopped Stoeckley and some male companions at approximately 2:15 a.m. on February 18, 1970, because he believed Stoeckley and her friends matched the description of the suspects. Beasley asserted he radioed the police department and asked them to call the Army CID and tell them he had located suspects in the MacDonald murders. After waiting an hour, he let Stoeckley and her companions go because they were threatening him. DX 5019. Beasley gave somewhat similar *voir dire* testimony at MacDonald’s trial. *See* Ttr. 5741-42. MacDonald also proffered the declaration of Blane O’Brian, who was a Cumberland County deputy sheriff in February 1970. He stated that on February 18, 1970, at about 2:30 a.m., he heard Beasley call the Fayetteville police dispatcher regarding suspects in the MacDonald murders. O’Brian heard the dispatcher respond that he would inform Army CID. O’Brian also heard Beasley call the dispatcher again an hour later, and the dispatcher respond that no one from Fort Bragg could meet with Beasley. DX 5032.

With regard to Beasley’s statements, Judge Dupree observed:

Former Fayetteville detective Prince Beasley figures prominently in MacDonald's motion for a new trial because of his relationship to Helena Stoeckley. Stoeckley worked for Beasley as an informant in Fayetteville in 1970 and their friendship appears to have lasted until the time of Stoeckley's death. The court's impression from the record is that Stoeckley looked up to Beasley and Beasley gave her the attention which she seems to have at times sought. At all stages of the case, the defense has obtained information from Stoeckley by using Beasley as its contact with her.

Beasley has given a series of statements, trial testimony and affidavits over the years which substantiate Stoeckley's involvement in the crimes. These statements have rarely been accurate. Upon hearing Beasley's *voir dire* testimony at trial to the effect that he had stopped Stoeckley and several of her male companions for about an hour on the morning of the murders and then let them go when CID agents did not arrive on the scene, this court noted that

[i]f it is within the province of this court to pass on the trustworthiness of a witness who proposes to testify . . . this court would be constrained to hold Officer Beasley's testimony to be unreliable. It is simply incredible that any self-respecting, competent police officer who really thought that he had a substantial lead toward solving these sensational murders would allow the suspects to go after waiting only an hour for the Army investigators

[*MacDonald I*], 485 F. Supp. at 1092.

The court's evaluation of the trustworthiness of Beasley in 1979 is left unchanged by his most recent statements and the court's observation of the demeanor of this witness during the evidentiary hearing on the post-trial motions. While the court does not believe this seriously ill man to be lying, medical records introduced by the prosecutors clearly show that he cannot consistently distinguish fact from fiction.

MacDonald III, 640 F. Supp. at 325.

I. Ernest Davis

Ernest Davis was engaged to Stoeckley at the time of the MacDonald trial and the two married the next year. In 1983, he signed a declaration stating that after the trial, Stoeckley told him she thought she had been in the MacDonald home the night of the murders. DX 5018. Davis stated that Stoeckley told him that she had gone into Dunkin' Donuts the night of the murders with blood on her hands and

washed them there. Davis also stated that Stoeckley told him she remembered: (1) “standing in her driveway the night of the murders and taking two hits of mescaline with Greg Mitchell”; (2) “going into a bedroom to keep the kids quiet” and that “[w]hen she came out, MacDonald was already stabbed and Colette MacDonald was screaming” and “[t]he next thing she remembered was standing in the living room, holding a candle” with “[b]lood dripping off her hand”; (3) that someone went in the MacDonalds’ jewelry box and took some things out; and (4) leaving in a hurry and leaving all the weapons, other than a pair of scissors behind.” She told Davis that “she acted confused at the trial in order to fool the judge.” DX 5018.

m. Greg Mitchell’s left-handedness

MacDonald also proffered the declaration of Greg Mitchell’s widow, Pat, who stated that Greg was left-handed. DX 5049. He also proffered the declaration of Ronald K. Wright, M.D., stating that he was of the opinion that

based upon the location of the injuries suffered by Colette MacDonald and the nature of those injuries . . . the blow which fractured Colette MacDonald’s skull was struck with a club that was in a left-handed swing by a person facing Mrs. MacDonald at the time she was standing [and because] the blow was very forceful I have concluded that it is consistent with someone who is left-handed.

DX 5049. Dr. Wright, however, later admitted on September 4, 1984, that

[i]ndividuals intoxicated with psychomimetic drugs or enraged by their wife cannot be presumed to strike with their handed side. Therefore, while perhaps slightly more often forceful blows delivered from a deceased’s right to left are delivered by lefthanded folk (adjusting for their minority status); it is certainly not unusual to see such a blow delivered by a righthanded individual.

MacDonald III, 640 F. Supp. at 328.

n. Jimmy Friar

In a declaration dated July 25, 1983, Jimmy Friar stated that he was an in-patient at the Womack Army Hospital at Fort Bragg in February 1970. Prior to being treated at Womack, he had been a patient at Walter Reed Hospital in Washington, D.C., where he had been treated by Dr. Richard MacDonald. While there, Friar became friendly with Dr. Richard MacDonald. On a couple of occasions while he was being treated at Walter Reed, Friar had gotten drunk, and he would call Dr. Richard MacDonald for help in getting back to the hospital.

Friar stated that on the evening of February 16, 1970, he persuaded an orderly to let him leave the hospital so he could go to Fayetteville to drink and shoot pool. When Friar eventually decided to return to Fort Bragg, he had no money to use a taxi and the buses had stopped running. Friar, who stated he was disoriented at the time and thought he was still in Washington, D.C., decided to try to contact Dr. Richard MacDonald. He stated that while at the Wade Hampton Hotel he called the base operator, and represented himself as a doctor who was friends with “Dr. MacDonald.” He did not specify Dr. MacDonald’s first name. The operator gave him a number, which he called around 2:00 a.m. A woman, who was laughing, answered the phone, and Friar asked for Dr. MacDonald. Friar stated that he heard someone in the background say, “Hang up the God-damned phone” and the phone was disconnected. DX 5021.

o. Lynne Markstein

On August 20, 1970, Lynne Markstein was in a traffic accident in Raleigh and taken to a hospital for treatment. DX 5017 ¶ 1. Markstein stated that while she was waiting in the x-ray waiting room, Stoeckley introduced herself and told Markstein she was in town to testify in the MacDonald trial. Stoeckley also told Markstein that she was at the MacDonald house when the murders occurred,

and she remembered standing over an uncovered bloody child in a bed. DX 5017 ¶ 3. Stoeckley asked Markstein: “Can you imagine someone like me doing that to those babies?” *Id.* She also told Markstein that she was under the influence of drugs at the time of the murder, and that she had been unable to remember any facts about the MacDonald murders until the time of trial. DX 5017 ¶ 4.

p. Richard Comisky

MacDonald also proffered the declaration of Richard Comisky, a man who resided in Fayetteville in 1970 and knew Stoeckley. DX 5016. Comisky stated that sometime between August and October 1970, he had a conversation with Stoeckley and another young, white man in “Skag” Park in Fayetteville. During the course of the conversation, Stoeckley told Comisky that “we did the MacDonald thing,” and when he asked what she meant, she replied, “we did the killings.” DX 5016 ¶ 3. She told Comisky that when the police questioned her, she was wearing the same clothes she had worn during the murders, including a wig, a hat and boots, all of which she later burned. DX 5016 ¶ 4. Stoeckley also asked Comisky whether fingerprints could be obtained from wax; Comisky stated that he did not know. DX 5016 ¶ 6.

I. Evidence underlying 1984 § 2255 motion

In 1984, MacDonald also moved pursuant to § 2255 to set aside his conviction, arguing the Government suppressed exculpatory evidence which, had it been introduced at trial, would have caused the jury to acquit him of the murders. The allegedly suppressed evidence included: “(1) a half-filled bloody syringe; (2) bloody clothes and boots claimed to have belonged to either Helena Stoeckley or Cathy Perry . . . ; (3) skin found under Colette MacDonald’s fingernail; and (4) photographs of the letter “G” printed on the wall of Helena Stoeckley’s apartment in Nashville, Tennessee.” *MacDonald III*, 640 F. Supp. at 299. Judge Dupree denied this motion, concluding that the Government did not

deliberately suppress anything and had acted in good faith, and also finding that this evidence did not meet the materiality requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). See *MacDonald III*, 640 F. Supp. at 309. The evidence supporting this motion is recounted below.

1. Syringe

MacDonald proffered a document in which FBI agents summarized their debriefing of Robert Shaw, who was in charge of the CID investigation, and Hilyard Medlin, who was in charge of the United States Army Crime Laboratory Forces dispatched to help CID investigators process the MacDonald crime scene. Both men were debriefed on February 21, 1970. The report included, in pertinent part, the following:

Mr. Medlin also advised that a half filled syringe that contained an as yet unknown fluid was located in a hall closet, which also contained some evidence of blood. In this connection, Medlin said that it appeared that someone with a bloody hand had reached into this cabinet containing medical supplies for some purpose.

DX 5079.

Noting that “[t]he only evidence that a ‘half-filled bloody syringe’ ever existed is contained in Medlin’s somewhat ambiguous statement to Agent Tool,” Judge Dupree found that there was insufficient evidence from which the court could conclude that a “half-filled bloody syringe” in fact existed. *MacDonald III*, 640 F. Supp. at 301. Specifically, Judge Dupree observed that

Medlin’s affidavit indicates [that] when he made his statement to Agent Tool he was only summarizing the information provided to him by other members of the crime scene processing team. . . . He had no first-hand knowledge of the contents of the closet and denies ever seeing a half-filled syringe which bore blood stains. The implication of his statement and its second-hand nature is that Medlin misunderstood what the other investigators told him about the contents of the closet. In fact this is what must have occurred, for investigative agents with firsthand knowledge of the contents of the hall closet state, or would state if called to testify at trial, that no “bloody half-filled syringe” or other half-filled syringe was found in the closet. . . . Moreover, the chemist who processed the hall closet for blood stains, Craig Chamberlain, and the

agent who inventoried the medical supplies in the closet, Hagan Rossi, state without reservation that no syringe of any kind was found during the crime scene investigation.

Id. Accordingly, Judge Dupree found MacDonald's assertion that the half-filled syringe existed to be not plausible.

2. Bloody clothes and boots

MacDonald also asserted that in early 1971, the CID came into possession of bloody clothes or boots belonging either to Stoeckley or Cathy Perry. The evidence presented to Judge Dupree showed that in late 1970 or early 1971, Cathy Perry, after stabbing her roommate Jackie Don Wolverton, moved into Betty Garcia's home for a few days. *MacDonald III*, 640 F. Supp. at 302-03. Wolverton gave Garcia some of Perry's belongings that were in his apartment. When Perry was thereafter admitted to a mental hospital, Garcia asked Wolverton to collect the remainder of Perry's belongings. Wolverton then went to various places where Perry had stayed, and gathered items that he thought belonged to her, but also could have belonged to other people, and eventually gave them to Garcia. When going through clothing, Garcia found a pair of beige boots, and other non-specified items which led her to believe that Perry was involved in the MacDonald murders. *Id.* at 303.

Garcia provided all of Perry's possessions to her attorney, Charles Kirman, who in turn gave the items to James R. Nance, an attorney who had represented MacDonald in a civil action. On the afternoon of January 6, 1971, Nance went to the offices of Captain James Douthat, MacDonald's appointed military counsel at the Article 32 proceedings, and released the Perry items to CID agents William Ivory and Peter Kearns. Ivory prepared a Military Police Receipt for Property listing the items received by Nance, which was signed by Nance, Ivory and Douthat. No clothes were listed on the receipt, but the items did include a "Pair of Woman's boots, beige, w/tag THE GREAT BOOTS by

GOLD SEAL.” *Id.* at 303. The receipt did not indicate that the boots, or any other items, were blood-stained. When routine laboratory analysis failed to provide any link between the boots and the MacDonald case, the boots and other items were returned to Garcia.

Judge Dupree concluded that “[t]here is no evidence from which the court can find that any items other than those listed on the military property receipt were given to CID Agents Ivory and Kearns.” *Id.* Judge Dupree also found that the boots were not blood-stained, crediting the affidavits of Agents Kearns and Ivory and Kearns’ sworn statement in April 1972 concerning the boots, especially when compared to the affidavits of Nance and Garcia regarding a possible brown stain on the boots. *Id.* at 304.²⁵

3. Skin found under Colette’s fingernail

The evidence before Judge Dupree was that a small fragment of skin was found under one of Colette’s fingernails during her autopsy, but that sometime between February 28, 1970, and December 19, 1970, the piece of skin was lost.

4. Photographs of the letter “G”

MacDonald also proffered evidence showing that in December of 1970, CID photographer Frank M. Toledo took photographs of the walls of Stoeckley’s former apartment in Nashville,

²⁵ The only other evidence before Judge Dupree concerning the existence of bloody clothing or boots was the declaration of Prince Beasley, wherein he stated that Garcia told him Perry asked her to hold a bundle of clothing for her because the police were after her. Garcia looked through the materials and saw some clothing and boots had blood on them. A few weeks later, Garcia received a phone call from Perry’s parents asking her to destroy the materials. Garcia threw out the clothing, but kept the boots and other items, including a calendar with the date February 17, 1970, circled on it. DX 5019. Beasley’s testimony before Judge Dupree was that Stoeckley knew that Perry had taken some clothes and given them to Garcia, but that Stoeckley did not specify to whom the clothes belonged. Transcript of Beasley’s Hearing Testimony [DE-136-9] at 20.

Tennessee. *MacDonald III*, 640 F. Supp. at 308. Toledo had previously worked on the MacDonald case and saw the crime scene.

Stoeckley had put palm and fingerprints on the walls in paint, and also had written on the walls in paint. “As he was photographing the words written on the walls, Toledo had a ‘flashback’ to the MacDonald crime scene and thought the letter ‘G’ in words such as ‘Good’ and ‘Gemini’ on the walls resembled the letter ‘G’ in the word ‘PIG’ which was written in blood on the headboard in the master bedroom of the MacDonald apartment.” *Id.* He wrote this observation down in his handwritten notes accompanying the exposures. *Id.*

In an affidavit prepared prior to the hearing before Judge Dupree, Toledo stated “that not only did the ‘G’s’ on the walls resemble the ‘G’ on the headboard at the MacDonald apartment, they also looked like ‘G’s’ which Toledo had seen in MacDonald’s military course notebooks.” *Id.* The Government also proffered evidence of FBI analysis finding that “the letters do not have sufficient distinguishing characteristics to enable the FBI or anyone else to determine whether they were made by the same hand.” *Id.*

J. Evidence underlying the 1990 and 1997 § 2255 motions

In 1990, MacDonald filed another petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255, arguing that “the prosecution failed to disclose prior statements of witnesses at trial, withheld laboratory notes written by government agents which would have aided the defense, and exploited the suppression of the prior statements and the lab notes by knowingly presenting a false and perjurious picture of the evidence and underlying facts.” *MacDonald V*, 778 F. Supp. at 1344. Specifically, MacDonald’s motion was premised, in part, upon his discovery of (1) laboratory bench notes from United States Army Criminal Investigation Laboratory (“USACIL”) Chemist Janice Glisson indicating

that she had found three blond synthetic hairs, up to twenty-two inches in length, on a clear handled brush found in the MacDonald home, and (2) government scientists' handwritten notes showing they "had discovered the presence of one black wool fiber and one white wool fiber in the debris taken from the right biceps area of Colette's pajama top, two black wool fibers and one green wool fiber in the debris removed from the wooden club murder weapon, and two black wool fibers in the debris removed from the mouth area of Colette, none of which were matched to any known source in the MacDonald home." *MacDonald V*, 778 F. Supp. at 1348-49; *see also* DX 5025 ¶ 5; DX 5027 ¶¶ 5-8. MacDonald argued, in part, that the lab notes identifying the saran fibers and unsourced fibers corroborated his story of intruders murdering his wife and children.

In response to MacDonald's motion, the Government offered two affidavits of Michael P. Malone, then a senior examiner of the Hairs and Fibers Unit of the FBI Laboratory in Washington, D.C. Malone had examined the hairs and fibers at issue at the request of the Government in response to MacDonald's 1990 petition. With regard to the hairs, Malone stated in his original February 14, 1991, affidavit that it was likely that the saran fibers came from a doll and not from a wig. Specifically, he stated:

All of these saran fibers . . . are consistent with the type of fibers normally used in the production of doll hair from the FBI laboratory reference collection These fibers . . . are not consistent with the types of fibers normally used in the manufacture of wigs, and based on my comparisons, are not like any of the known wig fibers currently in the FBI Laboratory reference collection. . . .

[A] grey delustered modacrylic [modified acrylic] fiber, previously removed from the clear handled hairbrush . . . and exhibits the same microscopic and optical properties as the grey delustered modacrylic fibers found in the . . . [hair piece] previously owned by Colette MacDonald. . . .

In connection with this matter I examined a blue handheld hairbrush I removed a grey delustered modacrylic fiber . . . from this item. This fiber . . . exhibits the same microscopic and optical properties as the grey delustered modacrylic fibers found in the

composition of the previously mentioned . . . [hair piece] of Colette MacDonald, and accordingly, is consistent with having originated from the [hair piece].

DX 5025, Ex. 1, ¶¶ 12-13. In his May 21, 1991, supplemental affidavit, Malone stated:

4. . . . [T]o the extent that petitioner contends that the “22-inch blond synthetic fibers” . . . are consistent with having originated from a cosmetic blond wig allegedly owned by Helena Stoeckley, there is no factual or scientific basis for this conclusion. I base my statement on the following facts and observations.

5. . . . [O]ne [saran fiber] matched the FBI Laboratory’s known saran doll hair reference exemplar . . . and did not match any wig exemplar in the reference collection.²⁶ Similar examinations performed on [another saran fiber] revealed a single light blond striated saran fiber, which was 22-inches in length, and also did not match any wig exemplar in the FBI reference collection. Lastly, similar examinations performed on [a third saran fiber] revealed a single grey, declustered, modacrylic fiber which was approximately 5-inches in length, and which matched modacrylic fibers removed from the . . . hair piece or “fall” worn by Colette MacDonald. Therefore, I can state that the only blond synthetic fibers which are 22-inches or longer and which were removed from Exhibit K, E-323 [the clear-handled hairbrush], are saran, which does not resemble human hair, and not modacrylic, which does resemble human hair.

6. In addition to performing physical examinations in this case, I have consulted numerous standard references (see Exhibits 1-6 attached to this affidavit) which are routinely used in the textile industry and as source material in the FBI Laboratory, concerning the industrial applications for fibers, including saran. None of these standard references reflect the use of saran fibers in cosmetic wigs; however, they do reflect the use of saran fibers for wigs for dolls and manikins, in addition to such uses as dust mops and patio screens.

7. Further, based upon my own investigation and research in this case, I can state that saran has the following physical characteristics which make it unsuitable for use in cosmetic wigs, in which the objective is to have the wig hair appear indistinguishable from natural human hair. Saran is very straight, is only manufactured as a continuous monofilament, does not lay down or drape like human hair, and is also too shiny to resemble human hair. Lastly, saran can not be manufactured as a “tow” fiber²⁷, which is essential to the cosmetic wig manufacturing process.

²⁶ [Affidavit Footnote] The FBI Laboratory’s reference collection of fibers has been maintained for over forty years. Among other items, it contains numerous samples from wigs, all of which I have personally examined and none of which revealed a known wig exemplar of saran. Rather, all of the known wig exemplars are composed of polyvinyl chloride (PVS), modacrylic or human hair.

²⁷ [Affidavit Footnote] A “tow” is a large group of continuous filaments, without any definite twist, which is cut into definite lengths.

DX 5025, Ex. 2. (second footnote omitted in original).

With regard to the fiber evidence, Malone examined the relevant fibers and found that the source of most of the fibers was unknown, “due to the absence at this time of known standards for comparison.” DX 5025, Ex. 1, ¶¶ 16-18. He found that the white wool fibers found on the right bicep area of Colette’s pajama top and on the wooden club were consistent with having originated from a shag rug in the MacDonald’s master bedroom. DX 5025, Ex. 1, ¶¶ 16-17.

The Government also proffered the affidavit of Shirley S. Green, an FBI physical science technician. *See* Aff. of Green [DE-138-11]. Therein, Green identified certain laboratory bench notes as “unequivocally” hers and not that of Kathy Bond, another laboratory technician. *Id.* ¶ 2. She also recounted that the Government requested that fibers and debris removed from the club (Q89) be compared to two throw rugs found in the MacDonald home. *Id.* ¶ 6. After receiving this directive, Green “made an additional slide of fibers from the Q-89 debris.” *Id.* In her affidavit, she specifically clarified that “[i]t should be noted that this examination was in addition to the comparison of the debris from Q-89, with the known threads from Q-12 [MacDonald’s pajama top] performed by Mr. Stombaugh in 1974.” *Id.* With regard to the 1974 examination, Green’s notes indicate that after receiving the vial of debris from the club on September 24, 1974, she placed 2 short pieces of purple cotton thread, like Q12, in a pillbox. She also stated:

Exam by PMS – notes + yn comp’s
“ ” MSC – notes + wood comp’s
Results (10-17-74) to Charlotte
 2 pcs purp. cot. sew. thr like used in constr of Q12
 were found in Q89
Results (11-5-74) to Charl.
 Wood particle in Q89 could not be fitted into Q14, but may have come from
 Q14.

Evid. retained in Lab.

See Bench Notes [DE-138-13]. In 1974, Stombaugh examined the debris, identified two purple sewing threads, and later opined at trial that they could have originated from MacDonald's pajama top. Ttr. 4097-98; *see also* 1974 Report from Stombaugh [DE-138-8] at 6.

Judge Dupree denied MacDonald's 1990 petition, relying on three separate independent grounds. First, Judge Dupree found that the new evidence was not material. *MacDonald V*, 778 F. Supp. at 1350-51. Judge Dupree also found that the Government attorneys did not violate the mandates of *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* at 1353-54. Finally, Judge Dupree found the 1990 petition to be barred by the doctrine of the abuse of the writ. *Id.* at 1356-60.²⁸

MacDonald appealed Judge Dupree's decision. The Fourth Circuit affirmed Judge Dupree's decision on the third ground, abuse of the writ, and did not reach the merits of MacDonald's 1990 petition. *MacDonald VI*, 966 F.2d at 856, *cert. denied*, 506 U.S. 1002 (1992).

On April 22, 1997, MacDonald file a motion to reopen the 1990 Petition, arguing that the affidavits of Malone were materially false and misleading. MacDonald also sought an order permitting new DNA testing of certain evidence that had been collected form the crime scene. In support of his motion, he submitted evidence that two standard reference texts on textiles stated that saran could be manufactured in "tow" form and was used in the manufacture of wigs. *See* DX 5025, Aff. of Cormier No. 1, ¶¶ 17-18. MacDonald also submitted evidence suggesting that the FBI reference library included these two standard reference texts. *Id.* ¶ 24. Additionally, MacDonald submitted evidence regarding

²⁸ Also in connection with the 1990 petition, MacDonald submitted a second declaration from Bryant Lane, executed on July 15, 1988 [DX 5033]. The court discusses this declaration in the context of the 2006 Britt Claim filings.

interviews the Government and the defense team conducted with a manufacturer of synthetic fibers and two employees of Mattel Toys, Inc.

With regard to the manufacturer, MacDonald submitted the FBI's interview summary ("Form 302") of its conversations with A. Edward Oberhaus, Jr., an executive of the Kanecka America Corporation, which was at the time the world's largest producer of modacrylic fibers. Aff. of Cormier No. 1, Ex. 12 [DE-48]. The Form 302 reflects that Oberhaus said he was familiar with the production and use of saran fibers, both at the time of the interview and prior to 1969-70. The FBI then drafted an affidavit consistent with the information in its 302 form, but Oberhaus refused to sign it, because he did not consider himself to be an expert on the uses of saran. Aff. of Cormier No. 1, Ex. 10 ¶ 9 [DE-48]. Oberhaus did, however, draft his own affidavit, which stated that wigs and hairpieces manufactured after 1960 "have most often been manufactured with human hair, modacrylic fibers, other fibers, or a combination of any of these filaments." Aff. of Cormier No. 1, Ex. 11 ¶ 8 [DE-48].

MacDonald also proffered affidavits of Judith Schizas and Mellie Phillips, two employees of Mattel, Inc., who were knowledgeable about dolls, along with the Form 302s summarizing the FBI's interviews with the women. Both women stated they were unaware of any Mattel doll having hair the length of 22 or 24 inches; Schizas, however, also told the FBI that it was possible – although not probable – that hair fiber that length came from a doll if the fiber was doubled over in the rooting process. Aff. of Cormier No. 1, Ex. 13 ¶¶ 7, 10; Ex. 14 ¶ 5 [DE-48]. Philips also told MacDonald's investigative team that she recalled telling the FBI that saran could be manufactured in tow form. Aff. of Cormier No. 1, Ex. 14 ¶ 4 [DE-48].

Additionally, MacDonald proffered evidence of what he characterized as a "pattern of deception" by Malone in other cases, in the form of excerpts from the Final Report of Department of

Justice Inspector General Michael R. Bromwich, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*, and an April 16, 1997 article from the *Wall Street Journal*. Aff. of Cormier No. 2, Ex. 1, Ex. 3 [DE-49].

Finally, MacDonald presented affidavits from individuals in the fiber and wig manufacturing industries who stated that saran fibers were manufactured in tow form and were used in wigs prior to 1970. Aff. of Cormier No. 1, Exs. 15, 17, 18, 22, 23.

This court denied MacDonald's 1997 motion, insofar as it sought to reopen the 1990 petition, finding that MacDonald had not shown that Malone's testimony was material to the outcome of the litigation on the 1990 petition. *MacDonald VII*, 979 F. Supp. at 1063. This court also found that MacDonald had shown insufficient evidence of a fraud upon the court. *Id.* at 1064-67. The court also ruled that MacDonald's "claim that newly gathered evidence that saran fibers were in fact used in the manufacture of human wigs prior to 1970, added to the weight of previously amassed exculpatory evidence, demonstrates his factual innocence and that he is entitled to a new trial, is TRANSFERRED to the United States Court of Appeals for the Fourth Circuit." *Id.* at 1069.

With regard to the matters transferred, the Fourth Circuit ruled that "the motion with respect to DNA testing is granted and this issued is remanded to the district court" but that "[i]n all other respects, the motion to file a successive application is denied." *MacDonald VII*, No. 97-713 (4th Cir. Oct. 17, 1997). In a separate opinion, the Fourth Circuit affirmed this court's denial of the motion to reopen. *MacDonald IX*, 161 F.3d at 4. On remand, this court entered orders setting the parameters for DNA testing. It took nine years for the testing protocol to be agreed upon by the parties, the tests to be conducted, and the results submitted, which are discussed in more detail below.

K. Current § 2255 motion

As this court has recounted, in 2006 MacDonald sought and received a pre-filing authorization from the Fourth Circuit, pursuant to 28 U.S.C. § 2244(b) and § 2255, permitting him to submit his proposed successive § 2255 motion to determine whether he meets the requirements for a successive § 2255 motion. MacDonald promptly filed his proposed successive § 2255 motion [DE-111] in this court on January 17, 2006, alleging that he had newly discovered evidence that proved a constitutional error occurred. Specifically, he argued that the evidence – the affidavit of former Deputy United States Marshal Jimmy Britt – showed that Stoeckley was prepared to testify at MacDonald’s trial that she and her accomplices were responsible for the murders, but that prosecutor James Blackburn threatened her into changing her testimony and proceeded to misrepresent to both the court and defense counsel what Stoeckley said to him.

Shortly thereafter, MacDonald filed a motion to add an additional predicate to his proposed § 2255 motion, in what has become known as the “DNA claim” or “unsourced hairs claim.” Relying on the March 10, 2006 mitochondrial DNA test results [DE-123-1], MacDonald sought to add a claim for relief to his proposed successive § 2255 motion, and also asked the court to consider the DNA results as part of the evidence as a whole. Finally, over a year later, MacDonald filed a motion asking the court to consider the affidavit of Helena Stoeckley’s mother as part of the evidence as a whole.

The evidence MacDonald proffered for his current proposed § 2255 motion is summarized below.

1. November 3, 2005, Affidavit of Jimmy Britt

The first piece of evidence attached to MacDonald’s 2006 proposed § 2255 motion was the November 3, 2005 affidavit of Jimmy Britt. *See* November 2005 Aff. of Britt [DE-115-2] at 2-5; *see*

also DX 5058. Therein, Britt averred that he was one of the deputy marshals assigned to the proceedings of the MacDonald trial in 1979, and that as part of his duties he was assigned to travel to Greenville, South Carolina, to pick up Stoeckley. DX 5058 ¶¶ 6, 11. He stated that he picked up Stoeckley at the county jail in Greenville, and that Ms. Jerry Holden, another employee of the Marshal Service, accompanied Britt as he drove Stoeckley to Raleigh. DX 5058 ¶¶ 11, 13. Britt asserted that during the course of transporting Stoeckley to Raleigh, she brought up the MacDonald trial, and said that she, along with others, were in the MacDonald house on the night of the murders, and specifically mentioned a hobby horse. DX 5058 ¶ 15.

Britt also stated he was assigned to escort Stoeckley to the courthouse the day after she made these statements. Once there, he first took Stoeckley to meet with MacDonald's attorneys on the seventh floor of the building. DX 5058 ¶¶ 17-18. He then escorted her to the United States Attorney's office on the eighth floor. DX 5058 ¶ 18. Britt stated that James Blackburn asked Britt to remain in the room, and Britt did so. According to Britt, during Blackburn's interview of Stoeckley, she told Blackburn the same things she had said to Britt the day before. Namely, she mentioned the hobby horse and that she and others were inside MacDonald's home on the night of the murders. DX 5058 ¶¶ 20, 22. She also said she had gone to the MacDonald house to acquire drugs. DX 5058 ¶ 22. Britt claimed that in response, Blackburn told Stoeckley: "If you testify before the jury as to what you have told me or said to me in this office, I will indict you for murder." DX 5058 ¶ 24.

Britt also stated that he previously told this information to two of his friends – and former employees of the Marshal Service – Cecil Goins and Lee Tart, but that he had refrained from coming forward to the court out of respect for the late Judge Dupree. DX 5058 ¶¶ 7, 10. Britt also took a polygraph examination regarding the matters he set forth in the affidavit, and MacDonald attached the

report stating that the examiner's opinion that Britt showed "no reactions indicative of deception." Davenport Report [DE-115-2] at 6-7.

2. Affidavit of Lee Tart

MacDonald also submitted the affidavit of Lee W. Tart, another former Deputy United States Marshal. Tart stated that in 2002, Britt told him about Stoeckley's statements that she had been in the MacDonald house on the night of the murders, and that she said the same to Blackburn. Tart also indicated that he thought Britt would tell nothing but the truth. Aff. of Tart [DE-115-2] at 9-10.

3. Affidavit of Wendy Rouder

MacDonald also proffered an affidavit from Wendy Rouder, the law clerk for Segal who gave *voir dire* testimony at the trial regarding Stoeckley's comments over a weekend recess. In the affidavit, Rouder averred that when she was contacted by MacDonald's present wife Kathryn about Jimmy Britt's November 2005 affidavit, "Helena Stoeckley's unexpected response to my questions in August of 1979 then made sense to me." Aff. of Rouder [DE-115-3] at 49-51. In her September 2005, affidavit, Rouder recalled that Stoeckley had admitted "her involvement in the MacDonald family murders – that she had seen a hobby horse in the MacDonald home, that she was there the night of the murders, and that she could name the people who killed Dr. MacDonald's family." *Id.*²⁹ Rouder recalled:

I had asked her why she was making admissions to me in private when she had made public denials at the courthouse, and why she did not testify in court as to what she was telling me. She had then responded: "I can't. I'm afraid." I asked her what she was afraid of. I *fully expected* her to say that she was afraid of the people with whom she was involved the night of the MacDonald family murders, or the person or persons who the motel manager had reported as having assaulted her. Thus, I was very surprised

²⁹ Ms. Rouder did not testify in 1979 that Stoeckley told her that she could name MacDonald's killers. It was Red Underhill who repeatedly testified on *voir dire* that Stoeckley had said to him that she could "name three people," but would not do so because "I doubt if [sic] I live if I do." *See, e.g.*, Ttr. 5923.

when Ms. Stoeckley responded that she could not testify as to what she was sharing with me because of “*those damn prosecutors sitting there.*” And she added words to the effect of “*They’ll fry me.*”

Id. at 51, ¶ 10 (emphases in original); *see also* Ttr. 5928-50. Rouder added that while she was in the motel room talking with Stoeckley, “the phone rang and the hotel operator had asked for me specifically. The call was from Judge Franklin Dupree. He addressed me by name, and asked me why I was there with Helena Stoeckely, and warned me not to ask her any questions.” *Id.* ¶ 13.³⁰

4. Affidavit of Everett Morse

Another affidavit filed with the proposed § 2255 motion was that of Everett Morse, who lived in the same apartment complex as Greg Mitchell during 1972-74. Morse stated that in the spring or summer of 1973, he mentioned to Mitchell that he needed golf balls. A few days later, Mitchell produced a case of new golf balls. When Morse refused to pay for them, Mitchell became angry and told Morse that if he did not take and pay for the golf balls, he would murder him as he had murdered Jeffrey MacDonald’s family. According to Morse, Mitchell then said that if Morse ever mentioned Mitchell’s involvement in the MacDonald murders, he would kill him. Aff. of Morse [DE-115-3] at 54-55.

5. Declaration and Affidavit of Bryant Lane

MacDonald also filed another affidavit of Bryant Lane.³¹ *See* 2005 Aff. of Lane [DE-115-3] at 56-58. This was the third such document executed by Lane; the second, a declaration executed in 1988,

³⁰ Rouder had not included this detail in her *voir dire* testimony in 1979.

³¹ As explained above, Mitchell befriended Lane and his wife when he was living in Charlotte in the 1970s.

was filed in connection with the 1990 § 2255 motion. *See* DX 5033. The court will review the contents of both documents.

The 1988 declaration provides much more detail about Greg Mitchell's statements than Lane's first declaration, which was filed in connection with MacDonald's 1984 motion for new trial. Specifically, Lane stated that soon after Mitchell quit his job at the Toledo Scale Company, Mitchell was "depressed and drinking" and "broke down in tears and said that he had killed the MacDonald family." DX 5033 ¶ 3. Lane stated that Mitchell said, "I personally know MacDonald is innocent, because I was the one that killed the MacDonald family." *Id.* Lane promised Mitchell that he would never tell anyone what he said. *Id.*

In a later conversation, Mitchell told Lane that he was being harassed by the FBI and he thought his phone was bugged. During another conversation where Lane's wife was present, she told Mitchell that he shouldn't have anything to worry about if he wasn't guilty, and Mitchell responded with tears in his eyes: "Well that's it. I did do it, I am guilty." DX 5033 ¶¶ 4-5. A few months before Mitchell passed away in 1982, he told Lane's wife that "[h]e was guilty of a crime he committed at Fort Bragg years ago, and he might have to go away to Haiti or somewhere to live." DX 5033 ¶ 11.

Lane asserted that his wife, after reading the novel *Fatal Vision*, called the FBI to report what Mitchell had said. After calling the FBI back twice and not getting a satisfactory response, Lane then contacted MacDonald's then-lawyer, who arranged for Ray Shedlick to take their statements. Lane noted that he only told Shedlick what Mitchell had said to his wife, because he was not comfortable telling strangers the whole story. DX 5033 ¶¶ 12-13. Thereafter, the FBI contacted Lane and his wife. Lane still did not tell the FBI everything that Mitchell had said, because he found the FBI agent to be sarcastic. DX 5033 ¶ 14.

The 2005 affidavit from Lane repeats many of the same statements he previously attributed to Mitchell in the 1988 declaration. DX 5033 ¶¶ 7, 10. Lane also, however, provided information about another statement from Mitchell. He said that approximately six months before he died, Mitchell told Lane that

in 1970, he was addicted to heroin, and that “MacDonald could have helped him.” Mitchell thought Macdonald knew an intermediary who could supply Mitchell with methadone, in order to kick hard drugs. Mitchell stated to me that he and his friends went to the MacDonald home on February 17, 1970, to “teach him a lesson” and intended to “whup ‘em.” Mitchell told me he was high on at least four drugs: Mescaline, angel dust, PCP and one other and said that “things got bad” and that “you don’t realize what you’re doing” when you are so high on drugs. Mitchell told me that Jeff MacDonald being alive was simply “lucky” because the group “didn’t know what they were doing” and “didn’t mean to kill anybody.”

2005 Aff. of Lane [DE-115-3] at 57, ¶ 8. Lane also said that Mitchell claimed to have tried to turn himself in on numerous occasions. *Id.* at ¶ 9. Lane also said that Greg Mitchell’s former business partner said that Mitchell “had confessed to his involvement in the MacDonald murders on many occasions.” 2005 Aff. of Lane [DE-115-3] at 56, ¶ 7.

6. Affidavit of Donald Buffkin

MacDonald also offered the affidavit of Donald Buffkin, a man who frequented the Hull Bar in Charlotte, North Carolina, where he met Mitchell in 1980. Aff. of Buffkin [DE-115-3] at 59-61; DX 5031. Buffkin reported being at the Hull Bar at least once a month during the period of 1980-82, and speaking to Mitchell, who he characterized as a “definite alcoholic and pot smoker,” each time he was there. DX 5031 ¶¶ 6-7. According to Buffkin, Mitchell told him on at least two occasions that he was “involved” and was there at the MacDonald murders. DX 5031 ¶ 6. According to Buffkin,

Gregory Mitchell stated to me that “what they [the government] said about MacDonald isn’t true. Gregory Mitchell also stated to me that his reason for being involved in the murders was that Jeffrey MacDonald “wouldn’t do what they [Mitchell and his friends]

wanted.” . . . Gregory Mitchell also stated that he was “mad” at Jeffrey MacDonald because he and some friends from Vietnam were involved in sending heroin back to the United States in bodybags and that he believed MacDonald was “on the receiving end.” He went to the MacDonald home to demand money or “dope.”

DX 5033 ¶ 6. Although Buffkin did not believe Mitchell at the time he made the statements, and believed the statements to be “bar talk,” he eventually contacted MacDonald’s attorneys in 2003, because after seeing television programs about the case, he began “to think that Mitchell’s statements were true and worth reporting.” DX 5033 ¶ 1.

7. Hamlet Hospital records

MacDonald also proffered an FBI report summarizing patients MacDonald had treated the day before the murders in the emergency room at a hospital in Hamlet, North Carolina. *See Investigation Concerning Blood Types* [DE-115-3] at 62-64; *see also* DX 5045. Those records indicated that MacDonald treated at least five patients who had Type O blood, including a patient he treated for a puncture wound to the left foot.

8. James Blackburn conviction

MacDonald filed the Judgment and Commitment Order for James Blackburn, arising out of his 1993 conviction for embezzlement and obstruction of justice. *See Judgment and Commitment* [DE-115-3] at 142-43.

9. FBI reports

MacDonald also proffered FBI reports, asserting that these reports showed Type B blood was present in the area where he said he struggled with his attackers. Specifically, he proffered the U.S. Army CID Preliminary Laboratory Report [DE-123-1] of April 6, 1970, which lists “Exhibit D-144 Portion of hall floor at west entrance bearing red-brown stains.” *See* DX 5103 at 5. He also proffered

the U.S. Army CID Chart of Exhibit Findings with Chemical Analysis, which showed that serology testing results for D-144 to be human blood that was indicated to either blood group type B (the same as Jeffrey MacDonald) or O (the same as Kristen MacDonald). DX 5104 at 10.

10. Mitochondrial DNA test results

In 2006, the Armed Forces Institute of Pathology's DNA Identification Laboratory ("AFDIL") reported its DNA testing results. Of particular importance, AFDIL found that three specimens – 75A, 91A, and 58A(1) – could not be matched to any other sample tested. DX 5102 at 5. MacDonald's arguments as to each of the three unsourced hairs were:

75A

Thus, it is clear that this unidentified hair was found underneath where Colette's body lay at the crime scene, and that it was a full length body or pubic hair. The fact that it had both the root and follicular tissue attached is indicative that it was pulled from someone's skin and lends great weight to this specimen as probative that there were unknown intruders in the home with whom Colette struggled and from whom she extracted a hair.

Mem. in Supp. of Mot. to Add an Additional Predicate [DE-123] at 3-4.

91A

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

Id. [DE-123] at 1-3. MacDonald also proffered laboratory reports purporting to show that 91A was, in fact, a human hair, with the hair root intact, found underneath the fingernail of Kristen MacDonald. *See* DX 5103; DX 5104. With regard to the third hair, MacDonald argued:

58A(1)

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

Mem. in Supp. of Mot. to Add an Additional Predicate [DE-123] at 4.

11. Affidavit of the elder Stoeckley

Finally, MacDonald proffered the affidavit of the elder Stoeckley [DE-143-2]. Therein, the elder Stoeckley stated that on two separate occasions, her daughter confided in her that she was present in the MacDonald house during the murders on February 17, 1970. Aff. of Elder Stoeckley [DE-143-2] ¶ 3. The first occasion was after the trial and prior to Helena Stoeckley moving to South Carolina. The second occasion was shortly before her death in 1983, when Helena Stoeckley knew she was dying. *Id.* ¶ 5. On the second occasion, Helena Stoeckley told her mother she was afraid to tell the truth because she was afraid of the prosecutor. *Id.* ¶ 11. The elder Stoeckley stated that Helena told her that she and Greg Mitchell, along with two of their friends, went to MacDonald apartment in the early morning hours of February 17, 1970, to intimidate MacDonald because they believed he was being too hard on drug users in the Fayetteville community. *Id.* ¶ 6. Although Helena told her mother that she and three other men were all high on drugs at the time, she still “absolutely knew” what was happening; she saw a hobby horse in a child’s bedroom and saw one of the men stab MacDonald. Once Greg Mitchell and one of the other men “went out of their minds” and were killing the family, she and the other man fled. *Id.* ¶¶ 7-8. Helena also told her mother that she tried to tell the truth but that the FBI and other law enforcement officials told her to keep quiet. *Id.* ¶ 9.

L. September 2012 Evidentiary Hearing Testimony

Following the remand from the Fourth Circuit, and after various motions practice and briefing from the parties, the court held an evidentiary hearing in September 2012. MacDonald presented his evidence first, followed by the evidence from the Government.

1. Wade Smith

The first witness called to testify was Wade Smith, one of MacDonald's attorneys during the trial. Htr. 21. Smith explained that the basic defense theory at trial was that MacDonald was in his home sleeping on the couch when intruders came into house and killed his family and wounded him. Htr. 22. Accordingly, any evidence supporting this theory was crucial to MacDonald's case. Htr. 23-24.

Smith testified that in January 2005, Jimmy Britt³² called him and said "that something had worried him and had been heavy on his mind and heart for all these years since the MacDonald case and he needed to talk to me about it and sort of unload his soul." Htr. 25. Smith invited Britt to his office, where Britt told Smith that during the MacDonald trial, he had been dispatched to South Carolina to retrieve Stoeckley, and during her transport she voluntarily made statements that indicated she was in the house when the murders occurred. Htr. 26. Britt also told Smith that he was present for the Government's interview of Stoeckley, and that Stoeckley had told the prosecutor that she was in the MacDonald house. Britt stated that the prosecutor informed Stoeckley that if she made such statements in court, he would indict her for first degree murder. Htr. 26-27.³³

³² Britt died shortly before this court issued its 2008 ruling in this case.

³³ After meeting with Smith, and prior to giving a statement under oath, Britt apparently executed a "Statement of Facts" that was notarized by his friend and former deputy marshal, Lee Tart. Therein, Britt said he was voluntarily submitting the Statement of Facts "regarding the irregularities I observed during the trial of Jeffrey MacDonald." GX 2085. According to Britt, "[t]he specifics are too numerous to list in this Statement of Facts" but he listed "the names of the people involved in the

Smith recognized the importance of what Britt told him, and subsequently engaged a court reporter and took a statement from him under oath. Htr. 27; DX 5055. In this statement, Britt said he waited to come forward about his concerns about the MacDonald trial out of respect for Judge Dupree, Rich Leonard, and John Edwards, all of whom he said were working for the court during the time of the MacDonald trial. DX 5055 at 9-10. Britt also stated that he was asked to travel to Charleston, South Carolina, to pick up Stoeckley, and he assumed custody of her at the United States Marshals Office in Charleston. DX 5055 at 12. He recounted that when he picked up Stoeckley, she was wearing a floppy hat, and he transported both Stoeckley and Ernest Davis to Raleigh, where he checked them into the Holiday Inn on Hillsborough Street in Raleigh. DX 5055 at 13-16. Britt said that he picked Davis and Stoeckley up at the hotel the following morning and transported them to court, where he escorted her to the defense interview, and then to Blackburn's office. DX 5055 at 16-17. Britt claimed that Blackburn was the United States Attorney at the time. DX 5055 at 17. According to Britt, Stoeckley told Blackburn that she was in the MacDonald home on the night of the murders to get drugs, and she mentioned a hobby horse. Britt stated that Blackburn told her that if she testified to that, he would indict her for murder. DX 5055 at 19-21. Following the interview with Blackburn, Britt took Stoeckley immediately to the courtroom, at which time he saw Blackburn going into Judge Dupree's chambers, and then approximately ten to fifteen minutes later, Blackburn and Judge Dupree returned to the courtroom. DX 5055 at 22-23.

Smith also asked Steve Davenport, who formerly worked for the State Bureau of Investigation, to conduct a polygraph examination of Britt. Htr. 40-44; DX 5057. Davenport opined that Britt showed

irregularities." *Id.* This list included "[t]he late Franklin Dupree, United States District Judge, . . . Rich Leonard and John Edwards, Law Clerks for Judge Dupree, and Jim Blackburn, United States Attorney, and the Foreman of the Jury."

no reactions indicative of deception. Htr. 44. Smith also testified that he was aware Davenport suffered a stroke sometime prior to 2006, did not have any record associated with the polygraph, and was now unavailable to answer questions about his conduct of the exam. Htr. 184-85.

Smith also obtained two affidavits from Britt; one was executed on October 26, 2005, the other in November 2005. Htr. 44-52; DX 5058; DX 5059. The October affidavit stated, in at least one paragraph, that Britt transported Stoeckley from Charleston to Raleigh; the November affidavit states that he transported her from Greenville to Raleigh. DX 5058 ¶ 15; DX 5059 ¶ 15; *see also* Htr. 40 (“Sometimes he said Charleston. Sometimes he said Greenville.”). The October affidavit also mentions what Britt felt was unethical behavior – Judge Dupree accepting cakes made by jurors – during the MacDonald trial. DX 5058 ¶ 28.

In February 2006, Britt executed an addendum to his affidavit, which included more detail than his previous affidavits. Htr. 199; GX 2089.³⁴ Specifically, Britt stated that he and Holden transported Stoeckley to the courthouse on August 15, 1979, for her interviews with the parties. GX 2089. He also stated that the defense interview of Stoeckley concluded around noon, and he then escorted her to the U.S. Attorney’s office. Britt again asserted that he was present during Stoeckley’s interview with the Government, and quoted Blackburn as telling her: “If you go downstairs and testify that you were at Dr. Jeffrey MacDonald’s house on the night of the murders, I will indict you as an accessory to murder.” *Id.* Britt also stated that after Stoeckley testified on August 17, 1979, he took her to The Journey’s End motel, and was later directed by Chief Deputy Marshal Eddie Sigmon on Sunday, August 19, 1979, to check Stoeckley out of that motel and to register her at the Holiday Inn. Britt

³⁴ Smith had not seen the addendum to the affidavit just before the September 2012 hearing. Htr. 199-200.

recounted that on Monday, August 20, 1979, Judge Dupree “stated as a matter of record that he was not going to permit Ms. Stoeckley to testify again, [and] that her brain was scrambled (like an egg).” According to Britt, Judge Dupree instructed the jurors not to consider the testimony Stoeckley had given on Friday, August 17th. Finally, Britt stated:

Hugh Salter, U.S. Marshal, asked me to go to the U.S. Marshal’s Office and see Ms. Reddick and that she would give me a check for four (4) days of subsistence. He asked me to cash the check and go to the bus station and purchase Ms. Stoeckley a one-way ticket to Charleston, SC, in which I did and for me to go to The Holiday Inn, Hillsborough Street, Raleigh, and check her out of the hotel and take her to the bus station and make sure she got on the bus and give the balance of her subsistence. This was on August 20, 1979, and I have not seen or heard from her since.

GX 2089.

Smith also testified as to his recollection of specific events in the MacDonald trial. Smith reviewed the portions of the trial transcript indicating that Stoeckley had been taken into custody pursuant to a material witness warrant, and that she was to make an initial appearance in South Carolina. Htr. 64-70. Smith noted that once Stoeckley was in Raleigh, he and Segal interviewed her, in the presence of Joe McGinniss, who was embedded as part of the defense team during the trial, in order to later write a book. Htr. 59, 77. Smith testified that Stoeckley made no indication that she was ever in the MacDonald house, and did not vary her answers even in response to Segal adjusting his interviewing tactics. Htr. 79-80. Segal told Stoeckley that the statute of limitations had run, and also confronted Stoeckley with crime scene photographs and the “Stoeckley witnesses” who all claimed that she had made inculpatory statements to them over the years. Htr. 80-90. Stoeckley did not change her response. Smith also reviewed portions of the trial transcript detailing a conference held before Judge Dupree, indicating that MacDonald was a non-indigent defendant, and once Stoeckley was released from her material witness custody, she would be placed under subpoena by the defense. Htr. 100.