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.

Smith also recalled bumping into Blackburn in the federal building following the prosecution's interview of Stoeckley. Blackburn told Smith that Stoeckley had not said anything meaningful in his interview, and Smith said much the same thing. Htr. 102-03. The following day, Stoeckley took the stand. When Smith was questioned about Segal's representations to Judge Dupree during a bench conference regarding Segal's account of what Stoeckley had told the defense team and his request to treat her as a hostile witness, Smith said:

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

Htr. 114.

Smith also testified about his recollection of conversations he had with Jerry Leonard, the attorney appointed to represent Stoeckley during the MacDonald trial. He clarified that his knowledge of Stoeckley's comments that seemingly tied her to the case came from Wendy Rouder, and not Leonard. Htr. 153-54. Smith also testified that Leonard has never told him anything that Stoeckley said to Leonard. Htr. 154.

2. Mary Britt

MacDonald's second witness was Mary Britt, the former wife of Jimmy Britt. Mary married Jimmy in 1957, and for most of their marriage he worked as a deputy United States Marshal. Mary remembered that Jimmy worked the MacDonald trial, and she specifically recalled that he came home one day during the trial and said the following day he would be traveling to South Carolina to pick up a witness. Htr. 223, 242. When he got home after transporting the witness from South Carolina, he was "very excited . . . because he felt the woman talked in the car coming back about her involvement, that

he said, in his words, she described the inside of the apartment where the MacDonalds lived . . . to a T[,] even to the fact of a child's hobby horse that was broken." Htr. 223.

Mary testified that she was anxious for Jimmy to return home the next day because she wanted to know what happened during the trial. Htr. 225. Jimmy told her that "they can't use her testimony because her brain is fried from the use of drugs." *Id.* Jimmy also told Mary that during the trial, he arrived at the hotel where Stoeckley was staying and found that she had been "beaten . . . to a pulp" by her boyfriend," and that he was upset with Stoeckley's boyfriend for doing so. Htr. 245-46. Jimmy also expressed his displeasure with the fact that some jurors brought in cakes for Judge Dupree. Htr. 247. Although Jimmy told Mary that Stoeckley had been interviewed, he never told her that Blackburn threatened Stoeckley. Htr. 248. Later, after MacDonald was found guilty, Jimmy told her that he refused to take MacDonald into custody. Htr. 226.

Mary and Jimmy eventually separated and divorced. During their separation, Mary saw the mini-series *Fatal Vision*, and later asked Jimmy if he had seen it. According to Mary, Jimmy answered through gritted teeth: "It's not accurate. They had me standing in the hall. I was in that room. I heard every word that was said." Htr. 227. He still did not, however, mention any threat from Blackburn.

3. Gene Stoeckley

Gene Stoeckley, the youngest brother of Helena Stoeckley, was called as MacDonald's third witness. Gene testified that he was approximately ten or eleven years old at the time of the MacDonald family murders, and that his sister's ties to the case had an impact on both him and his family. Htr 268-70. He was harassed at school, and his family received threatening phone calls. Gene testified that he held his sister accountable for much of the harassment he encountered, and eventually when he was in high school he confronted her about it when she had returned to the house for a visit. Htr. 270-71.

Gene said that her response was to tell him "to be careful because she had certain friends" and that "she also had an ice pick." Htr. 271.

Gene stated that his family did not talk about the MacDonald case, although he knew that his parents were in Raleigh for the trial. Htr. 272-73.

He testified that his sister Helena died in January 1983, and that he did not have much contact with her between the time of the trial in 1979 until her death. Htr. 274. He did, however, recall seeing his sister in the fall of 1982 when both he and Helena came to their parents' house for a visit at the same time. Htr. 274-75. She had brought her infant son with her. Helena passed away a few months later, but at the time of her visit she did not appear to be sickly to Gene, although she was jaundiced. Htr. 275-76.

Gene's father passed away in 2002. His mother, the elder Helena Stoeckley, eventually moved to an assisted living facility in Fayetteville, North Carolina, due to health problems. Htr. 279. Gene, who lived in Fuquay-Varina, North Carolina, oversaw her financial and medical needs and saw her about once a week. Htr. 280. Near the end of the summer of 2006, she became seriously ill and was admitted to the hospital, at which time Gene was told that she wasn't going to survive. Htr. 281. However, she recovered, and moved back into the assisted living facility. *Id.*

Gene began having intimate discussions with his mother about their family, and specifically questioned his mother about his sister's involvement in the MacDonald case. Htr. 283. Gene testified that his mother said that "Helena was there that night" and that "Helena had confided in her during that visit in Fayetteville when she had brought David to see her." *Id.* His mother said she thought Helena confided in her during that visit because she knew she was dying, and that MacDonald was not guilty of the crimes. Htr. 284.

Gene stated that his mother's comments

> weighed heavily on my mind. I didn't really know what to do with the knowledge. It was something I considered carefully. The last thing I wanted to do was draw attention to the remaining family members, but, by the same token, I felt somehow morally obligated to tell somebody.
>
> So, I discussed it in more detail with my mother, asked her if she cared to divulge this information to somebody outside the family. . . .
>
> She said that if there was someone who would listen and that where she thought it might do some good, she would be willing to do so.

Htr. 284-85.

After thinking about it for several weeks, Gene eventually went on the internet, found a website maintained by MacDonald's wife, Kathryn, and contacted her. Htr. 286. Kathryn immediately came down to North Carolina, and met with Gene at a restaurant in Fuquay-Varina on March 31, 2007. Htr. 287, 307. Gene set forth ground rules for talking with his mother, which included that if at any time his mother did not want to go forward, he would stop it. Htr. 287-88.

Kathryn and Gene then traveled to the facility in Fayetteville, arriving around 3:00 or 4:00 p.m. Htr. 320. His mother appeared to be having a physically good day, and agreed to meet with Kathryn. Gene also testified that his mother's mental state was "always sharp" and he had no problem communicating with her on the day Kathryn MacDonald came. Htr. 289-90. His mother told Kathryn that his sister had been in the MacDonald house on the night of the murders, and Kathryn then asked if MacDonald's then-attorney, Hart Miles, could be involved. Kathryn called Miles, and he and his paralegal, Laura Redd, came to the facility, arriving "well into the early evening." Htr. 292-93; 322.

The elder Stoeckley again related that her daughter had said she present on the night of the murders, and also said that her daughter had been intimidated. The elder Stoeckley "said an FBI agent had contacted them directly and told them to find a way to keep Helena's mouth shut and to keep her

out of – her nose out of the business." Htr. 294. Redd and Kathryn MacDonald used a computer in a small office adjoining the nurse's station to compose the affidavit, and Gene then read the affidavit to his mother. Htr. 295. A few corrections, "mainly just the verbiage," were made. Htr. 296. The elder Stoeckley then signed the affidavit, after Gene read it to her word for word. Htr. 296-97; DX 5051. Gene testified that he was very much confident that his mother knew what was in the affidavit when she signed it. Htr. 344.

Gene then was contacted by the FBI, and Agent Cheroke met with Gene, his mother, and his wife on April 25, 2007, at the facility. Htr. 328. During the interview, the elder Stoeckley told Agent Cheroke that someone from the FBI called her and said to tell her daughter to stop calling the FBI. Htr. 335. She also indicated in the interview that she had struggled with the issue of MacDonald's guilt. Htr. 331.[35]

4. Wendy Rouder

MacDonald also called as a witness Wendy Rouder, now a practicing attorney in California, who served on the defense team during the MacDonald trial. She testified to answering a phone call that came into the defense team office on a weekend morning during the trial. Htr. 346. The manager of The Journey's End motel had called asking that Stoeckley be removed from the motel. Htr. 346-47. Segal instructed her to go to the motel and find out what was going on. Htr. 346.

Rouder and Red Underhill arrived at The Journey's End and were escorted to Stoeckley's room, where they found her with a bleeding nose, yelling at Ernie Davis. Htr. 347. Davis left, and Stoeckley

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[35] It is unclear from the record what, exactly, the elder Stoeckley told Agent Cheroke during the April 25, 2007, interview. Although on cross-examination the Government asked Gene Stoeckley if he recalled his mother stating various things during the interview, he generally answered that he did not recall his mother making such statements. Htr. 329-36. No other evidence was presented as to the substance of Agent Cheroke's interview of the elder Stoeckley.

then asked Rouder to stay with her. Rouder spent the next several hours with her. Htr. 348. Rouder testified that every once in a while, Stoeckley would raise issues with her involvement with the MacDonald murders, saying that she thought she was there, she felt guilty, and that she wished she could purge her guilt. Htr. 348. Stoeckley also remembered there being a rocking horse. Htr. 349.

Stoeckley had been asked to leave The Journey's End, so Rouder made arrangements for her to stay at the Hilton. Stoeckley continued to make comments about her involvement, and Rouder asked her why she failed to testify on the stand as to what she was telling Rouder. Htr. 350. Rouder testified that Stoeckley answered, "I can't with those damn prosecutors sitting there." Htr. 350-51. Rouder also testified that she believed Stoeckley said that "they'll burn me, fry me, hang me" or other words to that effect. Htr. 351. Rouder admitted that she did not include that statement regarding "burn me" or "fry me" when she testified on *voir dire* during the MacDonald trial, but that she remembered those words when she was contacted by Kathryn MacDonald in 2005. Htr. 357. She also admitted that the trial transcript reflects the fact that she made notes of her conversation with Stoeckley. Htr. 388.

Rouder testified that Kathryn contacted her in August 2005, and told her that a United States Marshal had come forward with information about statements that Stoeckley had made to him, which were similar to the statements Stoeckley had made to Rouder in 1979. Kathryn also told Rouder about the marshal's allegation that Blackburn had threatened to indict Stoeckley for murder if she made admissions about her role in the MacDonald murders while testifying. Htr. 353-54. According to Rouder, this information "rang a bell" for her. "The bell that ran was, ah-ha, that's why she said she can't testify with those damn prosecutors sitting there." Htr. 354. After speaking with Kathryn, Rouder was sent an affidavit which she signed. Htr. 351; DX 5080. In addition to the details about what Stoeckley told her, Rouder also stated that while she was staying with Stoeckley, Judge Dupree called

the room, asked for Rouder specifically, and warned her not to ask her any questions. DX 5080 ¶ 13. Rouder stated: "For years afterward, I had wondered how Judge Dupree came to know that I had arrived on a weekend to see about Ms. Stoeckley's well-being, and why he was concerned about what she might be saying or being asked. Now, in August of 2005, hearing of Mr. Britt's statement, this bizarre occurrence made sense to me." *Id.*

5. Laura Redd

Laura Redd, the paralegal for Hart Miles who notarized the elder Stoeckley's affidavit, testified next. She testified that on the afternoon of Saturday, March 31, 2007, she received a call from Miles asking her to ride with him to Fayetteville to take and notarize an affidavit from the elder Stoeckley. Htr. 401. When she arrived with Miles, and talked to the elder Stoeckley, she found her to be "very sharp." Htr. 402.

Someone originally composed the elder Stoeckley's affidavit on a laptop, but the laptop was not compatible with the printer at the assisted living facility. Htr. 403-04. Consequently, Redd and the others had to re-type the affidavit on the facility's computer to be able to print it. Htr. 404. Redd testified that they "had a really hard time and it took a long time." *Id.* Redd testified that from the time she received the phone call from Miles until the time the affidavit was signed and notarized was about six or seven hours. Htr. 416.

6. Sara McMann

MacDonald's next witness was Sara McMann, who testified that she and her husband invited Stoeckley and her infant son to live with them from October 1982 until December 1982. Htr. 420-21. Shortly after meeting Stoeckley, McMann realized that she was Helena Stoeckley from the MacDonald case. Htr. 422. When McMann told Stoeckley that she knew who she was, Stoeckley told McMann that

three other men went to rough up MacDonald, and they asked her to go along. In exchange for going with them, Stoeckley was to become a wizard in an occult group. Htr. 423, 435-36. Stoeckley told McMann that the men murdered the MacDonald family members, and she ran out of the MacDonald home screaming. Htr. 423. McMann stated that both she and Stoeckley knew MacDonald was innocent and wanted him freed. Htr. 424. After Stoeckley died in January 1983, McMann and her husband became legal guardians of her infant son. Htr. 426.

7. Bench conference regarding Jerry Leonard

At the conclusion of McMann's testimony, MacDonald called Jerry Leonard, the attorney appointed to represent Stoeckley during the trial. A bench conference was then held, at which MacDonald's counsel informed the court that he anticipated that Leonard would assert the attorney-client privilege. Leonard's counsel was present at the conference. The court recessed the hearing for the evening to review the relevant caselaw. Htr. 443-62. At the start of the hearing the next day, the court ruled that based on *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the attorney-client privilege survived Stoeckley's death. MacDonald then rested, and the Government commenced its presentation of evidence.

8. Frank Mills

The Government's first witness was Frank Mills, a retired Special Agent for the FBI. At the time of the MacDonald trial in 1979, he was assigned to the Greenville, South Carolina office. Htr. 470. On August 13, 1979, he received a phone call from the U.S. Attorney's Office in Raleigh, followed by a teletype from the FBI, informing him of the bench warrant issued for Helena Stoeckley. Htr. 471; GX 2001. On August 14, 1979, Mills and Special Agent Tom Donohue located Stoeckley at a trailer near Walhalla, South Carolina, and transported her to the Pickens County Jail. Htr. 474-76.

Mills testified that they did not take her to Greenville to be housed because, at the time, Greenville was not a federally approved facility for prisoners. Htr. 479-80.

Per the instructions he received in the FBI teletype, Mills interviewed Stoeckley on the way to Pickens. Htr. 480. Mills testified that Stoeckley told him that she had been a heavy drug user for a number of years, and she remembered the night of the murder because of newspaper articles the next day. Htr. 480. She also said she not only used drugs, but she also sold them, and some of her buyers were doctors in the Fayetteville area, but MacDonald was not one of them. Htr. 480. According to Mills, Stoeckley said on the night of the murders, as every other night, she was using drugs. Htr. 481. Shortly before midnight she met with Greg Mitchell, who gave her a hit of mescaline, and she did not remember anything after that until the following morning. Htr. 481. Stoeckley said that Prince Beasley had contacted her in the following days about the murders, and she told him that she just could not remember what happened that night. Htr. 481.

Mills and Donohue booked Stoeckley in the Pickens County Jail, where she was held overnight. Htr. 484-87; GX 2006, 2007, 2064. Mills relayed the news of Stoeckley's arrest via a return teletype, and a phone call to the U.S. Attorney's office on August 15, 1979. Mills testified that Stoeckley was picked up the next day by Vernoy Kennedy, a tall black man he knew to be a deputy U.S. Marshal. Htr. 488, GX 2066.

Shortly thereafter, Mills summarized his interview with Stoeckley in an Form 302. In addition to what he already testified to, his summary in the Form 302 noted that Stoeckley said that "she could never figure out how any band of hippies as alleged by Dr. MacDonald, could have walked through an Officers Barracks section of Fort Bragg, inasmuch as there are numerous Military Police Patrols patrolling the area regularly." GX 2002. He also noted that Stoeckley told him that at the time of the

murders, she and her friends were involved in witchcraft. GX 2002. Stoeckley told Mills that when Beasley interrogated her shortly after the murders, she gave him "a number of different stories as to where she was during the time of the murder," because "she felt that a lie would be more believable than if she was to tell the truth which was that she simply was so high on drugs she had no recollection of where she was or what she was doing." GX 2002. Mills further summarized:

> Stoeckley advised that she honestly does not know what she did that night and therefore, could not categorically state that she was not involved in the murder. She stated that she has had a recurring dream since the murder in which she is pictured as being dressed in black with a candle in her hand with the words appearing on a wall of whatever room she is in with the inscription, "Acid is Groovie, Kill the Pigs." She stated in this dream, she does not specifically see bodies or anyone being killed or anything of this nature. She stated that this dream could very well be based upon information that she has read in newspaper accounts of the murder.

GX 2002.

Mills also testified that he interviewed Stoeckley on September 10, 1981, along with Special Agent Butch Madden. Htr. 496. Mills talked with Stoeckley about the interviews she had given to Prince Beasley and Ted Gunderson. Htr. 496-97. Stoeckley told Mills she was unhappy with Beasley and Gunderson because they were harassing her. Htr. 497-98.

Finally, Mills testified about the investigation into Stoeckley's death in 1983. Htr. 498. In 1983, Mills contacted a detective in Seneca, South Carolina, who told him that Stoeckley had died in early January 1983, and she had been in her apartment for several days before anyone found her. Htr. 499-500. At the time her body was found, her infant son was found, alive, underneath his crib. Htr. 499. Stoeckley's cause of death was pneumonia with cirrhosis of the liver as a contributing factor. Htr. 500.

9. Vernoy Kennedy

Over MacDonald's objection, the Government next read into the record the sworn statement of former Deputy U.S. Marshal Vernoy Kennedy, who died on June 11, 2007. In his sworn statement,

Kennedy said he transported Stoeckley from the Pickens County Jail to a meeting spot in Charlotte, North Carolina. GX 2010.9. Kennedy also identified his signature on Stoeckley's release form from the Pickens County Jail on August 15, 1979. *Id.* He stated that he, along with a female guard, transported Stoeckley to the intersection of Interstate 85 and Interstate 77 in Charlotte, North Carolina, where he met a deputy U.S. Marshal from the Eastern District of North Carolina and made the prisoner transfer. GX 2010.9-.10, .12. Kennedy also stated that he did not interview Stoeckley. GX 2010.13-.14.

10. Dennis Meehan

The Government's next witness was Dennis Meehan, a former Deputy U.S. Marshal. Meehan testified that on August 15, 1979, he was tasked by Chief Deputy Eddie Sigmon to travel to Charlotte, North Carolina, to pick up Stoeckley and transport her to Raleigh. Htr. 518-20. Because he was transporting a female inmate, he had to take a guard matron with him. Htr. 520. His office did not employ any female deputies, so Meehan's wife, Janice, was hired as a guard matron for the transport. Htr. 520.

Meehan drove to the pre-arranged meeting spot near the intersection of Interstate 85 and Interstate 77. Htr. 519, 521. Meehan testified that he could not remember the name of the deputy marshal from whom he received Stoeckley, but he did remember that he was tall black man. Htr. 522. Meehan than drove Stoeckley directly to the Wake County Jail via Salisbury Street and drove into the underground parking area, arriving around 4:30 to 5:00 p.m. Htr. 523-25. The news media were present, and Meehan recalled seeing footage of himself and his wife booking Stoeckley on the local news. Htr. 525. Meehan also recalled that the next morning, August 16, 1979, Jimmy Britt and Geraldine Holden transported Stoeckley from the Wake County Jail to the Federal Building, a trip of about six blocks. Htr. 526-27. Meehan opined that a picture of Stoeckley, Ernest Davis, and Jimmy

Britt published in the *News & Observer* on August 17, 1979, depicted them exiting the Federal Building on August 16, 1979, because he highly doubted that Stoeckley was at the Federal Building on August 15. Htr. 528-31, GX 2074. Meehan also testified that he never sat in an interview of a witness by an Assistant United States Attorney. Htr. 532.

11. Janice Meehan

Janice Meehan, Dennis Meehan's former wife, was the next witness called by the Government. She testified that she rode with her husband to pick up Stoeckley and that they picked her up from another deputy U.S. Marshal in a parking lot that was located approximately two to three hours from Raleigh. Htr. 538. She remembered a black male and a white male being with Stoeckley when they met her. Htr. 541. She said that on the way to Raleigh, Stoeckley mumbled, but Janice couldn't really hear her. Htr. 539. Janice also remembered media being present when Stoeckley was booked in jail, and seeing footage of herself later that evening. Htr. 539-40.

12. Eddie Sigmon

Eddie Sigmon, former Chief Deputy United States Marshal for the Eastern District of North Carolina, next testified for the Government. Htr. 543. Sigmon served as Chief Deputy during the MacDonald trial, and was responsible for handing out assignments to the deputy marshals. Htr. 546. He explained that at the time of the MacDonald trial, there was a policy that a female matron must be present when a marshal was transporting a female prisoner. Htr. 547. His office did not employ any female deputies at the time, so if possible, he would choose a deputy who had a wife available to transport a female prisoner. Htr. 547-48. He testified that, when transporting a female prisoner, if he had to choose between sending a deputy and a female clerical employee, or a deputy and his wife, he would choose the deputy who had a wife because he needed his clerical staff in the office to perform

their duties. Htr. 548. Sigmon also testified that if one of his deputies overheard a confession of someone in connection with a murder trial, he would hope that the deputy would tell him about it. Htr. 549. No such confession of Stoeckley was reported to him. Htr. 549. Sigmon also characterized Jimmy Britt as "an attention seeker." Htr. 550.

Sigmon also testified that once a material witness is released from custody and becomes a witness under subpoena, the United States Marshal no longer handled transportation of the witness. Htr. 557. He also testified that he did not call Jimmy Britt on August 19, 1979, and instruct him to get Stoeckley from The Journey's End Motel, noting he would not have authority to do so. Htr. 557. He also offered his opinion that former United States Marshal Salter did not instruct Jimmy Britt to deliver a subsistence check and purchase a bus ticket for Stoeckley, because it would be outside Marshal Service regulations. Htr. 558-59.

13. William Berryhill

William "Bill" Berryhill, former United States Marshal for the Eastern District, testified that he supervised Jimmy Britt during his tenure. Htr. 563-64. When asked to describe Britt as an employee, he said: "I would say he was a very marginal employee. I found Jimmy Britt to be rather large in ego and rather small when it came to veracity." Htr. 564.

14. Maddie Reddick

The Government's next witness was Maddie Reddick, who worked for the United States Marshal Service for 30 years as Supervisor Administrative Assistant of Office Work. Htr. 571-72. In that capacity, she was the disbursing officer for the Marshal Service, and was tasked with writing checks for the salaries for federal employees, as well as checks for jurors and witnesses. Htr. 572.

Reddick testified that she did not remember writing a subsistence check for Stoeckley, and she said for her to have done so would have been highly unusual because she would need a discharge form from the U.S. Attorney's office first. Htr. 573. She also testified that material witnesses who were housed in jail did not get pay, because the fee would have been disbursed to the jail providing housing and food. Htr. 574. Reddick said that she would not have been tasked with issuing checks to a defense witness, unless the defendant was indigent. Htr. 575, 578.

Reddick also testified that sometime around 2004, she received a phone call from Jimmy Britt, asking if Reddick knew where Gerry Holder was living. Htr. 577. Reddick told Britt what she knew, and testified she was surprised to have heard from Britt. Htr. 577.

15. J. Rich Leonard

J. Rich Leonard, who at the time of the hearing was a United States Bankruptcy Judge for the Eastern District of North Carolina, was called next by the Government. He testified that he served as a law clerk for Judge Dupree from 1976 to 1978. Htr. 586. During the second year of his clerkship, his co-clerk was John Edwards. Both of their clerkships ended at the same time. *Id.*

Leonard had taken the position as Clerk of Court just prior to the MacDonald trial. Htr. 587. Judge Dupree's law clerks during the trial were Steve Coggins, William Pappas, and Jeffrey Howard. Htr. 587. Leonard testified that during a recess during the MacDonald trial, the courtroom would have been locked to maintain chain of custody on the large number of exhibits in the trial. Htr. 589.

16. James Blackburn

James Blackburn, one of the prosecuting attorneys during the MacDonald trial, testified next. Blackburn stated that the prosecution began their interview of Stoeckley around 2:00 p.m. on August 16, 1979. Htr. 604, 605. The interview took place in the office of George Anderson, then the United

States Attorney for the Eastern District of North Carolina. Htr. 607. According to Blackburn, he, Anderson, Assistant United States Attorney Jack Crawley, and Assistant United States Attorney Brian Murtagh were the only people present for the interview with Stoeckley. Htr. 607-08. Blackburn testified that he asked Helena "words to the effect, Helena, are you involved in this case? Were you there? Did you participate in these murders?" and she said to him "very clearly, 'no I did not. I was not there.'" Htr. 610. She also asked Blackburn if the Government had evidence that she was there, and he responded that they did not, other than statements she had made over the years. Htr. 610. Blackburn maintains that he did not threaten to prosecute Stoeckley for the murders of the MacDonald family members. Htr. 611.

There was no other court session in the case for the remainder of the day on August 16, 1979. Htr. 611. After the conclusion of the Government's interview with Stoeckley, which lasted about an hour, Blackburn ran into Wade Smith in the Federal Building. Htr. 611-12. He does not recall Smith telling him anything about the defense interview, but he does remember telling Smith that Stoeckley had told the Government that she was not present in the MacDonald apartment and she did not participate in the murders. Htr. 612. He also testified that Jimmy Britt was not present during the interview with Stoeckley, and that Britt never approached him with any concerns about the trial. Htr. 640-41.

Blackburn also testified that he had no idea of what Stoeckley was going to testify to when called by the defense, and he noted that the trial transcript reflects that when court began on August 17, 1979, he brought up the issue of whether an attorney should be appointed to represent Stoeckley. Htr. 613-14. The defense wanted to proceed without one. Htr. 614. He also testified that he first learned

during court on August 17 of Stoeckley's various weekend activities, including her contacting Judge Dupree. Htr. 626-28.

Blackburn also was questioned about his actions which led to his 1993 disbarment and convictions for embezzlement, obstruction of justice, and forgery, among other crimes. Htr. 634-38; 653-81. In summary, approximately twelve years after the MacDonald trial, while he was in private practice, Blackburn made numerous misrepresentations to clients, including that he had filed actions on their behalf and/or was continuing to prosecute civil actions on their behalf. In the course of doing so, he forged judges' signatures to purported orders from the court to show the clients. He also misappropriated funds from his law firm's trust account to make payments to various clients, and forged one of his client's signatures to a promissory note. *Id.*, DX 5014A, 5014B, 5014C. Blackburn also testified about a promissory note he executed in 2001, promising to repay $50,000 advanced to him if he did not complete a book on the MacDonald trial. Htr. 688-89. Blackburn never completed the book, and has not repaid the money. Htr. 689-90.

Wade Smith was one of the attorneys who represented Blackburn in his state court criminal proceedings. In 2005, Smith contacted Blackburn, letting him know about some of the general updates in the MacDonald case. Blackburn agreed to execute a waiver of any conflict of interest, but made clear that he was not agreeing with the suggestion he ever said anything improper to Stoeckley. Htr. 643-47; GX 2013. The day after Blackburn signed the waiver, he was invited to Smith's office to review the Britt affidavit and some supporting documents. Htr. 645. When Blackburn read the affidavit, he had what he characterized as a heated discussion with Smith regarding what he viewed as the falsity of Britt's statements. Htr. 645. Blackburn also accused Smith of standing by while his co-counsel Segal made misrepresentations about Stoeckley's statements at trial. Htr. 646. A few hours later, Smith called

Blackburn to say that he was withdrawing from representing MacDonald. Blackburn later consented to one of Smith's law partners, Hill Allen, representing MacDonald. Htr. 646-47.

17. Jack Crawley

Jack Crawley, who served as an Assistant United States Attorney during the MacDonald trial, also testified for the Government. His role during the trial was to serve as an advisor on trial procedure and evidence, because of his previous trial experience. Htr. 714. Crawley testified that he was present for the interview with Stoeckley, along with Brian Murtagh, Jim Blackburn, and George Anderson. Htr. 721. He does not remember anyone else being present during the interview, and specifically he did not recall any deputy marshal, including Jimmy Britt, being there. Htr. 721. Accordingly to Crawley, Stoeckley told the prosecution team that she was not involved with or present at the MacDonald murders. Htr. 722. He also noted that if she had so confessed, he along with the other members of the prosecution team would have had a duty to disclose that information under *Brady v. Maryland*, 373 U.S. 83 (1963).

Crawley also testified to the fact that when he was in private practice in the mid-1990s, he had a grievance filed against him with the state bar, resulting in the bar filing a complaint against him charging that he failed to act with reasonable diligence with regard to two cases. A disciplinary hearing panel found that he had in fact failed to act with reasonable diligence, in violation of the rules of professional responsibility. Htr. 730. His license to practice law was suspended, and eventually he was found to be disabled to practice law, and was transferred to disability inactive status in 1997. Htr. 731.

18. Bill Ivory

The next Government witness was William "Bill" Ivory, the original Army CID Investigator assigned to the case. Htr. 759. Ivory testified about the crime scene search and the collection of

evidence at the MacDonald residence. He identified a great number of photographs of the crime scene, and described the evidence collected and noted by investigators. *See generally* Htr. 766-804. Ivory noted that during the crime scene search, investigating agents focused extensively on the area around the couch in the MacDonald living room, looking for debris and signs of a struggle, because that is where MacDonald claimed he was attacked. Htr. 775-77. Ivory testified that nothing was found in the carpeting in that area, particularly none of the blue threads that were found in other rooms throughout the house, and he also noted that the lamp in the room was upright and the pictures were hanging straight on the wall. *Id.* Ivory explained that investigators were able to "date" when the fibers consistent with MacDonald's pajama top were shed in the house, because of MacDonald's own statements and the blood. Htr. 878. Ivory also testified that several of the crime scene photographs show a rocking horse in Kristen's bedroom, but none of the springs of the rocking horse appear to be broken in any picture. Htr. 797, 823-32.

Ivory also testified about the ongoing investigation after the crime scene search. He stated that when he interviewed Greg Mitchell on May 25, 1971, Mitchell denied any involvement with the MacDonald murders and said that he didn't think Stoeckley, his girlfriend at the time, was involved either. Htr. 804-09; GX 2199. Ivory also testified about the use of polygraphs in the investigation, and how he felt it was not only the results of a polygraph that were important, but also how those results were used in a post-polygraph interview to obtain admissions from a person. Htr. 810. With regard to Mitchell, Ivory testified that Robert Brisenstine conducted a polygraph examination of Mitchell, and he concluded that Mitchell was being truthful when he denied involvement in the MacDonald murders and denied knowing the identify of the perpetrator(s). Htr. 813-816, GX 2200. Ivory also testified that Brisenstine also conducted a polygraph examination of William Posey, one of the Stoeckley Witnesses,

and concluded that Posey was not truthful when he denied giving false information in the Article 32 proceeding, and when he made statements to CID investigators. Brisenstine also concluded that Posey was not truthful when he said he thought his residence was broken into following his testimony in the Article 32 hearing. Htr. 817-22; GX 2331. During Posey's post-polygraph interview, he admitted that he did not observe Stoeckley dismount from an automobile on the morning of February 17, 1970, and only observed her walking from an automobile to her residence. GX 2331. Furthermore, he was not positive that the morning he observed Stoeckley walking to her residence was the same date of the murders. *Id.*

With regard to the crime scene, Ivory testified that at least six people were inside the MacDonald residence by the time he arrived on the scene. Htr. 834. He also stated that candle wax was found on the coffee table, the bedspread in Kimberley's bedroom, and the arms of a chair in Kimberley's room. Htr. 838-39. The candle wax found in those locations did not match any other candle found in the house, and all three differed from each other. Htr. 847-50. He noted, however, that the candle wax found throughout the house had been set for quite a while, and had household debris in it. Htr. 874. In Ivory's opinion, "it was not like the candles were just burnt that night." *Id.* Ivory also stated that when the *Esquire* magazine was examined, it showed the fingerprints from at least two investigators, as well as an unidentified finger print. Htr. 856-58. Ivory also recognized that the processing of the crime scene yielded 17 unidentified fingerprints and 14 unidentified palm prints. Htr. 860. None of the unidentified prints matched Mitchell's prints. Htr. 878.

19. Butch Madden

After Ivory, the Government called former FBI Special Agent Raymond "Butch" Madden to testify. Madden explained that he was tasked with investigating information given to the FBI by the

MacDonald defense team during post-conviction proceedings. Htr. 881. This mainly involved investigating the various statements of Helena Stoeckley naming individuals who may have participated in the MacDonald murders – Greg Mitchell, Dwight Edwin Smith, Shelby Don Harris, Bruce Johnny Fowler, and Allen Mazerolle. Htr. 882-83.

Madden testified that he also interviewed both Helena Stoeckley and her mother, the elder Helena Stoeckley, as well as defense investigators Ted Gunderson and Prince Beasley. Htr. 883, 917. The interviews with Helena Stoeckley occurred over a two-day period in September of 1981. Htr. 884. During the first interview, Stoeckley told Madden, along with SA Frank Mills, that Beasley had arrested her fiancé Ernest Davis in South Carolina and taken him to Fayetteville, and that he had promised to help out Davis if Stoeckley would go with him to Ted Gunderson's office in Los Angeles and give a statement. Htr. 887-88. He also promised her that they would relocate Stoeckley and Davis to California and help them find employment, financing, and new identities. Htr. 888. Madden testified that Stoeckley told him she was interviewed in California for a period of three to four days from the early morning into the late evening for sometimes twelve to fifteen hours a day, and that the questioning seemed non-stop. Htr. 889. Madden opined, as an experienced FBI agent, that this type of interrogation would be considered unethical and possibly illegal. *Id.* At the conclusion of this first interview with Madden, Stoeckley signed a statement in which she said that the statements she previously signed for Gunderson and Beasley were "basically accurate." Htr. 892. She went on to clarify: "However, the statements and the facts of the statements are what I think happened or dreamed and are not a positive recollection of events of February 16th-17th, 1970." *Id.* She also said, "The fact remains and the truth of the matter is that I do not actually know where I was during the early morning

hours of February 17th, 1970, and I do not know if I was present or participated in the MacDonald murders." *Id.*

The next day, Stoeckley gave Madden a second interview, stating she wanted to make corrections to her first statement. Htr. 911. In her second statement, she told Madden that Beasley brought Fred Bost to see her in South Carolina in January 1981. Bost was writing a book about the MacDonald murders, and Beasley asked that Stoeckley submit to an interview by Bost. Stoeckley told Madden that Beasley told her she should deal specifically through Beasley, and not through Gunderson or Bost. Beasley also told Stoeckley not to talk to the FBI, the Department of Justice, or anyone else involved with the MacDonald case. Htr. 910. Madden also testified that Stoeckley told him that she and Beasley were each supposed to receive 20% of the profits from Bost's book, with the remainder of the profits being split between Bost and the publisher. Htr. 910-11. She also told Madden that she remembered seeing MacDonald at some point prior to the trial, and that she was unsure what she did the evening of the MacDonald murders or the next morning. Htr. 912. Stoeckley reported feeling used by both Gunderson and Beasley, and stated that Gunderson coerced a confession out of her. Htr. 912-13. Stoeckley gave Madden a copy of a letter she wrote to Gunderson telling him she felt he had used her as a pawn. Htr. 913-15.

Madden also conducted an interview, audio-recorded and later transcribed, of Ted Gunderson and Prince Beasley regarding the statement they took from Helena Stoeckley. HTr. 917. Madden testified that Gunderson admitted to spending a day and a half with Stoeckley before she would agree to give him a written statement, and that she started talking at around 9 p.m. to 10 p.m., and he decided to continue with her until he was finished with the statement at 2:00 or 3:00 a.m. Htr. 920. When he reviewed the statement the next day, it was disorganized and disjointed. Accordingly, he reorganized

and retyped the statement and Stoeckley then signed the 53-page statement. Htr.921-22. Gunderson told Madden that he had contacted several individuals about a book or movie deal regarding the MacDonald murders, although he said that was not his primary goal. Htr. 935-36. Madden testified that he also talked to Beasley about the book deal with Fred Bost that Helena had told him about, and Beasley confirmed the percentage split that Helena had quoted. Htr. 937. The interview Madden conducted with Beasley and Gunderson was seventy-eight transcribed pages, but at no time during that interview did either of them mention that Helena had reported any threat to her by Jim Blackburn. Htr. 940.

Gunderson had given Madden the names of individuals Helena had implicated in the MacDonald murders (Bruce Fowler, Greg Mitchell, Don Harris and Allen Mazerolle) but told him that he had not run down those leads because he had not been paid to do so. Htr. 926. Madden testified that he then conducted an independent investigation into the possibility of these individuals being involved and was able to learn that during the MacDonald murders Allen Mazerolle was in jail. Htr. 926-29. With regards to Dwight Edwin Smith, Madden was able to interview him and he denied any involvement in the murders and stated that he did not know the other named individuals. Htr. 929-31. Madden testified that Shelby Don Harris was interviewed and said that he knew Helena Stoeckley, but that he had nothing to do with the murders and volunteered to take a polygraph examination. Htr. 932-34.

Madden also had occasion to interview the elder Helena Stoeckley on July 19, 1984, after the death of her daughter, Helena. Htr. 940, 942-43; GX 2332, 2333, 2334. He testified that the elder Stoeckley told him that the younger Helena told her and her husband that she did not know anything about the murders. Htr. 943-44; GX 2332. Mrs. Stoeckley believed that Helena could not have been present during the murders because she was nonviolent and loved children. She also believed her

daughter was not treated fairly by Gunderson and Beasley. *Id.* The elder Stoeckley told Madden that Helena's mind was "gone," especially when she was under the influence of drugs, and that when doing drugs she thought about the case. She reiterated, however, that she did not believe her daughter was involved. Htr. 945; GX 2332. Mrs. Stoeckley said that she saved all the newspaper clippings regarding the trial and allowed Helena to read them. *Id.* She also believed that Helena enjoyed all the attention from the MacDonald case and that when she asked her why she gave a statement to defense investigators, Helena told Mrs. Stoeckley that she thought she was at the murder scene. Htr. 945-46; GX 2332. Madden testified that, at the time of the interview, Mrs. Stoeckley was in good health, living at home, and appeared to have all her faculties. Htr. 946. At no time during their conversation did Mrs. Stoeckley ever mention a threat to Helena by Jim Blackburn. Htr. 947.

20. Joe McGinniss

The last witness for the Government was Joe McGinniss, author of *Fatal Vision*, a 1984 "true crime" book about the MacDonald trial. McGinniss testified that he was approached by MacDonald to come to the trial and write about it, in exchange for MacDonald receiving a percentage of the royalties. Htr. 954-55. He was given "unfettered access to any incidents, characters, dialogues, action scenes and situations that [he] desired in connection with the publication of the book." Htr. 955-56. He lived with a majority of the trial team in a fraternity house in Raleigh during the trial. Htr. 956.

McGinniss testified that he was present for interviews of some witnesses and potential witnesses, including Helena Stoeckley's parents. Htr. 956, 961. According to McGinniss's book, which he testified was accurate, during this interview Stoeckley's parents said that they did not know where their daughter was, but when they had last seen her in early June 1979, she had said she had planned to move to Walhalla, South Carolina, to live with a man she met at a rehabilitation center. Htr. 962,

GX 2201.2. The elder Helena Stoeckley also told defense attorneys that even if they could find her daughter, she didn't think it would be likely that she could contribute anything of value to the trial. Htr. 963; GX 2201.3. Specifically, the elder Stoeckley said of her daughter:

> "She called up, must have been a year and a half ago, four o'clock in the morning, all befuddled. She said somebody was chasing her and had taken her car keys. Then it turned out she'd had a stroke. We got her home, she was like a vegetable. She couldn't talk, couldn't eat, her face quivered, saliva would run out of her mouth. We put her on a strict diet and let her rest and after about three weeks she was improved, but still she was not quite right."
>
> . . .
>
> "She's had her gall bladder removed . . . she's had three liver biopsies, and she's been spitting up blood and passing blood in her stools for years. She's not at all like she used to be. She's a physical and mental wreck. She's not even a human being anymore. You find her now, sure she'll talk. She'll always talk. But I'm telling you, she's gonna talk all kinds of nonsense."

Htr. 963-64; GX 2201.3. The elder Stoeckley also described her daughter's reaction to the MacDonald murders, including her daughter's comment that "not a hippie around here" would do that. Htr. 964; GX 2201.3. The elder Stoeckley also blamed Prince Beasley for putting the idea that she was involved in the murders into her daughter's head:

> "Beasley was her Daddy image. He had a terrific amount of influence over her. She told me he had been up to talk to her right after it had happened and then she said, 'Yeah, I've been thinking, and I don't really know where I was that night. I might have been there.' And I knew right then that Daddy Beasley had talked her into it."

Htr. 964; GX 2201.3

McGinniss testified that he was present for the defense interview of Stoeckley. Htr. 965. According to McGinniss, Stoeckley maintained, even in the face of each "Stoeckley witness" being brought in the room to confront her, that she had no memory of being present during the murders. Htr. 969-77, GX 2201.3-.4. He also stated that Stoeckley's testimony on the stand the following day was consistent with what she said during her interview with the defense. Htr. 982.

McGinniss reviewed the transcript from the bench conference during Stoeckley's testimony where Bernie Segal told Judge Dupree about the things that Stoeckley allegedly said during the defense interview. Htr. 982-87. McGinniss said he "absolutely" did not hear Stoeckley make any statements that Segal represented she made. Htr. 987. He also indicated that Segal had provided him with a copy of the trial transcript, including the allegedly full volume of bench conferences, but this particular bench conference was omitted from the materials. Htr. 989-90. McGinniss also testified that he talked to Wade Smith after the trial, and that Smith said he had been between a rock and a hard place because he could not undermine his co-counsel, but he also could not participate in a fabrication. Htr. 990.

Following MacDonald's conviction, McGinniss continued to work on the book, and MacDonald invited him to stay in his condominium in southern California, near where MacDonald was imprisoned, and gave McGinniss permission to go through all of his files in the condo. Htr. 993-94. In the materials in the condo, McGinniss found the handwritten notes that MacDonald had made for his military lawyer during the Article 32 hearing in 1970. Htr. 995, GX 4000. In these notes, MacDonald wrote that on the evening of the murders he had possibly taken one diet pill when he had dinner with his family. Htr. 998; GX 4000. He indicated in his notes that in the three to four weeks preceding the murders, he had lost 12-15 pounds using 3-5 capsules of Eskratole Spansule, which consisted of 15 milligrams of dextroamphetamine and 7.5 milligrams of prochchlorperazine. Htr. 998, GX 4000. The notes did not specify over what time period MacDonald had taken 3-5 capsules; in other words, there is no indication whether he had taken 3-5 per day, or over the course of the entire preceding 3 to 4 weeks, or some other time period. GX 4000; Htr. 1008. McGinniss also wrote in *Fatal Vision* that MacDonald stated the following in his hand-written notes:

> The CID knows nothing about the possible diet pill . . . . If I did take the pill, it is conceivable that my urine and blood 11:30 A.M. Tues. would still have some residue.

> We would have to research the breakdown and excretion of what was in the pill. We would also have to find out if the excretion products are definitely different than normal breakdown products of adrenaline from the body, which would be increased in the excitement of the attack, etc. Right now, I don't know if it is definitely possible to identify Dextramphetamine from pills in the blood and the urine. I think I told the CID had the only pills I usually took were aspirin, occas. cold pills, and Tetracycline (antibiotic). . . . Dr. Henry Ashton, now living in Salt Lake City, Utah, was the group surgeon before I arrived in Sept. 1969. If he remembers, he can testify that the bottle of Eskatrol from my house (with only a few missing) was left in the desk I took over when he left. If necessary, we can then contact the Smith Kline & French representative near hear who can testify that I never received another large bottle of sample Eskatrol. He did give me some small sample bottles for use in the weight control program. Colette had some diet pills of her own (used before she was pregnant). I think I threw them all out because they made her nervous, but possibly there was an old container left in the medicine cabinet. . . .

GX 4002.2; Htr. 998-99.[36]

21. Jerry Leonard

As already recounted, prior to the Government's presentation of its evidence, this court ruled that the attorney-client privilege survived Stoeckley's death, based on the Supreme Court's decision in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). Htr. 468. Subsequently, the Government asked the court to reconsider the matter of waiver of attorney-client privilege with regard to Leonard's testimony, in light of a footnote in *Swidler*. Htr. 706-07; 524 U.S. at 409 n.3 (recognizing that "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the [attorney-client] privilege"). The court directed Leonard to prepare an affidavit and submit it for *in camera* review. Htr. 708-09.

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[36] GX 4000, the copy of MacDonald's notes, does not include this quoted language. The court assumes this was an oversight on the part of the Government, and this language was not fabricated by McGinniss. The court makes this assumption based on defense counsel's cross-examination of McGinniss, which focused, in part, on language McGinniss omitted from MacDonald's notes when quoting them in *Fatal Vision*. The court can only assume that defense counsel would have similarly questioned McGinniss about the above-quoted language if it was not accurate. *See* Htr. 1020-21.

After receiving and reviewing Leonard's affidavit [DE-302], the court informed the parties on September 20, 2012, that the privilege would be breached and Leonard could testify. Htr. 899. Accordingly, when the Government rested on September 24, 2012, MacDonald called Leonard to testify. Leonard's counsel made the request that the court conduct Leonard's examination *in camera*, which the court denied. Htr. 1106.

Leonard, an attorney in Raleigh, testified that he served as a law clerk to Judge Dupree after graduating from law school in 1971. Htr. 1106-07. He then went into private practice, about 30% of which involved criminal cases. Htr. 1107-08. Leonard testified that during the MacDonald trial, he received a phone call from Judge Dupree's law clerk asking if he would represent Stoeckley as a material witness in the case. Htr. 1108; 1118.[37] He agreed. Leonard testified that when he was appointed, "I had understood that she had been arrested as a material witness, that she had testified, that she was subject to recall, and I was being appointed and I needed to have her at court each and every day that court was in session." Htr. 1109. Although Leonard knew she had testified under oath, he cannot remember if he thought she had testified before the jury or on *voir dire*. Htr. 1147. As recently as the past 10 years, he thought she had testified to the judge under oath and outside the presence of the jury. Htr. 1157.

According to Leonard, he picked up Stoeckley, possibly at the Federal Building, late Sunday afternoon. Htr. 1109. He felt that he had to build trust with Stoeckley, and he also was worried about where she would stay and securing lodging for her. Htr. 1109. Leonard took her to his home where they

[37] Leonard stated in his affidavit that to the best of his recollection, he was appointed on Sunday, August 19, 1979. Aff. of Leonard [DE-302] ¶ 3. He admitted on cross-examination that when he was interviewed by the Government in preparation for the evidentiary hearing, he stated he thought he was first contacted by Judge Dupree's law clerk on Saturday night. Htr. 1140.

talked, and Stoeckley spent the night on his recliner. Htr. 1110. According to Leonard, the next day, he checked her into the Hilton before taking her to court. Htr. 1110.

At the courthouse, Leonard and Stoeckley had a room on the seventh floor to themselves. Htr. 1111. He explained to Stoeckley that his role as her attorney was to help her, and that anything she said was between him and her. Htr. 1111. They also talked about the statute of limitations, and Leonard told her he really didn't know the answer. Htr. 1112. He asked Stoeckley what her testimony would be if she was called to the stand again. Htr. 1112. Stoeckley told him she did not remember anything about the evening of the murders. Htr. 1113.

Leonard questioned how she knew she couldn't remember a particular night, and Stoeckley explained that everybody knew of the murders right after they happened. Htr. 1113. Stoeckley said she had spoken with investigators very soon after the murders, and that is how she knew she had no recollection of the night of the murders. Htr. 1113. Leonard testified that "that was it as far as I was concerned." Htr. 1113.

That afternoon, however, Stoeckley asked Leonard, "What would you do if I was there?" Htr. 1114. Leonard responded that he would still represent her, and that he needed to know the truth. Htr. 1114. Stoeckley then told Leonard she was there, and told him the story of what happened that evening. Htr. 1114. According to Stoeckley, she was there but did not participate in the actual murders. Htr. 1115. Stoeckley said she did not hurt anyone, nor did she anticipate that any of the MacDonalds would be hurt. She explained that at the time of the murders, she belonged to a cult, which had a core group of followers that engaged in rituals and believed in witches. Aff. of Leonard [DE-302] ¶ 13; Htr. 1191. Stoeckley told Leonard that the cult associated newborn babies with the devil. Htr. 1192. She also said that one of the members of the core group wanted to confront MacDonald about his discrimination

against heroin users in a drug treatment program, because heroin users were recommended for court marshal or discharge, while other drug users received more favorable treatment. Aff. of Leonard [DE-302] ¶ 14; Htr. 1191, 1198. This man talked the rest of the group into going. The end result, according to Stoeckley, was that things got out of hand and the people she was with committed the murders. Aff. of Leonard [DE-302] ¶ 14; Htr. 1191. Leonard told her that she could not take the stand again and testify, and that he would help her to assert her Fifth Amendment right against self-incrimination. Htr. 1114.

Leonard said that during the remainder of the week, Stoeckley would initiate conversations about the murders and offer additional random details. For example, she said that while she was in the MacDonald home, the phone rang, and she picked it up. One of the people she was with told her to put the phone down and hang up. Htr. 1115; 1194. She also, apparently out of context, spoke about a broken hobby horse in the MacDonald home, and remarked that the parents had not fixed it. Htr. 1189.

On cross-examination, Leonard was asked to read portions of the trial transcript detailing how Rouder and Underhill met Stoeckley at The Journey's End on Sunday, August 19, 1979, and secured her new lodging at the Hilton that day. Htr. 1167-77. He also reviewed the Government's notes of an FBI interview with him in 2006, where he told them that he paid for Stoeckley's first night at the Hilton out of his pocket, but was subsequently reimbursed by the court. Htr. 1164-65. He admitted that based on the information contained in the trial transcripts, it sounded like he would have had no need to secure lodging for Stoeckley on Sunday evening, but he nevertheless had the memory of having to do so. Htr. 1175-78. He also stated that while representing Stoeckley, he saw crime scene photographs, including one that showed the hobby horse. Htr. 1190.

Leonard was also questioned on cross-examination about statements he made to Errol Morris, who has authored a book about the MacDonald case. Specifically, he said that it was possible he told Morris that Judge Dupree would not let Stoeckley testify because of her past drug use. Htr. 1150, 1152. Leonard candidly stated, "I could have. You know, what happens is you find out stuff later and then you confuse that with what actually you knew at a particular time." Htr. 1152. Leonard was also questioned about his apparent statement to Morris that, at the time of his appointment, he did not know Stoeckley had testified at all:

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

Htr. 1159-60.

Leonard does not remember talking to anyone, including Wade Smith, about the case. Htr. 1207. He did send a poem written by Stoeckley to Blackburn, although he apparently did not remember doing so. Htr. 1227-28. He also did not remember hearing anything about Stoeckley being threatened or intimidated by either the Government or the defense, and nor did he remember Jim Britt ever telling him that Stoeckley had been threatened by Blackburn. Htr. 1127. He also did not receive any

information that Britt had sat in on Stoeckley's interview with the Government. Htr. 1128. He explained that he did not feel a need to contact the State Bar to ascertain what his duty was with regard to reporting what Stoeckley told him:

> She told me two different things and so my – to me, it was my duty – I didn't see a duty to go and say, hey, this witness who I didn't represent is now saying such and such because she was – part of it seemed to be what she had testified to before Judge Dupree or the jury. And so – she had a history, as I understood, of telling people she was there and then apparently on the witness stand she didn't incriminate herself.

Htr. 1231.

The Government also introduced, as part of the evidence as a whole, a 1995 North Carolina Supreme Court opinion censuring Leonard for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. GX 7010.

M. DNA or "Unsourced Hairs" evidence and arguments

As the court already has detailed, the Fourth Circuit has directed this court to consider DNA test results evidence from AFDIL, both as part of the evidence as a whole in assessing the Britt claim, and in support of a freestanding claim itself. At the September 2012 evidentiary hearing, MacDonald did not call any fact or expert witnesses with regard to the DNA evidence, nor did the Government. The parties did, however, agree to certain stipulations with regard to the DNA evidence, which were filed as Exhibit 1 to the parties' Corrected Joint Pre-Hearing Order [DE-306]. In pertinent part, the parties stipulated to the following:

- AFDIL performed mtDNA and/or nuclear DNA (STR)[38] testing on 29 questioned hair and vial contents specimens;[39]
- AFDIL'S DNA test results, subject to certain qualifications;[40] and
- the photographic and digital images generated by Master Sergeant Grant D. Graham, Sr., in the identification process of the specimens.[41]

The parties also designated a large number of exhibits and affidavits pertinent to the DNA evidence in the Corrected Joint Pre-Hearing Order [DE-307]. The parties relied upon the Stipulations, the designated exhibits, and other evidence in the record in making their arguments regarding the unsourced hairs at the evidentiary hearing.

At the outset, the court observes that the record shows that the parties agree upon the following:

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[38] "MtDNA" is shorthand for mitochondrial deoxribonucleic acid, and "STR" is short hand for short tandem repeats. "Generally speaking, every cell contains two types of DNA: nuclear DNA, which is found in the nucleus of the cell, and mitochondrial DNA, which is found on the outside of the nucleus in the mitochondrion." *United States v. Beverly*, 369 F.3d 516, 528 (6th Cir. 2004). "MtDNA . . . is inherited only from the mother and thus all maternal relatives will share the same mtDNA profile, unless a mutation has occurred." *Id.* at 529. With nuclear DNA, however, "half is inherited from the mother and half from the father, and each individual, with the exception of identical twins, almost certainly has a unique profile." *Id.* Accordingly, mtDNA has been said to be a test of exclusion, rather than one of identification, like nuclear DNA testing. *Id.* That being said, mtDNA "has some advantages over nuclear DNA analysis in certain situations." *Id.* Because there are a vast number of mitochondria in each cell, as opposed to just one nucleus, a significantly greater amount of mtDNA usually can be extracted by a lab technician as opposed to nuclear DNA; accordingly, mtDNA testing is "very useful for minute samples or ancient and degraded samples." *Id.* Additionally, mitochondrial DNA can be extracted from sources that do not have a nucleus, like bone samples or a hair without a root segment. *United States v. Coleman*, 202 F. Supp. 2d 962, 965 (E.D. Mo. 2002).

[39] The specimens were identified as follows: 46A, 48A, 51A(2), 58A(1), 58A(2), 71A(1), 71A(2), 71A(3), 75A, 91A, 93A, 97A(1), 98A, 101A(1), 101A(2), 104A(1), 104A(2), 112A(1), 112A(2), 112A(3), 112A(4), 112A(5), 112A(6), 112A(7), 112A(8), 112A(9), 112B(2), and 113A. *See* Stipulations [DE-306] ¶ 22.

[40] *See* Stipulations [DE-306] ¶ 29. Of note, one of the qualifications was that "[n]either party may rely on any statement in the AFDIL Report of March 10, 2006, filed by the Government . . . for any assertion with respect to the identity and provenance of any item examined, or tests performed or not performed by the Army CID or FBI laboratories prior to delivery of said item(s) to the AFID on May 17, 1999, except as reflected in Exhibit 1 to this Stipulation . . . ."

[41] *See* Stipulations [DE-306] ¶¶ 5, 9-11.

- A hair found on Kristen's bedspread (58A(1)), a hair from the rug within the body outline of Colette (75A), and another specimen designated as 91A, did not originate from a common source, from Helena Stoeckley, from Greg Mitchell, or from any member of the MacDonald family. These are referred to by the parties as "the unsourced hairs."[42]
- The hair found in Collete's left hand (51A(2)), an additional hair from Kristen's bedspread (58A(2)), and one of the hairs removed from the bedspread on the floor of the master bedroom (112A(3)) are consistent with each other and originated from Jeffrey MacDonald.[43]
- A forcibly removed hair adhering to the top sheet in the pile of bedding on the master bedroom floor (46A) is consistent with originating from Colette, and Kimberly and Kristen are excluded as sources of this hair.[44]
- The blond hair found in Colette's right hand (52A), and the hair found adhering to the bedspread on the master bedroom floor (112A(5)) have the same mtDNA sequence as Colette, Kimberly, and Kristen.[45]

The parties disagree, however, as to the import of these findings. More importantly, the parties disagree as to where one unsourced hair, specimen 91A, was collected.

1. Specimen 91A

The evidence referencing specimen 91A, and relied upon by the parties at the evidentiary hearing and in their briefing, is as follows.

a. MacDonald's contentions

MacDonald has noted that Dr. William Franklin Hancock, Jr., testified at trial that he conducted the autopsies on Kimberly and Kristen. Ttr. 2562. He participated directly in taking fingernail scrapings from both bodies, and gave those to CID agents who were in the autopsy suite at Womack Army Hospital. Ttr. 2601-02. One of the CID agents there was Bennie Hawkins, who testified at trial that he

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[42] *See* Stipulations [DE-306] ¶¶ 28, 35, 36, 37.

[43] *See* Stipulations [DE-306] ¶ 26.

[44] *See* Stipulations [DE-306] ¶ 27.

[45] *See* Stipulations [DE-306] ¶ 25.

collected, among other things, fingernail scrapings of the victims at the morgue in Womack Army Hospital. Ttr 3042. On cross-examination, Hawkins testified that the pathologist had collected items from the bodies and placed them in plastic vials. Ttr. 3049-50. He explained, "I took possession of vials containing what the doctor told me it contained at that point." Ttr. 3050. He specifically stated that he received the collected items from Dr. Hancock. Ttr. 3050. He marked each vial with the following notation, "BJH, 17 February '70." Ttr. 3051.

MacDonald next referenced the July 27, 1970, bench notes of Janice Glisson [DE-217-3]. The first page of the notes state that she received 13 plastic vials containing fingernail scrapings, hair samples, fibers and vaginal smears taken from the victims at Womack Army Hospital. The notes state that the vials were marked on the bottom with the notation "17 Feb 70 BHJ." The notes show that Glisson labeled each vial, and listed their contents. With regard to Vial number 7, Glisson stated:

> fingernail scrapings, left hand smaller female MacDonald (not labeled by Browning)
>
> 1 hair? – 2 fragments

Bench Notes [DE-217-3] at 1. The notes also indicated that after microscopically examining the contents of the vials, Glisson wrote that Vial number 7 contained fibers and "one light brown narrow hair, no medulla . . . intact root . . . ." *Id.* at 2. MacDonald's counsel asserted at the hearing, and in the post-hearing briefing, that the hair from Vial number 7 becomes hair number seven, which was later marked 91A by AFDIL. Htr. 1256; MacDonald's Post-Hearing Reply [DE-351] at 31; *see also* Stipulations [DE-306] ¶ 37.[46]

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[46] Paragraph 37 provides:
The hair removed from the unnumbered pill vial on July 27, 1970, by USACIL Chemist Janice Glisson, a vial which she marked "#7 JSG" and subsequently mounted on a glass microscope slide, which she numbered to correspond to the vial as "#7 fibers Hair," is the same hair on the same slide the FBI marked as Q137, and AFDIL subsequently marked and tested as AFDIL Specimen 91A.

MacDonald also highlighted the trial testimony of Dr. Hancock, who testified that some of Kristen's wounds could be "defined as defensive wounds or these could be wounds incurred in the process of other types of wounds happening." Ttr. 2577.

Based on the foregoing, MacDonald' s counsel argued at the hearing that Specimen 91A constitutes positive circumstantial evidence of intruders. Specifically, he argued that the chain of custody establishes that Specimen 91A was a hair that came from fingernail scrapings of Kristen MacDonald, and tests show that it is an unsourced hair. When coupled with Kristen's defensive wounds, according to MacDonald, the hair is evidence that an intruder inflicted harm upon Kristen. Htr. 1258.

b. Government's contentions

The Government highlighted the following evidence with regard to Specimen 91A. First, the Government noted the testimony of Drs. Gammel and Hancock in 1970 in the Article 32 proceedings. Their testimony showed that Dr. Gammel collected the fingernail scrapings from all the victims prior to the autopsy of Kristen, and Dr. Hancock assisted in the process by putting slips of paper in the vials identifying the origin of the scrapings. GX 3053.9; GX 3055.16-.17.

Next, the Government referenced the trial testimony of Dr. Hancock. As previously noted, Dr. Hancock testified that some of Kristen's wounds could have been defined as defensive wounds. A larger portion of trial transcript puts Dr. Hancock's testimony in better context:

> Q. With respect to the hands of Kristen MacDonald, what, if any, did you observe there, sir?
> A. There was multiple minor lacerations – cuts basically – on both hands if I recall from reading my protocol and, in addition, there was a more significant wound. I think it was on the right hand–the right hand on either the ring or middle finger. There was a fairly large – it looked like a incised or cut wound – approximately an inch and a half or so on the side of the finger. But the hand

also had some minor cuts on it in other places which basically did not cause any bleeding, but the large wound that I described was down basically to the bone.

Q. Do you have an opinion, sir, satisfactory to yourself, as to the type or classification of the wound that was on her finger?

A. I would say as a general reference these could be defined as defensive wounds

. . . .

Ttr. 2576-77; *see also* Ttr. 2587 (identifying GXP 778 as showing Kristen's hand); GX 5035.22 (testifying at the Article 32 hearing that he did not have a photo of the left hand). The Government also noted that CID Agent Bennie Hawkins did not testify that he was present during the autopsies of the victims.

The Government next noted GX 6001, which was a copy of a military property receipt. This shows that Bennie Hawkins relinquished custody of the autopsy items on February 21, 1970, to chemist Craig S. Chamberlain for transportation to USACIL for analysis. GX 6001; *see also* Supp. Aff. of Chamberlain [DE-213] ¶ 11. This same receipt also shows an entry for a "[p]lastic container containing hair samples of 3 year old victim, Christine McDonald, marked BJH, 17 Feb 70." GX 6001; Supp. Aff of Chamberlain [DE-213] ¶ 12, Ex. 1. Chamberlain has stated in an affidavit that at USACIL at Fort Gordon, Georgia, he was responsible for distributing the various items for testing. Supp. Aff of Chamberlain [DE-213] ¶ 13. For purposes of note taking and report listing, suspected blood stains were given the prefix "D" followed by a number. *Id.* ¶ 15. Hairs and fibers that were not being subject to serological testing were given the prefix "E" followed by a number. *Id.* ¶ 16.

On February 26, 1970, Chamberlain made an inventory of the items in his custody that he was going to distribute to other chemists at USACIL. Supp. Aff. of Chamberlain [DE-213] ¶ 17; GX 6002. In that inventory, he included the following: "D-237: Vial c/ fingernail scrapings marked 'L. Hand Chris.'" GX 6002. In his supplemental affidavit, Chamberlain explained:

> The use of quotation marks, and the word "marked" indicates that something bore the writing "L. Hand Chris", which contained the fingernail scrapings of Christine (sic)

> MacDonald. That exhibit D-237 was not described as a vial marked *fingernail scrapings L. Hand Chris*, but rather the exhibit was described as a Vial c/ fingernail scrapings marked "L. Hand Chris" indicates that the words "L. Hand Chris" were written on some surface (possibly a piece of paper) that was associated with the plastic pill vial.

Supp. Aff. of Chamberlain [DE-213] ¶ 19. Chamberlain further averred that his notes indicate that Glisson conducted any possible blood testing on D-237. *Id.* ¶ 22. He stated he has no personal knowledge of what constituted D-237, beyond what is reflected in his notes, and does not have knowledge of the serological or chemical analysis conducted on D-237, other than what is in his charts. *Id.* ¶¶ 22-23.

The Government next noted the bench notes of both Glisson and USACIL Chemist Dillard O. Browning. For his part, Browning was assigned to complete examination of the trace evidence. Aff. of Browning [DE-215] ¶ 4. His bench notes show that on March 9, 1970, he examined D-237, and observed:

> -Fingernail scrapings from ~~Kimberly's~~ Christine's left hand – vial contains one microscopic piece of multi strand polyester/cotton fiber identical to the pajama top material Bloodstained but washed.

Aff. of Browning [DE-215] ¶ 8; Ex. 3 [DE-215-3]. Browning testified to this identification before the grand jury in 1974. Aff. of Browning [DE-215] ¶ 9; Ex. 4 [DE-215-4]. Browning stated in his affidavit that "[t]here is no question in my mind . . . that what I removed from the bloody fingernail scrapings of Exhibit # 237 was a fiber, not a hair." Aff. of Browing [DE-215] ¶ 10. After microscopically comparing the fiber to MacDonald's pajama top, Browning did not return the fiber to the pill vial, and recollects that it was "consumed in the course of further examinations." *Id.* ¶ 11. Browning then turned over the residual fingernail scrapings to Glisson so she could type the blood. *Id.* ¶ 12.

Glisson's affidavit, and accompanying bench notes and other exhibits [DE-217], show that she conducted serology tests on materials from Kristin's left hand. Aff. of Glisson [DE-217] ¶¶ 9-13; Ex. 1 [DE-217-2]. Although she observed blood on the materials, Glisson's notes do not reflect that she identified the presence of a hair in the materials or that she performed any chemical analysis on any hair, and she stated that she would have recorded any such finding or testing in her notes. Aff. of Glisson [DE-217] ¶ 13. Glisson also explained in her affidavit that she did not use "D-237" in her notes, and that someone later added that designation, most likely Chamberlain. *Id.* ¶ 10.

Further, Glisson stated that during the course of the Article 32 hearings, due to the temporary unavailability of Browning, she was assigned to compare the known hair exemplars of Jeffrey MacDonald with hairs recovered from Colette's hands. As part of this process, she received from the Fort Bragg CID, on July 27, 1970, thirteen plastic vials reported to contain fingernail scrapings, hair samples, and other items collected from the MacDonald victims at autopsy. Aff. of Glisson [DE-217] ¶ 16; Ex. 2 [DE-217-3]. She explained that she numbered the vials, which were otherwise unmarked except for "17Feb70 BJH" on the bottom" and marked them with her initials "JSG" on the cap. After conducting a macroscopic inventory of the contents of the vials, she made notes about their contents and their origin. Aff. of Glisson [DE-217] ¶ 16. As noted by MacDonald, with regard to Vial 7 she stated:

> fingernail scrapings, left hand smaller female MacDonald (not labeled by Browning)
>
> 1 hair? – 2 fragments

Bench Notes [DE-217-3] at 1. Glisson observed in her affidavit that the description in her notes corresponds exactly with the words written on the piece of ruled paper depicted in GPS Photo No. 314. Aff. of Glisson [DE-217] ¶ 17; Ex. 7 [DE-217-8]. She also notes that she did not record in her notes

the contents or origin of this vial as being from "L. Hand Chris," "237" or "D-237." *Id.* Based on this she concluded that she had not previously examined the contents of this vial as presented on July 27, 1970. She also concluded that the container that Craig Chamberlain had described on February 26, 1970 as fingernail scrapings marked "L. Hand Chris", the contents of which she had previously subjected to serology tests, was not present on July 27, 1970. *Id.*

Glisson mounted the hair on a glass microscope slide, examined it, and recorded her observations. Aff. of Glisson [DE-217] ¶ 19. In her affidavit, she stated:

> I have no basis to believe that prior to July 27, 1970 I had ever seen this hair before. From the absence of any mention in my notes of suspected blood stains, or red brown stains, I conclude that I observed nothing on the hair under the microscope which indicated that this hair was, or had been, bloodstained. In any case, prior to mounting this hair on a slide #7, I performed no chemical analysis for the presence of blood. Nor did I wash this hair. Had I observed any indication of blood I would have recorded this in my notes, as I did in the case of the long "bloody" head hair (E-3) in vial #1, the debris around the mouth of Colette MacDonald, the "bloody" hair (E-4) from vial # 10, "R. Hand Mother" and the "bloody" hair (E-5) from vial #13, "left hand Mother."

Id.; Ex. 2 [DE-217-3]. She also stated that her use of the term "intact root" in relation to this hair was not meant to imply that the hair was pulled or otherwise forcibly removed. Aff. of Glisson [DE-217] ¶ 20.

The Government next noted that the hair on slide #7 came to be known as Specimen 91A, and expert analysis showed it to be a naturally shed hair. *See* Aff. of Fram [DE-219] ¶¶ 9-11.

Based on the foregoing, the Government argued that MacDonald had not, in fact, shown that Specimen 91A came from Kristen's left hand, let alone from under her fingernail. Nor, according to the Government, did MacDonald show that Speciman 91A was bloody or forcibly removed. The Government asserts that the provenance of the hair in Vial #7 was unknown prior to July 27, 1970, when Glisson first recorded her observations of it. Moreover, given that no blood was observed on

Specimen 91A, the Government argues that it is much more likely that the hair constitutes an artifact or debris, rather than a hair that was found in Kristen's hands which were covered in blood.

2. Specimen 58(A)(1)

The parties have stipulated that a hair found on Kristen's bedspread (58A(1)) is an unsourced hair. At the hearing, MacDonald argued that regardless of whether the hair was naturally shed or forcibly removed, it could have been shed by an intruder while that intruder was attacking Kristen in her bedroom, and is therefore positive, circumstantial evidence of his theory of intruders. Htr. 1258-59.

The Government, for its part, noted that Specimen 58A(1) was one of two hairs collected from Kristen's bedspread. FBI examiners determined that both hairs were of Caucasian origin, and that both hairs had "club" roots, indicating that they were naturally shed. Htr. 1319; Aff. of Robert Fram [DE-219] ¶¶ 19-21. As the court has noted, Specimen 58A(1) is one of the unsourced hairs. Specimen 58A(2), however, has a mtDNA sequence consistent with that of Jeffrey MacDonald. Htr. 1319; Stipulations [DE-306] ¶ 26. The Government argued that the presence of Specimen 58A(1), an unsourced, naturally shed hair, is no more probative than the presence of Specimen 58A(2), Jeffrey MacDonald's naturally shed hair, because there is no evidence as to when either hair was shed. Htr. 1320. The Government argued that this was especially the case, given the presence of numerous other unsourced fibers and unsourced black dog hairs. Htr. 1320-22.

3. Specimen 75A

The parties also have stipulated that a hair found on the rug in the master bedroom within the body outline of Colette (75A) is unsourced. MacDonald asserted in his post-hearing memorandum that "[t]he hair had both root and follicular tissue attached, indicative that it was pulled from someone's skin." Def. Post-Hearing Mem. [DE-343] at 37. Regardless, MacDonald argues that whether this hair

is naturally shed or forcibly removed, it is a piece of evidence that an intruder could have shed while attacking Colette. Htr. 1259.

The Government noted that Specimen 75A was collected almost a month after the murders. Htr. 1324; Aff. of Browning [DE-215] ¶¶ 3-6. The Government also noted an FBI examiner explained that naturally shed pubic hairs frequently have some follicular tissue attached, so the presence of follicular tissue does not mean that the hair was forcibly removed. Aff. of Fram [DE-219] ¶ 18. This same examiner opined that the pubic hair was naturally shed. *Id.* The Government posited that other debris was found on the rug, and that – other than the threads and yarns that are consistent with MacDonald's pajama top, which was indisputably torn on February 17, 1970 – there is no way to determine when Specimen 75A or the other debris were deposited on the rug. Htr. 1325-26.

4. Sourced hairs

The Government also argued that the DNA testing results regarding the "sourced" hairs strengthens the case against MacDonald.

First, the Government observed that DNA testing showed that Specimen 52A, a hair found in Colette's right hand, showed an mtDNA sequence identical to Colette, Kristen and Kimberly, who all share the same maternal mtDNA sequence. Stipulations [DE-306] ¶ 25. The Government asserted that this confirms earlier testimony that a microscopic comparison indicated this hair belonged to Colette. Htr. 1332.

Second, the Government noted that a previously uncomparable hair found in Colette's left hand, which MacDonald's trial counsel had pointed to as proof of intruders (and now designated as 51A(2)), was shown to have Jeffrey MacDonald's mtDNA sequence. Htr. 1332-33; Stipulations [DE-306] ¶ 26; Ttr. 3846-48, 7266. The Government noted that bench notes described the hair as having a rounded tip

and broken end, and noted that the hair bore tissue that appeared to be blood as well as unknown debris. The hair also had a fiber fragment along the shaft. *See* Bench Notes Graham [DE-123-4] at 8.

Third, the Government observed that Specimen 46A, a hair found adhering to the bedsheet on the floor in the master bedroom, was consistent with having originated from Colette, and Kimberly and Kristen were excluded as contributors. Stipulations [DE-306] ¶¶ 25, 27; AFDIL Laboratory Summary [DE-123-2] at 6. The Government also observed that an FBI examiner had determined that because of the presence of the root with sheath and follicular tag and attached tissue, this hair was consistent with having been forcibly removed. Htr. 1335; Aff. of Fram [DE-219] ¶¶ 22-24. The Government also noted that MacDonald had previously argued to the Fourth Circuit Court of Appeals that this hair could be highly persuasive evidence of MacDonald's innocence because the hair more than likely was deposited as a result of a struggle between the victims and the person who committed the murders.

Finally, the Government observed that a hair found adhering to the bedspread in the master bedroom (Specimen Q112A(5)) had the same mtDNA sequence as Kimberly, Kristen, and Colette, but the hair microscopically matched Kimberly's known exemplar. Htr. 1336; Aff. of Fram [DE-219] ¶¶ 26, 29. An FBI examiner also opined that this hair had been forcibly removed. Aff. of Fram [DE-219] ¶ 31. The Government posited that this result is notable because according to MacDonald's account, Kimberly should not have had contact with the bedspread in the master bedroom, and MacDonald also asserted that he had no contact with the bedspread or sheet. Htr. 1336.

N. Post-hearing submissions

Each side submitted post-hearing briefing. In connection with their memoranda, the parties filed additional exhibits.

1. MacDonald's filings

Specifically, MacDonald filed four periodical articles. The first was one authored by his former attorney, Harvey Silverglate, offered as support for MacDonald's assertion that the Government failed to disclose significant exculpatory or favorable evidence to MacDonald prior his trial. *See* DX 5114, Harvey Silvergate, *Reflections on the Jeffrey MacDonald Case*, THE CHAMPION, May 2013, at 52. Two other articles touch upon Michael Malone's testimony and suggest "Malone has engaged in misconduct." *See* DX 5119, Ruth Shalit, *Fatal Revision*, THE NEW REPUBLIC, May 26, 1997, at 18; DX 5120, Laurie P. Cohen, *Strand of Evidence: FBI Crime-Lab Work Emerges as New Issue in Famed Murder Case – Jeffrey MacDonald's Lawyer Alleges Fraud by Agent with History of Problems –Mystery of Blond Fibers*, WALL STREET JOURNAL, Apr. 16, 1997, at A1. The remaining article appears to cover MacDonald's 2005 filing regarding his Britt claim allegations. *See* DX 5118, Laurie P. Cohen, *Fatal Revision: The Plot Thickens in Famed Murder Case; Dr. MacDonald Pins Hope on U.S. Marshal's Account of What a Suspect Said*, WALL STREET JOURNAL, Dec. 14 2005, at A1.

MacDonald also filed the affidavits of two of his former attorneys, Hart Miles and Wade Smith, along with the affidavit of Robert L. Saddoff, M.D., a psychiatrist who examined MacDonald in 1970 and testified at the Article 32 hearing. Miles' affidavit concerns his recollection of how the elder Stoeckley's affidavit came about, and specifically states that the elder Stoeckley's participated voluntarily and with understanding as to what she was doing. DX 5115. Smith's affidavit seeks to clarify the record, and states, in part, that he does not think that Britt would have used him to perpetrate a fraud on the court. DX 5116. Sadoff's affidavit is offered in response to the hearing testimony of McGinniss; specifically, McGinniss's testimony that Sadoff stated that his opinion about MacDonald would have been very different had he known about MacDonald's possible use of drugs on the night

of the murders. Sadoff states that he has no recollection of making any such statement to McGinniss, and that his opinion has not changed throughout the case. DX 5117.

2. Government's filings

The Government also attached numerous exhibits to its sur-reply, some of which already were in the record of the case.

One such exhibit was the report of private investigator John Dolan Myers, regarding his January 23, 1980, interview of Jerry Leonard. In pertinent part, the report states:

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

Myers Report [DE-352-4].

The Government also filed the affidavit of Myers, which was filed in support of MacDonald's motion for writ of habeas corpus testicandum for Jimmy Friar on August 16, 1979 [DE-352-9]. In response to the writ, Friar was interviewed by the FBI on August 17, 1979, at the McDowell County Prison Unit in South Carolina. The Government has filed the report of Special Agent Stephen P. White, FBI, summarizing the interview [DE-352-10]. The Government also filed an article that was printed in the August 22, 1979 issue of the *News & Observer* [DE-352-7], which described the filing of the writ to obtained Friar's testimony and quoted the Myers affidavit. The Government also filed the affidavit of Butch Madden [DE-352-11], regarding his March 23, 1983, interview of Friar at the Psychiatric Unit of the South Carolina Department of Corrections facility.

ANALYSIS

Having recounted the highlights of the "evidence of the whole," the court turns to its gatekeeping duty of assessing whether MacDonald's claims satisfy the applicable standard of § 2255(h)(1). At the outset, the court notes that the Fourth Circuit's opinion explicitly remanded this case "for further consideration of both the Britt claim and the DNA claim." *MacDonald XI*, 641 F.3d at 599. Again, MacDonald's original claim under § 2255 – the Britt claim – asserted that the allegations of Jim Britt showed that his Fifth and Sixth Amendment rights had been violated. The DNA claim, or "unsourced hairs" claim, asserted a freestanding actual innocence claim. Additionally, buried in a footnote in his post-hearing Reply memorandum, MacDonald appears to try to resurrect a claim he asserted in 1990. *See* Deft. Post-Hearing Reply [DE-351] at 9 n.6 (asserting that he has shown a constitutional violation because "the government failed to disclose significant exculpatory or favorable evidence to MacDonald before his trial"); *see also MacDonald V*, 778 F. Supp. at 1342 (denying MacDonald's 1990 § 2255 petition premised upon the Government's alleged suppression of exculpatory and favorable evidence). Out of an abundance of caution, the court will construe Macdonald's assertion – argued for the first time since the remand of this matter in a single sentence in a footnote in a reply memorandum – to be a motion to amend to assert a third § 2255 claim. Pursuant to Rule 15(a), the court ALLOWS MacDonald's motion to amend to assert this claim.

Notwithstanding the Fourth Circuit's lengthy opinion instructing this court to conduct "a more searching § 2255(h)(1) evaluation" of both the Britt and unsourced hairs claim, the parties still disagree as to how this court should go about applying § 2255(h)(1). Moreover, assuming that any of MacDonald's claims survive the more searching § 2255(h)(1) inquiry, the parties also disagree as to how the court should assess the claims on the merits.

The Government seemingly contends that each of MacDonald's claims must be evaluated, for gatekeeping purposes, separately, although the evidence underlying each is considered as part of the evidence as a whole. In other words, the Government argues that for purposes of the § 2255(h)(1) analysis, the "newly discovered evidence" is the evidence underlying each § 2255 claim. *See* Gov't Post-Hearing Mem. [DE-344] at 183-85; 191-93. Moreover, the Government asserts that as to the merits, MacDonald is tasked with proving that a constitutional violation underlies *each* of his claims. *See* Gov't Post-Hearing Mem. [DE-344] at 193-95; Gov't Post-Hearing Reply [DE-346] at 50-52.

MacDonald, however, relying on the plain language of § 2255(h)(1) and authorities interpreting the statute, contends that all the newly discovered evidence – the evidence surrounding Britt's allegations, evidence of Stoeckley's statements to her mother and to Leonard, along with the evidence of the unsourced hairs – must be examined for gatekeeping purposes, untethered to any particular claim. Def. Post-Hearing Mem. [DE-343] at 8-10. MacDonald contends that this new evidence, after being considered against the backdrop of the evidence as a whole, serves to propel his § 2255 claims through the second gate. Furthermore, seizing upon the undersigned's comments at the evidentiary hearing that gatekeeping and merits assessments were conflated, MacDonald argues that to succeed on the merits, he need only make the identical showing required by the gatekeeping process. In other words, MacDonald argues that he need not prove a constitutional violation to succeed on the merits of any of his claims.

For the reasons more fully set out below, the court agrees with MacDonald regarding the standard of review, for gatekeeping purposes, under § 2255(h)(1). Nevertheless, the court concludes that MacDonald has failed to meet that standard for any of his claims. In other words, the court concludes that MacDonald has not demonstrated that the newly discovered evidence, viewed in light

of the evidence as a whole, is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty of the murders of his wife and daughters. Moreover, even if the court assumes that MacDonald's claims survive the § 2255(h)(1) inquiry, the court concludes that the claims fail on the merits.

A. 28 U.S.C. § 2255(h)(1)

As MacDonald observes, § 2255(h)(1) provides the starting point for this court's analysis at the gatekeeping stage. He also observes that to some extent, the language of the statute tracks the same procedure for a successive § 2255 motion as exists for a successive petition filed under § 2254 by a prisoner who was convicted in state court. Indeed, this court originally conducted the gatekeeping analysis under 28 U.S.C. § 2244(b)(2)(B)(ii), and although the Fourth Circuit concluded that this court erred, it also observed that the error was "probably harmless" because of the similarities between the two provisions. Notwithstanding the Fourth Circuit's characterization of the two provisions as "materially identical," *see MacDonald XI*, 641 F.3d at 610, MacDonald posits that crucial differences exist between the statutes, and these differences impact the court's gatekeeping analysis. The court agrees.[47]

As the Tenth Circuit Court of Appeals has observed, § 2255(h)(1) and § 2244(b)(2)(B)(ii) differ in at least two ways. "First, § 2255(h)(1) refers to 'newly discovered evidence,' whereas subparagraph (B)(ii) refers to 'the facts underlying the claim.'" *Case v. Hatch*, 731 F.3d 1015, 1035 (10th Cir. 2013). "[S]econd, § 2255(h)(1) omits the phrase 'but for constitutional error,' which appears in subparagraph (B)(ii)." *Id.* Accordingly, for gatekeeping purposes, § 2255(h)(1) allows "'newly discovered evidence'

[47] As discussed later in the order, the court does not, however, agree with MacDonald's argument that § 2255(h)(1) ultimately alters his burden on the merits.

to 'establish' a petitioner's innocence and omits any requirement that the new evidence be rooted in constitutional error at trial." *Id.* (contrasting § 2244(b)(2)(B)(ii) which "requires the '*facts underlying the claim*' to 'establish' a petitioner's innocence, and requires those facts to be attributable to some 'constitutional error' in the underlying trial proceedings") (emphasis in original); *see also Ferranti v. United States*, 480 F. App'x 634, 637 (2nd Cir. 2012) ("The district court thus imposed on Ferranti the additional requirement, not applicable to successive petitioners under § 2255, of demonstrating that the exclusion of exculpatory evidence from his trial was the result of constitutional error."); 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE, § 41.7 (6th ed. 2011) (observing that § 2255(h) "appears to adopt the same *procedure* for section 2255 cases as applies to successive state-prisoner habeas corpus petitions" but "adopts a *standard* for section 2255 cases that is significantly different from the comparable provision for state-prisoner successive petitions") (emphasis in original).

In applying this standard, the court sees no need to assess, for gatekeeping purposes, MacDonald's claims separately. Indeed, MacDonald himself does not attempt to assess his claims separately. Rather, he asks the court to consider all four categories of the newly discovered evidence (the Britt allegations, the alleged confessions to the elder Stoeckley and Leonard, and the unsourced hairs) in tandem, along with the rest of the evidence as a whole. *See* Def. Post-Hearing Reply [DE-351] at 10. Moreover, given that the new evidence proffered in support of each claim must also be evaluated as part of the evidence as a whole, distinguishing the claims for gatekeeping purposes makes little sense.[48] The court, accordingly, will assess whether all the newly discovered evidence, viewed in light

[48] Additionally, it appears that MacDonald is effectively seeking to amend his two claims to include evidence regarding Stoeckley's alleged confessions to her mother and Leonard. *See* Deft. Post-Hearing Reply [DE-351] at 7 (explaining that "the Britt claim" "label was adopted before Jerry Leonard

of the evidence as a whole, is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the murders of his wife and daughters.

B. MacDonald has not met his burden under § 2255(h)(1)

MacDonald has proffered four categories of new evidence in support of his § 2255 claims: (1) the three unsourced hairs; (2) Britt's allegations; (3) Stoeckley's alleged confession to her mother; and (4) Stoeckley's alleged confession to Leonard. None of the new evidence, considered against the whole panoply of evidence that MacDonald has marshaled over the past forty-plus years as well as the evidence presented at trial, would preclude a reasonable juror from finding him guilty.

1. The unsourced hairs evidence

Although MacDonald characterizes the DNA test results as "highly exculpatory," the court cannot agree. Looking at the actual evidence – as opposed to unsupported assertions in motions and memoranda – the DNA test results show the presence of three unsourced hairs: 58A(1) (found on Kristen's bedspread); 75A (found on the rug in Colette's body outline) and 91A (a hair found in a vial on July 27, 1970, containing fingernail scrapings from Kristen). A careful review of the evidence in the record shows that none of these hairs were forcibly removed, nor were they bloody. *See supra* pp. 120-26. Indeed, despite MacDonald's latest arguments to the contrary in his post-hearing memoranda,

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revealed what Stoeckley told him while he represented her during the MacDonald trial" and asserting that "[t]he important determination is what Stoeckley would have said if she had been called as a witness, free of any fear of subjecting herself to criminal liability in these homicides"); *id.* at 35 ("[A] jury hearing the newly discovered evidence from Jerry Leonard, Gene Stoeckley, Mary Britt and Wade Smith, as well as the DNA evidence of the unsourced hairs, would undoubtedly acquit MacDonald based on this evidence alone."). The court is, of course, cognizant of the Fourth Circuit's observation that this court previously has erred by viewing items of evidence proffered by MacDonald "as being submitted in support of claims separate and distinct from the Britt claim and each other." *MacDonald XI*, 641 F.3d at 614. Still, out of an abundance of caution, the court construes MacDonald's latest arguments as seeking to amend the two § 2255 claims. Pursuant to Rule 15(a), the court ALLOWS MacDonald's request to amend his § 2255 claims to include allegations relating to Stoeckley's confessions to her mother and Leonard.

his counsel conceded as much at the hearing in this matter.[49] To be sure, as MacDonald's counsel argues, the presence of an unsourced hair – even if it is naturally shed, and not bloody – could be considered as evidence of an intruder by a juror. It would be equally as easy for a juror to reach the conclusion, however, that the unsourced hairs were mere artifacts or debris, and not indicative of intruders. This is especially the case here, where the trial jury was presented with evidence MacDonald argued was supportive of his testimony that he and his family were attacked by intruders – other unsourced hairs; unsourced fingerprints and palm prints; unsourced wax; and the existence of a pink fiber in MacDonald's eyeglasses – and found him guilty anyway. *See* Ttr. 7266-68. Moreover, a juror

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[49] Defense counsel's concession occurred during the parties' closing arguments on September 25, 2012:

> Mr. Widenhouse: . . . . So, if there are unsourced hairs that are present at the crime scene that is some circumstantial evidence of intruders that was not available at trial.
>
> The Court: Well, excuse me. I understood the Government's discussion - - Mr. Murtagh's discussion of the unsourced hairs to be that they weren't as probative as they would be if they had been demonstratively forcibly removed and had blood on them.
>
> Mr. Widenhouse: Well, certainly, if they were forcibly removed they're more probative than they would be if they're not.
>
> The Court: All right. Do you say that the evidence still supports that?
>
> Mr. Widenhouse: Yes. The evidence supports that they're an unsourced - -
>
> The Court: You have read the affidavits attached - -
>
> Mr. Widenhouse: I'm not saying they're forcibly removed.
>
> The Court: Well, that's what I'm asking you.
>
> Mr. Widenhouse: No. I'm saying that the evidence from the DNA - -
>
> The Court: I'm asking you whether they have blood on them.
>
> Mr. Widenhouse: No, they don't seem to have blood on them.

Htr. 1396-97.

also would consider that the DNA results revealed that a hair found in Colette's left hand, which MacDonald's trial counsel had pointed to as proof of intruders, was shown to have Jeffrey MacDonald's mtDNA sequence. Htr. 1332-33; Stipulations [DE-306] ¶ 26; Ttr. 3846-48, 7266. Although MacDonald argues that the presence of this hair is not inculpatory, because his hair could have been discarded into Colette's hand during his efforts to save her life, a juror could reject that argument. A juror also could consider that the DNA tests showed that none of the tested hairs were consistent with coming from Stoeckley or Mitchell – two of the individuals MacDonald contends were involved in the murders of his family. In sum, the unsourced hairs evidence is not necessarily exculpatory scientific evidence. Furthermore, this evidence – even when considered against the record as a whole – is far from clear and convincing of MacDonald's actual innocence.

In this regard, the unsourced hairs evidence is similar in value to the other evidence of intruders proffered by MacDonald over the years; namely, unsourced fibers, saran fibers, and the alleged presence of a bloody syringe. For example, MacDonald has argued that the presence of black wool fibers found on the club and near Colette's mouth is evidence of intruders, because the fibers did not match any known exemplar from the MacDonald home. As indicated by previous findings by Judge Dupree and the Fourth Circuit, however, a juror could easily find the fiber evidence to constitute another example of household debris. *See MacDonald V*, 778 F. Supp. at 1351 (observing that "no two of these fibers appear to be from the same source" which diminishes the significance of the fibers, and that the fibers are unmatched "in part due to the fact that the MacDonald family's possessions are no longer available for forensic comparisons"), *aff'd MacDonald VI*, 966 F.2d at 854 ("The most that can be said about the evidence is that it raises speculation concerning its origins. . . . [T]he origins of the

hair and fiber evidence have several likely explanations other than intruders.").[50] Furthermore, the cumulative evidence regarding the saran fibers found in Colette's hairbrush can be viewed as "equivocal" as to whether the fibers originated from a wig or a doll. *MacDonald VI*, 1998 WL 637184, at *4. Ultimately, the saran fiber evidence engenders speculation as to the origin of the fibers; it by no means compels a conclusion that the three blond saran fibers are a product of Stoeckley brushing her wig with Colette's hair brush. Finally, the court, much like Judge Dupree before it, finds that there is little reliable evidence supporting the proposition that a "half-filled, bloody syringe" was recovered from the crime scene. *See supra* pp. 62-63. Like the unsourced fibers, saran fibers, and alleged presence of the bloody syringe, the presence of three unsourced hairs at the crime scene, even when considered in light of all the other evidence of intruders MacDonald has marshaled over the years, does not sufficiently rebut the Government's evidence of guilt. A juror presented with the evidence of the unsourced hairs and who considers the entire record in the case, could draw a number of reasonable, non-exculpatory inferences from the fact that three unsourced hairs were found at the scene.

In sum, the court finds that the unsourced hairs evidence does not constitute exculpatory scientific evidence. Moreover, even if it did, and even if it was considered against the entire record of evidence in this case, it does not serve to establish that no reasonable juror could find MacDonald guilty of the murders of his family.

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[50] Presumably it would not be lost on a juror that a possible reason that these fibers did not match any known exemplar from the MacDonald home is because the MacDonald family possessions were no longer available for comparison, having been returned to Jeffrey MacDonald and disposed of by him.

2. The alleged confessions of Stoeckley

The other new evidence MacDonald largely relies upon are the confessions Stoeckley allegedly made to Britt, Leonard, and her mother. The court finds that none of the proffered evidence constitutes reliable, credible evidence which would support the conclusion that no reasonable factfinder would have found MacDonald guilty of the murders of his wife and daughters.

a. Confession to Britt

As part of his new evidence, MacDonald proffers Britt's sworn statements that while he was transporting Stoeckley from South Carolina to Raleigh for the MacDonald trial she told him that she and others were in the MacDonald house on the night of the murders and that she mentioned that there was a hobby horse at the MacDonald home. After considering the various sworn statements of Britt, along with other evidence and testimony proffered at the September 2012 hearing, the court finds Britt's statements to be neither probably reliable nor likely credible.

First, the court notes that Britt's sworn statements contain material inconsistencies. For example, in the November 3, 2005 affidavit, Britt states that he was assigned to go to Greenville, South Carolina to pick up Helena Stoeckley, and in fact did pick her up at the County Jail in Greenville. DX 5059 ¶ 11. In his sworn interview on February 24, 2005, however, he stated that he went to Charleston, South Carolina, and assumed custody of her at the United States Marshal's Office there. DX 5055 at 12. Additionally, in his February 2005 sworn interview, he stated that upon arriving in Raleigh, he checked Stoeckley – who had been arrested on a material witness warrant – into the Holiday Inn on Hillsborough Street. DX 5055 at 16. In his February 2006 addendum to his affidavits, however, he stated that he committed her to the custody of the Wake County Jail. DX 5056. Perhaps the first inconsistency – Britt's assertions as to where he picked up Stoeckley – can be attributed to the fading

memories of Britt. The second inconsistency, however, between whether he committed Stoeckley to the custody of the Wake County Jail or whether he checked her into a hotel, calls into question the validity of any of Britt's memories, given that she had been arrested on a material witness warrant.

In addition to the inconsistencies between his own statements, Britt's various statements are also contradicted by a host of other evidence before this court. The testimony of Frank Mills establishes that he arrested Stoeckley on August 14, 1979, and committed her to the Pickens County Jail. Htr. 474-75. His testimony was supported by documentary evidence. *See* GX 2008 (booking report and materials from Pickens County Jail); GX 2064 (commitment form). The documentary evidence also showed that Stoeckley was released the next day to Deputy United States Marshal Vernoy Kennedy. GX 2066 (release form). Kennedy confirmed this fact in his August 23, 2006, sworn statement. GX 2010. Additionally, Kennedy stated that he and a female guard then transported Stoeckley to a prearranged spot at the intersection of Interstate 85 and Interstate 77 in Charlotte, where he turned Stoeckley over to a Deputy Marshal for the Eastern District of North Carolina. GX 2010 at 12-13. This evidence, which the court finds a reasonable juror would credit as credible and reliable, directly contradicts Britt's assertions that he traveled to South Carolina to transport Stoeckley to the trial.

The testimony of former Deputy Marshal Dennis Meehan and his former wife, Janice Meehan, also directly contradict Britt's assertions. Dennis Meehan testified that he and his wife, who was acting as a matron, were tasked with picking up Stoeckley in Charlotte and transporting her to Raleigh. He testified that he picked Helena up at a prearranged stop at the intersection of Interstate 85 and Interstate 77 in Charlotte from another deputy marshal, whom he described as a tall, black man. He then transported Stoeckley directly to the Wake County Jail. Janice Meehan confirmed this same version of events in her testimony. The Meehans' testimony, which the court perceives to be credible and

reliable, greatly discredits the idea that Stoeckley confessed to Britt during a long transport from South Carolina to Raleigh.

Additionally, the record as a whole establishes the high unlikelihood of other events Britt mentions in his sworn statements. In his Addendum to his affidavit, Britt states that on Sunday, August 19, 1979, he checked Stoeckley out of The Journey's End motel and then registered her at the Holiday Inn. DX 5056. This conflicts with the testimony of Wendy Rouder, who testified that she and Red Underhill retrieved Stoeckley from The Journey's End and subsequently checked her into the Hilton. Britt also asserted that on August 20, 1979, he was tasked with obtaining a subsistence check for Stoeckley from a Marshals Office administrator, cashing the check, and checking Stoeckley out of the Holiday Inn. Britt stated he did so, and followed his instructions to purchase a one-way bus ticket to Charleston for Stoeckley. DX 5056. The rest of the record reflects, however, that Stoeckley stayed in Raleigh through at least August 24, 1979, meaning that Britt could not have placed her on a one-way bus to Charleston on August 20, 1979. Additionally, testimony from Marshals Office employees establishes that it was highly unlikely that the government would be responsible for a subsistence check where Stoeckley, after August 17, 1979, was under a subpoena from MacDonald, a non-indigent defendant. Htr. 559, 572-75. Attributing these major inconsistencies to fading memories is extraordinarily difficult; rather, it is more likely that these details are fabrications or confused memories, which in turn render all of Britt's statements incredible and unreliable.

b. Confession to Leonard

Similarly, the court is constrained to find Leonard's testimony regarding Stoeckley's confession to be unreliable. Again, Leonard was appointed to represent Stoeckley after she had testified in front of the jury, and after a series of bizarre events over a weekend, including Stoeckley calling Judge

Dupree and telling him she was in fear of defense attorney Segal and requesting an attorney. Leonard testified that on August 20, 1979, Stoeckley originally told him that she could not remember the events of the early morning hours of February 17, 1970, but later that afternoon she changed her story, telling Leonard that she was present in the MacDonald home during the murders but did not participate. During the week she waited at the federal courthouse under subpoena from MacDonald, she offered up other details to Leonard, including that there was a broken hobby horse in the MacDonald home, and that while she was in the MacDonald home, she answered a ringing telephone, but hung up when one of the people she was with told her to do so.

Like Britt's statements about Stoeckley's confession, Leonard's recitation of the events surrounding his representation of Stoeckley is contradicted by other matters in the record. For example, he testified that he remembers picking Stoeckley up on a late Sunday afternoon, possibly at the federal courthouse, and taking her to his house. He spoke with her for several hours, and she eventually fell asleep on a recliner at his house. Leonard testified that he was responsible for her lodging, so he checked her into the Hilton prior to taking her to the courthouse on Monday morning. Htr. 1109-11. The record indicates, however, that Stoeckley spent most of Sunday, August 19, 1979, in the company of Rouder and Underhill, who arrived at The Journey's End motel around 11:00 or 11:30 a.m. Rouder spent several hours with Stoeckley at The Journey's End, and then drove her to the Hilton where Stoeckley and Underhill checked in. Stoeckley then accompanied Rouder and Underhill to the The Downtowner Hotel so Underhill could retrieve his belongings. Shortly after Underhill and Stoeckley returned to the Hilton, Rouder was summoned to transport Stoeckley to the hospital, for treatment for her nose. Underhill spent the night in an adjoining room, and Stoeckley spoke to Underhill on both Sunday evening and Monday morning. Ttr. 5897-5949. Leonard's version of his initial contact with

Stoeckley cannot be reconciled with the *voir dire* testimony at trial from Underhill and Rouder, or Rouder's hearing testimony in this matter. As was the case with Britt's allegation, Leonard's assertions as to something that seemingly did not happen calls into question the reliability of all of his testimony.

Similarly, Leonard testified that after Stoeckley told him that she was present in the home during the MacDonald murders, he instructed her to plead the Fifth Amendment if she was recalled to testify. He also stated that he did not discuss what Stoeckley told him with anyone, including Wade Smith. Ttr. 1206-07, 1211. Evidence in the record, however, calls into question this account. In open court discussions with Judge Dupree, Smith stated that he had talked with Leonard at length on the morning of August 23, 1979, regarding the defense's need to keep Stoeckley under subpoena because she continued to "say things that tie her to this case." Ttr. 6647. Additionally, on January 23, 1980, shortly after MacDonald's trial, Leonard spoke with John Dolan Myers, a defense team investigator. According to Myers' memorandum of the interview, Leonard said that with Stoeckley's permission, he had a conference with Smith during which Leonard told Smith what Stoeckley had told him. He also gave Smith insight into his impressions of Stoeckley. *See* Report of Myers Interview of Leonard [DE-352-4]. Again, these differing statements are hard to reconcile, and result in great questions about the overall reliability and credibility of Leonard's testimony.

This is the case, even though Leonard's account of Stoeckley's confession seemingly is corroborated by the July 25, 1983 declaration of Jimmy Friar. Therein, Friar stated that around 2:00 a.m. on February 17, 1970, he called the Fort Bragg base operator from a payphone at the Wade Hampton Hotel, in Fayetteville, attempting to get in contact with a Dr. Richard MacDonald, a doctor who had treated him while he was a patient at Walter Reed Hospital in Washington, D.C. He asked for "Dr. MacDonald" without specifying the first name. The base operator gave him a number, which he

called. Friar stated that a laughing woman answered the phone, and he heard someone say "Hang up the Goddamned phone." DX 5021. Friar's account corresponds to what Stoeckley allegedly told Leonard; namely, that during the time she was in the MacDonald house she answered the phone and hung it up when told to do so by one of the others with her.

The problem, however, is that Friar's declaration is neither likely credible nor probably reliable. As Friar himself sets forth in his declaration, he was disoriented on the night of the alleged phone call, having drunk alcohol and played pool in Fayetteville after persuading an orderly to let him sneak out from Womack Army Hospital at Fort Bragg. DX 5021 ¶¶ 3, 5, 6, 8. Indeed, in an interview with the FBI during the MacDonald trial, Friar stated that he had consumed quite a bit of alcohol during the day, in addition to taking prescribed medications for a mental condition. *See* Form 302 of Aug. 17, 1979, Interview of Friar [DE-352-10]. Moreover, in this interview Friar stated that he had undergone psychiatric treatment in various prison units, and, during the time of the MacDonald murders, he was being held in a special barracks at Fort Bragg, apparently as a result of being absent without leave from Walter Reed Army Hospital. *Id.* In a later interview with the FBI, however, he denied receiving any mental treatment, and stated he was only receiving treatment for shrapnel wounds and grand mal epilepsy. Subsequently, Friar admitted in correspondence with the FBI to being a frequent patient in the mental wards of numerous hospitals. *See* Aff. of Madden [DE-352-11]. He also described himself as a "con man and manipulator" to the FBI, and admitted to a criminal history that included convictions for fraud. *See* Form 302 [DE-352-10]; Aff. of Madden [DE-352-11]. Friar's history of mental illness, criminal convictions, and inconsistent statements, in addition to his admitted intoxication and

disorientation during this alleged phone call, makes him an inherently unreliable and incredible witness.[51]

Additionally, as Leonard candidly admitted during his testimony, "what happens is you hear stuff at a later date and it all becomes part of what you know and it's hard to peel away the context that you heard one thing from the other." Htr. 1159. Information about the Friar phone call has been known to the public since Wednesday, August 22, 1979, and has been recounted in an opinion from the Fourth Circuit. *See* Ginny Carroll, *Witnesses Attest to MacDonald's Trust, Compassion*, NEWS & OBSERVER, Aug. 22, 1979 at 25 [DE-352-7];[52] *MacDonald VI*, 966 F.2d at 855 n.7. Given Leonard's seemingly poor memory about the events of August 1979, the court finds it entirely plausible that he is "remembering" information he learned at a later date. In sum, the court respectfully finds that Leonard's testimony is not likely credible nor probably reliable.

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[51] Additionally, the court agrees with the Government's assertion that Friar related a "belated tale of improbable coincidences, that is riddled with contradictions and uncorroborated by any reliable or credible evidence." Gov't Post-Hearing Sur-Reply [DE-352] p. 38. It is telling that MacDonald ultimately chose not to call Friar as a witness at the 1979 trial.

[52] The article stated, in relevant part:

> [T]he defense attorneys also filed a request Tuesday to secure testimony from James E. Friar, 30, an inmate serving an 10-year sentence for fraud at the medium-custody state prison unit in McDowell County.
> Friar was convicted April 6, 1977, in Richmond County of writing a check with a fake name and address for men's clothing. Superior Court Judge William Z. Wood, who sentenced Friar, recommended that he receive psychiatric treatment.
> Friar told an investigator for MacDonald that about 3 a.m. on the morning of February 17, 1970, he was in Fayetteville. He said he telephoned the MacDonald house by mistake, looking for another doctor named MacDonald.
> According to an affidavit by defense investigator John Myers, a woman answered the phone and began laughing when Friar asked for Dr. MacDonald. A male voice in the background said, "Hang the damn phone up," according to the affidavit.

Id.

c. The reliability and credibility of Helena Stoeckley

Moreover, even if the court could find the statements of Britt and Leonard regarding Stoeckley's confessions to be credible and reliable, and if the court assumes that the elder Stoeckley's sworn statements are likely credible and probably reliable,[53] at bottom they are repeating the statements of Helena Stoeckley herself. As this court observed in 2008, with regard to Stoeckley's confessions, the relative credibility of Britt – or anyone else repeating Stoeckley's statements – is not especially relevant. *MacDonald X*, 2008 WL 4809869, at *17. "Regardless of the credentials of the person relating them, however, Stoeckley's 'confessions' were untrustworthy in 1970, in 1979, in 1990, and in 2005, and they remain so [today]." *Id.* "Neither the passage of time nor the identity of the hearsay witness improves the reliability of what Stoeckley said or believed about the night of February 17, 1970." *Id.*

Judge Dupree, who had the opportunity to observe Stoeckley during the trial, wrote in 1985:

> Helena Stoeckley testified before the court at trial and the court has reviewed her statements, the affidavits relating to her, and the videotape supplied by MacDonald of a television program featuring her, all of which lead to the conclusion that this woman is not reliable.
>
> The court's conclusion that Stoeckley is not a reliable confessor should not be construed to mean necessarily that she was not telling what she believed to be the truth when she confessed to the MacDonald murders. From the very beginning, she said that she could not remember what she had done on that night because she had taken so many drugs. Based upon MacDonald's account of the murders, the Fayetteville police, military police and the FBI investigated members of the drug culture in Fayetteville and Stoeckley, quite understandably, became anxious because she could not recall where she was during the crimes. This anxiety, her drug-induced state of confusion, and the

[53] The court recognizes that the Government challenges whether the elder Stoeckley's 2007 statements are likely credible or probably reliable. It is true that the elder Stoeckley's failure to tell the FBI in 1984 about her daughter's confessions raises questions about the credibility of her 2007 statements. Her daughter had already died at the time of the September 1984 interview, and therefore the elder Stoeckley would not have had the motivation to shield her daughter from criminal liability. Nevertheless, the court will assume that a reasonable juror could find the elder Stoeckley's 2007 statements credible and reliable.

> observations of her friends and Detective Beasley that she met the description of the woman involved in the murders led Stoeckley to believe that she might have participated in them but had a mental block about the night which prevented her from recalling details.
>
> Stoeckley's uncertainty and the relentless attention the case focused upon her undoubtedly tortured her over the years. Her drug abuse of the late 1960's and early 1970's gave way to alcohol abuse in the late 1970's which contributed to her premature death in 1983. The confluence of her drug and alcohol abuse and uncertainty over her role in the crimes appears to have ultimately led her to believe that she was involved and to piece together her fragmented memory of 1970 into an explanation which MacDonald says amounts to a confession. Whether this was done innocently or by design to gain the attention which she craved is unclear from the record. What is clear is that considering all of the circumstances, neither Stoeckley nor her "confessions" are reliable. Thus, although the inconsistencies in Stoeckley's confessions and contradictions of the statements by the facts of the case and the affidavits of other witnesses would be more than enough to lead the court to conclude that the confessions are untrue, Stoeckley's unreliability adds even greater force to this conclusion.

MacDonald III, 640 F. Supp. at 324. The court does not see how the fact that Stoeckley also allegedly confessed to a marshal, her attorney, and her mother (prior to Stoeckley's death)[54] changes the utter unreliability of Stoeckley herself.[55] Indeed, it reinforces earlier conclusions by this court that Stoeckley's statements, being "all over the lot" lacked any measure of trustworthiness. Ttr. 5808. Accordingly, any "confessions" from Stoeckley cannot constitute credible, reliable evidence to support the conclusion that no reasonable juror would find MacDonald guilty.

Nor does the consideration of the affidavits and declarations from numerous other witnesses about Stoeckley's activities around the time of the murders change this conclusion. Although Judge Dupree's findings and conclusions are not now binding, the court nevertheless agrees with his

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[54] It appears that with regard to the confessions to Leonard and her mother, Stoeckley was in fact recanting earlier versions of the stories she had told these individuals.

[55] For the same reason, Stoeckley's confession to Sara McMann fails to constitute credible, reliable evidence.

assessment that the statements of the witnesses "suffer from either factual inaccuracies or contradictions which render them of no use to MacDonald in proving that Stoeckley and her group committed the murders," or serve only "to place Stoeckley and her friends in Fayetteville at locations close to where she and other members of the group lived in 1970." *MacDonald III*, 640 F. Supp. at 325-27.

As to the latest affidavits relating the confessions of Greg Mitchell, the court cannot find the confessions themselves to be probably reliable or likely credible. Years prior to making these confessions, Mitchell had given a sworn statement to CID investigators disavowing any involvement in the murders, and had subsequently passed a polygraph examination. Most of the confessions that occurred years later came when Mitchell was under the heavy influence of alcohol, marijuana, or both. The court cannot find Mitchell's confessions to be reliable, due to his alcohol dependency, nor credible, given its contradiction to earlier sworn statements.

3. The alleged threat to Stoeckley and fraud on the court

The last category of evidence upon which MacDonald relies is Britt's assertions that (1) Stoeckley confessed her involvement in the murders to prosecutor Blackburn; (2) in response, Blackburn threatened to indict her for murder if she so testified; and (3) Blackburn subsequently misrepresented to the court and defense counsel what Stoeckley said to him. As the court already has observed, Britt's various sworn statements are replete with major inconsistencies and contradictions with the rest of the record, in such a manner that almost all of Britt's statements – including those regarding what Stoeckley said to prosecutor Blackburn and what he said in response to her – are rendered likely incredible and probably unreliable. Additionally, his assertions regarding the interview and threat are contradicted by two other witnesses who were present during the interview: prosecutors

Blackburn and Crawley. Although MacDonald attacks the relative credibility of Blackburn and Crawley, neither witness is inherently more incredible than Britt. Blackburn admittedly has engaged in fraudulent acts in the past, including forging orders of a court to present to clients, and ultimately lost his license to practice law. The record shows, however, that Britt likely submitted a fraudulent document to a court; namely an affidavit in a 2000 divorce proceeding stating, under oath, that he and his then-wife, Nancy, were no longer compatible, could no longer live together as husband and wife, and there was no possibility that they could reconcile. GX 2017. Other documents in the record, however, indicate that he and Nancy continued to live together through at least 2005. *See* GX 2123 (Jimmy Britt's 2005 Bankruptcy Petition listing Nancy's address as 616 Wimberly Road in Apex, NC); GX 2086 (Jimmy Britt's 2005 sworn statement, wherein he states that he lived at 616 Wimberly Road in Apex).[56]

Furthermore, according to Britt, at the conclusion of Stoeckley's interview with the prosecution on the eighth floor of the Terry Sanford Federal Building, he escorted her to the courtroom on the seventh floor. GX 2086 at 22. He stated, under oath, that at the same time he was taking Stoeckley into the courtroom, Blackburn was entering Judge Dupree's chambers, and stayed in the chambers for 10 to 15 minutes, while MacDonald's attorneys remained in the courtroom. GX 2086 at 22-23. The record reflects, however, that on the day of the Stoeckley interviews, Judge Dupree recessed court at 1:17 p.m. in order to allow time for the completion of the defense interview and to allow the prosecution to interview her. Judge Dupree ordered that court would resume at 9 a.m., the following day. Ttr. 5498-

[56] The Government suggests that Britt was motivated to move to Nevada for six weeks to obtain the divorce from Nancy because of a provision in the will of Nancy's mother, which provided that a large amount of land would be held in trust for the benefit of Nancy until one of two conditions were satisfied: Nancy's death, or her divorce from Jimmy Britt. GX 2023.

99, 5506. Both Smith and Blackburn testified that, in fact, neither side returned to court that afternoon because of the adjournment. Htr. 103; 610. Accordingly, again the court is presented with assertions from Britt of events that appear to never have happened. And, again, whether these assertions were a product of a faulty memory or of a nefarious motive, the end result is that the court cannot find any of Britt's statements to be likely credible or probably reliable.

4. The new unreliable evidence against the record as a whole

Neither the unsourced hairs evidence, nor the evidence regarding Stoeckley's confessions, given its likely incredibility and probable unreliability, are sufficient to show by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty – even when this new evidence is considered in light of all the evidence that MacDonald has marshaled to date that intruders were responsible for the murders. This is especially so when it is considered in the context of the evidence presented by both the Government and MacDonald at trial.

Again, at trial "[t]he government's theory of the case was that MacDonald and his wife were having marital problems and began arguing on the night of the murders over their youngest daughter's bedwetting."*MacDonald III*, 640 F. Supp. at 210. "Already fatigued from long hours at work, MacDonald flew into a rage and killed his wife and oldest daughter." *Id.* The Government argued that MacDonald "attempted to avoid prosecution and punishment by killing his youngest daughter and staging the crime scene to make it appear as if the murders had been committed by intruders." *Id.*

First, the Government presented evidence showing that the Old Hickory brand steel paring knife, the icepick, and a blood-stained piece of wood – all found outside the utility room door at the rear of the MacDonald apartment – along with a Geneva Forge Company paring knife, were the murder

weapons. Although MacDonald denied knowledge of the murder weapons,[57] the Government offered evidence from which the jury could have found that the weapons in fact came from within the MacDonald home.

The Government also offered evidence it argued showed that MacDonald's account of the attack, and his actions thereafter, were false. Specifically, the Government offered evidence showing that numerous threads and yarns consistent with MacDonald's pajama top were found throughout the home, even though MacDonald maintained that he took off his pajama top upon entering the master bedroom and finding his wife. Very few threads or yarns – if any – were found in the living room where MacDonald said he was attacked. The Government also proffered evidence, through the pajama top 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." *Id.* at 312-13.

MacDonald countered this evidence by noting that fibers of some sort were found in the living room, and thoroughly assailing the CID's processing of the crime scene and subsequent examinations. *See* Ttr. 7172 (arguing that the ineptitude of the CID "unalterably and forever prevented this crime scene from serving as the basis for all the invention and hypothesis and invention of theories and speculation by government counsel"), 7176 (arguing that it would be wrong to conclude that the numerous MPs did not disturb or move fibers during their initial efforts on the scene), 7180 (arguing that if the top were ripped where there was no seam, there would be very few fibers shed, and also noting that fibers were found near the south edge of the hallway), 7181-83 (arguing that the gurney and

[57] *See* Ttr. 7268-73 (arguing that the alleged murder weapons were consistent with MacDonald's theory of intruders, and that the evidence did not support the conclusion that the weapons came from the MacDonald home).

feet of the ambulance drivers had the potential to disturb any fibers), 7189 (arguing the CID "didn't understand that the living room was an important part of the crime scene and they didn't understand how to protect it and preserve the physical evidence and trace evidence in that room" and therefore "the inferences or conclusion that the Government asks you draw from it are simply unjustified and unfounded"), 7210-11 (arguing that it was reasonable to find that MacDonald had fibers on his body from the pajama top that were distributed in rooms other than the master bedroom and that it would be reasonable to find that his pajama bottoms were the source of the fibers), 7238-46 (criticizing the "pseudoscience" of the pajama top demonstration).

The Government also proffered evidence that the pieces of a 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, arguing 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." *MacDonald III*, 640 F. Supp. at 313. MacDonald attacked the Government witnesses' findings and conclusions as to the latex glove, and also the lack of processing for fingerprints on the headboard. Ttr. 7223-24, 7266 (arguing that MacDonald's expert witness – "the world's leading authority on the use of neutron activation analysis in forensic matters" – testified that it was unlikely the samples of gloves found in the house were made from the same batch found in the bedroom); 7232-33 (criticizing how the headboard where "PIG" was written was processed for prints).

Evidence also was offered regarding a footprint – which MacDonald conceded was his and probably stained in his wife's blood – that was found leading out from Kristen's bedroom. The Government noted that no prints were shown entering Kristen's bedroom, and argued that

inconsistency was support for its theory that Colette had been assaulted in Kristen's room and carried back to the master bedroom. The Government also offered extensive testimony regarding blood splatterings and the Government's reconstruction of the crime scene were also presented. MacDonald attacked all of the Government's theories. Ttr. 7235, 7278.

The Government also highlighted that no splinters from the wooden club or blood were found in the living room, where MacDonald said he was attacked, with the exception of a stain on an *Esquire* magazine. That blood was a mixture of Colette and Kimberly's blood types. The magazine contained an article about the Charles Manson murders, and the Government hypothesized that MacDonald had probably read the article before the murders and perhaps had referred to it on that night to stage the crime scene such that it would appear that a crazed cult had murdered his family. In addition to attacking this theory, MacDonald also attacked the idea that no blood was found in the living room. Ttr. 7217 (arguing that the CID's failure to properly process the crime scene prevented a reliable finding that there were no blood splatterings in the living room). Specifically, the defense noted that his spectacles were found with a blood spot on them, which they contended could have been a product of the struggle he had in the living room. Ttr. 7217-18. The defense specifically rejected the idea that the blood could have come from MacDonald's activities as an emergency room doctor, arguing: "If anything you have learned physically about Dr. MacDonald is what – is he a sloppy man? Is he a man likely to walk around with a blood spot on his reading glasses having to read for several hours?" Ttr. 7217.[58]

[58] The Government argued that the inference to be drawn was that the blood – which was Type O like Kristen's – came on the glasses during MacDonald's attack on his family.

In addition to attacking the CID's handling of the crime scene, the Government's evaluation and testing of the evidence and the Government's theories in general, MacDonald offered his own testimony, including his assertion that intruders, including a blond woman, murdered his family. His defense also highlighted what it considered to be evidence of the intruders: (1) the existence of a pink fiber found on MacDonald's glasses; (2) unsourced hairs; (3) unidentified fingerprints; and (4) unsourced candlewax. Ttr. 7266-68. MacDonald also called Stoeckley as a defense witness. Her testimony established that at the time of the crimes, she owned a blond wig, a floppy hat and boots. Her testimony also established that she had been an addict and continual user of all manner of drugs around the time of the MacDonald murders, and indeed on February 16, 1970, she had injected herself six or seven times with heroin and opium, and also smoked marijuana "all day." Ttr. 5553-54. Her last memory was standing in her driveway with Greg Mitchell around midnight, when she took a hit of mescaline and Greg left. *Id.* She testified that her next memory was being dropped off at her apartment by two to three soldiers, in a blue car, around 4:30 to 5:00 a.m. Although she testified that to her knowledge, she was not involved in the MacDonald murders, she also testified that because of her lack of memory and lack of alibi, she was concerned. Ttr. 5648-49; 5652-53.

Presented with that evidence, the jury found MacDonald guilty.

Against this trial evidence, and considered against the entire record of this long-running case, the court cannot find that any of the new evidence, given its unreliability and incredibility, is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty of the murders of his wife and daughters. Accordingly, MacDonald has not met his burden under § 2255(h)(1)'s procedural gatekeeping bar.

C. MacDonald's claims fail on the merits

Even if the court could somehow find that MacDonald has met his burden of passing through § 2255(h)(1)'s gate, thereby allowing the court to consider his claims on the merits, the court nevertheless finds that MacDonald has failed to prove any of his claims.

In so finding, the court rejects MacDonald's argument that by satisfying § 2255(h)(1)'s procedural gatekeeping requirements, he thereby automatically succeeds on the merits of his claims. As the Fourth Circuit stated in its 2011 opinion, § 2255(h)(1) is merely a procedural bar; if MacDonald can pass through the bar, he is entitled to have his clams "considered on [their] merits." *MacDonald XI*, 641 F.3d at 614. Indeed, as to the Britt claim, the Fourth Circuit specifically stated that as to the merits, MacDonald "would yet be obliged to prove the constitutional violation alleged in that claim before obtaining any § 2255 relief thereon." *Id.* ("We emphasize, however, that today's decision is not intended to signal any belief that the Britt claim passes muster under § 2255(h)(1) *or ultimately entitles MacDonald to habeas relief.*") (emphasis added). MacDonald discounts this language as dicta, and cites authorities which point out the difference between the gatekeeping statute for federal prisoners (§ 2255(h)(1)) and the one for state prisoners (28 U.S.C. § 2244(b)(2)(B)(ii)). As the court already has stated, it agrees with MacDonald that there are notable differences in the gatekeeping statutes. The court does not discern from the authorities cited by MacDonald, however, how these differences in the *gatekeeping* statutes translate into a different showing on the *merits*. *See Hatch*, 731 F.3d at 1034 (explaining that § 2255(h)(1) "*permits* a successive petition" if satisfied); *Ferranti,* 480 Fed. App'x at 636-37 (explaining that § 2255(h)(1), and not § 2244(b)(2)(B)(ii), was the proper "gatekeeping provision" to apply to see if a claim presented in a successive § 2255 motion must be dismissed); HERTZ & LIEBMAN § 41.7 (explaining that the standard for gatekeeping of § 2255 and § 2254 claims

are different). MacDonald has pointed to no persuasive authority that for successive § 2255 claims, the gatekeeping analysis and the merits analysis should always be collapsed into one inquiry.[59] The court declines to make the logical leap advocated by MacDonald, and will instead follow the directive of the Fourth Circuit. In so doing, the court finds that he has failed to establish either of his constitutional claims by a preponderance of the evidence. *See Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958) (per curiam) ("Because the proceeding under 28 U.S.C. § 2255 is a civil collateral attack upon the judgment of conviction, the burden of proof is upon petitioner to establish [his claim] by a preponderance of evidence."). He also has failed to meet the high burden required to establish his freestanding actual innocence claim.

1. The Britt Claim

As MacDonald's latest briefing indicates, the "Britt Claim" is premised on the idea that "Blackburn, (1) heard Helena Stoeckley admit she was in the MacDonald house when several people with her killed his family, but falsely told the district court that he had not, and (2) told Helena Stoeckley he would indict her for murder if she testified she was in the MacDonald House." Deft. Post-Hearing Mem. [DE-343] at 9 n.6. According to MacDonald, "[t]hese actions–a failure to disclose material evidence and a threat leading a witness to perjure herself–constitute independent constitutional

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[59] It appears to the court that the only time the inquiry would be "virtually identical" is where a petitioner asserts a freestanding actual innocence claim, as discussed later in this order. MacDonald has done so in this case, leading to the court's observation that the inquiries were somewhat conflated. *See In re Davis*, No. CV409-130, 2010 WL 3385081, at *45 (S.D. Ga. Aug. 24, 2010) (concluding that for a freestanding actual innocence claim, a petitioner "must show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence"); *see also Hunt v. McDade*, 205 F.3d 1333, 2000 WL 219755, at *2 (4th Cir. Feb. 25, 2000) (per curiam) (suggesting that "'[t]o be entitled to relief, . . . petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'") (quoting *Herrara v. Collins*, 506 U.S. 390, 429 (1993) (White, J., concurring)).

violations." *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995) and *United States v. Golding*, 168 F.3d 700, 703 (4th Cir. 1999)). Specifically, MacDonald contends that his Fifth and Sixth Amendment rights were violated.

With regard to his Fifth Amendment rights, in *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In order to prove a *Brady* violation, a defendant must meet three requirements: (1) the evidence must be favorable to the accused, (2) the government must have suppressed it, and (3) the defendant must suffer prejudice. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999); *United States v. Wilson*, 624 F.3d 640, 660-61 (4th Cir. 2010).

As to his Sixth Amendment rights, as this court has previously recognized, a defendant's constitutional right "to present a defense [is] violated if [the] Government intimidates a defense witness into changing her testimony or refusing to testify." *MacDonald X*, 2008 WL 4809869, at *21 (also recognizing that it would be a violation of a defendant's Fifth Amendment due process rights); *see United States v. Golding*, 168 F.3d 700, 703 (4th Cir. 1999) ("The authorities are uniform that threatening a witness with prosecution and comment about the absence of a witness who has a privilege not to testify are a violation of the Sixth Amendment right of a defendant to obtain witnesses in his favor."). The intimidation of a witness may violate a defendant's rights if it amounts to "substantial government interference with a defense witness' free and unhampered choice to testify." *United States v. Saunders*, 943 F.3d 388, 392 (4th Cir. 1991) (internal quotations omitted). Importantly, a defendant must make "a plausible showing that an act by the government caused the loss or erosion of testimony that was both material and favorable to the defense." *Griffin v. Davies*, 929 F.2d 550, 553 (10th Cir.

1991). If "a defendant is able to establish a substantial government interference, the inquiry moves to the question of whether it was prejudicial or harmless error." *Saunders,* 942 F.3d at 392; *Golding*, 168 F.3d at 703-05.

The court concludes that MacDonald has not shown that either his Fifth or Sixth Amendment rights were violated, because he has failed to show, by a preponderance of the evidence, that Stoeckley confessed to Blackburn, or that Blackburn intimidated her into changing her testimony. For the reasons already detailed in this order, the court finds Britt's sworn statements, as a whole, to be unreliable and incredible, and specifically finds his assertions as to Stoeckley's confession to Blackburn and Blackburn's threat to be untrue.

Nor does the court find the testimony of Rouder or the affidavit of the elder Stoeckley to provide support for the idea that Blackburn intimidated Stoeckley into altering her trial testimony. *See* Htr. 355 (testifying that Stoeckley told her she couldn't tell the truth at trial because of "those damn prosecutors sitting there" and stating that "they'll fry me"); DX 5051 ¶ 11 ("She told me she was afraid to tell the truth because she was afraid of the prosecutor."). The elder Stoeckley's affidavit lacks any context showing precisely why Stoeckley allegedly was afraid of the prosecutors – whether her fear was the result of a "threat" from Blackburn, or the realization on her own account that she could be subject to prosecution. The same holds true for Rouder's testimony. Both only allow for speculation that Stoeckley falsely testified *because* Blackburn threatened her.

Gene Stoeckley's testimony comes the closest to showing that Stoeckley told her mother she did not testify truthfully because of a threat from the prosecutor. Htr. 331 ("What my mother would say along those lines was that they wouldn't let her testify, she wanted to testify, but she was threatened with prosecution for murder."). Notably, however, the elder Stoeckley allegedly told Gene that Helena

was not "allowed" to testify at trial, not that Helena lied on the stand because of a threat. Htr. 331-32 ("Q. Regardless of the threat, the statement was that your sister was not allowed to testify at the trial? A. Correct."). Helena Stoeckley, of course, *did* testify at trial; no one prevented her testimony. Nevertheless, assuming that Helena Stoeckley did in fact tell her mother that she was not "allowed" to testify, this only serves to highlight what this court already has observed: Helena Stoeckley herself was not credible or reliable. The court cannot find, based on this hearsay statement from the unreliable Stoeckley, that she was in fact threatened by Blackburn and therefore induced to testify falsely.

The court also agrees with the Government that it is telling that, other than her mother, "no person to whom Stoeckley spoke, or allegedly spoke about this subject, from the completion of the prosecution interview on August 16, 1979 to her death in 1983, reported that Stoeckley told him or her about a threat from Blackburn and its supposed impact on her trial testimony." Gov't Post-Hearing Mem. [DE-344] at 186. This list includes Judge Dupree, Red Underhill, Lynn Markstein, Jerry Leonard, Kay Reibold, Ted Gunderson, Prince Beasley, Homer Young, Butch Madden, Ernest Davis and Sara McMann.[60]

Having found that MacDonald has failed to show that Stoeckley confessed to Blackburn, the court also finds that MacDonald has not shown that Blackburn misrepresented to the court the substance of the prosecution's interview with Stoeckley. Additionally, as the court observed in its 2008 Order, this "fraud upon the court" theory "depends on the truth of Segal's representations to Judge

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[60] In contrast, and as this court noted in 2008, the trial transcript reveals that over the weekend of August 18-19, 1979, Stoeckley had expressed her mortal fear of an unknown person who had punched her in the face at the motel, the "damn prosecutors," defense counsel Bernard Segal, unidentified persons who rendered her life "not worth five cents on the street," Allen Mazzarole, and possibly her fiancé, Ernest Davis.

MacDonald X, 2008 WL 4809869, at *27 n.28.

Dupree that Stoeckley essentially had cleared MacDonald of the crimes by her admissions during the defense team's interview in the presence of half a dozen or more witnesses the day before." *MacDonald X*, 2008 WL 4809869, at *20. The record, fully supplemented by the September 2012 evidentiary hearing, indicates that Stoeckley made no such statements during the defense interview. *See* Ttr. 5617 (Smith informing Judge Dupree, "Generally, she said to us the same thing and this, '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."); Htr. 114 (Smith testifying: "I was absolutely devoted to this case and upheld my role as counsel and I'm still devoted to this case, but I did not hear Helena Stoeckley say useful things for us. It is certainly possible. And I mentioned [a] while ago, maybe I was out of the room. I do not know the answer. But I can only speak for myself and that is that when I was present she did not say things that helped us."); Htr. 969-77 (McGinniss testifying that Stoeckley maintained throughout the defense interview that she had no memory of being present during the murders).

In sum, MacDonald has failed to show, by a preponderance of the evidence, that (1) Stoeckley confessed to Britt; (2) Stoeckley confessed to Blackburn; (3) Blackburn threatened Stoeckley such that she was intimidated into altering her testimony; or (4) Blackburn misled the defense and the court as to the prosecution's interview of Stoeckley. Accordingly, as to the merits, the "Britt claim" is DENIED.

2. The Footnote Claim

As this court has observed, MacDonald argues, in a footnote in his post-hearing Reply memorandum, that he has shown a constitutional violation because "the government failed to disclose significant exculpatory or favorable evidence to MacDonald before his trial." *See* Post-Hearing Reply [DE-351] at 9 n.6. The sole support for this assertion is a citation to an article written by one of

MacDonald's former attorneys. *See id.* (citing Harvey Silverglate, *Reflections on the Jeffrey MacDonald Case*, THE CHAMPION, May 2013 at 52). This article raises essentially the same points MacDonald argued in his petition for habeas corpus filed pursuant to § 2255 in 1990; namely, that the Government "withheld laboratory bench notes written by government agents which would have aided the defense, and exploited the suppression of . . . the lab notes by knowingly presenting a false and perjurious picture of the evidence and underlying facts." *MacDonald V*, 778 F. Supp. at 1344; *compare* Silverglate, at 54-55 (arguing that "[a]s a result of the failure of the prosecution to turn over *Brady* material in a format and at a time when it could be useful to the defense at trial, some enormously potent exculpatory evidence was not available for use by MacDonald's lawyers at his trial," including the bench notes of Glisson identifying the presence of long blond synthetic hairs in a brush at the crime scene and the report of a government examiner showing the presence of black wool fibers on the club and Colette).

The court will assume, without deciding, that MacDonald is not otherwise barred from raising this successive claim.[61] Nevertheless, the court finds that MacDonald has not shown that he is entitled to relief thereon, and this claim is DENIED on the merits.

Again, MacDonald raised a seemingly identical claim in his § 2255 petition filed in 1990, arguing that the government suppressed exculpatory evidence in violation of *Brady* and also presented its case in a manner intentionally designed to conceal the exculpatory evidence, which also violated his due process rights. The exculpatory evidence "consist[ed] of government forensic lab notes describing (1) three blond synthetic hairs found in a hairbrush located in the MacDonald home and (2) black and green wool fibers, not matched to any source in the MacDonald home, found on the murder weapon and on Colette MacDonald's body." *MacDonald V*, 966 F.2d at 856-57 (footnote omitted).

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[61] It is well settled that 28 U.S.C. § 2244(b)(1) bars claims raised by a state prisoner in a second or successive § 2254 petition that were previously presented in a prior application. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."); *see also United States v. Winestock*, 340 F.3d 202, 204-05 (4th Cir. 2003). What is unsettled, however, is whether § 2244(b)(1) applies to § 2255 motions filed by federal prisoners, like MacDonald. Section 2255's provision applicable to second or successive motions does not contain the same language found in § 2244(b)(1), leading some commentators to conclude that "[r]ead literally, § 2255(f) provides that a second or successive motion may be filed, regardless of whether a claim was presented in a prior motion, so long as the motion is certified by the court of appeals to satisfy one of two exceptions for newly discovered evidence or new rules of constitutional law." BRIAN R. MEANS, POSTCONVICTION REMEDIES § 27:4. Nevertheless, some courts have held that the term "prior application" in § 2244(b)(1) encompasses a motion under § 2255. *See White v. United States*, 371 F.3d 900, 901 (7th Cir. 2004) ("It would be odd if Congress had intended that a federal prisoner could refile the same motion over and over again without encountering a bar similar to that of section 2244(b)(1), and we have therefore held that 'prior application' in that section includes a prior motion under section 2255."); *see also Green v. United States*, 397 F.3d 101, 102 n.1 (2d Cir. 2005) (per curiam); *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999) ("Charles is not entitled to file a successive § 2255 motion to vacate because he seeks permission to file the same claims that have already been denied on the merits." (citing § 2244(b)(1))). The Fourth Circuit Court of Appeals has yet to weigh in on the issue. *See Winestock*, 340 F.3d at 205 ("Although [§ 2244(b)(1)] is limited by its terms to § 2254 applications, some courts have also applied it to § 2255 applications. . . . We need not decide here whether to follow this approach."); *see also MacDonald XI*, 641 F. 3d at 614 n.9 ("[I]t is an open issue in this Circuit – one we need not resolve today – whether § 2244(b)(1) applies to successive claims presented in second or successive § 2255 applications.").

Judge Dupree denied the petition, for several alternative reasons. First, Judge Dupree determined that the allegedly suppressed evidence was not material; i.e., he had not shown either a reasonable probability or any reasonable likelihood "of a different result had MacDonald been given access to the lab notes at trial." *MacDonald V*, 778 F. Supp. at 1351-53. Alternatively, Judge Dupree found that the Government's attorneys had not violated *Brady* because they allowed MacDonald the opportunity to examine and test all of the physical evidence, including the actual fibers, and because the Government attorneys had not read the lab notes regarding the fibers and were not aware of any potentially exculpatory materials therein. *Id.* at 1353-54. Finally, Judge Dupree found the 1990 petition to be procedurally barred under the then-applicable doctrine of abuse of the writ. *Id.* at 1356-60.

Assuming that the article by Mr. Silverglate – again, the sole support for MacDonald's successive claim – can constitute some sort of evidence or argument in support of MacDonald's claim, nothing therein dictates a different result from the one reached by Judge Dupree. The court has reviewed the transcript of the motion hearing held before Judge Dupree on June 26, 1991, and Silverglate's recent article reiterates the same arguments he made in open court on that date. Even if the court assumes – and it does not– that the additional evidence MacDonald has compiled since 1990 could change Judge Dupree's finding on materiality, Judge Dupree also denied the petition on the basis that the prosecution complied with its duties under *Brady* by affording MacDonald an opportunity to examine and test any of the physical evidence, irrespective of tendering the lab notes. *See MacDonald V*, 778 F. Supp. at 1353 (citing *United States v. Wolf*, 839 F.2d 1387, 1391 (10th Cir. 1988) ("If the means of obtaining the exculpatory evidence has been provided to the defense, however, a *Brady* claim fails, even if the prosecution does not physically deliver the evidence requested."); *United States v. Page*, 828 F.2d 1476, 1479 (10th Cir. 1987) ("[A] new trial is not warranted by evidence which, with

reasonable diligence, could have been discovered and produced at trial."); *United States v. Ramirez*, 810 F.2d 1338, 1343 (5th Cir. 1987) ("[A] *Brady* violation does not arise if, with reasonable diligence, [a defendant] could have obtained the information.")). Judge Dupree also found that MacDonald had presented no evidence showing that the prosecution attorneys were aware of the contents of the lab notes at issue. *See id.* at 1354, 1355. The court does not make different findings or reach an opposite conclusion because of Silverglate's article.

Accordingly, to the extent that MacDonald asserts a separate claim in footnote 6 of his post-hearing Reply memorandum, that claim is DENIED on the merits.

3. The Unsourced Hairs Claim

MacDonald's unsourced hairs claim is an "actual innocence" claim; that is, he argues that he is entitled to habeas corpus relief solely because he is actually innocent of the murders of his family members. The United States Supreme Court has never explicitly recognized a freestanding actual innocence claim,[62] although it has recognized the *possibility* of such a claim, "assum[ing], for the sake of argument . . ., that in a capital case a truly persuasive demonstration of 'actual innocence' made after

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[62] As one commentator has observed:

> Critical to understanding freestanding claims of actual innocence is the distinction between actual innocence and legal innocence. A defendant seeking relief based on legal innocence, or "legal insufficiency," contends that the prosecutor has failed to produce sufficient evidence at a criminal trial to establish guilt beyond a reasonable doubt. Conversely, a defendant seeking relief based on actual innocence contends that he or she did not commit the crime alleged, regardless of the judge or jury's finding of legal innocence. Unlike [] legal innocence, actual innocence focuses entirely on the factual predicate of the offense. . . .
>
> . . . .When a defendant claims actual innocence independent and unaccompanied by any other [constitutional] claim . . . it is referred to as a "freestanding" actual innocence claim. For claims of freestanding actual innocence, a prisoner seeks only to rebut the factual findings of the crime for which he was convicted.

Matthew Aglialoro, Note, *A Case for Actual Innocence*, 23 CORNELL J.L. & PUB. POL'Y 635, 639-40 (2014) (footnotes and citations omitted).

trial would render the execution of a defendant unconstitutional." *Herrara v. Collins*, 506 U.S. 390, 417 (1993). In *Herrara*, the Court explained that "the threshold showing for such an assumed right would necessarily be extraordinarily high," and found that the petitioner's evidence was "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist." *Id.* at 417, 418-19. Whether a freestanding actual innocence claim is cognizable remains an open question. *McQuiggin v. Perkins*, ___ U.S. ___, 133 S.Ct. 1924, 1931 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 71 (2009) (recognizing that the Court has assumed, *arguendo*, that there is a federal constitutional right to be released upon proof of "actual innocence" but also "noting the difficult questions such a right would pose and the high standard any claimant would have to meet"); *House v. Bell*, 547 U.S. 518, 554-55 (2006) (declining to resolve the issue of whether a freestanding actual innocence claim is cognizable). Similarly, although the Fourth Circuit has in the past stated that precedent prevents it from recognizing freestanding actual innocence claims, *see Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999),[63] in later cases the court appears to have assumed, without deciding, that such claims are cognizable. *See Teleguz v. Pearson*, 689 F.3d 322, 328 n.2 (4th Cir. 2012) (stating in

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[63] The *Royal* court stated:

> Royal maintains that his actual innocence in and of itself renders his conviction and execution violative of the Eighth and Fourteenth Amendments. Precedent prevents us from granting Royal's habeas writ on this basis alone. Because federal habeas relief exists to correct constitutional defects, not factual errors, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state proceeding."

188 F.3d at 243 (quoting *Herrera*, 506 U.S. at 400). The *Royal* court also observed that as in *Herrera*, the petitioner had a forum in the State – an executive clemency process – to pursue a claim of actual innocence, and, accordingly, it could not grant him "habeas relief based simply on his assertion of actual innocence due to newly discovered evidence." *Id.*

dicta that "[a] petitioner may also raise a freestanding innocence claim in a federal habeas petition"); *MacDonald XI*, 641 F.3d at 616-17 (observing that the Supreme Court "has yet to come across any prisoner who could make the 'extraordinarily high' threshold showing for such an assumed right"); *Hunt*, 2000 WL 219755, at *2 ("Even granting Hunt all necessary analytical assumptions to overcome the procedural bars imposed by *Herrara*, his claim that the PCR/DNA test results exonerate him of the murder of Mrs. Sykes cannot survive *Herrara*'s stringent evidentiary standard."). *See also* Kathleen Callahan, Note, *In Limbo: In re Davis and the Future of Herrera Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 636 n.41 (2011) ("The Fourth Circuit has used somewhat contradictory language in describing the cognizability of *Herrera* innocence claims, in one case noting that the *Herrera* decision held "that claims of actual innocence are not grounds for habeas relief even in a capital case," *Rouse v. Lee*, 339 F.3d 238, 255 (4th Cir. 2003), and in other cases treating *Herrera* claims as if they could, possibly, be cognizable in capital habeas proceedings, *Wilson v. Greene*, 155 F.3d 396, 404-05 (4th Cir. 1998)).

Like the Supreme Court and the Fourth Circuit, this court will assume, *arguendo*, that a freestanding actual innocence claim is cognizable. The court nevertheless finds that MacDonald has not met the "extraordinarily high" burden required for this court to grant the relief he requests. This raises the question, of course, as to exactly what the "extraordinarily high" burden entails. The Supreme Court has not yet articulated the burden. *See Teleguz*, 689 F.3d at 328 n.2 ("The Supreme Court has not articulated the standard under which these claims should be evaluated, but has made clear that the threshold for any hypothetical freestanding innocence claim [is] extraordinarily high.") (internal quotation marks omitted). The Fourth Circuit, for its part, appears to have used a standard that is *at least* as rigorous as the "clear and convincing" gatekeeping standard under § 2255(h)(1). In *Hunt v.*

McDade, the Fourth Circuit stated that "[t]o be entitled to relief, . . . petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" 2000 WL 219755, at *2 (quoting *Herrera*, 506 U.S. at 429 (White, J., concurring) (quoting *Jackson*, 443 U.S. at 324 (1979));[64] *see also Hazel v. United States*, 303 F. Supp. 2d 753, 760 n.13 (E.D.Va. 2004) (observing that the standard used in *Hunt* is "essentially similar to that prescribed in § 2244 for successive petitions," and observing the similarities between § 2244(b)(2)(B) and § 2255(h)). Indeed, one would expect that to prove the merits of a freestanding actual innocence claim, a movant would have to satisfy a more demanding burden of proof than that set forth in the gatekeeping statute.

Nevertheless, even if the court assumes that the standard for evaluating a freestanding actual innocence claim is identical to the standard employed in the court's gatekeeping duties under § 2255(h)(1), for the reasons the court already has discussed, MacDonald has failed to meet this "extraordinarily high" burden. Although the court has viewed the evidence in the record as a whole, it is worth noting that the new evidence upon which MacDonald most heavily relies is (1) the unsourced hairs; (2) the saran fiber evidence; and (3) the alleged confessions of Stoeckley and Mitchell. It bears repeating that neither the unsourced hairs evidence, nor the saran fiber evidence, are as exculpatory as MacDonald contends. The saran fiber evidence ultimately just invites speculation as to the source of the fibers, and by no means compels a conclusion that the fibers came from a wig worn by Stoeckley. As to the unsourced hairs, it is true that the presence of naturally shed, non-bloody

[64] In *Hunt*, the Fourth Circuit evaluated newly discovered DNA test results, "along with the entirety of the evidence introduced at both trials," and was "unable to conclude that no rational jury would have convicted Hunt of the murder." *Hunt*, 2000 WL 219755, at *3.

unsourced hairs *could* be evidence of intruders; it also could be like other random household debris, and not indicative of intruders. In this manner, the unsourced hairs evidence is similar to evidence that MacDonald argued at trial was indicative of intruders: other unsourced hairs, unsourced fingerprints and palm prints, unsourced wax, and the existence of a pink fiber in his eyeglasses. The presence of three additional naturally shed unsourced hairs is of minimal additional probative value.

That leaves, of course, the alleged confessions of Stoeckley and Mitchell. Even if the court accepts, as credible and reliable, the live testimony and affidavit testimony of the individuals who allegedly heard these confessions, the court cannot, on the record before it, consider Stoeckley or Mitchell to be credible or reliable themselves. Stoeckley's credibility and reliability problems have been exhaustively detailed in numerous opinions over the years; again, the fact that she may have confessed to her mother or attorney (presumably after telling them earlier, conflicting stories) does nothing to bolster her credibility or reliability. Nor can the court find Mitchell to be credible and reliable, in light of his previous sworn statements that contradict his late-in-life hearsay confessions. Even when the court considers, as a body, all of the evidence marshaled by MacDonald throughout the history of the case, the court cannot conclude that MacDonald has shown, by clear and convincing evidence, that no reasonable juror would have found him guilty.

Comparing the instant case to the record before the Supreme Court in *House v. Bell* reinforces this conclusion. In that case, House faced the death penalty for killing Carolyn Muncey, whose body was discovered in underbrush on an embankment up the road from her driveway in rural Tennessee. 547 U.S. at 522. Key pieces of evidence offered against House included testimony that blood found on jeans he wore the night of the crime was consistent with Muncey's blood and that it was "impossible" that the blood was House's. *Id.* at 528-29. Evidence also was presented indicating that

semen found on the victim's nightgown and underwear appeared to be consistent with House. *Id.* at 529. The prosecutor argued at trial and sentencing that House, who had a previous conviction for sexual assault, committed the murder during a sexual assault on the victim. *Id.* at 532-33.

After failing to obtain relief in the state court of appeals, House filed an untimely federal habeas petition, bringing forward new evidence showing that semen found on the victim's clothing belonged to her husband, and not him. House also presented testimony showing that blood evidence used against him appeared to have been deposited on the victim's clothing after the autopsy, and not when the victim was alive, which raised "substantial questions about the blood's origin." *Id.* at 542-48. House also presented evidence from "multiple sources" that Muncey's husband regularly abused his wife, testimony from two witnesses who said Muncey's husband had confessed to the crime, and testimony from another witness indicating that the husband attempted to construct a false alibi the morning after the crime. *Id.* at 548-53. The Supreme Court found that this new showing of evidence was enough to satisfy the lower standard[65] to enter the gateway for federal review of his otherwise barred claims, but it was *not* enough to establish "whatever burden a hypothetical freestanding innocence claim would require." *Id.* at 555.

MacDonald's evidence in this case is less compelling than the evidence presented in *House*. Unlike in *House*, where new DNA evidence contradicted the "only forensic evidence at the scene that would link House to the murder," *id.* at 541, in this case MacDonald's new forensic evidence serves to only create additional speculative questions as to the possible origins of the unsourced hairs and

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[65] In *Schlup v. Delo*, 513 U.S. 298 (1995), the Supreme Court held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of the new evidence, "it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt." *Id.* at 327.

saran fibers. While the evidence undoubtedly has some probative value, it does not do much to bolster the argument, originally presented at trial, that intruders committed the murders. It also does nothing to exclude MacDonald as the perpetrator of the crime, nor does it strongly suggest that some other specific individual was the perpetrator. It follows, accordingly, that if the new evidence in *House*, which included significant evidence calling into question "the central forensic proof connecting House to the crime" in addition to confessions by another suspect, was not enough to establish actual innocence, then the additional equivocal forensic evidence in this case, combined with the confessions of Stoeckley and Mitchell, are not enough to do so, even when considered against the other evidence proffered by the parties. Again, because MacDonald has not established, by clear and convincing evidence, that no reasonable juror would find him guilty of the murders of his family, his actual innocence claim is DENIED on the merits.

CONCLUSION

For the foregoing reasons, the court finds that MacDonald has not established, by clear and convincing evidence, that no reasonable factfinder would have found him guilty of the murder of his wife and two daughters, and therefore he has failed to satisfy the gatekeeping standard set forth in 28 U.S.C. § 2255(h)(1). Alternatively, assuming that MacDonald can satisfy the gatekeeping standard, the court finds that he has failed to establish any of his constitutional claims by a preponderance of the evidence, and has failed to establish any assumed actual innocence claim. His Motion to Vacate [DE-111] is therefore DENIED.

Having denied MacDonald's motion, the court must determine if he has made a sufficient showing to entitle him to a certificate of appealability. A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When

the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller–El v. Cockrell*, 537 U.S. 322, 336–38 (2003). However, when a district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85. Here, Macdonald has not made the requisite showing, and therefore, a certificate of appealability is DENIED.

SO ORDERED.

This the 24th day of July, 2014.

James C. Fox
Senior United States District Judge