

Q: When you say "nodded her head", do you mean affirmative or negative?

A: Well, you know, just, you know, she didn't say yes, she didn't nod no or yes, either way, she just motioned her head.

COL ROCK: I'm sorry, which way did she motion her head?

WIT: It was an up and down motion.

COL ROCK: To you, would that normally mean that the individual agreed with you or disagreed with you?

WIT: I couldn't - I couldn't, it didn't - I mean, like she didn't want to answer it to me, in my opinion, because she didn't nod her head yes or no either way.

Q: Before you decided to contact me and even before you decided to agree to appear here yesterday, did you discuss your testimony - did you discuss our request to have you come here and testify with your wife?

A: It had been bothering me, you know, a lot of what I'd seen that day, and what I had observed after that, but I mentioned to my wife, you know, that I wanted to go and tell the people what I know, and she was afraid. Like now, like yesterday when I was here, she didn't even know I was here, and today, this morning, I told her, and she's been real upset, like the other night in Haymount, she saw me up there, and that upset her, and like last night, the screen door on the house, you know, kept hitting, flopping back and forth and that upset her. She's been real jittery. She don't want to get involved.

Q: Why did you and your wife move from Haymount area?

A: Well, because of the hippies, you know, always tripping out and after that you couldn't - you couldn't tell what they will do, you know.

Q: What was told to you by Mr Eisman or myself, or anyone else about a reward?

A: Well, I think it was Tuesday night or Wednesday night that I was, after he had talked to me, Mr Eisman mentioned that if anybody gives any information leading to the conviction or arrest for the murder, they get a reward of \$5,000.

Q: Did anybody tell you or suggest to you, or in any way indicate to you that you would receive any compensation or anything of any value for coming here to testify in these proceedings?

A: No, you said that, you know, I asked you to keep my name out of the papers and stuff, and you said that, you made a remark, "well, you don't even know me, but you'll have to trust me about keeping your name out of the papers" but you said that it was risky, but, you know, there was no reward, you know, anything like that.

MR SEGAL: May I have marked for identification, sir, an automobile brochure of Ford Motor Company, A-37. Sir, may therecord reflect that I have taken from a page of a booklet, put out by the Ford Motor Company, a page illustrates six models of the Ford Mustang. This booklet is issued January 1970 and I am going to show it to the witness for the purpose of having him look at six profile outlines of Mustang models.

Q: I ask you to look at this, Mr Posey, and indicate whether you recognize the body style known as the Mustang Mach I here?

A: This one.

Q: You've indicated the car on the bottom of the two lines, or the profile that is in the middle. Is that right?

A: Right.

Q: Would you circle it with a red pen, please?

(Witness complied.)

Q: And does that resemble the car that the man with the mustache/<sup>who</sup>is known to us in the picture marked as A-36 drove?

A: Right.

Q: And does that resemble the car that came up to the house of this young lady on the morning of February 17th, 1970?

A: Yes, sir.

COL ROCK: That will be entered as Accused Exhibit A-37, illustration of Mustang Mach I.

- Q: Mr Posey, this young lady had occasion to tell you, did she not, that she was under some investigation by the police immediately after the early morning of February 17th 1970?
- A: Yes, sir.
- Q: And did she indicate to you as to what crime the police were talking to her about?
- A: About the MacDonald incident.
- Q: And did she indicate that she had read about that, the investigation of herself and other hippies in the newspaper articles too?
- A: I don't know what you mean.
- Q: Did she make reference to a newspaper article at that time referring to the hippies in the Haymount area?
- A: No.
- Q: Did she mention to you at any time that, that she not only didn't have an alibi, but that it appeared somewhere that she didn't have an alibi?
- CPT SOMERS: I object to that. That is totally leading and completely improper.
- MR SEGAL: I'll withdraw the question.
- Q: In regard to the discussion that you had with this young lady and the alibi, did she ever mention that her failure to have an alibi had been told to other people?
- CPT SOMERS: I object to that too.
- CPT BEALE: Rephrase it again, Mr Segal.
- Q: What, if anything, did she say about the knowledge of other people about her not having an alibi?
- A: I don't understand what you mean.
- Q: All right, let me put it this way. Did she ever discuss the fact that she didn't have an alibi with you? Please say yes, or no. Did she ever discuss with anybody else the alibi?
- A: Did she discuss - ?
- Q: She did discuss with you that she didn't have an alibi?
- A: Right.

Q: Did you ever hear from anyone else that she didn't have an alibi?

A: Other than Paul Bowman, no.

Q: Did you ever read anything about the fact that she didn't have an alibi?

A: Well, there was an article, the write-up in the Fayetteville Observer, I think it appeared about three or four days after that, was about her, you know, and it didn't say anything about, you know, where her whereabouts, you know, it just said they had questioned her several times.

MR SEGAL: May I have a photostatic copy of a news article marked as A-38 for identification, sir?

COL ROCK: Do you wish to show this to -

MR SEGAL: Yes, sir, I do.

(The article was examined by counsel for the government.)

CPT SOMERS: I object to this. I don't know what its purpose is, but this is a newspaper article concerning some information gained from some unknown source about, theoretically about the MacDonald case, and its use here is completely out of line. We, we can't measure it, test it or anything else.

MR SEGAL: It's not offered for the truth of its contents. It's offered for the fact that this is the article that the witness read in connection with his discussion with the young lady who had lived next door to him. Its contents are obviously not the evidence in this case. It's merely to indicate that this is the material he was reading.

COL ROCK: Well, then what purpose would that serve, even if it were admitted counselor? I don't follow.

MR SEGAL: Sir, this indicated that, in fact, and in fact we can verify it when we bring the investigating officers in, that the persons who were interviewed were being told they were being interviewed for some other offenses, some other investigations about drugs, and not the MacDonald case; as contrarily distinguished throughout, this witness has testified that the girl said that she was being interviewed about the MacDonald case. It seems to me it clearly indicates the fact that this young woman had information about the MacDonald case. Although it is purported

all those who were interviewed for other crimes, we will tie it together if necessary by bringing in all the investigators, but preliminarily, it has to be indicated that the article was the well spring of the conversation he was having with the young woman.

CPT SOMERS: Well, for the purpose the defense speaks of, this thing cannot be used to prove anything about that investigation, and in any use in connection with this witness, I still contend that it's irrelevant, incompetent and inadmissible in any kind of a form.

CPT BEALE: Mr Segal, the relevancy of it does not appear readily available to the investigating officer, and therefore at this time it will not be received.

MR SEGAL: All right, thank you. You may cross examine. I beg your pardon. There is one other matter I must ask him about.

Q: Has any threat been made against you in regard to your revealing the information about what you saw on the morning of February 17th, and anything else about the activities and whereabouts of the young woman you've described, the girl and the hat?

A: Well, the night before last when I had a conversation outside the Village Shop, you know, I told her I wasn't living there any more, you know. She asked me why and I said my wife was upset because of what was going on, the hippies and everything, and she asked me, she said "Where do you live now?" and she point blank asked me my address. She wanted to know where my address was, so I told her. I didn't tell her my real address, I told her a phoney one, but then I started to leave. My wife, you know, went by in the car, so I walked up to my mother-in-law's to meet my wife, and as I started to walk away real fast she was talking to her boy friend, and she said "Where are you going?" I said "I gotta go now. My wife just passed by." And she said "What was your address?" and she asked me two times what my address was, and so, you know, I told her again the same address I told her before, and she said, you know, kind of jokingly, she said "Well, tell your wife to lock the doors, because we'll be over to see you."

MR SEGAL: Cross examine?

Questions by CPT SOMERS:

Q: Did you say, sir, there was an incident which you reported, reported in the apartment across the way for the number of people there and the noise at the time they were staying up until one or two o'clock in the morning?

A: Yes, sir.

Q: Did you say that they were doing this often?

A: Well, you know, they were making noise pretty much in the night.

Q: And were they doing this late?

A: Well, it's, you know, around twelve o'clock, one o'clock. It never went past maybe one o'clock.

Q: Never went past one o'clock?

A: No, they usually stopped by then.

Q: Now you say this group, so far as you know, never used the term "family"?

A: No, sir.

Q: And you say this girl looked run down the last time you saw her, is that right?

A: Yes, sir.

Q: And did she also say she was suffering from hepatitis?

A: Yes, sir.

Q: What color was her boy friends car? Do you know that? What kind of car was it?

A: It's a - somewhere about a '65

Q: And what color?

A: Yellow.

Q: As I understand it, you say this girl said she didn't remember what she had done on the night of the 17th, but she felt she could not have been involved in the killing. Is that correct?

A: She said she didn't remember what she had done, other than just ride. She remember riding around early in the morning, but, you know, when I asked her, was she involved in it, was she there, and she didn't say. She never once, she never did say that she wasn't involved in it.

- Q: Didn't you say that she had said she did not feel she was capable of killing anybody?
- A: Yes, sir.
- Q: I see. Now didn't you also tell me on my cross examination that Mr Eisman mentioned this reward to you?
- A: Yes, sir.
- Q: I see. And I understand that you are frightened about this situation, and about giving information and becoming personally involved, or your wife is at any rate. Is that correct?
- A: Yes, sir.
- Q: And if that's the case, why did you personally go out and look for this girl and expose yourself to further danger?
- A: Because they needed to know the name of the girl.
- Q: Who is "they"?
- A: Mr Eisman and Mr Segal.
- Q: And because they wanted to know the name of the girl, you personally went out and exposed yourself to the danger and talked to her. Is that correct?
- A: Well, see, I didn't - I didn't think she would be there, because she had been gone so long, so I figured, I knew the people that she associated with, you know, and they knew me, and like I knew they used drugs and pushed drugs and I never ratted on them, so they didn't have no reason to, you know, think that I was there trying to gather information.
- Q: Well, now is it from her that you would fear reparation, or fear revenge or is it from her friends?
- A: Well, it's - would be from, to them, they are one. They watch out for each other, just like yesterday I saw in the paper where the one guy that -
- CPT SOMERS: Now, that's not -
- MR SEGAL: I object to cutting off the witnesses answer. He asked a question. The witness wants to explain his answer.

CPT SOMERS: The witness has answered the question. The rest of his answer is not responsive to the question.

MR SEGAL: We can't tell until we hear it, sir. I object to his cutting the witness off.

CPT BEALE: Captain Somers, if you will, let the witness finish answering your question.

Q: You may continue.

A: Yesterday I noticed that had sent this guy up for twelve years for tying up the other guy. See, these particular people, the names were in the paper, and one of the guys stayed next door, and the one guy that, you know, they took out to 71st and tied up, you know, held the shot gun to his head, he messed around with them, and one of them got busted for dope and they thought he was the informer, and so I figure if she knew I saw that, saw her that morning, if she was involved they would track me down and get me.

Q: Who is this "they?"

A: Well, her and her friends.

Q: Well, the people that you read about<sup>in</sup> the newspaper, are they part of this group? Are they her friends?

A: They have been over there. They have associated with her, her and her friends.

Q: Then you know these people in the newspaper?

A: I knew, you know, if I saw them I would know them, but I don't know them by name, but I'd seen them over there, and I know the guy that they had tied up and everything.

Q: Despite this danger that you are talking about, you took it on yourself, once you saw this girl, to go and speak to her and interrogate her about the MacDonald case. Is that correct?

A: See, I didn't - I didn't - I didn't just walk up to her and start talking to her about the MacDonald case.

Q: I understand that, but you did, in fact, interrogate her about the MacDonald case, didn't you?



A: Well, you know, yes.

CPT SOMERS: I have no further questions. Wait, yes I do have one for the benefit of the hearing.

Q: Would you define the term "busted"?

A: It means arrested.

Q: Arrested?

A: Right.

Q: Then it doesn't mean, for instance, convicted by a court? It means -

A: It means just picked up.

CPT SOMERS: I see. Nothing further.

MR SEGAL: Sir, I just want some information about this newspaper - the names from yesterday's paper to clarify the record. I will delay it if you have any questions.

COL ROCK: I have some questions. Go ahead.

MR SEGAL: If you will, sir, you may ask your questions and give me a moment to have someone check the article.

COL ROCK: All right.

COL ROCK: Mr Posey, do you know the last name of this girl? Helen's last name?

WIT: No, sir.

COL ROCK: Do you know whether Helen is her actual name or does she go by other names?

WIT: She goes by several names, different names.

COL ROCK: What are the other names?

WIT: Well, like, I've heard her called Mary, Mary a lot of times, but Helen was mostly what I heard her called by. I can't remember off hand what else the names I've heard.

COL ROCK: Where did you see her night before last?

WIT: At the Village Shop in Haymount, right outside, you know, by the two ice cream trucks there.

COL ROCK: What was she wearing night before last?

WIT: Black slacks with a black vest with a white shirt, you know.

COL ROCK: Did she seem to be of cheerful disposition, or sad, or -

WIT: Well, you know, earlier when I come into the Village Shop she was sitting over drinking her coke by herself, you know, and she was kind of to herself then, and one guy came in and spoke to her, so I just sat down at the other table, had a coke, and then she got up and left, you know, so I got up and left and then I come back about thirty or forty minutes later and went back in and had another coke and she wasn't there, you know. So I started back out the door and she was coming around the trucks, you know, and was going in. There was a water puddle between us, she walked on one side and I walked on the other and I says "Hey, how are you doing?", you know, and she stopped, you know, and I said "Have you seen Paul lately?" See, Paul is a good friend of mine and he was a real good friend of hers, you know, and we started talking about Paul. We brought up Paul, and then we sat down by the truck, you know, talking about an hour, I guess.

COL ROCK: Now that's Paul Bowman you are referring to?

WIT: Yes, sir.

COL ROCK: Do you know where Paul lives?

WIT: Oklahoma City is his, you know, his permanent address. I mean that's where his relatives and everything.

COL ROCK: Is he in Fayetteville now?

WIT: No, sir.

COL ROCK: I see. You don't know the specific address in Oklahoma?

WIT: No, sir.

COL ROCK: Was Paul in the Military service?

WIT: Yes, sir, he got discharged. He was in the 82d Airborne.

COL ROCK: Do you know what unit in the 82d?

WIT: No, sir, he was a radio operator.

COL ROCK: Do you know what date he was discharged?

WIT: No, sir.

COL ROCK: Do you know the approximate month?

WIT: It was in - I think it was January the 14th.

COL ROCK: How long did he remain in Fayetteville after his discharge? Do you have any idea?

WIT: Well, he left, you know, Fayetteville and went to Oklahoma City. He stayed maybe a week or two, then he come back.

COL ROCK: And how long did he remain in the Fayetteville area after he returned, so far as you know?

WIT: Maybe about a month or two. He used to live in the back apartment, you know, but he moved out and he was living on - - and I think when he got discharged he came back and stayed about a month or two after that.

COL ROCK: When was the last time you saw him? Can you give an approximate date?

WIT: Well, I saw him about three or four days after we had a discussion about, by the fense, and I saw him come in in a pick up truck to pick up a TV or something, and that was the last time I saw him.

COL ROCK: So then would you say sometimes towards the end of February was the last time you saw him?

(Witness nodded in the affirmative.)

COL ROCK: When you talked with Helen night before last, and you were outside the village shop, was there anyone else present at the time you were talking with her?

WIT: Well, at first, you know, it was just her and I, and then her boy friend passed by.

COL ROCK: Now, which boy friend? Is this a new boy friend?

WIT: No, this is the same one.

COL ROCK: You mean Paul Bowman?

WIT: No, Paul Bowman wasn't her boy friend. He was just a friend of ours.

COL ROCK: I see, just a friend, okay.

WIT: He was married.

COL ROCK: Who is her boy friend?

WIT: The only name I know him by is Jim. He drives a yellow Plymouth.

COL ROCK: '65, I believe you said.

WIT: Either a '64 or '65, I am not sure.

CDL ROCK: Okay, and what did Jim have to say during the course of the conversation, when you were talking to Helen?

WIT: Well, he passed by - you see, this was about forty-five minutes - we'd been there about forty-five minutes this time talking and he pulled up, you know, and he asked me, you know, if I wanted to tab out on acid that night, and I said no, I told him no, and then they started talking, he started talking to her about a girl that got busted Sunday in Spring Lake. They were bringing this shipment down and they got busted at Spring Lake, and he asked her had she seen a certain party, and she said no, and he said "Well, he owes me two hundred bucks" and he says "If he don't have the money, I am going to cut his throat when I find him." And it was for, you know, buying drugs I take it. He didn't say.

COL ROCK: Was he in the car all this time?

WIT: Right. He pulled up right beside the truck.

COL ROCK: How often have you been awakened at four a.m. to observe the actions of the people in the apartment across the way from you?

WIT: I had never awoken that time before. Just one time.

COL ROCK: Did you ever see any males at the apartment wearing parts of military uniform?

WIT: Well, not, you know, I'd seen them, a lot of them in their uniforms, complete uniforms.

COL ROCK: Complete uniforms?

WIT: Yeah, but they were these confederate, you know, jackets, and in fact I've seen one dressed completely in a confederate uniform one day, but the colored guy, he used to wear a confederate jacket all the time.

COL ROCK: Referring back to Helen's apparel, what color boots did she wear?

WIT: She had a pair of white - they were sort of like pat -

COL ROCK: Leatherette?

WIT: Patent, they were kind of shiny.

COL ROCK: And what color hat?

WIT: White.

COL ROCK: Could you describe the approximate length of the hair by showing where it might fall relative your own body?  
real

WIT: Her/hair? It come down to about right here

COL ROCK: And how about the blond wig, if you remember it?

WIT: It come down to about right here.

MR SEGAL: May we indicate for the record where?

COL ROCK: The brunette, approximately half way on the shoulder. The blond wig extending approximately eight inches below the Adam's apple.  
Have you ever been in the service?

WIT: Yes, sir.

COL ROCK: Where were you discharged?

WIT: Fort Bragg.

COL ROCK: I have no further questions at this time. Does either counsel?

CPT SOMERS: I do not, sir.

MR SEGAL: In regard to the newspaper article referred to yesterday, are you referring to an article about the trial of a James England, I-n-g-l-a-n-d?

A: Yes.

Q: Is that the trial you were referring to?  
(Witness nodded in the affirmative.)

Q: He was charged with the kidnapping and attempted killing of a Richard Fortner?

A: Yes, sir.

Q: Did you know those people?

A: Yes, sir. See, Richard Fortner, you know, he used to come over there. He didn't come over there, you know, until - he'd come about a week before the guy got busted, you know, and so they thought he was the one informed on. The reason I know it was him, because my father-in-law, he had a Triumph 650 CC motorcycle, and he sold it to Richard Fortner, and my mother-in-law and father-in-law, you know, they used to stay - they'd see him over there, like one day he was over there mopping the floors, and they saw him.

Q: What about James England? Did you know him or see him at all?

A: I - if I saw him, I could tell him. But other than just by the name I can't tell.

MR SEGAL: That's all.

COL ROCK: Well, I have one further questbn. Did you ask Helen what her current address is?

WIT: You know, I asked her where she was staying, and she said that she was just bumming around.

CPT SOMERS: Nothing further, sir.

COL ROCK: Mr Posey, you are requested not to discuss your testimony with any other person, other than counsel for the government or counsel for the accused. Do you understand, sir?

(Witness nodded in the affirmative.)

COL ROCK: You are excused, and thank you for appearing today.

MR SEGAL: May I just state in Mr Posey's presence that I this morning requested before he entered the room, requested all parties and persons with regard to this investigation to use the utmost precaution to protect his identity and his address, so that he will not have any fears by himself or his wife.

COL ROCK: You can be assured that we will do all within our power to respect your desires. You are excused.

MR SEGAL: Thank you very much, Mr Posey.

(The witness departed the hearing room.)

MR SEGAL: We have a very short witness that we could dispose of. He is a personal friend of the family of Captain MacDonald and he has a communication from Mrs MacDonald that we want read. I don't think it will take very long, sir.

COL ROCK: Okay, fine.

MR SEGAL: Mr Robert Stern.

(MR ROBERT STERN was called as a witness by the defense, was sworn, and testified as follows.)



Staff Photo by Bill Campbell

Body of one of MacDonald children was found in this room photographed through a window

# Ritualists Sought In Bragg Murders

By DICK BROWN  
Staff Writer

FT. BRAGG — The wife and two small daughters of an Army Medical Corps captain were stabbed and bludgeoned to death in their sleep here early Tuesday morning in seemingly ritualistic murders attributed to three men and a woman under the apparent influence of hallucinatory drugs.

Military officials identified the victims as Mrs. Colette MacDonald, 26, a native of Brooklyn, N. Y. and her daughters Kimberly, 6, and Kristen Jean, 2.

### Husband Hurt

The husband and father, Capt. Jeffrey MacDonald 26, of Patchogue, N. Y., was in serious but satisfactory condition at Womack Army Hospital. He is being treated for multiple stab wounds of the body and club wounds around the head. Capt. MacDonald has been attached to the preventive medicine section of Sixth Special Forces Group at the John F. Kennedy Center since last August.

The MacDonalds lived in a

unit of a four-family housing complex at the intersection of Castle and North Dougherty streets in the Corregidor homes section of Ft. Bragg.

The finding of the word "Pig" scrawled in bloody letters on the headboard of a bed, and statements Capt. MacDonald said were made by a blonde-haired woman, one of four persons he said took part in the attacks, led military authorities to attribute the murders to a quartet "who may have been on an LSD trip."

An all-points alarm was immediately flashed for four suspects — two white men, one Negro man and a blonde woman wearing a floppy hat and muddy white boots.

Military police found the bodies of Mrs. MacDonald and her children and her wounded husband at their home around 3:30 a.m. Tuesday. They went to the apartment following an incoherent telephone call for help from Capt. MacDonald.

The body of Mrs. MacDonald was sprawled near



Kristen Jean MacDonald



Kimberly MacDonald



Mrs. Colette MacDonald



Dr. Jeffrey MacDonald

See MURDER, Page 3

described the living room of the six-room apartment as "in shambles."

Army spokesmen said Capt. MacDonald was unable to give a very detailed description of his attackers. They were described as young.

Capt. MacDonald told military police that he had been attacked by three young men, two white and one Negro — and a blonde white woman.

The Negro he said, was wearing an Army field jacket with Sergeant's stripes on the sleeves. Also, in his initial statement, MacDonald said the woman was carrying a lighted candle.

Quotes

The captain quoted the blonde woman as saying, "Acid is groovy. Kill the pigs and hit 'em again!" during the attack.

Col. Robert J. Kriwanek, Ft. Bragg provost marshal, reconstructed the crime at a news conference Tuesday afternoon.

"We believe," he said, "Capt. MacDonald had been reading in the living room and had fallen asleep. He roused up when he heard a noise from his wife in their bedroom and was attacked at about the same time.

"During the struggle, the captain managed to make his way to the bedroom some 50 feet distant but was stabbed several times and finally knocked unconscious by a blow or blows on the head.

"We do not know how long he was out but when he roused up, he managed to call a Fayetteville telephone operator and tell her, 'I need military police and an ambulance, I've been stabbed.'

"This operator relayed the emergency message to the Ft. Bragg telephone exchange and then called MacDonald back. He answered the second call and both phones in the apartment were off the hook when MPs arrived a few minutes later.

The MPs found the front door of the living quarters locked. A back door, opening into a small utility room just off the master bedroom, was found unlocked. A second back door leading to the kitchen at the opposite end of the apartment was still locked.

The adjoining apartment next door to the MacDonalds is occupied by the family of

Fayetteville and Cumberland County area. "They live together in houses," he said. Many live in old farm houses, he added.

"They live like animals with quilts on the floor. They don't have any bed. They paint all kinds of pictures and decorations at the houses," he said.

Marijuana, LSD, hashish and heroin have been discovered on persons arrested on narcotics charges in Cumberland County.

About 100 military personnel arrested were military personnel," Worrell said.

A spokesman for the State Bureau of Investigation said the Fayetteville-Cumberland County area is one of "the hot spots" of drug traffic in North Carolina. The combination of military installations and colleges here have spawned the increasing usage of narcotics, the spokesman said. — JIM LEWIS.

Some 500 military personnel live in the Corrigedor homes area. The section is patrolled almost hourly by military police but nothing unusual was noted in the area by MPs Monday night or Tuesday morning.

In Raleigh Tuesday afternoon, police questioned six young people — two girls and four young men — for two hours in connection with the Ft. Bragg slayings, but at the end of the interrogation an FBI spokesman said, "As far as I'm concerned, they are just six innocent kids."

Wake County police said, however, that they had been asked to hold the six in connection with a charge of contributing to the delinquency of a minor.

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# FRONT PAGE DETECTIVE

*Does Bluebeard Live Again?*

## THE MISSING WIVES OF EDMUND CODY



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Dramatic photo through window of slain children's room keynoted tragedy initially. It was accented again as Green Berets carried coffins of victims to funeral services in chapel at Ft. Bragg.



75-010011-00015



EXHIBIT

FOR OFFICIAL USE ONLY

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

Docket No. 97-713

UNITED STATES

v.

JEFFREY R. MacDONALD

MEMORANDUM IN SUPPORT OF  
JEFFREY R. MacDONALD'S MOTION FOR  
AN ORDER AUTHORIZING THE DISTRICT COURT FOR  
THE EASTERN DISTRICT OF NORTH CAROLINA TO CONSIDER  
A SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. § 2255

I. INTRODUCTION.

The United States Supreme Court, when it set about the historic and controversial task of procedurally limiting judicial consideration of second and subsequent habeas corpus petitions and new trial motions, promised litigants and the American public that demonstrable actual, factual innocence would be an exception to the imposition of a procedural bar. See McCleskey v. Zant, 499 U.S. 467 (1991). When the Congress voted to follow the Supreme Court's lead and institutionalize such procedural barriers in statutory form, it retained the exception for actual innocence. See Antiterrorism and Effective Death Penalty Act of 1996, as codified in 28 U.S.C. § 2255 (providing for review where "newly discovered evidence, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have

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found the movant guilty of the offense") (emphasis supplied).

The case at bar, after a long, tortuous and tortured history in which the parties, the lawyers, and to some extent perhaps even the courts have shown signs of exhaustion,<sup>1</sup> is at a point where years and years of revelations, most of which have been laboriously unearthed from government files, collectively add up to a stunningly persuasive demonstration that an innocent man stands convicted and faces spending the rest of his life in prison for a crime that the evidence demonstrates he did not commit. It is not a matter of the evidence raising merely a reasonable doubt. The evidence is far more persuasive than that. If there is any substantive content and meaning to the phrase "actual innocence," this case, in the view of undersigned counsel, meets that standard.

However, no court has ever looked at the cumulated evidence, because procedural barriers have blocked such a proceeding. Government witnesses who hold the key to explaining why certain evidence was withheld, and whether such evidence might possibly carry some explanation or meaning that is not exculpatory, have never been put on the witness stand so that they might be questioned. Evidence that is of the sort which traditionally has been considered to be the most powerful exculpatory evidence

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<sup>1</sup> In its most recent published opinion in this case, this Court noted that at some point in the life of a case finality should be achieved. United States v. MacDonald, 966 F.2d 854, 861 (4<sup>th</sup> Cir. 1992) ("While we are keenly aware of MacDonald's insistence as to his innocence, at some point, we must accept this case as final.").

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imaginable — such as lab notes reporting on the presence of hairs and fibers found under the fingernails of the victims, indicative of a Titanic struggle leading to their deaths, and which hairs and fibers did not match Dr. MacDonald nor any known source in the MacDonald household, or a bloody palm print, not MacDonald's, deposited on the footboard of the master bed — has never been considered on the merits by any court, because of these procedural obstacles.

In the most recent defense effort to re-open this case, the District Judge, now deceased, gave as a very important reason for denying the defendant's petition the Court's reliance upon a government affidavit which now can be shown to be clearly erroneous at best and far more likely knowingly false. Yet because the District Judge who succeeded to this case upon the death of his predecessor believes that the deceased judge would have relied on still other grounds for maintaining the procedural barrier to examination of the case on the merits, the Court has once again refused not only to re-open the case, but even to allow the defense to do scientific DNA testing that holds out the possibility of demonstrating MacDonald's innocence to a virtual scientific certainty. Indeed, the Court has thrown MacDonald out of court even though the FBI agent whom the defense has demonstrated filed a false affidavit tellingly did not file an affidavit in his own defense in these latest proceedings.

There surely must come a time, when the accumulated evidence of innocence is so overwhelming, that the aggressive imposition

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of procedural barriers and suppositions must fall in the face of the Supreme Court's and the Congress' promise that actual innocence will trump finality. Exhausted as all of the parties and the courts justifiably may be in this tortured case, the time surely has come to face once and for all the extraordinarily disturbing questions the case raises about whether justice was done or thwarted. Only an examination of all of the available evidence, on the merits, can accomplish this. Surely the Supreme Court and the Congress had cases like this in mind when establishing procedural barriers that would tumble in the face of demonstrated actual innocence. The instant case is in a posture where this can, and should, be done.

**II. PROCEDURAL BACKGROUND AND THE DISTRICT COURT'S DECISION TO TRANSFER PORTIONS OF THIS CASE TO THIS COURT FOR CERTIFICATION.**

On April 22, 1997, Jeffrey R. MacDonald filed in the Eastern District of North Carolina his "Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery," in which he sought to reopen the § 2255 petition which he previously filed in October 1990 (hereafter the "1990 petition"). The motion to re-open was grounded on MacDonald's assertion that the government had submitted to the District Court affidavits of an FBI agent that were materially false and misleading on an issue that was central to the District Court's dismissal of his 1990 petition<sup>2</sup> and to

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<sup>2</sup> United States v. MacDonald, 778 F.Supp. 1342 (E.D.N.C. 1991).

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this Court's affirmance of that dismissal.<sup>3</sup> This central issue was whether certain 22-inch and 24-inch long blond synthetic fibers made from a substance called Saran, which were found at the crime scene and memorialized in laboratory bench notes that were withheld from the defense team prior to and at trial, were or were not used in the manufacture of wigs for human cosmetic purposes prior to date of the crime, February 17, 1970.

MacDonald deemed the Saran issue critical to demonstrating his innocence, since if the synthetic fibers were the type that likely came from a long blond wig, it would have powerfully corroborated his testimony and the defense account of who committed the murders — a woman named Helena Stoeckley who regularly wore a long blond wig. Further, if the affiant lied in his affidavits in the 1990 proceedings and thereby misled the Court into believing that the fibers could not have come from a wig because Saran was not used in such wigs, then his fraud on the Court would have been largely responsible for the District Court's refusal to allow his § 2255 motion.

More specifically, the defense argued that statements made by FBI Agent Michael Malone concerning the end-uses for Saran fibers were false and misleading because Malone had informed the District Court via affidavit that he had conducted an investigation from which he had determined that Saran fibers could not be extruded in a physical form (a so-called "tow") that

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<sup>3</sup> United States v. MacDonald, 996 F.2d 854 (4<sup>th</sup> Cir. 1992).



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was essential to the wigmaking process and that the fibers in question therefore had likely come from a doll rather than from a wig for human cosmetic use.

MacDonald's attack on Malone's affidavit was the result of a multi-pronged investigation that followed the District Court's reliance on Malone in dismissing MacDonald's petition on procedural grounds. Through the Freedom of Information Act (FOIA), the defense learned that Malone had available to him in the FBI Laboratory library certain reference texts which put him on notice that his statements about Saran were untrue. The defense also learned that, prior to filing his affidavits, Malone had also conducted an investigation in which he interviewed persons familiar with Saran and its end-uses who informed him that it was highly unlikely that the fibers in question had come from a doll. In addition, MacDonald buttressed his claims of fraud by submitting to the District Court affidavits from persons who had worked in the Saran fiber and wig manufacturing industries during the relevant time period, and who confirmed that (1) Saran fibers were indeed manufactured in a form suitable for commercial wig-making and (2) were in fact used in the manufacture of wigs for human cosmetic use.

— Further, MacDonald requested that the District Court order the government to give him access to certain items of physical evidence in the case which, if analyzed properly, would demonstrate his actual innocence. These items, which are documented in the handwritten laboratory bench notes of the Army

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and FBI Lab examiners, consist primarily of hairs and blood debris found in extraordinarily telling locations -- namely, under the fingernails of the victims, on their hands, on their bodies, or in their bedding. The lab notes reveal that the government's lab examiners had attempted to source these hairs by comparing them to known hairs taken from the victims and from Dr. MacDonald, but they were never able to match these hairs to any member of the MacDonald family, resulting in the obvious and highly exculpatory conclusion that these strategically-located hairs came from outsiders, thus corroborating MacDonald's account. With respect to certain blood debris found under the fingernails or on the hands of the victims, the government was able to determine the blood type in some instances but not in others. See Affidavit of Philip G. Cormier No. 2 -- Request for Access to Evidence to Conduct Laboratory Examinations -- in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery (hereafter "Cormier Aff. No. 2") which describes these hairs and blood debris in detail.

MacDonald sought access to this highly specific and crucial category of physical evidence for the purpose of subjecting these unsourced hairs and blood debris to DNA testing in an effort to further establish MacDonald's innocence by demonstrating definitively that these items did not originate from any MacDonald family member nor from MacDonald himself, but instead originated from one or more of the intruders whom MacDonald described seeing in his home on the night of the murders.

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In response to MacDonald's motion to reopen, the government filed a motion to dismiss claiming that the District Court lacked the jurisdiction to entertain MacDonald's motion to reopen, and alternatively suggesting that the District Court transfer the matter to this Court. Significantly, the government filed no affidavit from Agent Malone, nor for that matter any affidavits whatsoever, to rebut MacDonald's evidence of fraud-on-the-court. MacDonald filed a reply, and a supplemental affidavit, in which he pointed out, inter alia, the extraordinarily telling absence of any affidavit from the agent being accused of fraud. MacDonald requested an evidentiary hearing.

On September 2, 1997, without holding an evidentiary hearing, the District Court (Fox, C.J.), entered an order in which it denied MacDonald's motion to reopen on fraud grounds and transferred the remainder of the case to this Court for certification:

MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery is DENIED.<sup>4</sup> His claim that newly gathered evidence that saran fibers were in fact used in the manufacture of human wigs prior to 1970, added to the weight of previously amassed exculpatory evidence, demonstrates his factual innocence is TRANSFERRED to the United States Court of Appeals for the Fourth Circuit. Thus, the Government's Motion to Dismiss 28 U.S.C. § 2255 Petition for Lack of Jurisdiction and Suggestion, in the Alternative, to Transfer to the Court of Appeals, is DENIED IN PART and ALLOWED IN PART. Finally, MacDonald's Motion for Leave to File Supplemental Affidavit is ALLOWED.

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<sup>4</sup> The denial of MacDonald's motion to reopen on fraud grounds is the subject of a separate appeal to this Court. The notice of appeal from that portion of the District Court's Order was filed in the District Court on September 8, 1997.

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District Court's Order at p. 29; see also Order at pp. 1-2<sup>5</sup>

With respect to MacDonald's request for access to the physical evidence to conduct DNA tests, the District Court ruled that

since the court will not reopen the proceedings on the 1990 petition, and, as explained below, has no authority to consider the question of MacDonald's factual innocence based on all of his exculpatory evidence plus his new evidence regarding the possible origin of the Saran fibers,<sup>6</sup> there is no basis on which to allow MacDonald discovery. Moreover, the significance of items other than the saran fibers has been fully litigated in the past, and nothing now impugns the validity of the government's conclusions concerning them. (See Opp'n of the United States to Motion to Reopen at 51-52.)

District Court's Order at p. 24.

### III. ARGUMENT.

As described in the papers filed herewith<sup>7</sup> and as outlined below, MacDonald has more than met the factual innocence standard

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<sup>5</sup> The District Court's Order is included with the materials filed herewith.

<sup>6</sup> The District Court held that it was "barred by the Antiterrorism and Effective Death Penalty Act from considering whether [the] new evidence, added to the weight of MacDonald's other exculpatory evidence previously amassed in a trial and two habeas proceedings, finally tips the balance in his favor so as to warrant a new trial." District Court Order at p. 25.

<sup>7</sup> MacDonald's factual innocence argument is set forth in the following documents which are filed herewith: (1) Memorandum of Law in Support of Jeffrey R. MacDonald's Motion to Reopen 18 U.S.C. § 2255 Proceedings and for Discovery, 4/22/97, at pp. 52-65; (2) Jeffrey R. MacDonald's Reply to the Opposition of the United States to Defendant's Motion to "reopen" § 2255 Proceedings and for Discovery, and Response to the Government's Motion to Dismiss 28 U.S.C. § 2255 Petition for Lack of Jurisdiction and in the Alternative to Transfer to the Court of Appeals, 5/27/97, at pp. 19-38.

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set forth in 28 U.S.C. § 2255 upon which this Court is required to order lower court consideration of the merits of a successive application for relief.<sup>9</sup>

As this Court is aware from this case's history of prior proceedings, MacDonald was prosecuted and convicted on a circumstantial evidence theory that the physical evidence, analyzed by government forensic experts, demonstrated that his account was a lie because the physical evidence failed to support his claim that intruders had entered his home and attacked him and his family. Since trial, however, a wealth of evidence has surfaced from the government's own files which demonstrates the truth of MacDonald's account. Much of this evidence was not disclosed to the defense at the time of trial, and demonstrates that the government's own lab examiners had documented the existence of physical evidence at the crime scene which indicated the presence of intruders in the MacDonald home. This evidence of the presence of intruders consists of, among other things, the following.

First, notwithstanding the issue of whether or not Agent Malone committed fraud in the last proceeding, there is now more

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<sup>9</sup> Title 28 U.S.C. § 2255 provides in relevant part:

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

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

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than ample evidence that Saran fibers -- such as the 22 and 24-inch blond fibers found at the crime scene -- were in fact used in the manufacture of wigs prior to February 1970.<sup>9</sup> As described in the "Memorandum of Law filed in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery" at pp. 56-65, these fibers are direct evidence of Helena Stoeckley's participation in the murders. Stoeckley owned a long, blond, shoulder-length wig which she burned within days of the murders; she confessed on numerous occasions to having participated in the murders; and a woman meeting her description was seen standing in the rain on a street corner located less than a mile from the MacDonald home by one of the military police officers who responded to MacDonald's telephone call for help on the night of the murders. Id. Had the defense been provided at trial with the handwritten lab notes which documented the existence of these long blond Saran fibers in the MacDonald home, it would have devastated the government's case, especially after Stoeckley herself admitted to the jury that she owned a wig and burned it shortly after the murders.

The government's forensic case would have been further devastated had the defense known at trial that dark purple and bluish-black wool fibers had been found on Colette MacDonald's

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<sup>9</sup> See Memorandum of Law in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and For Discovery at 32-37, and Affidavit of Philip G. Cormier No. 1 (Concerning Saran Fibers) in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and For Discovery at pp. 41-53.

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mouth and biceps areas, especially in light of (1) Stoeckley's testimony to the jury that she always wore purple or black clothing and (2) the government's inability to match these fibers to any furnishing or item of clothing belonging to the MacDonald family or household. Id.

Second, the handwritten lab notes reveal that numerous unsourced hairs were found at critical locations at the crime scene (on or near the victims' bodies, or in the bedding) which could not be matched to any known sources, including MacDonald. See Cormier Aff. No. 2 at pp. 21-38. These crucial notations were not included nor mentioned in the final typewritten reports that were disclosed to the defense prior to trial. Without these notations, the typed reports seemed inculpatory in that the forensic findings appeared not to support MacDonald's account; with those notations, however, the forensic reports would have powerfully corroborated MacDonald -- would, indeed, have established his innocence, not simply a reasonable doubt of guilt.

The following is an illustrative, but far from exhaustive, list of some of the unsourced hairs found in critical locations:

(A) The lab notes reveal that Army lab technician Janice Glisson found at least one unsourced hair in the fingernail scrapings taken from the left hand of Kristen MacDonald, and at least one unsourced bloodstained hair in the fingernail scrapings from the left hand of Kimberly MacDonald. In each instance, Glisson determined that these

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hairs did not match the known hair exemplars from Jeffrey MacDonald. Cormier Aff. No. 2 at ¶¶ 33-38.

(B) Unmatched hairs found in the bedding (blue top sheet found on the floor of the master bedroom), including a "brown body hair of Caucasian origin" which was "forcibly removed" and which "appears to have a piece of skin tissue attached to the basal area of the hair." Cormier Aff. No. 2 at ¶¶ 17-18(a).

(C) Unmatched hairs found in the left hand of Colette MacDonald which the government is unable to source. Cormier Aff. No. 2 at ¶ 18(c).

(D) Two or more unsourced human body or pubic hairs found in debris removed from the vicinity of Colette MacDonald's left hand and arm. Cormier Aff. No. 2 ¶¶ 45-52.

(E) One or more unsourced human pubic or body hairs, possibly bloodstained, found on the bedspread on the floor of the master bedroom. Cormier Aff. No. 2 at ¶¶ 53-62.

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In addition to these unsourced hairs, there was blood debris found under the fingernails and on the hands of some of the victims which has, at most, only been blood-typed, but which has never been tested utilizing DNA technology to determine whether any of this blood originated from someone other than a member of the MacDonald family. There is also a palm-print, apparently in blood, that was found on the footboard of the master bed which was compared with known palm-print exemplars taken from MacDonald, his wife, and numerous other persons, and which could



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not be identified as belonging to any of these people, including MacDonald.

These unsourced hairs and other unsourced items like the palm-print are direct evidence of the presence of intruders in the MacDonald home and corroboration that MacDonald's longstanding and forever consistent account of events is true. The defense seeks access to this and similar unsourced evidence for the purpose of conducting DNA testing to further establish, by modern scientific testing methods not available at the time of MacDonald's trial, that it is without any doubt evidence of intruders and that these items did not originate from MacDonald's body or the bodies of his family members. As far as the defense is aware, none of the hairs, skin and blood debris in this case have ever been subjected to any form of DNA testing, including the recently developed mitochondrial DNA test which can be used to identify hairs that have no follicle or skin attached to them. See Cormier Aff. No. 2 at ¶¶ 23-28.

It is well understood that our criminal justice system is not infallible, and it is also well recognized that DNA and other new forms of forensic technology can be utilized to assure greater accuracy in the search for truth. Indeed, Attorney General Janet Reno herself has advocated the re-examination of old crime scene evidence using new forensic technology to correct miscarriages of justice. In June 1996, the National Institute of Justice ("NIJ") published a report entitled Convicted by Juries, Exonerated by Science. Case Studies in the use of DNA Evidence to

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Establish Innocence After Trial, in which it documented 28 case studies where the defendants were exonerated by DNA testing, after they had been convicted by juries. Attorney General Reno, in her opening message at the beginning of this report, stated:

Our system of criminal justice is best described as a search for truth. Increasingly, the forensic use of DNA technology is an important ally in that search. The development of DNA technology furthers the search for truth by helping police and prosecutors in the fight against violent crime. . . .  
At the same time, DNA aids in the search for truth by exonerating the innocent. The criminal justice system is not infallible . . . .

In addition, Attorney General Reno gave a keynote address last year before the American Academy of Forensic Sciences, in which she stated:

Laboratories must also be in a position in cases where evidentiary samples have been appropriately preserved and maintained to re-examine, using modern technology, evidence used years ago to convict someone. Properly conducted scientific tests are accurate and impartial and in the right cases, as I've indicated, can correct a miscarriage of justice. Forensic science can play no more important role than that.

Keynote Address By Janet Reno, Attorney General of the United States of America Before the American Academy of Forensic Sciences, February 21, 1996 at Nashville, TN, Alderson Reporting Co., at 15. See Cormier Aff. No. 2 at ¶ 29.

A number of federal courts have recognized that defendants should be given access to physical evidence to conduct DNA and other forms of testing to establish their innocence. In Toney v. Gammon, 79 F.3d 693, 700 (8<sup>th</sup> Cir. 1996), the Eighth Circuit Court of Appeals ordered the State of Missouri to give the convicted defendant access to physical evidence in the custody of

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the state for the purpose of permitting him to conduct DNA and other testing so that he could prove the prejudice prong of his ineffective assistance of counsel claim. Steven Toney was released from prison a short time later as a result of the DNA tests which exonerated him. Similarly, in Thomas v. Goldsmith, 979 F.2d 746, 749-750 (9<sup>th</sup> Cir. 1992), the Ninth Circuit, pursuant to Brady v. Maryland, ordered the state to turn over potential exculpatory evidence (a semen sample) so that the defendant could conduct laboratory tests which might further establish his factual innocence so that his procedurally defaulted claims could be heard.

Here, DNA testing could be used very effectively to further demonstrate Jeffrey MacDonald's innocence. One simple illustration makes this point. As noted above, crime scene investigators found in the bedding in the master bedroom of the MacDonald home a "brown body hair of Caucasian origin" which, according to the government's own lab examiners, appears to have been "forcibly removed" and "appears to have a piece of skin tissue attached to the basal area of the hair." If this hair and piece of skin were subjected to DNA testing, and were such testing to result in a determination that this item did not originate from either Jeffrey MacDonald, his wife, or his daughters, it would be highly persuasive evidence of MacDonald's innocence, for there is little, if any, possibility that this hair and skin found their way into the bedding in the master bedroom other than as a result of a struggle between the victims

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and the persons who committed the murders.<sup>10</sup>

As noted above, the defense is not aware that any DNA tests have ever been conducted in this case, and it is only within the past few years that forensic laboratories have begun to utilize the newer mitochondrial DNA testing in connection with hair identification. See Cormier Aff. No. 2 at ¶¶ 23-28. Because this DNA technology has only recently come into use and was not available at the time of trial nor when MacDonald brought his two § 2255 petitions in 1984 and 1990, MacDonald should be granted access to the physical evidence to conduct such DNA testing if, as determined by experts in the field of DNA testing, such testing can appropriately be conducted on the unsourced items in question. At the very least, the government should be compelled to file a statement asserting why it would be violative of either law or public policy for the Court to allow the use in this case of sophisticated and highly reliable scientific tests that the government itself relies upon when it suits the government's purposes.

#### IV. CONCLUSION.

For all the foregoing reasons, this Court should grant

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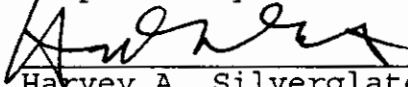
<sup>10</sup> Another equally potent illustration involves the hairs found in Colette MacDonald's left hand which the government maintains that it cannot identify because they do not possess sufficient characteristics for comparison purposes. See Cormier Aff. No. 2 at ¶ 18(c). Mitochondrial DNA testing might very well be used to identify these hairs. The same goes for blood debris found under the fingernails and on the hands of Colette MacDonald and the MacDonald children.

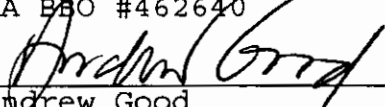
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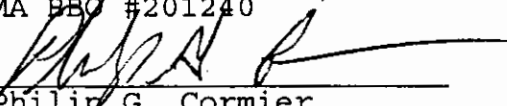
MacDonald's motion for an order authorizing the District Court to consider the evidence set forth in his motion to reopen which the District Court previously declined to consider. In conjunction therewith, MacDonald further seeks an order from this Court directing the government to give MacDonald access to the items of physical evidence (unsourced hairs, skin and blood debris) which are referenced in his motion to reopen, so that MacDonald can have experts in the field of DNA testing examine the evidence for the purpose of determining whether or not such testing can at this point in time be conducted on the specified items.

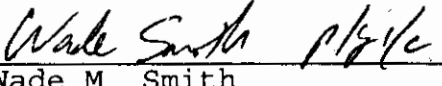
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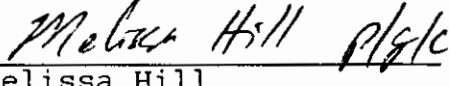
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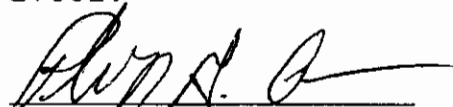
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CERTIFICATE OF SERVICE


I hereby certify that on this 17th day of September 1997, a true copy of the foregoing memorandum of law was served first class mail upon Janice McKenzie Cole, United States Attorney, Eastern District of North Carolina, New Bern Avenue, Suite 800, Federal Building, Raleigh, NC 27601.



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