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GENERAL COURT REPORTING SERVICES
RALEIGH • DURHAM • OXFORD
NORTH CAROLINA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO. 75-26-CR3

UNITED STATES OF AMERICA,)
)
 Plaintiff;)
)
 -v-)
)
 JEFFREY R. MACDONALD,)
)
 Defendant.)
-----)

T R A N S C R I P T
O F T H E
H E A R I N G

BEFORE: THE HONORABLE F. T. DUPREE, JR.
Judge Presiding

V O L U M E 1 O F 1
P A G E S 1 - 231

At Raleigh, North Carolina.
Monday, January 14, 1985.

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A P P E A R A N C E S

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T A B L E O F C O N T E N T S

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2 The hearing in the matter of the United States of
3 America, Plaintiff, versus Jeffrey R. MacDonald, Defendant,
4 was held at the United States Post Office and Courthouse,
5 Courtroom #1, Seventh Floor, 310 New Bern Avenue,
6 Raleigh, North Carolina, on Monday, January 14, 1985 at
7 10:00 A. M., before the Honorable F. T. Dupree, Jr.

8 The proceedings were reported and transcribed
9 by Ellen T. Oakley, Court Reporter in and for the State of
10 North Carolina.

11 The following proceedings were had, to wit:
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1 Colloquy

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2 THE COURT: Good morning, ladies and
3 gentlemen.

4 MR. SMITH: Good morning, Your Honor.

5 MR. O'NEILL: Good Morning, Your Honor.

6 MR. MURTAGH: Good morning, Your Honor.

7 THE COURT: The Court is ready for oral
8 argument in the MacDonald case.

9 MR. O'NEILL: Good morning, Your Honor.
10 Brian O'Neill, Wade Smith and Myrna Greenberg are
11 appearing on behalf of the Defendant, Dr.
12 MacDonald.

13 THE COURT: And you're ready?

14 MR. O'NEILL: We are, Your Honor.

15 THE COURT: Mr. Murtagh, the Government's
16 ready?

17 MR. MURTAGH: Yes, Your Honor, the
18 Government is ready, although I think there is a
19 preliminary matter that we addressed in our Motion
20 this morning.

21 We have some things that have not been
22 stipulated to.

23 THE COURT: Well, let me -- I'll have to
24 take a look at that because I haven't seen it
25 before.

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2 MR. MURTAGH: It's very brief, Your Honor.

3 THE COURT: (Court reviews Motion.) With
4 respect to the Motion filed by the Government this
5 morning, the Court will make the following ruling.

6 The Court will be unable to limit oral
7 argument to those legal and factual issues which
8 are encompassed within the pleadings filed up to
9 and including December 21, 1984, the reason being
10 that the Court is unable, because of the mass of
11 materials furnished in this case, to determine
12 what has been filed and what has not with respect
13 to any particular date, and I think the parties in
14 this case ought to have a full-blown hearing on
15 everything that's been filed.

16 Now, with respect to matters as to which
17 the Government has not had opportunity to respond
18 or as to which the time has not expired, the Court
19 will grant the Government the Motion to defer
20 decision on those matters until the Government has
21 had opportunity to respond to the new matters.

22 MR. MURTAGH: Your Honor, that's all I
23 think the Court need address at this time. There
24 were some other matters there.

25 THE COURT: All right, sir. Well, the -- I

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2 think there is pending a Motion for
3 Reconsideration of the Recusal Motion filed
4 earlier and I suppose that should be heard and
5 ruled upon before we proceed further, because if
6 the Motion is granted for reconsideration and that
7 takes additional time, then, of course, we will
8 have to abort this hearing and resolve the
9 reconsideration matter later on or, if the Court
10 should grant the Recusal Motion, of course, then
11 everything that's been filed before me, up until
12 this moment, would be academic and would, of
13 necessity, have to be ruled upon later by some
14 other Judge to whom the case might be assigned.

15 So, I'll hear you on that Motion for
16 Reconsideration, sir.

17 MR. O'NEILL: Very well, Your Honor.
18 At the Court's pleasure, unless the Court wishes
19 further argument, we will submit it on the moving
20 papers.

21 THE COURT: Well, let's -- because I don't
22 want to make a decision without the full benefit
23 of all the allegations and the law applicable
24 to those, but tell me just briefly again, just
25 more by way of refreshing my recollection because

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2 it's been, I'd say, about ten (10) days since --

3 MR. O'NEILL: (Interposing) Certainly.

4 THE COURT: -- I read your Motion. What was
5 the basis for the Reconsideration Motion?

6 MR. O'NEILL: Your Honor, it was in --
7 because of the Court's apparent conclusion, the
8 Court's written order, one of the apparent bases
9 of the Court's determination upon the written
10 order was the apparently minimal connection of Mr.
11 Proctor with the case.

12 And -- excuse me -- it was our position
13 that that new information, which we brought to the
14 Court's attention, which was contained in the
15 interview of Mr. Proctor, was further information
16 for -- of the extent of Mr. Proctor's involvement
17 in the case, which, according to his admission, was
18 considerably more extensive than we had originally
19 believed and which we had originally brought to the
20 Court's attention.

21 THE COURT: I seem to recall that
22 subsequent to the filing of some affidavit in
23 connection with the original motion, that Mr.
24 Proctor has -- had a press conference or something
25 of that nature, --

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MR. O'NEILL: (Interposing) Yes, Your Honor.

THE COURT: -- and has revealed that his interest in the case was far more extensive than had been previously brought to the Court. I think, Mr. O'Neill, that what -- that the Court's decision was not related so much to the feeling that Mr. Proctor's relationship to the case was minimal, but to my certain knowledge that whatever his interest in the case was, it was not known to the Court and would not have made any difference whatever.

In other words, it was more related to a minimal relationship between Mr. Proctor and myself before I came on the bench, and for the very short time that he remained as an Assistant United States Attorney afterwards. In other words, I -- and believe me, I wish I could find some merit in your motion because nothing would suit me better than to go home right now, but I -- of course, I just have to decide it on the basis of the merits and how I understand the facts to be, and face up to it, as arduous as the task may be, never letting myself forget that about fifteen

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2 (15) years ago, I asked for this position and that
3 this, of course, comes with the turf.

4 I will deny your motion for reconsideration,
5 sir. And, of course, you may have an exception to
6 that ruling.

7 MR. O'NEILL: Very well, Your Honor.

8 Your Honor, before our beginning argument,
9 there are a couple of housekeeping matters which
10 probably ought to be taken care of just so the
11 records are before the Court.

12 THE COURT: Yes. Well, I have some that I
13 want to bring up myself and I'll let you decide as
14 to the order in which they should be addressed.

15 First of all, I would like to know about
16 how much time it is estimated will be required to
17 conduct these hearings.

18 MR. O'NEILL: Your Honor, Mr. Smith and I
19 discussed -- we've not had a chance to discuss it
20 with Mr. Murtagh -- but it would not be our
21 intention to go over each and every line of each
22 and every paragraph of each and every brief that's
23 been filed in here because we'd be here until
24 Friday.

25 It is our expectation, Your Honor, that we

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2 should be able to complete argument, in the
3 aggregate, with our time probably being an hour
4 and fifteen minutes, an hour and a half. Is that
5 what we decided?

6 MR. SMITH: Yes.

7 THE COURT: Well, of course, I would
8 assume that that would be a much shorter time than
9 I would expect you to and, of course, counsel for
10 both sides -- I want you to have an opportunity
11 to present everything that you want to and we're
12 not going to call time on you. But my inquiry was
13 more related to the schedule for the remainder of
14 the day, if any, and the remainder of the week, if
15 any.

16 And also in the interest -- I notice that
17 we have people -- more than an ordinary audience
18 for a hearing in the Court, and it may be of some
19 interest to them in scheduling their -- the
20 remainder of their day.

21 Well, we'll take as much time as necessary
22 for everybody to get a full hearing and airing of
23 whatever he want -- he or she wants to say about
24 the case.

25 I will say this. We have a rather

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2 large audience, not a full house, but a sizeable
3 one this morning. We will normally recess for
4 about fifteen (15) minutes at eleven-thirty
5 (11:30) depending on where we are in the argument.
6 I won't cut somebody off in the middle of an
7 argument maybe, but until that time, if there
8 are those of you who feel that you're going to
9 have to go earlier, it's very disruptive to the
10 Court to have people going in and out.

11 So, I may declare a little mini-recess so
12 that you can get up and move about and take your
13 departure if you have to, but I will not permit just
14 indiscriminate goings and comings during the argument.
15 It's very disruptive to counsel and to the Court, so
16 please bear that in mind.

17 And then there will be a fifteen (15)
18 recess, oh, around an hour and a half from now.

19 MR. O'NEILL: Very well.

20 THE COURT: All right. Now, your matters.

21 MR. O'NEILL: Yes, Your Honor. Thank you.

22 There is a matter -- one of the witnesses
23 at the evidentiary hearing was a Mrs. Averitt.
24 Mrs. Averitt, on reviewing the transcript, did not
25 testify concerning the time of the sighting that she

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2 reported in her testimony and in an effort to
3 clarify that, we obtained and filed with the
4 Court a declaration, a copy of which was provided
5 to Mr. Murtagh this morning.

6 THE COURT: I read that --

7 MR. O'NEILL: Very well.

8 THE COURT: -- and she supplied the date.

9 MR. O'NEILL: There's another item of out-
10 standing evidence, Your Honor, which is now before
11 the Court which bears some explanation so that the
12 records will be complete and that is that the
13 issue of this tape recorded interview -- CBS
14 interview as to which a transcript wasl -- for which
15 a transcript was provided on the occasion of our last
16 hearing.

17 Since then, we've gone through a bunch of
18 efforts in order to make the reel-to-reel tape --
19 reel-to-reel audio into a form which is readily
20 digestable by the rest of the world and not the
21 television industry, which is a cassette. Only
22 one of those has been prepared and that has been
23 marked and is before the Court. A copy of the
24 same tape will be provided to Mr. Murtagh as soon
25 as we get it, which we expect is upon our return

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2 to Los Angeles. We'll just shoot it off in the
3 mail to him.

4 The reel-to-reel audio tapes are around --
5 are available. They're here should the Court
6 wish them as part of the Court records. Probably
7 the safer course is for us to give it to the
8 Court.

9 THE COURT: Well, first of all, if you file
10 them, are they in a form that can be played by
11 any equipment that the Court has?

12 MR. O'NEILL: No, they aren't, Your Honor.
13 Our concern was that there could be a chain of
14 evidence sufficient to satisfy the Court. That
15 final composition -- the video cassette -- in
16 fact, has a --

17 THE COURT: (Interposing) I don't think
18 we'd have any trouble about that.

19 MR. O'NEILL: Very well, Your Honor.

20 THE COURT: What I want to do is to hear
21 the tape with my own ears, and if you haven't got
22 it in something that we can play it, then, of
23 course, you can't do that, can you?

24 MR. O'NEILL: We cannot. Very well. We
25 won't -- we'll hold onto it, Your Honor. The -- we

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2 have it readily available should the Court to
3 check it for comparision purposes against the video
4 cassette which has been prepared and which is
5 readily viewable and hearable.

6 THE COURT: Do you know if the local
7 television stations have equipment that would
8 make this audible?

9 MR. O'NEILL: They probably do not, Your
10 Honor, but the video cassette, which has been
11 prepared from it, is readily viewable and hearable
12 on a VHS or -- I think that's what they call them
13 -- recording playing device.

14 THE COURT: Oh, well, if you have it --
15 that's what I wanted in the inception.

16 MR. O'NEILL: That's what we have, Your
17 Honor. That's before the Clerk.

18 THE COURT: Oh.

19 MR. O'NEILL: I was concerned about the
20 foundational --

21 THE COURT: (Interposing) Well, I don't
22 care anything about that. You say it's accurate,
23 don't you?

24 MR. O'NEILL: Yes, Your Honor.

25 THE COURT: Well.

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2 MR. O'NEILL: They're --

3 THE COURT: (Interposing) Do you have any
4 objection to that?

5 MR. MURTAGH: No, Your Honor.

6 THE COURT: All right.

7 MR. O'NEILL: Further preliminaries,
8 Your Honor, one other thing -- it's at the Court's
9 pleasure, of course, and we're here for as long as
10 the Court wants us here. I was going to suggest
11 that an appropriate order of argument might be the
12 following. The new trial motion, the twenty-two
13 fifty-five (2255) motion addressing Dr. Brussels
14 and then the twenty-two five (225) motion
15 addressing the Brady issues, if that's acceptable
16 to the Court.

17 THE COURT: Sounds good to me.

18 MR. MURTAGH: Your Honor, if I could be
19 heard on one second on that. I think since the new
20 trial motion encompasses, and incorporates by
21 reference, allegations of suppressed evidence, you
22 know, one incorporates the other, I don't really
23 care when they argue the Brussels motion, but I
24 would respectfully request that they argue the
25 motion to set aside the conviction before the new

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2 trial motion because it would -- there would be
3 less redundancy in argument I believe, certainly
4 from the Government's response.

5 MR. O'NEILL: It makes no difference to
6 us, Your Honor.

7 THE COURT: All right. You've agreed then
8 that the first will -- the first motion will be
9 the set aside. All right. Mr. Smith.

10 MR. SMITH: Your Honor, if I may, I'd like
11 to argue that motion, and to aid the Court should the
12 Court need to refer to any affidavits I may make
13 reference to, if I could just hand that up, not
14 as evidence, just as a matter of use for the
15 Court. (Hands document to Court.)

16 THE COURT: All right.

17 MR. SMITH: Did Your Honor wish that I use
18 the podium or can I stay here? It's up to you.

19 THE COURT: Where will you be more
20 comfortable?

21 MR. SMITH: I'm comfortable right here.

22 THE COURT: Well, I'm comfortable there,
23 too.

24 MR. SMITH: All right, sir. May I move
25 this over to the side?

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THE COURT: Yes.

MR. SMITH: Your Honor, as you have heard, this is a motion made to vacate the judgment against the Defendant, and it's our contention that the Government did not grant us a fair trial and we rely, in making this motion, on 28 United States Code 2255.

I guess it's inevitable, Your Honor, that in a case as vigorously contested by both sides as this one, that after it is over whoever lost the matter would go back home and dig around into evidence and probe around and lick their wounds and think about what happened and what should have happened, what didn't happen.

And, of course, that's what we did. We went back and thought about it and we asked for information from the Government under the Freedom of Information Act, and based upon some of the material we received, we felt that we ought to come back and we ought to contend, on behalf of our client, that some of that material was available to the Government and that the Government knew about it and that we did not know about it.

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And as Your Honor will recall, even though it has -- it's hard to believe it's been six (6) years almost since that trial -- it will be six (6) years soon, nothing about this case was more vigorously contested than discovery. And we all worked hard on discovery and we know the Government worked hard on discovery and we almost worried Your Honor to death about it.

And, as I recall, on one occasion you pointed your finger at the Government, in a friendly way, and you said, well let me just make this clear. If you've got something, you'd better give it to them, because if you don't give it to them, then there will be a reversal. And that was sort of the words that you used. And even though we had lost the motion hearing that day, that was comforting to us.

THE COURT: I wasn't telling them anything they didn't already know.

MR. SMITH: And they knew it. They knew it very well. They did.

And in going through the Freedom of Information material, Your Honor, we came across some items. Upon reflection, we think that we

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2 were wrong about two (2) or three (3) of them and
3 that -- and this morning we will want to abandon
4 our motion as to a couple of them.

5 But on about four (4) of them, we still
6 believe with all our strength, with everything we
7 have, that they knew about them and that they
8 ought to have given them to us and if they had
9 given them to us or let us know about them, it
10 would've made a real difference in the case.

11 It would've made a substantial difference
12 in it. It would've helped us, not only in our
13 preparation. It would've helped us in helping the
14 jury see that there was some credibility over here
15 on our side and that the Government was not just
16 surrounded by perfection and that the Government
17 did not dwell in an unapproachable light or
18 something like that.

19 The four (4) items to which I make
20 reference this morning are these. There was, we
21 believe, a syringe -- or a hypodermic syringe --
22 with some fluid in it. And we can't tell from the
23 material we got from the Government whether the
24 fluid in it had blood or whether there was
25 some blood around it. It's hard to tell from the

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2 wording. But at least we believe that there was
3 a syringe, and we didn't know about it.

4 We believe that there were some boots and
5 some clothes that were given by a woman named
6 Cathy Perry to a Mrs. Betty Garcia, who thereafter
7 gave them to her lawyer, Mr. Jim Nance down in
8 Fayetteville, who turned them over to the law
9 enforcement authorities. So, that's the second
10 item.

11 THE COURT: Was there any receipt
12 given by the authorities for that -- those
13 articles?

14 MR. SMITH: Your Honor, if there was a
15 receipt, I do not know about it. I have -- I'm
16 not positive, but I have -- in the material that is
17 before you, there is documentation that came from
18 the Freedom of Information Act, and that is in the
19 material and is what I would rely upon this
20 morning in making reference to the boots.

21 THE COURT: I asked that preliminary to
22 asking if anything other than boots was listed on
23 the receipt?

24 MR. SMITH: Well, --

25 THE COURT: (Interposing) You don't know

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2 if there was a receipt?

3 MR. SMITH: Well, I don't know if there
4 was a receipt. It may be --

5 THE COURT: (Interposing) Well, we're
6 hear from the Government on that.

7 MR. SMITH: -- but, I do know that based on
8 the material that you would have before you, there
9 were clothes and boots. There were some clothes
10 and some boots, and we think that we were entitled
11 to have known about that and that we did not know
12 about that.

13 There was a piece of material which
14 appeared to be human skin taken from the
15 fingernail of Colette MacDonald and we did not
16 know about that. The Government, I think, takes
17 the position that we did. We submit, Your Honor,
18 that we did not know about it and the source of
19 that piece of skin -- the information about that
20 piece of skin again is in the document that I have
21 given you this morning.

22 And there were some photographs, Your
23 Honor, of a letter "G", which the Government knew
24 about -- the Government had and, of course, as
25 Your Honor knows, there was a letter "G" painted

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2 on the headboard of the bed in the MacDonald
3 bedroom and it would have been helpful to us to
4 have had a comparison of the manner in which
5 Helena Stoeckley would draw a letter "G". And
6 the letter "G" photograph apparently came from the
7 wall of Helena Stoeckley's apartment in Tennessee.

8 And obviously we would liked to have had
9 that information and we did not get it.

10 Your Honor, we abandon --

11 THE COURT: (Interposing) Was there any
12 evidence as to who wrote the "G" in Tennessee?

13 MR. SMITH: No, sir. I don't believe
14 there is any evidence about that. All we can say
15 is that based on the Freedom of Information
16 material, that it was in her apartment in
17 Nashville. But as to who placed it there, we
18 cannot say.

19 There were some negatives of fingerprints
20 which were lost and there was evidence about a
21 bloody footprint. We made -- we raised those
22 points in our motion that we think the
23 Government's position is well taken as to those
24 and we do not this morning rely upon those matters
25 in this motion to set aside.

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2 Your Honor, we submit that we did not know
3 about these four (4) items at trial in 1979. We
4 submit that the Government did know about them,
5 and we believe they had a duty to tell us about
6 them, and we believe that they should not have
7 waited and let us learn about them through our
8 efforts with the Freedom of Information Act.

9 And, Your Honor, in addition to relying
10 upon the statute we have cited, we make this
11 motion on the strength of the Brady decision in
12 1963 and the Agurs decision in 1976 and, as Your
13 Honor knows, the teaching of those cases is that
14 when information is available to the Government
15 which ought to have been given the defense, and
16 which would have made a difference, that not only
17 does the defendant not get a fair trial, but the
18 society does not get a fair trial.

19 And so, what we would say is that if those
20 items would have made a difference, if the
21 information about them or the loss of them
22 would have made a difference, then society has
23 been denied a fair trial also.

24 The Brady decisions and the Agurs
25 -- the Brady decision and the Agurs decision

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give us three (3) kinds of situations to consider. And the first one -- these are the standards that one would examine in determining what ought to be done if we have been denied our rights.

The first one, Your Honor, would be where false evidence is used by the Government or evidence which may itself not be false, but which the Government knows creates a false impression, that is the lack of the evidence may have created a false impression. Then we would be entitled to have relief if there's any reasonable likelihood that the false testimony could have affected the judgment of the jury or the false impression could have affected the judgment of the jury.

The second one would be where the evidence was not disclosed to us, but where we made a specific request for the evidence. And in that situation, I think we would be entitled under those standards set out by Agurs to relief, if the suppressed evidence might have affected the outcome of the case.

The third situation that they described and -- that is that Agurs describes -- is where a general request, just a general request, sort of a

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2 broadside shotgun request has been made for
3 undisclosed evidence and in that event, the test
4 would be, does the omitted evidence create a
5 reasonable doubt that did not otherwise exist.

6 And what we would submit, Your Honor, is
7 that if you examine the four (4) different bits of
8 evidence here, and the circumstances surrounding
9 our failure to get those, that the standards one
10 and two would be the ones the Court would apply
11 here.

12 We made more than just a general request.
13 That would be the third kind of situation. Our
14 requests were not broadside shotgun requests. As
15 Your Honor recalls, in the numerous hearings we
16 had on discovery, we specified, as best we could,
17 the things we wanted and the things we felt we
18 were entitled to have, and so certainly we would
19 submit that the test would be would those items and
20 would information about those items -- could that
21 information have affected the outcome or might
22 that information have affected the outcome of the
23 trial? And we submit that we are certainly, at
24 least, entitled to have Your Honor apply that
25 standard.

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And we may be entitled to have Your Honor apply the first standard, that is, we would be entitled to relief if there is any reasonable likelihood the information would have affected the judgment of the jury.

So, with that preliminary, Your Honor, I'd like to be heard, if I may, about the evidence and to address the question of whether the Government knowingly presented evidence which created a false impression. That is not that they put perjured testimony, we don't take that position at all, or take the position that they would've ever done that, but we do take the position that we have an excellent argument that the -- the fact that they didn't give us that information -- they could've -- caused the jury to have a false impression about the crime scene and a false impression about the rest of the case.

And we do take the position, Your Honor, as vigorously as we know how, that we did make specific requests. And we think the record is replete with detailed information about when we made our specific requests, and on what date for each of these particular items.

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2 There's a Fourth Circuit case that seems
3 to be important, Your Honor, and -- in connection
4 with any discussion about this matter -- and that is
5 Hamric against Bailey. It's a 1967 decision.

6 And in that case, the Defendant was on trial
7 for murder and the Defendant contended that the
8 deceased was at her window -- right up next to the
9 window of her house. And the Government took the
10 position that the deceased was ten (10) or twelve
11 (12) feet away so that the shot would have been
12 fired not while the deceased was at the window.

13 And the prosecution offered testimony,
14 through its own examination, from witnesses that
15 know wood -- know pieces of wood, know slivers of
16 glass were found in the clothing of the deceased.
17 And that certainly would have been the case had
18 the deceased been up next to the window. So that
19 the discharged bullet would have passed through the
20 window and deposited debris on the body of the
21 deceased.

22 At the time the prosecution was making
23 those arguments and developing that line of
24 evidence, the prosecution knew that there were
25 witnesses and there was evidence that there were

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2 slivers of glass and pieces of wood in the
3 clothing of the deceased. But the prosecution did
4 not bring that to the attention of the defense.

5 So, what happened, Your Honor, was this.
6 The witnesses the prosecution offered and the
7 evidence the prosecution offered, these
8 witnesses did believe there were no pieces of wood
9 and no pieces of glass. So it wasn't perjured
10 testimony. There was no lie. It was the truth so
11 far as those witness knew.

12 What those witnesses did not know was that
13 there were other people who were aware of slivers
14 of glass and pieces of wood and so a false
15 impression was given -- was presented to the jury.

16 And what we would say today, Your Honor,
17 is this. The Government's case was physical
18 evidence. That's what it was all about. It was a
19 crime scene case. There really never was much the
20 Government could do with the testimony of the
21 Defendant except to point out that it differed
22 from the crime scene. It differed from the
23 evidence they had at the crime scene.

24 So, they had a case which was physical
25 evidence. And the Government had to build its

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2 house upon this proposition. You can depend on
3 this crime scene to tell you the truth. That was
4 their case. That was the theory of the
5 Government. Members of the jury, please rely on
6 this crime scene. Please believe that this crime
7 scene presents the truth.

8 Of course, our problem was that we needed
9 to attack that crime scene. We needed to show
10 that the jury could not depend upon that crime
11 scene to tell the truth, that there were little
12 problems about that crime scene.

13 And what we would submit, Your Honor, is
14 that this physical evidence, which we did not have,
15 but which the Government had and which the
16 Government should have told us about, would have
17 helped us to attack the crime scene, to show that
18 the crime scene was not perfect and that their
19 evidence was not perfect.

20 So, what we would say, Your Honor, is that
21 any evidence which might have placed Helena Stoeckley
22 at the scene, like boots and clothes, any evidence
23 that would have shown the presence of intruders, a
24 hypodermic needle or syringe or a piece of skin,
25 any evidence like that --

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THE COURT: (Interposing) How would the presence of a hypodermic syringe in a doctor's house prove intruders?

MR. SMITH: Well, Your Honor, I would answer that in two (2) ways. First of all, we realize that that -- that we have the Government at some disadvantage and we don't want to do that. But we can talk about what a wonderful syringe it was and what fantastic fingerprints it had all over it and all -- and we could make it a three (3) foot long syringe because it's gone.

We don't intend to do that. In all candor, it may be that that syringe would have proved nothing. But, Your Honor, we needed to know that it was lost. We needed to know that there was one and it was gone. I would just as soon, Your Honor, have had the information that the syringe had been found so we could fuss at the Government about losing it. And that would help the jury see that the Government fell down on its job -- that they had the syringe.

And, of course, Your Honor, you know that that's very effective defense strategy and very ethical defense strategy. For us to be able to

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say, listen, you had a hypodermic syringe and you lost it. We don't know what was in it, but there might have been blood in it and whose blood was it, and whose fingerprints were on it?

We would submit, Your Honor, that the fact they lost it was just as important to us as if they had been able to walk into the courtroom, deliver it to us, so we could take it off and have it tested. As a matter of fact, I would have been pleased to have either one, either the information was lost or the syringe itself.

And, of course, Your Honor, a piece of skin falls in that same category. It may be that that piece of skin, had it been retained, would have been our client's. I mean, that's the truth. Who knows? Who knows the truth? But, it is our position today, Your Honor, that we needed to know that there had been a piece of skin. We needed to know about that. And had that piece of skin been saved, it could have told us an awful lot.

As a matter of fact, Your Honor, that piece of skin is like a piece of magic, because the truth of the matter is it could have been the connection with an intruder, the one connection

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2 with an intruder. So, to us the piece of skin was
3 -- would have been very important. And the loss
4 of the piece of skin would have been very
5 important.

6 Well, the long and the short of it, Your
7 Honor, is this. With these items, we could have
8 shown the jury that intruders had perhaps been in
9 the apartment. And had we known they were lost,
10 we could have shown the jury that the Government
11 was not perfect after all, that they were making
12 mistakes, that their crime scene was not
13 inviolate.

14 I've already talked, Your Honor, about the
15 various items of evidence. If I may just touch
16 again on that briefly. The booklet that I
17 presented you this morning would give you these
18 particular exhibits, which you can look at again
19 at some point, but I think there's a tab on your
20 booklet that would indicate exhibits.

21 And they are copies of the Freedom of
22 Information material so that you can see what the
23 material looked like when it came to us and you can
24 see how reading over that material, we would shout
25 "eureka" when we would read it and see something

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because there are a lot of surprises in there.

And the first one is a line or a series of lines which read like this: "Mr. Medlin also advised that a half-filled syringe that contained an as yet unknown fluid was located in a hall closet, which also contained some evidence of blood." And, Your Honor, we don't know whether that means the hall closet contained some evidence of blood or the syringe did.

"In this connection," Medlin said, "that it appeared someone with a bloody hand had reached into the cabinet to obtain medical supplies for some purpose." And that, of course, is the language that was key to us in reviewing the first part of the Freedom of Information materials.

Now, Your Honor, we submit that this was exculpatory because it would have aided us in showing the possible presence of outsiders. The contents could have been a narcotic drug of some kind. The syringe could have obtained fingerprints -- could have carried fingerprints. And, of course, as I have said, to establish that the Government lost the syringe would have helped us to show that the Government was very imperfect

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2 and the crime scene was imperfect.

3 As to the clothes and boots, Your
4 Honor, the material we have given you from Freedom
5 of Information would show that CID Investigator
6 Ivory received a pair of boots and some women's
7 clothes from Mr. Nance, a lawyer in Fayetteville,
8 that Mr. Nance had received them from a Mrs.
9 Garcia and that she got them from Cathy Perry.

10 And it is our position, Your Honor, that
11 had we known about the boots and had we known
12 about the clothes, it would have given us again
13 some argument that the statements attributed to
14 Helena Stoeckley, and statements that were
15 attributed to others through the trial, would have
16 connected up so that, for example, Dr. MacDonald,
17 in his statement about seeing a person with boots,
18 that Dr. MacDonald might have been telling the
19 truth, and it would have helped us to establish
20 credibility for our position.

21 The human skin, Your Honor, the same way
22 -- the same arguments. The material you have
23 would show you the odyssey of this piece of human
24 skin, who first mentioned it, where it went from
25 there, and then it disappeared. There is even a

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2 point in that material indicating that the United
3 States Attorney, Mr. McNamara at that time, was
4 very interested in this piece of skin and was
5 seeking to find out more about the piece of skin.

6 So, there is a great wealth of information
7 about a piece of skin, and we wish that we had
8 known about that piece of skin and what we say it was
9 exculpatory, and it was very material, and it
10 was important to us to know that it was lost.

11 The same position, Your Honor, we would
12 take about the letter "G". We feel that we were
13 entitled to know that there was a note which had
14 been written by an investigator who examined the
15 apartment of Helena Stoeckley in Nashville and who
16 noted that there was a letter "G" and noted that
17 -- if it was important enough for him to write it
18 down in notes, then it was important enough for us
19 to hear about.

20 And again, we take the position that that
21 was exculpatory and very material.

22 Now, Your Honor, what we say is that the
23 Government created a false impression by not
24 providing us with that information. The
25 Government allowed the jury to believe everything

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2 in that crime scene was just okay.

3 For example, Mr. Ivory testified -- and this
4 is before Your Honor -- "there were no signs of
5 forced entry to the house" -- this is Mr. Ivory on
6 the witness stand in the presence of jury. "There
7 were no signs of forced entry to the house and
8 within the house the only items I found which were
9 indicative of someone coming from outside, were wet
10 spots and some grass."

11 Well, Your Honor, what about a syringe, and
12 why wasn't that important to Mr. Ivory? And Mr.
13 Ivory, in making that statement, was helping the
14 jury to believe that this crime scene was
15 inviolate, that this crime scene had been well
16 cared for and that there was nothing in there that
17 we could have relied upon to argue to the jury:
18 What about that syringe, ladies and gentlemen of
19 the jury? What about that?

20 We submit, Your Honor, that in the jury
21 argument, argued most effectively by Mr. Murtagh
22 and by Mr. Blackburn most effectively, over and
23 over we heard them say, "Things don't lie. People
24 do. Things do not lie. People lie. Believe
25 things. Don't believe people." Because we had

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2 the people on their side and they had the things
3 with them. And, Your Honor, we needed to know
4 about these other things.

5 Your Honor, we would submit that if the
6 Government did, at some point, go through and
7 decide that these were not important to us, maybe
8 even in good faith, maybe believing, Well, the
9 piece of skin, you know, is gone, and they don't
10 need to know about that. It really is unimportant
11 in the case.

12 And the boots -- there's no real
13 connection. Nobody can say these were Helena
14 Stoeckley's boots. And the letter "G"? They
15 probably never could be able to get an expert come
16 in and say that this letter "G" was drawn the way
17 the letter "G" was drawn in the word 'pig'.

18 And so suppose somewhere in some little
19 room far away some Government people sat down and
20 just decided for us what we needed and what we
21 didn't?

22 THE COURT: I don't believe they claimed
23 they could do that.

24 MR. SMITH: I don't think they did. I
25 don't think they could. But, Your Honor, what I'm

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2 saying is even if it was in the best of good faith
3 -- in the best of good faith -- it wasn't fair of
4 them to do that.

5 So, what I am saying to Your Honor is we
6 don't have to, in order to win this motion, we don't
7 have to say that these people were dishonest at all.
8 It's not a matter of good faith or bad faith. It
9 has nothing to do with it.

10 We're entitled to some relief if they,
11 with the best of intentions and the best of good
12 faith, decided that these things were unimportant.

13 Your Honor, in addition to our argument
14 that their failure to give us this material and
15 our failure to have this material created a false
16 impression, we would submit that we've got one
17 additional argument that ought to be made and that
18 is the Fifth Amendment argument -- the due process
19 argument -- that if the Government just klutzes
20 around and loses stuff that we ought to have, that
21 we've been denied due process. And, Your Honor, to
22 be sure, these notes written by these Government
23 agents who were doing their work, do contain
24 information about a syringe and skin and boots and
25 the letter "G".

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And to be sure that skin sample, if it ever existed, is lost and those boots and clothes, if they ever existed, I take it, they are lost. And that syringe, if it ever existed, is lost.

Your Honor, what are we supposed to say about that over on this side of the room? Who in the world -- what person of good will would ever take the position that we ought not to scream and shout about that? It makes infinite good sense that we should come in and say to Mr. Murtagh, "Why didn't we have those? We needed it. Why did we have to wait three and a half (3 1/2) years for the Freedom of Information Act to give us information about stuff that important?"

Now, Your Honor, we have tried to document this record to show that we did not have this stuff. Mr. Murtagh, I assume, will go for the daylight that's available to him and that is diligent counsel would have found it, but we were as diligent as we could be. We can't any more diligent than we were in that case.

And, Your Honor, Mr. Murtagh is going to argue to you that we're bound by the Erady

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2 decision. And the Erady decision doesn't have a
3 bit of bearing on this, not one bit. The Erady
4 decision involved a jury instruction. The
5 Defendant was convicted in a jury trial; and with
6 his lawyer, he sat right at his counsel table, and
7 permitted the Court to instruct the jury and
8 permitted the Court to make an error in
9 instruction.

10 As I understand the case, they simply laid
11 back and let the Court make a mistake in the jury
12 instruction. Then they appealed the matter and
13 didn't mention it. And then sometime way off down
14 the road, they came back under twenty-two fifty-
15 five (2255) and tried to claim that this was a
16 legitimate inquiry at that late date. And the Court
17 said, no, you cannot do that.

18 THE COURT: As related to this case, it
19 would involve inquiry as to whether or not you
20 had this material or it was available to you,
21 right?

22 MR. SMITH: Yes, sir. And all we're
23 saying, Your Honor, is that we --

24 THE COURT: (Interposing) The Government,
25 I believe, says that you did. You say that you

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2 did not?

3 MR. SMITH: Exactly. And if we -- what
4 I'm saying, Your Honor, is that we couldn't
5 possibly appeal and claim error about something
6 that we didn't know about. That just -- it's just
7 plain logic. We didn't know about it. We
8 couldn't have raised it till now. And what we're
9 saying is we did not know about it.

10 In summary, Your Honor, we say we did not
11 know and never could have known about the lost
12 skin, about the letter "G", about the syringe with
13 blood, about the boots and clothes -- that we
14 never could have known about it but for the
15 Freedom of Information Act; and had we not taken
16 the precaution of spending three (3) years or so
17 trying to get that information, we would not know
18 about it to this very day.

19 We say, Your Honor, in conclusion, that
20 the Government had a duty to tell us about it
21 anyway, that even if we didn't ask for these
22 things specifically, they had an obligation to
23 tell us.

24 We say in conclusion, that the
25 Government stood before this jury and presented to

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2 this jury a crime scene which they said was
3 inviolate and trustworthy and dependable and at
4 the moment they were doing it there was reason for
5 them to know, if they had studied the case, that
6 there was some evidence about a syringe and about
7 some skin and about a letter "G" and about the
8 other things we're complaining about and that the
9 jury couldn't know and that the jury had a false
10 impression.

11 Returning to the tests then, Your Honor,
12 the Agurs test, is there reasonable likelihood
13 that this false impression the jury got could have
14 made a difference to them? And we say, yes. There
15 is a reasonable likelihood that it could have made
16 a difference. It would have helped us immensely
17 with our argument.

18 Secondly, Your Honor, looking at the
19 second test, might this evidence have affected the
20 outcome and that's all we have to show. And, Your
21 Honor, we believe that through all our affidavits
22 and through our motion, through our argument,
23 through our exhibits, we have demonstrated to Your
24 Honor that the loss of this material -- the
25 information about the loss of the material or the

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2 material itself, might have affected the outcome.

3 Your Honor, I thank you very much for
4 hearing me.

5 THE COURT: Thank you, Mr. Smith. Mr.
6 Murtagh, do you want now to respond to each motion
7 as it's argued?

8 MR. MURTAGH: Yes, Your Honor.

9 THE COURT: You may.

10 MR. MURTAGH: I believe that would be
11 appropriate.

12 Your Honor, in the way of prefatory
13 remarks, I think it's fair to characterize that
14 what we have here and what -- and I rely principally
15 upon the submissions of the affidavits that we
16 have filed with the Court and counsel. And if I
17 fail to mention a specific item in argument, that
18 doesn't connote that we haven't covered it in our
19 filing.

20 I think what we have is not a failure on
21 the part of the Government to disclose, but rather
22 a failure on the part of the defense to inspect
23 items reflected in laboratory reports, which I must
24 pointedly take issue with Mr. Smith, that were
25 furnished to the defense. And I would remind the

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2 Court and counsel that this is somewhat similiar
3 to the arguments that we heard on the motion to
4 reinspect the crime scene, were also as the
5 result of discoveries under the Freedom of
6 Information Act.

7 There were seven (7) items that were
8 claimed that we suppressed and they didn't know
9 about them and further that they were still in the
10 crime scene. I would point out, for Mr. Smith's
11 benefit, that one of those items contained -- was
12 a sample of the piece of cloth that we gave them a
13 cutting of and had a signed receipt for it.

14 Now, I don't make this argument to show
15 Mr. Smith's bad faith. I don't contend that. But
16 what I do contend is that there is a massive
17 amount of data in this case and that you cannot
18 hold the Government to the standard of proving
19 what the defense knew and when they knew it. I
20 don't have access to their files. I don't have
21 access to their law clerks or paralegals.

22 Your Honor, also I point out --

23 THE COURT: (Interposing) I don't want to
24 interrupt your train of thought and I'll let you
25 start all over, but right now it would be of

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2 interest to me in view of what you have already
3 said, in what document or communication between
4 the Government and defense counsel was it
5 disclosed or could they have learned of the
6 existence of a syringe with some fluid in it?

7 MR. MURTAGH: Your Honor, the document
8 would be -- the one document I can think of is a
9 receipt for drugs that were found at the crime
10 scene, in the medical cabinet or the linen closet
11 actually. And before I forget to make this point,
12 the blood on the cabinet was identified. It was
13 the Defendant's blood and, in fact, we introduced
14 numerous syringes from that cabinet as well as
15 disposable scalpel blades.

16 And as far as Mr. Ivory's testimony, he
17 also testified -- speaking of false impression --
18 that those syringes were found in the house. So,
19 at -- also, this is the Defendant's house. Now, I
20 can't give you a specific piece of paper.

21 THE COURT: But Ivory testified at the
22 trial.

23 MR. MURTAGH: At the trial, in front of
24 the jury, and --

25 THE COURT: (Interposing) Yeah.

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2 MR. MURTAGH: -- I believe we've cited that
3 portion of his testimony in one of our filings in
4 which he mentions syringes, because part of the --
5 if you'll recall, he was on cross-examination and
6 Mr. Segal was attacking him on the idea that
7 nothing was taken from the house.

8 Ivory had testified, I believe, that the
9 absence of a ramsacking of the house of items of
10 value that were not taken -- TV sets, stereo systems
11 -- indicated the absence to him of a burglary. And
12 one of the points he was making is that if this is
13 a group of drug-crazed intruders and you have
14 fifty (50) or a hundred (100) glass syringes,
15 which any drug addict in the Fayetteville
16 community probably would have given his right arm
17 to obtain, the absence of those items being taken
18 -- Your Honor may recall the photograph of the
19 linen closet, showed that it is otherwise
20 undisturbed except for this blood stain, which is
21 number D114, on the sliding cabinet door.

22 Before I get too far down the pike, Your
23 Honor, we contest that this is a hypodermic
24 syringe. What Mr. Medlin is apparently saying -- and
25 it's not actually Mr. Medlin's statement, it's an

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2 agent who was taking down Mr. Medlin's statement --
3 is that a syringe was found in the closet.

4 Now, we don't know whether we're talking
5 about a syringe to clean out a child's ear, whether
6 we're talking about a vaginal syringe. We don't
7 know what type of syringe we're talking about.

8 And the Defendant is leaping to the
9 conclusion that it was a hypodermic syringe and
10 further that it had blood on it.

11 They could have had access and, in fact,
12 they did have access to the crime scene in 1970,
13 during the Article 32 investigation. So, if they
14 wanted to go in there and look around for
15 syringes, they could have found them.

16 The point I think that should be clear, Your
17 Honor, is the one that Your Honor, in effect,
18 raised with counsel. The presence of a syringe in
19 a house that a doctor occupies -- a doctor that
20 other evidence showed was a pack rat, that took
21 medical supplies home from the office in tremendous
22 quantities -- is not, in and of itself,
23 dispositive.

24 Your Honor, to go on further, unless --

25 THE COURT: (Interposing) Well, I want to

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MR. MURTAGH: (Interposing) -- the skin, I

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think --

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THE COURT: -- take these four (4) items.

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MR. MURTAGH: Okay.

7

THE COURT: The next is boots and clothes.

8

MR. MURTAGH: Okay. The boots and clothes.

9

In answer to Your Honor's question to Mr. Smith

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about a receipt, yes, there is a receipt and, in

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fact, it's in their pleadings here -- or the copy

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of the pleadings --

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THE COURT: (Interposing) What prompted

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that was, I seem to recall that somewhere another

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along the line that you had said that there was

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nothing on the receipt about clothes.

17

MR. MURTAGH: That's correct, Your Honor.

18

THE COURT: Just boots.

19

MR. MURTAGH: And we maintain, and in fact

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I put it before the Court and to Mr. Smith, that

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no clothes were proffered by Mr. Nance or Captain

22

Douthat or anybody else at that time. That's not

23

to say that Cathy Perry may not have had clothes

24

left at Mrs. Garcia's abode, which may or may not

25

have blood stains on them, but I think we've covered

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2 that in our pleadings showing that Perry was
3 involved in stabbing her pet puppy dog or some,
4 you know, crazy thing like that at about the time.
5 Perry, at the time of the episode, never mind what
6 happens later on, was involved in stabbing her
7 roommate, a GI by the name of Jackie Don Wolverton,
8 and also Mrs. Perry's son and also during a narcotic
9 episode apparently Perry's pet puppy dog, so, you
10 know -- and we're talking January, 1971.

11 The receipt which, you know, I mean it
12 lists social security cards, birth control pills,
13 calendars, and talks about a pair of woman's
14 boots, beige with tag the Great Boots by Gold
15 Seal.

16 One point I'd like to start out with, Your
17 Honor, is that I'm not sure from the Defendant's
18 contention whose boots these are supposed to be.
19 Is the contention that at the time these items
20 were given to the CID that they were represented
21 to be Cathy Perry's boots, because that certainly
22 seems to be what Mr. Nance has said in his
23 declaration, or whether they're contending that at
24 the time these things were proffered, there was a
25 link to Stoeckley.

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2 And I think it does make a big difference,
3 because if we're talking about Perry's boots in
4 1971, the CID, first of all, would have had no way
5 of knowing what Perry would have said fourteen
6 (14) years later or twelve (12) years later to --
7 or twelve (12) years later what Stoeckley would
8 have said to Gunderson. In other words, what I'm
9 saying, at the time that these items were
10 proffered, Cathy Perry was just another of the
11 hippie types that was floating around in
12 Fayetteville.

13 THE COURT: When did the CID agent come
14 into possession of these boots?

15 MR. MURTAGH: The boots came into the
16 possession of the Government on January 6, 1971.

17 THE COURT: About a year after the murder.

18 MR. MURTAGH: Yes, Your Honor. And at the
19 time -- it's covered in the affidavit of Mr. Kerns
20 --

21 THE COURT: (Interposing) Had these Perry
22 stabbings of pets and roommates and children --

23 MR. MURTAGH: (Interposing) Late
24 December, '70, -- excuse me, Your Honor. Late
25 December of 1970 is the time frame of those episodes,

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2 if you will look at the --

3 THE COURT: (Interposing) Between these
4 murders and the delivery of the boots to the CID
5 agent?

6 MR. MURTAGH: Correct, Your Honor. And
7 the boots -- there is -- and by the way, a photo-
8 graph of the boots was taken and is in the record
9 -- it's in our pleadings -- and before I forget,
10 Mrs. Garcia came and demanded back from Mr. Kearns
11 the items, the boots, the birth control pills, the
12 whole business, and she was given those and a
13 receipt was obtained, and that receipt is also in
14 evidence.

15 In other words, the receipt that they've
16 got in here is the receipt that was given to Mr.
17 Douthat apparently. Douthat had it in his
18 possession and Douthat, lest we forget, was
19 MacDonald's individual military -- I'm sorry --
20 appointed military defense counsel at the Article
21 32 investigation.

22 THE COURT: And you say that answers my
23 question as to when information as to the
24 existence of boots and/or the clothes came into
25 the possession of the defense counsel?

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MR. MURTAGH: Yes, Your Honor, in terms of the time frame. But, what I'm saying is that it's one thing if Mr. Nance -- and by the way, we dispute that Mr. Nance was not acting as an attorney for Dr. MacDonald as -- and the same case with Mr. Douthat. Even if they weren't acting as attorneys, they were certainly de facto agents of the defense here, because what they're doing is in the midst of a reinvestigation, they're saying, "Look what we found. Here's somebody else to go investigate."

And the agents were very dutiful about taking down what -- you know, the description of the items, and we dispute, and the affidavits of our witnesses bear this out, that any other items were proffered at that time.

And I think human nature, if you will, Your Honor, adds credibility to that representation because Mr. Kearns, who is in charge of a reinvestigation at this juncture, knows he's dealing with somebody, at least as far as he's concerned, who's Dr. MacDonald's attorney. He was his Army attorney and the fact that MacDonald was out of the Army really doesn't make that much of a difference

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2 as far as Mr. Kearns is concerned.

3 So, I just don't believe that, one, Mr.
4 Kerns would not have indicated some items -- I
5 mean, if Nance and Douthat have some bloodstained
6 clothing and they proffer it to him, is Kearns
7 going to be crazy enough not to take this stuff?
8 I submit that he would not.

9 The other side of the coin is, if he did,
10 do you believe that Mr. Douthat would sign a
11 receipt for only those items that they picked up
12 and not indicate in some fashion on the receipt,
13 you know, refused to take bloodstained boots, for
14 example, or bloodstained -- I don't know -- but
15 something -- the skirt.

16 We submit that the clothes, if they
17 existed at all, existed back in Mrs. Garcia's
18 custody and were never proffered to the Government.
19 In any event, the boots were not bloodstained.
20 They were not stained in any fashion. I think the
21 photograph of that bears that out. If they had
22 been stained, why did Captain Douthat sign a
23 receipt that didn't in some way indicate pair of
24 boots, you know, containing red-brown stains or
25 suspected bloodstains, or something like that.

1 Colloquy

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And by the way, this information was not in the exclusive possession of the Government. It was also in Captain Douthat's possession. He had a copy of this in his files when the defense went to talk to him in 1978.

Your Honor, on the skin, I take specific exception to the representation by Mr. Smith that the defense was unaware of the existence of the piece of skin. And I stand on the testimony at the Article 32 investigation of Major Gammel, G-a-m-m-e-l, the Pathologist who dissected -- performed the autopsy on Colette MacDonald -- in which he said a piece of skin was found under her fingernail.

It's also in the autopsy report, which the defense put in the record of the Article 32 investigation. Further, the piece of skin was lost by the CID lab. I don't want to make any bones about that. But what I think these references to Mr. McNamara and the other people who were interested in the piece of skin, yes, we tried to determine what happened.

So we had the vials reexamined and another laboratory report is prepared in which it said,

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"Examination of the fingernail scraped in vials did not reveal the presence of any skin particles." And they got that laboratory report and we know about it.

And further, they had access to all of those files. All of that stuff was in this courtroom and, as far as I'm concerned, I think it's still in the courthouse. They didn't bother to examine it. And I think there you get into the due diligence thing. And I suggest the reason that they didn't bother about the piece of skin is because that evidence cuts both ways. Yes, it could be argued that it is consistent with Mr. Mica's testimony, who I believe they did not attack at all, on the fingernail scratches on Dr. MacDonald's chest.

So the piece of skin they clearly knew about, and we also would maintain that they knew about the loss of the piece of skin from Captain Summers, who was the military officer handling the Article 32 from the Government's standpoint, and his affidavit was in the record.

Now, Your Honor, with respect to the "G". The "G", for the sake of the record, I believe appears in the word 'gemini' and the word 'good'.

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2 which somebody spraypainted on the wall in this
3 safe house -- the police safe house that Stoeckley
4 was staying in in February and March of 1971. And
5 the reason the "G" was photographed was because
6 the CID was trying to get Stoeckley's record
7 prints for elimination with those unidentified
8 prints found at the crime scene.

9 So, a Mr. Mahon, M-a-h-o-n, needed to have
10 that wall photographed. Apparently Stoeckley had
11 taken paint, put it on her hands and made finger
12 paintings or something on the wall. She would not
13 give her fingerprints and that was one way -- if
14 you photographed it, you'd get the print.

15 So Mahon has a photographer who, as luck
16 would have it, had been at the crime scene -- a
17 fellow by the name of Toledo -- photograph the
18 walls. And Toledo, who's not a handwriting
19 examiner, as he's looking at this "G" says to
20 himself, "Boy, that resembles the "G" in the word
21 'pig'." This is fourteen (14) months later and
22 he's not looking at a picture of it or anything
23 like that. It's just, as he put it, he had a
24 mental flashback.

25 And if you also looks at Mr. Toledo's

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2 affidavit, he says that not only did it resemble
3 the "G" in the word 'pig', but Toledo had examined
4 MacDonald's notebook from his military medical
5 courses, and according to Toledo, the "G" also
6 resembled the "G" in the notebook. So, as far as
7 Toledo's concerned, the guy who wrote 'pig'
8 on the wall and the guy who wrote in the notebook
9 were one and the same person.

10 Obviously that's not competent evidence
11 and the -- we don't maintain that, you know, a
12 specific tender of the "G" report, if you will,
13 was made to the defense. But all of this stuff
14 was packed up and sent to the FB -- to the CID
15 laboratory because it was a fingerprint question
16 and the fingerprint materials in toto were made
17 available to the defense prior to trial.

18 They never bothered to re-examine them.
19 And I think one of the reasons that they have now
20 relinquished their position on the lost negatives,
21 which we just heard Mr. Smith say they are not
22 relying on, is all of that stuff was in material
23 that was available to them if they bothered to
24 inspect it.

25 With respect -- okay, we have the syringe,

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we have the boots, the skin, the "G" -- I think that's about it in terms of the items, Your Honor.

The only, let's see -- the other point I heard Mr. Smith make is that we presented in argument to the jury, I gather expressly from what he says, the argument that this crime scene was perfect, that it was inviolate, I believe was his word, or something to that effect.

Your Honor, we had all kinds of problems in this case and I think they all came out in the courtroom. And I seem to recall either myself or Mr. Blackburn arguing to the jury that how did what the CID lost -- how did what they lost lose effect what they didn't lose, something to that effect.

This case was tried, Your Honor, and I think you will recall, warts and all by the Government. We certainly took our lumps sometimes in the trial and I think the jury resolved those issues against the Defendant.

By the way, Mr. Smith is arguing that all we had was the crime scene. Well, certainly that was most of what we had. But we also had

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2 such things as the Defendant's statement after the
3 dismissal of the military charges, that he had
4 caught one of the intruders in a bar in
5 Fayetteville, beaten a confession out of him, and
6 killed him.

7 I believe when the Defendant took the
8 stand he admitted that that was a lie of incredible
9 proportions, as well he should have. The case did
10 not turn entirely on issues that are in any way
11 related to "G's" on walls or the boots.

12 It would be one thing if there had been no
13 testimony about boots, but if you recall, we had
14 again Mr. Mica, the MP who drove to the crime
15 scene, and testified to seeing a girl on the corner
16 a couple of blocks from the house wearing a floppy
17 hat and boots, and I believe he described the boots.

18 So, you know, if they wanted to rely on
19 something like that, they could have. It was in
20 the record.

21 Your Honor, I would contend that the
22 standard that applies if at all in this case, is
23 the third standard and, in that regard, I would
24 point out that we have all of this other evidence,
25 the pajama top, the bloody footprint, which they