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2 What you rely upon are confessions which
3 do have corroboration, both by their internal
4 consistency, by the relationship to external
5 criteria, which can measured quite apart from the
6 -- the validity or the credibility of the
7 declarant.

8 If they said that the moon comes up at
9 two forty-five (2:45) and by golly, it did that
10 night, and you can tell by -- as Abe Lincoln did
11 by the Almanac, well that's corroboration and
12 that's just the way we measure all kinds of
13 statements.

14 And so, do we have to elect between
15 Mitchell, Perry and Stoeckley? If we do, we'll
16 elect for them all because they've all told
17 exactly what happened. Are there bits and pieces
18 that don't fit, bits and pieces in one that are a
19 little bit different from another? Yes, there
20 are.

21 What's our experience in the real world?
22 People recounting events don't have exactly the
23 same recall usually, unless they're getting
24 together to talk about them. That's just the way
25 the human mind works. If they had colluded to form

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2 a statement, that would be one thing.

3 But here they're coming, one in the
4 instance -- Jacksonville, Florida, Cathy Perry.
5 Another, Greg Mitchell, Charlotte, North Carolina
6 and Helena Stoeckley, Seneca, South Carolina.
7 Absolutely not one shred of evidence indicating
8 that since these events that drew them together
9 here in Fort Bragg or down in Fort Bragg, during
10 the Vietnam War, that they've ever associated
11 again. And yet they all have this recollection of
12 this event.

13 Different in certain respects and some
14 important respects, I think. Perry sees boys --
15 little boys -- and everybody knows these poor
16 unfortunate victims were little girls.

17 THE COURT: Has any one of these witnesses
18 ever incorporated in a statement any fact which
19 could not have been learned by listening, looking
20 at, or reading something in the news media?

21 MR. O'NEILL: I think Perry's rope burns
22 and the lock of the child's hair in the closet,
23 Your Honor.

24 THE COURT: All right. I thought your
25 trouble with your rope burn was the fact that this

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2 arm was broken obviously by some blunt object
3 striking it.

4 MR. O'NEILL: No doubt.

5 THE COURT: And unless you had the
6 impression of a rope itself, it seems to me like
7 that's very tenuous.

8 MR. O'NEILL: There are a number of --
9 excuse me, Your Honor -- there are a number of
10 items to which Stoeckley -- which Stoeckley
11 addressed in her statement, which were the subject
12 of cross-examination of Mr. Beasley and Mr.
13 Gunderson by Mr. Murtagh at the time of the last
14 hearing before the Court wherein that very subject
15 was raised. A question about this dog, a question
16 about the placement of rooms within the house and
17 that sort of thing.

18 The argument could be made on either side
19 that Stoeckley learned -- I could make that
20 argument quite comfortably -- Stoeckley learned
21 that by being there.

22 Mr. Murtagh contends that there was a
23 photograph of one of these items in the newspaper
24 and that later -- and it's true -- Stoeckley was
25 shown crime scene photographs. But there were --

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2 specific statements by Stoeckley about these
3 things questioned whether they could have been
4 gained from outside evidence. * They could have,
5 Your Honor. Now, whether they were, I don't know.

6 THE COURT: All right. Thank you, sir.
7 Well, you've been interrupted, but it doesn't take
8 away from your unlimited time that I've given both
9 sides.

10 MR. MURTAGH: Okay. Thank you, Your
11 Honor. Your Honor, Jeffrey MacDonald --

12 THE COURT: (Interposing) Except I will
13 do this. I'll give you the option now of
14 recessing until two-fifteen (2:15) --

15 MR. O'NEILL: (Interposing) It's fine
16 with me, Your Honor.

17 THE COURT: -- and -- because obviously
18 we're not going to finish this morning and you're
19 -- if you're at a breaking place in your argument?

20 MR. MURTAGH: Yes, I am, Your Honor.

21 THE COURT: We'll take a recess until two-
22 fifteen (2:15).

23 -----
24 (LUNCH RECESS: 12:40 - 2:15 P. M.)
25 -----

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THE COURT: Good afternoon all. Are you
3 ready to continue?

4

MR. MURTAGH: Yes, Your Honor, thank you.

5

THE COURT: All right, sir.

6

7

MR. MURTAGH: Your Honor, before I start
my presentation, a question the Court asked -- I
8 think I have an answer on Mr. Nance's status.

9

10

The suit, I believe, was called MacDonald
versus Flannagan, F-l-a-n-n-a-g-a-n. The docket
11 number, I believe, is cited in our response to
12 this point and it was filed in the Eastern
13 District of North Carolina before Judge Algernon
14 Butler -- the late Judge Butler. Your Honor, in
15 addition, in response to the addendum principally
16 on the Perry issue, which the defense filed on the
17 eve of this hearing, I have just served counsel
18 with our detailed response and have now proposed
19 to file a copy with the Court.

20

21

I'm not going to go through it in oral
arguments, Your Honor, but I think some of the
22 points (pause) --

23

24

THE COURT: Is this a copy for the Court
or the original?

25

MR. MURTAGH: This is the -- I have --

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2 that's the original for the Clerk's office. I
3 have a copy.

4 THE COURT: All right. (Court reviews
5 document.) All right.

6 MR. MURTAGH: Your Honor, if I may proceed?

7 THE COURT: Yes, sir.

8 MR. MURTAGH: May it please the Court,
9 counsel, Your Honor, Jeffrey MacDonald,
10 notwithstanding the fact that he is a medical
11 doctor and I might add, one of apparently
12 excellent repute in the medical profession, stands
13 before this Court a convicted murderer, stripped
14 of the presumption of innocence and the evidence
15 upon which that conviction was obtained, in this
16 Court, is totally intact, I submit, and is
17 completely un rebutted in any manner by the defense
18 with regard to any filing that they have made to
19 date.

20 There are no recanting government
21 witnesses here. Helena Stoeckley was the
22 defense's witness at trial in front of the jury, not
23 the government's, and I think that's a point that
24 needs to be borne in mind because the government
25 proved -- and I don't say this just to reiterate our

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2 case because I think it is only against the frame
3 of reference of -- a microcosm of the evidence
4 that was produced at trial, upon which the
5 contentions of newly discovered evidence, even if
6 they aren't in fact new or admissible, can be
7 evaluated by the Court.

8 And what I say is that the government
9 proved that the person who clubbed and stabbed
10 Colette, Kimberly and Kristen MacDonald wore a
11 blue pajama top which he placed on Colette's
12 chest.

13 The Defendant had admitted to placing the
14 pajama top on Colette MacDonald's chest and it's
15 only his actions -- even if you assume, for the
16 sake of argument, that there were intruders -- it
17 is only by his account that it was his action that
18 puts that pajama top on Colette MacDonald's chest.

19 We also proved, and I believe this was a
20 specific point of argument to the jury, that the bare
21 bloody footprint, MacDonald's footprint in Colette
22 MacDonald's blood type, exiting from Kristen's
23 bedroom, identified the Defendant as the -- beyond
24 a reasonable doubt -- as the perpetrator of the
25 crime.

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Now, after his conviction has been affirmed by the Court of Appeals and by the Supreme Court, he has come in with a motion for a new trial principally on the grounds of the post-trial statements of Helena Stoeckley Davis.

Now, Stoeckley, whose existence was known to the defense since August, 1970, and who testified at trial before the jury, died of cirrhosis of the liver, secondary to pneumonia, in 1983.

I don't say that from the standpoint of she's dead therefore, you know, that the evidence, if it were to be admissible, --

THE COURT: (Interposing) It satisfies the unavailability --

MR. MURTAGH: (Interposing) She's not available as a witness.

THE COURT: -- requisite.

MR. MURTAGH: And I might add, while I'm on the subject, Mitchell is dead also of cirrhosis of the liver. Cathy Perry, to my knowledge, is alive and well and living in Florida, but you have the two (2) principal confessors upon which they rely, are both dead witnesses.

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2 That does bring into play the
3 admissibility issue on the Rule 804(b)(3) and I'll
4 cover that a bit later.

5 But what I'm saying that in terms of due
6 diligence, they never bothered to interview
7 Stoeckley until the trial, and the only reason
8 she was brought to the trial was the Government
9 sought a material witness warrant for her. We
10 wanted her available and we brought her here.
11 An FBI agent arrested her and we -- the Court
12 actually turned her over to the defense for
13 interviewing and recessed the trial so that they
14 could talk to Stoeckley.

15 I point that out because the Sto -- the
16 statements of Stoeckley are not so much newly
17 discovered as I submit produced; and I would say
18 that given the totality of the circumstances
19 involving Stoeckley, Gunderson and Mr. Beasley --

20 THE COURT: (Interposing) I think I under
21 -- if I understand defense's position with respect
22 to Stoeckley, it's not that she has said anything
23 new, but that the surrounding, corroborating
24 circumstances now known to the defense were not
25 known to them at the time that we had a voir dire

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2 hearing and it was a question of whether or not
3 those statements had sufficient corroborating
4 circumstances as to make them trustworthy.

5 Now, the basis of the Court's ruling at
6 trial that those Tennessee statements -- and they
7 are the ones I think that were sought to be
8 introduced -- were not admissible, was that simply
9 the Court was of the opinion that those statements
10 and the surrounding circumstances did not provide
11 that indicia of trustworthiness required by
12 803(b)(2).

13 Now, the Defendant has come, though, with
14 not those statements, but some similiar in
15 import to them, and now says that these are
16 corroborated by Mitchell and by Perry and various
17 things. And it seems like that your problem to
18 meet that is to show that these extrinsic things
19 do not, in fact, corroborate it.

20 MR. MURTAGH: I intend to meet that, Your
21 Honor. I just --

22 THE COURT: (Interposing) All right.

23 MR. MURTAGH: -- want to make a point on
24 due diligence and I'll leave it at that. And, by
25 the way, I do not contend that because of the

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2 Court's ruling on the pretrial statement with
3 regard to Stoeckley, that that ipso facto requires
4 the inadmissibility of the statements subsequently
5 offered.

6 THE COURT: I'm sure you don't take that
7 position.

8 MR. MURTAGH: No, sir, I do not. Now, we
9 know from Mr. Gunderson's testimony at the
10 evidentiary hearing -- Mr. Gunderson being a former
11 FBI agent -- that he went to see Paul Stombaugh,
12 the government's principal scientific witness at
13 the trial, and trading on his former status as an
14 FBI agent, apparently he got Mr. Stombaugh to lay
15 out the government's case for him. And Stombaugh
16 did.

17 Now, the point I'm making is that none of
18 the submissions subsequently filed by the defense
19 in any way bear on the evidence upon which MacDonald
20 was convicted.

21 What we have is an attempt to create a
22 total screen, if you will, between the evidence
23 upon which the jury found the Defendant guilty --
24 and I'm talking principally about the pajama top
25 and the footprint and the distribution of the

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2 threads and of the bathmat that the weapons
3 were wiped off on -- but to create with Stoeckley's
4 assistance, a -- almost like an alibi defense. It's
5 not precisely the same, but it's a different case
6 almost.

7 THE COURT: I think it goes to
8 corroboration of the Defendant himself.

9 MR. MURTAGH: Well, --

10 THE COURT: (Interposing) He says, "I
11 didn't do it. Four (4) people -- four (4)
12 intruders came in and did it."

13 MR. MURTAGH: Well, that's what --

14 THE COURT: (Interposing) And now he
15 proposes to offer Stoeckley's statement that says,
16 yes, I was one of those four (4) people. And
17 also evidence by three (3) or four (4) others who
18 said that they were there at the same time, so
19 that lends a lot of credibility to it, they say and
20 backs up.

21 You see, no eyewitness, except MacDonald,
22 has testified that they knew what happened.

23 But now, he says that if Stoeckley would
24 come and tell a jury what she says in these
25 statements, she would be an eyewitness who would

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2 exonerate him.

3 MR. MURTAGH: Yes, Your Honor. I
4 understand that to be their contention. The point
5 I'm trying to make is that for that to have
6 validity as a legal proposition, first, assuming
7 for the sake of argument, the admissibility of
8 those statements -- and I'll address that in a
9 moment -- the story as told by MacDonald would
10 have to be corroborated by Stoeckley and not
11 contradicted. In fact, Stoeckley's story
12 contradicts MacDonald in various particulars.

13 The episode of the asking for drugs and
14 the phone call supposedly to the pharmacy and it
15 turns out to be a phone call to the MPs.
16 MacDonald never said that. So you have problems
17 with the interlocking of the two (2) statements.

18 But, let me -- if I could move along with
19 that, I think I'll cover the points that Your
20 Honor has addressed.

21 We start with Helena Stoeckley. We know
22 that she's a drug addict. We know that she's an
23 emergency room groupie, if you will. We know that
24 she considers herself a benevolent witch. I'm
25 not arguing that she was a benevolent witch,

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2 but she thought she was. And I don't think either
3 side would dispute her -- dispute that issue. She's
4 also an aspiring actress.

5 Now, what started out in her mind as an
6 attention -- and the evidence I think is not in
7 dispute that, on the night of the murders, Helena
8 Stoeckley, by her own admission -- and I understand
9 the defense not to be contesting this point -- had
10 taken all sorts of hallucinogenic drugs that day,
11 had injected herself with heroin and liquid opium
12 and, I believe, the description was that she was
13 stoned out of her mind.

14 So, that's their witness to start from.
15 Now, what initially starts with Stoeckley as, I
16 believe, an attention-getting device -- I mean
17 this is the most exciting event ever to occur, I
18 believe, in Fayetteville, certainly in that time
19 frame. And Stoeckley starts off with the -- you
20 know, I don't know where I was last night. I
21 need an alibi type of thing.

22 And that's sort of a -- it's kind of a
23 peer attention-getting thing initially. But
24 because of her drug problems and because of her
25 other mental problems, she -- at the same time

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2 she's diagnosed as a schizoid personality with a
3 drug dependence by the -- I believe it's Chapel
4 Hill where she was in -- institutionalized at the
5 time.

6 But she soon becomes to believe that she
7 might have been there, and I don't dispute that
8 that became a very real fear in Stoeckley's mind.
9 That -- there's a difference between thinking you
10 might have been there and actually having been
11 there.

12 Now, the problem with her pretrial
13 statements is that there are no insider details
14 whatsoever. I mean, we had the business about the
15 rocking horse and I think we've beaten that one
16 pretty well into the ground -- or at least I hoped we
17 had until this last filing -- the picture of the
18 rocking horse being taken by a newspaper reporter
19 from outside the crime scene and appearing in the
20 Fayetteville papers on February 18th, 1970, and
21 that picture was in evidence in the trial.

22 But -- so, we don't have these statements.
23 Now, Your Honor's ruling at the trial we now know
24 from post-trial statements of Stoeckley, incensed
25 her. She was royally incensed at -- insulted

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2 at the fact that the Court excluded her out of
3 court statements. I'm not saying that her
4 characterization of what the Court said is
5 accurate. Far from it. But in Stoeckley's mind
6 the jury was told to disregard her testimony, and
7 the record is quite clear that no such thing ever
8 happened. Stoeckley testified in front of the
9 jury.

10 But, this became another thing that sort
11 of gnawed at her, if you will, and it was
12 exploited by the defense investigators and the
13 other people such as Mr. Bost, who interviewed
14 her, what do you think of the, you know, Judge's
15 ruling?

16 It all, I think, goes to show her frame of
17 mind at the time that Gunderson and company
18 approach her.

19 Now, Gunderson knows that the key
20 to obtaining Stoeckley's cooperation is to enlist
21 the support of her father figure and former police
22 informant handler, Mr. Prince Beasley, who
23 subsequently retired from the police department
24 and, as the medical records in evidence before the
25 Court reflect, it was a disability retirement

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2 precipitated by the diagnosis of organic brain
3 syndrome, pre-senile dementia and with symptoms of
4 confusion, confabulation and, I believe,
5 helplessness.

6 Now, I point this out, not to embarrass Mr.
7 Beasley, but to show that later on when we get to
8 the issue of supposed corroborating circumstances
9 from Mr. Beasley with respect to Stoeckley's
10 statements, you have someone who has a memory --
11 an organic memory impairment.

12 Okay. Now what happens basically, as the
13 evidence at the hearing showed, as well as the
14 filings, that Mr. Gunderson and Mr. Beasley work
15 up a way to arrest Helena Stoeckley's husband,
16 Ernest Davis.

17 And we're not contesting the validity of
18 the arrest. Apparently it was a bond that Mr.
19 Beasley had gone for Mr. Davis. But it's clear
20 that the purpose of that arrest was to separate
21 Davis from Helena because Davis apparently didn't
22 get along with Gunderson or Beasley and he was
23 creating problems in obtaining the statements.

24 So they get Stoeckley away from Davis,
25 they get her out to California, she's three

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2 thousand (3,000) miles away from home, and I think
3 the record is clear that they interrogate her or
4 they interview her, depending on which
5 connotation you choose to accept.

6 But in any event, this goes on from
7 October 22nd, 1980 until October 25th, 1980. Now,
8 only one tape recording, Your Honor, has emerged
9 from this process and it's a very fragmentary tape
10 of, I believe, October 23rd, 1980, in which -- and
11 it's in evidence, having been offered by the defense,
12 -- that Stoeckley is initially reluctant to talk at
13 all and the tape recorder is turned off.

14 And for all -- the record shows the tape
15 recorder is not turned on again until after these
16 statements have been obtained. And I think that
17 is, in and of itself, suspicious because we know
18 that Mr. Gunderson's method of operation was to
19 tape record everything that Stoeckley said. And I
20 think it is significant that we haven't had any
21 tape recordings from that particular period,
22 because what does emerge I think is a pretty
23 clear pattern.

24 We have Mr. Beasley, the surrogate father,
25 who once boasted in writing that Helena would turn

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2 in her best friends and say anything to make him,
3 Beasley, act proud of her. We have Mr. Gunderson,
4 who's a former high official from the Los Angeles
5 Division of the Federal Bureau of Investigation.

6 Now, Stoeckley, as Gunderson testified, is
7 a police buff, and I think these are factors that
8 play on the atmosphere under which these
9 statements were obtained.

10 As Your Honor mentioned earlier this morning,
11 we know that Mr. Gunderson, whether he was right
12 as a matter of law or not, told Stoeckley that the
13 Statute of Limitations had run. It's -- to me it
14 seems -- it is significant what the -- not what
15 the objective legal truth of that statement is,
16 but certainly as far as Stoeckley is concerned,
17 when your -- the defense is saying that these are
18 statements made by -- admissions exposing someone
19 to criminal liability. And I submit that someone
20 who believes that the Statute of Limitations has
21 run and is not completely untutored in the ways of
22 the criminal justice system -- in fact, she was
23 studying police science in Nashville in 1971 --
24 that I think is a factor that goes to the admission
25 portion of the 804(b)(3) determination.

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2 Now, we also know that at this time, the
3 Defendant's conviction had been overturned. If
4 Your Honor would recall, and I think the record
5 shows the Defendant's conviction was overturned on
6 speedy trial grounds, I believe it was July
7 29th, 1980. It was either the end of July or the
8 first week in August, but anyway, by October of
9 1980, MacDonald is out of jail and it looks as
10 though the case, to the outside observer, is
11 finished.

12 We know that Gunderson made statements to
13 her concerning books and movies; and what I'm
14 saying is we're in a world that is a little
15 different from the normal police interrogation,
16 because what Gunderson did -- and I think it is,
17 given the circumstances, so worthy of condemnation
18 -- is he pretended to take Stoeckley seriously and
19 from the impact of that feeling on Stoeckley -- in
20 other words, you have someone who has a long history
21 of making wild statements and not being believed. I
22 mean, I think the fact that she was apparently
23 rejected by her parents, as Beasley noted, had to
24 do with her kind of propensity to be a story-
25 teller.

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2 But Gunderson pretends to take her
3 seriously and what we get as a result of this
4 process is a detailed confession, if you will, to
5 the crime, and I'm referring principally to
6 Defendant's Exhibit Number Two. And as the Court
7 may recall, that statement occurs or it is like the
8 second or third revision of earlier statements
9 which Stoeckley had adopted after Gunderson had
10 written them out for her.

11 In other words, this is kind of the final
12 product, if you will, of that October episode.
13 Now, --

14 THE COURT: (Interposing) What's the date
15 on that?

16 MR. MURTAGH: The date on the statement,
17 Your Honor, is October 25th. What they -- the
18 typed date is October 24th. The 24 has been
19 crossed out and 25 has been written and I believe
20 the explanation for that was that it was two (2)
21 o'clock in the morning or something at the time
22 she signed it.

23 The point I think that is crucial to an
24 understanding of the motivation behind this
25 statement is -- and I think it's clear that
Gunderson and Beasley convinced Stoeckley that

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2 while she might have been present at this, you
3 know, awful crime, she, in fact, did not hurt
4 anyone. She was a witness and, in fact, she tried
5 to help people.

6 And you have this sort of weird aspect of
7 her statement that she's running around in the
8 middle of this emergency giving people mouth to
9 mouth resuscitation and checking pulses and going
10 back again to Stoeckley's vision of herself as a
11 emergency room nurse.

12 Another point that should be made with
13 regard to that, Your Honor, is that what we have
14 from Stoeckley is not technically -- not at least
15 as far as she was concerned -- a confession to any
16 crime as distinguished from, say, Cathy Perry,
17 who says "I killed Colette MacDonald", or "I
18 killed the woman in the family", she doesn't
19 name her.

20 What you have from Stoeckley is really a
21 statement in which she inculcates other people;
22 Mitchell, Fowler, Harris, Mazerolle, who was in
23 jail, for the crime. This, in addition to the
24 feeling that the Statute of Limitations has run, I
25 think gives her sort of total latitude.

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2 I mean, what restraint is there on this
3 person from saying anything in terms of her own
4 frame of reference, and I submit that she felt no
5 restraints.

6 Now, we have the Stoeckley statement and I
7 think you then have to look at the statement
8 itself because there is the issue of the
9 admissibility of the statement under 804(b)(3), and
10 the Defendant takes the position that the Court
11 cannot consider the character of the declarant at
12 all. They rely principally on the Fourth
13 Circuit's subsequent decision United States
14 versus Brainard.

15 THE COURT: That's what the Brainard case
16 holds, isn't it?

17 MR. MURTAGH: Well, that's what it holds,
18 Judge, and I think in a prior filing I've
19 distinguished Brainard from MacDonald.
20 Brainard, if the Court recalls, involved a co-def
21 -- co-conspirator's admission, which the government
22 used as evidence in its case.

23 THE COURT: I have a little problem with
24 the concept that you can examine the surrounding
25 circumstances and that the statement, as -- standing

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2 alone, may have some validity notwithstanding
3 perhaps even, for hypothetical purposes,
4 overwhelming evidence that the declarant was
5 incompetent to say anything at the time of it.

6 MR. MURTAGH: Well, I have problems with
7 it, too, Your Honor, but I want to make a point
8 for the sake of the --

9 THE COURT: (Interposing) That's what the
10 case says.

11 MR. MURTAGH: That's what the case says in
12 effect, and I think you have to look at the
13 specific facts that Judge Murnaghan was talking
14 about. I mean, he was well aware of his prior
15 writings on this subject in this case. But, I
16 think what Brainard is saying if you take it
17 literally, is that a witness, who's a ten (10)
18 time convicted perjurer, for the the sake of
19 argument, who says, I saw Brian Murtagh hit Jim
20 Blackburn over the head with a baseball bat, that
21 statement, in and of itself, what Murtagh did to
22 Blackburn, is not inherently unreliable.

23 It certainly isn't true, I might add,
24 but the statement itself, does not, on its face,
25 give you reason to say this is an inherently

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2 untrustworthy statement.

3 I think if you had someone who was without
4 the ten (10) perjury convictions, but who said, I
5 saw a spaceship land and little green men got out
6 and they went into the MacDonald house, I think
7 there you have a situation where you can look
8 clearly at the statement itself and say it's, you
9 know, inherently unreliable.

10 But the point, Your Honor, is, for the sake
11 of argument is this case, I would take the
12 proposition that you have an inherently unreliable
13 witness, Stoeckley, but separate -- and Perry,
14 too, for that matter -- but separate and apart from
15 that you have the absence of circumstances clearly
16 corroborating the trustworthiness of that
17 statement.

18 And it would be my position, Your
19 Honor, that the Court should look at -- in terms
20 of the admissibility issue at the absence of
21 circumstances clearly indicating trustworthiness
22 of the statement and also at circumstances which
23 contradict the trustworthiness of the statement.

24 For example, we have the statement that
25 Mazerolle was there. Now, she's consistent in all

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2 of her post-trial statements in which she names
3 the perpetrators, that Mazerolle is a murderer. I
4 mean, that's what she's saying. She says she saw
5 him beat up on the Defendant and also pound on
6 Colette MacDonald's chest, so she's perfectly
7 consistent in that regard. But the objective
8 fact is that Allen Mazerolle was in jail on the
9 night of the murders.

10 Mazerolle, I might add, is a person of
11 terrible character. He's got all kinds of
12 criminal records. But, the -- but, it's clear
13 that he was in jail that night of the murders.

14 Now, the problem gets into Stoeckley's
15 statements because we have Mr. Bost, who went to
16 the police department, or the court rather, and he
17 didn't check the records thoroughly. He checked
18 them with the co-defendant, Mr. Rizzo, and it
19 turned out that Rizzo had been released on bail and
20 Mazerolle had not.

21 And this gets also -- if I could digress
22 for a second to this idea of the indelibility of
23 the witness' perception. Okay. You have Stoeckley
24 says Mazerolle was there, Beasley says Mazerolle
25 was in Stoeckley's company on the morning of the

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2 18th, although he later retracts that statement at
3 the evidentiary hearing, and you have a neighbor, a
4 Mrs. Jan Snyder, who in their filings is known as
5 Jan Snyder Ault, A-u-l-t.

6 And she identifies the composite which
7 Stoeckley says is Mazerolle and she says, you
8 know, I would recognize -- he's the guy driving
9 around in the blue mustang up the street. And she
10 said, I would recognize that man anyway by the
11 gleam in his eye and the sneer on his face.

12 Well, the point is, you know, that guy was
13 in jail and, you know, witnesses particularly to a
14 crime -- I say witnesses -- eople who think they are
15 witnesses to a highly celebrated crime will give
16 conflicting statements and will think that they have
17 seen something which, in fact, they have not.

18 But, not to get too far afield, one issue
19 here is whether the statements would be admissible
20 in a new trial. And we would contend that the
21 absence of corroborating circumstances would make
22 them inadmissible if it came to that, certainly
23 as to Stoeckley.

24 Perry's unavailability is a matter that's
25 not resolved at this time. I don't know whether

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2 she would be available or not, or if she's alive and
3 subject to a subpoena. They have not subpoenaed her,
4 I might add, in connection with this proceeding.

5 But you have the absence of any kind of
6 insider's knowledge. Now, in the recent filing
7 with regard to Stoeckley, you have contentions
8 that they knew -- that Stoeckley knew about the
9 broken springs on the rocking horse. We're back
10 to the rocking horse, unfortunately.

11 At the Court of Appeals, they argued that
12 the rocking horse had broken wheels and Stoeckley
13 knew about that and, as the Court may recall, the
14 rocking horse actually sits or sat on springs on
15 sort of a metal frame.

16 And I have filed with the Court and served
17 on counsel copies of the crime scene photographs
18 which Stoeckley described in front of the jury as
19 depicting the -- this was the episode where she
20 said that the rocking horse wouldn't rock, and
21 apparently Mr. Segal took her through that on
22 direct examination.

23 And I submit to Your Honor that whatever's
24 in that picture, it isn't a rocking horse with
25 broken springs. The springs are there, they're

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2 intact, they're parallel. In all observable
3 characteristics they're functional.

4 In any event, the jury saw that. We also
5 have the contention that only Stoeckley could have
6 known that the kitchen phone was on the wall in
7 the crime scene. Well, kitchen phones are usually
8 on kitchen walls. I mean, fifty (50%) percent of
9 the time you're going to be right on that one. But,
10 in point of fact, it's in a crime scene photograph,
11 also in the response that we have filed. And we
12 know that she was shown the crime scene photos.

13 So the point I'm making, Your Honor, is
14 that there is nothing that Stoeckley has ever said
15 which purported to demonstrate insider's knowledge
16 which could not be attributed to either a fact
17 that was in the media, reported in the media, a
18 crime scene photograph that she was shown, or a
19 matter that was suggested to her by the way that
20 Gunderson and company interrogated her.

21 One example, and I believe I've covered it
22 in my pleadings is, she's asked by Gunderson a
23 question which is, you know, "Helena, Cathy Perry
24 had some bloodstained boots and clothing. Do you
25 know anything about that?" And in fact, Stoeckley

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2 says that Perry wasn't there, but supposedly she
3 makes some vague reference to the clothing.

4 But the point is that if you're trying to
5 argue that Stockley could po -- not possibly have
6 known about Cathy Perry having boots or bloody
7 clothing or whatever, you can't interrogate
8 someone like Stoeckley who personalizes every
9 detail that she can possibly get her hands on and
10 still maintain the integrity of her statement.

11 But, besides the admissibility issue, Your
12 Honor, what we're really talking about here is
13 whether, if the evidence were to be admitted at
14 trial, it would probably result in an acquittal.
15 And there, as I understand the rule, the Court is
16 to -- looking at the evidence that was adduced
17 at trial, to try to determine whether, okay, here's
18 this evidence, would it probably result in an
19 acquittal, in a new trial?

20 And I submit that that is probably the
21 sixty-four dollar question in this case. Ad, I
22 don't want to concede the admissibility of these
23 statements. I don't think they're corroborated by
24 independent circumstances. But assuming, for the
25 sake of argument, that the government were not to

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2 object to those statements if a new trial was
3 granted, the question remains whether they would
4 probably result in an acquittal. And I submit
5 that they would not. And the reason for that is
6 that the government's evidence remains intact.
7 Stoeckley's story does not change any of that
8 evidence.

9 You know, even -- if you were to take the
10 position that, let's say you had an independent
11 witness, a neighbor, who said that Stoeckley and
12 Mitchell and Harris and Fowler and, let's say,
13 Mazerolle was out of jail on a pass that night,
14 that they all came to MacDonald's residence and
15 they tried to get drugs from him, for the sake of
16 argument.

17 I'm not conceding that that actually
18 occurred, but what I'm saying is if you were to
19 accept that hypothetical, I submit that the evidence
20 that we argued to the jury identified MacDonald as
21 the only criminal agent, would still remain totally
22 intact.

23 You still have the problem of the holes
24 in the pajama top, the absence of any corresponding
25 wounds on MacDonald's body, the fact that

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2 the reconstruction -- the twenty-one (21) probes
3 going through the forty-eight (48) holes in the
4 pajama top, matched the twenty-one (21) icepick
5 wounds on Colette MacDonald's chest. The
6 footprint, which is clearly MacDonald's cannot be
7 accounted for by Stoeckley or anybody else.

8 So, what I'm saying is the government's
9 evidence remains intact and you have, in effect --
10 it's like an alibi situation. Yes, there is a
11 witness who says the Defendant wasn't present at
12 the crime scene, but his fingerprints, you know,
13 in the position of -- could only have been
14 obtained during the commission of the crime, are
15 there. I use that just by way of an example.

16 And also, Your Honor, it seems to me that
17 going into the equation in determining whether
18 statements would probably result in -- as an
19 acquittal, would be the character of the
20 declarant, and the government would be able to
21 impeach Stoeckley, whether she's alive or dead.

22 And in impeaching her, we would bring out
23 the fact that prior to her exposure to the evidence
24 at the trial, she never made any such statements
25 which showed anything about phones or rocking horses

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2 or flower pots or any of the other insider details
3 that she believed were seen in the crime scene
4 photographs.

5 We would also point out that Stoeckley,
6 after making these statements to Gunderson and
7 Beasley, was interviewed by the FBI in September
8 of 1981. And unlike the circumstances under which
9 Mr. Gunderson interviewed Stoeckley, she was
10 interviewed in the presence of her husband, in her
11 home. She was not in any way dragged away from
12 her normal surroundings and what she says in that
13 statement was -- in our response -- is that what
14 I told Gunderson was basically true.

15 In other words, yeah, I made these
16 statements and it's basically true in that it's
17 what I dreamed or what I thought happened, but the
18 truth of the matter is I really don't know what
19 happened. And that's what she says, Judge, and, you
20 know, it's kind of like somebody telling you
21 truthfully about a nightmare that they had. That
22 doesn't mean that the nightmare is a fact.

23 It would -- and it's also like somebody's
24 truthfully, as far as they are concerned, telling
25 you that they are Napoleon. That doesn't mean

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2 that they're Napoleon.

3 And that's what you have here with Stoeckley.
4 And all the time that this is going on, she is
5 being, you know, either buffeted one way and
6 another by Gunderson and Beasley, who were
7 constantly after her.

8 After she retracts her statements -- this
9 statement of September, 1981, the damage control
10 party of Gunderson and Beasley go down to South
11 Carolina and they get the retraction of her
12 retraction.

13 And at the evidentiary hearing, Mr.
14 Gunderson purported to introduce verbatim
15 transcripts of the statements that he took from
16 Stoeckley. And supposedly the tapes, that
17 were admitted at that time, were supposed to
18 correspond to the verbatim transcripts.

19 Well, we now know, now that we've had those
20 transcripts -- the tapes themselves transcribed,
21 that what Mr. Gunderson did was do a cut-and-paste
22 job, you know. He will have fifty (50) pages
23 deleted from what Stoeckley said on the so-called
24 statements.

25 There's nothing on -- I'm referring to, I

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2 believe, defense Exhibit 12, is the cut-and-paste
3 job, and it's covered also in our proposed findings
4 of fact on this issue. Nothing in that statement
5 shows that there are deletions, and I think when
6 you're talking about the integrity of the statement,
7 that's a material fact.

8 But anyway, you have Stoeckley being
9 reinterviewed and now -- they contend she wasn't
10 interested in publicity, but the purpose of this
11 trip to South Carolina, and I think it was May of
12 1982, was to get her ready to go up to New York to
13 be interviewed for Sixty Minutes. And she
14 subsequently does go up to New York and we have
15 the transcript of that, but as -- neither the Court
16 or the government has seen the videotape of that
17 interview.

18 At this time Stoeckley is nine (9) months
19 pregnant and is clearly suffering from a delusion
20 that the cult -- she sees Mazerolle peeking at her
21 through windows and Mazerolle was in the courtroom
22 during the trial and all kinds of weird
23 statements. But it's clear that, in her mind, she
24 was concerned about some sort of retribution,
25 that they were going to kill her baby and crucify

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2 her and all kinds of weird stuff.

3 So, you get this subsequent statement in
4 which she says, okay, the cult did it, but I
5 won't name any of these people. I won't talk
6 about cult activities. Now this is subsequent to
7 her having already named people. I mean, it makes
8 no sense in any kind of logic. In the meantime,
9 MacDonald's conviction is reinstated and now we have
10 the filing of these statements.

11 Mr. O'Neill, in his presentation,
12 contended that if an FBI agent were to come in with
13 Stoeckley's confessions, the case would be
14 prosecuted; and I submit -- and I might add, I'm
15 very thankful that I've never been presented with
16 either an FBI agent or a government witness -- FBI
17 agent, such as Mr. Gunderson or a government
18 witness such as Helena Stoeckley -- but I submit
19 that, you know, that statement by Mr. O'Neill, it
20 just -- it doesn't bear close examination because she
21 would be talking about trying to prosecute somebody
22 who on one hand says she's an admitted perjurer, on
23 the other hand says that, you know, she told the
24 truth when she perjured herself, who states that
25 she's present at the murder scene, but also says

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2 she didn't confess to anything. You know, it
3 just -- it just doesn't hold up.

4 Then you get into the business of Perry's
5 statement and Stoeckley's statement and there is
6 no way that you can reconcile the two (2) of
7 those. I mean the -- nothing that Perry said fits
8 the crime scene.

9 Colette MacDonald wasn't tied up
10 and I would point out, Your Honor, that the
11 reliance on Russell Fisher's statement has been
12 quoted out of context. What Mr. Fisher -- or
13 Dr. Fisher -- said, and I believe this is covered
14 in our response -- by the way I responded to each
15 one of the allegations that they make in their
16 addenda to the proposed findings of fact -- Dr.
17 Fisher says that, you know, the bruise somewhat --
18 his word -- "somewhat" resembles a rope burn. He
19 does not attribute the cause of that bruise to
20 rope burn. He proceeds to then say that it is
21 consistent with the muscle in the arm being
22 flattened by the edge of the club or the arm being
23 bound up in the garment or cloth of the pajama top
24 that she was wearing.

25 And in point of fact, Colette MacDonald's

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2 right arm was lacerated and abraded and fractured
3 from fingertip almost to the arm -- the axillary
4 portion of the arm.

5 We have the contention that the hair in
6 the closet corroborates Perry. Now, of course,
7 Perry said she stuffed -- I forgot whether it was
8 the older boy or the younger boy, but it is a boy
9 in any event -- she stuffed him in the closet on the
10 second floor. Well, the defense relies on items
11 they received under the Freedom of Information
12 Act.

13 I might add, the same subject matter is
14 covered in the FBI and CID laboratory reports,
15 what they got as the worksheets, and yes, Kristen
16 MacDonald's hair was found on a pillow stored
17 in the south -- Kimberly's bedroom closet, but so
18 was Jeffrey MacDonald's hair and so was Kimberly's
19 hair found on that same pillow.

20 And the Defendant doesn't claim that he was
21 stuffed in a closet in any bedroom.

22 And I think what it shows is that a pillow
23 that everybody either put their head on at one
24 time or other was stored in the closet. It
25 doesn't in any way corroborate Perry, or Stoeckley

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2 for that matter.

3 I think Mr. O'Neill conceded in oral
4 argument that we do have the phenomenon of the
5 compulsive confessor and we have that in this
6 case. We have about six (6) confessions and they
7 don't rely on all of them, but they seem to be
8 relying principally on Stoeckley and, to some
9 extent, on what they claim is Mitchell's
10 statement.

11 With regard to Mitchell, with respect to
12 The Manor House episode, the mission downtown, we
13 don't concede that it was Greg Mitchell. In fact,
14 the witness identifies the individual as Dave and
15 the photo spread identification, I think, is
16 pretty dubious because what we have is a
17 statement, which, at best, is that the individual
18 resembled, ten (10) years later, or twelve (12)
19 years later, Dave. So, they're contending that
20 Dave at the mission is Mitchell.

21 And, you know, we had, I think, this
22 phenomenon in the early 1970's of the returned
23 Vietnam G. I. -- and that's what we're talking about,
24 1971 here. Mitchell, we do know that in his
25 second tour in Vietnam, was severely wounded and

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2 apparently was never the same subsequent to that.

3 But we had the phenomena of people
4 confessing to war crimes. At the time, I was in
5 the Army CID command and we used to get, after the
6 My Lai trials, people coming and confessing to all
7 kinds -- it was sort of a group thing, to see if you
8 could confess to something that was really
9 horrible.

10 But then you have the episode out at the
11 farmhouse in which supposedly somebody writes on
12 the wall "I killed Mrs. MacDonald and her
13 children." Well, the witness that I think the
14 Court ought to look at there -- their witness --
15 is this Reverend Randy Phillips. Reverend
16 Phillips, according to his recollection, is that
17 when Mrs. Canady and Mrs. Sisnerios,
18 S-i-s-n-e-r-i-o-s, came out of the farmhouse,
19 something to the effect of "death to pigs" was
20 written on the wall and supposedly they went and
21 got a Deputy Sheriff and they showed it to him.

22 Well, the Deputy Sheriff has never been
23 produced. In fact, we don't even know what
24 Sheriffs' Department we're talking about.

25 And then they go back to The Manor House,

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2 the farm, and the wall has been painted over.

3 Reverend Phillips say, "yeah; about a week later,

4 people employed by The Manor painted the wall."

5 Well, none of them have come forward. So, I think

6 it is highly questionable as to what, if anything,

7 was written on that wall.

8 But, even, assuming for the sake of

9 argument, you did have this statement, "I killed

10 Mrs. MacDonald and her children", the fact

11 remains, who wrote it? Was this some sort of

12 braggadocios jest? Was this, you know, the type of

13 idiocy that people, you know, write on walls, the

14 type of people who, in fact, do write on walls,

15 the graffiti artists?

16 And then you have Mitchell's statements

17 subsequent to his FBI interview. Well, Mr.

18 Mitchell was interviewed by the FBI. He cooperated

19 voluntarily. He gave his fingerprints. By the

20 way, they don't fit any of the unidentified

21 fingerprints found at the crime scene. And there

22 was no accusatory aspect to this interview.

23 So, if Mitchell later on, to impress his

24 friends, made some sort of statement to the effect

25 that, "Boy the FBI is hot on my trail", well, they

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2 knew where to find Mitchell. I mean, he wasn't in
3 hiding anyplace. He was living in the Charlotte
4 vicinity.

5 You also have the fact that Mr. Mitchell,
6 who subsequently died of cirrhosis of the liver
7 was an alcoholic and I think that you cannot take
8 such statements completely out of context. I point
9 that out in the context of the probability of
10 resulting in acquittal as opposed to the
11 admissibility of the statement.

12 One other matter that is, I think, unique
13 in this case, and I frankly don't know what the
14 answer is, but, I cause the issue and perhaps Mr.
15 O'Neill will respond to it, is that the
16 corroboration that is being offered to a certain
17 extent consists of other hearsay statements.

18 We have statements which, under Rule
19 804(b)(3), would have to come in under the corrobor-
20 ating circumstances clearly indicating the trust-
21 worthiness aspect of the rule or not at all.

22 I guess what I'm saying is, I don't think
23 that you get corroboration from different
24 inadmissible hearsay statements. Certainly not --
25 in other words, let's say, Perry and Stoeckley.

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2 You have -- assume for the sake of argument that
3 Perry is unavailable, you have her confession and
4 you have Stoeckley's. I think the fact that you
5 have two (2) inadmissible statements doesn't make
6 for, you know, one admissible statement. Certainly
7 that would be the case in the absence of an
8 interlocking aspect to these statements.

9 It would be one thing if, for example, you
10 had -- I'm taking Mr. Mazerolle, say, for example.
11 Let's say that, you know, Mazerolle made the
12 statement which ducktails, in the major aspects,
13 what Stoeckley said. Well, then you could argue
14 that well -- and Mazerolle is unavailable for the
15 sake of the hypothetical -- you could argue that
16 the mere interlocking of the statements provides
17 some evidence of their credibility.

18 But when you have statements that don't
19 interlock, in fact contradict, I mean, you know,
20 who's supposed to have killed Colette MacDonald? Is
21 it Mazerolle and Mitchell or is it Cathy Perry? And
22 I submit that they can't have it both ways and at
23 the same time argue that these statements
24 corroborate each other.

25 If Your Honor, will indulge me a second.

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2 (Counsel reviews notes.)

3 Mr. O'Neill said, and I believe I'm
4 quoting him correctly, "if something is not
5 corroborated by anything you don't rely on it."
6 And I submit that Stoeckley, or Perry for that
7 matter, is not corroborated or they are not
8 corroborated by anything. In fact, they are
9 contradicting everything that is a matter of
10 objective fact.

11 You simply cannot take Stoeckley's story
12 and use that to explain the evidence upon which
13 the Defendant was convicted. I mean, Stoeckley
14 doesn't say how the holes got in the pajama top
15 or how the wounds matched the holes in the pajama
16 top. She doesn't account for the bloody
17 footprint. She doesn't account for the
18 Defendant's pajama top fibers or the club inside
19 the house, things like that.

20 Now, the defense also contends that we
21 have twenty-two (22) -- or they have twenty-two
22 (22) witnesses. Well, they probably have twenty-
23 two (22) declarations in their initial filing, but
24 what you have basically is twenty-two (22) people
25 seeing twenty-two (22) different episodes, if you

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2 will.

3 And some of that, they knew about in
4 advance, the episode at the diner, Dunkin Donuts.
5 We know that a woman by the name of Frankie
6 Bushey, as opposed to Edith Boushey -- and I'll
7 spell the two (2) names -- Frankie Bushey is
8 B-u-s-h-e-y -- tried to contact Mr. Smith during
9 the trial. In fact, I think she might have been
10 referred to Mr. Smith by Your Honor. She called
11 the Court I believe and they never followed up on
12 that one.

13 So, that to the extent that Helena
14 Stoeckley may have been at Dunkin Donuts, and for
15 all I know she was. I mean, I don't know whether
16 this will come back to haunt me, but the one time
17 that I spoke to Helena Stoeckley, with Victor
18 Worheide and Special Agent Dick Mahon, was at
19 Dunkin Donuts because she was working at the
20 theater selling popcorn and didn't get out of her
21 job until, I think, two (2:00) o'clock in the
22 morning. That was the only place that was open to
23 talk to her.

24 Dunkin Donuts apparently was a hippie
25 hangout on Bragg Boulevard in Fayetteville. She

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2 may have been there. I don't know that that means
3 a whole heck of a lot. If you look at her
4 statements to Gunderson, she starts with a
5 recollection that when she returned home, there
6 was a box from Dunkin Donuts in the car, you know.
7 And from that she has reconstructed, in her mind,
8 the whole episode of having been at Dunkin Donuts.

9 You also have the business of the school
10 teacher at North Carolina State Extension, who
11 supposedly sees -- I don't believe she -- according
12 to them that she sees Stoeckley. The person I
13 believe that she identifies is the composite that
14 Stoeckley says is Don Harris, okay?

15 Don Harris, we know, was back at
16 Stoeckley's apartment at Clark Street with Diane
17 Hedden, and Harris was apparently sleeping on the
18 couch.

19 You also have -- and here I think, Judge,
20 is a witness that absolutely has no reason to lie.
21 She was called by the defense at the Article 32
22 investigation. We had her at the trial and I'm
23 referring to Elizabeth Ramage, R-a-m-a-g-e. Her
24 maiden -- during the Article 32, her married name
25 at the time was Krystia, K-r-y-s-t-i-a.

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2 But if you'll look at the affidavit that
3 we've supplied -- and by the way, Mrs. Ramage is a
4 Canadian citizen and she's from British Columbia.
5 She was with Colette MacDonald at class that night.
6 They were friends. They went to class together.
7 They -- Colette picked her up, took her to the class,
8 and took her back.

9 And we supplied Mrs. Ramage with the Edith
10 Boushey, B-o-u-s-h-e-y, statements. And by the
11 way, Mrs. Boushey is one of these people that
12 remembers the cleanly chisled chin of this guy
13 that she's identified as Harris. The details are
14 just so vivid, I think they're suspect.

15 But Mrs. Ramage says that never happened.
16 And I submit that Mrs. Ramage has no reason to
17 lie, you know. In other words, she's saying there
18 was -- there never occurred an episode where
19 hippie-like individuals came up to Colette
20 MacDonald. That's what Boushey says, that --
21 something about if you'll go along, everything
22 will be okay.

23 THE COURT: Did you say one of these
24 witnesses testified at the trial?

25 MR. MURTAGH: Elizabeth Ramage, yes, Your

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2 Honor. In other words, she testifies to the whole
3 -- not the Boushey vision of things, but she
4 testifies to going to class with Colette
5 MacDonald.

6 In other words, we have a witness who
7 was with Colette MacDonald from the time Colette
8 picks her up -- Mrs. Ramage was a neighbor --
9 until she comes back having dropped off Mrs. Ramage.
10 In other words, she's there the whole time at school
11 with Colette MacDonald. She says this never
12 happened.

13 And while we're on sort of a related topic

14 --

15 THE COURT: (Interposing) Where is it
16 that says that it did happen?

17 MR. MURTAGH: Well, Edith Boushey comes
18 out of the woodwork, you know, twelve (12),
19 thirteen (13) years after the trial, and she says
20 that a group of --

21 THE COURT: (Interposing) It hadn't been
22 twelve (12) or thirteen (13) since the trial.

23 MR. MURTAGH: I'm sorry. Twelve (12) or
24 thirteen (13) after the event.

25 THE COURT: Okay.

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2 MR. MURTAGH: I'm sorry Judge. At times
3 it seems like twelve (12) or thirteen (13) years
4 after the trial, but I --

5 THE COURT: (Interposing) I'll agree with
6 that.

7 MR. MURTAGH: Sir?

8 THE COURT: I'll agree with that.

9 MR. MURTAGH: But, anyway, in other words,
10 first of all there's the time problem with her
11 statement and also Mrs. Boushey recalls being
12 spoken to by an Army Judge Advocate Officer, I
13 believe, who was from Richmond.

14 Now, the only person in this case, in all
15 of the lawyers that have been involved -- Richmond
16 or Roanoke, I could have that wrong -- but it's --
17 the only person who in any way comes close to
18 fitting that description is Captain Douthat.

19 It was Captain Douthat who, when he was
20 interviewed by -- and this is all contained in our
21 submission -- when Captain Douthat was interviewed
22 in 1970 -- late 1970, after the Article 32
23 investigation, he bragged to the CID investigators
24 about how he found Elizabeth Krystia. I mean,
25 when the CID never bothered to check who was at

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2 class with Colette MacDonald, and he found that out.

3 And I submit that the government has no
4 way of proving, at this time, whether, in fact,
5 Captain Douthat was the one who contacted Mrs.
6 Boushey. She said she was contacted by somebody.
7 We didn't do it. So, you go on with things like
8 that.

9 Now, the other witnesses, and I don't want
10 to waste the Court's time with going through each
11 and every one of them, but what you have, in the
12 aggregate, is a bunch of people who think they
13 saw hippies. Now, maybe they did see hippies. I
14 submit that there were hippies in Fayetteville,
15 that there were people who wore fatigue jackets.
16 It was and is a town with a large Army
17 population.

18 THE COURT: It's not the uniform of the
19 day, but the uniform of the night.

20 MR. MURTAGH: Well, Judge, you had, I
21 think, a fad that, to some extent, still exists of
22 sort of a counterculture that the people who were
23 not in the military wore bits and pieces of
24 military uniform as a sort of a protest thing.
25 There's that aspect of the thing.

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2 There's also the fact that G.I.s, being
3 short of money then, probably much more so than
4 than they are now, but it's not uncommon to have
5 a G.I. wear his fatigue jacket when he's off post.
6 He's not supposed to do it unless he's in full
7 uniform, but it happens.

8 None of that -- none of those sightings,
9 if you will, either separately or in the
10 aggregate, would probably result in an acquittal.
11 And I say that because you had at the trial -- and
12 Your Honor mentioned this neighbor -- well, you
13 had a Mr. Milne, M-i-l-n-e, and Mr. Milne, who
14 incidentally apparently made some statement to
15 Mrs. Douthat after the trial -- I'm sorry -- after
16 the Article 32 incident, and it was Mr. Douthat who
17 brought that to the defense's attention in 1977.
18 Well, anyway Mr. Milne testified, in front of the
19 jury, that he was building a model airplane, I
20 believe, or a model boat, working late at night at
21 his house -- and this was not in dispute -- was
22 right up at the corner from the MacDonalds'
23 quarters. If you looked out his door, you would
24 see a path leading down to the MacDonald house.

25 He testified he saw three (3) or four (4)

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2 people carrying candles and wearing either
3 bedsheets or choir robes who were chanting and who
4 were walking down the path to MacDonald's
5 house.

6 And you had Mr. Mica, who saw the floppy-
7 hatted girl on the corner, and then you also had,
8 I believe the testimony of a Major Williams,
9 who recounted the business about MacDonald's
10 presence at a drug counseling session for like
11 four (4) or five thousand (5,000) G.I.s that were
12 being told that statements made to a military
13 physician are not privileged because the
14 doctor/patient privilege doesn't exist in the
15 military. You might recall that testimony.

16 What I'm saying is that you had, if the
17 jury wanted to find on the basis of a hippie
18 sighting type of a thing, you had plenty of
19 evidence in front of the jury, if they chose to
20 reject the evidence upon which the Defendant was
21 convicted. And I submit that obviously their
22 verdict shows that they did not.

23 Now, I might add, Your Honor, and I'm sure
24 you recall and Mr. Smith recalls, that the jury
25 came in with -- literally with tears in their

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2 eyes. The first man through the door was a juror
3 by the name of Embrey, I believe, who was a
4 retired Green Beret Master Sergeant, and I vividly
5 recall the man was crying. I also recall the women
6 on the jury crying.

7 They did not want to convict this man. I
8 think this was probably the most difficult decision
9 from just a gut, you know, feeling that any jury
10 ever had to deal with, but I submit that they
11 performed their duty and they saw their duty
12 clearly and they accepted the evidence linking the
13 Defendant, and only the Defendant, to the crime.
14 And they convicted him beyond a reasonable doubt.

15 And I would submit that, given the facts
16 of this case, and given the inherent incredibility
17 of the crime -- I mean, I don't dispute for a minute
18 that this is a crime that literally -- it shocks
19 the conscience, it's unthinkable of how this nice
20 doctor could have committed this horrible crime.

21 But that's exactly what we argued to the jury.
22 We didn't retreat from that issue. We met it head-
23 on. We took our lumps on certain aspects of the
24 evidence, but on others, we argued strongly that
25 they proved that he committed the crime.

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2 All that evidence remains intact and I
3 think, you know, if you were to introduce in the
4 new trial the Stoeckley and Perry statements, they
5 would not probably result in an acquittal.

6 Thank you, Your Honor, unless you have
7 some --

8 THE COURT: (Interposing) Well, let me
9 ask you this, now. Suppose the Court should find
10 that the standards you just stated were not
11 applicable, but that one of these lesser standards,
12 such as suggested by Mr. Smith, this morning,
13 that is, is there a likelihood that the result
14 would have been different or, I guess the least of
15 the standards is, can you say that this evidence,
16 if produced before a jury, might result in a
17 different verdict. What would you say to those
18 things?

19 MR. MURTAGH: Well, as I recall, Mr. -- I
20 think it was Mr. O'Neill who argued that motion --
21 said that in the context of, he assumed for the
22 sake of argument, the Court's finding of
23 suppression on the part of the government, well
24 clearly, you know -- which we contest. I mean, that
25 was --

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2 THE COURT: (Interposing) Well, let's put
3 that aside for the moment. If the Court finds
4 that you suppressed material evidence, you're
5 gone, aren't you?

6 MR. MURTAGH: Under the tests that --

7 THE COURT: (Interposing) Yeah.

8 MR. MURTAGH: Well, if his standard is
9 applicable. I don't know that I would concede
10 that, but I certainly -- I wouldn't want to be
11 arguing --

12 THE COURT: (Interposing) You're in a
13 heap of trouble.

14 MR. MURTAGH: I'm in a heap of trouble.
15 I'm sure I would be. But we, you know, we
16 strongly dispute that we suppressed anything. I
17 mean, let's talk about -- the boot thing, I think,
18 is an issue that sort of, you know, if --

19 THE COURT: (Interposing) Let's forget about
20 suppression for a moment and just confine it in
21 the context of the new trial evidence. Suppose
22 the Court should say that, in the context of this
23 evidence, that if this evidence were before a
24 jury, the result might be different?

25 MR. MURTAGH: Well, I don't think that the

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2 result might be different, Your Honor, I don't
3 think --

4 THE COURT: (Interposing) Well, I just
5 wanted you to express yourself on that proposition.

6 MR. MURTAGH: Oh, okay. No, I don't think
7 it might be different and the reason I say that is
8 because of the evidence upon which the man was
9 convicted and the theory of the defense is
10 basically the same -- the hippies or intruders or
11 whatever that were supposed to have perpetrated the
12 crime -- the jury certainly had that theory before
13 them and they had the -- Mr. Smith talked about,
14 you know, natural law and listen to your insides
15 on the case, and, you know, the -- you had a crime
16 that was truly unbelievable in terms of the
17 accusation, but you also had proof of the identity
18 of the perpetrator that went beyond a reasonable
19 doubt. And I submit and if you didn't have that,
20 you wouldn't have gotten a conviction.

21 And since that evidence still remains
22 intact, I don't think the result might be
23 different, you know. I certain think that if you
24 were to put Stoeckley or Perry's statements in,
25 the government would have a field day in

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2 impeaching them, you know.

3 I -- it just, as a passing thought, Mr.
4 O'Neill talking about the -- prosecuting Stoeckley's
5 statement. With all the headaches that the
6 government has had in this case and I have had in
7 dealing with it, I couldn't possibly come to terms
8 with having Stoeckley as a government witness. I
9 mean, it just -- it really just completely is out
10 of my conception of reality.

11 So, that's what I'm saying. I don't think
12 the result, under any standard that they choose to
13 apply, might be different, but I think that they
14 are attempting to get the Court to use the wrong
15 standard and that premise is based upon their
16 allegation of suppression.

17 But to get back to one point, the business
18 about the boots, you know. If -- at the time the
19 boots are given to the CID, Mr. Nance, who is Dr.
20 MacDonald's civilian, you know, defense counsel --
21 I mean he's a civil attorney involved in trying to
22 enjoin the Army from taking hair samples from the
23 Defendant because they didn't want to compare it
24 with the unidentified hair in Colette MacDonald's
25 hand.

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2 But let's say at the time he said, "These
3 boots belong to Helena Stoeckley", or Perry said
4 "These boots belong to Helena Stoeckley", and I
5 don't think there's any contention in the record
6 that that is what he did say. What he said was
7 that we have a client, Mrs. Garcia, who is very
8 scared and we're trying to humor her.

9 And it makes a difference because it is
10 only subsequent, in fact almost twelve (12) years
11 subsequent, that the boots as to Stoeckley, have
12 any possible materiality. It's only after
13 Gunderson says, Helena, you remember, you
14 know, Cathy Perry, had bloody boots and
15 clothing, that Stoeckley starts making
16 statements about that.

17 The point also -- and I neglected to
18 mention this earlier -- is Mr. Douthat, in his
19 affidavit prepared for the defense, says that if
20 he had -- even though he wasn't acting as Dr.
21 MacDonald's attorney and assuming, for the sake of
22 argument, the truthfulness of that statement, he
23 said that even so, if he had known of any evidence
24 that could've possibly been of use to the defense,
25 he would have turned it over to Mr. Segal or Mr.

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2 Mallory or whatever.

3 And we know that he did that subsequently
4 with the Milne statement. In other words, Milne
5 comes to the defense's attention by way of
6 Douthat. And I submit that when you're contending
7 that the government's suppressed something, here
8 you have somebody who was the former defense
9 attorney -- or present defense attorney,
10 depending on how you look at it -- of the
11 Defendant, he certainly has no love for the CID.
12 He's an officer of the Court and an officer of the
13 United States Army and he's presented with this
14 business of the Perry boots. And I submit to you
15 that if Mr. Douthat, at the time, thought that
16 there was any possible connection of these boots
17 to Helena Stoeckley, he would have beat a path to
18 Mr. Segal to make that information available to
19 him.

20 The point being that you can't hold the
21 government to a standard of clairvoyance as to
22 what's going to be said twelve (12) years later,
23 that the defense attorney at the time doesn't see.
24 Clearly, they didn't think that this stuff had any
25 relevancy whatsoever.

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2 By the way, we don't think it does even
3 now, but for the sake of argument about
4 suppression, there was no linkage at the
5 time as to Stoeckley. And we still don't know
6 whose boots they're supposed to be. I don't know
7 whether it's -- we're talking about Perry's boots
8 or Stoeckley's boots, but in any event, whatever
9 --

10 THE COURT: (Interposing) Did you tell me
11 earlier that -- or did I read it someplace, that
12 there's no evidence that there was any blood on these
13 boots, whomever they were?

14 MR. MURTAGH: No, sir. The boots were
15 photographed and the photograph has been furnished
16 to the Court and counsel. It's in the appendix to
17 the government's response on the motion to set
18 aside the conviction. And I think also that the
19 absence of any discription in the receipt. Why
20 would Mr. Nance sign the receipt? He's an
21 experienced defense attorney. Why would he sign a
22 receipt that doesn't describe these as even being
23 suspected bloodstains?

24 And then we get back to the business of
25 the clothes. We contend that no clothes were