

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 15-7136

UNITED STATES OF AMERICA

vs. Appellee,

JEFFREY R. MACDONALD,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii	
STATEMENT OF JURISDICTION.....	1	
STATEMENT OF ISSUE.....	2	
STATEMENT OF FACTS	3	
SUMMARY OF ARGUMENT	68	
ARGUMENT	69	
THE DISTRICT COURT DID NOT ERR IN FINDING THAT MACDONALD HAS NOT MET THE GATEKEEPING STANDARD OF 28 U.S.C. §2255(h)(1)		69
I. Standard of Review		69
II. Discussion of Issue.....		69
A. <u>The district court’s approach</u>		69
B. <u>The Britt claim and related evidence of Stoeckley’s “confessions.”</u>		70
1. <u>Jimmy Britt</u>		71
2. <u>Jerry Leonard</u>		72
3. <u>Helena Stoeckley Sr.</u>		73
C. <u>The DNA Claim</u>		74
1. <u>Unsourced Hairs</u>		74
2. <u>“Sourced” hairs</u>		75
D. <u>The Evidence As a Whole</u>		76

1. <u>The Pajama Top</u>	76
2. <u>Milne and Mica</u>	77
3. <u>Physical evidence</u>	79
Conclusion	82
Certificate of Compliance	
Certificate of Service	

TABLE OF AUTHORITIES

CASES

<u>Swidler & Berlin v. United States</u> , 524 U.S. 399 (1998).....	56
<u>Thompson v. Keohane</u> , 116 S.Ct. 457 (1995)	69
<u>Townsend v. Sain</u> , 372 U.S. 293 (1963).....	69
<u>United States v. U.S. Gypsum Co.</u> , 333 U.S. 364 (1948).....	69
<u>United States v. MacDonald</u> , 456 U.S 1 (1982)	16
<u>United States v. MacDonald</u> , (MacDonald II), 688 F.2d 224 (4th Cir. 1982)	42
<u>United States v. MacDonald</u> , (MacDonald III) 640 F. Supp. 286	43, 44
<u>United States v. MacDonald</u> (MacDonald IV), 779 F.2d (4th Cir. 1985)	44
<u>United States v. MacDonald</u> , (MacDonald VI), 966 F.2d 854 (4th Cir. 1992).....	45
<u>United States v. MacDonald</u> , (MacDonald XI), 641 F.3d 596 (4th Cir. 2011).....	1, 55, 70
<u>United States v. Pettiford</u> , 612 F.3d 270 (4th Cir. 2010).....	69
<u>United States v. Ragin</u> , 820 F.3d 609 (4th Cir. 2016).....	69
<u>United States v. Roane</u> , 378 F.3d 382 (4th Cir. 2004).....	69

STATEMENT OF JURISDICTION

Jurisdiction in the district court was premised on 28 U.S.C. § 2255(h)(1) and this Court's remand in 2011. United States v. MacDonald (MacDonald XI), 641 F.3d 596, 614-17 (4th Cir. 2011). Jurisdiction in this Court is premised on 28 U.S.C. §§ 1291 & 2253(c) and the certificate of appealability granted on April 4, 2016. [Doc: 12].

STATEMENT OF ISSUE

Whether the district court erred finding that MacDonald did not establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense. Id.

STATEMENT OF FACTS

Jeffrey and Colette MacDonald were married on September 14, 1963, JA646. They subsequently had two girls, Kimberly, born 1964, and Kristen, born 1967. The MacDonalds were married while Jeff was an undergraduate student at Princeton, and the family moved while he attended medical school and residency. At times they had lived in "squalid neighborhoods" and, therefore, Colette was in the habit of always locking outside doors. JA647. MacDonald¹ was unfaithful to his wife during the marriage and admitted that when away from home he did "date" and "sleep with" other women. JA665. In September 1969, the MacDonalds moved into a small apartment (JA1700, 3698) in base housing at Ft. Bragg, North Carolina, where MacDonald was assigned to the 6th Special Forces Group. JA1621-24. During Christmas 1969, Colette's mother, Mildred Kassab, observed that Colette was subdued and quiet and had ceased to be the happy person she had once been. JA648. A frequent babysitter noticed that after the first of the year in 1970, there had been a change in Jeff and Colette's relationship. "They didn't smile much to each other." JA687. At that time, Colette was pregnant with their third child, who was due in July 1970.

¹ Whenever the surname MacDonald is used herein without a first name, it refers to the Appellant Jeffrey R. MacDonald. Referenced Government exhibits that can be reduced to paper are included in the Joint Appendix. Other "GX" references are to physical exhibits.

On Sunday, February 15, 1970, Mildred Kassab called Colette. Colette said that she was "not too well" and that she was going to have an Army doctor do her third cesarean. JA651-52. Colette also expressed concern that Jeff was going to be out of the country serving in Russia as the physician for the Post boxing team at the time of the birth of their third child. JA652.² Colette told her mother that she would "give anything to come home." JA652.

On February 15-16, MacDonald worked a 24-hour shift at his moonlight job as an emergency room physician in Hamlet, North Carolina, about 55 miles from Ft. Bragg. JA1591-92. On the evening of Monday, February 16, Colette attended a class in a child psychology course.³ JA568. During the class, Colette raised the question of children climbing into their parents' bed at night, thereby forcing the mother to sleep elsewhere. JA574. Colette "appeared to be quite happy" with the consensus of the class discussion that the child should be placed in its own bed. JA574-75. Colette told her classmate that her husband "was really tired that night when she left for class" due to the work at his moonlight job.⁴ JA572.

² MacDonald's version of his travel plans differed from Colette's understanding as confided to her mother the day before the murders. Compare JA1587-98 and JA1628-31 with JA651-52.

³ MacDonald later falsely claimed that the class was in English literature. JA1879; (this is a reference to the transcript of a tape-recorded, non-custodial (but nevertheless Mirandized) interview of MacDonald by CID agents on April 6, 1970 (hereinafter "4/6/70 interview")).

⁴ MacDonald had been taking amphetamine-based diet pills during this timeframe, although his personal notes indicate that he was unsure whether he took any of the pills on the night of February 16. JA3162-80.

The physical evidence adduced at trial, see infra at 6-23, demonstrated that the following occurred: Sometime in the early morning hours of February 17, Kimberly wet Jeff's side of the bed. An argument ensued leading to a physical altercation between Jeff and Colette. At some point during this altercation, Kimberly was in the master bedroom. Colette probably used the Geneva Forge knife.⁵ At some point, MacDonald used the end of the club to fend off Colette, poking it into her sternum. Serious wounds were inflicted upon Colette and Kimberly using the club in the master bedroom. During the struggle, MacDonald's pajama top was torn and the pocket was torn off. With Colette likely unconscious, MacDonald took the badly injured Kimberly back to her room and struck her with the club. Now in cover-up mode, MacDonald obtained the Old Hickory knife and icepick and entered Kristen's room where he used those weapons to kill her. During this time, Colette likely regained consciousness and entered Kristen's bedroom where she was again struck with the club with great force. MacDonald then went to the master bedroom and took the bedding back into Kristen's room to use it to move Colette's body back to the master bedroom. The Old Hickory knife and icepick were used to make sure that all the victims were dead and to conform to MacDonald's cover story of a ritual killing. In this process, MacDonald stabbed Colette 21 times in the chest, with the

⁵ There were four weapons involved: a club (2x2 piece of lumber); the Old Hickory knife (steel paring knife); an icepick; and the Geneva Forge knife (steel paring knife with a bent blade).

icepick, through his torn pajama top that he had placed on her chest. MacDonald donned one of the many pairs of surgical gloves he maintained at the apartment and used his right hand to write the word "PIG" on the headboard in the master bedroom using Colette's blood. This was to imitate ritual killings about which MacDonald had read in an issue of *Esquire* magazine which was found in the living room. MacDonald used a Hilton bathmat to wipe off the Old Hickory knife and icepick and opened the utility room door to throw the three weapons he had used (the club, the Old Hickory knife, and the icepick) out into the wet grass just outside the door. MacDonald used a scalpel to inflict a wound upon himself. At approximately 3:45 a.m., MacDonald called the military police (MP). JA43. When the MPs arrived and gained entry to the ground floor apartment via the utility room door at the rear of the quarters (the front door was locked), they found MacDonald clad only in his pajama bottoms, lying adjacent to and partially covering his wife's body. JA49, 63, 70.

At that time, MacDonald described an alleged attack by four intruders consisting of two white males, one black male, and one blond woman wearing a floppy hat who was carrying a candle and saying "acid is groovy; kill the pigs." JA59. At 4:00 a.m., CID agent William Ivory arrived at the scene. Ivory walked through the apartment and observed Colette's body in the master bedroom on which a blue pajama top and Hilton bathmat had been placed. JA139-40, 1707-14. Ivory also observed Kimberly's body in her (south) bedroom and Kristen's body in her

(north) bedroom. JA141-143, 1715-21. On the wall above Kristen's bed, Ivory observed blood spatter (later proven to be Colette's type⁶) and two bloody bare footprints exiting from Kristen's room. JA143, 1722-23. One of these footprints was identified as having been made by MacDonald's bare left foot in Colette's bloodtype. JA627, 738-39.

In the master bedroom, Ivory observed the blood-spattered walls, the master bed from which the top bedding had been stripped, and the pile of bedding on the floor by the hall entrance.⁷ JA153-55, 1737-40. Prior to the removal of Colette's body, agents Ivory and Shaw collected MacDonald's blue pajama top (GX101) and the Hilton bathmat (GX314) from Colette's chest and abdomen, respectively. JA209. They also found the pajama top pocket on a throw rug adjacent to Colette's feet.⁸ JA210, 1707.

As Colette's corpse was being lifted onto a stretcher, Ivory noticed a dark thread sticking out of a blood clot directly under her head. JA214, 1725-32. Ivory further observed numerous other small, dark threads, both within and outside the

⁶ Each of the four members of the MacDonald family had a different one of the four ABO blood groups: Colette-Type A; Jeff-Type B; Kimberly-Type AB; Kristen-Type O. JA1755.

⁷ From the photographs taken at this time of Colette, it was later possible for the FBI to determine that MacDonald's pajama top was turned right sleeve inside-out and that the torn left panel was trailing off Colette's body. JA882-84, 1707-11.

⁸ At trial, there was uncontested expert testimony that the pocket was stained with Colette's bloodtype, that the staining was the result of smearing and soaking caused by direct contact, and that the staining occurred prior to the pocket being torn from the pajama top. JA690-97.

body outline of Colette. JA216-17, 1733. Later that morning, when a laboratory team arrived from Ft. Gordon, and during the days that followed, a detailed search of the scene would be conducted for additional threads and yarns.

At trial, uncontradicted testimony established that MacDonald's pajama top was made of a blend of polyester-cotton sewn at the seams with purple cotton thread, and the cuffs with blue-black cotton thread, JA840-42, and that the pajama top was torn from the midline of the v-neck through the left side seam to the left cuff. Also uncontradicted was testimony that threads and yarns identical in all characteristics to the constituent parts of MacDonald's pajama top, which in the expert's opinion could have originated from it, were distributed inside and outside the house as follows: In the master bedroom, 60 purple threads and 18 blue-polyester yarns and one blue-black cotton thread; in Kimberly's bedroom, 14 purple threads and five blue yarns from the bedding in which Kimberly had been wrapped; in Kristen's bedroom, one purple thread and one blue yarn were removed from the bedding; two purple threads were removed from the bloodstained and splintered club found just outside the back door. JA744-66. An extensive search of the area in front of the living room couch⁹ revealed no threads, yarns, splinters, or bloodstains. JA254. About three

⁹ MacDonald claimed he was attacked there.

feet away from the couch were MacDonald's eyeglasses with Kristen's bloodtype on the outer surface of one lens, bloody side down on the floor.¹⁰ JA683-86, 1705-06.

A large splinter bearing Colette's bloodtype was found with purple cotton seam threads on the rug immediately adjacent to where her head had rested. JA227-28, 673-74, 680-83, 1732. This same splinter was found to fit into the club, which bore Colette and Kimberly's bloodtype as well as two purple threads from MacDonald's pajama top. JA421, 757-59. The investigators observed that the pattern of splinters from the club and threads from the pajama top found in proximity to blood-spattered walls was repeated in both children's rooms. JA759-67.

In the master bedroom, a piece of bloodstained latex was found on the rug between Colette's body and the headboard with "PIG" in Colette's bloodtype. JA256-57, 1711. On the floor beneath "PIG," a purple cotton thread, identical to those of the pajama top, was recovered. GX324. Fifteen purple threads and seven blue yarns were removed from the bottom (GX119) sheet on the master bed JA296, 845-48, 671. A finger section of what appeared to be a latex glove,¹¹ also stained with Colette's bloodtype, was found inside the sheet. JA257-58.

¹⁰ MacDonald stated that he was not wearing his glasses at the time of the assault.

¹¹ At trial, the Government offered expert testimony that both questioned pieces of latex and samples taken from packages of latex surgeon's gloves (found under the kitchen sink in proximity to MacDonald's bloodtype on the kitchen floor) JA270, 287-88 were consistent and could have originated from the same manufacturer. JA808-09. The defense expert found more trace elements in common to the samples and exemplars, but opined that it was unlikely that they all originated

Shaw found the Old Hickory knife, icepick, and club outside the utility room door. JA423-25, 1734-35. The Geneva Forge knife was found in the master bedroom near the dresser by the north wall. JA1709-10.

Colette's autopsy revealed that the cause of death was stab wounds, but that she also sustained massive blunt trauma injuries which were consistent with a frontal assault and could have been caused by the club. JA481-85. Both arms were broken and Colette's head had sustained at least five separate lacerations which exposed the skull and in one place fractured it. JA478-84. She also sustained a "pattern bruise with sharp margins" on her chest that could definitely have been caused by the end of the club as it was thrust in a straight-on motion. JA485-87, 1761-62, 1742. Colette suffered 16 gaping stab wounds to her neck and chest inflicted in a perpendicular manner when her body was in a flat position (JA487-89), caused by a single-edged, sharp knife "very consistent" with the Old Hickory knife.¹²

from the same manufacturing batch. But, on cross examination, he conceded that variations in concentrations of trace elements existed as between all eight exemplar samples. See JA987-1022. [Note: In the amended Joint Appendix, these JA page numbers are illegible. More legible page numbers for the pages cited in this footnote can be found in the bottom, right corner of these transcript pages TD17-00000132 through TD17-00000167.]

¹² While no blood was found on the blade of the Old Hickory knife, when the handle was disassembled, Colette's bloodtype was found inside the handle. JA678-779, 704-05. One of the bloodstains on the Hilton bathmat (which MacDonald referred to in an interview as a "towel") matched in general shape and configuration to the blade and handle of the Old Hickory knife and could have been caused by that knife being wiped off on the "towel." JA858-59.

Colette also sustained 21 puncture wounds in her chest (16 on the left side and five on the right) such as would be caused by an icepick.¹³ JA490-91, 507, 1758-59. Colette's body was not moving at the time the icepick injuries were inflicted. JA513.

Kimberly sustained at least two blows to the head, one on each side of her face (JA519-521), and one blow to the right side fractured her skull. JA521, 1774-77. Kimberly's bloodtype was soaked into the rug at the entrance to the master bedroom, on the front of MacDonald's pajama top, spattered on the wall in her own room, and found on the club. JA702-04, 724-40. Kimberly's neck also sustained eight to ten incisional wounds which could have been inflicted by the Old Hickory knife. JA538. Streaks of Kimberly's bloodtype were also found on the Hilton bathmat. JA708-09.

Kristen did not sustain blunt trauma injuries, but she sustained multiple gaping, incisional wounds to the chest and back, some of which penetrated her heart. JA531-32, 1763-64. These wounds could have been inflicted with the Old Hickory knife. JA543. Kristen also received superficial puncture wounds to her chest consistent with the icepick. JA530-43. Kristen's icepick wounds must have been

¹³ Human blood was found inside the metal fitting of the handle of the icepick but not on the blade (JA679), and other stains on the Hilton bathmat had the general impression of an icepick being wiped on it. JA860.

inflicted when her pajama top was lifted up, as no puncture holes were found in it but were found in her undershirt. JA810-12, 1747.

In comparison to Colette, Kimberly, and Kristen, MacDonald's wounds were trivial. A technician, whose prior experience included service with a casualty clearing company of the 1st Calvary Division in Vietnam, testified that MacDonald's vital signs were stable and that while he had three wounds on his chest and left arm, the technician "did not see any icepick wounds." JA548-53. MacDonald had no wounds on his back. JA555. Further examination by a surgical resident revealed MacDonald had "a contused area of his left forehead, slightly raised, the skin abraded," four punctate wounds in the left pectoral area, and a three-quarter inch wound on his right chest at the seventh intercostal space, i.e., between the seventh and eighth ribs, a superficial laceration of the lower left quadrant of his abdomen, and a cut on his left arm. JA582-85.¹⁴ MacDonald's vital signs were "very acceptable" and "his general condition was good." JA579, 86. An X-ray of MacDonald's chest revealed a small pneumothorax (air between the lung and the inner wall of the chest) (JA585)) on the right side, which is "well tolerated" by someone of MacDonald's "relative good health, size, and robustness." JA589-90.

¹⁴ MacDonald had no wounds on his right arm, which is notable because it was the right sleeve of his pajama top that had puncture holes in it. JA1752.

MacDonald was interviewed in the hospital and described an attack on him by four individuals in the living room, one of whom struck him with a club. JA564. Then he described the weapon as a baseball bat, smooth and slippery with blood. Id. Although the interviewer made no mention of the discovery of an icepick outside the house, MacDonald said, "I felt a sharp pain in my side, and I thought this was when I got hit; but that is when I must have gotten stabbed with the icepick." JA565.

FBI Agent Caverly interviewed MacDonald on the afternoon of February 17. MacDonald told Caverly that upon retiring at approximately 2:00-2:30 a.m., he found that Kristen had wet his side of the bed; that he picked up the child and returned her to her own room; and that he returned to the living room and lay down on the sofa. JA601. Later MacDonald was awakened by his wife screaming: "Jeff, Jeff, Jeff, help me. Why are they doing this to me?" At the same time he heard Kimberly screaming: "Daddy, Daddy, Daddy." JA602. As he looked up, MacDonald saw four intruders who assaulted him. In MacDonald's description of the assault, he said the black male and one white male continued fighting with MacDonald as he pushed away from the couch toward the hallway, with these two males tearing at his pajama top. JA604. He said that he passed out and when he awoke, he was on the floor at the entrance to the hallway with his pajama top torn, bloody, and twisted around his wrist. JA605. MacDonald then claimed he moved from room to room touching all the bodies, removing a knife from his wife's chest,

and covering his wife with his pajama top and "a towel." JA606-07. On February 18, Agent Caverly interviewed MacDonald again, at which time MacDonald volunteered that he did not check either the front or back door and that he may have gone into the hall bath to stop his bleeding¹⁵ and that one of the assailants had been wearing lightweight gloves, perhaps surgical gloves. JA612-13.

On April 6, 1970, MacDonald consented to a non-custodial interview at the CID office, after the agents Mirandized him and informed him that the interview was being tape-recorded.¹⁶ Once again, MacDonald said that he had awakened hearing Colette and Kimberly each screaming and that MacDonald was simultaneously being attacked by four individuals, one of whom was a girl with a wavering light who was chanting: "Acid is groovy, kill the pigs." JA1789. MacDonald described a scenario in which his pajama top was pulled over his head and then used by him to blunt thrusts by a knife and icepick wielded by the intruders. JA1797-98. When MacDonald woke up lying on the hall steps to the living room, he said the pajama top was "still around his hands." Id. MacDonald claimed that after regaining consciousness in the living room, he went directly to the master bedroom, pulled a knife (Geneva Forge) from his wife's chest, and then covered his wife's chest with

¹⁵ MacDonald's bloodtype was found on the sink beneath the mirror. JA732-34.

¹⁶ The tape of the morning interview was played to the trial jury.

his torn pajama top to keep her "warm."¹⁷ Id. Asked to explain how the pocket from his pajama top was found on the throw rug by Colette's feet with her blood on it, MacDonald maintained that he had not made a "circuit" of the house wearing his pajama top, but had gone directly into the master bedroom and had covered his wife with it.¹⁸ JA1858-59.

Asked whether the bloody club found outside the utility room door came from his household, MacDonald claimed he "never saw it." JA1830. After learning that the dimensions of the club were approximately 1 5/8 by 1 1/2 inches, MacDonald claimed he "didn't have any two-by-twos" and if he did, they weren't cut "specifically that way" and they were outside the house in the wood well and not inside the house. JA1831.¹⁹

¹⁷ Uncontradicted testimony at trial showed that Colette's bloodtype was found in at least 25 places on his pajama top, and that some of the bloodstains were bisected by the tears in the garment, from which the examiner concluded that MacDonald's pajama top had been stained with Colette's blood prior to the garment being torn. JA711-17, 836-39. The two cuts in MacDonald's pajama top were consistent with having been made by the Geneva Forge knife found near Colette's body but were inconsistent with having been made by the Old Hickory knife. JA827-28. The cuts in Colette's pajama top were not consistent with having been made with the dull-bladed Geneva Forge knife, though they were consistent with having been made by the sharp-bladed Old Hickory knife found outside. JA816-26.

¹⁸ Kimberly's bloodtype was also found on MacDonald's pajama top. JA712-13.

¹⁹ The club (GX306) was identified by its annual growth rings, which perfectly matched as having once been part of a 2x4 piece of wood (GX141) which was a bed slat in Kimberly's bed. JA767. See also JA1743-1744. Dried paint spatters on the club also matched paint on a pair of Perry brand latex surgical gloves (JA1736, GX329) and a larger piece of wood (GX328), both of which were found in the locked storage shed. JA776; see also JA1745. Additional evidence conclusively established that the club was in the MacDonald home prior to the murders. JA773-74, 779, 784-85, 1741, 1746; GX2.

MacDonald denied that there had been an icepick in his home. JA1832. Pressed, he said, "I never said there was an icepick in the house. We had no icepick. I'm lazy and I buy ice cubes." JA1890-91.²⁰

In recounting his movements throughout the house after the intruders had left, MacDonald was emphatic that he did not go outside the utility room door. JA1869-71.

After making the above statements during the morning session of this interview, MacDonald learned for the first time in the afternoon session from the investigators that many threads and yarns identical to those of his pajama top were found in the master bedroom, and that Kimberly's blood was found on the rug and on the sheet on the floor of the master bedroom. JA1888-89. Investigators also told him that they suspected that the sheet had been used to move one of the bodies. Id.

MacDonald was initially charged under the UCMJ, but the charges were dropped after an adversary Article 32 hearing. United States v. MacDonald, 456 U.S 1, 4-5 (1982). On November 19, 1970, MacDonald had a conversation with Colette's step-father in which he claimed to have found one of the intruders, extracted a confession, and killed him. JA654-61. MacDonald also wrote a letter to

²⁰ At trial, two witnesses testified to separate occasions on which they used an icepick to chip frozen food loose from the freezer in the MacDonald home. JA649, 689.

his in-laws alluding to the account he gave in the phone conversation. GX12; see also JA654-658.

Following extensive reinvestigation by Army CID and the U.S. Department of Justice, MacDonald was indicted for the murders of Colette, Kimberly, and Kristen on January 24, 1975. The trial was delayed for several years because of ultimately unsuccessful pretrial motions and interlocutory appeals by the defense. 456 U.S at 5-6. The trial finally began on July 19, 1979.

In addition to trial evidence previously referenced, the Government introduced evidence concerning the pajama top. It had 48 puncture-type holes, none of which were found in the torn left panel or sleeve, and all but nine were in the back and right shoulder of the garment. JA816-18, 748-54. The puncture holes were consistent with having been made by the icepick, and due to the absence of torn fabric around the punctures, the examiner testified that the garment was stationary when the puncture holes were made. JA834-36. See also JA4276, 1023-24 (demonstration for jury with pajama top in motion during icepick thrusts). The pajama top was bloodstained in places before it was torn (JA836-37), and evidence indicated that the garment had been torn from the front by someone grabbing the v-neck and pulling downward and to the right. (JA828-30). When MacDonald's pajama top was turned right sleeve inside out, as it was found on Colette's body (JA1709-11), it was discovered that 21 puncture holes were visible. When 21 probes

were inserted through these 21 holes in a specific sequence, it was possible to simultaneously align all 48 punctures with 21 probes. JA885-88, 1765. The examiner concluded that all 48 punctures, which due to the absence of torn areas were made while the garment was stationary, could have been made by 21 thrusts of an icepick passing through the folds in the material. JA888. When the 21 probes were inserted simultaneously through the pajama top, it revealed a pattern of 16 holes on the left and five on the right. JA885. Colette sustained 16 puncture wounds on the left side of her chest and five on the right side. JA500-05. When the pattern made by the icepick wounds and the pattern made by the probes were plotted on graph paper, they were virtually identical. JA925-38, 1766-73, 1783.

Expert testimony revealed that the top sheet from the master bed, found on the floor of the master bedroom, contained stains in Colette's bloodtype in 26 areas and spatters of Kimberly's bloodtype in two areas. JA725-29. Further examination by the FBI laboratory in 1974 revealed that several of the stains in Colette's bloodtype were contact stains or fabric impressions. The examiner testified that two of the stained areas were made by bloodstains transferred from the right sleeve of MacDonald's pajama top. JA875-81, 1784-85. Two other areas had the general appearance of having been made by bloody left and right hands. JA867-68. Another area conformed in general appearance to a bare left shoulder,²¹ while another portion

²¹ MacDonald's pajama top was torn so as to expose the left shoulder. JA849-53, 1748.

of that area was made by blood transferred from the left sleeve of MacDonald's pajama top after it was torn. JA865-66. In two areas, stains were made by blood transferred from the left sleeve and right sleeve of Colette's pajama top. JA862-63.

The bedspread (GX104) found inside the sheet was heavily stained with Colette's bloodtype. JA730, 1756, 1781.

A pathologist testified that Kimberly would not have been ambulatory after receiving her initial blunt trauma injuries to the head. JA525. Since she was definitely struck in the master bedroom but was found tucked into bed in her bedroom, it was clear that she was carried from room to room. Kimberly's bloodtype was found on MacDonald's pajama top and also in the hall leading from the master bedroom to the entrance to her room. JA698-700. The evidence shows that Kimberly was again struck with the club in her bedroom. JA521, 758-65. The presence of both Colette's bloodtype and Kimberly's spattered on the wall opposite Kimberly's bed demonstrates that this occurred after the assault in the master bedroom. JA677, 733-35. The presence of numerous seam threads and yarns from MacDonald's pajama top in proximity to the club splinters in Kimberly's room, and in the bedding after it was turned back, demonstrates that MacDonald was the assailant. JA1782.

Physical evidence indicated that the club was wielded in Kristen's room as well. JA761-62, 743-44; GX364-67, 372, 378-79. But Kristen did not sustain any

blunt trauma injuries. Rather the evidence shows that Colette was struck with the club in Kristen's room. JA739-43; GX371, 373. MacDonald was connected to this chain of physical evidence by the presence of a purple cotton seam thread and blue polyester fabric yarn from his pajama top found on the bedspread of Kristen's bed. JA843; GX363.

The evidence shows that Colette sustained a second series of blunt trauma injuries in Kristen's room. JA739-43. Due to the severity of these injuries, Colette must have been carried back to the master bedroom. Colette was bleeding profusely on her pajamas and on Kristen's bed, yet none of her bloodtype was found on the floor in Kristen's bedroom. From the amount of Colette's bloodtype which soaked into the bedspread found inside the sheet on the master bedroom floor, and the bloody fabric impressions on the sheet, it was apparent that the sheet and bedspread were used to cover Colette as she was transported from Kristen's room into the master bedroom. A green fiber matching the throw rug beside Kristen's bed was found in the left hand of Colette. JA797. The presence of two seam threads from MacDonald's pajama top found on the bedspread demonstrates that he placed Colette on the bedspread. Numerous threads and yarns from MacDonald's pajama top were found on the master bedroom rug within the body outline of Colette, demonstrating that her body was placed on the rug on top of pajama top threads which had previously settled on the rug when the garment was initially torn.

MacDonald's bare left footprint in Colette's bloodtype was made exiting (not entering) Kristen's bedroom. JA143, 627, 738-39. Since MacDonald did not track Colette's blood into Kristen's room, MacDonald must have stepped on something soaked in Colette's blood that was subsequently removed from Kristen's room, *i.e.*, the bedspread. MacDonald consistently denied moving Colette's body covered with the sheet and the bedspread. JA1641-42.

The evidence indicates that the blunt trauma injuries suffered by Colette and Kimberly were caused by being struck with the club that was found outside near the utility room door. MacDonald is linked to the club, which he falsely denied came from his household, by the presence of two purple threads from his pajama top found adhering to it. JA4408.

The MacDonalds' quarters were in a housing area containing hundreds of virtually indistinguishable units. JA1779-80. There was no evidence of forced entry and yet there was evidence that Colette was in the habit of locking doors. JA647. MacDonald's account asked the jury to believe that somehow the group of intruders found an unlocked utility room door by happenstance, in the dark, in the rain, in an apartment complex with which they were not familiar.

MacDonald's latent fingerprints were found on a copy of *Esquire* magazine found in the living room. JA640-41. The magazine contained an account of the highly-publicized Tate-LaBianca murders perpetrated by Charles Manson's hippie

family. The magazine also contained other articles concerning the California sub-culture and some of the individuals portrayed therein bore a striking resemblance to the intruders described by MacDonald. JA945-81. MacDonald's fingerprints were found throughout the magazine. JA639-41. There was also a bloody, finger-like smudge, with a mixture of Colette and Kimberly's bloodtype on an unexposed portion of the magazine²² indicating that MacDonald picked up the magazine after the assault on Kimberly and Colette, and further that he tried to imitate the style of the Manson murders to divert suspicion.

MacDonald's account of the alleged attack on him by the intruders was contradicted by the fact that no blood, splinters, threads or yarns from his pajama top were found in the area where he said he was assaulted. His pajama top was torn from the front, not from around the back as he claimed. None of the 48 puncture holes in his pajama top were torn, as they would have been if the garment had been used to blunt icepick thrusts. He had no icepick injuries on his back, right shoulder, or right arm—the areas of his body which would have been underneath the pajama top as it was being punctured. Moreover, he had no injuries to his hands and only one cut to his left arm (corresponding to the cut in his pajama top sleeve), which

²² See JA1704-05. The magazine was pinned under the turned-on-side coffee table, and the bloodstain was found above the letters "QU" in the word *Esquire*. That portion was covered by the box of children's cutouts and thus could not have been stained by blood spatters during the assault, and there were not any blood spatters in the living room.

would be inconsistent with fending off the intruders with his pajama top, JA1632-36, and inconsistent with wearing his pajama top as it was penetrated with the icepick 48 times. JA1023-28; see infra at 76-77;.

There was evidence to suggest that MacDonald's pneumothorax was self-inflicted. A short time before the murders, MacDonald had witnessed another physician treat a patient with pneumothorax by making an incision and inserting a chest tube to remove air from the chest cavity. JA590. In making an incision in the chest wall, a physician is able to control the depth of the cut made by a scalpel. JA616. Numerous disposable scalpel blades were found in the linen closet. JA982. MacDonald's bloodtype was found on the linen closet door approximately six feet up from the floor. JA675, 732. Droplets of his bloodtype were found on the edge of the sink beneath the mirror in the hall bathroom. JA732-33.

An FBI examiner testified that bloodstains on the pajama top in the areas of the left shoulder, left sleeve, and left side seam were on the garment before it was torn. JA836-837. These bloodstains were Colette's bloodtype. JA711-17, 836-39. This disproves MacDonald's claim that his pajama top was torn during a fight with intruders in the living room long before he went to the master bedroom to discover Colette's body.

MacDonald denied assaulting Kimberly and claimed that he was not wearing his pajama top when he entered her room after the assault. But Kimberly's bloodtype

was on his pajama top (JA712-13), and numerous seam threads from his pajama top were found in Kimberly's bedding. JA745-66, 1757.

MacDonald consistently denied the weapons used in the murders came from his household. The evidence showed that the club was cut from a larger piece of wood (a 2x4) that was subsequently used as a bed slat in Kimberly's room, that it was used to support Kimberly's bed when the bed was painted, and that it was the same dimension as the scrap lumber used to make shelves in the closets throughout the house. MacDonald admitted that he built the shelves. JA1828-31. The babysitter testified that scrap lumber was kept inside the utility room. JA688.²³ MacDonald did not claim that he was struck with the club, and there were no splinters of it in the living room. MacDonald's version was that his pajama top was torn in the living room and the club was already outside the house when he entered the master bedroom. But adhering to the club were two purple cotton seam threads from his pajama top as well as numerous fibers from the throw rug in the master bedroom. A more plausible explanation of the evidence is that the threads, like the

²³ MacDonald's story was that a group of at least four intruders came to his house to commit mass murder against a fit Green Beret (who could have had a firearm at home) and his family armed only with a piece of scrap lumber to use as a club, two small kitchen knives (one with a bent blade), and an icepick, along with surgical gloves and candles. After murdering three of the occupants, the assailants wiped off the knives and icepick with a bathmat they found in the house and then, instead of taking their weapons with them, left them where they could be readily discovered by police. If the assailants also brought a baseball bat, as implied by one of MacDonald's descriptions of a weapon used against him (even though there is no evidence that a bat was used to inflict any injuries) they apparently decided to take that away from the crime scene, along with the surgical gloves and candles.

pajama pocket, came to rest on the throw rug after the pajama top was torn in the master bedroom and subsequently the club, after becoming sticky with Colette's and Kimberly's blood, also came to rest on the throw rug and acquired the pajama threads, throw rug fibers, and black wool fibers before MacDonald discarded the club outside the utility room door.

Helena Stoeckley was a hippie and drug addict local to the Fayetteville area in 1970. At trial, Stoeckley's parents were subpoenaed by the defense in an effort to locate their daughter on August 13, 1979. JA984. AUSA Jim Blackburn informed the Court that the Government had issued a subpoena for Stoeckley and had the FBI looking for her, but that she had not yet been located. JA987. At that time, Judge Dupree issued a material witness warrant for the arrest of Helena Stoeckley, and the FBI was instructed by AUSA Blackburn to apprehend her. JA3588-89.

While in Raleigh, the parents of Helena Stoeckley were interviewed by the defense team. JA3700, 3126-29. Mrs. Stoeckley informed the defense team, “[my daughter] called up, must have been a year and a half ago, four o'clock in the morning, all befuddled. She said somebody was chasing her and had taken her car keys. Then it turned out she'd had a stroke. We got her home, she was like a vegetable. She couldn't talk, couldn't eat, her face quivered, saliva would run out of her mouth ... after about three weeks she was improved, but still she was not quite right.” JA3128, 3701. She continued, “[s]he's not at all like she used to be. She's

a physical and mental wreck. She's not even a human being anymore. You find her now, sure she'll talk. She'll always talk. But I'm telling you, she's gonna talk all kinds of nonsense." Id. They discussed the MacDonald murders and Helena's reaction to them. JA3129. Mrs. Stoeckley said that Helena was very hurt by the murders and told her that no hippie would do such a thing. Id. At that time, Mrs. Stoeckley believed that it was Prince Beasley who had put the idea of Helena's involvement in the murders into her head. Id. She told the defense, "Beasley was her daddy image. He had a terrific amount of influence over her. She told me he had been up to talk to her right after it happened and then she said 'Yeah, I've been thinking, and I don't really know where I was that night. I might have been there.' And I just knew right then that Daddy Beasley had talked her into it." Id.

On August 14, 1979, FBI Special Agents Thomas Donohue and Frank Mills located Stoeckley at the Oakway Trailer Community in Oconee County, near Walhalla, South Carolina, arrested her, and interviewed her. JA2639-40, 3592. Helena told the agents that she had consumed so many different drugs on the day of the MacDonald murders that she had no recollection of where she was or what she did that day. Id. Special Agents Mills and Donohue transported Stoeckley to the Pickens County Jail, in Pickens, South Carolina, for booking. JA2642-54, 3697. No one else was in the car with Stoeckley but Agents Mills and Donohue. Id. She was logged into the jail by Special Agent Donohue at 6:32 p.m., and fingerprinted. Id.;

JA3597, 3599, 3602, 3608, 3636-47. Special Agent Mills sent a teletype to the FBI's Charlotte field office relaying the details of the arrest. JA2648-49, 3595. Stoeckley spent that night at the Pickens County Jail. After learning of Stoeckley's arrest, the parties discussed the matter in court on August 15. Upon request by the defense to interview Stoeckley, Judge Dupree instructed his law clerk to tell the Magistrate in Greenville, South Carolina, that Stoeckley was to be held with no bond and she was to be brought to Raleigh and made available to defense counsel. JA1030-32. He also decided that Stoeckley would be interviewed by each side in turn on the following day. Id.

Deputy U.S. Marshal (DUSM) Vernoy Kennedy, from Greenville, South Carolina, collected Stoeckley at the Pickens County Jail at 2:30 p.m. on August 15, 1979, and drove her approximately two hours to Charlotte, North Carolina, to meet USMS representatives from Raleigh. JA2652, 2673-79, 3639, 3609, 3624. DUSM Kennedy is described as being a black male, approximately 6'2'' tall and having a medium build. JA2653. The only other person present in the car during this time was a female guard. Id. DUSM Kennedy met DUSM Dennis Meehan and his wife, Janice Meehan, at the intersection of I-77 and I-85 in Charlotte, in order to transfer Helena Stoeckley into their custody. JA2677-78, 2686, 3639. The Meehans drove Stoeckley directly to the Wake County Jail in downtown Raleigh. No one else was in the car with them during this transport. JA2687, 2704.

Stoeckley spent the night in the Wake County Jail and, on the morning of August 16, was transported approximately six blocks from the jail to the federal courthouse, JA3695, probably by DUSM Jimmy Britt and Geraldine Holden. JA2691-96, 3647. At approximately ten o'clock that morning, the defense team interviewed Stoeckley in an office the defense was using on the seventh floor of the Federal Building. JA3134, 3699-3708. Wade Smith and Bernard Segal conducted the defense interview of Helena Stoeckley in the presence of author Joe McGinniss, who had an exclusive agreement with the defendant to chronicle the trial. JA2243-54, 3134-46, 3699-3708. Stoeckley told the defense team that she was not in the MacDonald house, nor did she have anything to do with the murders. Id. Mr. Segal had each of the "Stoeckley witnesses"²⁴ confront Helena one by one about the statements that she had allegedly made to them, but she did not change her story. Id. Stoeckley was given a bologna sandwich and left by Segal and Smith with notebooks containing all of the crime scene photographs while the defense team left to give a status report to Judge Dupree.²⁵ JA3142.

²⁴ Jane Zillioux, Prince Beasley, James Gaddis, Red Underhill, Robert Brisenstine, and William Posey.

²⁵ In an interview with author Errol Morris, Wade Smith described Stoeckley as saying in the defense interview: "I don't know anything about it. I certainly wasn't there. And I think he did it. And you promised me some food. And no one has given me any food. And you promised me I'd get something to eat.' It had gone from sublime hope to deepest of ridiculous statements. And she sat there, as she ate her sandwich, and leafed through the bloody photographs that were exhibits in the case and seemed completely and totally unmoved by them...And we had hoped that after she had some food, we would be able to persuade her. But we never were. We never were. She stuck to that story. And she certainly stuck to it when she testified." JA4021.

At one o'clock, court reconvened and Wade Smith informed Judge Dupree that the defense would need more time to finish interviewing Stoeckley. JA1047-48. Because the Government had yet to meet with Stoeckley, Judge Dupree released the jury, to reconvene on August 17, 1979, at nine in the morning. Id. The defense did not further interview Stoeckley, and she was brought to the United States Attorney's Office on the eighth floor of the Federal Building at approximately two o'clock for her government interview. JA3145-46, 2770.

Present for the government interview were United States Attorney George Anderson, First Assistant United States Attorney Jim Blackburn, Assistant United States Attorney Jack Crawley, and Department of Justice Trial Attorney Brian Murtagh. JA2772-73, 2886. No one else was present during the interview, nor was it customary for a DUSM to sit in during an interview of a trial witness. Id. Stoeckley told the prosecution team the same thing she had told the defense team: that she was neither present for, nor involved in the MacDonald murders. JA2413-14, 3775, 2887-90. At no time during the prosecution interview was Helena Stoeckley threatened. JA2413, 2775-76, 3077, 3105, 3112, 3289-91, 3718, 4011, 4100. At the conclusion of her interview by the prosecution, Stoeckley was returned to the Wake County Jail for the night by DUSM Britt, and probably Geraldine Holden, because Judge Dupree refused to release her from custody pending her trial testimony. JA1050, 3647.

On Friday, August 17, 1979, Stoeckley testified before the jury from nine o'clock in the morning until almost one-thirty in the afternoon. JA1055-1221. During this time, she detailed her extensive history of drug use. JA1096-97. In her testimony, Stoeckley explained that during the course of the day and night on February 16, 1970, she had six or seven intravenous injections of a mixture of heroin and opium, had used marijuana all day, and had taken a "hit" of mescaline shortly before midnight, which had been given to her by Greg Mitchell with whom she had conversed in her driveway. JA1095-97. The next thing she recalled was returning to her house in a car driven by some soldiers at approximately 4:30 a.m. JA1098-1100. She denied any involvement in the murders and admitted that her knowledge of the killings was the result of what she heard on the radio news bulletin and what others had told her. JA1195-97. Stoeckley told the jury about her involvement in witchcraft and the rituals she had performed involving the use of a candle. JA1085-90. Stoeckley told the jury that she did own a blond wig,²⁶ a floppy hat, and pairs of both white and brown boots of varying heights, but that she started to wear them less and less and eventually got rid of them altogether because they tied her to the

²⁶ MacDonald had not said that the female assailant wore a wig. Instead, he said that she had long blond hair. When the defense later focused on Stoeckley, they advanced the possibility of a wig because Stoeckley was dark-haired. JA3647, 1178. Also, Stoeckley did not resemble the composite drawing made from MacDonald's description in 1970. Compare JA3730 to 3647 and 1778. When MacDonald was shown a photograph of Stoeckley in 1970, he stated that he had never seen the girl in the photograph. JA1638-40.

murders and people continuously approached her about being involved. JA1131-47, 1188-89.

She recounted for the jury her various interviews with Army CID and Detective Beasley in both Fayetteville and Nashville, Tennessee. JA1147-55. She was questioned about her recollection of conversations with each of the “Stoeckley witnesses.” JA1101-21, 1206-07. At that time, she admitted to talking with her neighbor William Posey about the MacDonald murders back in 1970, and stated that she could not recall her whereabouts on the night they were committed. Id. She recalled talking with Jane Zillioux, Red Underhill, Officer James Gaddis, and CID Agents Dick Mahon and Robert Brisenstine in Nashville about the MacDonald murders, but did not remember what she said during those conversations. Id. Helena told the jury that each of the many times she spoke with the CID she told them the same thing: that she could not remember where she was during the murders.

She was shown several crime scene photographs while on the stand, including those depicting what she described as a “hobby horse,” those of Kristen MacDonald’s body in her bed after having been murdered, and a photograph of the MacDonald’s living room. JA1122-25. Segal tried to get Helena to say that she recognized the photographs and the people and places therein, but she did not. Id. Helena told the jury that when she had viewed the photograph of the “hobby horse” the day before her testimony during the defense interview, it had appeared broken to

her, even though Segal openly challenged her on this fact in court. JA1167-70.²⁷ Helena told the jury that she had never been to 544 Castle Drive before and had never seen the “hobby horse” in person. Id. After Helena Stoeckley denied recognizing those items or being at 544 Castle Drive, Segal asked to approach the bench, where he moved to treat her as a hostile witness and proceed as if on cross-examination. JA1157-61. At that time, Segal made representations to the Court that during the defense interview the previous day, Helena said that she had ridden the rocking horse²⁸ and that she remembered standing at the end of the MacDonalds’ couch with a candle. Id. Segal also told Judge Dupree that Helena had stated she remembered standing outside of the MacDonald house and saying, “My God, the blood; oh my God, the blood.” JA1159. Blackburn then told the Court that not only had Helena said nothing of that sort during the prosecution interview, but also that he had run into Wade Smith after both interviews the previous day and Smith had relayed to him that Helena had, similarly, said nothing helpful to the defense case during the defense interview. JA1160, 2267-68, 2274-79, 2777-85. Smith then responded to the Court that Blackburn was correct, that generally Helena had told

²⁷ On the day after the murders, *The Fayetteville Observer* published a photograph taken through the window of Kristen’s bedroom. JA3712. The “Wonder Horse,” mounted on springs, is visible. It is not broken. As demonstrated at the 2012 hearing, if even one of the springs had been broken or missing, its appearance would have been quite different. JA2962, 2988-96. The photo was introduced at trial. JA1693.

²⁸ It would be virtually impossible for an adult to ride the “Wonder Horse.” See supra n.27.

the defense she didn't remember, but that several things she said would give an "interesting insight into her mind."²⁹ JA1161. No other member of the defense team reported hearing any of the things Mr. Segal represented to the Court regarding Helena Stoeckley's statements during the defense interview. JA2243-54, 2267-68, 2274-79, 3134-46, 3151, 3699-3704. Judge Dupree then asked Helena, in the presence of the jury, whether she had told the same thing to both the prosecution and the defense, and she stated that she had. JA1161-62. When direct examination resumed, Stoeckley told the jury that she had had a dream where she saw a body on MacDonald's sofa and she was holding a candle. JA1174-1175. She admitted to the jury to hanging funeral wreaths outside her home the week after the murders. JA1175-78.

During cross-examination, Stoeckley told the jury that she had never been in the MacDonald apartment, did not know any member of the MacDonald family, and

²⁹ When Mr. Smith was questioned about this exchange at the 2012 evidentiary hearing, he stated: "Let me just put it this way, I was absolutely devoted to this case and upheld my role as counsel and I'm still devoted to this case, but I did not hear Helena Stoeckley say useful things for us. It is certainly possible. And I mentioned a while ago, maybe I was out of the room. I do not know the answer. But I can only speak for myself and that is that when I was present she did not say things that helped us." JA2279. This is corroborated by the testimony of author Joe McGinniss as well. McGinniss stated: "You know, I talked to Wade Smith after the trial and he told me he felt that he had been between a rock and a hard place because he couldn't stand up there and undermine his co-counsel by telling the court Mr. Segal's not telling the truth, but on the other hand, he's not—as an officer of the court, he's not going to participate in trying to fabricate anything or put up—you know, say anything that was not true ... he walked a fine line and he was very happy when he got to the other end." JA3155. See JA2073-76 (district court's 2008 order commenting on Segal's statements in this bench conference). In its July 2014 order, the district court found as a fact that "Stoeckley made no such incriminating statements during the defense interview." JA4546.

did not participate in the murders. JA1189-91. She further stated that her neighbor, William Posey, had tried to get her to say things about the murder that she didn't want to say, and that he had offered to give her an alibi. JA1206-07.

Once Stoeckley finished testifying, she was released from federal custody, but placed under subpoena by the defense. JA1220-21, 1229-31. The Court then proceeded to conduct a voir dire of the "Stoeckley witnesses" in order to make a determination as to the admissibility of their hearsay testimony. JA1231-1317. These were Jane Zillioux (JA1231-46), James Gaddis (JA1247-53), Red Underhill (JA1254-58), Robert Brisenstine (JA1258-80), Prince Beasley (JA1281-94), and William Posey (JA1294-1317).³⁰

After hearing arguments regarding the admissibility of alleged out-of-court statements by Stoeckley to the "Stoeckley witnesses," Judge Dupree stated that he would issue his ruling on Monday morning, and recessed court. JA1342.

At the close of court on Friday, August 17, 1979, Segal provided Stoeckley with a subpoena and check for witness fees for subsistence over the weekend. JA1488. Stoeckley called Segal on Friday night to inform him that she was staying at the Downtowner Motel. Id. She had seen a television story about the testimony on Friday and wanted to ask Segal whether people had really said such things about

³⁰ A full recitation of the testimony of each of these witnesses is contained in the district court's order of July 24, 2014. JA4426-31; see also JA4222-34.

her. JA1489. Segal informed Stoeckley that the defense team and witnesses were moving to the Downtowner on Saturday, and that she would need to move to a different hotel, because it would be inappropriate for her to be in the hotel with the defense team. Id.

On Saturday morning, August 18, 1979, Ernest Davis, Stoeckley's fiancé, called Segal to inform him that they were moving to a different hotel, but did not tell him where they were going. Id. That evening, Stoeckley called Judge Dupree at home and told him that she was "living in mortal dread of physical harm by Bernard Segal, counsel for the Defendant, and that she wanted a lawyer to represent her." JA1517. She told Judge Dupree that she was staying at the Journey's End Motel. Id.

Red Underhill also learned that Stoeckley was staying at the Journey's End Motel. JA1456. He got information from the motel manager that Helena had been involved in an altercation with Davis, and had a black eye. JA1490. He called Segal to inform him of what he had learned, who then sent a member of the defense team, Wendy Rouder, to check on Stoeckley. JA1489-91, 2511.

On Sunday, August 19, 1979, Wendy Rouder and Red Underhill went to the Journey's End Motel. JA1434-36, 1445, 2511. When they arrived, Stoeckley had a black eye, and was disheveled. JA1435, 1445-48, 2512, 3240-44, 3699. Ernest was

still present, but left shortly thereafter to return to South Carolina. JA1467. Underhill loaned him the bus fare. JA1463.

Underhill and Rouder were told by the manager at the Journey's End that, due to the disturbance, Stoeckley was no longer welcome to stay there. JA1446, 1472, 2512. While Segal's secretary made arrangements for Stoeckley to check into the Hilton Hotel, Rouder stayed with Stoeckley at the Journey's End. JA1468-72, 2512-14. During that time, they discussed a variety of things related to the MacDonald murders. Stoeckley allegedly told Rouder that she thought she could have been there that night and that after seeing the photographs of the rocking horse and of Kristen in her bed that the scene looked familiar. Id.

Rouder and Underhill then drove Stoeckley to the Hilton and checked her in. JA1449, 1473, 2514. It was decided that Rouder could not stay at the Hilton with Stoeckley, but Underhill would. JA1449, 1473. After check-in, the three drove back to the Downtowner so that Underhill could get his clothes. JA1474, 2514-16. While waiting for him in the car, Stoeckley and Rouder discussed the MacDonald murders again, at which time Stoeckley allegedly said that she remembered standing at the end of MacDonald's couch holding a candle that was not dripping wax, but dripping blood. JA1474. When Rouder asked Stoeckley why she didn't say that in court,

Stoeckley told her that she couldn't with those "damn prosecutors sitting there."³¹

JA1574, 2515-16.

Rouder then drove Stoeckley and Underhill back to the Hilton and dropped them off, but it was not fifteen or twenty minutes before she was called back to the Hilton to take Stoeckley to the hospital to get her nose treated. JA1481. After being treated at the hospital, Stoeckley returned to the Hilton, where she spent the night. JA1436-37, 1450-53, 1458. While at the Hilton Sunday night, and again on Monday morning before court, she and Underhill discussed the MacDonald case. Id. Underhill later testified that Stoeckley had told him during this time that she could name three individuals involved in the MacDonald case, but that she was afraid for her life so she would not.³² JA1451.

As Rouder and Underhill were helping Stoeckley change hotels on Sunday, Steve Coggins, law clerk for Judge Dupree, was busy trying to find a lawyer for Stoeckley. JA1517-18. It proved difficult to do on a Sunday afternoon, but he was able to secure the services of Jerry Leonard, who appeared in court on Monday to represent Stoeckley. Id.

³¹ Rouder's 1979 testimony, using notes made that weekend, did not include an allegation that Stoeckley said "They'll fry me." JA1469, 1464.

³² This was the third time in less than 24 hours that Stoeckley had told someone she was afraid. Each time, it was fear of a different person (Segal, Ernest, unnamed intruders), but none of them were members of the prosecution team.

On Monday morning, August 20, 1979, Judge Dupree issued his ruling as to the admissibility of the hearsay testimony of the “Stoeckley witnesses” at trial. JA1343-52. After careful consideration of the transcript of the witnesses’ testimony, the briefs of both parties, and all of the relevant case law he could find on point, he ruled “that these proposed statements do not comply with the trustworthy requisites of [FRE] 804(b)(3) or (b)(5); that far from being clearly corroborated and trustworthy, that they are about as unclearly trustworthy—or clearly untrustworthy, let me say—as any statements that I have ever seen or heard.” JA1344. He noted that her statements, both in court and out of court, were “all over the lot.” JA1344-45. Importantly, Judge Dupree also held that any hearsay testimony of the “Stoeckley witnesses” would be cumulative given that “[Stoeckley] has told everything—she told this jury everything that [the defense] proposed to show by these witnesses that she told them.” JA1346. He did permit the defense to call the “Stoeckley witnesses,” however, who had information regarding Stoeckley’s whereabouts and actions around the time of the MacDonald murders. JA1353-58. The defense proceeded to call Beasley, Zillioux, Underhill, Posey, and Gaddis, five of the six who had testified on voir dire.³³ JA1359-1568.

³³ Only Army polygrapher Brisenstine was not re-called to testify in front of the jury. MacDonald repeatedly misstates in his brief that the “Stoeckley witnesses” testimony was excluded at trial. See Appellant’s Brief at 2, 26. As reflected in the transcript, the jury heard a significant amount of testimony from the “Stoeckley witnesses,” albeit not everything MacDonald proffered.

Prince Beasley told the jury that he had seen Helena Stoeckley often during the relevant time period wearing a blond wig and floppy hat, and associating with two white men and a black man wearing a fatigue jacket with E-6 stripes. JA1368-70. He testified that he was unable to locate Stoeckley on the night of the murders after receiving MacDonald's description of the alleged intruders, but that he saw Helena at her house on the night after the murders and she was with at least three males in a car. JA1373. Beasley stated that he called dispatch and told them he had some suspects in custody regarding the MacDonald murders and to come take a look, but that no one ever came. JA1376. He also told the jury that Helena had, in fact, later given him the floppy hat and blond wig. JA1377. Further, he identified a drawing of an individual Stoeckley had named as a suspect in the MacDonald murders as Alan Mazzarole.³⁴ JA1396. Judge Dupree asked Beasley what the names of the individuals were who he saw with Stoeckley that night, but he could only name Greg Mitchell. JA1399.

Next, the defense called Jane Zillioux. JA1404. After covering some preliminary topics—how she knew Stoeckley and what her demeanor was like in Nashville—Segal proceeded to ask Zillioux a series of questions about what

³⁴ Later investigation by the FBI revealed that Mazzarole could not have been present for the murders because he was incarcerated at the time. JA3091-94; See JA4247.

happened during the portion of the defense interview of Stoeckley that Zillioux witnessed on August 16. JA1409-22.

Red Underhill was called to testify about his interaction with Stoeckley in Nashville, and more recently in Raleigh during trial. JA1427-37. Unable to get into evidence any of Stoeckley's statements to Underhill in Nashville, Segal switched tactics and started having Underhill explain the events of the preceding weekend. JA1434. Underhill explained first seeing Stoeckley that weekend at the Journey's End Motel, and the time he spent with her at the Hilton, but when Segal began to ask him what Stoeckley said to him, the prosecution objected and the jury was sent out. JA1437. Underhill detailed for Judge Dupree the events of the weekend and the things that Stoeckley said to him. See JA4229-31.

Segal then called Rouder to expound upon Underhill's description of events and tell the court what statements Stoeckley had allegedly made in her presence. Id. After hearing the arguments of both sides, Judge Dupree further excluded this hearsay testimony and said, "but the picture emerges, though, of a person whose mind is so far impaired and distorted by this drug addiction that she has become and remains in an almost constant state of hallucination. That she is extremely paranoid about this particular thing, and that what she tells here in court and what she tells witnesses, lawyers in a motel room, simply cannot have attached to it any credibility at all in my opinion. I think it is not as required by [FRE] 803(b)(3) clearly

trustworthy. It is perhaps the most clearly untrustworthy evidence that I have had put before me.” JA1513-14. He went on to say that the jury, having heard Stoeckley testify and having heard most of the “Stoeckley witnesses” themselves, are in the best position to evaluate her credibility. Id.

Even though the alleged out-of-court statements of Stoeckley to Underhill and Rouder had been excluded, Judge Dupree permitted the defense to call two additional “Stoeckley witnesses” to testify before the jury. William Posey testified, as he had during voir dire, that he saw Helena the night of the MacDonald murders, and told the jury about Helena’s manner of dress and actions after the murders.³⁵ JA1520-68. He also told the jury about Helena’s interest in witchcraft and her association with Alan Mazzarole. JA1537-39.

The final “Stoeckley witness” heard by the jury was James Gaddis. JA1573-81. After having Gaddis describe the nature of his relationship with Stoeckley, namely that she was his criminal informant in Nashville, Segal began a series of questions carefully crafted so as to convey the answer within the question. JA1577. Objections were sustained as to most of the questions before Gaddis could answer, and so the examination proceeded more like a narrative by Segal of his own version of events. JA1578-81; see also JA2069. The prosecution did not cross-examine

³⁵ The majority of Posey’s testimony was discredited by his own confession, subsequent to a polygraph examination, to testifying falsely at the Article 32 hearing. See JA4228.

Gaddis, and the defense moved on to its other witnesses, unrelated to Stoeckley. JA1581.

Stoeckley and her lawyer, Jerry Leonard, remained in the courthouse, subject to recall, until Monday, August 27, 1979. JA1660-61. During this time, neither side was allowed access to Stoeckley, but Leonard did have conversations with Wade Smith regarding whether the defense would recall her as a witness. JA1619, 4019. Closing arguments were heard on August 29, 1979. After only 6.5 hours of deliberation, the jury found MacDonald guilty of two counts of second degree murder and one count of first degree murder. The conviction was affirmed on appeal.³⁶

In 1980, defense investigators Ted Gunderson and Prince Beasley made promises to Stoeckley and subjected her to intense and “unethical” interrogation. JA4492-94, 4245-47.

Helena Stoeckley died on January 9, 1983, from pneumonia and cirrhosis of the liver. JA2665. In 1984, MacDonald filed post-conviction motions largely based on Stoeckley’s “confession” to Gunderson. United States v. MacDonald (MacDonald III), 640 F. Supp. 286, 315, 318-24 (E.D.N.C. 1985). As the Government prepared to respond, FBI Agent Raymond “Butch” Madden

³⁶ For a complete procedural history of the case, see JA4391-98. This Court rejected MacDonald’s challenge to the sufficiency of the evidence. United States v. MacDonald (MacDonald II), 688 F.2d 224, 234 (4th Cir. 1982) (“Our canvass of the record . . . gives ample warrant for the verdict.”).

interviewed Stoeckley's mother on July 19, 1984. JA3107, 3718, 3722, 3726. He interviewed her at her residence and she did not have any difficulties with her memory or sight. JA3111. Mrs. Stoeckley told SA Madden that "when Helena came home after the MacDonald murders, [she] told her in a perfectly sober and non-drug state that [she] did not know anything about the MacDonald murders." Id. She also relayed that her husband had questioned Helena after the MacDonald murders and told her to tell the truth, but that Helena told him, too, that she did not know anything about the murders. JA3109, 3718. It was Mrs. Stoeckley's opinion that Helena could not have been involved because she was not violent and loved children. Id. Mrs. Stoeckley did not believe that Helena had been treated fairly by Ted Gunderson and Prince Beasley. Id. She told SA Madden that Helena's mind was "gone," especially when she was drinking or doing drugs, and that when she was under the influence she often thought about the case but she was not involved. Id. It was Mrs. Stoeckley's opinion that Helena was "used," but she did not say by whom. JA3110. Mrs. Stoeckley said that, during the trial, "they" wanted her to take drugs to help her remember the details. Id. Mrs. Stoeckley had saved all the newspaper articles about the MacDonald trial and when Helena returned home, she allowed her to read them. Id. Helena struggled with drugs throughout the 1970s, and was committed to Dix Hospital for mental health treatment. Id. When she was released from treatment in 1977 she moved home and she was "never right." Id. Mrs. Stoeckley told SA

Madden that she believed Helena enjoyed the attention that the MacDonald case had brought her, and that the only reason these issues kept arising is because Prince Beasley would not leave Helena alone. Id. Helena told her mother that her testimony at trial was the truth and that it was the extent of her knowledge. JA3111. Not long before her death, Helena was in terrible physical shape and that is when she gave a statement to private investigators in California,³⁷ and told them that she thought she was at the murder scene. Id. At no time during this conversation did Mrs. Stoeckley ever tell SA Madden that Helena had been threatened by Blackburn or any other prosecutor. Id. at 3112. She also did not mention Helena telling her anything about a hobby horse. JA3113.

MacDonald's post-conviction motions were denied, MacDonald III, 640 F. Supp. 286, and this Court affirmed. United States v. MacDonald (MacDonald IV), 779 F.2d 962, 966 (4th Cir. 1985) (accepting Judge Dupree's meticulous recitation of the facts). MacDonald continued to file unsuccessful post-conviction challenges.³⁸ JA4392-93. In 1997, this Court affirmed the denial of MacDonald's latest motions but remanded to the district court to oversee DNA testing. JA4393.

³⁷ See MacDonald III, 640 F. Supp. at 319-21 (4th Cir. 1985)

³⁸ In affirming the denial of MacDonald's second motion for habeas relief, this Court said: "Here, over twenty years after the event of the crime, MacDonald reopens his case with specious evidence. While we are keenly aware of MacDonald's insistence as to his innocence, at some point we must accept this case as final. Every habeas appeal MacDonald brings consumes untold government and judicial resources. Furthermore, successive appeals of little merit must cruelly raise and then

Jimmy Britt was a DUSM who had occasion to transport Stoeckley to and from the federal building from the jail about six blocks away on day 20 of the 29-day trial. Years after Britt retired from the USMS, between February 23, 2005, and February 28, 2006, he created five different sworn statements containing allegations regarding Helena Stoeckley and her involvement in the MacDonald trial. JA3648-92. The affidavits are internally inconsistent with one another. In his February 23, 2005, “Statement of Facts,”³⁹ notarized by former DUSM Lee Tart, Britt claims that there were certain “irregularities” during the MacDonald trial that he wanted to bring to light. JA2330-31, 3648. Britt alleged that the individuals involved in the “irregularities” were Judge Dupree, Rich Leonard,⁴⁰ John Edwards,⁴¹ and Jim Blackburn. *Id.* He noted that he had an appointment with Wade Smith the next day and that he would provide details at that time. *Id.*

disappoint the hopes of one, like MacDonald, faced with a long term of incarceration.” United States v. MacDonald (MacDonald VI), 966 F.2d 854, 860-61 (4th Cir. 1992).

³⁹ This first sworn statement was not included in the filing of the § 2255 motion in this case, and the Government did not become aware of it until August 22, 2012, at a pre-hearing meeting with Lee Tart. Subsequent to that meeting, the Government requested again, and was provided, the additional affidavits and statements of Britt on August 24, 2012.

⁴⁰ J. Rich Leonard served as a law clerk to Judge Dupree from September of 1976 through August of 1978. JA2748. He later served the EDNC as Clerk of Court, U.S. Magistrate Judge, and U.S. Bankruptcy Judge.

⁴¹ John Edwards was a law clerk for Judge Dupree from 1977 to August of 1978 (almost a year before the MacDonald trial). JA2751.

Britt did go to Smith's office the next day and give a sworn statement. JA2331. Present for the statement were Wade Smith, Attorney Timothy Junkin, and Lee Tart. In this "Interview Under Oath," Britt told Smith that he had kept silent until now out of respect for Judge Dupree, Judge Rich Leonard, and Senator John Edwards. JA2334, 3649. Britt said that he was asked to travel to the United States Marshals Office in Charleston, South Carolina, to pick up Helena Stoeckley. JA2337, 3659-60. He stated that when he arrived to pick her up, her boyfriend Ernest was with her and she was wearing the floppy hat that was described at trial. JA2338, 3661. According to Britt, he took Geraldine Holden with him to pick up Stoeckley, and Stoeckley's boyfriend Ernest rode with them back to Raleigh. *Id.* During the ride, Britt stated that Stoeckley told him she was at Jeffrey MacDonald's home and that a hobby horse was in the living room.⁴² JA2340, 3662-63. Upon arrival in Raleigh, he claimed to have checked her in at the Holiday Inn, and then to have picked her up there the next morning for court. JA2341, 3664. When they got to the courthouse, he said he escorted Stoeckley first to the defense interview, and then to Jim Blackburn's office who, according to Britt, was the United States Attorney at the time. JA2342, 3665. At that time, Britt stated that Blackburn asked him to stay for the interview, and that no one was present other than Blackburn,

⁴² The Wonder Horse was in Kristen's bedroom, not the living room. See JA234.

Stoeckley and Britt. JA2343, 3666. According to Britt, Stoeckley then proceeded to tell Blackburn that she had been inside the MacDonald house and had seen the hobby horse; it was at that time that Britt claimed Blackburn threatened to indict Stoeckley for murder if she testified that way in front of the jury.⁴³ JA2344, 3667-69. When the interview was over, Britt claimed he immediately took Stoeckley down to the courtroom,⁴⁴ at which time he saw Blackburn going into Judge Dupree's chambers, and then the two of them coming back into the courtroom approximately ten to fifteen minutes later. JA2345, 3670-71.

The next affidavit was signed on October 26, 2005, and notarized by an employee of Wade Smith. JA2352, 3684. In this affidavit, Britt stated that he did not come forward earlier out of respect for Judge Dupree, but he omitted reference to Rich Leonard and John Edwards. JA2352-53, 3685. The location from which he had retrieved Helena Stoeckley had also changed; in this affidavit, Britt claimed to have picked her up at the County Jail in Greenville, South Carolina, and there is no mention of the floppy hat. JA2353, 3685. Britt still maintained in this affidavit that

⁴³ No person to whom Stoeckley spoke, or allegedly spoke, about this subject, from the completion of the prosecution interview on August 16, 1979 to her death in 1983, is documented to have reported that Stoeckley told him or her about a threat from Blackburn and its supposed impact on her trial testimony. This includes Judge Dupree (JA4224-29), Wendy Rouder (JA4230, 4242-43), Red Underhill (JA4231), Jerry Leonard (JA4237, 4250), the elder Helena Stoeckley (JA4235-36, 4237-40, 4248, 4063), Ted Gunderson, Prince Beasley, and Homer Young (JA4247, 4242-44), Butch Madden (JA4245-46), and Sara McMann (JA4243-44).

⁴⁴ In fact, court had recessed for the day. JA4535-36.

Geraldine Holden accompanied him, noting that Holden was, by the time of the affidavit, deceased so that no one could corroborate this account with her. JA2355, 3685. In this version of events, however, Britt left out the presence of Ernest Davis, and where he took Stoeckley upon their return to Raleigh. Id. In paragraph 15, however, Britt reverted to Charleston as Stoeckley's place of origin, rather than Greenville, as mentioned in paragraph 11 of this same affidavit. JA3685. Facts had changed with respect to the interview of Stoeckley by the Government, as well. Britt now stated that he had been asked by the U.S. Attorney's Office to be present for many interviews in the course of his career, and that it is possible that the U.S. Attorney at the time, George Anderson, and Brian Murtagh may have both been present, but may have left at some point. JA2358, 3686-87. He also now recalled Stoeckley asking the prosecution for a sandwich at this time.⁴⁵ Id. The method by which Stoeckley had gotten from the U.S. Attorney's office on the eighth floor to the courtroom on the seventh floor had also now changed; Britt stated in ¶27 that he took her down the stairs, whereas, in his "Interview Under Oath" he stated that they used the elevator. JA3670, 3687. Finally, in this October affidavit, Britt stressed the supposedly unethical conduct of Judge Dupree in accepting cakes baked by the jurors in the MacDonald case. JA2359-60, 3687.

⁴⁵ Stoeckley's request for a sandwich actually came during the defense interview, which was conducted from approximately 10:00 a.m. to 1:00 p.m. See JA4219 at 4221.

Britt's affidavit created on November 3, 2005, was the affidavit filed with his January 17, 2006, petition for relief pursuant to 28 U.S.C. § 2255. JA3688. No other affidavits or statements were mentioned or disclosed at that time. This affidavit was in substantially the same format as the October 26 affidavit, but a few key facts had changed. This version of events consistently cited Greenville, South Carolina, as the location from which Stoeckley was retrieved. JA2361-62, 3689. Additionally, any reference to the cake incident had been removed from the new affidavit. JA2361-63. Britt asserted that "Ms. Stoeckley told Mr. Blackburn the same things [regarding her presence at the MacDonald murders] she had stated to me on the trip from Greenville to Raleigh." JA3690.

The last of Britt's averments came in the form of an "Addendum to Affidavit," which Britt completed on February 28, 2006. JA3692. This one was notarized by Laura Redd, assistant to one of MacDonald's attorneys, Hart Miles. JA2364, 3693. The addendum contained many facts not present in any of the earlier affidavits and statements. Britt now claimed that he and Geraldine Holden had transported Helena Stoeckley to the courthouse on August 15 (sic), 1979 for her interviews with the parties. JA2365, 3692. The addendum also rearranged the facts of the prosecution interview, now stating that it started at noon, that George Anderson and Brian Murtagh were definitely present for the entire interview, and that Blackburn threatened to indict her as an "accessory to murder." JA2367. Britt averred that

after Stoeckley testified on Friday, August 17, 1979, he took her and checked her into the Journey's End Motel.⁴⁶ JA2369, 3692. He further stated that Chief Deputy Eddie Sigmon contacted him on Sunday, August 19, told him that someone from the hotel had called Judge Dupree and said that Stoeckley and her boyfriend had to leave because they were fighting, and asked Britt to check her out of the Journey's End and into the Holiday Inn.⁴⁷ JA2369-70, 3692. The addendum stated that on Monday August 20, 1979, Judge Dupree announced that he would not allow Helena Stoeckley to testify again because her brain was "scrambled like an egg," and that he directed the jurors not to consider any of her Friday testimony.⁴⁸ JA2370-71, 3692. Finally, Britt averred that he was asked by U.S. Marshal Hugh Salter to go to see USMS employee Maddie Reddick and get a check for Stoeckley's subsistence

⁴⁶ Stoeckley actually checked in that night to the Downtowner, and moved to the Journey's End the next day because the defense team was moving into the Downtowner that Saturday. JA2369; See JA4229.

⁴⁷ Eddie Sigmon never asked Jimmy Britt to go to Stoeckley's aid at any time that weekend, and, in fact, the Marshals Service would not have been involved at all with a witness who was not in Government custody. JA2722. Jimmy Britt never went to Helena Stoeckley's hotel. Members of the defense team—Wendy Rouser and Red Underhill—moved Helena to the Hilton—not the Holiday Inn—on Sunday, August 19. See JA4232-34.

⁴⁸ Judge Dupree never made any such ruling, and Stoeckley remained in Raleigh under subpoena for another week in case the defense wanted to recall her as a witness. See JA4231-34.

during the trial, take it to her, and put her on a bus back to Charleston, South Carolina, which he did on August 20, 1979.⁴⁹ JA2371-72, 3692.

On March 22, 2006, after the filing of the § 2255 motion based on the Britt affidavit, the FBI interviewed Jerry Leonard. JA3291, 4011. Leonard told the FBI that while Helena had gotten into a fight with her boyfriend and had reported to Judge Dupree that she had been harassed by Bernie Segal, she, at no time, informed him of any threats made to her by any member of the prosecution team. Id. Additionally, Leonard knew Jimmy Britt, and told the FBI that Britt never came to Leonard to report any threats made to his client, nor was it his understanding that Britt sat in on Helena Stoeckley's interview. JA3291-93, 4012. Leonard conveyed that he was a former law clerk to Judge Dupree and had a relationship with him such that if anything had been amiss during trial he could have reported it to him. Id.

The DNA test results were released to the parties and filed with the Court by the Government in March 2006.⁵⁰ MacDonald then filed a motion seeking to add the DNA results as an “additional predicate” to his § 2255 claim. JA2020. This became known as “the DNA claim” and later “the unsourced hairs claim.” See infra at 74-75.

⁴⁹ This assertion was disproven at the hearing, see JA2722-24, 2738-40, and is contrary to the trial record. See JA4231 (Stoeckley remained in Raleigh throughout that week). Stoeckley's home was in Walhalla, SC, about 258 miles from Charleston. JA3696, 3694.

⁵⁰ Prior to the 2012 evidentiary hearing, the parties stipulated to the DNA results. JA4103.

In early 2007, Eugene Stoeckley allegedly had a conversation with his mother, about his sister's involvement in the MacDonald murders. JA2449-50. At this time, the elder Stoeckley was in an assisted living facility and suffering from macular degeneration, in need of oxygen therapy, and had ongoing heart problems. JA2467. According to Gene Stoeckley, it was then that his mother told him his sister had confided in her (during the younger Stoeckley's last visit home in the fall of 1982) that she was present at the scene of the MacDonald murders.⁵¹ Instead of calling law enforcement with this information, Gene Stoeckley contacted Kathryn MacDonald, the defendant's current wife, via the Jeffrey MacDonald website. JA2471. The two exchanged phone numbers and Gene called Kathryn during his lunch break on Friday, March 30, 2007. JA2472. Kathryn drove from Maryland to North Carolina that same day, and on Saturday, March 31, 2007, Gene and Kathryn spent several hours over lunch discussing the case. JA2473. In the late afternoon, they got in the car together and drove to Fayetteville so that Kathryn could speak to Mrs. Stoeckley. JA2474. Kathryn requested that a statement be prepared, and called attorney Hart Miles in Raleigh, who drove down immediately with his paralegal, Laura Redd. JA2476. While waiting on Miles and his paralegal, Kathryn MacDonald typed a draft of Mrs. Stoeckley's affidavit on the assisted living

⁵¹ This encounter between Helena and her mother occurred mere months before Mrs. Stoeckley's interview with the FBI in which Mrs. Stoeckley was adamant that Helena was not involved in the murders. See JA4235-36.

facility's computer. JA2477-78. Once Miles and Redd arrived, Redd and Kathryn MacDonald took turns typing on the computer in the facility's office until an affidavit was completed. JA2578-79. The affidavit was a total of 3 pages; the first two pages were typed in numbered paragraphs, 1 to 15. JA4063. Neither of the first two pages was initialed by the elder Mrs. Stoeckley, nor were they numbered. The third page was a signature page with the word "Untitled" centered at the top of the page, and "Page 1" centered at the bottom of the page. Id. There are no staple holes on the pages of the affidavit. JA2863, 2865. Gene allegedly read the affidavit to his mother and then allowed her to make corrections. JA2480. According to Gene, "[s]he had the pen in her hand and I just placed her hand in the general area of the document where the line is." JA2485. The affidavit was signed by the elder Helena Stoeckley, Gene Stoeckley, and Grady Peterson, and notarized by Redd. JA4063. Mrs. Stoeckley's signature was not on the signature line; rather, it was above and to the right, signed at an angle.

Gene and Kathryn had arrived at the nursing home between 3:00 and 4:00 p.m., and Miles and Redd arrived around 6:00 or 6:30 p.m. JA2485, 2576. The time period from the call to Miles (after Gene and Kathryn had separately interviewed Mrs. Stoeckley) until the time the affidavit was completed was about six or seven hours, making the time of completion somewhere between nine and ten o'clock. JA2581.

On May 6, 2007, the defense filed a “Motion to Supplement Applicant’s Statement of Itemized Material Evidence,” attaching Mrs. Stoeckley’s affidavit in support of their previously filed § 2255 motion. JA4063-65. Upon becoming aware of this new affidavit by the elder Helena Stoeckley, the FBI requested a second interview with her. JA2493. Gene Stoeckley requested to be present during this interview. JA2494. During the interview on April 25, 2007, Mrs. Stoeckley told the agent that Helena loved children and old people and could never hurt one. JA2495-96. Mrs. Stoeckley told Agent Cherokee words to the effect that she had never made up her mind about MacDonald’s guilt. JA2497. At that time, Gene Stoeckley told Agent Cherokee that this interview was going quite differently than the earlier interview with Kathryn MacDonald and Hart Miles. JA2498.

Jimmy Britt died on October 28, 2008. JA2068. On November 4, 2008, the district court issued a detailed Order denying defendant’s motion to add an additional predicate and motion to supplement the statement of itemized evidence for failure to apply for, and receive, a pre-filing authorization from the Fourth Circuit. JA2070. The Court also denied MacDonald’s Motion to Expand the Record (JA2038), leaving only the original 2255 motion or ‘Britt claim’ for the Court’s gatekeeping consideration. JA2071-72. With regard to the Britt claim, the court held that “MacDonald has not demonstrated that the Britt affidavit, taken as true and accurate on its face and viewed in light of the evidence as a whole, could establish by clear

and convincing evidence that, but for constitutional error, no reasonable factfinder would have found MacDonald guilty of the murder of his wife and daughters.” JA2077.

On April 19, 2011, the Fourth Circuit reversed and remanded the case for further proceedings. MacDonald XI, 641 F.3d at 614-17. A hearing was ordered for October 31, 2011. JA2080. After a series of attorney changes and requested delays by MacDonald, the hearing was rescheduled for September 17, 2012. JA2165.

In preparation for the hearing, the Government interviewed Jerry Leonard on August 24, 2012. JA3393. During this meeting, Leonard told the Government that he got the call from Steve Coggins to represent Stoeckley on Saturday night (8/18/79), not on Sunday night (8/19/79). JA3304-05. Leonard said that he did not recall ever talking to Wade Smith during the trial, and that during the trial he didn't feel like he needed to talk to anybody about anything related to the case. JA3371-72.

At the September 2012 hearing, the defense called Jerry Leonard to the stand. JA2608. A bench conference was held at which Mr. Widenhouse informed the court that his understanding was that Leonard would assert the attorney-client privilege. JA2609. A discussion ensued about the relevant case law and the Government requested that, in light of the First Amendment, that the conversation regarding the

law of attorney-client privilege be held in open court. JA2612, 2617, 2626. The Government made clear that it did not have any opposition to the privilege being lifted and Leonard being allowed to testify regarding his conversations with Stoeckley. JA2613. The hearing was recessed for the evening so that the Court could have an opportunity to read the relevant case law. JA2627. The next morning, the Court, having reviewed Swidler & Berlin v. United States, 524 U.S. 399 (1998), ruled that the privilege survived Stoeckley's death. JA2632.

Later, the Government asked the Court to reconsider the matter of waiver of attorney-client privilege with respect to Jerry Leonard's testimony, in light of footnote three in the Swidler & Berlin case regarding exceptional circumstances. JA2871-72; 524 U.S. 399, 409 n.3 (1998). The Government requested that Mr. Leonard give an in camera proffer of his testimony to inform the Court's decision. The Court decided that the proper procedure at that point would be for Mr. Leonard to prepare an affidavit, which it would review in camera and then make a determination about the privilege. JA2873-74.

The last witness for the Government was Joe McGinniss, author of Fatal Vision, the 1984 book about the MacDonald trial. McGinniss was approached by MacDonald to attend the trial and write a book about it, in exchange for MacDonald receiving a percentage of the royalties. JA3119-20. He was given unfettered access to any "incidents, characters, dialogues, action scenes and situations" that he desired

in connection with the publication of the book. JA3120. He joined the trial team and lived with them at a fraternity house in Raleigh during the trial. JA3121. McGinnis testified about the interview of Stoeckley's parents by the defense team, and how Mrs. Stoeckley characterized her daughter. JA3127-29; see JA4219-20, 3700. He was present for, and wrote about, the defense interview of Helena Stoeckley, because Segal wanted to make sure that McGinnis was there to record the "great moment of triumph." JA3130, 3701. During his testimony, McGinnis read the excerpt from Fatal Vision describing the interview, where Segal paraded the "Stoeckley witnesses" one by one into the interview room to confront Helena, but she always maintained that she had no memory of being present or involved in the murders. JA3134-42, 3701. McGinnis testified that even though Segal told Judge Dupree that he needed time to clarify a few matters and he would turn Stoeckley over by two o'clock, the interview did not continue after Segal returned from court. JA3146.

McGinnis had received a trial transcript from Segal, which included bench conferences, but the bench conference where Segal told Judge Dupree about the things Stoeckley had allegedly said during the defense interview was not among the materials given to McGinnis. JA3154. McGinnis testified that the things Segal represented to Judge Dupree during that bench conference were not the things that Stoeckley said during the defense interview. JA3151-55; see supra at 33.

After the trial, while McGinniss was writing his book, he continued to be in touch with MacDonald. JA3158. He flew out to visit MacDonald at Terminal Island, CA, and MacDonald gave him the run of his condo and all of the relevant materials in it so that McGinniss could continue working on the book. Id. Among the items in the condo, McGinniss located the handwritten notes of Jeffrey MacDonald, that he had made for his military lawyer during the Article 32 hearing in 1970. JA3160, 3935, 3953. MacDonald himself had told Prosecutor Victor Woerheide that these notes were the most complete and accurate account of what occurred the evening of the murders, but he would not turn them over to the Grand Jury. JA3161, 3935, 3953. In these notes, MacDonald wrote that, on the evening of the murders, he might have, “but probably didn’t,” take one fifteen milligram capsule of Eskatrol Spansule, which he called “speed,” and that the CID did not know about it but that it was possible his urine and blood could have some residue. JA3162-63, 3245-46, 3935, 3953. McGinnis further testified that when he was finished writing the book, he sent the notes and his manuscript to 60 Minutes, which confronted MacDonald with the information regarding his amphetamine use during an interview. JA3179; GX4001.

After McGinniss testified, the Government rested its evidence, and Mr. West, attorney for Jerry Leonard, made another plea to the Court to take Leonard’s testimony in camera or in a closed courtroom. JA3261. The Government opposed

this motion. JA3261-71. The Court agreed, and Jerry Leonard was then called as a defense witness. JA3271.

Leonard testified for the defense on direct that he was called by Judge Dupree's office one weekend during the MacDonald trial and asked to represent Stoeckley, who was a material witness. JA3273-74. He testified that he picked her up late on a Sunday afternoon, and couldn't recall from where, but thought that it might have been the federal building. JA3274. Leonard claimed that he had to find her lodging and so he took her to his house, and she slept on a recliner chair at his house that night. JA3274-75. Leonard stated that he had to drive her to court on Monday morning and that, on the way there from his house, he checked her in to the Hilton Hotel. JA3275. He testified that he stayed with her in an assigned room in the courthouse almost all day, but couldn't remember if they went out for lunch. JA3276. Leonard couldn't remember if he brought up the issue of the statute of limitations or if Stoeckley did. JA3277. They also discussed what her testimony would be if she were to take the stand, and she told him that she did not remember anything about the evening of the murders. JA3277-78. Leonard alleged that, later that day, Stoeckley asked him what he would do if she told him she were at the MacDonald house. Leonard told her he would continue to represent her, then she told him she had been there. JA3279. He claimed that she told him that while she was in the MacDonald house that the phone rang and she answered it, and she told

him about a hobby horse. JA3280-81. He did not give any further specific details from memory during his testimony, rather, MacDonald's counsel pulled Leonard's affidavit up on the courtroom monitor and had Leonard read it into the record. JA3281-89. After reading his affidavit into the record, direct examination abruptly ended and the Government proceeded to its cross-examination. JA3289, 4098.

Leonard was first asked whether Stoeckley, at any time, represented to him that a member of either the defense or prosecution teams had threatened her, and he said that she did not. JA3289-90. He recalled speaking with the FBI in 2006 and telling them that Stoeckley had not told him of any threats. JA3290-91. Leonard could not remember, however, the exact timeframe of this FBI interview, nor did he recall that its purpose was to ask about whether Britt ever came to him and told him about threats to Stoeckley by the prosecution. JA3291-92. He testified that he never received any information that Britt sat in on any interview with Stoeckley. JA3292-93.

Leonard stated that it is his opinion that MacDonald did not receive a fair trial because of how Segal conducted himself in front of the jury. JA3294-96. He was then shown a copy of JA4013-20,⁵² an excerpt from Errol Morris' book, detailing a conversation between Jerry Leonard and MacDonald defense investigator John

⁵² See also JA4323.

Dolan Myers about five months after the MacDonald trial. JA3297. Leonard did not recall the date of this interview, nor did he recall telling Myers that he did not feel the prosecution had proved its case and that MacDonald had been “screwed.”⁵³ JA3299-3300, 4019. Leonard was then questioned about statements he made to Morris concerning the composition of the MacDonald jury and Wade Smith’s chances of winning the trial, but could not specifically recall making those statements to Morris, even though he admitted that the interview with Morris had taken place only six months prior to his testimony. JA3301-02. Leonard was questioned about how he came up with the date of August 19, 1979, as the day he was appointed to represent Helena Stoeckley and said that he “put it together.” JA3304-05. He admitted that when he met with Government counsel on August 24, 2012, that he did not know at that time what date his representation began, but thought it was Saturday night. JA3304-05. He further stated that he went back to try to determine the date when he was asked to prepare his affidavit for the evidentiary hearing. JA3307. When he spoke with Morris, Leonard speculated as to the reasons Judge Dupree appointed him to represent Helena Stoeckley.⁵⁴

⁵³ Leonard saw only about one hour of the 9-week trial and “never saw any of the Government’s presentation.” JA3295-3300, 4312. He was also completely mistaken about the education level of the jury. See JA4251.

⁵⁴ JA4014. (“I had been head of Legal Aid after I left Judge Dupree, so he thought I could understand Helena, because probably I had a drug background or something. I’m kind of kiddin’ about that. But he told me that he thought that I could communicate with her better.); but see JA1517-18.

Leonard was next questioned about his interview with the FBI. He did not recall telling them that the statute of limitations may have been a factor in Judge Dupree appointing him to represent Stoeckley. JA3308, 4011. He was next asked about the statement in his affidavit that, at the time of his appointment, Stoeckley had already testified in front of the jury, and whether that was his clear recollection. JA3312. Leonard responded that he only recently found out she had actually testified in front of the jury. Id. He could not recall telling the FBI agents that he did not remember Stoeckley testifying in open court. JA3313. He admitted that the first time he heard that Stoeckley had testified in front of the jury was when Hart Miles told him in about 2006. JA3314. He could not recall the date of his interview with Miles, and thought that it was after his interview with the FBI, but then conceded it must have been before, since he told the FBI agents that he had been interviewed by Miles. JA3314.

Leonard was questioned about additional statements made to Morris. JA3316. He said that it was possible he had told Morris that Judge Dupree would not let Stoeckley testify because of her past drug use. He said “I could have. You know, what happens is you find out stuff later and then you confuse that with what actually you knew at a particular time.” JA3317, 4017. When asked about his presence in the courtroom during Judge Dupree’s ruling on the Stoeckley witnesses, Leonard could not recall being present but said that he “apparently” was because he appears

in the transcript at a bench conference that day. Additionally, he admitted that, as recently as his conversations with Morris, he was under the impression that Stoeckley had testified outside the presence of the jury, but then admitted that he told Morris she had not testified at all. JA3322, 4020. He did recall telling Morris that he just remembered sitting there and it “seemed pretty boring.” JA3324, 4020.

The following colloquy ensued:

Q. So, as I understand your testimony, you’re saying that it’s sometimes difficult to distinguish what you learned in 1979, and what you’ve learned since?

A. Yeah, and that’s the danger. And I haven’t talked to – I’ve tried real hard not to talk to people about this. I’ve tried real hard not to – I mean, I’m talking about the trial in general, although I have obviously. And what happens is you hear stuff at a later date and it all becomes part of what you know and it’s hard to peel away the context that you heard one thing from the other.

JA3324-25.

Leonard agreed that he told the FBI in 2006 that he had to secure lodging for Stoeckley at the Hilton, and that Judge Dupree provided a court allowance to cover the duration of her stay. JA3325-30, 4011. When confronted with portions of the trial transcript proving that it was Rouder and Underhill of the defense team who checked Stoeckley into the Hilton on Sunday, Leonard stated that it was still his memory that he had done so. JA3330-43. When confronted with the fact that Stoeckley was already staying at the Hilton when he was appointed he stated: “I don’t remember that, I really don’t.” JA3340.

Next, Leonard was asked about the statement in his affidavit concerning his conversation with Stoeckley about the statute of limitations and how he remembered telling her it was “up in the air.” JA3343. He did recall telling the FBI in 2006, and telling Morris in 2012, that there was a potential ten-year statute of limitations, six months of which would have been left at the time of trial, but stated that he has since realized that what he told them was an incorrect legal proposition. JA3343-46, 4020. He recalled wanting to keep Stoeckley off the stand because she was “all over the place.” JA3347. When asked if Monday, August 20, 1979, was the first day of his representation of Helena Stoeckley, he replied that based on the transcripts he had read, that was correct. JA3349-50.

Leonard was next questioned about the preparation of his affidavit, and he testified that he prepared it himself, only a few days before the evidentiary hearing began, without the benefit of any notes or documentation from his work in August 1979. JA3351-53. He stated that Stoeckley’s mention of the hobby horse was not necessarily connected to her presence at the crime scene, but just a random statement. JA3353. He also mentioned that he had been given access to the crime scene photographs himself during the trial, and saw the photograph of the horse, and that in the photograph it appeared broken to him. JA3354-55. Leonard was then asked to recall the specifics of what Helena Stoeckley had told him, without the aid of his affidavit on the courtroom monitor, and was able to say that she told him she

was a member of a cult who went to the MacDonald house, but was unable to give the level of detail present in his affidavit. JA3356-59. Leonard further testified that Stoeckley had told him that there were four or five males with her at the MacDonald house, but that he did not put that in his affidavit and that he “just added that number” to his testimony at the evidentiary hearing. JA3364. He stated that although he did not put it in his affidavit, he had conversations with Stoeckley about how she could help herself by giving information to the government. JA3366.

Leonard testified that at the time Stoeckley allegedly made these admissions to him, he never brought it up with the Court or asked the State Bar for guidance on the issue. JA3366-68. He admitted that during his interview with the Government in August of 2012, he stated that he didn't remember needing to talk to anybody about Stoeckley's statements at the time of the trial. JA3372. He did not recall ever having a conversation about the case with Wade Smith. JA3371, 4019. Leonard testified that he did try to contact the State Bar in 2007, but then admitted that it was actually Hart Miles, attorney for MacDonald, who had made the inquiry. JA3379-80, 4031, 4027. Similarly, Leonard stated that he was aware that Stoeckley died in 1983 but that her death did not change his opinion regarding attorney-client privilege and whether he should come forward with any information. JA3377. He testified that well-publicized cases regarding whether privileged information could be disclosed after the client's death did not cause him to feel that he could come forward

with any information regarding Stoeckley's statements. JA3382-86. Leonard testified that his representation of Stoeckley "seemed boring," and the fact that she had allegedly made admissions to him in one of the most famous murder cases in North Carolina did not trigger a response in him because she had told so many conflicting stories. JA3387.

Leonard admitted the truth of statements made to author Errol Morris, specifically, the following: "Honestly, my memory is not a hundred percent and for anything that I say to be reliable, even as I'm trying to fill in the facts for you, is fairly dangerous I think because honestly I'm wrong on some key facts" and "I'd like to be a little shining light but I just don't know that I can." JA3388, 4019-20.

The Government then asked to approach the bench and tendered an exhibit to the Court, without asking Mr. Leonard about it in open court, offered as part of the evidence as a whole in considering the likely credibility and probable reliability of Leonard's evidence. JA3390. This was JA4024, the North Carolina Supreme Court decision in 1995 publicly censuring Leonard for:

(1) his behavior while publicly intoxicated in Key West, Florida which resulted in his arrest and a negotiated plea of nolo contendere to the criminal offense of trespass after warning; (2) his behavior while publicly intoxicated in Raleigh, North Carolina which resulted in his conviction of the criminal offense of indecent exposure; and (3) his continuing refusal, even after admitting to psychological dependency, to abstain from the consumption of alcohol, the use of which caused the aforementioned incidents and conduct.

On redirect, Leonard stated that he believed the things Stoeckley had told him were no different than the things to which she had already testified, and had already told other people with regards to the case, and so it didn't trigger a need to tell anyone about them. JA3396.

At the conclusion of Leonard's testimony, the Government offered an exhibit (JA3964); a compilation of MacDonald's statements during his testimony at trial, to be considered with regards to the evidence as a whole, and in conjunction with JA1892, a compilation of the defendant's pre-trial statements, already in evidence at trial. JA3402.

Following extensive briefing,⁵⁵ the district court found that "MacDonald has not established, by clear and convincing evidence, that no reasonable factfinder would have found him guilty . . . and therefore he had failed to satisfy the gatekeeping standard set forth in 28 U.S.C. 2255(h)(1)." JA4556. The court also denied MacDonald's motion to alter or amend the judgment. JA4605. This appeal followed. JA4631.

SUMMARY OF ARGUMENT

The district court has made the more searching inquiry that this Court mandated, by considering all the evidence as a whole, that is, the evidence in the record from the trial and the multiple collateral attacks, as well as everything that

⁵⁵ Post-hearing litigation is described in JA4514-16 and JA4606-09.

MacDonald submitted in filings or introduced at the hearing. As shown above, and as reviewing courts have found before, the trial evidence of guilt was strong. After exhaustive review of the evidence, the district court found that evidence related to the Britt claim (including Britt, Jerry Leonard, and the elder Stoeckley) was unreliable and incredible, and that the unsourced hairs evidence was not exculpatory scientific evidence. These findings were not error, let alone clear error. Without any newly discovered evidence that is reliable, credible, and probative of innocence, the district court properly found that “MacDonald has failed to establish, by clear and convincing evidence, that no reasonable factfinder would have found him guilty of the murder of his wife and two daughters.” JA4389.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN FINDING THAT MACDONALD HAS NOT MET THE GATEKEEPING STANDARD OF 28 U.S.C. §2255(h)(1).

I. Standard of Review.

This Court “review[s] [the district court’s] legal conclusions de novo and its findings of fact for clear error.” United States v. Roane, 378 F.3d 382, 395 (4th Cir. 2004); see also United States v. Pettiford, 612 F.3d 270, 275 (4th Cir. 2010). Findings of fact are “basic, primary, or historical facts: facts ‘in the sense of a recital of external events and the credibility of their narrators.’” Thompson v. Keohane, 116 S.Ct. 457, 464 (1995) (quoting Townsend v. Sain, 372 U.S. 293, 309 (1963)). Findings of fact resulting from an evidentiary hearing are reviewed for clear error. United States v. Ragin, 820 F.3d 609, 617 (4th Cir. 2016) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). In order to reverse a finding as “clearly erroneous” the reviewing court must find that “on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed.” Id.

II. Discussion of Issue.

A. The district court’s approach.

The district court scrupulously followed this Court’s remand instructions to “consider all the evidence, old and new, incriminating and exculpatory, without

regard to whether it would necessarily be admitted under [evidentiary rules].” JA4398-99, citing MacDonald XI, 641 F.3d at 612. Before, during, and after the evidentiary hearing in September 2012, the court received and considered everything that MacDonald put forward.⁵⁶ See, e.g., JA4520-21. As requested by MacDonald, the court considered, for gatekeeping purposes, all the evidence pertaining to his various claims together. JA4518-21. Thus the court considered all “the proffered evidence—with due regard for the likely credibility and probable reliability thereof . . .,” JA4399, citing 641 F.3d at 614, and “assess[ed] whether all the newly discovered evidence, viewed in light of the evidence as a whole, is sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the murders of his wife and daughters.” JA4520-21. The court wrote a 169-page order making careful factual findings and concluding that, considering all the evidence in the entire record, “the court cannot find that any of the new evidence, given its unreliability and incredibility . . .” was sufficient to meet MacDonald’s gatekeeping burden. JA4540.

B. The Britt claim and related evidence of Stoeckley’s “confessions.”

⁵⁶ The district court afforded MacDonald every possible advantage in considering his proffered evidence, even allowing MacDonald to add, almost one year after the hearing, an additional claim (“the footnote claim”). JA4517.

The evidence that MacDonald proffers as “newly discovered” relating to the Britt claim can be grouped into three categories: Helena Stoeckley’s alleged confessions to Jimmy Britt, to Jerry Leonard, and to her mother.

1. Jimmy Britt

The Government completely disproved Britt’s narratives claiming to have witnessed a confession by Stoeckley. Unsurprisingly, the district court found that the details of Britt’s statements were “fabrications or confused memories” and that “all of Britt’s statements [were] incredible and unreliable.” JA4527; see also JA4536.

Britt gave five different sworn statements regarding Helena Stoeckley, all of which materially differ. JA3648-93. Every material assertion of fact in the affidavit (JA3688) filed in conjunction with MacDonald’s §2255 motion, as well as his other four sworn statements, is demonstrably false.⁵⁷ JA3731-48. At the evidentiary hearing, the Government presented indisputable evidence that Britt did not transport Stoeckley to Raleigh and compelling evidence that he did not participate in the Government’s interview of her in the federal building.⁵⁸ Thus, each of the three

⁵⁷ Because Britt’s statements have been proven false, the testimony of Mary Britt to whom he allegedly relayed a similar false scenario should be equally disregarded. The same is true of the affidavit of Lee Tart, which was withdrawn anyway prior to the hearing. JA2078.

⁵⁸ Britt is alleged to have conversed with Stoeckley about her involvement in the murders during “the long (5 hour) journey from Greenville, SC . . .”, JA2064-67, and it was this account that Stoeckley supposedly repeated to prosecutors in Britt’s presence the next day. JA3690. Since

prongs of the Britt claim—the confession, the threat, and the fraud—have been shown to be false. See JA4534-36; supra at 26-29, 42-44, 47 n.43, 51, 60.

For these reasons and others explained in the district court’s order, JA4525-27, 4534-36, and those set forth earlier herein, supra at 45-51, the district court’s finding with regard to Britt’s statements is not clearly erroneous.

2. Jerry Leonard

Jerry Leonard’s testimony was also found to be “not likely credible or probably reliable.” JA4531.

The version of events relayed by Jerry Leonard both in his affidavit (JA4098) and during his testimony is directly contradicted by evidence more contemporaneous to the events.⁵⁹ JA4249-56; supra at 26-37.⁶⁰ The Government showed that Leonard has a history of substance abuse, leading both to criminal charges as well as public

there was no “long journey” with Stoeckley, then Britt’s claim that he heard her repeat that same confession to prosecutors the next day is patently false.

⁵⁹ For example, Leonard’s testimony to 33-year-old recollections to the effect that he did not converse during the trial with MacDonald defense counsel Wade Smith about Stoeckley’s statements to Leonard (JA3372) is far less reliable than the trial transcript (JA1619) and the 1/23/80 memo of MacDonald’s investigator (JA4323), which show that Leonard did, with Stoeckley’s permission, discuss these matters with Smith. See JA4241, 4311-14. The district court was right to rely on the contemporaneous record in such instances.

⁶⁰ MacDonald argues that Leonard’s claim that Stoeckley confessed to him is supported by the inclusion of the detail about the alleged phone call of Jimmy Friar. The district court found, however, that Friar’s statements were unreliable and that they have been available to the public since an August 22, 1979, article in the Raleigh NEWS & OBSERVER, and were thoroughly recounted in an opinion of this Court in 1992. JA4530-4531, 4341-43.

censure by the N.C. Supreme Court. JA4024. Leonard plainly admitted that he could not distinguish actual memories from things he later learned later about the case.⁶¹ Supra at 63, 66; JA4531.

For these reasons and others explained in the district court's order, JA4525-27, 4534-36, and set forth earlier herein, supra at 59-67, the District Court's finding regarding Leonard's evidence is not clearly erroneous.

3. Helena Stoeckley Sr.

With respect to the elder Stoeckley's 2007 affidavit recounting alleged confessions to her by her daughter in 1979 and 1982, the district court did not find it necessary to decide whether it was credible or reliable⁶² because the court found that any such confession from the younger Stoeckley "cannot constitute credible, reliable evidence . . ." JA4533. This finding is not clearly erroneous.

⁶¹ MacDonald argues that Leonard's testimony at the evidentiary hearing was "unequivocal" and that his "memory was clear" as to the matters set forth in his affidavit, citing JA3396-97. The transcript reveals, however, that Leonard was asked "And are you telling us that your memory is clear about everything you put in your affidavit?" He responded: "What I put in my affidavit is what I am willing to testify to." That does not constitute an averment of clear memory. See also JA4502, 4531, 4249-56.

⁶² The Government respectfully submits that the circumstances under which this affidavit was executed in 2007 render it unreliable and that it cannot be considered clear and convincing evidence of what the younger Stoeckley may have said to her mother in 1979-82. See supra at 52-54. Once again, the more reliable evidence is that which was memorialized close in time to the events. Compare JA3699-3701 (elder Stoeckley in 1979 is sure that younger Stoeckley was not involved in MacDonald murders) and JA3718-29 (elder Stoeckley in 1984 still sure younger Stoeckley—who died in 1983 and would no longer need to be shielded from criminal liability—was not involved and that any "confessions" were suspect) with JA4063-65 (allegedly professing to believe that younger Stoeckley was indeed involved based on statements of younger Stoeckley prior to death—and prior to elder Stoeckley's 1984 interview with FBI).

C. The DNA or “Unsourced Hairs” Claim

1. Unsourced Hairs

At the evidentiary hearing in this matter, the Government proved, and MacDonald conceded, that the three unsourced hairs (specimens 58A(1), 75A, and 91A) were neither bloody nor forcibly removed. JA4507-14, 3561-62, 2105, 2140-43, 2150-57. The district court so found, rejecting “. . . unsupported assertions in motions and memoranda . . .” JA4521-4522.

The district court reasoned that it would be equally likely that a jury would find these hairs to be mere artifacts or debris and disregard them, as it had other unsourced evidence presented at trial and touted by MacDonald then as evidence of intruders. JA4522. Considering the unprobative nature of the unsourced hair evidence against the backdrop of the evidence as a whole, the district court found that the unsourced hairs do not constitute exculpatory scientific evidence. JA4524.

MacDonald argues repeatedly that specimen 91A was a hair found in the fingernail scrapings, or under the fingernail of Kristen MacDonald. Appellant’s Brief at 21, 43, 53, 60-61. Though the burden of proof is on MacDonald, the Government has clearly demonstrated through documentary evidence and the sworn statements of lab personnel that this assertion is false—no hair was present under Kristen MacDonald’s fingernails at the time of her autopsy, nor in her fingernail

scrapings,⁶³ certainly not one that was bloody or forcibly removed. See JA4295-4310, 4315-20, 3463-93, 3749, 3871, 3958, 3962, 2081, 2092-97, 2103-04, 2117-24, 2145.

2. “Sourced” hairs

In his brief, MacDonald completely ignores the other DNA results that strengthen the Government’s case. See generally JA4306-08, 3889-3934. Most importantly, the hair that was found in Colette’s left hand, AFDIL 51A(2), which the defense touted at trial as evidence of intruders, see JA793-95, 1699, 4307-08, was shown to have the defendant’s mtDNA sequence. JA4110.

The district court carefully considered the “actual evidence,” JA4521, relating to sourced and unsourced hairs per the DNA results, in conjunction with all the other evidence in the history of the case, and found that the unsourced hairs evidence did not constitute exculpatory scientific evidence. JA4524. This finding was not clearly erroneous.

⁶³ Again, Appellant’s brief only asserts that Specimen 91A came from under Kristen’s fingernail, without citation to evidence that it did. Appellant’s Brief at 21, 43, 53, 60-61.

D. The Evidence As a Whole

MacDonald renews many old arguments in his characterization of the “evidence as a whole.” He contends that the “newly discovered evidence” suddenly makes these old arguments valid. Each one of these contentions has been repeatedly disproven, a fact which is unchanged by any purportedly newly discovered evidence produced since 2006. The Government and judicial findings have discredited these assertions throughout the course of the 41 years of litigation. Some of these are addressed below.⁶⁴

1. The Pajama Top.

As discussed supra at 17-18, the pajama top reconstruction was powerful evidence of MacDonald’s guilt at trial. MacDonald again renews his argument against the validity of the reconstruction, citing the conclusions from the FBI’s review of hair evidence disclosed by the Government to MacDonald in September 2014 and raised in MacDonald’s Rule 59(e) pleadings. MacDonald’s argument is misplaced. MacDonald argues that Paul Stombaugh⁶⁵ was the chief architect of the pajama top reconstruction. Appellant’s Brief at 29. It was actually Shirley Green

⁶⁴ Space limitations prevent discussion of all such defense assertions, but the district court’s order deals comprehensively with them. JA4403-4516.

⁶⁵ The lack of importance of the questioned six lines from the trial cross-examination of Stombaugh is explained by the district court. JA4625-26. The jury was informed that microscopic hair identifications were not conclusive. JA793-94, 4571.

who found the “solution” and created the reconstruction, and so testified. JA4573-4603. Moreover, the examinations by both Green and Stombaugh were thoroughly but unsuccessfully challenged by MacDonald at trial. Id. The jury was not persuaded.⁶⁶ After thorough supplemental briefing on this issue, the district concluded that “none of the new evidence changes this court’s conclusion that MacDonald failed to establish, by clear and convincing evidence, that no reasonable factfinder would have found him guilty of the murder of his wife and daughters.” JA4623.

2. Milne and Mica.

MacDonald suggests that a woman matching Stoeckley’s description was seen by “several unbiased witnesses near the crime scene at or around the time of the murders.” Appellant’s Brief at 11. The witnesses to which he refers in this citation are James Milne and MP Kenneth Mica, and MacDonald overstates their testimony.

During Milne’s belated and farfetched account, he testified that he saw two men and a woman with candles marching through the neighborhood on the night of

⁶⁶ MacDonald again contends that the threads in the house could have come from his pajama bottoms. Appellant’s Brief at 31. This argument, which was presented at trial, is unavailing. See JA4273-75. The pajama bottoms were thrown away by a hospital technician who said they were bloody and torn. JA561-62. In the 4/6/70 interview, MacDonald said nothing about the pajama bottoms being torn during the struggle. Nothing is known about their fabric. JA4257. Even if the material was the same and the pajama bottoms were already torn as MacDonald moved about the apartment that night, this would not explain away the powerful inculpatory evidence presented at trial. See JA4274-75.

the murders. He said the woman was hatless, had light-brown blondish hair, and was wearing a bed sheet or choir robe. JA1043-44, 1045-46. This is far from “matching” the description of Stoeckley or MacDonald’s alleged female intruder. Milne was never shown a photograph of Stoeckley or an artist’s sketch from MacDonald’s description of the alleged female intruder.⁶⁷ Moreover, Milne said he saw this group between 11:45 p.m. and 12:15 a.m. JA4421. According to MacDonald, the “intruders” did not enter his home until after 2:30 a.m. It is very unlikely the Milne’s band of choristers could have marched around the neighborhood for more than two additional hours without someone else noticing.

Mica said he saw a lone woman more than one-half mile from the MacDonald apartment. MacDonald states that Mica thought “it strange that [the woman] would be out at that hour on a rainy night.” Appellant’s Brief at 9, 11, 37. Mica actually testified that it was “unusual, [but] it was not uncommon.” JA131. He said she was wearing a matching dark raincoat and rain hat, perhaps “somewhat floppy.” JA81-82, 133. He could not say what color the woman’s hair was and could not recall any boots. He observed her only briefly through the rain and the side curtain of a Jeep, and his fellow MP did not see the woman. JA80-83. Here again, Mica was not shown a photograph of Stoeckley or an artist’s sketch from MacDonald’s description

⁶⁷ MacDonald’s description of the female intruder given in the weeks after the murders does not “match” a description of Stoeckley. See supra at 30 n.26.

of the alleged female intruder. As with the other trial evidence, no new analysis is needed. The jury found this unpersuasive, and it is not enhanced by any of the Britt claim evidence. JA4259-61, 4276-79.

3. Physical evidence.

MacDonald renews his arguments regarding a host of physical evidence that he suggests either is evidence of intruders or demonstrates ineptitude in the handling of the crime scene. Appellant's Brief at 37-38. The jury and/or habeas courts have already considered and rejected these challenges, and the items advanced as newly discovered evidence in the post-2005 habeas filings do nothing to change the analysis. A thorough exposition of each item is located in the following filings: synthetic blond fibers⁶⁸ (JA4453-59, 4289-94); black wool fibers (JA4453-59, 4283-89); the murder weapons (JA4259); the bloody syringe (JA4450-51, 4280-83); bloodstain evidence (supra at 8-9, 14 n.17, 18-20, 22-23; JA4262-64); wax drippings (JA4271-4273); and unidentified prints (JA4265-71).

⁶⁸ Because MacDonald described the alleged female intruder as blond and Stoeckley was dark-haired, he has been forced into arguing for the 46 years since he learned of Stoeckley's existence that the female intruder wore a blond wig. As the district court noted, MacDonald's evidence regarding saran fibers is "equivocal as to whether the fibers originated from a wig or a doll." JA4524. It remains highly unlikely that the fibers got there when Stoeckley paused during the mayhem of a mass murder to use Colette's hairbrush to brush Stoeckley's blond cosmetic wig, made of stiff saran fibers. See id.

CONCLUSION

The district court's findings, reached after careful review of all evidence submitted, that the Britt claim evidence (from that from Britt, Leonard, and the elder Stoeckley) was unreliable and incredible, and that the unsourced hairs evidence was not exculpatory scientific evidence, are certainly not clearly erroneous. With nothing new that is probative of innocence, it logically follows that MacDonald has failed to show that newly discovered evidence, viewed in the light of the evidence as whole, establishes by clear and convincing evidence that no reasonable factfinder would have found him guilty of these offenses.

For the foregoing reasons, the United States respectfully requests that the judgment of the district court be affirmed.

Respectfully submitted, this 6th day of September, 2016.

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/s/ Jennifer P. May-Parker
JENNIFER P. MAY-PARKER
Signature of Filing Party

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016, a copy of the foregoing document has been served this day upon the Appellant in this action by filing same with the Court via the CM-ECF system, which will send notification of such filing to counsel for Appellant as follows:

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