

1 BY THE FBI ON A FALL KNOWN TO HAVE BEEN OWNED BY COLETTE
2 MACDONALD, IT HAS BEEN ESTABLISHED THAT THIS FIBER
3 ORIGINATED IN COLETTE MCDONALD'S OWN FALL. SO YES, WE DO
4 HAVE EVIDENCE THAT ONE OF THESE FIBERS ORIGINATED IN A
5 WIG, COLETTE MACDONALD'S WIG, AND I INVITE THE COURT'S
6 ATTENTION TO NUMBER SEVENTEEN IN THE APPENDIX TO MR.
7 MALONE'S AFFIDAVIT.

8 LET'S NOW ADDRESS THE OTHER THREE SYNTHETIC FIBERS
9 THAT WERE FOUND IN THE CLEAR HANDLED HAIR BRUSH. THOSE
10 THREE FIBERS WERE MADE OF A SUBSTANCE KNOWN AS SARAN.
11 SARAN, WE KNOW FROM OUR EXPERT, IS TOTALLY UNSUITED FOR
12 THE MANUFACTURE OF WIGS, HAS NEVER BEEN KNOWN TO HAVE BEEN
13 USED IN THE MANUFACTURE OF WIGS BECAUSE IT SIMPLY DOESN'T
14 APPEAR ANYTHING LIKE HUMAN HAIR. ITS SOLE USE, SO FAR AS
15 OUR FORENSIC EXAMINER KNOWS, IS TO BE USED IN THE
16 MANUFACTURE OF DOLL HAIR, IN SCREENS, MOPS AND MANNEQUINS.
17 I'M AWARE OF NO EVIDENCE THAT EVEN SUGGESTS IN THIS RECORD
18 THAT HELENA STOECKLEY WAS WEARING A MOP OR PERHAPS
19 MANNEQUIN HAIR.

20 THE COURT: WELL, DEFENDANT SUGGESTS ON THE
21 OTHER HAND THAT NO DOLL HAS TWENTY-TWO INCH LONG HAIR.

22 MR. DEPUE: THAT'S RIGHT, YOUR HONOR, BUT WHAT
23 WE KNOW FROM WORKING WITH THIS CASE AND WORKING WITH OUR
24 FORENSIC SPECIALISTS, IT'S ONE THAT WHEN DOLLS ARE MADE
25 THE HAIR IS TYPICALLY LOOPED OR WOVEN INSIDE THE SKULL OF

1 THE DOLL, ACCOUNTING FOR OR EXPLAINING THE LENGTH OF THE
2 HAIR BUT THE IMPORTANT THING TO UNDERSTAND IS THAT SARAN
3 HAS NEVER BEEN USED IN HUMAN WIGS. NONETHELESS, NOT
4 ONLY --*

5 THE COURT: WOMEN USED TO WEAR SOMETHING, I
6 BELIEVE I HEARD IT DESCRIBED AS A DOUGHNUT, A LITTLE CURL
7 OF HAIR ON THE BACK OF THE HEAD. ARE YOU SUGGESTING THAT
8 DOLLS HAVE THAT?

9 MR. DEPUE: I HAVE NEVER SEEN ONE, YOUR HONOR.
10 I THINK WHAT ELSE IS SIGNIFICANT HERE IS THAT MR. MALONE,
11 OUR FBI FORENSIC SPECIALIST, COMPARED ONE OF THESE SARAN
12 HAIRS TO A STANDARD IN THE FBI REFERENCE COLLECTION AND
13 FOUND THE TWO TO BE CONSISTENT. SARAN HAIR BEING FULLY
14 CONSISTENT WITH A DOLL HAIR FROM THE HEAD OF A DOLL IN THE
15 FBI'S REFERENCE COLLECTION. SO ONE EXPLANATION FOR THE
16 LENGTH OF THIS FIBER IS THAT IT WAS VERY LIKELY DOUBLED IN
17 THE SKULL OF THE DOLL, THE TYPE OF DOLLS WE KNOW TO HAVE
18 BEEN OWNED BY THE MACDONALD CHILDREN AND TO HAVE BEEN IN
19 THE MACDONALD HOUSEHOLD AT THE TIME.

20 LET ME NEXT ADDRESS THE WOOL, THE DARK COLORED WOOL.
21 IN THIS CONTEXT I THINK IT'S FIRST OF ALL IMPORTANT TO
22 POINT OUT THE FACT THAT PETITIONER HAS NEVER CONNECTED
23 THAT WOOL WITH ANYTHING IN THE MACDONALD HOUSEHOLD. THE
24 GOVERNMENT AT THAT TIME DIDN'T EITHER BECAUSE IT SIMPLY
25 WASN'T FORENSICALLY SIGNIFICANT. INDEED, JEFFREY

1 MACDONALD GOT RID OF ALL THE CLOTHING.

2 THE COURT: THE DEFENDANT SAYS IT WAS NOT
3 CONNECTED WITH ANYTHING IN THE MACDONALD HOUSEHOLD FOR THE
4 SIMPLE REASON THAT IT WAS NOT OF MACDONALD HOUSEHOLD
5 ORIGIN; THAT IT CAME FROM OUTSIDE.

6 MR. DEPUE: THAT, YOUR HONOR, OF COURSE, IS PURE
7 SPECULATION. WE DON'T KNOW PRECISELY WHERE IT CAME FROM.
8 WHAT WE DO KNOW, HOWEVER, YOUR HONOR, IS THAT THERE WERE A
9 NUMBER OF MISCELLANEOUS, MANY, MANY, MANY MISCELLANEOUS
10 FIBERS FOUND ON COLETTE MACDONALD'S BODY. THE GOVERNMENT
11 HAS BEEN ABLE TO NAIL DOWN MANY OF THOSE HAIRS AND FOUND
12 THEM TO HAVE ORIGINATED IN THE MACDONALD HOUSEHOLD ITSELF.

13 WE KNOW THAT UNDER THE LOCARD THEORY AN INDIVIDUAL
14 GENERALLY REFLECTS HAIRS OR FIBERS THAT REFLECT THE
15 SUBSTANCE TO WHICH THE INDIVIDUAL'S BODY LAST CAME IN
16 CONTACT. IN THIS CASE, THAT SURFACE WAS THE RUG ON WHICH
17 COLETTE'S BLOODY BODY LAY, WHICH PICKED UP MANY, MANY
18 OTHER COLORED FIBERS. THE LOGICAL CONCLUSION IS THAT
19 THESE BLACK WOOL FIBERS ORIGINATED IN THE MACDONALD
20 HOUSEHOLD, GOT ON THE RUG AND SHE PICKED THEM UP WHEN HER
21 BLOODY BODY HIT THE FLOOR, HIT THE RUG.

22 THE COURT: WAS SHE FOUND ON THE BED OR FLOOR?

23 MR. DEPUE: SHE WAS FOUND ON THE FLOOR ON A RUG
24 AND MANY OF THE WHITE HAIRS THAT PETITIONER HAS PROFFERED
25 IN HIS OPENING BRIEF, THAT IS, HIS NEWLY DISCOVERED

1 EVIDENCE WAS FOUND TO HAVE ORIGINATED FROM THAT SPECIFIC
2 RUG.

3 I THINK IT'S IMPORTANT TO UNDERSTAND THAT JEFFREY
4 MACDONALD HAD ACCESS TO ALL THE DARK WOOLEN CLOTHING IN
5 THE MACDONALD HOUSEHOLD FOLLOWING THE ARTICLE 32
6 INVESTIGATION. HE GOT RID OF THAT DARK WOOLEN CLOTHING
7 AND THAT HAS IN SOME MEASURE INHIBITED US AT THIS TIME
8 FROM PRECISELY PINNING DOWN THE SOURCE OF THOSE DARK WOOL
9 FIBERS.

10 I THINK IT'S ALSO IMPORTANT TO UNDERSTAND THAT THESE
11 DARK WOOLEN FIBERS, AS THEY WERE FOUND, HAD BEEN
12 DETERMINED BY OUR FORENSIC EXPERT NOT TO HAVE ORIGINATED
13 FROM ONE GARMENT BUT RATHER TO HAVE BEEN OF MANY DIFFERENT
14 DARK COLORS, SUGGESTING DIFFERENT SOURCES AND, OF COURSE,
15 SERIOUSLY UNDERCUTTING PETITIONER'S CLAIM THAT THEY
16 ORIGINATED FROM A SINGLE SOURCE, THE CLOTHING OF HELENA
17 STOECKLEY. BUT EVEN IF THIS EVIDENCE COULD BE CONSTRUED
18 TO SUGGEST THE PRESENCE OF AN INTRUDER IN THE HOUSEHOLD,
19 IT WOULD NOT IN THE LEAST CHANGE THE POSTURE OF THIS
20 EVIDENCE.

21 THERE WAS EVIDENCE BEFORE THE COURT SUGGESTING THE
22 PRESENCE OF INTRUDERS, UNACCOUNTED FOR CANDLE DRIPPINGS,
23 FINGERPRINTS, FOREIGN FIBERS. ALL OF THIS WAS ARGUED VERY
24 VIGOROUSLY BY MR. SEGAL TO THE COURT YET THAT DIDN'T
25 CHANGE THE COMPELLING NATURE OF THE FORENSIC EVIDENCE THAT

1 DEVASTATED PETITIONER'S VERSION OF EVENTS, PARTICULARLY
2 THE PAJAMA TOP THAT ONLY HE COULD HAVE CONTROLLED AND THAT
3 ONLY HE COULD HAVE KNOWN THE TRUTH WITH RESPECT TO IT. IT
4 DID NOT CHANGE IN THE LEAST THE FACT THAT THAT FORENSIC
5 EVIDENCE POINTED DIRECTLY TO PETITIONER AS THE MURDERER.

6 HOW WOULD THIS PHYSICAL EVIDENCE, THIS NEWLY
7 DISCOVERED PHYSICAL EVIDENCE HAVE AFFECTED THE
8 ADMISSIBILITY OF STOECKLEY'S TESTIMONY? FIRST THING I
9 THINK YOUR HONOR NEEDS TO RECALL IN THIS REGARD IS YOU
10 EXCLUDED HELENA STOECKLEY'S TESTIMONY NOT MERELY BECAUSE
11 OF THE ABSENCE OF CORROBORATING EVIDENCE BUT BECAUSE SHE
12 WAS INHERENTLY TRUSTWORTHY, BECAUSE HER STATEMENTS WERE
13 CONTRADICTORY AND BECAUSE OF HER PHYSICAL STATE, HAVING
14 BEEN --

15 THE COURT: DID YOU SAY TRUSTWORTHY OR
16 UNTRUSTWORTHY?

17 MR. DEPUE: UNTRUSTWORTHY, AND HER PHYSICAL
18 STATE AT THE TIME HAVING BEEN A FREQUENT DRUG USER AND
19 HEAVY --

20 THE COURT: YOU ARE ALLUDING NOW TO THE EXCLUDED
21 HEARSAY?

22 MR. DEPUE: YES, SIR, PRECISELY.

23 THE COURT: NOT TO HER ACTUAL LIVE TESTIMONY
24 WHICH WAS GIVEN RIGHT HERE FROM THIS STAND?

25 MR. DEPUE: YOU EXCLUDED HER HEARSAY STATEMENTS

1 BECAUSE THEY WERE UNTRUSTWORTHY, BECAUSE OF HER PHYSICAL
2 STATE, BECAUSE THEY WERE INCONSISTENT NOT BECAUSE OF LACK
3 OF PHYSICAL CORROBORATION. BUT THEN HOW WOULD THIS
4 EVIDENCE HAVE CORROBORATED HER TESTIMONY? SHE DENIED SHE
5 WAS WEARING A WIG ON THE NIGHT IN QUESTION. WE HAVE NO
6 EVIDENCE FROM STOECKLEY HERSELF WHAT SHE WAS WEARING THAT
7 NIGHT. INDEED, EVIDENCE PRESENTED DURING THE SUBSEQUENT
8 HABEAS PROCEEDING THAT I'LL DISCUSS LATER HAS HER IN LIGHT
9 COLORED CLOTHING AND, AS I HAVE SAID BEFORE, NONE OF THIS
10 PHYSICAL EVIDENCE EVEN SUGGESTS THAT STOECKLEY WAS WEARING
11 A MOP, WEARING DOLL HAIR PERHAPS, WAS IN THE HOUSE ON THE
12 NIGHT OF THE MURDER.

13 NOW, LET ME GO BACK TO THE ISSUE OF PROCEDURAL
14 DEFAULT, THE ONE THAT MR. SILVERGLATE HAS SO NOTICEABLY
15 DISREGARDED DURING HIS PRESENTATION. AS A PREFACE TO
16 THAT, WHILE YOUR HONOR IS CERTAINLY FAR MORE FAMILIAR WITH
17 THE PROCEDURAL BACKGROUND OF THIS CASE THAN I AM, LET ME
18 PROVIDE A FACTUAL PREDICATE FOR THAT ARGUMENT.

19 AS EARLY AS 1979, BEFORE THIS CONVICTION WAS EVEN
20 FINAL, PETITIONER BEGAN FILING WITH VARIOUS GOVERNMENT
21 AGENCIES REQUESTS UNDER THE FREEDOM OF INFORMATION ACT FOR
22 THE GOVERNMENT'S INVESTIGATIVE FILES IN THIS CASE. FILED
23 SUCH REQUESTS WITH THE ARMY CID COMMAND, THE FEDERAL
24 BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE.
25 BEGINNING IN 1983 AND CONTINUING ON UNTIL 1984 THE

1 GOVERNMENT FURNISHED TO THE DEFENSE LITERALLY THOUSANDS
2 AND THOUSANDS OF PAGES FROM THAT FILE. IN APRIL OF 1984
3 THE ATTORNEY WHO WAS THEN REPRESENTING PETITIONER, BRIAN
4 O'NEILE OF SANTA MONICA, CALIFORNIA AND LOCAL CO-COUNSEL,
5 WADE SMITH, FILED THREE PETITIONS FOR COLLATERAL RELIEF.
6 TWO OF THEM WERE STYLED PETITIONS FOR POST-CONVICTION
7 RELIEF UNDER 28 USC 2255.

8 ONE OF THOSE TWO WAS PREMISED ON THE MATERIAL
9 FURNISHED AS A RESULT OF THE FOIA. IT ALLEGED THAT IN
10 VIOLATION OF BRADY VERSUS MARYLAND THE GOVERNMENT HAD
11 WITHHELD EXCULPATORY EVIDENCE FROM THE DEFENSE, SUGGESTING
12 THE PRESENCE OF HELENA STOECKLEY IN THE MACDONALD HOUSE ON
13 THE NIGHT OF THE MURDER. THIS INCLUDED BLOODY CLOTHING
14 AND BOOTS THAT ALLEGEDLY BELONGED TO HELENA STOECKLEY AND
15 WHICH ALLEGEDLY MATCHED MACDONALD'S DESCRIPTION OF
16 STOECKLEY'S CLOTHING; A PHOTOGRAPH OF A LETTER G WRITTEN
17 BY HELENA STOECKLEY WHICH ALLEGEDLY MATCHED A LETTER G ON
18 THE WORD PIG AT THE MURDER SCENE; A HALF FILLED BLOODY
19 SYRINGE; UNIDENTIFIED FINGERPRINTS. IN A LENGTHY
20 PUBLISHED OPINION YOUR HONOR REJECTED THAT HABEAS
21 PETITION.

22 FIRST YOU EXAMINED THAT PHYSICAL EVIDENCE AND
23 CONCLUDED, AS WE BELIEVE YOU SHOULD TODAY, THAT IT WAS
24 COMPLETELY LACKING IN PROBATIVE VALUE. YOU WENT ON
25 HOWEVER TO HOLD THAT EVEN IF IT HAD PROBATIVE VALUE THE

1 FORENSIC EVIDENCE WAS SO OVERWHELMING THAT DISPUTED
2 PETITIONER'S STORY AND DEMONSTRATED HIM TO BE THE
3 PERPETRATOR OF THE CRIME. A STANDARD UNDER 2255 WAS NOT
4 MET. *

5 HOW DOES THAT FIT WITH THE JURISPRUDENCE OF SANDERS
6 AND MCCLESKEY? FIRST, IN SANDERS VERSUS UNITED STATES THE
7 SUPREME COURT HELD THAT HABEAS PETITIONS THAT ARE
8 PREDICATED ON THE SAME GROUND ARE SUBJECT TO DISMISSAL AND
9 BY GROUND THEY MEANT THE SAME LEGAL BASIS, THE SAME LEGAL
10 ISSUE. THEY GAVE US AN EXAMPLE, A SITUATION WHERE IN A
11 FIRST HABEAS PETITION A CLAIM OF AN INVOLUNTARY CONFESSION
12 WAS PREDICATED UPON COERCION AND IN THE SECOND PETITION A
13 CLAIM OF INVOLUNTARINESS WAS BASED ON PSYCHOLOGICAL RATHER
14 THAN PHYSICAL COERCION. THAT'S PRECISELY WHAT WE HAVE
15 HERE TODAY, YOUR HONOR. TWO CLAIMS PREDICATED UPON BRADY
16 VERSUS MARYLAND ALLEGING THAT EXCULPATORY EVIDENCE WAS
17 WITHHELD FROM THE DEFENSE, SUGGESTING THE PRESENCE OF
18 INTRUDERS IN THE MACDONALD HOUSEHOLD AND CORROBORATING
19 PETITIONER'S STORY. THE ONLY DISTINCTION ARE THE FACTUAL
20 DIFFERENCES, THE NATURE OF THE PHYSICAL EVIDENCE ITSELF.

21 THEREFORE, UNDER SANDERS, THIS SUBSEQUENT PETITION IS
22 SUBJECT TO DISMISSAL.

23 THE COURT: I HAVE BEEN WAITING FOR YOU TO SAY
24 THAT, WHAT I UNDERSTAND IS ONE OF YOUR CONTENTIONS, IS
25 THAT EVERYTHING NOW KNOWN TO PRESENT DEFENSE COUNSEL WAS

1 REVEALED TO MR. O'NEILL AND HIS STAFF IN 1984; IS THAT
2 CORRECT?

3 MR. DEPUE: THAT'S CORRECT, YOUR HONOR. I'M
4 LEADING UP TO THIS. LET ME GET INTO IT RIGHT NOW. DURING
5 THESE FOIA INQUIRIES THAT I JUST DESCRIBED TO YOU, THE
6 GOVERNMENT RELEASED EVERY SINGLE DOCUMENT THAT FORMS THE
7 BASIS OF PETITIONER'S HABEAS INQUIRY TO DATE.

8 THE COURT: INCLUDING THAT EXCULPATORY NOTE OF
9 GLISSON'S THAT SAID THERE WAS A LAST THING THEY DID GET?

10 MR. DEPUE: ABSOLUTELY, YOUR HONOR. LET ME
11 ADDRESS THAT QUESTION. IN FACT, WE RELEASED THE FIRST
12 DOCUMENT OF GLISSON'S ON TWO DIFFERENT OCCASIONS. FOR
13 PURPOSES OF THIS ANALYSIS, LET ME REFER TO THESE BLOW-UP
14 CHARTS OF JANICE GLISSON'S LAB NOTES. THE BLOW-UP CHART
15 ON THE LEFT IS A BLOW-UP OF AN EXHIBIT TO THE AFFIDAVIT OF
16 PARALEGAL JOHN J. MURPHY. IT APPEARS ON PAGE TWENTY-FIVE
17 IN YOUR GREEN BOOK. YOU WILL NOTE ON THAT CHART THAT
18 JANICE GLISSON HAS LISTED THE FOLLOWING ANNOTATION.

19 NUMEROUS BLOND, VARIOUS LENGTHS, UP TO FIFTEEN
20 INCHES, CURLY SYNTHETIC, QUESTION MARK. UP TO TWENTY-TWO
21 INCHES. WE KNOW FROM JANICE GLISSON'S TESTIMONY THAT AT
22 THIS POINT WHAT SHE WAS DOING WAS CATALOGING THE THINGS
23 THAT SHE TOOK OUT OF THE HAIR BRUSH. HOWEVER, BECAUSE OF
24 THE PRESENCE OF THIS QUESTION MARK AFTER THE WORD
25 SYNTHETIC, PETITIONERS NOW MAINTAIN THAT BACK IN 1983 THEY

1 DID NOT FULLY UNDERSTAND WHAT SHE WAS DOING; THAT THEY DID
2 NOT SEE THIS AS ANYTHING MORE THAN SPECULATION.

3 TWO LINES DOWN, HOWEVER, YOU SEE HER BEGINNING TO
4 WRITE UP HER FINDINGS, AS SHE EXPLAINS IN HER AFFIDAVIT.
5 THE STATEMENT THERE IS SYNTHETIC STIRATED FIBERS MADE TO
6 LOOK LIKE HAIRS, VARIOUS LENGTHS, ALL BLOND. SO YOU CAN
7 SEE IN THIS VERY DOCUMENT SHE LISTED THE ITEM AS A
8 QUESTIONED ITEM THEN CONFIRMED HER SPECULATION.

9 THIS DOCUMENT ALONE, IF IT WAS IN THE POSSESSION OF
10 PETITIONER IN THE SUMMER OF 1983, SHOULD IN AND OF ITSELF
11 HAVE PUT PETITIONERS ON NOTICE RESULTING IN AN OBLIGATION
12 OF INQUIRY UNDER THE MCCLESKEY DECISION.

13 THE COURT: THAT'S NOT THE SO-CALLED EXCULPATORY
14 NOTE?

15 MR. DEPUE: THIS IS NOT THE CONFIRMATORY NOTE;
16 THEY CALL IT THE CONFIRMATORY NOTE.

17 THE COURT: SO THEN THIS YOU SAY WAS DELIVERED
18 TO DEFENSE COUNSEL IN 1983?

19 MR. DEPUE: YES, YOUR HONOR. LET ME GET TO
20 THAT. NOW, VERY FORTUNATELY FOR US, YOUR HONOR, WE DON'T
21 NEED TO SPECULATE HERE ON WHAT PETITIONERS KNEW, WHAT THEY
22 THOUGHT ABOUT THIS DOCUMENT AND WHEN THEY KNEW IT. AS AN
23 EXHIBIT TO THEIR REPLY BRIEF, THEY APPENDED A COPY OF
24 THEIR OWN ANNOTATED VERSION OF THIS GLISSON NOTE. IT
25 SPEAKS VOLUMES. IT SPEAKS VOLUMES AS TO WHAT THEY HAD,

1 WHAT THEY KNEW AND WHEN THEY GOT IT.

2 FIRST, YOUR HONOR, I WOULD INVITE YOUR ATTENTION TO
3 THE UPPER RIGHT HAND CORNER OF THIS DOCUMENT. IT CONTAINS
4 THE ANNOTATION RECEIVED JUNE 30, 1983, ARMY. WE KNOW FROM
5 THE TESTIMONY OF AN EMPLOYEE OF BRIAN O'NEILL THAT THIS
6 WAS BRIAN O'NEILL'S RECEIPT STAMP CONFIRMING THAT THEY HAD
7 THIS DOCUMENT BACK ON JUNE 30, 1983 AND CONFIRMING THE
8 AFFIDAVITS OF OUR FOIA OFFICIALS THAT IN FACT IT WAS
9 RELEASED ON THE 21ST OF JUNE 1983 IN COMPLIANCE WITH FOIA
10 REQUESTS.

11 SECOND, ON THIS ANNOTATED VERSION OF THIS NOTE IN THE
12 REPLY BRIEF, YOU WILL NOTICE THAT BRIAN O'NEILL'S
13 EMPLOYEES CONNECTED GLISSON'S CONFIRMATORY NOTE, SYNTHETIC
14 STIRATED FIBERS MADE TO LOOK LIKE HAIR, WITH HER CATALOG
15 SYNTHETIC, UP TO TWENTY-TWO INCHES LONG; DEMONSTRATING
16 THEY KNEW FULL WELL THEN AND THERE THAT GLISSON HAD
17 CONFIRMED HER CATALOG AT THIS POINT.

18 THE COURT: THERE WAS SOME SUGGESTION IN THE
19 RECORD, WAS THERE NOT, AT LEAST BY AUGUST OF 1984, THE
20 CONFIRMATORY NOTE WAS MADE AVAILABLE AND I DON'T RECALL
21 WHETHER THAT WAS PRIOR TO ORAL ARGUMENT ON O'NEILL'S
22 MOTION OR NOT.

23 MR. DEPUE: THAT'S THE NEXT POINT IN MY
24 PRESENTATION, YOUR HONOR.

25 THE COURT: ALL RIGHT.

1 MR. DEPUE: OKAY. SO THE SECOND THING THAT YOU
2 NEED TO KNOW ABOUT, YOUR HONOR, IS THIS ARROW
3 DEMONSTRATING THAT PETITIONERS THEMSELVES CONFIRMED WHAT
4 THIS ANNOTATION WAS. THAT THEY UNDERSTOOD THERE WAS A
5 CONNECTION BETWEEN GLISSON'S FINDING AND HER CATALOG.

6 THE THIRD THING THAT I ASK YOUR HONOR TO LOOK AT, I
7 WILL USE THE SMALLER BLOW-UP FOR THIS, IS A SECOND ARROW
8 THAT WAS PLACED FROM THE NUMEROUS BLOND FIBERS ANNOTATION
9 TO AN ANNOTATION THAT WAS WRITTEN APPARENTLY BY JOHN
10 CROUCHLEY, A LAW STUDENT WHO WAS THEN WORKING FOR BRIAN
11 O'NEILL. THIS SAYS K EQUALS E323, CLEAR HANDLED HAIR
12 BRUSH, NOT THE ONE FOUND UNDER COLETTE'S BODY. FROM THIS
13 WE KNOW THAT THE REASON THAT PETITIONER'S HABEAS ATTORNEYS
14 DID NOT CONSIDER THIS MATERIAL BACK IN 1983 WAS NOT
15 BECAUSE IT WAS SPECULATIVE DUE TO THE QUESTION MARK BUT
16 BECAUSE THEY VIEWED IT AS NOT BEING SIGNIFICANT. IT
17 WASN'T THE HAIR BRUSH THAT THEY WERE INTERESTED IN. THEY
18 WERE INTERESTED IN THE HAIR BRUSH THAT CAME FROM UNDER
19 COLETTE'S BODY AND THIS WASN'T THAT HAIR BRUSH.

20 FOURTH, AGAIN IN THE HANDWRITING OF JOHN CROUCHLEY,
21 IS THIS POST-IT NOTE THAT APPEARS ON THEIR ANNOTATED COPY
22 OF THE GLISSON BENCH NOTE.

23 KAREN, HERE'S THE REFERENCE TO THE WIG HAIRS. I
24 THINK THE DESCRIPTION FIFTEEN CURLY RELATES TO OTHER
25 HAIRS ON THE BRUSH AND UP TO TWENTY-TWO INCHES

1 RELATES TO THE SYNTHETIC HAIRS. THIS IS THE ONLY
2 REFERENCE TO IT I FOUND FROM FOIA.

3 HERE WE KNOW BACK IN 1983 BRIAN O'NEILL'S,
4 PETITIONER'S FIRST HABEAS PETITIONER'S LAWYERS, ASSOCIATES
5 REALIZED THE POTENTIAL OF THESE SYNTHETIC FIBERS YET THEY
6 ELECTED TO DO NOTHING ABOUT THEM. IN FACT, THIS PHRASE
7 WIG HAIR IS THE ONLY EVIDENCE IN ANYTHING THAT PETITIONER
8 HAS PROFFERED THAT EVEN SUGGESTS THAT THESE FIBERS CAME
9 FROM A WIG AND WHAT IS IT, IT'S THE SPECULATION OF A LAW
10 STUDENT.

11 AGAIN, YOUR HONOR, MCCLESKEY SPEAKS NOT ONLY IN TERMS
12 OF HAVING THE EVIDENCE IN ONE'S POSSESSION AT THE TIME OF
13 THE FIRST HABEAS PROCEEDING BUT A DUTY OF INQUIRY WHERE
14 THE DEFENDANT IS ON NOTICE THAT THIS STUFF EXISTS. SURELY
15 THIS IMPOSED A DUTY OF INQUIRY. IN FACT, IT DEMONSTRATES
16 ONE, PETITIONERS HAD THIS EXHIBIT; TWO, THAT THEY
17 UNDERSTOOD IT; THREE, THAT THEY UNDERSTOOD ITS
18 IMPLICATIONS BACK IN 1983.

19 THAT'S NOT ALL. NOT ONLY DID THEY HAVE THIS MATERIAL
20 BUT THEY HAD UNFETTERED ACCESS TO THE PHYSICAL EXHIBITS
21 THEMSELVES WHICH, AS YOUR HONOR WILL REMEMBER, HAD BEEN
22 KEPT TOGETHER FOR FURTHER ANALYSIS BY BRIAN O'NEILL, IF HE
23 WISHED TO DO SO.

24 INDEED, EVEN BEFORE THE TRIAL DOCTOR JOHN THORNTON,
25 THE PETITIONER'S FORENSIC EXPERT WHO KNEW THERE WERE

1 UNMATCHED FIBERS FOUND IN THE HOUSE, WHO UNDERSTOOD THEIR
2 POTENTIAL FOR FORENSIC SIGNIFICANCE BY WRITING BERNIE
3 SEGAL A LETTER SAYING HEY, WE BETTER LOOK AT THIS STUFF,
4 WAS AFFORDED UNFETTERED ACCESS TO THE PHYSICAL EXHIBITS
5 THEMSELVES IN A JAIL CELL HERE IN RALEIGH. DESPITE THE
6 FACT THAT THE TRIAL ATTORNEY, MR. MURTAGH, EXPRESSLY ASKED
7 HIM IF HE WANTED TO LOOK AT THE FIBERS. HE DECLINED THE
8 INVITATION SAYING FBI KNOWS WHAT IT'S DOING IN THIS AREA,
9 I'LL RELY ON THEM.

10 THE PETITIONER MAKES MUCH OF THE FACT THAT THIS WAS
11 SQUIRRELED AWAY IN SOME BOX THAT COULDN'T POSSIBLY HAVE
12 BEEN SEEN BY DOCTOR THORNTON. WE'LL SHOW THE BOX TODAY TO
13 YOUR HONOR. WHAT'S IT SAY? SYNTHETIC HAIRS, AND THEN
14 ENUMERATION OF IT. INSIDE THE BOX IS A MAILER --

15 THE COURT: DOES IT SAY SYNTHETIC DARK HAIRS?

16 MR. DEPUE: YES, YOUR HONOR, ON TOP. ONE BLACK,
17 BLACK AND GRAY SYNTHETIC HAIRS AND A NUMBER OF LINES ON
18 IT.

19 MR. SILVERGLATE: THAT WAS THE POINT MADE BY
20 DEFENSE COUNSEL, I BELIEVE.

21 MR. DEPUE: INSIDE THAT BOX YOUR HONOR WILL SEE
22 THERE ARE SLIDES AND ONE OF THOSE SLIDES IS LABELED
23 SYNTHETIC HAIRS, BLOND. SO IT BOGGLES OUR MIND HOW THEY
24 CAN COME TO YOU TWELVE YEARS AFTER THIS CONVICTION AND
25 CLAIM THAT THEY WERE NEVER PROVIDED ACCESS TO THIS

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1 MATERIAL. BUT WHAT REALLY DISTURBS US, YOUR HONOR, IS HOW
2 THEY CAN COME BEFORE YOU WITH A STRAIGHT FACE TODAY AND
3 SAY THAT THIS IS NEWLY DISCOVERED EVIDENCE RESULTING FROM
4 THESE 1990 FOIA INQUIRIES.

5 WITH THAT PREFACE LET ME GO ON TO THE SO-CALLED
6 CONFIRMATORY NOTE. THIS IS AN EXHIBIT FOUND IN
7 PETITIONER'S OPENING BRIEF AND REPLY OF THE CONFIRMATORY
8 NOTE. IT SAYS IN THE UPPER LEFT HAND CORNER, K SYNTHETIC
9 HAIR, BLOND; K GRAY OR BLOND. THEY MAINTAIN WHEN THEY SAW
10 THIS THEY KNEW FOR THE FIRST TIME IN 1990 WHAT GLISSON HAD
11 BEEN TALKING ABOUT BACK HERE, DESPITE THE FACT, AS I HAVE
12 SAID BEFORE, THAT BRIAN O'NEILL'S COLLEAGUES HAD
13 IDENTIFIED PRECISELY WHAT SHE HAD BEEN TALKING ABOUT.

14 THE COURT: HOW COME THEY WAITED UNTIL AUGUST OF
15 1984 TO GIVE THIS CONFIRMATORY NOTE TO THEM WHEN THEY HAD
16 GIVEN THEM EVERYTHING ELSE IN 1983?

17 MR. DEPUE: I WILL REFER TO MR. MURTAGH TO
18 EXPLAIN THAT QUESTION.

19 MR. MURTAGH: YOUR HONOR, MAY IT PLEASE THE
20 COURT. THERE WERE TWO DIFFERENT FOIA RELEASES. ONE WAS
21 MATERIAL THAT CAME FROM MY FILES IN THE DEPARTMENT OF
22 JUSTICE TO THE ARMY AND WERE RELEASED ON JUNE 21, 1983.
23 THERE ARE TWO COPIES, YOUR HONOR, IF YOU WILL, OF THE
24 FIRST GLISSON PAGE AND THERE'S ANOTHER CHART HERE, IF I
25 MAY. I'M REFERRING TO CROUCHLEY EXHIBIT NO. 1.

1 CROUCHLEY, THEIR AFFIANT. THIS IS WITH THEIR DATE STAMP,
2 RECEIVED JUNE 30, 1983, ARMY. YOUR HONOR WILL FIND AT THE
3 BOTTOM OF THE PAGE ITEM NUMBER ONE HUNDRED FORTY-TWO.
4 THAT'S THE ARMY'S FOIA NUMBER CORRESPONDING TO THE JUNE
5 PROCESSING, JUNE 1983 PROCESSING OF THESE DOCUMENTS. SO
6 THEY GOT THIS PAGE. IN FACT, THEY GOT IT THREE TIMES:
7 JUNE 1983, AUGUST 1984, AND I'LL EXPLAIN HOW THAT OCCURS,
8 AND THEN IN MAY 1990.

9 WHAT HAPPENS THEN IS MR. O'NEILL, APPARENTLY AFTER
10 READING MR. MCGINESS' BOOK, MADE AN ALL ENCOMPASSING
11 REQUEST FOR FOIA MATERIAL IN NOVEMBER OF 1983 AND THE
12 STUFF WENT -- THE REQUEST WENT TO THE LABORATORY AND THEY
13 FOUND THE DOCUMENTS AND MR. O'NEILL WAS INFORMED IN
14 DECEMBER OF 1983 THAT MORE MATERIAL HAD BEEN FOUND AND IT
15 WAS BEING PROCESSED. IN FACT, AS LATE AS MARCH OF 1984 HE
16 WAS INFORMED THAT THE STUFF HAD BEEN PROCESSED BY THE
17 ARMY, SENT TO ME FOR MY REVIEW AND WAS IN THE WORKS. BUT
18 HE FILES HIS PETITION ON APRIL 5, 1984.

19 WHAT THEN HAPPENED IS THE ENTIRE -- THE TOTALITY OF
20 THE GLISSON BENCH NOTES, THAT'S MURPHY EXHIBIT 1 OF THEIR
21 ORIGINAL PETITION, PAGES ONE THROUGH I THINK FORTY-THREE,
22 ARE RELEASED IN AUGUST, AUGUST 7, 1984 BY A FOIA OFFICER
23 NAMED ANDERSEN AT THE ARMY CID COMMAND, HAVING BEEN
24 PREVIOUSLY NUMBERED WITH A NEW NUMBERING SCHEME BY A
25 TECHNICIAN NAMED BARKLEY. BARKLEY NUMBERED THESE

1 DOCUMENTS AT THE BOTTOM, 785. NOW, THAT'S PRIOR TO HER
2 LEAVING; THIS IS ACCORDING TO HER AFFIDAVIT, PRIOR TO HER
3 LEAVING THE CID COMMAND IN JANUARY 1984. SHE NUMBERS THE
4 DOCUMENTS. ANDERSEN RELEASES THEM IN AUGUST 1984 BUT THEY
5 NOW HAVE THESE NUMBERS WRITTEN ON THERE FOREVER.

6 SO WHAT HAPPENS IS THAT WHEN MR. SILVERGLATE'S
7 ASSOCIATE, MR. MURPHY, DISCOVERS THE KAREN TO JOHN NOTE,
8 APPARENTLY THEY GO BACK AND MAKE A NEW FOIA REQUEST. WHAT
9 THEY GET IS THE SAME DOCUMENTS THAT WERE RELEASED IN 1984.
10 AUGUST 1984 ARE RELEASED AGAIN SO THEY GET THE
11 CONFIRMATORY PAGE IN AUGUST OF '84, MAY OF 1990. THEY GET
12 THE INITIAL GLISSON PAGE, WHICH THEY CLEARLY UNDERSTOOD
13 BECAUSE OF THEIR NOTES ON IT; THEY GET IT IN JUNE 1983,
14 AGAIN IN AUGUST 1984 AND A THIRD TIME IN MAY 1990.

15 I KNOW IT'S CONFUSING, YOUR HONOR, BUT THAT'S THE
16 LINEAGE OF THESE DOCUMENTS.

17 THE COURT: WELL, I THINK I FOLLOW YOU. LET'S
18 GO TO SOMETHING ELSE.

19 MR. DEPUE: OUR POINT IS, YOUR HONOR, WITH
20 RESPECT TO THE GLISSON NOTES, EVERYTHING THAT FORMS THE
21 BASIS OF THIS CLAIM WAS IN ESSENCE POSSESSED BY PETITIONER
22 BY AUGUST OF 1984. THAT THESE ANNOTATIONS SUGGEST TO US
23 THESE CLAIMS COULD HAVE BEEN RAISED JUST AS EASILY BACK
24 THEN AS THEY ARE NOW AND THE PROBABLE REASON FOR THE 1990
25 FOIA INQUIRIES WAS TO CREATE THE ILLUSION THAT THIS WAS

1 NEWLY DISCOVERED EVIDENCE OR PERHAPS IN THE HOPES OF
2 OBTAINING COPIES THAT DID NOT BEAR THE TELLTALE
3 ANNOTATIONS OF BRIAN O'NEILL'S CO-COUNSEL.

4 LET ME REVIEW BRIEFLY THE SAME SEQUENCE OF EVENTS
5 WITH RESPECT TO THE NOTES OF JIM FRYER AND KAREN DAVIDSEN
6 CONCERNING THE DARK WOOLEN FIBERS -- I'M SORRY, JANICE
7 GREEN. KAREN DAVIDSEN, AN ATTORNEY WHO WAS THEN EMPLOYED
8 BY BRIAN O'NEILL, HAS ACKNOWLEDGED IN AN AFFIDAVIT THAT
9 SHE RECEIVED THOSE NOTES ON JULY 20 OF 1983. IT'S VERY
10 DIFFICULT FOR THEM TO DENY THE FACT THAT THEY WERE
11 RECEIVED THEN BECAUSE THE VERY COPIES OF THESE DOCUMENTS
12 IN THEIR PAPERS BEAR THEIR DATE STAMP. BUT THAT'S NOT THE
13 END OF THE MATTER.

14 BY CONTRAST WITH THE GLISSON BENCH NOTES, THERE IS NO
15 SUGGESTION THAT CONFIRMATION WAS NECESSARY HERE. INDEED,
16 THERE'S NO EVIDENCE THAT DURING THE 1990 FOIA INQUIRIES
17 ANY FURTHER MATERIAL WAS OBTAINED BY PETITIONERS RELATING
18 TO THE DARK WOOL FIBERS. SO ONCE AGAIN THE ISSUE COULD
19 HAVE BEEN PRESSED IN 1983 ON THE BASIS OF THE MATERIAL
20 THEY POSSESSED, JUST AS EASILY AS IT WAS PRESSED IN 1990.

21 THE COURT: SO YOU SAY THIS CLAIM IS BARRED BY
22 MCCLESKEY?

23 MR. DEPUE: ABSOLUTELY, YOUR HONOR.

24 THE COURT: I THINK I UNDERSTAND YOUR POSITION
25 ON THAT.

1 MR. DEPUE: THANK YOU, YOUR HONOR. NOW,
2 PETITIONERS HAVE SOUGHT TO COME WITHIN TWO EXCEPTIONS
3 SUGGESTED IN MCCLESKEY OR THEY THINK MIGHT BE EXCEPTIONS
4 OF MCCLESKEY. FIRST THEY SAY IF MR. O'NEILL HAD THESE AND
5 DISREGARDED THEM HE MUST HAVE BEEN INEFFECTIVE; HE JUST
6 DIDN'T KNOW WHAT HE WAS DOING. NOW, I THINK YOUR HONOR
7 CAN JUDGE FOR YOURSELF BRIAN O'NEILL KNEW FULL WELL WHAT
8 HE WAS DOING AND IT TOOK A SIXTY-SEVEN PAGE OPINION FROM
9 YOUR HONOR TO ADDRESS THE CLAIMS THAT BRIAN O'NEILL
10 RAISED.

11 BUT IN A BROADER SENSE, WE LEARNED YESTERDAY, TWO
12 DAYS AGO FROM COLEMAN VERSUS THOMPSON IN THE CONTEXT OF
13 HABEAS PETITIONS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS
14 CANNOT BE MADE. THIS IS BECAUSE THE SIXTH AMENDMENT DOES
15 NOT EXTEND THE CONSTITUTIONAL RIGHT TO COUNSEL IN HABEAS
16 PROCEEDINGS. THERE'S NO RIGHT --

17 THE COURT: I NOTED THAT POSSIBLE ANSWER TO THE
18 INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT. I'LL HEAR
19 THAT A LITTLE LATER FROM MR. SILVERGLATE ON THAT. YOUR
20 POSITION IS THAT COLEMAN, WHICH WAS DECIDED ON MONDAY OF
21 THIS WEEK, ELIMINATES THE INEFFECTIVE ASSISTANCE OF
22 COUNSEL ISSUE?

23 MR. DEPUE: PRECISELY, YOUR HONOR. WE NOTED IN
24 OUR SUPPLEMENTAL MEMORANDUM THIS WAS THE LAW IN THE
25 CIRCUIT BUT COLEMAN WAS PENDING BEFORE THE SUPREME COURT

1 ON THE ISSUE. OF COURSE, THE CASE NOW HAS NOW BEEN
2 DECIDED. EVEN IF IT WERE TO BE ASSUMED COLEMAN DIDN'T BAR
3 THE ISSUE. AS STRICKLAND VERSUS WASHINGTON MAKES PATENTLY
4 CLEAR, REASONED TACTICAL DECISIONS DO NOT CONSTITUTE
5 INEFFECTIVE ASSISTANCE. WE KNOW BY LOOKING AT THOSE
6 CHARTS THAT THE DISMISSAL OF THE SYNTHETIC FIBERS ON THE
7 HAIR BRUSH WAS NOT MERELY AN OVERSIGHT. IT WAS A TACTICAL
8 DECISION BY BRIAN O'NEILL'S ASSOCIATES. WE KNOW ALSO THE
9 VERY LIKELY REASON WHY NOT VERY MUCH WAS MADE OF THE DARK
10 WOOLEN CLOTHING OR THE DARK WOOLEN FIBERS THAT MAY HAVE
11 ARGUABLY COME FROM THE CLOTHING OF AN INTRUDER BECAUSE IN
12 THAT 1984 HABEAS PETITION PETITIONERS HAD STOECKLEY IN
13 LIGHT COLORED CLOTHING ON THE MORNING AFTER THE MURDER AND
14 TO HAVE INTRODUCED SUCH EVIDENCE AT THAT TIME WOULD HAVE
15 BEEN PATENTLY INCONSISTENT WITH THAT SUBMISSION.

16 I ALREADY ADDRESSED THE MISCARRIAGE OF JUSTICE
17 ARGUMENT. AS I HAVE EXPLAINED, NONE OF THE PHYSICAL
18 EVIDENCE THAT'S AT ISSUE HERE IN ANY WAY, SHAPE OR FORM
19 SUGGESTS THE PRESENCE OF INTRUDERS. INDEED, IF THIS
20 COMMON HOUSEHOLD DEBRIS HAD BEEN PRESENTED TO THE JURY IN
21 THAT CASE IT COULD HAVE BEEN NO DIFFERENT FROM THE OTHER
22 ITEMS OF HOUSEHOLD DEBRIS THAT BERNIE SEGAL SO VIGOROUSLY
23 ARGUED SUGGESTED THE PRESENCE OF INTRUDERS. THE OUTCOME
24 WOULD HAVE BEEN PRECISELY THE SAME.

25 I HAVE A FEW MINUTES LEFT OVER. WITH THAT TIME I'M

1 GOING TO ASK BRIAN MURTAGH TO MAKE WHATEVER ADDITIONAL
2 COMMENTS HE THINKS MIGHT BE APPROPRIATE, IF THAT'S ALL
3 RIGHT WITH YOUR HONOR?

4 • THE COURT: ALL RIGHT, SIR.

5 MR. DEPUE: THANK YOU, YOUR HONOR.

6 MR. MURTAGH: THANK YOU, YOUR HONOR. MAY IT
7 PLEASE THE COURT, BEFORE I ADDRESS ANY ADDITIONAL ISSUES I
8 WONDER IF THE COURT HAS ANY AREAS OF INQUIRY YOU WOULD
9 SPECIFICALLY LIKE ME TO ADDRESS?

10 THE COURT: WELL, I MAY THINK OF SOME.

11 MR. MURTAGH: YOUR HONOR, JUST TO SORT OF CLEAN
12 UP A COUPLE POINTS. MR. SILVERGLATE SAYS WE HAVE NO WAY
13 OF KNOWING WHETHER THE BOX WITH THE SLIDES ANNOTATED BLOND
14 SYNTHETIC WERE IN FACT IN THE JAIL CELL THAT SERVED AS THE
15 EVIDENCE ROOM PRIOR TO THE TRIAL. WELL, THEY WERE THERE
16 AND I DON'T SAY THAT -- I JUST ASK THE COURT TO ACCEPT MY
17 REPRESENTATION. IT'S ALSO IN MY AFFIDAVIT AT PAGES
18 EIGHTEEN AND NINETEEN AND IT'S UNCONTESTED BY MR.
19 THORNTON.

20 THOSE EXHIBITS, IN FACT EVERYTHING Q-1 THROUGH Q-129
21 WERE TRANSPORTED BY SPECIAL AGENT MURRAY, THEN OF THE FBI,
22 TO RALEIGH AND KEPT IN THAT CELL NOT ONLY BEFORE THE TRIAL
23 BUT FOR YEARS AFTERWARDS UNTIL THE MARSHAL FINALLY,
24 UNDERSTANDABLY, SAID GET THIS STUFF OUT OF HERE. BUT
25 DURING THAT PERIOD, AS MR. DEPUE NOTED, THE STUFF WAS

1 AVAILABLE PURSUANT TO YOUR HONOR'S ORDER IN CONNECTION
2 WITH THE MOTION TO RE-EXAMINE THE CRIME SCENE. SOMETIME,
3 I THINK IN NOVEMBER OF 1983, MR. O'NEILL WANTED TO RE-
4 EXAMINE THE CRIME SCENE FOR STUFF WHICH HE ALLEGED WAS
5 STILL AT THE CRIME SCENE. WE SAID NO, IT'S NOT, IT'S IN
6 THE EVIDENCE ROOM AND WE HAVE NO OBJECTION TO YOU LOOKING
7 AT IT AND YOUR HONOR DIRECTED WE MAINTAIN ALL THAT
8 MATERIAL FOR HIS INSPECTION AND ANALYSIS. NEEDLESS TO
9 SAY, HE NEVER BOTHERED TO PURSUE IT.

10 YOUR HONOR, AS YOUR HONOR WILL RECALL, AND I THINK
11 ANYONE WHO WAS IN THIS COURTROOM IN JULY AND AUGUST OF
12 1979, THIS CASE WASN'T ABOUT HAIRS OR HAIR BRUSHES; IT WAS
13 ABOUT THE PAJAMA TOP FOUND ON COLETTE'S MACDONALD'S BODY
14 AND THE EVIDENCE OF HER BLOOD TYPE WAS ON IT PRIOR TO
15 BEING TORN BUT THE FORTY-EIGHT HOLES IN THE PAJAMA TOP
16 MATCHED THE TWENTY-ONE WOUNDS IN COLETTE'S CHEST WHEN
17 PROBES WERE INSERTED WHEN THE PAJAMA TOP WAS TURNED RIGHT
18 SLEEVE INSIDE OUT. IT WASN'T ABOUT THE ABSENCE OF
19 EVIDENCE OF INTRUDERS BUT ABSENCE OF EVIDENCE CONSISTENT
20 WITH JEFFREY MACDONALD'S ACCOUNT OF A STRUGGLE IN THE
21 LIVING ROOM IN WHICH, ACCORDING TO HIM, HIS PAJAMA TOP WAS
22 TORN IN THAT ROOM. THE PAJAMA TOP WAS PUNCTURED BY AN ICE
23 PICK WIELDING ASSAILANT IN THAT ROOM AND YOUR HONOR MAY
24 RECALL THERE WAS NO EVIDENCE OF TEARING BUT JUST NICE,
25 NEAT PUNCTURES. AND, OF COURSE, THE KEY THING, YOUR

1 HONOR, IS EVEN IF YOU HAD, AND I SEEM TO RECALL MAKING AN
2 ARGUMENT SOMETHING TO THIS EFFECT AT TRIAL, THAT EVEN IF
3 YOU HAD EVIDENCE THAT CLEARLY PUT HELENA STOECKLEY IN THE
4 HOUSE -- LET'S SAY SHE WAS THE BABYSITTER AND HER
5 FINGERPRINTS ARE ALL OVER THE KITCHEN OR DINING ROOM
6 TABLE, IT WOULD NOT HAVE CHANGED THE EVIDENCE UPON WHICH
7 WE ASKED THE JURY TO CONVICT MR. MACDONALD. THAT WAS HIS
8 OWN ACCOUNT OF WHAT HE SAID HE DID AFTER THE INTRUDERS HAD
9 SUPPOSEDLY FLED INTO THE NIGHT. BECAUSE, AS YOUR HONOR
10 MAY RECALL, IT IS ONLY JEFFREY MACDONALD WHO CAN MOVE THE
11 PAJAMA TOP FROM HIS BODY DOWN THE HALL TO THE MASTER
12 BEDROOM AND PLACE IT ON COLETTE MACDONALD'S BODY. HE'S
13 THE ONLY PERSON THAT CAN PLACE THAT IN THERE. NO WAY
14 HELENA STOECKLEY CAN, HAD SHE BEEN IN THE HOUSE, CAN
15 CHANGE THE FACT THAT HE PUT IT ON HER. HER BLOOD WAS ON
16 IT BEFORE IT WAS TORN AND THAT THE WOUNDS IN COLETTE
17 MACDONALD MATCHED THE HOLES IN THE PAJAMA TOP, PROVING
18 THAT SHE WAS STABBED THROUGH THE PAJAMA TOP BY JEFFREY
19 MACDONALD.

20 NOW, IN FOCUSING ON THE BLACK WOOLEN FIBERS AND SOME
21 OF THIS OTHER MISCELLANEOUS DEBRIS WE LOSE SIGHT, AND I'M
22 SURE IT'S NOT INTENTIONAL ON MR. SILVERGLATE'S PART, WE
23 LOSE SIGHT OF THE OTHER EVIDENCE THAT WAS UNDER COLETTE
24 MACDONALD'S BODY. I BELIEVE THERE WERE FIFTEEN PURPLE
25 COTTON THREADS THAT MATCHED MACDONALD'S PAJAMA TOP

1 UNDERNEATH HER BODY. THERE WAS EVIDENCE ABOUT WHETHER THE
2 BODY WAS MOVED OR NOT. THE JURY OBVIOUSLY RESOLVED THAT
3 AGAINST JEFFREY MACDONALD. IT WAS CLEAR THAT HER BODY HAD
4 BEEN IN CONTACT NOT ONLY WITH THE THROW RUG IN THE MASTER
5 BEDROOM, THE SHAG RUG BENEATH THE THROW RUG BUT ALSO A
6 THROW RUG IN KRISTEN'S ROOM. THERE WERE FIBERS WHICH
7 CONNECTED HER -- IN FACT, ONE OF THE ONES MR. SEGAL
8 STIPULATED TO WAS A FIBER THAT CONNECTED HER -- I'M SORRY,
9 I STAND CORRECTED. IT WAS BROWNING'S TESTIMONY WHICH PUT
10 A FIBER FROM THE THROW RUG IN KRISTEN'S ROOM IN COLETTE'S
11 HAND. NONE OF THAT IS CHANGED OR LESSENER NOR THE
12 PROBATIVE VALUE OF IT LESSENER BY THE PRESENCE OF FOREIGN
13 FIBERS WHICH PROBABLY CAME FROM THE SHAG RUG, WHICH WOULD
14 BE A NATURAL REPOSITORY FOR FOREIGN DEBRIS.

15 NOW, MR. SILVERGLATE TALKED IN TERMS OF THE INOCUOUS
16 FIBERS THAT MR. SEGAL STIPULATED TO AND LIKE YOUR HONOR, I
17 SHARE THE, I THINK A MOMENT OF, HOW SHALL I PUT IT,
18 CONDONATION IN DESCRIBING MR. SEGAL AS A NAIVE ATTORNEY.
19 MR. SEGAL AND I DIDN'T GET ALONG VERY WELL BUT THE ONE
20 THING I WOULD NEVER SAY WAS HE WAS LESS THAN A VIGOROUS
21 AND AGGRESSIVE ADVOCATE. WE FOUGHT DAILY ON VIRTUALLY
22 EVERY ISSUE, AS I'M SURE YOU RECALL.

23 THE POINT WAS THAT MR. SEGAL STIPULATED TO THE
24 PRESENCE OF THESE FIBERS ON THE CLUB. THAT'S FIBERS FROM
25 THE THROW RUG FOUND NEAR COLETTE MACDONALD'S BODY WHICH

1 HAD THE POCKET FROM MACDONALD'S PAJAMA TOP WITH HER BLOOD
2 ON IT, THREADS FROM HIS PAJAMA TOP. NOW THOSE FIBERS FROM
3 NOT ONLY THE COMPOSITION OF THE THROW RUG BUT THREADS FROM
4 MACDONALD'S PAJAMA TOP WERE FOUND ON THE CLUB OUTSIDE THE
5 HOUSE. IT WAS NOT INOCUOUS BECAUSE AGAIN ONLY MACDONALD
6 COULD BRING THE PAJAMA TOP INTO THE MASTER BEDROOM AT A
7 TIME WHEN, ACCORDING TO HIS ACCOUNT, THE CLUB IS ALREADY
8 OUTSIDE THE HOUSE AND HE NEVER TOUCHES IT. IN FACT,
9 ACCORDING TO HIS DESCRIPTION HE WAS HIT WITH A BASEBALL
10 BAT. HE NEVER IDENTIFIED THE CLUB. IN FACT, HE TRIED TO
11 SHOW IT WAS A FOREIGN OBJECT NOT RELATED TO THE HOUSE;
12 UNSUCCESSFULLY I MIGHT ADD.

13 THE SIGNIFICANCE IS THAT THE CLUB HAD TO HAVE BEEN IN
14 CONTACT WITH BOTH THE THROW RUG AND NOW THE SHAG RUG WE
15 KNOW FROM MR. MALONE'S EXAMINATION AT A TIME WHEN THE
16 PAJAMA TOP THREADS HAD ALREADY GOTTEN ON TOP OF THE THROW
17 RUG. THAT CAN ONLY HAPPEN IF MACDONALD IS IN THE ROOM AT
18 THE TIME. OTHERWISE THE CLUB IS OUTSIDE, ACCORDING TO HIS
19 ACCOUNT, AND HE'S IN THE LIVING ROOM.

20 YOUR HONOR, MR. SILVERGLATE HAS ARGUED BOTH IN HIS
21 BRIEF AND IN HIS PRESENTATION THAT IN FINAL ARGUMENT BOTH
22 MYSELF AND MR. BLACKBURN, WHOSE FINAL ARGUMENT WAS FAR
23 MORE ELOQUENT THAN MINE, I MIGHT ADD, WHICH IS NOT TO SAY
24 MINE WAS ELOQUENT AT ALL, TRIED TO CONVICT MACDONALD
25 BECAUSE OF THE ABSENCE OF EVIDENCE OF INTRUDERS. WE DID

1 NO SUCH THING BUT MR. BLACKBURN SAID, AND I'M QUOTING FROM
2 THE TRANSCRIPT PAGE 7120:

3 WE AREN'T ASKING YOU TO CONVICT THE DEFENDANT ON WHAT
4 MIGHT HAVE BEEN. WE ARE ASKING YOU TO CONVICT THE
5 DEFENDANT ON WHAT WE HAVE GOT. WHAT IS HERE, NOT
6 WHAT IS NOT HERE. NOT WHAT WE DIDN'T FIND BUT WHAT
7 WE DID.

8 AND I BELIEVE I SAID AT A LATER POINT IN THE
9 TRANSCRIPT, 7058 TO 7060:

10 THE GOVERNMENT'S CASE RISES AND FALLS ON WHETHER THE
11 PHYSICAL EVIDENCE CONNECTS THE DEFENDANT BEYOND A
12 REASONABLE DOUBT TO THE COMMISSION OF THIS CRIME.

13 WHAT WE WERE ARGUING IS PRECISELY THAT. THAT THE
14 PAJAMA TOP CONNECTED HIM TO THE CRIME, THE PRESENCE OF THE
15 THREADS UNDER THE BODY CONNECTED HIM TO THE CRIME. THE
16 ONLY INSTANCE WHERE WE ARGUED THE ABSENCE OF SOMETHING WAS
17 THE ABSENCE OF THREADS OR YARNS FROM HIS PAJAMA TOP,
18 SPLINTERS FROM THE CLUB, AND BLOOD IN THE LIVING ROOM
19 WHERE HE DESCRIBED AN ATTACK HAD OCCURRED.

20 YOUR HONOR, INDULGE ME A SECOND. IF I CAN CONFER
21 WITH COUNSEL. YOUR HONOR, MAY IT PLEASE THE COURT, THAT'S
22 IT UNLESS THE COURT HAS SOME AREAS IT WISHES ME TO
23 ADDRESS, THAT WILL CONCLUDE MY PORTION OF THIS
24 PRESENTATION AND IN FACT THE GOVERNMENT'S ARGUMENT.

25 THE COURT: SINCE THIS CONFIRMATORY NOTE WAS NOT

1 MADE AVAILABLE UNTIL AFTER THE MOTION HAD BEEN FILED IN
2 1984 BY MR. O'NEILL, HOW CAN YOU SAY THAT MCCLESKEY STILL
3 INVOLVES IT?

4 MR. MURTAGH: IN THE FIRST PLACE WE WOULD DIRECT
5 YOUR HONOR'S ATTENTION BACK TO MR. DEPUGH'S ARGUMENT ABOUT
6 THEIR INITIAL ANALYSIS OF THE FIRST PAGE AND IN TERMS OF
7 -- WE WOULD ARGUE THAT THERE'S NO NEED FOR CONFIRMATORY
8 PAGE. THEY MADE THE CONNECTION IN JUNE OF 1983 BUT IN ANY
9 EVENT, I WOULD POINT OUT TO YOUR HONOR THAT THE THING WAS
10 OBTAINED IN AUGUST OF 1984. THEY WERE ON NOTICE PRIOR TO
11 FILING THEIR PETITION THAT THERE WERE MORE LABORATORY
12 BENCH NOTES COMING AND THEY WENT AHEAD AND FILED ANYWAY.
13 SO IT SEEMS TO ME IT WAS INCUMBENT UPON THEM TO PURSUE, IF
14 THEY WERE INTERESTED AND IF THEY WEREN'T IT'S NOT THE
15 GOVERNMENT'S RESPONSIBILITY.

16 THE COURT: WAS THIS CONFIRMATORY NOTE,
17 SO-CALLED, MADE AVAILABLE TO MR. O'NEILL PRIOR TO THE ORAL
18 ARGUMENT?

19 MR. MURTAGH: YES, IT WAS, YOUR HONOR. NOT ONLY
20 PRIOR TO THE EVIDENTIARY HEARING WHICH WAS, AS YOUR HONOR
21 MAY RECALL, ON THE GOVERNMENT'S MOTION AND HELD IN
22 SEPTEMBER I THINK THE 19TH OR 20TH OF 1984 AND THEN I
23 BELIEVE, YOUR HONOR, AND THE DOCKET ENTRIES WILL EITHER
24 PROVE ME RIGHT OR WRONG BUT I BELIEVE THE ORAL ARGUMENT
25 WAS EARLY JANUARY OF 1985. DURING THAT PERIOD, MR.

1 O'NEILL WAS FILING STUFF VIRTUALLY ON A, I WOULDN'T SAY A
2 DAILY BASIS, BUT THERE WERE NUMEROUS MOTIONS TO AUGMENT
3 THE RECORD, MOTIONS TO SUPPLEMENT THE RECORD. THERE WERE
4 A NUMBER OF SUPPLEMENTARY PLEADINGS AND THERE'S NO
5 QUESTION THAT IF THEY HAD BEEN OF A MIND TO PURSUE THIS
6 MATTER, WHICH I SUBMIT THEY DISREGARDED AS OF JUNE 1983
7 WHEN THEY REALIZED IT WASN'T THE RIGHT HAIR BRUSH, IT
8 DIDN'T FIT THEIR THEORY. POINT OF FACT, THERE IS NO
9 EVIDENCE TO CONNECT THE CLEAR HANDLED HAIR BRUSH TO ANY
10 CRIMINAL ACTIVITY IN THE CRIME SCENE.

11 MR. SILVERGLATE OR MR. SILVERGLATE'S PARALEGAL, BASED
12 UPON HIS ANALYSIS OF THE PHOTOGRAPH, SAID THE CLEAR
13 HANDLED HAIR BRUSH IS THE ONE THAT'S ON THE DINING ROOM
14 SIDE TABLE OR SERVING TABLE ADJACENT TO THE KITCHEN DOOR.
15 WELL, ASSUMING HE'S CORRECT ON THAT, AND I DON'T KNOW THAT
16 WE AGREE WITH HIM, BUT ASSUMING HE'S CORRECT, THAT AREA IS
17 ABOUT AS UNDISTURBED AN AREA OF THE CRIME SCENE AS YOU
18 COULD POSSIBLY FIND. THERE WERE VALENTINE CARDS, ALTHOUGH
19 NONE FROM DOCTOR MACDONALD TO HIS WIFE, IN THAT AREA AND
20 HER PURSE WAS THERE. IN OTHER WORDS, IT WAS CLEAR THAT
21 MRS. MACDONALD HAD COME HOME THAT EVENING, PUT HER PURSE
22 DOWN, TAKEN HER HAIR BRUSH OUT AND LEFT IT THERE. THERE
23 WAS NO EVIDENCE THAT CONNECTED THAT IN ANY WAY TO HAVING
24 BEEN DISTURBED OR RIFLED OR THE CONTENTS DUMPED OUT AT ANY
25 TIME.

1 NOW, THE SO-CALLED CONFIRMATORY BENCH NOTE I THINK
2 MUST BE KEPT IN CONTEXT OF THE EARLIER NOTE OF JANICE
3 GLISSON, WHICH CLEARLY SHOWS THEY UNDERSTOOD WHAT THEY
4 WERE LOOKING FOR. I MIGHT ADD, YOUR HONOR, THAT WHILE
5 THERE WERE CERTAINLY REQUESTS FOR PRETRIAL AND PRE-
6 TESTIMONIAL RELEASE OF LABORATORY NOTES, MR. SEGAL
7 BASICALLY ASKED FOR EVERYTHING. HE PRACTICALLY WANTED ME
8 TO WRITE OUT MY QUESTIONS IN ADVANCE FOR HIM. THE POINT
9 IS, WHEN THESE WITNESSES TESTIFIED AND FOR EXAMPLE JANICE
10 GLISSON WAS QUALIFIED, BECAUSE SHE WAS THE PRINCIPAL
11 SEROLOGIST, AS A SEROLOGIST BUT IT WAS CLEAR THEY KNEW SHE
12 HAD DONE HAIR AND FIBER ANALYSIS; IT WAS CLEAR THEY KNEW
13 STEINBRAUG HAD DONE HAIR AND FIBER ANALYSIS; BROWNING WAS
14 NOTHING BUT HAIR AND FIBER ANALYSIS. AND WITH THE
15 EXCEPTION OF STEINBRAUG THERE WAS NO REQUEST AFTER THE
16 WITNESS TESTIFIED FOR THE BENCH NOTES AND THE WITNESSES
17 WERE ON THE STAND WITH THEIR BENCH NOTES IT WAS NO SECRET
18 THERE WERE NOTES INVOLVED IN THIS CASE. I ASK THE COURT
19 TO JUST BEAR THAT IN MIND IN TERMS OF THE DUE DILIGENCE
20 ASPECT OF THIS CASE THAT THEY COULD HAVE DISCOVERED THIS
21 STUFF BY MERELY ASKING FOR IT AFTER THE WITNESSES HAD
22 TESTIFIED ON DIRECT AND THE RECORD IS CLEAR THAT THEY DID
23 NOT.

24 THANK YOU, YOUR HONOR.

25 THE COURT: ALL RIGHT. THANK YOU, MR. MURTAGH.

1 NOW, MR. SILVERGLATE, YOU HAVE USED UP EXACTLY ONE HOUR OF
2 YOUR TIME WHICH YOU HAD BUT I WILL LET YOU HAVE SOME
3 ADDITIONAL TIME FOR REBUTTAL. I WOULD HOPE THAT YOU WOULD
4 BE ABLE TO LIMIT THIS SAY TO ABOUT TEN MINUTES. CAN YOU
5 DO SO?

6 MR. SILVERGLATE: I BELIEVE I CAN, YOUR HONOR.

7 THE COURT: ALL RIGHT. TRY YOUR BEST AND WE
8 WILL SEE HOW WE DO.

9 MR. SILVERGLATE: YOUR HONOR, FIRST OF ALL MR.
10 DEPUE ARGUED THAT AT THEIR BEST THESE BENCH NOTES WERE
11 FLAGS OR SIGN POSTS TO THE PHYSICAL EXHIBITS. THE
12 OPPOSITE IS TRUE. HAD THE DEFENSE FOUND THE PHYSICAL
13 EXHIBITS THE FIRST THING THEY WOULD HAVE ASKED IS WAS
14 HAVING HAD THEM ANALYZED DO YOU HAVE ANY REPORTS? WHAT IS
15 THIS? HOW DOES THE GOVERNMENT IDENTIFY IT? THE LAB
16 NOTES, THE REPORT AS TO WHAT THIS IS IS CLEARLY MORE
17 IMPORTANT THAN THE PHYSICAL EXHIBIT ITSELF.

18 IN ANY EVENT, YOUR HONOR HAS SEEN THE BOX OF SLIDES
19 AND IT IS CLEARLY MISLEADING. YOU CANNOT FAULT THE
20 DEFENSE EXPERT FOR SEEING THAT BOX AND NOT BOTHERING TO
21 OPEN IT UP. IT IS MISLABELED.

22 THE COURT: I DON'T KNOW HE DIDN'T OPEN IT UP.

23 MR. SILVERGLATE: HE SAYS HE NEVER SAW ANY SUCH
24 BLOND WIG FIBERS.

25 THE COURT: WELL, IF THAT'S THE ANSWER TO IT BUT