

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO.: 3:75-CR-26-3
NO.: 5:06-CV-24-F

UNITED STATES OF AMERICA .
 .
 v. .
 . September 21, 2011
 JEFFREY R. MacDONALD, . Wilmington, NC
 .
 Movant. .

STATUS CONFERENCE
BEFORE THE HONORABLE JAMES C. FOX
SENIOR UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Government: THOMAS G. WALKER, UNITED STATES ATTORNEY
JOHN BRUCE, FIRST ASSISTANT U.S. ATTORNEY
BRIAN MURTAGH, ESQUIRE
UNITED STATES ATTORNEY'S OFFICE
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RALEIGH, NC 27601

For the Movant: HART MILES, ESQUIRE
POST OFFICE BOX 361
RALEIGH, NC 27602

CHRISTINE C. MUMMA, ESQUIRE
NORTH CAROLINA CENTER ON ACTUAL INNOCENCE
POST OFFICE BOX 52446
SHANNON PLAZA STATION
DURHAM, NC 27717-2446

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Court Reporter: STACY SCHWINN, CCR, CVR
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Proceedings recorded by stenomask, transcript produced from dictation.

1 WE ASKED YOUR HONOR FOR RELIEF BASED ON THE INNOCENCE
2 PROTECTION ACT WITH WHAT WE HAVE NOW WITH THE DNA, BUT
3 ALTERNATIVELY IF YOUR HONOR WERE TO DENY RELIEF UNDER THE
4 INNOCENCE PROTECTION ACT WITH REGARDS TO THE DNA WE DID
5 ALTERNATIVELY ASK FOR FURTHER TESTING AND THAT WAS THE PURPOSE
6 OF MS. MUMMA'S AFFIDAVIT SINCE IT HAS BEEN A LONG TIME SINCE
7 THE DNA TESTING WAS PERFORMED.

8 THE COURT: WELL, I UNDERSTOOD FROM HER AFFIDAVIT
9 THAT NEW PROCEDURES HAVE BEEN DEVELOPED.

10 MR. MILES: THAT'S CORRECT. THAT'S CORRECT, YOUR
11 HONOR.

12 THE COURT: I SUSPECT, MR. BRUCE, YOU'VE HAD JUST
13 ABOUT AS LONG AS I'VE HAD TO GET FAMILIAR WITH ALL THIS --
14 WITH THIS MOTION. I KNOW YOU WANT TO RESPOND TO IT CERTAINLY.

15 MR. BRUCE: YES, YOUR HONOR. WE WOULD NEED SOME
16 GOOD BIT OF TIME TO RESPOND TO THE NEW MATTER, THE MOTION THEY
17 FILED UNDER THE INNOCENCE PROTECTION ACT. I GUESS THEY'VE
18 BEEN PREPARING IT FOR SOME TIME AND WE NEED TO LOOK IN DETAIL
19 AT 18 U.S. CODE 3600 AND WHAT THEY'RE PROPOSING TO DO. WE HAD
20 A LOT OF RESERVATIONS ABOUT IT OBVIOUSLY JUST HAVING READ
21 THROUGH IT.

22 AND SO, OUR PREFERENCE WOULD BE TO MOVE FORWARD WITH
23 WHAT'S ALREADY BEFORE THE COURT ON REMAND AND MEANWHILE WE CAN
24 BE PREPARING A RESPONSE TO THEIR LATEST MOTION. WE'RE GOING
25 TO OPPOSE ANY NEW DNA TESTING FOR SURE.

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1 AND WITH REGARD TO WHETHER WE HAVE AN EVIDENTIARY
2 HEARING, WE'RE COMFORTABLE WITH HAVING AN EVIDENTIARY HEARING.

3 THE COURT: YES, I KNOW. YOU ASKED FOR IT IN YOUR
4 LAST -- IN YOUR FILING IN THIS COURT SOME TIME AGO.

5 MR. BRUCE: WELL, THAT'S TRUE. AND WE, IN OUR
6 LATEST FILING, STATED THAT THE COURT COULD DO THAT OR UNDER
7 RULE SEVEN OF THE RULES GOVERNING 2255 HAVE A PERIOD OF
8 AFFIDAVITS AND EXHIBITS AND THEN DECIDE WHETHER TO HAVE AN
9 EVIDENTIARY HEARING.

10 AS FAR AS HOW LONG THE EVIDENTIARY HEARING WOULD
11 TAKE, THAT DEPENDS. OUR VIEW IS, AS WE STATED IN OUR FILING
12 EARLIER THIS WEEK, WE WOULD LIKE TO HAVE THE COURT ADDRESS
13 WHETHER OR NOT MACDONALD CAN PROVE THE NEWLY DISCOVERED
14 EVIDENCE ON WHICH HIS CLAIMS ARE BASED. THAT, WE THINK, WOULD
15 NOT TAKE ALL THAT LONG. MAYBE TWO OR THREE OR FOUR DAYS.

16 IF WE'RE GOING TO HAVE A HEARING ON EVIDENCE AS A
17 WHOLE FOR PURPOSES OF GATE-KEEPING, THE WAY THE FOURTH CIRCUIT
18 IS NOW DEFINING IT, WHO KNOWS HOW LONG THAT WOULD TAKE. I
19 DON'T KNOW HOW MUCH THEY INTEND TO INTRODUCE IN THAT REGARD.

20 THE COURT: WELL, AS YOU KNOW, I DIDN'T TRY THE CASE
21 AND I'M NOT AS FAMILIAR WITH IT AS JUDGE DUPREE WOULD HAVE
22 BEEN WERE HE HERE.

23 WELL, I'M GOING TO GIVE YOU SOME TIME TO RESPOND TO
24 THE MOTION FOR A NEW TRIAL PURSUANT TO THE INNOCENCE
25 PROTECTION ACT. HOW LONG DO YOU WANT TO RESPOND TO THAT?

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1 MR. BRUCE: WE'D LIKE TO HAVE 60 DAYS TO RESPOND TO
2 THAT, YOUR HONOR.

3 THE COURT: 60?

4 MR. BRUCE: YES.

5 THE COURT: LET'S SEE. WHAT'S TODAY, THE 20TH OR
6 THE 21ST?

7 MADAM CLERK: 21ST.

8 THE COURT: WOULD DECEMBER THE 1ST, DO IT?

9 MR. BRUCE: THAT WOULD BE FINE, YOUR HONOR.

10 THE COURT: IS THAT ACCEPTABLE?

11 MR. MILES: YES, YOUR HONOR.

12 THE COURT: WE'LL MAKE IT DECEMBER 1ST, 2011, OKAY?

13 MR. BRUCE: THANK YOU, YOUR HONOR.

14 THE COURT: NOW, MY NEXT QUESTION IS, I WOULD THINK
15 YOU'D WANT TO HAVE -- IF WE ORDER NEW DNA TESTING, WHICH YOU
16 OPPOSE, OR NEW PROCEDURES, WHY WOULD -- I'M JUST CURIOUS, IF
17 IT WOULD PRODUCE MORE INFORMATION, WHAT WOULD BE THE OBJECTION
18 TO IT?

19 MR. BRUCE: YOUR HONOR, OUR OBJECTION TO THAT IS
20 THAT -- WELL, FIRST OF ALL, WE NEED TO LOOK INTO THESE NEW
21 TECHNOLOGIES --

22 THE COURT: RIGHT.

23 MR. BRUCE: -- THAT THEY ARE PROFFERING THAT THEY
24 HAVE.

25 THE COURT: I UNDERSTAND.

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1 MR. BRUCE: THEY TALK ABOUT TOUCH DNA AND THERE'S A
2 HIGH RISK THERE OF CONTAMINATION. THIS EVIDENCE HAS BEEN
3 HANDLED OVER A 40 YEAR PERIOD AND IF WE'RE GOING TO -- IF THEY
4 PROPOSE TO SEARCH EVERY BIT OF PHYSICAL EVIDENCE THERE IS FOR
5 DNA RESIDUE OF SOMEONE WHO MIGHT HAVE TOUCHED IT WE'RE GOING
6 TO GET COUNTLESS HITS SO TO SPEAK. THE --

7 THE COURT: WELL, I MEAN, IF THEY WERE HITS FROM
8 UNKNOWN PEOPLE, WOULD IT BE RELEVANT?

9 MR. BRUCE: NO, WE AGREE WITH THAT, AND THAT'S WHY
10 WE DON'T SEE THE NEED FOR FURTHER DNA TESTING. THIS CASE DOES
11 NOT FIT INTO THE PARADIGM OF HOW DNA EXCULPATES PEOPLE. THE
12 PARADIGM IS WHERE YOU HAVE A CASE WHERE SOMETHING -- SOME
13 BIOLOGICAL EVIDENCE WAS INTRODUCED AT THE TRIAL AND WAS
14 ATTRIBUTED TO THE DEFENDANT, SUCH AS IN A RAPE CASE, AND NOW
15 WE HAVE DNA AND WE CAN GO BACK AND TEST THAT AND SAY, NO, IT
16 WASN'T THE DEFENDANT, IT WAS SOMEONE ELSE. THAT CASE DOESN'T
17 FIT THIS PARADIGM.

18 OBVIOUSLY, THEY WOULD CONCEDE THAT THERE IS -- THE
19 CRIME SCENE WAS REplete WITH THE DNA OF THE DEFENDANT,
20 MACDONALD, AND CONTINUING TO COME UP WITH UNSOURCED THINGS,
21 LIKE UNSOURCED HAIRS, ADDS NOTHING TO THE MIX.

22 IT'S BEEN KNOWN FROM THE TIME BEFORE THE TRIAL AND
23 AT THE TRIAL AND THROUGH ALL THE HABEAS PROCEEDINGS THAT THERE
24 WERE UNSOURCED BITS OF BIOLOGICAL EVIDENCE IN THE HOUSE AS
25 THERE WOULD BE IN ANY HOUSE.

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1 AND SO, IT'S FUTILE TO CONTINUE TO KEEP DOING ROUND
2 AFTER ROUND OF DNA TESTING AND WE ALSO THINK THAT THIS IS TOO
3 LATE. THAT THEY HAD THE CHANCE TO ASK FOR THIS. THERE WAS A
4 LOT -- AS YOUR HONOR KNOWS, THERE WAS A LOT OF LITIGATION AND
5 A LOT OF BACK AND FORTH BETWEEN THE PARTIES ABOUT EXACTLY WHAT
6 WOULD BE TESTED IN THIS ROUND THAT WE HAVE HAD. AND THIS IS
7 WHAT WAS SETTLED ON. THESE ITEMS WERE GOING TO BE TESTED.
8 AND IT'S TOO LATE, WE CONTEND, TO COME BACK AND SAY WE WANT TO
9 TEST MORE ITEMS.

10 THE COURT: MR. MILES.

11 MR. MILES: THANK YOU, YOUR HONOR. WELL, JUST TO
12 ADDRESS THE GOVERNMENT'S CASE AT TRIAL, MY UNDERSTANDING UPON
13 READING THE TRANSCRIPT, IS THAT A LARGE PART OF THEIR CASE WAS
14 BLOOD EVIDENCE, WHICH WE WOULD OBVIOUSLY SUBMIT TO THE COURT
15 IS FULL OF DNA. AND THAT -- AND I DON'T KNOW ABOUT THE
16 PRESERVATION CHAIN OF CUSTODY. ALL THOSE ISSUES, OBVIOUSLY,
17 ARE THINGS THAT WE'RE GOING TO HAVE TO DEAL WITH. BUT CLEARLY
18 BLOOD EVIDENCE WAS A BIG PART OF THE GOVERNMENT'S CASE IN
19 CHIEF AND THAT IS AND WE WOULD PROPOSE THAT THAT IS A PRIME
20 SOURCE OF RELEVANT EVIDENCE IN THIS CASE.

21 YOU KNOW, OTHER THINGS, I CAN'T SPEAK TO THE COURT
22 AS TO WHAT EXACTLY WE'RE GOING TO BE ABLE TO IDENTIFY. MAYBE
23 MS. MUMMA COULD SPEAK TO THAT A LITTLE BIT BETTER THAN ME.
24 SHE DID IDENTIFY SOME THINGS IN HER AFFIDAVIT THAT COULD BE
25 POTENTIAL AREAS TO SEARCH FOR THIS WITH THESE NEW TESTING

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1 METHODS TO DISCOVER DNA, BUT, ULTIMATELY, YOUR HONOR,
2 OBVIOUSLY, THIS IS ABOUT THE TRUTH.

3 AND WHEN WE'RE TALKING ABOUT -- THIS IS OBVIOUSLY,
4 WE WOULD THINK, JEFFREY MACDONALD'S LAST CHANCE IN COURT TO
5 HAVE ALL THE EVIDENCE EVALUATED AND TESTED FOR DNA. AND IF
6 THERE'S DNA INFORMATION AS THE COURT ALLUDED TO, THAT THERE'S
7 NEW INFORMATION THAT MAY AID THE COURT IN ITS EVALUATION OF
8 WHETHER HE IS, IN FACT, ACTUALLY INNOCENT OR NOT WE BELIEVE
9 THAT THAT IS -- THAT JUSTICE REQUIRES THAT IT BE TESTED. AND
10 IF YOU -- AS FAR AS MORE TECHNICAL INFORMATION AS TO THE DNA,
11 I WOULD DEFER TO MS. MUMMA.

12 THE COURT: ALL RIGHT. MS. MUMMA.

13 MS. MUMMA: YES, YOUR HONOR, IF I COULD JUST ADD TWO
14 THINGS. ALTHOUGH I AGREE THAT THE UNSOURCED DNA IS -- MAY NOT
15 BE RELEVANT TO THE CASE, REALLY DEPENDS WHERE THAT DNA IS
16 FOUND. IF IT'S FOUND IN A LOCATION WHERE IT WOULD HAVE ONLY
17 ENDED UP IN THAT LOCATION THROUGH A STRUGGLE, THEN CLEARLY
18 THAT BECOMES MORE IMPORTANT. AND IF YOU FIND A DNA PROFILE IN
19 MORE THAN ONE PLACE THAT'S CONSISTENT AND IT'S A MALE PROFILE
20 THAT'S NOT JEFFREY MACDONALD, THEN THAT WOULD BE IMPORTANT TO
21 CONSIDER AS WELL.

22 I UNDERSTAND THAT THE WEAPONS MAY HAVE BEEN
23 CONTAMINATED BY OTHER PARTIES TOUCHING THE EVIDENCE, BUT
24 CERTAINLY THE INSIDE OF THE FINGER OF THE SURGICAL GLOVE,
25 WHICH IS A VERY GOOD CONDUIT FOR COLLECTING SKIN CELLS WHEN

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1 THAT COMES OFF THE FINGER, IS SOMETHING THAT COULD BE TESTED.

2 AS FAR AS THE BLOOD EVIDENCE GOES, THE FAMILY HAD
3 UNIQUE BLOOD TYPES THROUGH ALL FOUR MEMBERS, BUT THE DNA THAT
4 WOULD BE COLLECTED FROM THAT BLOOD WOULD NOT BE UNIQUE TO THE
5 FAMILY. IT WOULD BE UNIQUE TO THE PERSON WHO ACTUALLY DROPPED
6 THAT SPECK OF BLOOD.

7 THERE ARE LOCATIONS IN THE HOME WHERE THE BLOOD MAY
8 HAVE BEEN DROPPED BY THE PERPETRATOR IF THEY HAD AN INJURY,
9 AND I THINK IT WOULD BE VERY RELEVANT TO TEST THOSE BLOOD
10 SPOTS. AND CERTAINLY THAT WOULD NOT HAVE BEEN SUBJECT TO
11 CONTAMINATION LIKE THE WEAPONS MAY HAVE BEEN IN THIS CASE.

12 THE COURT: WELL, DNA, IT SEEMS TO ME, WOULD CUT
13 BOTH WAYS, MR. BRUCE, WOULDN'T YOU THINK SO?

14 MR. BRUCE: WELL, YOUR HONOR, HERE'S THE THING, THIS
15 CASE IS 40 YEARS OLD.

16 THE COURT: IT SURE IS.

17 MR. BRUCE: IT'S HAD A TRIAL. IT'S HAD THREE
18 HABEASES. IT'S NOW BACK HERE FOR ITS FOURTH AND FIFTH HABEAS
19 BEFORE THEIR FILINGS OF YESTERDAY.

20 THEY CANNOT USE THE INNOCENCE PROTECTION ACT, AND
21 WE'VE GOT TO STUDY IT AND WE'VE GOT TO BRIEF IT FOR THE COURT,
22 BUT WE BELIEVE THEY CANNOT USE THE INNOCENCE PROTECTION ACT TO
23 REPLAY EVERYTHING, TO TEST EVERY BLOOD SAMPLE, ASSUMING THEY
24 STILL CAN BE TESTED BEING 40 YEARS OLD, TO REHASH THE TRIAL.

25 WHAT THEY HAVE TO SHOW UNDER THE INNOCENCE

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1 PROTECTION ACT IS THAT THERE'S SOME DISCRETE ITEM OF DNA THAT
2 THEY WANT TO TEST AGAINST THE DEFENDANT AND MAYBE SOME OTHER
3 FOLKS AND THAT'S GOING TO BE THE MAGIC BULLET. IT'S NOT
4 DESIGNED TO LET'S REDO EVERYTHING ABOUT THE TRIAL. AND I
5 THINK WHEN WE PUT THAT BEFORE THE COURT IN A BRIEF, I THINK
6 THE COURT WILL AGREE.

7 JUST ONE FOR INSTANCE, IT WAS MENTIONED ABOUT THE
8 FRAGMENT OF THE --

9 THE COURT: GLOVE.

10 MR. BRUCE: -- RUBBER GLOVE, THE SURGICAL GLOVE.
11 MR. MURTAGH INFORMS ME THAT THAT WAS TESTED WITH A CHEMICAL AT
12 THE TIME FOR PRESENCE OF BLOOD -- TRYING TO GET A FINGERPRINT
13 AND IT HAS DESTROYED EVERYTHING ON THERE. IT WON'T HAVE
14 ANYMORE BIOLOGICAL EVIDENCE ON IT.

15 AND THIS IS THE KIND OF THING THAT HAS BEEN
16 LITIGATED AND LITIGATED AND LITIGATED. AND OPENING A WHOLE
17 NEW ROUND OF DNA TESTING IS JUST GOING TO MAKE THIS CASE GO ON
18 FOREVER. WE'VE GOT TO ACHIEVE FINALITY IN THIS CASE.

19 WE'RE PREPARED TO GO FORWARD WITH WHAT THE FOURTH
20 CIRCUIT SENT BACK. IF THE COURT CHOOSES TO HAVE AN
21 EVIDENTIARY HEARING THAT WOULD BE FINE WITH US AND WE DON'T
22 THINK THEY CAN PROVE THEIR NEWLY DISCOVERED EVIDENCE ON THE
23 BRITT CLAIM OR THEIR PRESENT DNA CLAIM AND THAT SHOULD BE THE
24 END OF THIS MATTER.

25 THE COURT: WELL, OF COURSE, I'M GOING TO BE GLAD TO

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1 READ YOUR BRIEF ON THAT. MR. HART (SIC), IS THE DNA CLAIM A
2 FREESTANDING ACTUAL INNOCENCE CLAIM?

3 MR. MILES: WELL, YOUR HONOR, I BELIEVE IT IS. I
4 BELIEVE IT IS.

5 THE COURT: WELL, HAS THE SUPREME COURT EVER
6 RECOGNIZED THAT AS A GROUNDS FOR HABEAS RELIEF?

7 MR. MILES: I DON'T BELIEVE THE SUPREME COURT HAS
8 RECOGNIZED IT IN THAT WAY, YOUR HONOR.

9 THE COURT: I DON'T THINK IT HAS EITHER. IN FACT,
10 SOME COURTS HAVE DECLINED TO RECOGNIZE IT, IS THAT CORRECT?

11 MR. MILES: YOUR HONOR, I CAN'T SPEAK TO A
12 SPECIFIC --

13 THE COURT: WELL, LET ME SEE. I WAS READING WITH
14 INTEREST A BOOK CALLED PATRON -- POST-CONVICTION REMEDIES,
15 2011 EDITION, AND THIS DISCUSSION IS FOUND AT PAGE 6:17 OR
16 6:18, PAGE 224.

17 AND JUST READING IT, IT SAYS, "THE SUPREME COURT HAS
18 YET TO DEFINITELY RESOLVE WHETHER THERE IS A FEDERAL
19 CONSTITUTIONAL RIGHT TO BE RELEASED UPON PROOF OF ACTUAL
20 INNOCENCE. AS CHIEF JUSTICE ROBERTS RECENTLY OBSERVED,
21 WHETHER SUCH A FEDERAL RIGHT EXISTS IS AN OPEN QUESTION. WE
22 HAVE STRUGGLED WITH IT OVER THE YEARS AND IN SOME CASES
23 ASSUMING ARGUENDO THAT EXIST WHILE ALSO NOTING THE DIFFICULT
24 QUESTIONS SUCH A RIGHT WOULD IMPOSE IN THE HIGHEST STANDARD
25 ANY CLAIMANT WOULD HAVE TO MEET." AND THEN IT GOES ON TO

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1 REFER TO HERRERA VS. COLLINS AND THE OPINIONS EXPRESSED
2 THEREIN. THERE ARE NUMEROUS OPINIONS EXPRESSED IN IT.

3 IF IT IS A GATEWAY CLAIM, I'D LIKE FOR YOU TO
4 IDENTIFY THAT UNDERLYING CONSTITUTIONAL VIOLATION THAT
5 SUPPORTS IT.

6 MR. MILES: I UNDERSTAND, YOUR HONOR. I UNDERSTAND.

7 THE COURT: I DON'T REALLY UNDERSTAND -- I MEAN, I
8 HAVEN'T -- YOU'RE FAR MORE FAMILIAR WITH IT THAN I AM.

9 MR. MILES: WELL, AND AS FAR AS SPEAKING TO THE --
10 THE INNOCENCE PROTECTION ACT OFFERS A NEW TRIAL. THE RELIEF
11 IS A NEW TRIAL.

12 THE COURT: I UNDERSTAND THAT'S A DIFFERENT ISSUE.

13 MR. MILES: RIGHT. RIGHT.

14 THE COURT: IN OTHER WORDS, I'M SAYING YOUR -- IT
15 WOULD SEEM TO ME, AND I HAVEN'T -- I'M NOT FAMILIAR WITH IT.

16 MR. BRUCE, I GOT THIS MOTION LAST NIGHT AT 4:30 AND I WAS
17 GONE, QUITE FRANKLY.

18 MR. MILES: I UNDERSTAND, YOUR HONOR.

19 THE COURT: AND I'VE READ IT FOR MAYBE 45 MINUTES
20 THIS MORNING, BUT IT SEEMS TO ME THAT THE ACTUAL -- THAT THE
21 DNA CLAIM, IF IT'S A FREESTANDING ACTUAL INNOCENCE CASE, THE
22 LEGAL ISSUES ON THAT COULD BE BRIEFED IMMEDIATELY.

23 MR. MILES: SURE, YOUR HONOR.

24 THE COURT: NOW, IF YOU WANT TO BRIEF THAT
25 IMMEDIATELY I'LL BE GLAD TO RECEIVE YOUR BRIEFS IF YOU WANT TO

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1 DO THAT, BUT THAT DOESN'T GET TO THE INNOCENCE PROTECTION ACT
2 ISSUES.

3 MR. MILES: THAT'S TRUE, YOUR HONOR.

4 THE COURT: I MEAN, THOSE ARE TWO DIFFERENT ISSUES
5 IT SEEMS TO ME. NOW, THE QUESTION OF THE LIKELY --
6 RELIABILITY AND CREDIBILITY OF THE BRITT CLAIM AND ITS
7 TIMELINESS WOULD BE THE SUBJECT OF AN EVIDENTIARY HEARING, IS
8 THAT CORRECT, MR. BRUCE?

9 MR. BRUCE: THAT WOULD BE FINE WITH THE COURT --
10 WITH THE GOVERNMENT FOR US TO HAVE AN EVIDENTIARY HEARING. WE
11 DON'T THINK THE COURT'S REQUIRED TO DO THAT. IF THE COURT
12 WANTED TO PROCEED ANOTHER WAY UNDER RULE SEVEN, BUT WE'RE
13 COMFORTABLE WITH EITHER PATH.

14 THE COURT: WELL, I'LL LEAVE THAT TO COUNSEL. IF
15 YOU WANT TO PRESENT TESTIMONY, MR. HART, YOU CAN DO THAT. IS
16 THAT WHAT YOU WANT TO DO?

17 MR. MILES: YES, YOUR HONOR.

18 THE COURT: WELL, THEN THE GOVERNMENT -- OF COURSE,
19 THE GOVERNMENT CAN PRESENT EVIDENCE AS WELL.

20 MR. BRUCE: YES, YOUR HONOR.

21 THE COURT: NOW --

22 MR. BRUCE: AND, OF COURSE, THE MOVANT HAS THE
23 BURDEN OF PROOF AT THE EVIDENTIARY HEARING.

24 THE COURT: YES. AND I GATHER THAT'S BY CLEAR AND
25 CONVINCING EVIDENCE, IS THAT CORRECT? IS THAT WHAT THE

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1 STATUTE SAYS?

2 MR. ALLEN: YOUR HONOR, SECTION 2255 DOES REFER TO A
3 PREPONDERANCE OF THE EVIDENCE. IT'S NOT ENTIRELY CLEAR --

4 THE COURT: I'M SORRY?

5 MR. ALLEN: 2255 REFERS TO A PREPONDERANCE OF THE
6 EVIDENCE AS WELL. SECTION 2255(h) REFERS TO CLEAR AND
7 CONVINCING. I THINK THE GOVERNMENT HAS ACKNOWLEDGED THERE'S A
8 LITTLE BIT OF A LACK OF CLARITY ABOUT EXACTLY WHAT THE
9 STANDARD IS. WE'D BE GLAD TO FOCUS ON THAT IF YOUR HONOR
10 WOULD LIKE US TO BRIEF IT.

11 THE COURT: WELL, I'D LIKE FOR YOU TO DO THAT.
12 SECTION 2255(h)1 REFERS TO CLEAR AND CONVINCING EVIDENCE.
13 THAT'S A STATUTE, NOT COURT MADE. IT SEEMS LIKE TO ME THAT'S
14 BINDING.

15 MR. ALLEN: IF YOUR HONOR PLEASE, IN THE
16 GOVERNMENT'S OWN MEMORANDUM AT FOOTNOTE FIVE, PAGE EIGHT, THEY
17 HAVE ACKNOWLEDGED THAT THE FOURTH CIRCUIT HAS STATED --

18 THE COURT: I DON'T CARE ABOUT THAT. I'M ASKING YOU
19 DOES THE STATUTE CONTROL OR THE FOURTH CIRCUIT CONTROL?

20 MR. ALLEN: THE STATUTE CONTROLS. AND IF YOUR HONOR
21 PLEASE, I BELIEVES THE STATUTE REFERS TO A SECOND STANDARD, A
22 PREPONDERANCE OF THE EVIDENCE, WHICH THE FOURTH CIRCUIT HAS
23 ACKNOWLEDGED.

24 THE COURT: WELL, IF YOU'LL LOOK AT THAT SECTION
25 2255(h)1 FOR ME AND TELL ME WHERE IT REFERS TO A PREPONDERANCE

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1 OF EVIDENCE.

2 MR. ALLEN: YES, SIR. I APOLOGIZE, YOUR HONOR. I'M
3 GETTING THERE. I HAVE --

4 THE COURT: ALL RIGHT, SIR.

5 MR. ALLEN: -- TAKEN --

6 THE COURT: I'M NOT TRYING TO PUSH YOU, BUT I'M JUST
7 TELLING YOU WHAT I READ AND SEE AND DON'T SEE.

8 MR. BRUCE: YOUR HONOR, IF I MAY CHIME IN. COUNSEL
9 MAY HAVE A POINT. THE 2255(h)1 CLEARLY STATES THAT WHEN YOUR
10 HONOR MAKES THAT GATE-KEEPING DETERMINATION ABOUT ANALYZING
11 THEIR SO-CALLED NEWLY DISCOVERED EVIDENCE IN THE LIGHT OF THE
12 EVIDENCE AS A WHOLE, THEN THE COURT APPLIES THE CLEAR AND
13 CONVINCING EVIDENCE STANDARD TO SEE IF THE COURT WOULD
14 CONCLUDE THAT NO REASONABLE JUROR WOULD HAVE FOUND MACDONALD
15 GUILTY.

16 THE COURT: RIGHT.

17 MR. BRUCE: THAT'S THEIR BURDEN OF CLEAR AND
18 CONVINCING EVIDENCE. AND THAT'S WHAT YOUR HONOR DID IN 2008
19 IN THE ORDER. BUT IN THAT 2255(h)1 IT SAYS THE MOVANT'S NEWLY
20 DISCOVERED EVIDENCE COMMA IF PROVEN COMMA.

21 THE COURT: THAT'S CORRECT.

22 MR. BRUCE: ALL RIGHT. THEY MAY BE RIGHT THAT ALL
23 THEY HAVE TO DO IS PROVE THEIR NEWLY DISCOVERED EVIDENCE BY A
24 PREPONDERANCE AND THEN SEE IF THAT PERSUADES THE COURT IN THE
25 LIGHT OF ALL THE EVIDENCE WHETHER IT SATISFIES THE CLEAR AND

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1 CONVINCING. OUR POINT IS --

2 THE COURT: I UNDERSTAND IT'S A GOOD -- I APPRECIATE
3 THAT, MR. BRUCE.

4 MR. BRUCE: AND OUR POINT IS THAT THEY HAVE NEVER
5 BEEN REQUIRED TO PROVE THEIR NEWLY DISCOVERED EVIDENCE ON THE
6 BRITT CLAIM NOR THE DNA CLAIM. WE DON'T THINK THEY CAN PROVE
7 IT BY A PREPONDERANCE. AND IF WE HAVE THE EVIDENTIARY
8 HEARING, OR WHATEVER METHOD WE USE, WE DON'T THINK THEY CAN
9 PROVE IT AND WE HAVE A LOT OF EVIDENCE TO COUNTER WHAT THEY
10 PUT IN THE BRITT AFFIDAVIT AND ALSO AS TO WHAT THEY CLAIM
11 ABOUT THE DNA EVIDENCE.

12 SO, THAT'S WHAT WE WANT TO PROCEED ON FIRST BECAUSE
13 IT SEEMS TO ME THAT THE COURT WENT THROUGH A VERY EXACTING
14 ANALYSIS OF THE GATE-KEEPING THE LAST TIME THIS WAS HERE.

15 AND NOW THE FOURTH CIRCUIT INSISTS THAT THAT BE DONE
16 OVER AGAIN WITH A MORE EXPANSIVE VIEW OF EVIDENCE AS A WHOLE.
17 THAT SEEMS AN ENORMOUS TASK, BUT IT'S A MORE DISCRETE TASK FOR
18 THEM TO HAVE TO PROVE WHAT GOT THEM HERE IN THE FIRST PLACE,
19 THE BRITT AFFIDAVIT AND WHAT THEY CLAIM IS NEWLY DISCOVERED
20 DNA EVIDENCE THAT'S EXCULPATORY. WE DON'T THINK THEY CAN
21 PROVE THAT AND WE THINK THAT COULD DISPOSE OF THIS CASE THE
22 MOST QUICKLY.

23 THE COURT: WELL, YOU'D STILL HAVE THE INNOCENCE ACT
24 MOTION.

25 MR. BRUCE: WE'LL DEAL WITH THAT IN OUR BRIEF, WE'RE

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1 HOPING. AND I LOOKED LAST NIGHT AT IT. LIKE YOUR HONOR, WE
2 JUST GOT THIS LATE YESTERDAY AFTERNOON. AND I NOTICED THAT
3 THERE'S TEN THINGS THAT THEY HAVE TO PROVE ALL OF TO ESTABLISH
4 THEIR IPA CLAIM. AND, OF COURSE, THE RESULT IS, IF THEY MEET
5 ALL THOSE TEN STEPS, THEN THEY WOULD GET THEIR NEW TESTING.
6 WELL, WHO KNOWS HOW LONG THAT'S GOING TO TAKE. THE LAST TIME
7 IT TOOK YEARS.

8 THE COURT: WELL, I DON'T KNOW WHY THAT TOOK THAT
9 LENGTH OF TIME. I MEAN, MS. MUMMA MAY COULD EXPLAIN IT TO ME.
10 I DON'T KNOW THAT MUCH ABOUT DNA TESTING. DO YOU KNOW WHY THE
11 DELAY OR WHY IT TOOK SO MUCH TIME?

12 MS. MUMMA: I DO NOT KNOW, YOUR HONOR, BUT I CAN
13 TELL YOU THAT IT WOULD BE MUCH QUICKER THIS TIME. WE ARE
14 PREPARED TO PROVIDE THE FUNDING TO ENSURE THE TESTING IS
15 EXPEDITED AND WOULD GET BACK TO THE COURT AS QUICKLY AS
16 POSSIBLE.

17 THE COURT: WELL, I NOTICED -- LET ME ASK ONE OTHER
18 QUESTION. MR. BRITT'S HEALTH WAS NOT GOOD AND MS.
19 STOECKLEY'S, I GUESS, NOT EITHER. YOU MADE A MOTION FOR A
20 STATUS CONFERENCE. DID YOU EVER MAKE ANY -- HAVE ANY IDEA OF
21 TRYING TO TAKE THEIR DEPOSITION?

22 MR. MILES: WELL, YOUR HONOR, THAT WAS ONE OF THE
23 THINGS OBVIOUSLY DURING THAT PERIOD OF TIME THAT --

24 THE COURT: I MEAN, WHY DIDN'T YOU DO THAT?

25 MR. MILES: WHY DID WE FILE THE --

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1 THE COURT: WHY DID YOU NOT TAKE THEIR DEPOSITIONS?

2 MR. MILES: WELL, YOUR HONOR, AT THE PARTICULAR TIME
3 THAT THE MOTION WAS FILED, WHEN MR. JUNKIN FILED THE MOTION, I
4 WAS LOCAL COUNSEL, THE DECISION WAS MADE TO FILE THE
5 AFFIDAVITS AND SEE IF THE COURT WOULD ENTERTAIN DISCOVERY AND
6 WE DID ASK FOR STATUS CONFERENCES AND, OBVIOUSLY, YOUR HONOR,
7 THIS CASE --

8 THE COURT: THAT DIDN'T PRECLUDE YOU FROM TAKING THE
9 DEPOSITION, DID IT?

10 MR. MILES: NOTHING PRECLUDED --

11 THE COURT: AND THE BURDEN IS ON YOU, RIGHT?

12 MR. MILES: THE BURDEN IS ON US, THAT'S CORRECT,
13 YOUR HONOR. THAT'S CORRECT. THAT'S CORRECT.

14 THE COURT: WELL, WHAT I DON'T WANT TO DO IS ADDRESS
15 THE ISSUES BEFORE THE COURT AS THEY CURRENTLY ARE ON A 2255
16 WITH A FREESTANDING CLAIM OF INNOCENCE AND THEN HAVE TO GO
17 THROUGH THE INNOCENCE ACT FOLLOWING THAT. DO YOU SEE WHAT I
18 MEAN?

19 MR. MILES: I UNDERSTAND.

20 THE COURT: I THINK IT OUGHT TO BE WRAPPED UP AT ONE
21 TIME. WHAT'S YOUR SUGGESTION ON THAT, MR. BRUCE?

22 MR. BRUCE: WELL, WE RESPECTFULLY DISAGREE WITH
23 THAT.

24 THE COURT: I'M SAYING, WHY DO YOU THINK IT OUGHT TO
25 BE HANDLED PIECEMEAL?

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1 MR. BRUCE: WELL, OUR VIEW IS THAT THE FOURTH
2 CIRCUIT HAS REMANDED THE TWO CLAIMS THAT WERE HERE BEFORE AND
3 THAT HAVE GONE UP AND THEY'RE RIPE FOR DISPOSITION. DRAGGING
4 IT OUT LONGER JUST MEANS THAT MORE WITNESSES ARE NOT
5 AVAILABLE.

6 THE COURT: WELL, THE FOURTH CIRCUIT MADE A
7 REFERENCE TO THE INNOCENCE PROTECTION ACT.

8 MR. BRUCE: IT WAS MENTIONED --

9 THE COURT: WHY WOULD THEY MENTION IT IF THEY DIDN'T
10 WANT US TO LOOK INTO IT?

11 MR. BRUCE: WELL, I THINK THEY WERE THROWING IT OUT
12 AS AN OPTION AS SOMETHING THEY MIGHT FILE, BUT BECAUSE IT GOT
13 DISCUSSED SOMEWHERE IN THE BRIEFS, BUT IT'S A NEW THING, IT'S
14 A NEW ACTION.

15 THE COURT: I UNDERSTAND.

16 MR. BRUCE: WHEREAS, THESE OTHER ONES ARE RIPE FOR
17 CONSIDERATION. WE HAD -- YOU KNOW, AS YOUR HONOR TALKED ABOUT
18 HOW LONG IT TOOK. A LOT OF THAT WAS AGREEING ON WHAT ITEMS
19 WERE GOING TO BE TESTED, AGREEING ON WHETHER OR NOT ITEMS
20 COULD BE TESTED, THAT THE TESTING ITSELF WOULD DESTROY THE
21 ITEM, THE PARTIES HAD TO AGREE ON THAT, AND WE'RE GOING TO
22 HAVE THAT SAME THING. THEY'RE GOING TO BE ASKING -- AS I READ
23 THEIR MOTION UNDER THE IPA, THEY'RE GOING TO BE ASKING TO TEST
24 HUNDREDS OF ITEMS. I MEAN, THEY WANT TO TEST THE VICTIMS'
25 BLOOD.

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1 THE COURT: WELL, THEY'RE GOING TO PAY THE COST OF
2 IT, IS THAT CORRECT? IF THEY'RE GOING TO PAY THE COST OF IT.

3 MR. BRUCE: WELL, THAT'S BETWEEN THEM AND THE NORTH
4 CAROLINA TAXPAYERS AS TO WHETHER THEY WANT TO PAY FOR IT. BUT
5 I AM SKEPTICAL THAT THIS PROCESS CAN MOVE AS QUICKLY AS MS.
6 MUMMA SUGGESTS BECAUSE THERE'S GOING TO BE A LOT OF DETAIL IN
7 TRYING TO DECIDE WHAT'S AVAILABLE FOR TESTING, WHAT WOULD BE
8 THE RESULT OF THE -- RESULT AS FAR AS HARM TO THE PHYSICAL
9 ITEM FROM THE TESTING, YOU KNOW, ARE WE GOING TO TEST EVERY
10 POOL OF BLOOD THAT THE VICTIMS LEFT.

11 THE COURT: WELL, MIGHT NOT THAT JUST BE INCULPATING
12 AS WELL AS EXCULPATING?

13 MR. BRUCE: I'M SURE IT WOULD BE, BUT IT'S -- I
14 CAN'T IMAGINE HOW MANY ITEMS WE'RE TALKING ABOUT.

15 THE COURT: WELL -- EXCUSE ME. I'M SORRY. GO
16 AHEAD.

17 MR. BRUCE: I'M SORRY. I JUST CAN'T IMAGINE HOW
18 MANY ITEMS OF TESTING WE'RE TALKING ABOUT. THEY'RE TRYING TO
19 REDO THE TRIAL AND YOU JUST CAN'T DO IT UNDER THE INNOCENCE
20 PROTECTION ACT. AND I THINK THE COURT MAY DEAL WITH THIS ON A
21 LEGAL BASIS WHEN WE RESPOND TO THEIR MOTION. IN A BRIEF WE
22 MAY BE ABLE TO DEMONSTRATE TO THE COURT THAT THE IPA IS
23 LEGALLY UNAVAILABLE TO THEM AND THE COURT MIGHT NOT HAVE TO DO
24 IT AT ALL. BUT IF THEY DO SATISFY ALL THOSE TEN THINGS THAT
25 THEY HAVE TO SATISFY AND GET NEW TESTING ORDERED, I THINK

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1 THAT'S GOING TO BE A VERY COMPLEX UNDERTAKING. AND THE
2 GOVERNMENT DOES NOT WANT TO WAIT TO HAVE THIS BRITT CLAIM AND
3 DNA CLAIM THAT'S NOW BEFORE THE COURT, GET THAT ADJUDICATED
4 AND OVER WITH AND LET'S TRY TO ACHIEVE SOME FINALITY IN THIS
5 CASE.

6 YOU KNOW, WE DISAGREE, AS I'M SURE THE COURT MIGHT,
7 WITH WHAT THE FOURTH CIRCUIT DID IN TERMS OF THAT EVIDENCE AS
8 A WHOLE, BUT WE'VE GOT TO DEAL WITH IT SO WE SAY, LET'S SEE IF
9 THEY CAN PROVE THEIR CLAIMS ON BRITT AND DNA, THE ONES THAT
10 ARE ALREADY HERE. AND WE MAY GET THAT DONE BEFORE THE IPA
11 THING CAN EVER GET RESOLVED AS TO WHETHER OR NOT THEY NEED ANY
12 NEW TESTING.

13 THE COURT: I'M SITTING HERE THINKING ABOUT JUDGE
14 GILLIAM, WHO I --

15 MS. MUMMA: YOUR HONOR, IF I MAY?

16 THE COURT: YES, MA'AM.

17 MS. MUMMA: I CANNOT IMAGINE THAT IT WOULD BE MORE
18 THAN A COUPLE OF DOZEN OF ITEMS. WE UNDERSTAND THE IMPORTANCE
19 OF THE RELEVANCE OF THE EVIDENCE THAT WOULD BE TESTED.

20 I ALSO WANT TO CLARIFY THAT THIS WOULD NOT BE
21 TAXPAYER MONEY THAT WOULD GO TO PAY FOR THIS TESTING. THIS IS
22 MONEY THAT'S THROUGH THE INNOCENCE ORGANIZATION. IT IS NOT
23 TAX -- IT'S NOT STATE FUNDS. SO, JUST TO MAKE SURE THAT'S
24 CLEAR.

25 THE COURT: I COULDN'T HELP BUT REMEMBER THAT JUDGE

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1 GILLIAM USED TO SAY THAT WHEN THE FOURTH CIRCUIT REVERSED HIM,
2 IT DIDN'T MEAN HE WAS WRONG, HE ALWAYS SAID IT JUST MEANT THEY
3 DISAGREED WITH HIM. I'VE TAKEN GREAT SOLACE IN THOSE COMMENTS
4 OVER THE YEARS.

5 WELL, YOU CAN RESPOND, MR. BRUCE, TO THEIR MOTION.
6 AND, OF COURSE, THEY'LL HAVE A CHANCE TO RESPOND TO YOUR
7 BRIEF, ET CETERA. THE MOTION UNDER THE -- THE REQUEST FOR THE
8 HEARING UNDER THE INNOCENCE PROTECTION ACT, YOU'RE GOING TO
9 RESPOND TO THAT RIGHT AWAY, BUT THE -- I MEAN, BY DECEMBER THE
10 1ST.

11 IF YOU WERE UNSUCCESSFUL OR IF THE DEFENDANT WAS
12 SUCCESSFUL IN THEIR MOTION, SHOULD WE WAIT UNTIL AFTER WE GET
13 THAT RESOLVED BEFORE SETTING A HEARING DATE?

14 MR. BRUCE: OUR PREFERENCE WOULD BE NO. WE WOULD
15 LIKE TO PROCEED AS SOON AS THE COURT CAN WITH THE EVIDENTIARY
16 HEARING ON WHAT'S HERE NOW ALREADY, THE BRITT CLAIM AND THEIR
17 FREESTANDING CLAIM OF INNOCENCE UNDER THE DNA SAMPLES THAT
18 HAVE ALREADY BEEN TESTED.

19 THE COURT: WELL, IT WILL BE THE TIMELINESS, THE
20 LIKELY RELIABILITY AND CREDIBILITY AND ALSO, AS I SEE IT, THE
21 DNA CLAIM, THE UNSOURCED HAIRS. I NOTICE YOU REFER TO THE
22 FACT THAT IT WAS CONSIDERED BEFORE AND IT WAS, BUT IT WASN'T
23 CONSIDERED IN THE CONTEXT IN WHICH THE DEFENDANT PRESENTED, AM
24 I CORRECT IN THAT?

25 MR. MILES: THAT'S CORRECT, YOUR HONOR, AS FAR AS

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1 DNA EVIDENCE.

2 THE COURT: RIGHT. SO, CONTEXTUALLY, IT'S NOT THE
3 SAME. WELL, I JUST DON'T KNOW WHAT SHOULD WE -- WHETHER WE
4 WAIT TILL AFTER WE RULE ON YOUR INNOCENCE PROTECTION CLAIM OR
5 GO AHEAD AND HAVE THE HEARING.

6 MR. MILES: AND COULD I BE HEARD ON THAT, YOUR
7 HONOR?

8 THE COURT: YES, SIR.

9 MR. MILES: WELL, IN TERMS OF WHAT THE FOURTH
10 CIRCUIT, THE MANDATE IN TERMS OF THAT LANGUAGE OF EVIDENCE AS
11 A WHOLE, IF WE'RE GOING TO DO -- IF WE'RE GOING TO HAVE ACCESS
12 TO THE EVIDENCE TO DO ADDITIONAL DNA TESTING AND THE COURT --
13 LET'S ASSUME THAT WE MEET OUR BURDEN AND THE COURT ENTERTAINS
14 A MERITS EVALUATION ON THE CASE, CERTAINLY WE WOULD WANT THE
15 RESULTS OF THAT DNA TESTING, GOOD OR BAD, OBVIOUSLY, IF IT'S
16 GOOD FOR THE DEFENDANT IT WOULD BE PART OF OUR PRESENTATION.
17 IF IT'S BAD FOR THE DEFENDANT OBVIOUSLY THAT'S SOMETHING HE'S
18 GOT TO DEAL WITH.

19 SO, I THINK THAT THAT WOULD MAKE THE MOST SENSE AS
20 FAR AS MAKING SURE WE DIDN'T PUT THE CART BEFORE THE HORSE.

21 THE COURT: WELL, YOU KNOW, I'VE THOUGHT ABOUT THAT,
22 VIEWING THE EVIDENCE AS A WHOLE, AND I'VE GONE BACK AND READ
23 -- STARTED IN READING THE TRANSCRIPT. DO YOU HAVE ANY IDEA
24 HOW LONG IT WOULD TAKE ME TO READ THE ENTIRE TRANSCRIPT
25 ASSUMING I HAVE SOMETHING ELSE TO DO?

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1 MR. MILES: I UNDERSTAND. IT IS A TREMENDOUS RECORD
2 IN THIS CASE, YOUR HONOR.

3 THE COURT: I MEAN, THE RECORD WOULD BE TREMENDOUS
4 AND, ALSO, IN MY ATTEMPTS TO DO THAT I CANNOT CONVEY TO YOU
5 THE DIFFICULTY IN FOLLOWING A TRANSCRIPT, WHICH IS DISCUSSING
6 ITEMS AND PHOTOGRAPHS THAT ARE NOT BEFORE YOU. I MEAN, YOU'RE
7 NOT VIEWING -- YOU'RE VIEWING IT STATIC. IT IS NOT AS IT
8 COMES OUT OF THE COURTROOM.

9 AND ALSO, I'M FRANK TO SAY, THERE IS A REASON FOR
10 LOOKING AT WITNESSES AND SEEING THEM. AND THAT IS TO
11 DETERMINE CREDIBILITY. AND THAT CERTAINLY DOES NOT APPEAR ON
12 A PIECE OF PAPER.

13 IN A SENSE -- I DON'T MEAN THIS CRITICALLY, BUT IT'S
14 JUST TRUE, IT WOULD BE A MONUMENTAL TASK TO GO BACK AND VIEW
15 THE EVIDENCE IN THE CONTEXT IN WHICH IT CAME OUT IN COURT. IT
16 WOULD BE JUST STAGGERING. IN FACT, I DON'T THINK ANYBODY'S
17 CAPABLE OF DOING IT.

18 I STARTED IN THAT AND STARTED MAKING THE EFFORT IN
19 THAT REGARD. I MADE -- I CAME TO THE CONCLUSION AFTER
20 REVIEWING THE FIRST WEEK OF THE TRIAL TESTIMONY THAT I WOULD
21 HAVE TO KIND OF ZERO IN ON WHAT I CONSIDER TO BE SIGNIFICANT,
22 PICKING PORTIONS OF THE TRANSCRIPT TO READ, BECAUSE I DON'T
23 THINK I COULD POSSIBLY READ IT ALL IN LESS THAN HALF A YEAR.

24 MR. BRUCE: YOUR HONOR, THERE'S ONE THING I THINK
25 THE GOVERNMENT CAN HELP OUT ON THAT, IS I THINK WE CAN PRODUCE

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1 A SET OF TRIAL EXHIBITS AND CHARTS AND EVERYTHING AND GET THAT
2 TO THE COURT SO THAT YOU COULD HAVE IT WHILE YOU'RE REVIEWING
3 THE TRANSCRIPTS.

4 THE COURT: WELL, I APPRECIATE THAT, MR. BRUCE. I
5 GOT YOUR APPENDIX AND THAT WAS VERY HELPFUL. THAT'S THE ONLY
6 THING I HAD TO WORK WITH. I WAS ABLE TO SEE THE MODEL OF THE
7 HOUSE AND SO ON AND SOME OF THE PHOTOGRAPHS. AND I CAN'T TELL
8 YOU HOW MUCH I APPRECIATE YOUR COMPILATION OF THAT. AS I SAY,
9 AS YOU KNOW, I DIDN'T TRY THE CASE AND THIS ALSO HAPPENED A
10 FEW YEARS AGO BEFORE I CAME ON THE BENCH, BUT I APPRECIATE
11 THAT. BUT LET ME THINK ABOUT THIS JUST A MOMENT.

12 MR. BRUCE: IF I COULD SAY ONE MORE THING ABOUT THE
13 EVIDENCE AS A WHOLE ISSUE. THE FOURTH CIRCUIT DIRECTED IN
14 DOING THE GATE-KEEPING THE COURT HAS TO TAKE THIS EXPANSIVE
15 VIEW OF THE EVIDENCE AS A WHOLE IN TERMS OF THE THINGS THAT
16 THEY SUBMITTED EARLIER LIKE THE ELDER HELENA STOECKLEY'S
17 ALLEGED AFFIDAVIT AND AFFIDAVITS OF PEOPLE THAT TALKED TO GREG
18 MITCHELL AND THAT KIND OF THING.

19 AND I MUST ADMIT, THAT THE FOURTH CIRCUIT'S OPINION
20 ALLOWS THEM TO THROW SOME MORE EVIDENCE AS A WHOLE INTO THE
21 HOPPER, BUT I DON'T THINK THERE'S ANYTHING IN THE FOURTH
22 CIRCUIT OPINION AND IN THE ORAL ARGUMENT THAT I WITNESSED THAT
23 SAID THAT THE COURT HAD TO WAIT FOR THEM TO CREATE NEW
24 EVIDENCE AS A WHOLE, TO HAVE NEW DNA TESTING AND THROW THAT
25 INTO THE MIX.

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1 THE COURT: NO. I QUESTION IF WE WERE TO DETERMINE
2 -- MAKE THE DETERMINATION FIRST THAT THERE WAS NOT GOING TO BE
3 ANYMORE DNA TESTING THEN I WOULD HAVE NO HESITANCY GOING
4 IMMEDIATELY AHEAD WITH THE HEARING.

5 IF, ON THE OTHER HAND, WE DETERMINED THAT THERE WAS
6 GOING TO BE MORE DNA TESTING THEN, I THINK, OBVIOUSLY, THAT A
7 HEARING OUGHT TO PROBABLY BE DELAYED UNTIL WE GOT THE RESULTS
8 OF THAT TESTING. THAT SEEMS TO ME TO BE THE MORE EFFICIENT
9 APPROACH TO THE MATTER.

10 MR. BRUCE: OUR ARGUMENT AGAIN, YOUR HONOR, IS IN
11 TERMS OF EFFICIENCY IS THIS; CLEARLY, IF YOU LOOK AT 2255(h)1,
12 I THINK YOUR HONOR DID IT IN THE RIGHT ORDER THE FIRST TIME,
13 WHICH IS ASSUME THEY CAN PROVE THEIR NEWLY DISCOVERED
14 EVIDENCE, IT WAS THE BASIS OF THEIR 2255 CLAIM, AND THEN SEE
15 IF BY CLEAR AND CONVINCING EVIDENCE THAT ESTABLISHES THAT NO
16 REASONABLE JUROR WOULD HAVE FOUND MACDONALD GUILTY. THAT'S
17 WHAT YOUR HONOR DID. OKAY. THE FOURTH CIRCUIT WANTS YOU TO
18 DO THAT OVER WITH A GREATER UNIVERSE OF EVIDENCE AS A WHOLE.

19 WHAT WE SAY IS WE KNOW OF NO LEGAL REASON WHY THE
20 COURT COULDN'T REVERSE THE PROCESS AND SAY, WELL, FIRST, MR.
21 MACDONALD, PROVE THE BASIS OF YOUR CLAIM, PROVE THE BRITT
22 AFFIDAVIT IS TRUE, PROVE THAT YOU'VE GOT NEW DNA ON THESE
23 HAIRS THAT HAVE ALREADY BEEN TESTED THAT IS REALLY NEWLY
24 DISCOVERED EXCULPATORY EVIDENCE, WHICH WE CONTEND IT IS NOT.
25 AND IF THEY FAIL TO DO THAT THE COURT DOESN'T HAVE TO READ THE

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1 TRIAL TRANSCRIPT OR CONSIDER EVIDENCE AS A WHOLE BECAUSE THEY
2 -- IF THEY CAN'T PROVE THE TRUTH OF THEIR -- WHAT WAS THE
3 BASIS OF THEIR 2255 CLAIMS THEY'RE OUT OF COURT.

4 SO, THAT'S WHAT WE WANT ADDRESSED FIRST AT THE
5 EVIDENTIARY HEARING, YOUR HONOR.

6 THE COURT: MR. HART.

7 MR. MILES: WELL -- AND, YOUR HONOR, WE STAND
8 PREPARED TO MOVE FORWARD, BUT TO ADDRESS THE COURT'S CONCERNS
9 AS FAR AS THE HEARING GOES AND AS FAR AS THE BRITT CLAIM, THE
10 COURT HAS THE POWER TO ALLOW US TO DO DEPOSITIONS.

11 THERE ARE THINGS THAT WE CAN DO TO AID THE COURT
12 IN AN EXPEDITED REVIEW OF THE OTHER CLAIMS SEPARATE AND APART
13 FROM THE NEW DNA TESTING.

14 THE COURT: WELL, I KNOW YOU CAN DO DEPOSITIONS, BUT
15 IF THEY'RE GOING TO BE CREDIBILITY DETERMINATIONS THAT I'M TO
16 MAKE, I WANT TO SEE THEM.

17 MR. MILES: I UNDERSTAND, YOUR HONOR.

18 THE COURT: I DON'T THINK THERE'S ANY SUBSTITUTE FOR
19 SOMEBODY TESTIFYING IN FRONT OF WHOEVER THE FACT-FINDER IS
20 GOING TO BE TO DETERMINE CREDIBILITY.

21 MR. MILES: I UNDERSTAND, YOUR HONOR.

22 THE COURT: THAT'S MY VIEW OF IT. MR. BRUCE.

23 MR. BRUCE: YOUR HONOR, I AGREE WITH WHAT YOUR HONOR
24 SAID EARLIER ABOUT IF THEY THOUGHT MR. BRITT WAS IN ILL HEALTH
25 THEY COULD HAVE FILED A MOTION THEN TO HAVE A DEPOSITION

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1 BECAUSE HE MIGHT NOT BE AVAILABLE LATER ON AND WE WOULDN'T
2 HAVE OPPOSED THAT.

3 BUT OTHER THAN THAT, WE ARE STRONGLY OPPOSED TO THIS
4 COURT GIVING LEAVE FOR DEPOSITIONS IN THIS CASE. THAT IS AN
5 INVITATION TO A TIME WASTING FISHING EXPEDITION.

6 THE COURT: THAT'S WHAT I JUST SAID, I'M NOT IN
7 FAVOR OF IT EITHER.

8 MR. BRUCE: YOU KNOW, WE DON'T -- YOU KNOW, THE
9 NORTH CAROLINA INNOCENCE COMMISSION MAY HAVE UNLIMITED TIME TO
10 GO ON A FISHING EXPEDITION TO HAVE DAY-LONG DEPOSITIONS THAT
11 WE HAVE TO ATTEND, BUT WE DON'T HAVE THE RESOURCES TO DO THAT
12 IN A 40-YEAR-OLD CASE.

13 IF WE'RE GOING TO TAKE TESTIMONY, LET'S DO IT IN AN
14 EVIDENTIARY HEARING, YOUR HONOR.

15 THE COURT: WELL, MR. HART.

16 MR. MILES: THANK YOU, YOUR HONOR. AND ONE THING
17 I'D LIKE TO POINT OUT TO YOUR HONOR, DURING THE PREVIOUS
18 LITIGATION BEFORE THE APPEAL THERE WAS A BIG PERIOD OF TIME
19 WHERE THE GOVERNMENT HAD THE OPPORTUNITY TO SUBMIT AFFIDAVITS
20 AND OTHER EVIDENTIARY MATTERS BEFORE THE COURT FOR YOUR
21 CONSIDERATION AT THAT TIME.

22 THE COURT: WHOSE BURDEN? IT'S YOUR BURDEN.

23 MR. MILES: IT ABSOLUTELY IS, YOUR HONOR.

24 THE COURT: NOT THEIRS.

25 MR. MILES: IT IS. I AGREE. THAT IS THE LAW.

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1 YOU'RE RIGHT, YOUR HONOR. BUT I JUST WANTED TO POINT THAT
2 OUT. BUT, YOUR HONOR, AS FAR AS, YOU KNOW, ONE THING THAT WE
3 COULD DO IS DO THE BRITT CLAIM HEARING FIRST. I THINK SINCE
4 THAT IS SEPARATE AND APART FROM THE DNA EVALUATION, IT'S A
5 SEPARATE EVALUATION --

6 THE COURT: YES.

7 MR. MILES: -- I THINK WE COULD DO THAT HEARING
8 FIRST WITHIN A SHORTER PERIOD OF TIME IF THAT HELPED MOVED
9 THINGS ALONG AS FAR AS THE COURT'S DETERMINATION, I THINK THAT
10 COULD BE DONE.

11 THE COURT: MR. BRUCE, YOU AGREE?

12 MR. BRUCE: YOUR HONOR, WE WILL BE READY TO PROCEED
13 ON THE BRITT AFFIDAVIT FIRST IF THAT'S WHAT THE COURT WANTED
14 TO DO.

15 THE COURT: HOW SOON DO YOU WANT TO HAVE THE
16 HEARING?

17 MR. MILES: I THINK WE COULD BE READY IN 30 DAYS,
18 YOUR HONOR.

19 THE COURT: SUE, WHAT'S MY SCHEDULE LIKE?

20 (COURT CONFERS WITH MADAM CLERK.) (PAUSE.)

21 THE COURT: HOW LONG DO YOU THINK IT'S GOING TO
22 TAKE, MR. BRUCE OR MR. HART?

23 MR. MILES: I WOULD SAY TWO DAYS, YOUR HONOR.

24 MR. BRUCE: I'LL AGREE WITH THAT. MAYBE THREE.

25 THE COURT: WELL, THAT MEANS WE OUGHT TO PLAN FOR

1 FOUR.

2 (COURT CONFERS WITH MADAM CLERK.) (PAUSE.)

3 THE COURT: COULD WE DO IT OCTOBER THE 24TH? IS
4 THAT TOO SOON?

5 MR. BRUCE: YOUR HONOR, I THINK WE CAN GIVE THAT A
6 TRY. IF WE RUN INTO UNAVAILABILITY PROBLEMS WE WOULD JUST
7 FILE A MOTION TO GET A LITTLE BIT MORE TIME.

8 MR. MILES: SURE. YOUR HONOR, WE WILL DO OUR BEST
9 TO PROCEED.

10 THE COURT: WELL, I'M NOT TRYING TO PUSH YOU. I'M
11 JUST TRYING TO -- IF YOU WANT TO TRY TO DO IT LATER, I'LL DO
12 IT --

13 (COURT CONFERS WITH MADAM CLERK.) (PAUSE.)

14 THE COURT: HOW ABOUT THE WEEK OF OCTOBER 31ST?

15 MR. MILES: THAT'S FINE, YOUR HONOR. I THINK THAT
16 WILL WORK PROBABLY --

17 MR. BRUCE: THAT'S FINE, YOUR HONOR.

18 THE COURT: ALL RIGHT. WELL, WE'LL SET IT FOR
19 OCTOBER THE 31ST, AND THAT WILL BE THE BRITT CLAIM. NOW, JUST
20 A MOMENT.

21 (PAUSE.)

22 THE COURT: NOW, AT THAT TIME, AT THAT OCTOBER 31ST
23 HEARING, WE'D BE TAKING EVIDENCE CONCERNING THE TRUTH OF
24 BRITT'S AFFIDAVIT, THE TIMELINESS OF HIS CLAIM.

25 NOW, WE HAVE A NUMBER OF OTHER ITEMS THAT WE'RE

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1 DIRECTED TO CONSIDER. ONE IS THE AFFIDAVIT OF THE OLDER
2 HELENA STOECKLEY, THREE AFFIDAVITS MADE BY GREG MITCHELL, AND
3 THE BLONDE SYNTHETIC HAIR-LIKE FIBERS, AND I GUESS I'D BE
4 TRYING TO DETERMINE THE LIKELY CREDIBILITY AND PROBABLE
5 RELIABILITY OF THAT EVIDENCE. DO YOU AGREE WITH THAT?

6 MR. MILES: YES, YOUR HONOR.

7 THE COURT: NOW, IS THERE ANYTHING ELSE FACTUALLY
8 THAT WE SHOULD CONSIDER, MR. HART? I'M TALKING ABOUT NOW YOUR
9 DNA CLAIM. AS I UNDERSTAND IT, THAT'S A FREESTANDING CLAIM.

10 MR. MILES: WELL, IT'S -- WE ARGUE THIS IS A
11 FREESTANDING CLAIM AND THERE'S ALSO A CLAIM UNDER -- YES, IF
12 YOU INDICATE UNDER 2255, YOUR HONOR, IT'S A FREESTANDING CLAIM
13 AND WE'RE ALSO --

14 THE COURT: WELL, NOW, WAIT A MINUTE.

15 MR. MILES: OKAY.

16 THE COURT: IF IT'S A FREESTANDING CLAIM UNDER 2255,
17 YOU BETTER BRIEF THE LEGALITY OF IT.

18 MR. MILES: EXCUSE ME, YOUR HONOR?

19 THE COURT: IF THERE'S A FREESTANDING ACTUAL
20 INNOCENCE CLAIM UNDER 2255, AS I HAVE READ, THERE IS
21 CONSIDERABLE QUESTION AS TO WHETHER THAT CAN BE RAISED.

22 MR. MILES: I UNDERSTAND, YOUR HONOR.

23 THE COURT: NOW, THAT'S A LEGAL ISSUE.

24 MR. MILES: OKAY.

25 THE COURT: AND I WOULD THINK YOU'D WANT TO BRIEF

1 THAT AT SOME POINT.

2 MR. MILES: SURE. I'LL BE GLAD TO BRIEF THAT, YOUR
3 HONOR.

4 THE COURT: NOW, IS THERE ANYTHING FACTUALLY? I
5 NOTICE THAT THE GOVERNMENT CONTENDS THAT THERE IS QUESTIONS OF
6 THE -- LET'S SEE -- THE LOCATION OF THE HAIRS AT THE CRIME,
7 WHETHER THEY WERE BLOODY AND FORCIBLY REMOVED AND THAT SORT OF
8 THING. ARE THOSE FACTUAL ISSUES?

9 MR. MILES: WELL, THEY'RE FACTUAL ISSUES, BUT I WILL
10 SUBMIT TO THE COURT THEY WOULD BE BETTER EVALUATED WITH THE
11 DNA EVIDENCE.

12 THE COURT: AT A HEARING WITH REGARD TO THAT ALONE?

13 MR. MILES: YES, SIR.

14 THE COURT: MR. BRUCE.

15 MR. BRUCE: I AGREE WITH THAT, YOUR HONOR.

16 THE COURT: WELL, WE WILL NOT CONSIDER THAT AT THIS
17 OCTOBER 31ST HEARING THEN.

18 MR. BRUCE: BEG YOUR PARDON?

19 THE COURT: WE WILL NOT CONSIDER THAT -- THOSE
20 MATTERS AT THE OCTOBER 31ST HEARING. IT WILL BE CONFINED TO
21 BRITT.

22 MR. BRUCE: THEIR DNA CLAIM, I AGREE WITH THAT, YOUR
23 HONOR.

24 THE COURT: ALL RIGHT. IS THAT CORRECT?

25 MR. MILES: AND, YOUR HONOR, I'M SORRY, MR. ALLEN

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1 WANTED TO ADDRESS ONE ISSUE REAL QUICKLY.

2 MR. ALLEN: AND, YOUR HONOR, IT'S A LITTLE MUDDLED
3 IN MY MIND, AND I APOLOGIZE. I WANTED TO MAKE SURE THAT WE
4 HAD THOUGHT ABOUT WHAT THE FOURTH CIRCUIT HAD DIRECTED, WHICH
5 I HAD UNDERSTOOD TO BE TO CONSIDER THE EXISTING DNA EVIDENCE
6 AS PART OF THE EVIDENCE AS A WHOLE IN THE CONTEXT OF THE BRITT
7 CLAIM AS WELL.

8 THE COURT: WELL, THAT'S WHAT I'VE BEEN TRYING TO
9 FIND OUT.

10 MR. ALLEN: AND SO, IT WOULD SEEM TO ME, THAT DNA
11 EVIDENCE WOULD ALSO BE CONSIDERED ALONG WITH THE BRITT CLAIM
12 AS PART OF ALL THE EVIDENCE THAT THE FOURTH CIRCUIT ISSUED ITS
13 MANDATE ON.

14 THE COURT: MR. BRUCE.

15 MR. BRUCE: WELL, WE'RE READY -- CAN BE READY
16 CERTAINLY BY THE OCTOBER 31ST DATE TO HAVE A HEARING ON NOT
17 ONLY THE BRITT CLAIM, BUT THEIR NOW EXISTING DNA CLAIM BASED
18 ON THREE UNSOURCED HAIRS AND THIS TESTING THAT'S ALREADY BEEN
19 DONE --

20 THE COURT: OKAY.

21 MR. BRUCE: -- IF THEY WANT TO CONSIDER THAT AS A
22 WHOLE.

23 THE COURT: YOU WANT TO DO THAT?

24 MR. MILES: YES, YOUR HONOR.

25 THE COURT: OKAY. WE'LL CONSIDER THE BRITT CLAIM

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1 AND THE DNA CLAIM AT THAT HEARING.

2 MR. BRUCE: THANK YOU. CAN I BRING UP ONE OTHER
3 POINT, YOUR HONOR?

4 THE COURT: YES, SIR. NOW, EXCUSE ME, YOU'RE GOING
5 TO HAVE TO BE PREPARED TO PRESENT THEIR LOCATION AT THE CRIME
6 SCENE, WHETHER THEY WERE BLOODY OR FORCIBLY REMOVED, THE
7 ISSUES THAT THE GOVERNMENT HAS RAISED AT THIS HEARING.

8 MR. MILES: I UNDERSTAND, YOUR HONOR.

9 THE COURT: YES, SIR.

10 MR. BRUCE: YOUR HONOR, AT THE EVIDENTIARY HEARING
11 THE QUESTION OCCURS ABOUT THE RULES OF EVIDENCE. I'VE LOOKED
12 AT IT IN TERMS OF RULE 1101 OF THE FEDERAL RULES OF EVIDENCE
13 WHICH IS WHERE THEY'RE APPLICABLE, AND ALSO THE RULES ON
14 HABEAS HEARINGS, RULE EIGHT, AND THE BEST I CAN -- SENSE I CAN
15 MAKE OUT OF IT IS THAT IT'S IN THE DISCRETION OF THE COURT AS
16 FAR AS THE APPLICABILITY OF THE RULES OF EVIDENCE AT A 2255
17 HEARING. OBVIOUSLY, IF STRICT EVIDENTIARY RULES WERE GOING TO
18 BE APPLIED, NO HEARSAY, THEY DON'T HAVE ANYTHING.

19 THE COURT: WELL, THAT'S A PROBLEM THAT HAS PUZZLED
20 ME FOR QUITE SOME TIME.

21 MR. BRUCE: BUT WHAT WE WOULD SAY TO THE COURT IS --

22 THE COURT: OF COURSE, THE RULE IS THE FOURTH
23 CIRCUIT'S EXPANSIVE READINGS WHETHER ADMISSIBLE OR NOT
24 ADMISSIBLE.

25 MR. BRUCE: THAT'S WHAT THEY SAID ABOUT EVIDENCE AS

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1 A WHOLE. AND SO, ALL WE WOULD SAY IS WE JUST THINK IT SHOULD
2 APPLY TO BOTH SIDES. IN OTHER WORDS, IF THEY COME IN AND
3 INTRODUCE JIM BRITT'S AFFIDAVIT AS THE BASIS OF THEIR CLAIM,
4 THAT'S OBVIOUSLY HEARSAY, WE'RE GOING TO HAVE SOME HEARSAY OF
5 OUR OWN TO REBUT IT.

6 THE COURT: ALL RIGHT, COUNSEL. MR. HART, WHAT MR.
7 BRUCE IS SAYING IS WHAT'S SAUCE FOR THE GOOSE IS SAUCE FOR THE
8 GANDER.

9 MR. MILES: AND I APOLOGIZE, YOUR HONOR, BECAUSE OF
10 THE COMPLEXITY OF THE ISSUES INVOLVED, YOUR HONOR, I DISCUSSED
11 IT WITH MS. MUMMA, THE WHOLE IDEA, BECAUSE OF THE MOTION THAT
12 WE FILED AND WE BROUGHT THIS ON OURSELVES BY FILING THIS
13 MOTION OF DEALING WITH HOW THE DNA EVIDENCE IS GOING TO BE
14 PRESENTED AND I'D LIKE MS. MUMMA JUST TO ADDRESS THAT BRIEFLY
15 AS FAR AS FROM A HEARING STANDPOINT AS TO WHAT MAKES THE MOST
16 SENSE.

17 MS. MUMMA: YOUR HONOR, MY CONCERN IS THAT THE DNA
18 TESTING THAT WAS ALREADY CONDUCTED ON THE HAIR EVIDENCE THAT
19 ISSUE IS STILL AN OPEN ISSUE THAT HAS TO BE HEARD.

20 I THINK IT MAKES MORE SENSE TO HAVE ALL OF THE DNA
21 TESTING CONSIDERED AT THE SAME TIME IN THE SAME LIGHT. AND WE
22 CAN MOVE THAT FORWARD QUICKLY OR WE CAN BRIEF THE ISSUE ABOUT
23 WHETHER THIS ADDITIONAL DNA TESTING IS TAGGED ON TO THE OPEN
24 HAIR TESTING THAT'S ALREADY BEEN DONE.

25 IN FACT, I THINK IT WOULD BE -- TO PUT EVERYTHING ON

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1 OCTOBER 31ST, WOULD BE PREMATURE IF WE'RE GOING TO CONSIDER
2 NEW DNA TESTING.

3 SO, I WOULD SUGGEST THAT THE BRITT CLAIM BE HEARD ON
4 OCTOBER 31ST, THAT WE BRIEF THE ISSUE OF WHETHER ADDITIONAL
5 DNA TESTING IS TIMELY OR MEETS THE REQUIREMENTS OF IPA AND
6 THEN CONSIDER THE DNA AT A LATER DATE.

7 THE COURT: MR. BRUCE.

8 MR. BRUCE: SO, IF I UNDERSTAND IT, WE'RE BACK TO
9 JUST HEARING THE BRITT CLAIM ON OCTOBER 31ST?

10 THE COURT: THAT'S WHAT I UNDERSTAND.

11 MR. BRUCE: THAT'S ACCEPTABLE WITH THE GOVERNMENT,
12 YOUR HONOR, BUT WE DIDN'T GET AN ANSWER ON OUR HEARSAY
13 QUESTION.

14 THE COURT: WELL, I CAN ASSURE YOU, IF THEY'RE GOING
15 TO GET HEARSAY IN, I'LL LET THE GOVERNMENT GET HEARSAY IN. I
16 MEAN, AFTER ALL -- DO YOU HAVE ANY PROBLEM WITH THAT, MR.
17 HART?

18 MR. MILES: WELL --

19 THE COURT: YOU MEAN YOUR HEARSAY OUGHT TO COME IN,
20 BUT HIS OUGHT NOT TO?

21 MR. MILES: I'M NOT GOING TO TAKE THAT POSITION,
22 YOUR HONOR. I THINK WE SHOULD BOTH BE HELD TO THE SAME
23 STANDARD.

24 THE COURT: I DO TOO. I MEAN, MR. MILES. I'M
25 SORRY. WELL, WE'LL GO FORWARD. MR. BRUCE, YOU'VE LOOKED INTO

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1 THE QUESTION OF WHETHER THE FEDERAL RULES OF EVIDENCE SHOULD
2 APPLY OR NOT. I DON'T KNOW HOW THE STOECKLEY EVIDENCE COULD
3 COME IN OR BRITT'S EVIDENCE COULD COME IN IF YOU APPLY THE
4 FEDERAL RULES.

5 MR. BRUCE: THAT'S CORRECT, YOUR HONOR. THOSE
6 AFFIDAVITS ARE HEARSAY.

7 THE COURT: BUT THE FOURTH CIRCUIT HAS SAID WHETHER
8 IT'S ADMISSIBLE AT TRIAL OR NOT. SO, I THINK WE WOULD HAVE TO
9 -- I MEAN, I FEEL THAT THEY HAVE -- I AGREE WITH YOU, THAT'S
10 THE WAY I WOULD HAVE ORIGINALLY PERCEIVED IT. BUT THE FOURTH
11 CIRCUIT SEEMS TO HAVE ABANDONED THAT POSITION SO I THINK
12 WHATEVER THEY WANT TO BRING IN CAN COME IN WHETHER IT'S
13 HEARSAY OR NOT.

14 MR. BRUCE: SUBJECT TO THE STANDARD OF PROBABLE
15 RELIABILITY AND --

16 THE COURT: CREDIBILITY.

17 MR. BRUCE: AND CREDIBILITY.

18 THE COURT: THAT'S CORRECT.

19 MR. BRUCE: THAT'S RIGHT, YOUR HONOR.

20 THE COURT: DO YOU AGREE, MR. MILES?

21 MR. MILES: YES, YOUR HONOR, AND THEY -- THE FOURTH
22 CIRCUIT SPEAKS TO THAT IN THEIR OPINION THEY SAY BECAUSE OF A
23 GATEWAY INNOCENCE CLAIM INVOLVES EVIDENCE THAT THE TRIAL JURY
24 DID NOT HAVE BEFORE IT, THE INQUIRY REQUIRES THE FEDERAL COURT
25 TO ASSESS HOW REASONABLE JURORS WOULD REACT TO THE OVERALL

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1 NEWLY SUPPLEMENTED RECORD AND THAT THE COURT MAY HAVE TO MAKE
2 SOME CREDIBILITY ASSESSMENTS, SO, YEAH.

3 THE COURT: RIGHT. WELL, THAT HEARING IS GOING TO
4 BE ON THE 31ST. YOU'RE GOING TO RESPOND TO THE GOVERNMENT'S
5 (SIC) INNOCENCE PROTECTION ACT MOTION BY DECEMBER 1ST, RIGHT?

6 MR. BRUCE: WE WILL RESPOND TO THE OTHER SIDE'S
7 MOTION ON IPA BY DECEMBER THE 1ST, YOUR HONOR, YES.

8 THE COURT: WELL, I SUPPOSE, AFTER WE GET THOSE
9 RESPONSES OR AFTER THE HEARING, WE MAY HAVE TO ESTABLISH A
10 BRIEFING SCHEDULE AND THEN AFTER I GET THE DEFENDANT'S
11 RESPONSE OR REPLY TO YOUR RESPONSE TO THEIR MOTION OF THE IPA,
12 IF THEY WERE TO BE SUCCESSFUL AND WE ENTERED AN ORDER FOR
13 ADDITIONAL TESTING -- MS. MUMMA, HOW LONG DO YOU THINK
14 ADDITIONAL TESTING WOULD TAKE?

15 MS. MUMMA: WE HAVE TO AGREE ON A LAB, YOUR HONOR.
16 THE LABS THAT I WORK WITH WE COULD HAVE IT BACK IN A FEW
17 MONTHS.

18 THE COURT: SO, WE'RE TALKING ABOUT PROBABLY
19 REACHING THAT ISSUE IN APRIL OR THEREABOUTS?

20 MS. MUMMA: DEPENDING ON WHEN WE CAN AGREE ON THE
21 ITEMS TO BE TESTED AND TRANSFER CUSTODY AND GET THE TESTING
22 STARTED, YES, YOUR HONOR.

23 MR. BRUCE: YOUR HONOR, I CAN TELL YOU THE
24 GOVERNMENT IS GOING TO OBJECT TO GIVING UP CUSTODY OF THESE
25 ITEMS. AND I NOTICE THAT THE STATUTE EXPRESSES A STRONG

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1 PREFERENCE FOR THE FBI TO DO THE TESTING.

2 THE COURT: I SAW THAT.

3 MR. BRUCE: I DON'T KNOW WHETHER THEY'LL BE WILLING
4 TO DO IT OR NOT. I SUPPOSE IF A FEDERAL COURT ORDERS THEM TO
5 THEY WILL.

6 THE COURT: WELL, COULD YOU INVESTIGATE THAT?

7 MR. BRUCE: WE WILL AS PART OF OUR RESPONSE. I
8 THINK THAT'S ONE OF THE MANY ISSUES THAT NEEDS TO BE RESOLVED.

9 THE COURT: NOW, HAVE YOU GIVEN THEM A LIST OF ITEMS
10 THAT YOU WANT TO EXAMINE?

11 MR. MILES: WE HAVE NOT AT THIS POINT, YOUR HONOR,
12 BUT WE WILL.

13 THE COURT: CAN YOU?

14 MR. MILES: WE CAN.

15 THE COURT: WELL, I WOULD LIKE FOR YOU TO DO THAT AS
16 SOON AS POSSIBLE. IT MAY BE THAT SOME OF IT THE GOVERNMENT
17 WOULD NOT HAVE ANY QUESTION -- ANY RESERVATION ABOUT GIVING
18 YOU ACCESS TO. I DON'T KNOW.

19 MR. MILES: AND I DO NOT THINK IT'S GOING TO BE AN
20 EXTENSIVE LIST, YOUR HONOR. I THINK WE CAN --

21 THE COURT: I THINK THE SOONER YOU CAN DO THAT, THE
22 BETTER IT WOULD BE.

23 MR. MILES: CERTAINLY, YOUR HONOR.

24 MR. BRUCE: YOUR HONOR, COULD -- THAT WOULD BE VERY
25 HELPFUL BECAUSE THAT MIGHT ENABLE US TO DO OUR RESPONSE MORE

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1 QUICKLY AND MAYBE WE'LL HAVE SOME AREAS OF AGREEMENT, I DON'T
2 THINK SO, BUT MAYBE WE WILL. AND SO --

3 THE COURT: WELL, WE CAN ALWAYS HOPE FOR THE BEST.

4 MR. BRUCE: IS THE COURT GOING TO FIX A TIME FOR
5 THEM TO PROVIDE US THAT, YOUR HONOR?

6 THE COURT: HOW LONG WILL IT TAKE YOU, MR. MILES?

7 MR. MILES: TWO WEEKS, YOUR HONOR. 14 DAYS.

8 MR. BRUCE: THAT'S GREAT, YOUR HONOR.

9 THE COURT: OKAY. WITHIN 14 DAYS YOU'LL GIVE THEM A
10 LIST OF THE ITEMS THAT YOU WANT TO TEST.

11 MR. MILES: WE WILL.

12 THE COURT: AND THEN YOU CAN ADVISE THE COURT, MR.
13 BRUCE, AS TO WHAT YOU OBJECT TO AND WHAT YOU DON'T OBJECT TO
14 WITHIN A WEEK AFTER THAT.

15 MR. BRUCE: WELL, YOUR HONOR, WE WOULD LIKE TO JUST
16 ROLL THAT INTO OUR RESPONSE THAT WE FILE ON DECEMBER 1ST, YOUR
17 HONOR.

18 THE COURT: OKAY. ALL RIGHT. ANYTHING FURTHER WE
19 NEED TO TAKE UP TODAY, COUNSEL?

20 MR. MILES: I DON'T BELIEVE SO, YOUR HONOR. ONE
21 THING THAT IN READING YOUR ORDER AND GOING OVER THE FOURTH
22 CIRCUIT OBVIOUSLY WE'RE CONCERNED ABOUT THE FUTILITY LANGUAGE
23 THAT WAS IN YOUR ORDER, BUT, OBVIOUSLY, YOUR HONOR SEES FIT
24 THAT YOU CAN LOOK AT OUR EVIDENCE OBJECTIVELY AND I KNOW YOU
25 FEEL CONFIDENT THAT YOU CAN EVALUATE IT.

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1 THE COURT: WELL, I NEED TO GET AN EDUCATION IN DNA
2 ANYWAY. ANYTHING FURTHER AT THIS TIME, COUNSEL?

3 MR. BRUCE: NOTHING FROM THE GOVERNMENT, YOUR HONOR.

4 THE COURT: MR. MILES?

5 MR. MILES: NO, YOUR HONOR. THANK YOU.

6 THE COURT: MR. MILES, I APOLOGIZE, YOUR NAME WAS
7 COVERED UP BY THE CORD COVERING THE -- MY SEATING CHART HERE
8 AND I JUST SAW HART AND NO MILES.

9 MR. MILES: WELL, AND MY PARENTS ARE TO BLAME FOR
10 THAT, YOUR HONOR, BY GIVING ME TWO LAST NAMES.

11 THE COURT: IF THERE'S NOTHING ELSE, COUNSEL, I LOOK
12 FORWARD TO HEARING FROM YOU, MR. BRUCE. ANYTHING FURTHER?

13 MR. MILES: NO, YOUR HONOR.

14 THE COURT: OKAY.

15 MR. BRUCE: THANK YOU, YOUR HONOR.

16 MR. ALLEN: THANK YOU, YOUR HONOR.

17 MR. MILES: THANK YOU, YOUR HONOR.

18 THE COURT: ADJOURN COURT.

19 (WHEREUPON, THESE PROCEEDINGS CONCLUDED AT 11:27 A.M.)

I CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE
TRANSCRIPT OF SAID PROCEEDINGS.

/s/ STACY SCHWINN
STACY SCHWINN, CCR, CVR

10/18/11
DATE

September 21, 2011