

1 JUST TO HAVE A BOX AND SAY HE WOULD NOT HAVE OPENED IT --

2 MR. SILVERGLATE: WELL, HE DID NOT OPEN IT. IN
3 ANY EVENT, THERE'S NO REASON HE SHOULD HAVE. IT'S CLEARLY
4 DECEPTIVELY LABELED, MAYBE NOT INTENTIONALLY, I DON'T KNOW
5 BUT IT'S NOT SOMETHING SOMEBODY LOOKING FOR BLOND WIG
6 HAIRS WOULD OPEN UP THAT BOX.

7 SECOND OF ALL, YOUR HONOR, MR. DEPUE ARGUES THAT
8 THERE'S NOTHING TO SUGGEST THAT SHE WORE, STOECKLEY WORE
9 THE WIG THE NIGHT OF THE MURDER. WELL, WE HAVE EVIDENCE
10 SHE HAD IT, SHE AGREED SHE HAD THE WIG AT THAT TIME.
11 NATURALLY SHE WASN'T CONFESSING TO THE MURDERS. SHE
12 DIDN'T SAY ON THE STAND SHE WORE THE WIG BUT SHE DID SAY
13 SHE BURNED THE WIG THREE DAYS LATER BECAUSE SHE WAS AFRAID
14 IT WOULD CONNECT HER TO THE MURDER. I WOULD SAY THAT'S
15 PRETTY GOOD EVIDENCE THAT STOECKLEY KNEW THAT WIG WOULD
16 CONNECT HER TO THE MURDER AND DIDN'T WANT TO ADMIT SHE
17 WORE IT.

18 THIRD, MR. DEPUE SAID THAT POSEY SAID SHE HAD A
19 STRINGY BRUNETTE HAIR. IN FACT ON PAGE 178, PAGE
20 THIRTY-FIVE OF THE APPENDIX OF EXCERPTS FROM THE RECORD
21 WHICH WE FILED WITH OUR ORIGINAL BLUE BRIEF, THE RAP
22 REPORT IS REPRODUCED, PART OF IT, AND WHAT HE SAID WAS
23 POSEY, ACCORDING TO COLONEL RYE, HE DESCRIBED HELENA AS
24 HAVING BRUNETTE HAIR AND SHE NORMALLY WORE A WHITE HAT AND
25 HAD LONG, STRINGY BLOND WIG. SO SHE HAD BRUNETTE HAIR BUT

1 NOT A BRUNETTE WIG, IT WAS BLOND.

2 THE GOVERNMENT MAKES AN ARGUMENT ABOUT THE TRANSFER
3 THEORY OF LOCARD AND WHAT IS SIGNIFICANT, WHAT'S NOT
4 SIGNIFICANT AND WHY. THAT IS ALL FOR THE JURY AND THEY
5 ARE WELCOME TO ARGUE THAT TO THE JURY.

6 GOVERNMENT SAYS IT WAS MACDONALD WHO GOT RID OF THE
7 DARK WOOLEN CLOTHING. WELL, HE GOT RID OF WHATEVER WAS IN
8 THE HOUSE. IT WAS THE GOVERNMENT'S FAULT, THE GOVERNMENT
9 GAVE IT BACK TO HIM. HAD THE DEFENSE KNOWN, OF COURSE,
10 ABOUT THESE LAB NOTES THEY WOULD HAVE GOTTEN RID OF
11 NOTHING. IT'S THE GOVERNMENT'S FAULT. I DON'T SEE HOW
12 THEY CAN PUT IT OFF ON MACDONALD. HE DIDN'T HAVE THE DUTY
13 TO PRESERVE BUT THE GOVERNMENT HAD THE DUTY TO DISCLOSE.

14 WITH RESPECT TO ALL OF THE OTHER UNMATCHED FIBERS AT
15 THE SCENE, YOUR HONOR, THEY DIDN'T LINK STOECKLEY AND
16 THEREFORE THEY WERE NOT IMPORTANT. NOW, LET ME JUST REFER
17 FOR ONE MOMENT. THE GOVERNMENT HAS MADE A VERY DETAILED
18 ARGUMENT CONCERNING THESE LAB BENCH NOTES AND IT IS A VERY
19 DETAILED BUT VERY FACILE ARGUMENT. THE AFFIDAVITS THAT WE
20 HAVE FILED ARE ABSOLUTELY CLEAR AND UNEQUIVOCAL THAT
21 NEITHER BRIAN O'NEILL NOR SEGAL, NOR DAVIDSEN WHO WORKED
22 FOR O'NEILL, RECEIVED THE CONFIRMATORY NOTE. WHEN THOSE
23 FILES CAME TO ME, AND WE SET OUT IN OUR AFFIDAVITS AN
24 ENTIRE CHANGE OF CUSTODY HOW THESE FILES WERE HANDLED, BY
25 WHOM THEY WENT TO AND WHEN. WHEN THEY CAME TO US WE WENT

1 THROUGH EVERY SCRAP OF PAPER. IN FACT, MR. MURPHY HAD TO
2 WHERE A SURGICAL MASK BECAUSE HE WAS GETTING ASTHMA FROM
3 ALL THE DUST. THE CONFIRMATORY NOTE WAS NOT THERE. THE
4 AFFIDAVITS OF THE PRIOR LAWYERS SAID THEY NEVER SAW IT. I
5 KNOW THE GOVERNMENT THINKS THEY RELEASED IT. IT WAS NOT
6 THERE. WE DID FIND ALL THE OTHER STUFF. WE FOUND THE
7 INITIAL SO-CALLED INVENTORY NOTE, WE FOUND THE BLACK WOOL
8 NOTES. WE ADMIT THAT WE FOUND IT, IT WAS THERE.

9 THE COURT: HOW DO YOU ACCOUNT FOR THE FACT THAT
10 THE FOIA, YOU CALL IT FOIA, I BELIEVE?

11 MR. SILVERGLATE: YES, YOUR HONOR.

12 THE COURT: THE RECORD GIVES THIS CONFIRMATORY
13 NOTE AN AUGUST 1984 DATE.

14 MR. SILVERGLATE: I'M SURE THEY THINK THEY
15 RELEASED IT BUT THEY DIDN'T RELEASE IT, YOUR HONOR.
16 HERE'S THE EVIDENCE. THE CROUCHLEY POST-IT NOTE, YOUR
17 HONOR, WE HAVE TO LOOK AT THE TEXT OF THE CROUCHLEY
18 POST-IT NOTE.

19 KAREN, HERE'S THE REFERENCE TO THE WIG HAIRS. I
20 THINK THE DESCRIPTION FIFTEEN INCHES CURLY RELATES TO
21 OTHER HAIRS ON THE BRUSH AND UP TO TWENTY-TWO INCHES
22 RELATES TO THE SYNTHETIC HAIRS.

23 THIS IS THE ONLY REFERENCE TO IT THAT I FOUND FROM
24 FOIA. JOHN.

25 KAREN DAVIDSEN FILED AN AFFIDAVIT EXPLAINING WHAT

1 THIS IS ALL ABOUT. SHE SAYS IN HER AFFIDAVIT SHE FOUND
2 THIS FIRST TENTATIVE, WHAT THE GOVERNMENT SAYS IS THE
3 INVENTORY BLOND HAIR NOTE. IT'S THE ONE WITH THE QUESTION
4 MARK. *AS A RESULT OF FINDING THAT, SHE GAVE CROUCHLEY THE
5 TASK OF TRYING TO FIND MORE IN ORDER TO GET CONFIRMATION
6 THAT THERE WAS BLOND WIG HAIR. AND HE THEN WRITES THIS
7 NOTE TO HER, WHICH SHE IDENTIFIED AS HIS HANDWRITING,
8 CROUCHLEY. SAYING THIS IS THE ONLY ONE THAT I FOUND,
9 THERE IS NOTHING MORE. IT WAS IMPORTANT ENOUGH TO
10 DAVIDSEN, WHO WORKED FOR O'NEILL, TO SEND CROUCHLEY
11 THROUGH THE FOIA RELEASES LOOKING FOR SOMETHING MORE
12 BECAUSE THIS WAS VERY TANTALIZING BUT NOT ENOUGH. AND
13 JOHN AND THIS POST-IT NOTE THAT THE GOVERNMENT HAS HERE IN
14 YELLOW DEMONSTRATES THAT JOHN CROUCHLEY FOUND NOTHING.
15 NOR DID JOHN MURPHY FIND IT WHEN HE LOOKED AT THE FILES.
16 YOUR HONOR, IT WASN'T THERE. IT SIMPLY WASN'T IN THE
17 FILES. GIVEN THE FACT THAT DAVIDSEN RECOGNIZED THE
18 IMPORTANCE OF THIS, HAD SHE FOUND IT, HAD JOHN CROUCHLEY
19 FOUND IT AND GIVEN IT TO HER, YOUR HONOR CAN BET THIS
20 WOULD HAVE APPEARED IN THESE PAPERS. IT'S THE SINGLE MOST
21 IMPORTANT THING IN THE CASE.

22 CAN YOU IMAGINE A DEFENSE LAWYER IN A CASE LIKE THIS
23 HAVING FROM THE GOVERNMENT'S FILES PROOF FROM WHICH THE
24 JURY COULD AT LEAST CONCLUDE THAT A WOMAN WITH A BLOND WIG
25 WAS PRESENT AT THE MURDER SCENE? IT'S JUST BEYOND BELIEF

1 THAT IF THEY FOUND IT THEY WOULDN'T HAVE USED IT AND THE
2 CROUCHLEY NOTE IS THE KEY; THEY DIDN'T HAVE IT. WHY
3 DIDN'T THEY HAVE IT? THEY COULDN'T HAVE GOTTEN IT. WHY
4 DIDN'T THEY GET IT? I DON'T KNOW. THERE'S A SLIP-UP
5 SOMEWHERE. THEY ADMIT EVERYTHING THEY HAD BUT IT'S NOT
6 THAT.

7 THE COURT: BUT THERE ARE NUMBERS BOTH BEFORE
8 AND AFTER OF RELEASED INFORMATION AND ONE OF WHICH REFERS
9 TO THIS CONFIRMATORY NOTE; IS THAT RIGHT?

10 MR. SILVERGLATE: WELL, NO, THIS IS THE
11 TENTATIVE NOTE. I'M NOT SURE WHAT YOUR HONOR MEANS. YOU
12 MEAN THIS WORD SYNTHETIC HERE?

13 THE COURT: NO, I'M UNDER THE IMPRESSION WHEN
14 THESE ITEMS ARE RELEASED BY THE GOVERNMENT IN RESPONSE TO
15 A FOIA REQUEST, THAT THEY ARE SOMEWHAT DATED BY NUMBERS
16 AND THAT THIS NUMBER FALLS WITHIN A SEQUENCE OF NUMBERS
17 WHICH, BEFORE AND AFTER WHICH YOU CONCEDE THE MATERIALS
18 WERE DELIVERED.

19 MR. SILVERGLATE: YOUR HONOR, I'M NOT SAYING
20 THEY DIDN'T PROCESS IT FOR RELEASE. I'M ONLY SAYING IT
21 NEVER MADE IT TO O'NEILL'S OFFICE.

22 THE COURT: ALL RIGHT.

23 MR. SILVERGLATE: THAT'S ALL WE ARE SAYING, YOUR
24 HONOR.

25 THE COURT: I UNDERSTAND THAT.

1 MR. SILVERGLATE: ONE OTHER THING, YOUR HONOR, I
2 THINK COULD BE MISLEADING FROM THE GOVERNMENT'S
3 PRESENTATION IN 1990 WHEN MR. MURPHY, AND HE WENT WITH
4 ATTORNEY ANTHONY BISCEGLIE, OUR FOIA EXPERT, MADE THE
5 REQUEST THAT ULTIMATELY, AS WE ARGUE, PRODUCED FOR THE
6 FIRST TIME THE CONFIRMATORY NOTE; THE GOVERNMENT SAYS IT
7 PRODUCED IT FOR THE THIRD TIME. MR. MURPHY WENT DOWN TO
8 THE ARCHIVE CENTER AND WITH MR. BISCEGLIE, WENT THROUGH
9 THESE RECORDS THEMSELVES. THIS WAS NOT SELECTED, THIS WAS
10 NOT PRODUCED BY ANY GOVERNMENT CLERK. WHAT HAPPENED WAS,
11 AND FRANKLY I'M SKEPTICAL WE WOULD HAVE HAD IT EVEN NOW
12 EXCEPT FOR THIS FACT, THE CLERKS DOWN AT THE ARMY RECORD
13 CENTER SAID TO BISCEGLIE AGAIN, ANOTHER FOIA REQUEST FOR
14 MACDONALD? WE ARE PULLING OUR HAIR OUT. DO US A FAVOR,
15 COME DOWN, WE WILL OPEN UP THE DOOR. YOU ROAM THROUGH ALL
16 THIS STUFF. PLEASE LEAVE US ALONE. MURPHY AND BISCEGLIE
17 WENT DOWN THERE AND THEY SPENT A COUPLE DAYS GOING THROUGH
18 THIS STUFF. THAT'S HOW THEY FOUND IT. IT WAS NOT
19 SELECTED OUT BY ANYBODY. FORTUNATELY WE HAD CART BLANCHE
20 TO JUST ROAM AND THAT'S HOW WE LOCATED IT.

21 THE COURT: YOU SAY THAT'S THE FIRST TIME THE
22 CONFIRMATORY NOTE'S EXISTENCE WAS EVER MADE KNOWN TO
23 DEFENSE COUNSEL, OF ANY DEFENSE COUNSEL?

24 MR. SILVERGLATE: THAT'S CORRECT, YOUR HONOR.

25 THE COURT: ALL RIGHT, SIR.

1 MR. SILVERGLATE: AND WE WERE DOING, IN 1990 WE
2 HAD MURPHY DO WHAT CROUCHLEY WAS ASSIGNED BY KAREN
3 DAVIDSEN BUT WE HAD MURPHY DO IT RIGHT IN THE GOVERNMENT'S
4 OWN FILES. THAT'S HOW WE FOUND THEM.

5 AS FOR THE ARGUMENT, YOUR HONOR, THAT THERE WAS A
6 TACTICAL DECISION MADE NOT TO USE THEM, KAREN DAVIDSEN,
7 WHOSE AFFIDAVIT IS FILED ALONG WITH OUR REPLY BRIEF, KAREN
8 DAVIDSEN SON PAGE SIX OF HER AFFIDAVIT STATES,

9 I HAVE NO MEMORY OF EVER HAVING SEEN THESE NOTES NOR
10 OF HAVING RECOGNIZED THEIR MEANING AND IMPORTANCE
11 EVEN IF I DID, IN FACT, COME ACROSS THEM IN MR.
12 O'NEILL'S MACDONALD FOIA FILE DURING THE TIME I
13 WORKED IN THE MACDONALD CASE.

14 IT'S CLEAR SHE WOULD HAVE RECOGNIZED THE IMPORTANCE
15 BECAUSE THAT'S WHAT SHE WAS HAVING CROUCHLEY DO.

16 THE COURT: MISS DAVIDSEN?

17 MR. SILVERGLATE: YES, YOUR HONOR. WITH RESPECT
18 TO MR. MURTAUG'S -- THAT'S WITH RESPECT TO BLACK WOOL,
19 YOUR HONOR. SHE ADMITS SHE DIDN'T SEE THEM BUT THEY WERE
20 NOT OMITTED. THERE WAS NO STRATEGIC DECISION EVEN TO FAIL
21 TO BRING UP THE BLACK WOOL. THAT WE ADMIT.

22 YOUR HONOR, WITH RESPECT TO THE LONGEST DISSERTATION
23 GIVEN CONCERNING THE EVIDENCE OF WHAT DID OR DID NOT
24 CONVICT MACDONALD. WE CAN ARGUE BACK AND FORTH FOREVER
25 ABOUT THAT. ALL I CAN SAY IS THAT ARGUMENT IS INTERESTING

1 BUT THE FOURTH CIRCUIT HAS ESSENTIALLY ESTABLISHED AS LAW
2 OF THE CASE HERE THAT THE ADMISSION OF EVIDENCE OF
3 STOECKLEY'S CONFESSIONS WOULD HAVE DESIMATED (PHONETIC)
4 THE GOVERNMENT'S CASE AND I DON'T SEE HOW THAT THAT, IT
5 SEEMS TO ME, IS OUR STARTING POINT. IN THIS ANALYSIS THE
6 GOVERNMENT CAN ARGUE WHATEVER IT WANTS ABOUT WHAT WAS
7 IMPORTANT AND WHAT WASN'T BUT THE FOURTH CIRCUIT HAS
8 SPOKEN ON THAT POINT AND THAT'S WHERE WE ARE NOW BOUND.

9 I WANT -- I WILL POINT OUT TO YOUR HONOR IF ONE
10 ACCEPTS THAT STOECKLEY WAS PRESENT ALONG WITH THREE OTHERS
11 AT THE MURDER SCENE, A LOT OF THE GOVERNMENT'S EVIDENCE
12 SUDDENLY TAKES ON NEW MEANING AS TO WHOM MIGHT HAVE DONE
13 WHAT. IF MACDONALD WAS NOT THE ONLY LIVING PERSON LEFT IN
14 THE APARTMENT WITH RESPECT TO PLACEMENT OF VARIOUS
15 EVIDENCE.

16 THE GOVERNMENT MAKES THE ARGUMENT THAT GLISSON WAS
17 QUALIFIED AS A SEROLOGIST BUT THE DEFENSE KNEW THAT SHE
18 DID SOME HAIR EXAMINATIONS AND THAT WHEN SHE FINISHED
19 TESTIFYING THERE WAS NO REQUEST FOR HER NOTES. AS THE
20 GOVERNMENT IS WELL AWARE, THE DEFENSE WOULD NOT HAVE BEEN
21 ENTITLED TO ANY NOTES UNDER THE JENCKS ACT THAT GLISSON
22 DID ON HAIR BECAUSE SHE DIDN'T TESTIFY TO HER HAIR WORK.
23 SHE TESTIFIED TO HER IS SEROLOGY WORK. ONLY THE SEROLOGY,
24 THAT WAS ALSO, I THINK, A DECISION MADE BY THE GOVERNMENT
25 NOT TO PUT HER ON AS A HAIR EXPERT.

1 WHEN BROWNING WAS TESTIFYING AND MR. SEGAL TRIED TO
2 ASK BROWNING ABOUT GLISSON'S HAIR WORK, THE GOVERNMENT
3 OBJECTED. SO THE GOVERNMENT WAS NOT INTERESTED, WAS NOT
4 EAGER TO HAVE GLISSON TESTIFYING ABOUT HAIR. IT CERTAINLY
5 WOULDN'T VOLUNTARILY TURN OVER 3500 MATERIAL IF IT DIDN'T
6 HAVE TO. IT HAD TO TURN IT OVER FOR BRADY AND NO REQUEST
7 WAS NEEDED FOR THAT BECAUSE REQUEST FOR LAB NOTES HAD
8 ALREADY BEEN MADE MULTIPAL TIMES BY DEFENSE COUNSEL.

9 NOW, I HAVE ONE OTHER POINT TO MAKE AND THAT IS THIS,
10 YOUR HONOR. I HAVE THOUGHT A BIT ABOUT A QUESTION YOUR
11 HONOR ASKED ME ABOUT EARLIER AND I WANT TO POINT OUT THAT
12 WE ARE NOT SAYING NOW THAT YOUR HONOR ABUSED YOUR HONOR'S
13 DISCRETION IN NOT ALLOWING THE STOECKLEY HEARSAY INTO
14 EVIDENCE. WHAT WE'RE SAYING IS THAT YOUR HONOR DIDN'T
15 HAVE THESE LAB NOTES. HAD YOUR HONOR HAD THE LAB NOTES,
16 FIRST OF ALL I EXPECT YOUR HONOR WOULD HAVE ADMITTED THE
17 STOECKLEY HEARSAY. IF YOUR HONOR DIDN'T I BELIEVE IT
18 WOULD THEN HAVE BEEN AN ABUSE OF DISCRETION BUT YOUR HONOR
19 HAS NEVER HAD THE OCCASION TO EXAMINE THOSE NOTES AND
20 DECIDE WHETHER, IN YOUR HONOR'S JUDGMENT, YOUR HONOR WOULD
21 HAVE ADMITTED THE LAB NOTES AND THAT'S THE EXERCISE WE'RE
22 SAYING SHOULD BE DONE NOW BY YOUR HONOR.

23 AND FINALLY, A VERY IMPORTANT POINT THAT I THINK YOUR
24 HONOR HAS TRIED TO HAVE ME CLARIFY AND I THINK I DIDN'T DO
25 A VERY GOOD JOB THE FIRST TIME. IT IS ABSOLUTELY TRUE

1 THAT YOUR HONOR ALLOWED STOECKLEY TO TESTIFY UNINJURED AT
2 TRIAL. SHE DID NOT ADMIT THAT SHE COMMITTED THE MURDER.
3 SHE HAD THIS ODD GAP IN HER MEMORY. SHE REMEMBERED WHAT
4 SHE DID BEFORE THE MURDERS, SHE REMEMBERED WHAT SHE DID
5 AFTER BUT BETWEEN MIDNIGHT AND FOUR SHE HAD NO MEMORY.
6 CONVENIENTLY GREG MITCHELL, WHOM SHE IMPLICATED IN THE
7 MURDERS AND WHOM HIMSELF CONFESSED TO FRIENDS HE COMMITTED
8 THE MURDERS, HE HAD THE SAME MEMORY GAP. WHAT AN
9 INCREDIBLE COINCIDENCE.

10 THE QUESTION IS ASKED WELL WHY DIDN'T SHE ADMIT TO
11 THE MURDERS? NUMBER ONE, SHE DIDN'T HAVE IMMUNITY. SHE
12 WANTED IMMUNITY; SHE DIDN'T GET IMMUNITY. NUMBER TWO, SHE
13 WAS ASKED TO CONFESS TO A MURDER UNDER OATH, IN COURT, IN
14 FRONT OF A JUDGE, IN FRONT OF PROSECUTORS. IT'S TOTALLY
15 REASONABLE SHE WOULD TELL HER FRIENDS BUT NOT REASONABLE
16 SHE WOULD ADMIT IT IN SUCH A WAY THAT SHE WOULD END UP
17 GETTING INDICTED FOR MURDER. THAT'S WHY THE HEARSAY
18 CONFESSIONS WERE SO CRITICAL, AS THE FOURTH CIRCUIT
19 RECOGNIZED, AND AS A RESULT OF THAT NOT COMING INTO
20 EVIDENCE THE GOVERNMENT'S CASE WAS NOT DESIMATED, AS THE
21 FOURTH CIRCUIT SAID IT WOULDN'T HAVE BEEN. AND SO WHILE
22 STOECKLEY WAS ALLOWED TO TESTIFY THAT CLEARLY WASN'T
23 ENOUGH. SHE WAS NOT ABOUT TO ADMIT THE HOMICIDES IN COURT
24 AND THAT'S WHY THE CONFESSIONS TO HER FRIENDS, NEIGHBORS
25 AND ASSOCIATES WERE SO CRITICAL.

1 I THANK YOU, YOUR HONOR.

2 THE COURT: ALL RIGHT, WELL, BEFORE YOU GO, MR.
3 SILVERGLATE, LET ME ASK YOU A BRIEF QUESTION OR TWO. THE
4 GOVERNMENT HAS PUT A NEW TWIST ON THE TERM UNMATCHED
5 FIBERS.

6 MR. SILVERGLATE: YES, YOUR HONOR.

7 THE COURT: AND WHAT IS YOUR RESPONSE TO THAT?
8 I HAD UNDERSTOOD THAT UNMATCHED WERE THAT THEY LOOK ALL
9 OVER THE LOT AND COULDN'T FIND ANYTHING THAT MATCHED THEM.
10 HE SAYS NOW, IF I UNDERSTAND HIM CORRECTLY, THAT IT SIMPLY
11 MEANT THEY DIDN'T UNDERTAKE TO MATCH THEM WITH ANYTHING.

12 MR. SILVERGLATE: CLEARLY FROM THE REQUEST MR.
13 MURTAGH MADE, HE WROTE TO FRYER AND ASKED THAT CERTAIN
14 UNMATCHED FIBERS BE MATCHED. HE WAS CONCERNED ABOUT
15 UNMATCHED FIBERS AND HIS INSTRUCTIONS WERE THAT THEY MAKE
16 AN ATTEMPT TO MATCH WHATEVER THEY COULD AND THAT WAS
17 BEFORE THIS STUFF WAS DESTROYED, EXCEPT OF COURSE
18 STOECKLEY'S WIG. THE REASON STOECKLEY'S WIG WAS
19 DESTROYED, NOT AVAILABLE, WAS BECAUSE SHE BURNED IT.
20 THERE'S NOTHING WE CAN DO ABOUT THAT. THAT'S NOT
21 MACDONALD'S FAULT. BUT WHEN MR. MURTAGH MADE THE REQUEST
22 THAT UNMATCHED FIBERS BE MATCHED, CLEARLY HE WAS
23 INTERESTED IN HAVING WORKED ON THE MATCHING. THE
24 GOVERNMENT DID WHATEVER IT COULD; FRYER MATCHED WHATEVER
25 HE COULD. WHAT WAS LEFT UNMATCHED, WHAT THERE WAS NO

1 KNOWN TO COMPARE TO SIMPLY WAS UNMATCHED. THIS OF COURSE
2 IS TRUE. MY PROBLEM WITH THE WAY THE GOVERNMENT PROCEEDED
3 WAS THAT THEY ASSUMED THAT IF SOMETHING COULDN'T BE OR
4 WASN'T MATCHED IT WAS FORENSICALLY INSIGNIFICANT BUT FROM
5 THE POINT OF VIEW OF THE DEFENSE, THIS IS SIMPLY NOT TRUE.
6 UNMATCHED HAIKS AND FIBERS COULD BE AS SIGNIFICANT AS
7 MATCHED IF THEY LINKED UP -- IF THERE WAS A FOUNDATION TO
8 LINK THEM UP TO OTHER EVIDENCE IN THE CASE IF THEY SOMEHOW
9 SUPPORTED MACDONALD'S VERSION OF THE EVENTS. THAT BECOMES
10 IMPORTANT EVEN IF UNMATCHED. THAT'S MY RESPONSE TO THAT
11 QUESTION, YOUR HONOR.

12 THE COURT: ALL RIGHT, SIR. NOW, DO I CORRECTLY
13 UNDERSTAND THAT THE ONLY PIECE OF EVIDENCE, AND IT'S
14 DISPUTED BY THE DEFENDANT AND THE GOVERNMENT AS TO WHETHER
15 OR NOT IT WAS MADE AVAILABLE IN 1984, THAT THE ONLY ITEM
16 OF EVIDENCE WHICH YOU CONSIDER CRITICAL TO THIS CASE THAT
17 WAS NOT DISCLOSED WAS THIS CONFIRMATORY NOTE?

18 MR. SILVERGLATE: CORRECT, YOUR HONOR. NOW I DO
19 HAVE ONE MORE COMMENT TO MAKE ABOUT THAT THOUGH. UNDER
20 OUR READING OF MCCLESKEY, THE FACT THAT THIS EVIDENCE NOW
21 BEFORE YOUR HONOR MAKES A COLORABLE CLAIM OF FACTUAL
22 INNOCENCE WHICH THE JURY HAD A RIGHT TO CONSIDER. THAT'S
23 WHAT WE ARE SAYING, HAD A RIGHT TO CONSIDER AND MIGHT HAVE
24 CHANGED THE JURY'S MIND IN ITS VERDICT. THAT TRUMPS ALL
25 OF THESE TECHNICALITIES THE GOVERNMENT HAS RAISED UNDER

1 MCCLESKEY SO WHILE IT IS INTERESTING TO DEBATE WHO HAD
2 WHAT WHEN AND I FIND IT PARTICULARLY INTERESTING THE
3 GOVERNMENT IS CLAIMING THAT THE DEFENSE COULD AND SHOULD
4 HAVE KNOWN WHEN THEY CLAIMED MR. MURTAGH DIDN'T EVEN KNOW
5 ABOUT THESE NOTES UNTIL WE CALLED THEM TO HIS ATTENTION.
6 BUT THE DEFENSE SHOULD HAVE KNOWN ABOUT THEM. ASIDE FROM
7 THAT, SADDLING THE DEFENSE OF THE BURDEN THAT THE
8 GOVERNMENT CAN'T MEET. THE FACT IS UNDER MCCLESKEY NONE
9 OF THESE TECHNICAL OBJECTIONS MATTER BECAUSE THIS IS ONE
10 OF THE RARE CASES WHERE THE PROCEDURAL DEFECT IS TRUMPED
11 BY THE EVIDENCE OF ARGUABLE INNOCENCE. THAT'S WHAT I
12 MEANT AT THE BEGINNING OF MY ARGUMENT WHEN I SAID THAT THE
13 MERITS OF THIS CASE AND THE PROCEDURAL ISSUES COALESCE AND
14 IF WE ARE RIGHT ABOUT THE MERITS THEN WE WIN ON THE
15 PROCEDURAL ISSUE. IF WE'RE WRONG ABOUT THE MERITS WE LOSE
16 ON THE PROCEDURAL ISSUE IF YOUR HONOR BELIEVES THAT THE
17 GOVERNMENT'S VERSION RATHER THAN OUR VERSION AS TO WHO HAD
18 WHAT WHEN.

19 THE COURT: FINALLY, LET ME INQUIRE, I THINK
20 MISSING FROM YOUR ARGUMENT THIS MORNING OR NOTICABLY
21 ABSENT, I MIGHT SAY, IS ANY REFERENCE TO THE
22 INEFFECTIVENESS OF COUNSEL WITH RESPECT TO THIS 1984 THING
23 OF MR. O'NEILL'S. WHAT DO YOU SAY THAT THE COLEMAN CASE,
24 THE MOST RECENT SUPREME COURT PRONOUNCEMENT IN THIS AREA
25 HAS TO DO WITH THAT ARGUMENT?

1 MR. SILVERGLATE: I BELIEVE THAT THE COLEMAN
2 DECISION DOES DISPOSE OF THE INEFFECTIVE ASSISTANCE
3 ALTERNATIVE BUT THE WAY IT DOES IT IS INTERESTING. THE
4 FACT IS THAT IF THE INEFFECTIVE ASSISTANCE LED TO THE
5 CONVICTION OF AN INNOCENT MAN IT DOESN'T MATTER WHETHER HE
6 WAS INEFFECTIVE OR NOT INEFFECTIVE. WHAT MATTERS IS IS
7 THERE EVIDENCE HERE THAT AN INNOCENT PERSON WAS CONVICTED?
8 WHAT THE SUPREME COURT IS TRYING TO DO IN ALL THESE
9 DECISIONS AND IT'S MORE THAN TRYING TO DO, THEY HAVE SAID
10 THIS IS WHAT THEY ARE TRYING TO DO. THEY ARE TRYING TO
11 PUT LESS EMPHASIS ON THE TECHNICAL VIOLATION OF
12 CONSTITUTIONAL RIGHTS AND MORE ON THE SUBSTANTIVE QUESTION
13 OF GUILT OR INNOCENCE IS THIS A HABEAS WHICH JUSTICE
14 REQUIRES US TO ADJUDICATE AND THEY ARE SAYING WE DON'T
15 CARE IF YOU HAD EFFECTIVE OR INEFFECTIVE ASSISTANCE OF
16 COUNSEL. IF THE EVIDENCE IS REALLY THAT YOU DID WE'RE NOT
17 GOING TO RECOGNIZE THAT ON A SECOND OR SUBSEQUENT HABEAS.
18 ON THE OTHER HAND, IF YOU DID GET CONVICTED AND YOU DIDN'T
19 DO IT OR THERE'S EVIDENCE FROM WHICH A JURY COULD CONCLUDE
20 YOU DIDN'T DO IT AND IF IT'S LINKED WITH A CONSTITUTIONAL
21 VIOLATION WE WILL REVIEW THE PETITION. THE CONSTITUTIONAL
22 VIOLATION HERE IS NOT A VIOLATION OF THE SIXTH AMENDMENT
23 RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, IT WAS A BRADY
24 VIOLATION, A DUE PROCESS VIOLATION.

25 I THINK THE GOVERNMENT AND I APPARENTLY READ

1 MCCLESKEY QUITE DIFFERENTLY AND I COMMEND THE ISSUE TO THE
2 ONLY ANSWER TO COUNT RIGHT NOW. THANK YOU, YOUR HONOR.

3 THE COURT: LET ME -- YOU MAY TAKE YOUR SEAT.
4 BUT I WAS GOING TO SAY THIS THAT I SEEM TO PERCEIVE, AND
5 IT ESCAPES ME FOR THE MOMENT, A POINT THAT YOU MADE IN
6 YOUR REBUTTAL ARGUMENT WHICH WAS NOT EXACTLY IN REBUTTAL
7 OF ANYTHING THE GOVERNMENT HAD SAID. WHAT I WAS GOING TO
8 DO WAS TO GIVE THE GOVERNMENT AN OPPORTUNITY TO RESPOND TO
9 THAT BUT WITH THE UNDERSTANDING OF COURSE THAT YOU WILL
10 GET TO GO LAST.

11 MR. SILVERGLATE: THANK YOU VERY MUCH.

12 THE COURT: DID YOU HAVE SOMETHING THERE THAT
13 WAS RAISED IN HIS REBUTTAL ARGUMENT THAT YOU WANTED TO
14 RESPOND TO BRIEFLY?

15 MR. MURTAGH: YES, SIR, YOUR HONOR. MAY IT
16 PLEASE THE COURT. I THANK THE COURT FOR THE COURT'S
17 INDULGENCE. IF I COULD TRY AND IN RESPONSE TO A QUESTION
18 FROM THE COURT, THERE ARE TWO POINTS I WOULD LIKE TO
19 ADDRESS.

20 ONE IS THIS CONFIRMATORY PAGE. AGAIN WE SUBMIT THAT
21 THE INITIAL PAGE IS ITSELF CONFIRMATORY.

22 THE COURT: WELL, THAT'S A FACTUAL MATTER.
23 EITHER YOU DID OR DIDN'T. HE SAYS YOU SAY YOU DID AND HE
24 SAYS YOU DIDN'T.

25 MR. MURTAGH: NO, YOUR HONOR, WITH RESPECT

1 THERE'S NO DISPUTE BECAUSE IT'S THEIR DOCUMENT THAT THEY
2 RECEIVED THE INITIAL PAGE IN JUNE OF 1983. IF I MAY, YOUR
3 HONOR. SEE, THAT'S THEIR DATE STAMP NOT OURS. THE
4 ISSUE --

5 THE COURT: YOU ARE SAYING THAT IS HIS RECEIVING
6 STAMP ON THERE?

7 MR. MURTAGH: YES, THAT'S HIS. BY THE WAY, IT
8 WASN'T ON THE FIRST COPY THEY FILED WITH THE PETITION BUT,
9 IN ANY RATE, THAT'S THEIR STAMP. THE DISPUTE, YOUR HONOR,
10 IS WITH RESPECT TO THIS SECOND PAGE WHICH WAS NUMBERED IN
11 1984, 785, BY JANICE BARKLEY. NOW, THEIR POINT IS THAT
12 THEY ARE SAYING MAYBE THE GOVERNMENT THINKS IT RELEASED IT
13 BUT WE NEVER GOT IT. IN POINT EFFECT THERE'S A REASON WHY
14 NEITHER DAVIDSEN NOR CROUCHLEY CAN SPEAK TO THAT ISSUE.
15 CROUCHLEY, ACCORDING TO HIS AFFIDAVIT, WORKED FOR O'NEILL
16 BETWEEN MAY OF 1983 AND APRIL OF 1984. HE WAS GONE BY THE
17 TIME THIS WAS RELEASED IN AUGUST OF 1984. DAVIDSEN,
18 ACCORDING TO HER AFFIDAVIT, PAGE ONE, WORKED BETWEEN
19 NOVEMBER OF 1982 AND FEBRUARY 15, OF 1984. SHE WAS GONE
20 BEFORE THIS PAGE WAS RELEASED.

21 NOW, WHAT MR. O'NEILL SAYS IN HIS AFFIDAVIT IS NOT
22 THAT I NEVER GOT IT. HE SAYS I NEVER SAW IT. WE
23 SUBMIT --

24 THE COURT: I THOUGHT HE SAID HE DIDN'T REMEMBER
25 SEEING IT.

1 MR. MURTAGH: WELL HE SAYS -- THE POINT IS THEY
2 ARE ON NOTICE.

3 THE COURT: I THINK I HAVE YOUR POINT ON THAT.

4 MR. MURTAGH: THE OTHER POINT, YOUR HONOR, IS
5 WITH RESPECT TO THIS UNMATCHED UNCOMPARED AND MR.
6 SILVERGLATE ALLUDED TO A REQUEST THAT I MADE TO THE FBI
7 LAB IN DECEMBER OF 1978. FIRST OF ALL, YOUR HONOR, I
8 WOULD LIKE TO POINT OUT WHAT I WAS REQUESTING THAT THEY
9 COMPARE WERE TWO TYPES OF ITEMS. ONE WERE UNCOMPARED,
10 PREVIOUSLY UNCOMPARED AND THEREFORE UNMATCHED FIBERS, PINK
11 NYLON BUT SPECIFICALLY A BLUE ACRYLLIC FIBER THAT WAS
12 COMPARED TO MACDONALD'S BLUE PAJAMA TOP AND WAS REPORTED
13 IN THE LAB REPORT AS NOT MATCHING MACDONALD'S BLUE PAJAMA
14 TOP. THAT LAB REPORT WAS DISCLOSED TO THE DEFENSE AND YES
15 I WAS "GREATLY CONCERNED THAT THAT BE IDENTIFIED." IN
16 THAT REGARD I ASKED THEM TO CONDUCT FURTHER EXAMINATIONS.

17 SO WHAT MR. SILVERGLATE IS TRYING, IF YOU WILL, TO
18 SORT OF SMUDGE TOGETHER IS THE DIFFERENCE BETWEEN
19 UNCOMPARED AND UNMATCHED, AND I WOULD SUBMIT THAT MANY OF
20 THE, FOR EXAMPLE, THE BLACK WOOLEN FIBERS WHICH WERE NOT
21 KNOWN TO ME AND ARE NOT IN THAT REQUEST LETTER DISCOVERED
22 IN 1979 BY FRYER ARE UNCOMPARED, THAT IS IN 1979 THERE'S
23 NOTHING -- THERE ARE NO CLOTHING OF THE MACDONALD
24 HOUSEHOLD OTHER THAN THAT WHICH WE SEIZED AS EVIDENCE, THE
25 PAJAMAS BASICALLY, WITH WHICH TO COMPARE. SO IT'S NOT AN

1 UNMATCHED FIBER, IT'S AN UNCOMPARED ONE.

2 AS TO MR. SILVERGLATE'S POINT IT WAS THE GOVERNMENT'S
3 DUTY TO PRESERVE THAT CLOTHING, I WOULD SUBMIT IF THE
4 BLACK WOOLEN FIBERS WEREN'T DISCOVERED BY FRYER UNTIL 1979
5 WE CAN HARDLY BE HELD TO THE TASK OF THE ARMY GIVING THEM
6 BACK TO HIM IN DECEMBER OF 1970 WHEN THE CHARGES WERE
7 DISMISSED AND THERE WAS NO FURTHER PROCESS PENDING AT THAT
8 TIME.

9 THE COURT: ALL RIGHT, SIR. NOW, MR.
10 SILVERGLATE, YOU GET TO GO LAST.

11 MR. SILVERGLATE: YOUR HONOR IS VERY KIND AND
12 VERY GENEROUS AND I MUST SAY IT'S BEEN AN ABSOLUTE
13 PLEASURE DOING AN ARGUMENT IN FRONT OF YOUR HONOR THIS
14 MORNING. YOUR HONOR'S REPUTATION PRECEDES YOUR HONOR.

15 THE TWO POINTS IN REBUTTAL, YOUR HONOR. FIRST OF
16 ALL, GOVERNMENT SAYS THAT CROUCHLEY AND DAVIDSEN MAY HAVE
17 LEFT OR DID LEAVE THE OFFICE BEFORE THE CONFIRMATORY NOTE
18 ARRIVED AND THAT'S WHY THEY DIDN'T SEE IT. THIS MAY BE.
19 IT MAY HAVE ARRIVED AFTER THEY LEFT. THAT'S BECAUSE IF IT
20 ARRIVED IT WOULD HAVE ARRIVED IN ANOTHER BATCH OF
21 MATERIALS BUT WE HAVE DONE EVERYTHING WE CAN. O'NEILL
22 SAYS HE DIDN'T SEE IT. WE HAVE COMBED O'NEILL'S FILE. WE
23 HAVE NO EXPLANATION FOR WHAT'S NOT IN THERE. WE ARE NOT
24 HIDING ANYTHING BECAUSE WE OBVIOUSLY DISCLOSED WE HAD THE
25 BLACK WOOL, WE DISCLOSED WE HAD THE FIRST NOTE. WE DON'T

1 KNOW WHY WE DIDN'T GET THE SECOND, WHETHER IT WAS RELEASED
2 BUT NEVER MADE IT, NO IDEA YOUR HONOR. BUT THE ULTIMATE
3 ISSUE HAS GOT TO BE THIS. CAN THIS CASE TURN ON WHETHER
4 OR NOT THE CONFIRMATORY NOTE ARRIVED JUST BEFORE THE
5 ARGUMENT IN THE PRIOR HABEAS, THAT DAVIDSEN AND CROUCHLEY
6 WERE GONE AND O'NEILL DIDN'T SEE IT. IF THAT'S WHAT
7 HAPPENED CAN A HABEAS UNDER THE MCCLESKEY DOCTRINE TURN ON
8 THAT RATHER THAN ON THE QUESTION OF WHETHER THERE WAS A
9 COLORABLE CLAIM OF INNOCENCE MADE. WE SUBMIT THAT IT
10 COULD BE LUDICROUS TO HAVE THIS CASE TURNED ON THAT KIND
11 OF TECHNICALITY WHICH, IN ANY EVENT, I SUPPOSE WOULD HAVE
12 TO BE A HEARING ON BECAUSE IF YOUR HONOR WANTS TO GET TO
13 THE BOTTOM OF IT I SUPPOSE WE WOULD HAVE TO START FROM
14 SCRATCH ON THAT SET OF ISSUES.

15 FINALLY, THE GOVERNMENT SAYS DON'T CONFUSE UNMATCHED
16 AND UNCOMPARED. ALL I CAN SAY IS, YOUR HONOR, IF WE HAD
17 THE LAB NOTES I CAN ASSURE YOU THE DEFENSE WOULD HAVE DONE
18 THE MATCHING AND THE COMPARING, EVEN IF THE GOVERNMENT
19 DIDN'T. IF IT WAS UNMATCHED AND UNCOMPARED IT WASN'T THE
20 DEFENSE'S FAULT AND AS LONG AS IT WASN'T THE DEFENSE'S
21 FAULT THEN IT HAS TO RESULT IN A NEW TRIAL.

22 I THANK YOU, YOUR HONOR.

23 THE COURT: THANK YOU, SIR. GENTLEMEN, BEFORE WE
24 ADJOURN LET ME MAKE THIS OBSERVATION. I HAVE BEEN WITH
25 THIS CASE NOW THE BETTER PART OF SIXTEEN YEARS AND IT'S --

1 WELL, ALONG WITH ANOTHER ONE WHICH I HAVE THAT I INHERITED
2 WHEN I FIRST CAME HERE OVER TWENTY YEARS AGO, IT'S TAKING
3 ON SOME OF THE ASPECTS OF JOHN DICE AGAINST JOHN DICE BUT
4 ALL THROUGH THE LITIGATION OF THIS HIGHLY IMPORTANT AND
5 EXCEEDINGLY INTERESTING CASE, I HAVE HAD THE PLEASURE OF
6 HEARING FROM EXCELLENT COUNSEL AT ALL STAGES OF THE
7 PROCEEDINGS. THIS WAS AT THE MOTION STAGE, WHICH PRECEDED
8 THE TRIAL AS I RECALL BY FOUR OR SOME YEARS; AT THE TRIAL
9 STAGE, I ALREADY COMMENTED ON DEFENSE COUNSEL AT THAT
10 STAGE; AND OBVIOUSLY YOU ONLY HAVE TO JUDGE BY THE RESULTS
11 THAT THEY OBTAINED THAT THE PROSECUTION ATTORNEYS DID A
12 VERY ABLE JOB. AND ALL, LET ME ADD, IN A MOST
13 PROFESSIONAL MANNER. THEN NEXT WE HAD MR. O'NEILL WHOM I
14 FOUND TO BE AN EXCEPTIONALLY ABLE ATTORNEY, LIKABLE LAWYER
15 WHO MADE A VERY FINE PRESENTATION OF HIS CASE IN 1984 OR
16 POSSIBLY '85. WELL, UP UNTIL THE FINAL ARGUMENTS WHICH
17 MAY HAVE BE IN JANUARY OF '85. SO IT'S A LITTLE ODD TO ME
18 TO SEE, ORIGINALLY HAVING HIM NOT EXACTLY CHARGED BUT THE
19 SUGGESTION OF INEFFECTIVENESS ON HIS PART BECAUSE I HAD
20 RECALLED THAT HE WAS SUCH AN EXCELLENT LAWYER AND IT WAS A
21 REAL PLEASURE TO HAVE HIM IN THIS COURT. AND NOW DOWN TO
22 TODAY'S PROCEEDINGS. MR. SILVERGLATE, I WANT TO COMMEND
23 YOU ON THE EXCELLENT JOB THAT YOU HAVE DONE WITH YOUR
24 BRIEFS AND YOUR PRESENTATION HERE IN COURT. IT'S BEEN A
25 PLEASURE TO HAVE YOU AND YOUR ASSOCIATES. I HAVE KNOWN

1 MR. SMITH FOR QUITE SOME TIME. HE USED TO BRING ME
2 BUSINESS WITH MORE FREQUENCY. I GUESS THAT'S WHEN I WAS
3 DOING IT ALL HERE. IN RECENT TIMES HE HASN'T BROUGHT ME
4 VERY MUCH, FOR WHICH I'M VERY MUCH OBLIGED, BUT HE OF
5 COURSE, AS YOU WELL KNOW, IS ONE OF OUR EXCELLENT CIVIL
6 RIGHTS LAWYERS. AND THE GOVERNMENT BROUGHT US MR. DEPUE
7 AND MR. MURTAGH AGAIN WHOM I CONFESS SOME REASONABLE
8 ACQUAINTANCESHIP FROM YESTERYEAR AND I JUST WANTED TO SAY
9 PUBLICLY WHAT A PLEASURE IT'S BEEN TO HEAR SUCH ABLE AND
10 COMPETENT ZEALOUS ADVOCATES PRESENT A CASE AS COMPLICATED
11 AND AS INTRIGUING AS THIS ONE HAS BEEN.

12 YOU MAY TAKE A RECESS. LET ME SAY, OF COURSE, IT
13 HAPPENS TO BE VACATION TIME. MY SECRETARY'S AWAY FOR
14 ANOTHER EIGHT OR TEN DAYS. WE WILL GET YOU A DECISION IN
15 THIS THING I HOPE IN THE REASONABLY NEAR FUTURE BUT JUST
16 WHEN I CAN NOT PREDICT AT THE MOMENT BECAUSE SOME OF IT IS
17 BEYOND MY CONTROL AT THE MOMENT. YOU MAY RECESS THIS
18 COURT UNTIL FURTHER CALL. I WILL GO DOWN AND SPEAK TO
19 COUNSEL BEFORE YOU LEAVE.

20
21
22
23
24
25

END OF TRANSCRIPT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

THIS IS TO CERTIFY THAT THE FOREGOING TRANSCRIPT OF PROCEEDINGS TAKEN AT THE CRIMINAL SESSION OF UNITED STATES DISTRICT COURT IS A TRUE AND ACCURATE TRANSCRIPTION OF THE PROCEEDINGS TAKEN BY ME IN MACHINE SHORTHAND AND TRANSCRIBED BY COMPUTER UNDER MY SUPERVISION.

THIS THE 2nd DAY OF July 1991.

Donna J. Tomawski
DONNA J. TOMAWSKI
OFFICIAL COURT REPORTER