

FILED

NOV 14 1983

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
FAYETTEVILLE DIVISION  
E. DIST. NO. CAR.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	NO. 75-26-CR-3
	)	
VS.	)	<u>O</u> <u>R</u> <u>D</u> <u>E</u> <u>R</u>
	)	
JEFFREY R. MacDONALD,	)	
	)	
Defendant	)	

Citing seven items of "crime scene evidence not previously known to the defense" counsel for the defendant in this thirteen-year-old murder case have filed a motion for an order permitting a criminalist to examine, inspect and photograph the murder scene in the residence located at 544 Castle Drive, Fort Bragg, North Carolina. It is alleged that the evidence hoped to be developed by such an inspection will be supportive of a motion for new trial, which defense counsel are contemplating filing pursuant to Rule 33, F.R.Crim.P. In support of the motion presently before the court one of defendant's attorneys, who did not appear in the trial of the case but who apparently was retained more than a year ago, has filed his affidavit in which it is stated that several criminalists with whom he has consulted have advised "that there is the possibility that some physical evidence may remain at the crime scene even though the crime scene has already been processed."

In a response in opposition to this motion the government has filed a thirty-eight-page brief and affidavit by one of its

11/18/83 ma WS  
RECEIVED

attorneys who participated in the trial of the case to which forty-five exhibits from the government's files and the court record have been attached.

The government's submissions establish quite clearly that the seven items of evidence mentioned in connection with defendant's motion were made available to his counsel and the criminalist retained by defendant who appeared as a witness for him at the trial and that these items were examined in detail by the expert prior to the trial. For reasons best known to the expert and defense counsel they did not avail themselves of the opportunity which was open to them to inspect the crime scene prior to the trial, but they did inspect it during the course of the trial and prior to the time defendant's expert testified. It thus appears that defendant's counsel and expert witnesses have had every reasonable opportunity to inspect this crime scene at any reasonable time during the last thirteen years, and therefore the defendant's present motion cannot be considered timely.

Even so, because of the importance of the case and the fact that the defendant stands to serve a long prison term in the event his contemplated motion for new trial is not successful, the court would be reluctant to deny defendant's experts yet another chance to inspect the crime scene if it appeared there was the slightest chance that evidence favorable to the defendant could be developed by a crime scene inspection at this late date. However, defendant's experts have not favored the court with any suggestion as to what possible evidence an inspection of the crime scene at this time

might disclose, and we are therefore left with the simple assertion that there is "the possibility that physical evidence may remain present" at the crime scene. Adding to this highly speculative situation is the fact that the crime scene premises have been broken into on several occasions and have been subjected to much vandalism over the last thirteen years so that it would seem next to impossible for anyone to say that evidence found there now was there on the night of the murder in early 1970.

The court is under the impression that defense counsel recognized the virtual futility of any further examination of the crime scene at this time by their experts but that the motion was prompted by the court's memorandum to counsel of record for the government and defendant dated August 11, 1983 in which counsel were informed of an urgent request by the Army that the residence in question be released from impoundment by the court since "these quarters have deteriorated and that they are badly needed for occupancy by service members with families at Fort Bragg." The memorandum stated that there was nothing pending in this court at this time relating to the case and that the court knew of no reason why the quarters should not be released immediately. Counsel were requested to inform the court within ten days if there was any objection to the release of the quarters thereafter and within the ten-day period the motion presently under consideration was filed.

In view of all the circumstances outlined above the court has concluded that no useful purpose would be served in continuing

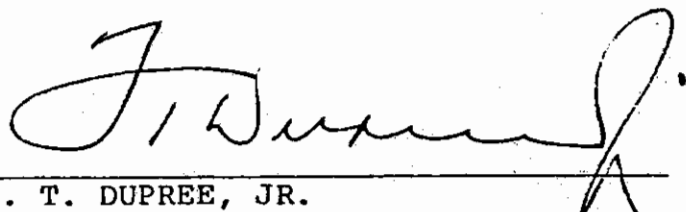
the impoundment of the crime scene premises in order to allow their further inspection by defendant's experts at some time in the future. Accordingly, it is now

ORDERED:

1. That defendant's motion for crime scene inspection filed August 22, 1983 be and the same is hereby denied.<sup>1</sup>

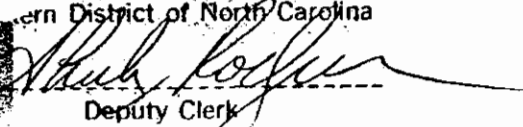
2. That the previous order of the court impounding the premises at 544 Castle Drive, Fort Bragg, North Carolina, is rescinded and said premises are released to the United States Army for its use without further obligation to this court or the parties in the above-entitled action.

Let copies of this order be served forthwith on Colonel Kenneth A. Raby, Chief, Criminal Law Division, Department of the Army, Office of the Judge Advocate General, Washington, District of Columbia, 20310, and on the Commanding General, United States Army, Fort Bragg, North Carolina.

  
F. T. DUPREE, JR.  
UNITED STATES DISTRICT JUDGE

November 14, 1983.

1. In a further response recently filed defendant has requested permission to examine again the seven items of evidence referred to previously which remain in the custody of the Clerk and/or the Marshal. The government having indicated that it has no objection to such examination, the requested permission is granted provided that a representative of the government is present at the time of the examination.

Verify the foregoing to be a true and correct copy of the original.  
Richard Leonard, Clerk  
United States District Court  
Western District of North Carolina  
  
Deputy Clerk

**FILED**

**MAY - 7 1984**

**UNITED STATES COURT OF APPEALS**

**U. S. Court of Appeals  
Fourth Circuit**

**FOR THE FOURTH CIRCUIT**

**No. 83-6654**

**United States of America,**

**Appellee,**

**-versus-**

**Jeffrey R. MacDonald,**

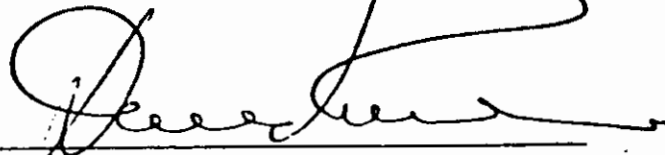
**Appellant.**

**O R D E R**

The United States has moved to dismiss appellant's appeal from the district court's order denying appellant's motion for discovery. The government contends that the order is a non-appealable, interlocutory order. While the appealability of this order may not be free of doubt, we are of the opinion that, whether the order is appealable or not, the appeal is without merit, and oral argument is unnecessary.

It is, therefore, ORDERED, That the appeal be and the same is hereby dismissed on the merits.

Entered with the concurrence of Judge  
Hall and Judge Sprouse.



**United States Circuit Judge**