IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

———

NO. 08-8525

———

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY R. MACDONALD,

Defendant-Appellant.

———

REPLY BRIEF OF APPELLANT

———

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

I. This Appeal Is Not Mooted By the Death of DUSM Jimmy Britt.

The Government argues first that this appeal should be deemed moot because Deputy United States Marshal Jimmy B. Britt, whose affidavit is one basis of MacDonald's Section 2255 Motion, is now dead. The Government cites no cases in support of its argument. This argument has no merit.

MacDonald filed his Section 2255 Motion, with the Britt affidavit attached as an exhibit, on January 17, 2006. (JA 49-50). The Government filed its response in opposition to the Section 2255 Motion on March 30, 2006. (JA 51). Then, for more than a year, the district court took no action with the case. MacDonald therefore sent a letter to the district court on September 7, 2007, informing the district court of DUSM Britt's poor health and how that affected his availability for a hearing in the matter. (DE-148, Ex. 1).

Two more months passed with no action taken by the district court. On November 5, 2007, MacDonald sent a second letter to the district court, requesting a status conference and noting the "fragile health of key witnesses." (DE-148, Ex. 2). The Government filed a response on November 13, 2007, asking the district court to address the procedural issues in the case prior to undertaking a status conference or evidentiary hearing, and arguing it would be "premature" to hold a status conference prior to deciding those procedural issues. (DE-148 at 2-3).

Another year then passed with no action by the district court until, on October 28, 2008, the Government filed a notice with the district court informing it that DUSM Britt had died on October 19, 2008. (DE-149). One week later, on November 4, 2008, the district court issued its order denying MacDonald's Section 2255 Motion without a hearing. (JA 53). The Government now seeks to use DUSM Britt's death, and the delay that occurred in the district court in addressing this case, to its advantage by arguing that this appeal should be considered moot. This argument is both legally and equitably without merit.

First, the Government's argument that the Britt affidavit is inadmissible as "rank hearsay" is neither legally correct nor a proper basis for arguing that this appeal is moot. The fact that Britt is not now available to testify does not prevent the district court from considering the Britt affidavit at a hearing on MacDonald's Section 2255 Motion under Federal Rule of Evidence 807. DUSM Britt was a veteran and well-respected law enforcement officer with no reason to fabricate, and nothing to gain by admitting, the matters in his affidavit. The affidavit is made under oath, and DUSM Britt in the affidavit states that he has "no doubt" about what he witnessed between Helena Stoeckley and AUSA Blackburn during MacDonald's trial. (JA 983, ¶ 25). Moreover, extensive corroboration exists for the Britt affidavit. DUSM Britt's affidavit is corroborated by the affidavit of DUSM Lee Tart, another veteran lawman who set out how, in 2002, DUSM Britt

told him of the matters in Britt's affidavit. (DE-115, Ex. 3).[1] The Britt affidavit is further corroborated by the other evidence submitted by MacDonald, including the affidavit of Wendy Rouder (JA 985) and the affidavit of Helena Stoeckley's mother. (JA 1473). Most important, the district court specifically found DUSM Britt's affidavit to be "a true representation of what he heard or thought he heard." (JA 1554 at n. 18).[2]

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[1] Tart's affidavit was submitted to the district court as Exhibit 3 to his Section 2255 Motion. (DE-115). Exhibits 2 and 3 to MacDonald's Section 2255 Motion were inadvertently omitted from the Joint Appendix, and therefore are reproduced in the Addendum to this Reply Brief.

[2] After the district court entered the order denying MacDonald's Section 2255 Motion, the Government filed a motion asking the district court to "modify" its order regarding its finding that DUSM Britt had told the truth in his affidavit. (JA 1565). The Government claimed that it had "incontrovertible proof" that Britt's affidavit was not accurate, a claim it repeats in its Brief in this Court. (Gov't Br. at 24).

The Government's transparent attempt to discredit the Britt affidavit, attempted only after the district court found the affidavit to be true, should be rejected. As noted in the response filed by MacDonald in the district court, (JA 1618), the Government's "incontrovertible proof" is anything but, and is simply some evidence that DUSM Britt may have been mistaken as to when exactly he took custody of Helena Stoeckley. Most important, however, the Government's "incontrovertible proof" does not contradict in any way the uncontested fact that Britt did in fact have custody of Stoeckley. Nor does the Government's "proof" contradict in any way the key evidence produced by DUSM Britt -- (a) Stoeckley's admissions to AUSA Blackburn during MacDonald's 1979 trial, and (b) AUSA Blackburn's threat to Stoeckley in response. (JA 1618). The district court denied the Government's motion for modification. (JA 1672).

The Government still has produced no evidence to contradict these violations of MacDonald's constitutional rights shown by DUSM Britt's affidavit.

The fact that the district court has already determined that DUSM Britt's affidavit is "a true representation of what he heard or thought he heard," (JA 1554 at n. 18), shows that the affidavit has the "circumstantial guarantees of trustworthiness" necessary for its admission under Rule 807 at a hearing on MacDonald's Section 2255 Motion. The other three conditions for admission under Rule 807 also exist -- (a) the affidavit is evidence of material fact, (b) there is no other more probative evidence that can be offered by MacDonald on these points, and (c) the "interests of justice" will be served by admission of the affidavit, as the affidavit will aid the district court in seeking the truth in this case. The Britt affidavit is admissible under Rule 807. *See, e.g. United States v. McHan*, 101 F.3d 1027, 1038 (4th Cir. 1996) (admitting grand jury testimony of deceased government witness at defendant's trial under residual hearsay exception, where circumstances of grand jury appearance provided guarantees of trustworthiness of the testimony). The Britt affidavit shows that MacDonald's trial was infected with

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The Government's efforts to discredit the Britt affidavit, attempted only after its truth was accepted by the district court, are meaningless, as they do not address the evidence set out in the Britt affidavit that is the basis for his Section 2255 claims. The Government's motion to "modify" can be viewed only as an attempt to divert attention from its failure to produce any evidence to contradict the violations of MacDonald's constitutional rights shown by DUSM Britt's affidavit.

constitutional error, requiring a new trial. The fact that DUSM Britt is now dead does not prevent, in any way, such a finding.[3]

Second, the Government's argument should be rejected as a matter of equity. Twice in the fall of 2007 MacDonald brought DUSM Britt's fragile health condition to the attention of the district court and the Government. The Government, when informed of DUSM Britt's grave state in the fall of 2007, filed a notice with the district court wherein it took the position that it was "premature" to hold a status conference or evidentiary hearing until after the district court had determined procedural matters relating to the motions filed by MacDonald to expand the scope of evidence to be considered by the district court. (DE-148 at 3). The Government took this position after the Section 2255 Motion had already been pending for more than year, and another year passed (without action by the district court) before DUSM Britt died.

[3] Nor is there a "double hearsay problem" as argued by the Government. (Gov't Br. at 29 n. 13). DUSM Britt's affidavit shows that MacDonald's constitutional rights were violated when Stoeckley confessed her participation and knowledge of the murders to AUSA Blackburn during the 1979 trial, and AUSA Blackburn then (a) threatened Stoeckley with prosecution if she testified to her participation and knowledge; (b) failed to disclose to the defense or the court Stoeckley's admission and his own threat; and (c) affirmatively misrepresented to the district court the nature of what he had been told by Stoeckley. The constitutional violation is shown by the occurrence of these events. DUSM Britt's affidavit is therefore not being offered, at this point, for the truth of any matter asserted by Stoeckley or Blackburn, but rather to show that these events (and the resulting constitutional error) occurred during MacDonald's 1979 trial.

The Government should not now be heard to argue that this appeal is mooted by DUSM Britt's death, when it actively opposed the case being moved forward to an evidentiary hearing in the district court after learning of DUSM Britt's health problems. *See Minor v. United States*, 396 U.S. 87, 99 (1969) (Stewart, J., dissenting) ("Mr. Justice Holmes used to say that one dealing with the Government should turn square corners. When the present all-powerful, all-pervasive Government moves to curtail the liberty of the person, it too should turn square corners"). Neither the law nor equity supports the Government's argument.

This appeal is not mooted by DUSM Britt's death in October 2008. Britt's affidavit is admissible and is one of several items of evidence that can be considered by the district court at an evidentiary hearing on MacDonald's Section 2255 Motion.

II. The Government's Proposed Definition of "Evidence as a Whole" In Section 2244(b)(2)(B) Is Contrary to the Plain Language of the Statute and to All of the Relevant Precedent.

The Government argues that a district court, in conducting its gatekeeping analysis under 28 U.S.C. § 2244(b)(2)(B), must exclude from consideration as part of the "evidence as a whole" all evidence previously submitted by the petitioner in connection with any other previous habeas petition, as well as exclude from consideration all newly discovered evidence for which there has been no pre-filing authorization issued by the court of appeals. In essence, the Government argues

that the district court correctly excluded from consideration all of the evidence submitted by MacDonald in his previous habeas filings, and also correctly excluded from consideration the DNA evidence offered by MacDonald because he has not obtained a specific pre-filing authorization with respect to that evidence.

Two points must be noted at the outset with respect to the Government's argument. First, the Government has cited no precedent whatsoever in support of its construction of the phrase "evidence as a whole" in Section 2244. The cases cited by the Government in its brief deal only with general principles of statutory construction or cases citing general principles about the habeas corpus laws. The Government argument on this issue spans twenty-eight (28) pages in its brief, yet not once does the Government cite a case that has construed the phrase "evidence as a whole" consistent with its position. The reason for this is simple -- no court has construed the phrase "evidence as a whole" in Section 2244(b)(2)(B) in the manner advanced by the Government.

Second, nowhere in the Government's argument does it address the most basic principle of statutory construction -- that words in a statute are given their plain meaning. *United States v. Hatcher*, 560 F.3d 222, 226 (4th Cir. 2008). Under the tortured reading advanced by the Government, the phrase "evidence as a whole" does not mean just that, but instead means something much *less* than that.

The Government's tortured construction of the statute violates the most basic premise of statutory construction, and must be rejected on those grounds.

The caselaw cited by MacDonald echoes the mandate that the plain language of the phrase "evidence as a whole" be given its plain meaning. This phrase in Section 2244 is in accord with pre-AEDPA law, where a district court, when considering whether a habeas petitioner had established his actual innocence necessary to avoid a procedural bar, was required to consider "all of the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House v. Bell*, 547 U.S. 518, 537-38 (2006); *see also Schlup v. Delo*, 513 U.S. 298, 327 (1995) (noting that evaluation of whether newly discovered evidence meets standard for habeas relief, court must consider all of the evidence, including "evidence that became available only after the trial"); Hertz & Leibman, Federal Habeas Corpus Practice and Procedure, § 28.3(e) at 1321 (4th Ed. 2001). Cases decided after the enactment of Section 2244 have applied the *Schlup/House* standard to define "evidence as a whole" in Section 2244(b)(2)(B) to mean just that, and to not exclude previously considered or newly discovered evidence from the calculus. *Lott v. Bagley*, 2007 U.S.Dist.Lexis 91762, *15-17 (N.D. Ohio 2007), *aff'd*, 2008 U.S.App.Lexis 16788 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2053 (2009).

The Government's attempts to distinguish *Schlup*, *House*, and *Lott* are unconvincing. (Gov't Br. at 45-47). The Government fails to acknowledge that in each of these cases, the court considered *all* of the evidence -- both newly discovered and previously presented -- in assessing the viability of the petitioner's present habeas claim. *Lott* involved a second habeas petition, and in construing the phrase "evidence as a whole" in Section 2244(b)(2)(B), the court considered all of the evidence offered by the petitioner in support of his first habeas petition, as well as newly discovered evidence. Nothing in these cases supports in any way the Government's attempts to read a requirement into the phrase "evidence as a whole" that simply does not exist.[4]

Finally, the Government's argues at length that the phrase "evidence as a whole" in Section 2244 cannot mean what it says because Congress has expressed an intent in other legislation to limit habeas review. (Gov't Br. at 32-37). This argument is equally unavailing. Where the "terms of a statute are clear, its

[4] In similar vein, the Government argues that the prohibition in Section 2244(b)(1) against recycling successive habeas claims means that evidence offered in support of a previous habeas claim cannot be considered as part of the "evidence as a whole" under Section 2244(b)(2)(B)(ii) in assessing the viability of a later but different habeas claim. (Gov't Br. at 41-45). But this argument ignores not only the law as set out in *Schlup*, *House*, and *Lott*, but also fails to acknowledge the distinction between a "claim" and "evidence." Section 2244(b)(1) certainly prohibits the recycling of a habeas claim, but it in no way prevents the evidence offered in support of that claim from being considered later as part of the "evidence as a whole" in the context of some other and different claim. The Government is attempting to write into the statute a limitation that does not exist, and is contrary to the controlling caselaw.

language is conclusive and courts are not free to replace that clear language with an unenacted legislative intent." *Hatcher*, 560 F.3d at 226 (citations omitted). The Government cannot avoid the plain language of the phrase "evidence as a whole" in Section 2244(b)(2)(B)(ii).

In sum, the district court was required to consider "the evidence as a whole" in conducting its gatekeeping function under Section 2244(b)(2)(B). There can be no question that the district court did not do that in this case. The district court expressly refused to consider the highly exculpatory DNA evidence offered by MacDonald in assessing the Section 2244 standard. The district court expressly refused to consider the affidavit from Stoeckley's mother in this analysis. The district court expressly refused to consider, and in fact struck from consideration, the three affidavits relating to Greg Mitchell's confession to participation in the murders -- vitally important evidence not only because it directly implicates Mitchell, but also because it corroborates the admissions of Helena Stoeckley. And the district court expressly refused to consider the extensive exculpatory evidence offered in support of MacDonald's previous habeas petitions and post-trial motions, including hair, fiber, and other physical evidence discovered post-trial that is completely inconsistent with the Government's presentation at trial. The district court's error requires that its order denying MacDonald's Section 2255 motion be vacated.

III. The Certificate of Appealability Issued In This Case Does Not Prevent This Court From Addressing the Merits of the Case.

The Government argues that the certificate of appealability issued by this Court in this case is "limited to specific procedural rulings" and therefore, according to the Government, prevents MacDonald from raising objections to the district court's ruling on the merits of his Section 2255 Motion. (Gov't Br. at 58-59). Though not entirely clear, it appears that the Government is arguing that MacDonald is not permitted to argue that the district court was wrong in denying his Section 2255 Motion.

The Government's position fails to acknowledge that MacDonald is entitled to, and has, shown the prejudice resulting from the district court's erroneous application of the phrase "evidence as a whole" in Section 2244. As set out by MacDonald in his Opening Brief, the district court's failure to consider all of the evidence prejudiced him, in that the district court concluded that the claims in his Section 2255 Motion did not meet the "no reasonable juror" standard. (MacDonald Opening Br. at 50-51, 54). The Britt affidavit shows that AUSA Blackburn threatened defense witness Helena Stoeckley when she told Blackburn of her involvement in and knowledge of the murders. When called to testify at trial as a defense witness the day after this encounter, Stoeckley claimed that she could not remember the specific time period during which the murders took place. There is plenary caselaw holding that a prosecutor's threat to a potential defense

witness that causes that witness to change her testimony, or refuse to testify, is a violation of the defendant's constitutional rights. *See, e.g. United States v. Golding*, 168 F.3d 700, 703 (4th Cir. 1999). When viewed in light of the "evidence as a whole" -- and not just the truncated and limited evidence considered by the district court below -- MacDonald is entitled to a new trial under this claim. Likewise, as set out by MacDonald in his Opening Brief, the "fraud" claim in his Section 2255 Motion entitles him to relief in light of the evidence as a whole. (MacDonald Opening Br. at 52-54).

The Government appears to argue that the district court's ultimate decision regarding MacDonald's Section 2255 claims cannot be addressed in this appeal, because, in its view, the district court was right. (Gov't Br. at 59). Of course, this cannot be true -- if so, what would be the point of this Court granting a Certificate of Appealability at all? MacDonald has shown that the district court erred in its application of Section 2244(b)(2)(B)(ii) gatekeeping function in this case, and has properly set out the error in the district court's denial of his Section 2255 claims resulting from the improper application of Section 2244. The "evidence as a whole" has never been considered in MacDonald's case, and when it is considered, it is plain that he is entitled to relief. The Government cannot seek to avoid this

result by reading something into this Court's order granting a certificate of appealability that is not there.[5]

The district court erred in its decision to deny MacDonald's Section 2255 Motion. In light of the evidence as a whole, the facts underlying MacDonald's Section 2255 claims entitle him to relief. The district court's order should be vacated.

CONCLUSION

For the reasons stated herein, Appellant Jeffrey R. MacDonald respectfully requests that the district court's November 4, 2008 Order be vacated, and that the case be remanded to the district court for entry of an order requiring a new trial, or in the alternative for an evidentiary hearing on MacDonald's § 2255 Motion.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), MacDonald respectfully requests oral argument in this appeal, as he submits that the Court's decisional process will be

[5] A further example of the Government's hyper-technical attempts to read things into the language of orders in this case that simply do not exist is shown by the last argument made in its Brief. At Page 59-60 of its Brief, the Government argues that no error has occurred in this case because the district court, in its order, stated that MacDonald's claim was being denied "in light of the evidence as a whole." Thus, it appears that the Government argues that the district court's use of this language at the end of its Order means that the district court did consider the "evidence as a whole." Of course, this position is illogical -- earlier in its Order the district court expressly refused to consider the numerous pieces of exculpatory evidence that form the basis of the grant of a certificate of appealability and of this appeal. This is yet another example of the Government's attempts to interpret the language of statutes and the district court's order contrary to their plain meaning.

aided by oral argument given the array of factual and legal issues involved in this case.

This the 21st day of September, 2009.

/s/ Joseph E. Zeszotarski, Jr.
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 3,712 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii);

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

This the 21st day of September, 2009.

/s/ Joseph E. Zeszotarski, Jr.
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing BRIEF through the electronic service function of the Court's electronic filing system, as follows:

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This the 21st day of September, 2009.

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ADDENDUM

CONTENTS

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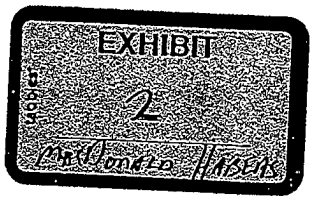

CLIENT:	Wade M. Smith Attorney At Law P.O. Box 1151 Raleigh, NC 27602
SUBJECT:	Jimmy Bluther Britt 616 Wimberly Road Apex, NC 27523
SOCIAL SECURITY #:	XXX-XX-3764
DATE OF EXAMINATION:	May 24, 2005
PLACE OF EXAMINATION:	Raleigh North Carolina
ISSUE:	Integrity
EXAMINER:	Steve Davenport 333-P
FILE NUMBER:	05333429

At the request of Wade M. Smith, Attorney At Law, I conducted a polygraph examination to JIMMY BLUTHER BRITT on May 24, 2004, in Raleigh, North Carolina. Prior to the to the examination Mr. Britt signed a Consent and Release Agreement giving me his permission to administer the examination and then release the results to Mr. Smith. All questions asked Mr. Britt during the in-test phase of his examination were reviewed with him before any attachments were placed on his person.

The purpose of this examination was to determine Mr. Britt's truthfulness regarding his statement that he had overheard a conversation between Helena Stokely and Jim Blackburn.

EXAMINATION RESULTS:
I asked Mr. Britt the following relevant questions on multiple tests during the in-test phase of his examination, and he gave the indicated answers:

-Did you hear Helena Stokely tell Jim Blackburn she had seen a broken hobby horse while she was inside the MacDonald home?
Answer: YES

-Did you hear Jom Blackburn tell Helena Stokely he would have her indicted for murder if she testified she had been inside the MacDonald home?
Answer: YES

-Are you now lying about the conservation between Jim Blackburn and Helena Stokely.
Answer: NO

At the conclusion of all testing I conducted an analysis and numerical evaluation of Mr. Britt's physiological reactions when he answered the above questions as shown. Based on that evaluation it is my opinion there were no reactions indicative of deception to those relevant questions.

If you have any questions about this examination or need any additional information, please do not hesitate to call me.

Sincerely,

Steve Davenport, Examiner

FROM : Panasonic TAD/FAX PHONE NO. : 9193873533 Jun. 11 2005 12:57PM P01

Davenport Associates
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STEVE DAVENPORT
FORENSIC POLYGRAPH EXAMINER

EDUCATION:

Bachelor of Business Administration, Campbell College, Buies Creek, North Carolina, May 1971

INVESTIGATIVE QUALIFICATIONS:

Completed the third session of the SBI Academy, October 1971. Served as a Special Agent with the State Bureau of Investigation (SBI) from 1971 to 1993. Was Special Unit Supervisor from 1980 to 1993. Principal assignment was Polygraph Examiner-Interrogation Specialist.

POLYGRAPH TRAINING:

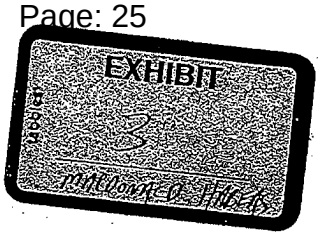
Basic polygraph training was at the National Training Center of Polygraph Science, New York, February 1974. Advanced courses were completed at the National Training Center, Virginia School of Polygraph, Reid College, the Academy of Polygraph Science and Methodology, University of North Carolina at Charlotte, Delta College, and Behavioral Measures & Forensic Sciences, L.L.C.

POLYGRAPH EXPERIENCE:

Have administered in excess of 5,000 specific polygraph examinations dealing with criminal (felony) cases and in excess of 3,000 pre-employment security screening examinations. Have lectured on polygraph theory and methodology at the SBI Academy, law enforcement agencies, local colleges, District Attorneys' Conferences, civic groups, and various professional seminars and colloquiums. Was a staff instructor at the Academy of Polygraph Science and Methology from 1981 to 1986. Licensed Private Examiner since 1993.

PROFESSIONAL AFFILIATIONS:

Society of Former Special Agents of the SBI
Elected a Distinguished Fellow in the Academy of Certified Polygraphists
Founder and past President of the North Carolina Polygraph Association
Charter member and former Director of the American Association of Police Polygraphists
Certified Sex Offender Testing



NORTH CAROLINA

SAMPSON COUNTY

AFFIDAVIT OF LEE W. TART

I, Lee W. Tart, of 1451 Old Goldsboro Road, Newton Grove, North Carolina, affirm that the following statements are true and accurate to the best of my recollection:

1. I am a retired Deputy United States Marshal with twenty-nine years service. Prior to my work with the United States Marshal's Service, I was a North Carolina Highway Patrolman for three years. My career in law enforcement totals thirty-two years.

2. I have known Jimmy B. Britt since 1957. We worked together with the U.S. Marshal's Service. I was with the Marshal's Service during the time of the Jeffrey MacDonald trial.

3. In the fall of 2002, I traveled with Jim Britt to Oxford, Mississippi. He told me that something was troubling him. He said it was something that he had observed during the MacDonald trial which was bothersome and irregular. He said that he had been sent to South Carolina to transport Helena Stoeckley to North Carolina and that during the journey she told him that she had been in the MacDonald house on the night of the murders. He said that Helena Stoeckley told Jim Blackburn, the prosecutor, these same things during his interview with her.

4. Mr. Britt told me that thereafter Jim Blackburn told Helena Stoeckley that if she testified to these things in the courtroom he would indict her for murder.

5. Jim Britt has since discussed the same thoughts and recollections with me and on each of these occasions, his words were consistent with the first time he told me these thoughts and recollections.

6. I have known Jim Britt for over three decades. I know his reputation for truthfulness and honesty in this community and in North Carolina. Jim Britt would tell nothing but the truth.

7. I have seen a definite change in the Jim Britt I know so well since he came forward and told Wade Smith what happened at the trial. He is at peace with his conscience now and feels very relieved.

This the 26th day of OCTOBER, 2005.

Lee W. Tart

Sworn and subscribed to before me this
26th day of October, 2005.

Janiffa H. Earp
Notary Public

My Commission Expires: 5-13-06

0194019

JANIFFA H. EARP NOTARY PUBLIC JOHNSTON COUNTY, N.C.