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**BOOK REVIEW: ERROL MORRIS,
“A WILDERNESS OF ERROR”:
PROVOCATIVE BUT UNPERSUASIVE**

Richard C. Cahn^{*}

In undertaking to review Errol Morris’s collection of anecdotes in “A Wilderness of Error,”¹ I recognize a special obligation to be fair and objective. I was interviewed by Morris for the book because I had represented Alfred and Mildred Kassab, the parents of Collette MacDonald and the grandparents of Kimberly and Kristen MacDonald, who were brutally bludgeoned and stabbed to death in the early hours of February 17, 1970, in their quarters at Ft. Bragg, North Carolina.² Their son-in-law, Jeffrey MacDonald, a Green Beret captain (and then doctor), was initially cleared by the army³ of the

^{*} Richard C. Cahn, A.B. Dartmouth College 1953, LL.B. Yale Law School, 1956, began his career as a trial lawyer with the Department of Justice, Washington, D.C., as part of the Attorney General’s Program for Honor Law Graduates. He served as President of the Suffolk County Bar Association and is a fellow of the American College of Trial Lawyers. He serves as a member of the Board of Governors of Touro Law School and has taught classes in Professional Responsibility, New York Practice, and Pretrial Litigation as a member of the adjunct faculty at Touro.

¹ ERROL MORRIS, *A WILDERNESS OF ERROR: THE TRIALS OF JEFFREY MACDONALD* (2012).

² *Id.* at 119.

³ Gabriel Falcon, *After 35 Years, ‘Fatal Vision’ Author, Killer Meet Again*, CNN, <http://www.cnn.com/2012/09/29/justice/mcginniss-macdonald-appeal/index.html> (last updated Sept. 30, 2012, 12:46 PM). On April 6, 1970, after an investigation by the Army’s Criminal Investigation Division (“CID”), MacDonald was advised that he was a suspect in the murders and restricted to quarters in lieu of arrest. MORRIS, *supra* note 1, at 35. On May 1, he was formally charged, and two weeks later a hearing began under Article 32 of the Uniform Code of Military Justice (“UCMJ”), 10 U.S.C. § 832 (2006), to determine whether a general court martial should be convened. *Id.* at 46. The hearing continued for twenty-five days, during which MacDonald testified that he had fallen asleep on the living room couch and been awakened in the early morning hours of February 17 by screams from his wife and older daughter in the master bedroom and was immediately confronted by a group of four “hippies”: a black man wielding a club, two white men, and a white woman wearing a floppy hat and wig and holding a candle. Record, Article 32 Proceeding, at 24-27. As he started to rise from the couch, the black man raised the club over his head and struck his arm and the left side of his forehead, and he was knocked back flat on the couch. *Id.* at 29. He pushed himself up in a sitting position, and the man raised the club again and started to swing;

murders of his wife and daughters. After his hardship discharge from service,⁴ MacDonald was indicted and convicted of these crimes in a North Carolina Federal Court.⁵

MacDonald partially blocked the blow, grabbed the assailant's arm and the club. *Id.* He then "could feel like a rain of blows on my chest, shoulders, neck, you know, forehead, or whatnot. . . . I suddenly got a very sharp pain in my chest, my right chest. . . . I just let go of [the club] and struggled with the other two people." *Id.* at 30-31. In his own words, "my hand's [sic] were like bound up in my own pajama top. I couldn't get them out of the sleeves or something. . . . I had the impression that it had been ripped from around me, or pulled over my head. . . . The pajama top was around my wrists . . . in the hand I saw a blade." *Id.* at 31-32. Then he remembered "falling towards the stairs" and lost consciousness. Record, Article 32 Proceeding, at 33. He awoke some time later to find the apartment empty except for the bodies of his family members: he found his wife dead on the floor of the master bedroom and covered her with his pajama top, and he went into his daughters' bedrooms, attempted vainly to give mouth-to-mouth resuscitation to each, but the girls were also dead, each bludgeoned and stabbed in her own bed. *Id.* at 35-39. He entered the bathroom, examined his own wounds, washed himself off, and telephoned for assistance. *Id.* at 39-42. The crime scene (including the word "PIG" written in blood on the headboard of the master bed) strongly brought to mind the so-called "Manson murders," which had occurred in California the previous August. MORRIS, *supra* note 1, at 19. Following the Article 32 hearing, the charges were dismissed for "insufficient evidence" by the convening authority upon the recommendation of the tribunal's presiding officer, Col. Warren V. Rock, who went considerably further than his advisory duties under the statute by purporting to find that the charges against MacDonald were "not true." *Id.* at 71 (quoting Colonel Warren V. Rock, Investigative Report (Oct. 13, 1970); Major General Edward Flanagan, Dismissal of Court-Martial Charges Against Jeffrey MacDonald (Oct. 23, 1970)) (internal quotation marks omitted).

⁴ See MORRIS, *supra* note 1, at 73 (discussing how MacDonald received an honorable discharge). After the dismissal of the charges, MacDonald, aided by strong public statements from the Kassabs, was granted an honorable discharge on grounds of "hardship," *viz.*, the murders of his wife and daughters. *Id.*

⁵ On January 24, 1975, the grand jury in the Eastern District of North Carolina indicted MacDonald on three counts of murder on a federal reservation in violation of 18 U.S.C. § 1111. *Id.* at 149. From 1975 to 1979, MacDonald sought to dismiss the indictment on the grounds that his Fifth Amendment right not to be subject twice to trial for the same offense and his Sixth Amendment right to a speedy public trial had been violated. See *Order on Defendant's Remaining Pretrial Motions*, THE JEFFREY MACDONALD CASE, <http://www.thejeffreymacdonaldcase.com/html/aff-segal2-1990-10-13.html> (last visited Jan. 2, 2013) (providing a copy of the decision responding to MacDonald's motions). His motions were denied by Judge Franklin Dupree Jr., the assigned trial judge, who had recently acceded to the position of Chief Judge following the death of his predecessor Algernon Butler, in 1978. *Id.*; *History of the Federal Judiciary*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=333&cid=999&ctype=na&instate=na> (last visited Dec. 29, 2012). The Fourth Circuit reversed and dismissed the indictment on the ground that the delay in bringing him to trial violated MacDonald's Sixth Amendment right to a speedy trial. *MacDonald v. United States*, 531 F.2d 196, 198-99 (4th Cir. 1976). However, the Supreme Court reversed, finding that a criminal defendant could not appeal the denial of a motion to dismiss on speedy trial grounds until after the trial had been completed. *United States v. MacDonald*, 435 U.S. 850, 863 (1978). The reinstated indictment was brought to trial and MacDonald was convicted on two counts of second-degree murder and one count of first-degree murder and was sentenced by Judge Dupree to three consecutive life prison terms.

A number of events led to the dramatic reversal of MacDonald's fortunes. The Army's Criminal Investigation Division ("CID") conducted an eighteen-month reinvestigation of the crimes, after which Major Steven Chucala, the CID Command's Staff Judge Advocate, concluded that the investigation "establishe[d] a prima facie case."⁶ Collette's parents became convinced that their son-in-law was the perpetrator, and "Freddy" Kassab began loudly, and very publicly, to excoriate the Department of Justice for its failure to commence a prosecution against MacDonald in the civil courts.⁷ Af-

MORRIS, *supra* note 1, at 255. On appeal, the Fourth Circuit again held that MacDonald's speedy trial rights had been violated. *United States v. MacDonald*, 632 F.2d 258, 260 (4th Cir. 1980), *rev'd*, 456 U.S. 1 (1982). On petition of the government, the Supreme Court granted certiorari. *United States v. MacDonald*, 451 U.S. 1016, 1016 (1981). The Supreme Court reversed, finding that the time between dismissal of the military charges and the indictment should not be considered in determining whether MacDonald's Sixth Amendment rights had been violated. *United States v. MacDonald*, 456 U.S. 1, 11 (1982). In the meantime, the Fourth Circuit affirmed Judge Dupree's rejection of MacDonald's double jeopardy claim. *United States v. MacDonald*, 585 F.2d 1211, 1212-13 (4th Cir. 1978). The Supreme Court denied certiorari. *United States v. MacDonald*, 440 U.S. 961 (1979).

⁶ Letter from Major Steven Chucala, United States Army Criminal Investigation Command, to Alfred G. Kassab (Mar. 20, 1974) (contained in Algernon Lee Butler papers (#4034) in the Southern Historical Collection, Manuscripts Department, Wilson Library, The University of North Carolina at Chapel Hill).

⁷ See MORRIS, *supra* note 1, at 88 (discussing Freddy's shift from supporting his son-in-law's innocence to fighting for his prosecution). Alfred Kassab (usually called "Freddy") and his wife Mildred had strongly supported their son-in-law, at first refusing to entertain seriously any suggestion that he had killed their daughter and granddaughters. *Id.* at 42, 168-69. Freddy publicly denounced the Army for persecuting MacDonald (by bringing an Article 32 proceeding against him) and badgered the army to grant MacDonald a hardship discharge. See *id.* at 73-75 (exemplifying Freddy's support for his son-in-law). The dramatic conversion of the Kassabs from MacDonald's staunch defenders to his unrelenting pursuers, came about in a relatively short period of time; after they read the 18-volume transcript of the Article 32 proceeding (its release to them had been resisted by MacDonald) and Freddy visited the crime scene, they became convinced that MacDonald's account of the events of February 17, 1970—both in his Article 32 testimony and in his repeated statements to them—were totally inconsistent with the physical evidence. See *id.* at 88 (discussing Freddy's shift in beliefs). That evidence included the unusual circumstance that each member of the family had a different blood type, and so it was possible to reconstruct the location within the family's quarters of each of the victims, and of MacDonald himself, by preparing a "map" of the apartment and showing where each person's blood had been shed. *Id.* at 136-41. It also included the finding of fibers from MacDonald's pajama top, some bloodstained, in various locations at the crime scene. MORRIS, *supra* note 1, at 302-03; see also *United States v. MacDonald*, 640 F. Supp 286, 290 (E.D.N.C. 1985) (discussing the evidence found). The physical evidence was incompatible with MacDonald's narrative of the events. See *id.* at 290 n.2 (discussing the evidence that allowed the prosecution to recreate the crime scene). MacDonald's credibility was finally destroyed in the Kassabs' eyes when he told his father-in-law (and reiterated in a letter to him) that he had pursued and personally killed one of the perpetrators—a statement that MacDonald later admitted at his trial "was a lie of incredible proportions." Transcript of Record at 6709-10, *United States v. MacDonald*, 485 F.

ter I made several unsuccessful attempts of my own to persuade the FBI and Justice Department to convene a grand jury, I discovered (to my surprise) that nothing in Rule 3 of the Federal Rules of Criminal Procedure would prevent the Kassabs from presenting a criminal complaint to a federal judge.⁸ With detailed information provided by principal Army CID investigator Peter Kearns, I drafted a complaint and supporting affidavits, which the Kassabs, Kearns, and I presented on April 30, 1974, to Chief Judge Algernon Butler of the United States District Court for the Eastern District of North Carolina in his chambers in the basement of the United States Post Office building in Clinton, North Carolina. Judge Butler, clearly concerned about the matter, pressed the Attorney General to present the case to a grand jury or publicly explain why the government would not do so.⁹ At

Supp. 1087 (E.D.N.C. 1979) (No. 75-26-CR-3).

⁸ FED. R. CRIM. P. 3. There was very little decisional law dealing with the question whether a private citizen could force the government to prosecute a criminal case. The principal case, *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), had held that the United States Attorney could not be compelled to sign an indictment, because the determination whether to prosecute an individual was within the sole discretion of the executive branch. *Id.* at 172. However, the court noted that the “inquisitorial power of the grand jury is the most valuable function which it possesses” and that “[t]he grand jury possesses plenary and independent inquisitorial powers.” *Id.* at 175 (Rives, J., concurring in part and dissenting in part). In *Blair v. United States*, 250 U.S. 273 (1919), the Supreme Court had also endorsed the importance of the grand jury’s “inquisitorial function.” *Id.* at 280. In *United States v. Thompson*, 251 U.S. 407 (1920), the Supreme Court held flatly that the grand jury’s powers are “susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper.” *Id.* at 413.

⁹ MORRIS, *supra* note 1, at 122; Letter from Hon. Algernon L. Butler, to Hon. William B. Saxbe, Attorney General of the United States & Hon. Thomas P. McNamara, United States Attorney (May 1, 1974) (“Please advise me with respect to the following: 1. Will the United States attorney prepare and submit a signed indictment to a grand jury charging the defendant with the three alleged capital felonies? 2. If the grand jury should return a true bill of indictment, will the United States prosecute the case? 3. If a grand jury should be convened to hear the evidence in this case, would the United States attorney cooperate with the grand jury in its investigation and draft indictments, if any, in accordance with its desires and sign any indictment that may be found by the grand jury? 4. If the United States attorney should decline to sign an indictment, or if the government should decline to prosecute, please disclose fully the government’s reason for its decisions.”). Several days before our appearance before Judge Butler, and unbeknownst to me, Thomas P. McNamara, the United States Attorney for the Eastern District of North Carolina, had responded to an inquiry Judge Butler had made by advising him that, on the basis of case precedent and treatises, he could entertain our private citizen’s complaint, and that the discretion whether thereafter to issue a warrant of arrest under Rule 4 or convene a grand jury lay with the court. *See generally Cox*, 342 F.2d 167; *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); 8 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 3.05 (2d ed. 1985) (for the basis of Judge Butler’s decision to accept the Kassab’s criminal complaint); Letter from Thomas P. McNamara, United States Attorney, to Hon. Algernon L. Butler, Chief Judge (Apr. 26, 1974) (contained in Algernon Lee Butler papers (#4034) in the Southern Historical Collection, Manuscripts De-

long last, the Department of Justice—which for more than three years had adamantly refused to reopen the case—changed its position, assigning its veteran trial lawyer Victor C. Worheide to the matter “[i]n contemplation of possible grand jury action.”¹⁰ MacDonald’s ensuing trial and convictions (second-degree murder of his wife and five-year-old Kimberly and first-degree murder of two-year-old Kristen) were reviewed by the Fourth Circuit and affirmed.¹¹

As I write this review, the current United States Attorney in Raleigh, North Carolina, has just defended the convictions at an evidentiary hearing requested by MacDonald on his pending claim under 28 U.S.C. § 2255, following remand by the Fourth Circuit requiring the district court to consider the pending claims “in light of the evidence as a whole.”¹² At the hearing before District Judge James C. Fox, MacDonald’s latest aggregation of lawyers tried to prove that there was newly discovered exculpatory evidence, which they claimed consisted of DNA in three human hairs found at the crime

partment, Wilson Library, The University of North Carolina at Chapel Hill); see MORRIS, *supra* note 1, at 123 (discussing the effect of the letter on the progress of the case).

¹⁰ See Letter from Judge Algernon L. Butler to Attorney General William B. Saxbe, *supra* note 9; MORRIS, *supra* note 1, at 122 (discussing the letter sent from the judge in anticipation of a grand jury proceeding).

¹¹ *United States v. MacDonald*, 688 F.2d 224, 234 (4th Cir. 1982).

¹² 28 U.S.C. § 2255(h)(1) (2006); *United States v. MacDonald*, 641 F.3d 596, 598 (4th Cir. 2011). The appellate judges reviewed a second application by MacDonald under 28 U.S.C. § 2255 to set aside his convictions and sentences on the basis of what he claimed was newly discovered evidence. *MacDonald*, 641 F.3d at 598. The statute requires that a subsequent § 2255 motion must contain “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense. . . .” *Id.* (quoting 8 U.S.C. § 2255(h)(1)). MacDonald also made a claim of “actual innocence” under the Innocence Protection Act of 1974, 18 U.S.C. § 3600, based upon his contention that the prosecution had withheld exculpatory evidence, that three human hairs, bloody roots intact, had been found at the crime scene, one under Kristen’s fingernail, and that DNA evidence ruled out any members of the MacDonald family as the source of any of these hairs. *Id.* at 605-06. The court ruled that although the burden of proof imposed upon MacDonald was “daunting,” he would be entitled to a hearing to attempt to prove by clear and convincing evidence, “in light of the evidence as a whole,” that Assistant United States Attorney James Blackburn, the government’s lead prosecutor at the 1979 trial, had threatened Helena Stoeckley, a defense witness, with prosecution for murder, if she testified that she had been present at the time of the crimes, or that other exculpatory evidence had been withheld by the prosecution. *Id.* at 604, 607, 616-17. Stoeckley was a self-confessed drug addict who over the nine years between the crimes and the trial had made several jumbled, vague and inconsistent statements to various individuals about her involvement. See MORRIS, *supra* note 1, at 241-45 (discussing the issue of Stoeckley’s credibility). She was called to the witness stand by the defense but told the jury she had no memory of her whereabouts on the night of the murders. *Id.* at 204-05.

scene, one under Kristen MacDonald's fingernail, none of which was traceable to any family member; and testimony that the trial judge excluded, including testimony from witnesses as to out-of-court statements of Helena Stoeckley, a self-confessed drug addict who vacillated between admitting and denying being a part of the group of "hippies" whom MacDonald contended committed the crimes.¹³ MacDonald also claimed that during a long drive in 1979 from Greenville, South Carolina, to Raleigh, North Carolina, where the trial was taking place, Stoeckley admitted her complicity in the crimes to Deputy United States Marshal "Jimmy" Britt.¹⁴ Britt had come forward in 2005, twenty-six years after the trial, to make an affidavit to that effect and also to claim that he heard Assistant United States Attorney James Blackburn threaten to indict Stoeckley if she made such admissions during her testimony at the trial.¹⁵ Britt died in 2008.¹⁶

A major problem with the case is that virtually every witness presently relied upon by MacDonald and by Morris in his book is dead: the roll call of the deceased includes Mr. and Mrs. Kassab, who had an encyclopedic knowledge of the events in the case and the lies that their son-in-law told them; Stoeckley; Greg Mitchell, Stoeckley's 1970 boyfriend; Ted Gunderson, a one-time FBI agent hired by MacDonald's lawyers to investigate the case long after the convictions; Fayetteville Detective Prince Beasley, who told Morris that Gunderson offered Stoeckley "\$25,000 to \$50,000 or even higher" if she would confess to the crimes; Raymond Shedlick, a former Nassau County detective who told his daughter he commenced an investigation of the case with a predisposition to believe MacDonald guilty, but who came to believe that "sloppy, sloppy work" by government lab personnel entitled MacDonald to a new trial; and Britt, the former Deputy United States Marshal.¹⁷

In the absence of a live witness who can substantiate MacDonald's claims of prosecutorial misconduct, it is difficult to know how a federal judge could sustain any of those claims. It is always possi-

¹³ See *United States v. MacDonald*, Nos. 75-CR-26-3, 5:06-CV-24-F, 2008 WL 4809869, at *5-10 (E.D.N.C. Nov. 4, 2008) (discussing Stoeckley's testimony), *vacated*, 641 F.3d 596 (4th Cir. 2011).

¹⁴ *Id.* at *3.

¹⁵ See *MacDonald*, 641 F.3d at 604 (citing Britt Aff. ¶ 15, Nov. 3, 2005).

¹⁶ *Id.* at 615 n.11.

¹⁷ See MORRIS, *supra* note 1, at xii-xviii, 304 (listing the people involved with the case who are now deceased).

ble, of course, that the court could be “100 percent certain,” as New York Times reviewer Dwight Garner was, that MacDonald did not get a fair trial.¹⁸ But, even though there is substantial overlap between MacDonald’s claims and Morris’s claims—raising provocative questions as to whether the release of the book was timed to influence the court proceedings—this is a book review, not a preview of what the federal courts will conclude on the basis of the evidence actually presented at the 2012 hearing, thirty-three years after the trial.

Because it is impossible to verify the claims that Morris makes, I call this book a collection of anecdotes. In the words of the writer of the cover blurb, the book is a “masterly reinvention” of the case.¹⁹ If this were presented as a work of fiction, it would indeed be masterful, in the praiseworthy sense. Fiction based on historical events is always a reinvention, and reading about real people who once lived who have been dropped by an author into an alternative universe of his making can be provocative and enjoyable, and sometimes frightening. For instance, in Philip Roth’s “Plot Against America,” a creative fantasy about Charles Lindbergh, in reality a universally admired young aviation hero who later became an unabashed Hitler admirer, who in the book is elected President instead of Franklin Roosevelt in 1940.²⁰ But, “Wilderness of Error” is presented as fact, yet contains glaring errors and omissions.²¹ It also weakens its credibility by taking snide and cheap shots at not only the prosecutors and the investigators, but also at Judge Butler (described by Michael Malley, MacDonald’s former Princeton roommate, as “an old, slow man . . . [who] seems like some old corporate lawyer whose southern Republicanism paid off during the sleepwalk of the Eisenhower years by appointment to the federal bench”).²² Contrary to the Malley description, which Morris seemed eager to republish, Algernon Butler was by all other accounts a distinguished lawyer, a courtly man, and a widely respected jurist, credited, among other things, as the judge principally responsible for desegregating the schools in eastern North

¹⁸ Dwight Garner, *A New Angle on a 1970 Murder Case*, N.Y. TIMES (Sept. 10, 2012), <http://www.nytimes.com/2012/09/11/books/a-wilderness-of-error-by-errol-morris-on-the-macdonald-trial.html?pagewanted=all>.

¹⁹ MORRIS, *supra* note 1.

²⁰ Compare MORRIS, *supra* note 1 (non-fiction work), with PHILIP ROTH, *THE PLOT AGAINST AMERICA* (2004) (fiction work).

²¹ See generally MORRIS, *supra* note 1 (providing anecdotal commentary that is not factually accurate).

²² *Id.* at 120.

Carolina.²³ Because of these flaws, Morris's book must be read as a legal brief containing a committed advocate's scornful, one-sided, arguments in support of his client's legal position.

But in trying to substantiate MacDonald's long-rejected claim that a band of acid-dropping hippies entered his family's apartment and slaughtered his family but barely injured him,²⁴ Morris ignores facts from the crime scene that most disinterested observers (or jurors) would likely consider conclusive evidence against the "intruder" theory. Why on earth would a group of murderous strangers take five-year-old Kimberly's bloody body and move it from the master bedroom (where everyone agrees she was killed) to her own bedroom, carefully tucking her into bed?²⁵ How is it consistent with MacDonald's story (he was beaten and stabbed on the couch in the living room and his pajama top was torn while he was trying to defend himself) that the detached pocket of that pajama was found near Collette's body on the floor of the master bedroom?²⁶ How does MacDonald (or Morris) explain why the pajama top was soaked with Collette's blood before it was torn, and not afterwards, when MacDonald claims he placed his ripped garment on his wife's bloody chest in an attempt to keep her from going into shock?²⁷ Why are there no marks on the ceiling or walls of the living room, where MacDonald claimed he was clubbed (by a man swinging a wooden club over his head) and stabbed, or, indeed, any signs of a deadly struggle having occurred in the living room?²⁸ How does Morris explain MacDonald's denial that the ice pick of a certain manufacture (one of the murder weapons) found at the crime scene was from the family's quarters, when both Pamela Kalin, the teenaged babysitter who lived next door, and Mildred Kassab testified at trial that such an instrument was indeed kept in a kitchen drawer and that each had used it on more than one previous occasion?²⁹ In Morris's own introductory words to Chapter 55, "It is possible to cherry-pick evi-

²³ See *Godwin v. Johnston Cnty. Bd. of Educ.*, 301 F. Supp. 1339, 1343 (E.D.N.C. 1969) (dealing with the issue of desegregation in schools).

²⁴ *MacDonald*, 641 F.3d at 599-600.

²⁵ See *Kearns Aff.* at 2, Mar. 6, 1972 (discussing the physical evidence that indicated the daughter's body was moved).

²⁶ See *id.* at 4 (noting where the pajama pocket was found).

²⁷ See *MORRIS*, *supra* note 1, at 174-75 (providing inconsistent theories as to when the shirt was laid on Collette).

²⁸ See *id.* at 36-37 (providing MacDonald's claim regarding where he was clubbed).

²⁹ *Id.* at 170 (providing the testimony that the MacDonald household had an ice pick).

dence to support any conclusion.”³⁰

Morris’s stated objective is to prove that MacDonald had an unfair trial.³¹ But his book is advertised (I presume that he approved this message) as “pos[ing] bracing questions about the nature of proof, criminal justice, and the media, showing us how MacDonald was condemned not only to prison but to the stories that have been created around him.”³²

Fair enough. These have long been vexing philosophical questions. Witnesses have from time immemorial seen the same events and then dramatically differed in not only their later accounts but often in their original perceptions.³³ Any trial lawyer knows that individuals, some certifiably delusional, come forward to swear that they heard or saw something that they were never in a position to witness.³⁴ Witnesses’ opinions about the motivations of those with whom they claim to have had contact can be shaped by personal animosity, greed, fear, or a thousand other concerns.³⁵ One “witness” cited by Morris is a woman, known as Jane Graham-Bailey, who had testified at the trial that Stoeckley had told her that she had been “involved in . . . some murders.”³⁶ She told Morris that the trial and the TV miniseries made from Joe McGinnis’s book “Fatal Vision” were “such an injustice,” in part because “the way they portrayed Mr. Kassab. Karl Malden, it’s all wrong, it’s just wrong. . . . To me, when I saw Mr. Kassab, he was a tall, fat, mean-looking man, and then for them to portray him as Karl Malden, who has always been a hero for my generation.”³⁷ Graham-Bailey also was angry that Mildred Kassab was played by Eva Marie Saint: “Mrs. Kassab was *not* Eva Marie Saint, who is a beautiful blonde.”³⁸ Having known them, I would have described Freddy Kassab as knowledgeable, serious, and deter-

³⁰ *Id.* at 401.

³¹ *Id.* at 3.

³² MORRIS, *supra* note 1; *see also id.* at 13 (restating that “MacDonald was condemned to the story that had been created around him”).

³³ *See, e.g.,* Jules Epstein, *The Great Engine that Couldn’t: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 729, 732 (2007) (discussing the reasons eyewitness testimony may be scientifically unreliable).

³⁴ *See id.* at 769-71 (noting that witnesses are sworn to testify and how direct and cross-examination are used to elicit the truth).

³⁵ *See id.* at 767 (discussing the history of providing rewards to testify against the accused).

³⁶ MORRIS, *supra* note 1, at 213.

³⁷ *Id.* at 211.

³⁸ *Id.*

mined, and Mildred as angry and sad, still mourning her daughter and innocent young grandchildren that some malevolent force took so prematurely from her. And both were deeply shaken by the evidence that forced them to abandon their faith in their son-in-law's innocence.³⁹ Our system of justice is designed to test those perceptions, motivations, and hidden biases.

The trial judge, Franklin Dupree, relied upon Rule 804(b)(3) of the Federal Rules of Evidence, a rule that was designed to permit hearsay testimony under certain limited circumstances,⁴⁰ in ruling out testimony by several individuals who came forward to state that Helena Stoeckley had admitted being present during the commission of the crimes.⁴¹ In the face of a denial by Stoeckley herself on the witness stand that she was present or that she knew the identities of the perpetrators, Judge Dupree ruled that testimony about Stoeckley's inconsistent statements proffered by MacDonald's trial attorney was not sufficiently trustworthy to warrant its admission.⁴² That ruling was affirmed by the Fourth Circuit.⁴³ The same court, in granting MacDonald's application for section 2255 relief, expressly noted that one of MacDonald's contentions "was that the trial court had erroneously excluded the testimony of seven so-called 'Stoeckley witnesses' concerning alleged inculpatory statements made by Helena Stoeckley in the aftermath of the murders."⁴⁴ Thus, this particular is-

³⁹ Fred Kassab, *Vendetta* (1979) (unpublished manuscript) (on file with author), available at http://www.thejeffreymacdonaldcase.com/html/kassab_vendetta.html. In his unpublished essay, "Vendetta," Freddy Kassab wrote about the painful transformation from the Kassabs being their son-in-law's defenders to his accusers. He poignantly notes, "[Y]ou die a little in the process." *Id.* at 3.

⁴⁰ FED. R. EVID. 804(b)(3)(B) (providing that a statement against the absent witness' interest is not excluded by the hearsay rule if it "is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability").

⁴¹ MORRIS, *supra* note 1, at 268; see also *United States v. MacDonald*, 485 F. Supp. 1087, 1091-94 (E.D.N.C. 1979) (discussing reasons for rejecting hearsay evidence about Stoeckley's out of court admissions).

⁴² *MacDonald*, 485 F. Supp. at 1091-94.

⁴³ *MacDonald*, 688 F.2d at 234 (Murnaghan, J., concurring) (joining in upholding Judge Dupree's application of FED. R. EVID. 804(b)(3)).

⁴⁴ *MacDonald*, 641 F.3d at 601. Morris seizes upon an apparent slip of the tongue to scoff at Judge Dupree's ruling, asking, "Which is it? Unclearly trustworthy or clearly untrustworthy?" MORRIS, *supra* note 1, at 241. On the same subject, Morris, in writing of Fourth Circuit Judge Francis D. Murnaghan (who had uneasily joined his colleagues in affirming Judge Dupree's exclusion of the testimony of the Stoeckley-related witnesses), veers off into re-litigation by hyperbole and scorn: "But how could Murnaghan concur with the majority opinion, if he truly believed that MacDonald 'would have had a fairer trial if the Stoeckley tes-

sue was raised and disposed of, and, with all due respect to Morris, that should be the end of it.

It is a measure of the court's willingness to bend over backwards to give MacDonald yet another day in court so long after the guilty verdicts and affirmances that Judge Fox listened for more than six days to second-hand testimony about Stoeckley's alleged admissions during the recent hearing.⁴⁵ The Fourth Circuit had directed Judge Fox to hear " 'all 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,' "⁴⁶ "giv[ing] 'due regard to any unreliability of' the evidence," in deciding whether there was now something substantial that would have changed the result.⁴⁷

From what I gather, none of MacDonald's current witnesses—or the physical evidence—lived up to their billing. Britt never drove Stoeckley for six hours from Greenville or anywhere else in South Carolina to Raleigh. She was actually in the custody of United States Marshals from South Carolina from Pickens to Charlotte, North Carolina, where she was transferred to marshals from North Carolina (not including Britt) for the drive to Raleigh.⁴⁸ Britt, accompanied by a matron, picked Stoeckley up at the Raleigh jail and drove her for ten minutes to the federal courthouse, hardly long enough for her to give the detailed confession he ascribed to her.⁴⁹ Britt was not present in the room when Blackburn interviewed Stoeckley.⁵⁰ Jerry Leonard, an attorney appointed by Judge Dupree to represent Stoeckley after she was taken into custody as a material trial witness and released from the attorney-client privilege by Judge

timony had been admitted'? A *fairer* trial? Where does fairness shade off into unfairness? Should the phrase be changed—*some* justice for all?" *Id.* at 269.

⁴⁵ See Associated Press, *Lawyers Make Cases in Jeffrey MacDonald Hearing*, KOB.COM (Sept. 25, 2012, 10:35 PM), <http://www.kob.com/article/stories/S1479681.shtml> (describing the most recent hearings to determine the admissibility of Stoeckley's out of court admissions).

⁴⁶ *MacDonald*, 641 F.3d at 612 (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)).

⁴⁷ *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 328 (1995)).

⁴⁸ Government's Motion for Publication and Modification of Order at 7, *United States v. MacDonald*, Nos. 3:75-CR-26-F, 5:06-CV-23-F, 2012 WL 4049848 (E.D.N.C. Sept. 13, 2012).

⁴⁹ F. T. Norton, *Defense Rests in MacDonald Hearing*, STAR NEWS ONLINE (Sept. 19, 2012), <http://legal.blogs.starnewsonline.com/12050/defense-rests-in-macdonald-hearing/>.

⁵⁰ David Zucchino, *Jeffrey MacDonald Claims Challenged at 'Fatal Vision' Hearing*, L.A. TIMES (Sept. 20, 2012, 4:11 PM), <http://www.latimes.com/news/nation/nationnow/la-na-nn-jeffrey-macdonald-hearing-20120920,0,2030391.story>.

Fox, testified that he “never heard any threats or intimidation of her” during the time he represented her and that her story “changed from not remembering to telling me she was there.”⁵¹

Wendy Rouder, a former law clerk to MacDonald’s trial counsel, Bernard Segal, and now a California attorney, dispensed with the notes that she had used while testifying at the trial about her conversations with Stoeckley, which contained a notation in her own handwriting in which she was reminding herself that she should not say certain things to the federal prosecutors, and denied she had had such notes until confronted with the trial record of her testimony.⁵² Wade Smith, the distinguished North Carolina trial lawyer who acted as second-seat for Bernard Segal in 1979, testified that in the interviews with the defense team at the time of trial, Stoeckley gave no information of use to the defense.⁵³ Joe McGinnis, who had been embedded with the defense team when they met with Stoeckley, also denied under oath that Stoeckley had admitted being present in the MacDonald apartment and flatly stated that Segal lied to Judge Dupree in making a contrary representation.⁵⁴

Stoeckley’s supposed inside knowledge of the fact that Kristen’s hobby horse was broken was rebutted by evidence that the toy, identified specifically as a patented toy named “Wonderhorse,” could not have been broken when its photograph at the crime scene—standing upright and straight on its spring supports—was published in the North Carolina newspapers within days after the murders, because a broken spring would have caused it to list at something like a thirty-degree angle.⁵⁵

⁵¹ F. T. Norton, *MacDonald Witness Wavered, Lawyer Says*, STAR NEWS ONLINE (Sept. 24, 2012, 10:58 AM), <http://www.starnewsonline.com/article/20120924/ARTICLES/120929835?p=all&tc=pgall> (internal quotation marks omitted).

⁵² See Transcript of Record at 5928-46, *United States v. MacDonald*, 485 F. Supp. 1087 (E.D.N.C. 1979) (No. 75-26-CR-3), available at <http://www.thejeffreymacdonaldcase.com/html/tt-1979aug20-rouder.html> (stating that she had taken notes).

⁵³ Judy Royal, *Army Doctor Aims to Prove Innocence in ‘Fatal Vision’ Killing*, CHI. TRIB. (Sept. 17, 2012), http://articles.chicagotribune.com/2012-09-17/news/sns-rt-us-usa-crime-armydoctorbre88h02m-20120917_1_helena-stoeckley-macdonald-home-pregnant-wife-and-two.

⁵⁴ F. T. Norton, *‘Fatal Vision’ Author Testifies in MacDonald Case*, STAR NEWS ONLINE (Sept. 21, 2012, 5:20 PM), <http://www.starnewsonline.com/article/20120921/ARTICLES/120929914?p=2&tc=pg>.

⁵⁵ See Anne Blythe, *Attorney: Stoeckley’s Accounts of Involvement with MacDonald Case Varied*, NEWSOBSERVER.COM (Sept. 25, 2012, 4:25 AM),

“Newly discovered” DNA evidence is both a focus of Morris’s book and central to MacDonald’s current claims: three un-sourced hairs, one found in the vicinity of Collette’s body, one found on Kristen’s bedspread, and a third allegedly under Kristen’s fingernail.⁵⁶ Surprisingly, no evidence was presented by the defense team at all on this point.⁵⁷ It was the government lawyers who placed what evidence there was before Judge Fox: all three hairs were free of blood and naturally shed, rather than having been forcefully torn from someone’s body or limb, facts ultimately conceded by MacDonald’s lawyers at the hearing; one hair was found on the shag rug within Collette’s body outline a month after the body had been removed, accompanied by no fewer than thirty threads from MacDonald’s pajama top; no one knows how long the hair had lain there.⁵⁸ Another hair was found on Kristen’s green bedspread; it was accompanied by animal hairs, a splinter from the club that had been used to attack Collette in Kristen’s room, and another thread from MacDonald’s pajama top.⁵⁹

The third hair was in a pill vial into which a pathologist had placed fingernail scrapings in a folded paper marked “L. Hand Chris,” and a second piece of ruled paper marked “fingernail scrap-

<http://www.newsobserver.com/2012/09/24/2366564/attorney-stoeckleys-accounts-of.html> (stating that Stoeckley told Leonard she saw a hobby horse with broken springs); Transcript of Record at 5666-67, *United States v. MacDonald*, 485 F. Supp. 1087 (E.D.N.C. 1979) (No. 75-26-CR-3) (stating that the witness had thought the hobby horse was broken); MORRIS, *supra* note 1, at 427-28 (discussing the issue of the hobby horse).

⁵⁶ See Blythe, *supra* note 54 (“The hairs match no one in the MacDonald family”); David Zuchino, *Jeffrey MacDonald Case: Two Views of New ‘Fatal Vision’ Evidence*, L.A. TIMES (Sept. 17, 2012), <http://articles.latimes.com/2012/sep/17/nation/la-na-nn-jeffrey-macdonald-fatal-vision-20120917> (discussing the DNA evidence defense claims to be exculpatory); Motion for Leave to File Brief as Amici Curiae at 22, *United States v. MacDonald*, 641 F.3d 596 (4th Cir. 2011) (No. 08-8525) (listing the evidence claimed to be exculpatory).

⁵⁷ See Errol Morris, *Until Justice Is Served*, N.Y. TIMES (Oct. 13, 2012), <http://www.nytimes.com/2012/10/14/opinion/sunday/morris-until-justice-is-served.html> (discussing how the newly discovered evidence should be taken into account); MORRIS, *supra* note 1, at 474 (proposing that the defense team could not present on the hair because the court found in favor of the government’s argument that the hair was contaminated and therefore, it could not be tested as evidence in favor of MacDonald).

⁵⁸ David Zuchino, *Fatal Vision Case: Jeffrey MacDonald Decision Is Now with Judge*, L.A. TIMES (Sept. 26, 2012, 9:00 AM), <http://www.latimes.com/news/nation/nationnow/la-na-nn-fatal-vision-murders-evidence-20120926,0,7643353.story>.

⁵⁹ See Anne Blythe, *Judge in MacDonald Hearing Weighs Next Steps*, NEWSOBSERVER.COM (Sept. 25, 2012, 9:18 PM), <http://www.newsobserver.com/2012/09/25/2368682/jeffrey-macdonalds-lawyers-ask.html> (noting the presence of animal hairs).

ings left hand [of] smaller female McDonald [sic].”⁶⁰ In March 1970, the vial was opened to extract and test the fingernail scrapings in the folded paper, at which time was found a bloody polyester-cotton fiber which matched MacDonald’s pajama top.⁶¹ The blood sample was insufficient to perform a matching test.⁶² Laboratory bench notes of two chemists at the time failed to mention the presence of any hair in the fingernail scrapings.⁶³ Nor was there any reference in the pathologist’s autopsy report to the presence of hair under Kristen’s fingernails.⁶⁴ It was not until July 27, 1970, four months after the vial had been opened and the pajama top fiber identified, that anyone discovered the third hair in the vial.⁶⁵ By that time, the folded paper marked “L. Hand Chris” had been removed, probably at the time of the March 1970 testing.⁶⁶ There was no indication where the lone hair came from, and, not having been mentioned in either note or the autopsy report, there was the distinct possibility that it was as a result of contamination.⁶⁷ Morris denigrates this explanation as simply the “government’s theory,”⁶⁸ forgetting that the burden “by clear and convincing evidence” of connecting the DNA evidence to the crime scene was imposed upon MacDonald, not upon the government.⁶⁹ Morris also fails to address the ubiquitous presence of those inconvenient pajama fibers in all three locations. If, as he testified, MacDonald had taken off his pajama top and placed it on his wife’s body in the master bedroom before he went to check on Kristen,⁷⁰ how did

⁶⁰ Government’s Response to Motion for New Trial at 24-27, *United States v. MacDonald*, Nos. 3:75-CR-26-F, 5:06-CV-23-F, 2012 WL 4049848 (E.D.N.C. Sept. 13, 2012).

⁶¹ *Id.* at 24.

⁶² *Id.* at 26.

⁶³ *Id.* at 25-26 (indicating that Janice Glisson and Craig Chamberlain’s notes do not reflect the presence of hair).

⁶⁴ Autopsy Protocol, Autopsy of Kristen MacDonald, Approved by Captain William F. Hancock at 1, Record, Article 32 Proceeding, at 184.

⁶⁵ Government’s Response to Motion for New Trial at 26; see Renee Chou, *MacDonald Could Wait Months to Learn if He’ll Get New Trial*, WRAL.COM (Sept. 25, 2012), <http://www.wral.com/news/local/story/11588843/> (mentioning the three hairs discovered).

⁶⁶ MORRIS, *supra* note 1, at 474 (drawing that the note had probably been removed as it passed through the chain of custody from William Hancock to USACIL to Dillard Browning).

⁶⁷ *Id.* at 474-75 (stating that the government’s theory was that “Specimen 91A had not in fact been found at the crime scene, but rather ended up in a laboratory test tube as a result of contamination”).

⁶⁸ *Id.* at 474.

⁶⁹ *MacDonald*, 2008 WL 4809869, at *15 (quoting 28 U.S.C. § 2244(b)(2)(B) (2006)).

⁷⁰ See Record, Article 32 Proceeding, at 37 (describing MacDonald’s claim that he covered his wife with his pajama top after trying to resuscitate her).

one of its fibers end up on Kristen's bedspread?

Morris muses on the relationship between justice and the media.⁷¹ Interestingly, he appears to despise Joe McGinnis more for condemning MacDonald "to the story that had been created around him" than for betraying MacDonald's trust, as Janet Malcolm so memorably documented.⁷² But in criticizing those who would select facts to weave a narrative to suit their own purposes, Morris himself, I suggest, plunges into the same trap: he has indisputably rearranged the facts ("reinvent[ed]" them, according to his publisher),⁷³ with no other obvious motivation (if we discount what I assume is his hope to profit from the sales of his book) than to persuade those who still care that a grave injustice has been perpetrated upon MacDonald and perpetuated for more than forty years, because, in the end, regardless of what the jury and the appellate courts have found,⁷⁴ the man is actually innocent.

This alternative universe appeals to the press and the media. It is certainly much more titillating to imagine that a monstrous injustice has been visited upon a blameless individual of spotless character, doomed to mourn his closest loved ones within the confines of a tiny prison cell, than to read one more account that confirms the guilt of a man who was long ago convicted. Make no mistake about it: despite his protestations, Morris is not merely arguing that MacDonald has been maltreated by the system of justice at every step of his forty-year long legal odyssey; he is aggressively campaigning and actively promoting during a multitude of media appearances the notion that Jeffrey MacDonald is an innocent man.⁷⁵

⁷¹ See Pamela Cytrynbaum, *Errol Morris Probes Notorious Murder: Will Thriller Prompt Debate About Wrongly Convicted?*, THE JEWISH DAILY FORWARD (Sept. 21, 2012), <http://forward.com/articles/163175/errol-morris-probes-notorious-murder/?p=all> (discussing the books and television shows created about the MacDonald case).

⁷² MORRIS, *supra* note 1, at 13; see also Fred W. Friendly, *Was Trust Betrayed?*, N.Y. TIMES (Feb. 25, 1990), <http://www.nytimes.com/1990/02/25/books/was-trust-betrayed.html?pagewanted=all&src=pm> (quoting McGinnis's denial to Robert Keeler of *Newsday* who covered the case from the beginning, that he in any sense "betrayed Jeffrey or did him dirt or anything," and his protestation that "[m]y only obligation from the beginning was to the truth" (internal quotation marks omitted)); JANET MALCOLM, *THE JOURNALIST AND THE MURDERER 3* (Alfred A. Knopf 1990) ("Every journalist who is not too stupid or too full of himself to notice what is going on knows that what he does is morally indefensible.").

⁷³ MORRIS, *supra* note 1.

⁷⁴ See, e.g., *United States v. MacDonald*, 966 F.2d 854 (4th Cir. 1992); *United States v. MacDonald*, 779 F.2d 962 (4th Cir. 1985); *MacDonald*, 688 F.2d 224 (exemplifying the multitude of appearances before the court).

⁷⁵ See generally MORRIS, *supra* note 1 (claiming MacDonald's innocence). Morris main-

To which, I would like to borrow one of the late Milton Gould's memorable aphorisms: sorry, Mr. Morris, the evidence shows MacDonald to be "as pure as the driven slush."⁷⁶

Now, do I "know" MacDonald is guilty? No, I do not, any more than Morris does. Neither of us was present while terrible carnage took place at 544 Castle Drive. But, just as Morris is convinced that MacDonald is innocent, I remain convinced that he is guilty. (I should mention that I flew to North Carolina in 1979 because I wanted to observe MacDonald as he took the witness stand in his own defense at his trial. I had concluded in 1974 that MacDonald was almost certainly guilty of these crimes, and nothing that I have seen or heard at any time thereafter, including MacDonald's demeanor on the witness stand in 1979, has changed that opinion. Nor, I must say, has my reading of Morris's book.)

The real focus of Morris's philosophical musings and ours should be: do we resolve our differences of opinion on the guilt or innocence of an individual by conducting competing public relations campaigns? To me, an affirmative answer is unthinkable. Whatever we mean by "justice" is not achieved by following "fair and balanced" contradictory narratives in the press and media. We cannot subcontract our court system to the PBS NewsHour any more than we can do so by casting Fox News as an explainer and arbiter of the evidence in a deadly serious criminal case. I am not alone in thinking that long ago we formulated a far different and certainly more disciplined method of resolving momentous factual disputes when we enacted Article III of the United States Constitution.⁷⁷

It may be fascinating and even useful to speculate what really

tains a website, which posts daily news clippings about the progress of the §2255 hearing, and I am told he made himself available in front of the courthouse virtually every day of the hearing for television interviews. A WILDERNESS OF ERROR, www.wildernessoferror.com (last visited Nov. 3, 2012).

⁷⁶ See Robert McG. Thomas Jr., *Milton S. Gould, 89, Legal Giant in a City of Lawyers, Dies* (Mar. 24, 1999), <http://www.nytimes.com/1999/03/24/nyregion/milton-s-gould-89-legal-giant-in-a-city-of-lawyers-dies.html>. Milton S. Gould, a partner of Shea and Gould, a prominent New York law firm for many years, was considered a "giant in a city of lawyers" and was an endlessly entertaining speaker. Gould died in 1999 at the age of eighty-nine. *Id.* The phrase quoted in the text is one he liked to employ in speeches that he made to judges and lawyers gathered at meetings of the Federal Bar Council to describe one former client or another whom he had either succeeded in freeing despite the evidence or who, despite Gould's best efforts were (alas) convicted.

⁷⁷ See *History of the Federal Judiciary*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/landmark_01.html (last visited Nov. 3, 2012) (providing the courts with power to provide justice, not the media).

happened, but Morris ignores the fact that we members of the public do have an important role to play, albeit in a different forum. Our forbears in colonial America and centuries before in England decided that our powers of analysis, our emotional reactions and our ability to make common-sense judgments, all derived from years of living our respective lives, are valuable tools to assist in doing justice and devised a system to harness that every-day wisdom. Twelve of us, selected randomly and screened for bias, are to be seated in a large room and asked to listen and observe those who claim the right to inform us of the facts. Thereafter, we are to retire and discuss privately among ourselves what we have seen and heard and try to reconcile our conclusions.

And the witnesses and the evidence we will have heard and observed in doing our task will have been tested for reliability, almost certainly by cross-examination, and often as well by a learned and experienced man or woman in whom we have also reposed most somber and weighty responsibilities in the matter, which we trust will be discharged fairly and without fear of reprisal or removal from the bench, should the judgment reached in some manner outrage some influential portion of the public, or perhaps the media.

So, in the MacDonald case, we await the ruling of Judge Fox (which will almost certainly be reviewed by the Fourth Circuit, and later, possibly, the Supreme Court) on the evidence that the defendant has submitted so long after the fact, including undisguised hearsay statements of witnesses who, being deceased, are so far as we know beyond the reach of the most skillful cross-examiner. Judge Fox will be doing what federal judges are paid to do, to decide what information, under circumstances that are unique to this case, is reliable and persuasive enough to be placed in the scales and weighed against evidence to the contrary that has long ago been found to be competent and probative and believable, so that a decision can be made that is most likely to command the respect of those who (unlike Morris and me) are disinterested.

That is the process that should command such respect. Morris's book has some interesting and provocative information in it, but I counsel against using it as the basis for forming a judgment about Jeffrey MacDonald's guilt or innocence.