

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA

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4 HONORABLE WILLIAM J. REA, JUDGE PRESIDING
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6
7 DR. JEFFREY R. MAC DONALD,)

8 Plaintiff)

9 vs.)

No. CV 84-6170-WJR

10 JOE MC GINNISS,)

11 Defendant.)

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16 REPORTER'S TRANSCRIPT OF PROCEEDINGS

17 Los Angeles, California

18 Wednesday, July 15, 1987

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22 Sherrill Boutté, CSR
23 Official Court Reporter
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Los Angeles, California 90012
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A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

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1 LOS ANGELES, CALIFORNIA; WEDNESDAY, JULY 15, 1987; 9:30 AM

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3 THE CLERK: Civil Case 84-6170-WJR,
4 Dr. Jeffrey MacDonald vs. Joe McGinniss.

5 Counsel, please state your appearances.

6 MR. BOSTWICK: Good morning, your Honor.
7 Gary Bostwick and Jo-Ann Horn appearing on behalf of the
8 plaintiff, Dr. MacDonald.

9 MR. KORNSTEIN: Good morning, your Honor.
10 Daniel Kornstein and Mark Platt who will be here present,
11 appearing for the defendant, Joe McGinniss.

12 THE COURT: All right. I think Mr. Towne is
13 here on his -- on the matter concerning the subpoena.

14 MR. TOWNE: Good morning, your Honor.
15 Richard Towne on behalf of a nonparty, Witness Melinda
16 Stephens. With respect to the pending matter, the subpoena
17 duces tecum served on her with respect to trial.

18 In response to the Court's request and order
19 of last week, I have discussed the matter with Miss Stephens
20 with respect to the provisions to the Court for in camera
21 review of correspondence between Miss Stephens and the
22 plaintiff, regarding Miss Stephens' book, pursuant to the
23 subpoena that was served upon her shortly before the trial.

24 With respect to that subpoena, we respectfully
25 submit to the Court the following is Miss Stephens'

1 position in that regard. Based upon her individual rights
2 to privacy and her journalist privilege, as articulated
3 there in some length last week before the Court, and in
4 addition based upon her promise and commitment to the
5 correspondent in those correspondence, that is,
6 Dr. MacDonald, she would respectfully request, first, that
7 the Court reconsider its order to turn over those documents;
8 and, second, in the event that the Court would decline to
9 so reconsider, she would indicate that she would not be
10 able to comply with the Court's order at this time; and that
11 the matter be permitted to proceed to the Ninth Circuit
12 for expedited review.

13 THE COURT: Okay. Why can't she produce them?
14 What's the reason?

15 MR. TOWNE: Physically, there is no reason.
16 It's a matter of, first, as I indicated last week --

17 THE COURT: She has located the document?

18 MR. TOWNE: That's correct, your Honor.

19 THE COURT: Correct?

20 MR. TOWNE: Yes, your Honor.

21 THE COURT: They are in her possession; correct?

22 MR. TOWNE: Yes, in fact, they're in my
23 possession.

24 THE COURT: Your possession.

25 MR. TOWNE: Yes. I do have them with me --

1 THE COURT: She's just refusing to turn them
2 over; is that it?

3 MR. TOWNE: That's correct, your Honor.

4 THE COURT: All right.

5 MR. TOWNE: And just so the record is clear as
6 to the basis, her own individual right to privacy, as
7 explained at some length last week; the journalist's
8 privilege issue; and in addition, the fact that she has
9 made a promise and commitment to the plaintiff, the other
10 party to the correspondence, that she would not turn those
11 letters over.

12 THE COURT: All right. Mr. Kornstein, you're
13 the one that subpoenaed these records. What's your
14 position?

15 MR. KORNSTEIN: I think that Mr. Towne's
16 argument explains why the subpoena should be enforced. One
17 of the reasons given for noncompliance is a promise or
18 commitment made to the plaintiff.

19 THE COURT: That's immaterial. You can't put
20 yourself above the law that way.

21 MR. TOWNE: Exactly, and particularly since
22 it's the plaintiff who --

23 THE COURT: That part is not of any great
24 moment to the Court. What about the other objection?

25 MR. KORNSTEIN: As to the privacy aspect, I

1 thought that was the very reason having the in camera
2 review, so that the Court could be able to determine
3 whether things were of such a confidential private matter
4 that they would be inappropriate for Counsel and
5 Mr. McGinniss to see them. But if they were matters that
6 were material to the counterclaim and the defense, based
7 on the breach of exclusivity as we allege it, then it is
8 directly relevant. And that's the heart of what we're
9 saying.

10 We don't understand why there is no compliance.
11 And as to journalist's privilege, that again is
12 confidentiality of source, and here that doesn't apply,
13 because the source himself is known and is a party to the
14 litigation.

15 That's really our position.

16 THE COURT: All right. Do I understand,
17 Mr. Towne, that you're refusing to allow the court an
18 in camera proceeding to examine these papers? Is that your
19 position?

20 MR. TOWNE: That's the position of Miss Stephens
21 yes, your Honor. And I should also indicate to the Court,
22 for the record, that Miss Stephens is present in court.

23 THE COURT: All right. So I suppose that means
24 that if she's going to take that position, we'll have to
25 set aside some time on a contempt hearing; will we not?

1 MR. TOWNE: I understand, your Honor.

2 THE COURT: How soon are you going to require
3 these papers?

4 MR. KORNSTEIN: We would require them on our
5 part of the case when we call Miss Stephens as part of our
6 examination of her, and also require it for our cross-
7 examination of Dr. MacDonald. And that's -- I don't know
8 who the next witness for the plaintiff is going to be, but
9 it could be Dr. MacDonald, and that would mean within the
10 next two or three days.

11 THE COURT: Mr. Bostwick, who do you intend to
12 call as your next witness?

13 MR. BOSTWICK: Your Honor, we intend to call
14 Mr. Malley, and I can represent to the Court that I don't
15 believe that Mr.-- that Dr. MacDonald will be on the stand
16 until at least the 21st, next Tuesday. But it is possible
17 that as of -- at the time, he would be.

18 THE COURT: All right. All right, have your
19 client step forward, Mr. Towne.

20 Step through the gate there, please, and step
21 up beside Mr. Towne.

22 Will you state your name, please.

23 MISS STEPHENS: Melinda Stephens.

24 THE COURT: Do I understand that, Miss Stephens,
25 that you are refusing to abide by the ruling of this Court

1 pursuant to the subpoena that has been served upon you,
2 to produce documents; that you refuse them even for a
3 hearing in camera when the Court would review them without
4 Counsel being present to determine whether or not they would
5 meet some confidentiality or privilege that you're claiming;
6 and that you are refusing to allow the Court to do that?
7 Am I correct in my understanding?

8 MISS STEPHENS: Well, your Honor, I promised
9 Jeffrey MacDonald that I'd never reveal his correspondence
10 and I believe that the evidence that is already in the
11 record states the position clearly, your Honor.

12 THE COURT: Well, you see, because someone
13 makes a commitment to another person, does not mean that
14 you can put yourself above the law. If the law is such
15 that you must produce things, even though you may have made
16 an agreement with someone, if the Court orders it absent
17 some privilege of some kind, it seems to me that you can't
18 control the Court by saying you refuse to do it, just
19 because you said you weren't going to.

20 MISS STEPHENS: Well, it's also because of my
21 belief in the laws of journalist's privilege and confiden-
22 tiality and --

23 THE COURT: Well, that's the purpose of the
24 in camera hearing, to see if there is such a privilege, one
25 that you could exercise. And without an in camera hearing,

1 the Court isn't going to be able to determine that.

2 MISS STEPHENS: Well, the problem is, if you
3 find one thing that's relevant -- there is a lot of things
4 that aren't that I certainly wouldn't want Mr. McGinniss
5 or his lawyers to be able to see.

6 THE COURT: Well, they're not going to know
7 anything about the Court's in camera review.

8 MISS STEPHENS: Well, your Honor, if they're
9 not going to know anything about the Court's in camera
10 review, would I have an opportunity to let you see them;
11 and then, depending on your decision, still -- if it was to
12 give it to them -- be able to go to jail rather than have
13 you give it to them?

14 THE COURT: Well, if you produce the papers
15 for the Court to review in camera, and the Court concludes
16 that certain papers or documents should be available to the
17 counter-claimant, Mr. McGinniss, then if you refuse to allow
18 the Court to do that, I suppose that then we'd have to have
19 a contempt proceeding.

20 MISS STEPHENS: Well, on that basis --

21 THE COURT: I'm not sure of the answer to your
22 question at this moment, whether or not -- if you submit
23 those papers to me in camera -- whether then they are in
24 the possession of the Court, and the Court can do with
25 them as it sees fit, I don't know.

1 Do you gentlemen know what the law is on that
2 point? I've never had that request made. Maybe, one of
3 you has had that situation before. Have you?

4 MR. TOWNE: I haven't, your Honor. That
5 procedure would certainly be acceptable to me.

6 THE COURT: The thing is that if the documents
7 are produced in camera for my review, and if I conclude
8 that some of them should be available for the purpose of
9 this trial, and Miss Stephens disagrees with that, then I'm
10 not sure just exactly what the procedure would be. Whether
11 or not I would have to return them to her, let her maintain
12 her right of confidentiality or whatever she's claiming.
13 And if I order her to produce them, and she doesn't, then,
14 I guess, the next thing is contempt -- she is found in
15 contempt, and what punishment the Court should impose.

16 (Miss Stephens is crying.)

17 MR. KORNSTEIN: We would be agreeable to that
18 process, because we think it's important that someone
19 determine whether or not they are relevant. At least it
20 would move things along that way. Our purpose is not in
21 any way to discomfort or harass Miss Stephens; it's just
22 to get the information that's relevant.

23 THE COURT: So, if I understand what you're
24 saying, you're stipulating that the Court may review these
25 documents in camera; and if the Court concludes that some

1 of the documents should be made available to you, and
2 Miss Stephens disagrees, that she may take possession of
3 those documents and then we would have to take it from
4 there as to whether or not she should be held in contempt
5 of court.

6 MR. KORNSTEIN: Yes, your Honor. As I
7 understand it, it's really just postponing whatever
8 contempt proceeding might be necessary, until your Honor
9 has reviewed it.

10 THE COURT: So, you're not going to take the
11 position that her -- once she surrenders these documents
12 to the Court, that she has waived her right to allow the
13 Court to use them, presuming the Court finds them to be
14 relevant.

15 MR. KORNSTEIN: Yes, that would be our
16 understanding, in order to accelerate the process and move
17 things along.

18 THE COURT: Is that agreeable with you?

19 MISS STEPHENS: Yes.

20 THE COURT: In other words, what we'll do is,
21 I will look at your documents, and I presume that you should
22 be there with Mr. Towne in chambers. We'll go over them,
23 and then we'll decide whether or not they should be made
24 available.

25 Can you tell me, Mr. Towne, how many documents

1 I'll be looking at, roughly? Is it a great number or --

2 MR. TOWNE: It's not a great number, your
3 Honor. I didn't count them. If I could have a moment
4 with Miss Stephens, I could.

5 (Pause.)

6 MR. TOWNE: Approximately between 10 and 15.

7 THE COURT: Documents?

8 MR. TOWNE: Yeah, items.

9 THE COURT: Items. All right --

10 MR. TOWNE: And if I could request that this
11 could be -- that this review could be done Friday afternoon?
12 Is that convenient with the Court's schedule?

13 THE COURT: I think that would be acceptable.
14 I don't think we're going to be at the point in the trial
15 where we'll be using the papers, if they are going to be
16 used. All right.

17 MR. TOWNE: Our preference would be as late in
18 the afternoon as the Court's schedule would accommodate.

19 THE COURT: Tell me why it should be late in
20 the afternoon.

21 MR. TOWNE: Simply convenience for Miss Stephens
22 and myself. That's all.

23 MISS STEPHENS: Whatever time is convenient in
24 the afternoon, is fine.

25 THE COURT: I didn't hear you.

1 MISS STEPHENS: Whatever time would be at your
2 convenience in the afternoon, would be fine with me.

3 THE COURT: I was thinking, perhaps 1 o'clock,
4 and maybe we can do it in half an hour, so that we don't
5 interfere with the progress of the trial. Otherwise, we
6 have to keep the reporter, and the clerk, and everyone here
7 late.

8 MISS STEPHENS: Okay.

9 MR. TOWNE: I understand. That's fine with me,
10 your Honor.

11 THE COURT: All right. We'll set it down then
12 for 1 o'clock on Friday afternoon. You don't have any
13 objection, do you, Mr. Kornstein, to Miss Stephens' being
14 present with her attorney when I review these records?

15 MR. KORNSTEIN: None, your Honor. I wonder
16 whether it might be appropriate to -- for someone on our
17 side to be present without looking at the documents, in
18 case a question may come up that you consult with us about,
19 as well I understand in camera review is frequently done
20 that way.

21 THE COURT: Well, let me say this to you, that
22 I will have a reporter present. It won't be done without
23 being on the record, so there will be a record which may be
24 sealed. But there will be a record of what goes on, so you
25 will have the satisfaction of knowing that we just weren't

1 in there talking off the record.

2 MR. KORNSTEIN: And I think it probably would
3 be useful, just before the in camera session, if we could
4 have an opportunity to explain what we think are the ground
5 rules of relevance on the claims.

6 THE COURT: All right. Why don't you -- are
7 you able to prepare in writing anything, or --

8 MR. KORNSTEIN: Yes. That would be fine. We
9 can do that.

10 THE COURT: Why don't you do that? And then I
11 think that Mr. Bostwick should be apprised of your position
12 as well.

13 All right, then we'll set it for Friday at
14 1 o'clock.

15 MR. TOWNE: Thank you very much, your Honor.
16 I appreciate the Court's consideration. Thank you.

17 THE COURT: Are we ready for the jury or did
18 you have something that you wanted to take up?

19 MR. KORNSTEIN: One scheduling matter that I
20 wanted to take up with you and Mr. Bostwick right away, if
21 I may. Should we do it in chambers or in open court?

22 THE COURT: Scheduling -- is there any reason
23 why it should be done out of the presence of those present?

24 MR. BOSTWICK: Not that I know of.

25 MR. KORNSTEIN: All right. What we would ask

1 the Court is this: One of our witnesses, William Buckley,
2 because of his commitments would -- can only be available
3 next Wednesday, Thursday, and Friday. His testimony on
4 direct should take, I think, between a half hour and
5 45 minutes.

6 What I'm asking is, if we can take him out of
7 turn. And I understand from what Mr. Bostwick said, it
8 would still be during the plaintiff's case because of that
9 problem.

10 THE COURT: Okay. Mr. Bostwick, are you going
11 to object to that?

12 MR. BOSTWICK: Yes, sir, we do. Your Honor,
13 we object strenuously to interrupting any of our witnesses
14 by any sort of witness on behalf of Mr. McGinniss. We
15 think it will interrupt the flow of the testimony that is
16 important. It will interrupt some of the testimony of key
17 witnesses, perhaps Mr. McGinniss or Dr. MacDonald himself;
18 And I believe that it very well might confuse the jury to
19 a certain extent to have someone brought on, even if they
20 are warned.

21 I'm concerned that the jury needs to have the
22 entire case for Dr. MacDonald in front of it, before there
23 is any sort of rebuttal whatsoever; not only from the point
24 of view of maintaining a single line, but also for the
25 ascertainment of truth, which I believe is the guiding

1 principle of Rule 611 on the order of witnesses.

2 So we object very strenuously to doing that.
3 We don't know any reason why Mr. Buckley can't accommodate
4 his schedule to this, and why the Court or other witnesses
5 have to accommodate themselves to him or to Mr. McGinniss.

6 MR. KORNSTEIN: Your Honor, it's my experience
7 that with certain professional people -- whether they be
8 doctors or others -- that courts frequently try to
9 cooperate as a matter of courtesy. Mr. Buckley is not a
10 doctor, but obviously he is a man who has commitments in
11 different parts of the country; and what we're trying to
12 do -- and our purpose is certainly not to interrupt the
13 flow of plaintiff's case -- it would only be for a brief
14 time, and it's the only witness that we're asking this
15 courtesy for.

16 THE COURT: What is the reason for his not
17 being available when you put your case on?

18 MR. KORNSTEIN: He has to be elsewhere. He has
19 made prior commitments that he cannot get out of. He has
20 a window this Wednesday, Thursday, and Friday of next week.
21 Wednesday morning is the very best time, but if necessary,
22 it could be Thursday or Friday of that week.

23 THE COURT: If the Court's going to consider
24 this, I think it would consider it only if we didn't have
25 to interrupt the testimony of another witness.

1 MR. KORNSTEIN: So, if a witness concluded --

2 THE COURT: If the Court -- I want to give
3 some consideration to this request. But what I'm saying is,
4 if Dr. MacDonald was on the witness stand, I would not
5 consider interrupting his testimony to put on another
6 witness.

7 MR. KORNSTEIN: I understand.

8 THE COURT: If Mr. Buckley can be sandwiched
9 in between witnesses, so that they're not -- their testimony
10 would not be interrupted, then I might consider that.

11 MR. KORNSTEIN: All right. Your Honor, I think
12 I need some cooperation from Mr. Bostwick on that, because
13 that makes it possible for him to control that.

14 MR. BOSTWICK: Your Honor, I'd like to point
15 out as well that we have brought a witness down here once
16 from San Francisco and sent him home, and we have brought
17 Mr. Malley over here from Phoenix and sent him home, all
18 because of the fact that due to certain things that are
19 going on in the courtroom, it is -- it was not possible to
20 get these people here exactly when they could be here, and
21 exactly when it was necessary.

22 THE COURT: But you understand that sometimes
23 it's necessary to make some adjustments in that. I mean
24 I know you -- I'm sure you've done this in the past. And I
25 know that if you could, you would accommodate Mr. Kornstein.

1 All I'm saying to you is, I would -- and this is not my
2 ruling, but I would consider allowing him to do this,
3 provided it did not cause the interruption of the testimony
4 of the witness.

5 MR. BOSTWICK: Your Honor, in a Court trial,
6 I don't think I've ever denied any opposing counsel, or
7 objected to any opposing counsel doing that. I don't ever
8 recall not objecting in a jury trial. On the other hand,
9 I understand the Court's inclination, and we will try to
10 make it possible to keep Mr. Kornstein informed as to when
11 there will be a gap, if such a gap will occur, as best we
12 can.

13 I do not withdraw my objection. I think it is
14 out of place. But other than that, we'll do our best.

15 THE COURT: I understand.

16 MR. BOSTWICK: I have one other matter, your
17 Honor, though. As to these witnesses, the Court did order
18 Mr. McGinniss' counsel to provide a summary of the
19 qualifications and a short narrative statement under
20 Rule 9.4.6 of the local rules; and we were provided
21 yesterday with a summary of defendant's possible expert
22 testimony for -- I think I counted 19 experts.

23 And I don't know whether the Court has seen
24 this or not, or whether it has been filed. But there are
25 three things wrong with it. Number One, 19 experts in this

1 case, and being sprung essentially upon us at this point
2 with the narrative just being given to us yesterday, is
3 simply too burdensome to be able to deal with.

4 Second of all, there is no clear description
5 of the qualifications of the witnesses, other than saying
6 things like author and newspaper columnist for the
7 Chicago Tribune. That may in some cases be enough, but
8 I think that saying that someone is a Pulitzer Prize
9 winning author and a newspaper columnist for the New York
10 Daily News simply isn't enough to apprise us as to how we
11 may have to rebut the expert testimony, or how we would go
12 about cross-examining.

13 The narrative statements are similarly sparse
14 and somewhat weak, in terms of the details of what they
15 are going to say.

16 In general, I would like to -- the final
17 objection, I think, is that Mr. Kornstein who has signed
18 the document states that these experts may be brought.
19 Now, that is not what Rule 9.4.6 says. I don't believe
20 that's what's contemplated. Obviously, if you say to
21 someone on the other side that you are going to bring an
22 expert, then decide not to, no one's going to complain.
23 But to say that you may bring 19 experts at trial, is
24 simply not being put on notice. And we have an objection
25 to this procedure. And I'm afraid that if the Court doesn't

1 exert some control over it at this stage, we're going to
2 have arguments further down the line that the Court's
3 going to have to deal with.

4 I thought we ought to do it before the actual
5 moment arrives.

6 THE COURT: Well, I was just -- I just came
7 into possession of the document to which you refer, namely,
8 Summary of Defendant's Possible Expert Testimony.

9 My only observation would be, I haven't read
10 this yet. I would think that we are going to run into
11 a -- perhaps, a situation where we are looking at a lot of
12 cumulative evidence; and I'm not saying that's the case,
13 but it could be. And I just remind Counsel that the Court
14 does not look favorably upon cumulative evidence.

15 MR. KORNSTEIN: I understand that, your Honor,
16 and we will avoid it. I just wanted to have the pool and
17 put Mr. Bostwick on notice about it.

18 THE COURT: I think that --

19 MR. KORNSTEIN: Some of them are rebuttal
20 witnesses to testimony that's already come in.

21 THE COURT: Rebuttal witnesses are different.
22 We were not talking about -- you're not talking about
23 rebuttal witnesses?

24 MR. BOSTWICK: No, I'm not, your Honor.

25 MR. KORNSTEIN: Well, some of these on the

1 list are rebuttal witnesses.

2 THE COURT: All right. Maybe you can designate
3 those for us then.

4 MR. KORNSTEIN: I'll do that right now, in fact,
5 your Honor.

6 THE COURT: Why don't you tell who your
7 possibles are.

8 MR. KORNSTEIN: All right, Mr. Bostwick.
9 Dr. Standaerdt on Page 4 is a rebuttal witness; Dr. Becker,
10 Dr. Frederickson, Dr. Stone --

11 THE COURT: Excuse me. Dr. who?

12 MR. KORNSTEIN: Stone, on Page 4, your Honor,
13 near the top.

14 Mr. Barbato on Page 5; and Mr. Backster on
15 Page 5 that we anticipate will be a rebuttal witness.

16 THE COURT: Okay.

17 MR. KORNSTEIN: And, your Honor, some of the
18 literary witnesses are also fact witnesses. So they would
19 be --

20 THE REPORTER: I couldn't hear the end.

21 MR. KORNSTEIN: Some of the literary witnesses
22 would be fact witnesses as well. I think percipient
23 witnesses is the term that your Honor used. And some of
24 the testimony may be very brief.

25 THE COURT: Well, I think that should treat it.

1 Let's get on with the jury. It's now after 10 o'clock; I
2 hate to keep them waiting.

3 Gentlemen, what I'd like to do today is take
4 a one-hour noon recess, because I'm on a rules committee,
5 and we have our meeting at 4 o'clock today on a rather
6 important matter concerning a rule that's being considered
7 for the court; and it involves considerable complexity, and
8 I've got to be at that meeting.

9 Any problem with that?

10 MR. BOSTWICK: No, your Honor, particularly if
11 you're going to get rid of a meet-and-confer rule.

12 THE COURT: We're not going to get rid of a
13 rule; we're going to add a rule.

14 MR. BOSTWICK: I see. We don't have any
15 problem with it, your Honor.

16 THE COURT: All right. Then would you get the
17 jury, please.

18 (Pause.)

19 MR. KORNSTEIN: Your Honor, Mr. Bostwick just
20 informs me that Miss Stephens is outside talking to the
21 press now.

22 THE COURT: Miss Stephens?

23 MR. KORNSTEIN: Yes, your Honor. I suppose in
24 some technical sense she's my witness; but to say I have
25 any control or persuasive force over her, is to be as far

1 off the mark as possible. I ask the Court what, if
2 anything, I should do.

3 (In the presence of the jury:)

4 THE COURT: Good morning, ladies and gentlemen.
5 Well, come to the side bar, gentlemen.

6 (Side-bar conference off the record.)

7 (On the record within the hearing of the jury:)

8 THE COURT: All right. You may call your next
9 witness, Mr. Bostwick.

10 MR. BOSTWICK: Your Honor, the plaintiff,
11 Dr. MacDonald, will call as the next witness Michael Malley.

12 THE COURT: All right. Step forward, Mr. Malley,
13 to be sworn.

14 MICHAEL J. MALLEY -- PLAINTIFF'S WITNESS -- SWORN

15 THE CLERK: Please, be seated and state your
16 full name and spell it for the record.

17 THE WITNESS: My name is Michael Malley,
18 Michael J. Malley. My last name is M-a-l-l-e-y.

19 DIRECT EXAMINATION

20 BY MR. BOSTWICK:

21 Q Good morning, Mr. Malley.

22 A Good morning, Mr. Bostwick.

23 Q Do you know Dr. MacDonald?

24 A Yes, I do.

25 Q Do you know Joe McGinniss?

1 A Yes, I do.

2 Q When was the first time that you met Dr. MacDonald?

3 A I think I met him very early on in my freshman year
4 at college.

5 Q Could you give the jury just a little bit of your
6 educational background since high school?

7 A Yes. I went to Princeton University and got a
8 Bachelor's Degree in 1965. I went to Harvard Law School
9 and got a Law Degree in 1968.

10 Q Since that time, did you practice law?

11 A Yes. I've been a practicing attorney since then,
12 although the first couple of years were not with a law
13 firm but in other capacities; but, yes, I've been a
14 practicing attorney since then.

15 Q What is your present occupation?

16 A I'm a lawyer.

17 Q What kind of law do you specialize in?

18 A I do civil litigation, mostly business litigation. I
19 litigate contract cases, antitrust cases, trade secret
20 cases, things like that; things that -- Government contract
21 cases that our clients, business clients, get involved
22 with in court.

23 Q You've examined a lot of witnesses in your day?

24 A Yes, I have.

25 Q Have you ever been a witness before?

1 A Once.

2 Q It feels a little different; doesn't it?

3 A It's incredibly different, yes, sir.

4 Q Do you live in Phoenix?

5 A Yes, I do.

6 Q Do you work for a law firm there?

7 A Yes. I'm a partner in a law firm with locations both
8 in Phoenix and in Palo Alto, California.

9 Q What's the name of the firm?

10 A The firm is Brown & Bain, B-a-i-n.

11 Q After you left law school, did you work for a law firm?

12 A Well, right after I left law school, I was a law clerk
13 for the Chief Judge for the United States Court of Claims
14 for a year. And then I was in the Army for two years, where
15 I worked mostly, but not exclusively, as a lawyer. And then
16 after the Army, I went to work for a law firm in
17 Washington, D.C.

18 Q And from Washington, D.C., you moved to Phoenix?

19 A Yes, I did.

20 Q You said you met Dr. MacDonald sometime at Princeton.
21 How did that come about?

22 A He lived on the floor above me in a dormitory. And it
23 came about because his floor and my floor basically shared
24 a bathroom; and we saw each other in the halls; and some of
25 his roommates became friends of me and some of my roommates.

1 So over the course of a year we just saw each other a lot.

2 Q Would you say you were friends in that first year?

3 A Yeah. We were not close friends, but we became
4 friendly enough to where at the end of the first year some
5 of his roommates and some of my roommates decided to pool
6 our -- what's called room draw -- you had -- to get better
7 rooms at Princeton, and we certainly wanted better rooms
8 than we had that first year, you had to put together groups
9 of people and draw for them.

10 And we decided to, as I said, some of his
11 roommates and some of my roommates -- freshman year -- drew
12 together as collective set of roommates for the second
13 year.

14 Q Were you Dr. MacDonald's roommate in your sophomore
15 year in college?

16 A Yes, I was.

17 Q And did you become closer friends at that time?

18 A Yes, we did.

19 Q Were you roommates in your junior year?

20 A No. Jeff got married at the end of our sophomore year,
21 and he moved off campus with his wife.

22 Q Did you see him after that?

23 A Yes. I saw him occasionally. I saw him in classes
24 from time to time. And occasionally I saw him, and his
25 wife, and their daughter socially. I didn't see him a lot,

1 because his social life was off campus. And that actually
2 was kind of unusual in those days at Princeton. So I didn't
3 really see him too much.

4 Q After he left for medical school, did you maintain
5 contact with Dr. MacDonald?

6 A I think it was Christmas cards. Actually, Collette
7 was much better at Christmas cards than he was. I'm pretty
8 good at Christmas cards. So I think I sent them a
9 Christmas card every year, and she sent me a Christmas card
10 every year.

11 We kept in touch that way, and I remember
12 getting a graduation notice from Jeff from medical school,
13 from Collette. And that's really about it. We did not --
14 I don't think we saw each other in those years where he was
15 in medical school and I was in law school.

16 Q What was the next contact you had with -- let's say
17 the name of Dr. MacDonald after you left Harvard Law School?

18 A Well, that was actually quite memorable. I read about
19 the murder of his family in the paper in El Paso where I
20 was stationed. I actually read about the murder the day
21 after it happened, because it was front-page news. But I
22 confess I didn't notice the names. I just read about the
23 murder and --

24 Q Did you --

25 A -- a couple of days later, there was a picture in the

1 paper. I think it was from the funeral, a picture of Jeff.
2 And there was a caption; and it listed his name and his
3 family's name. And I looked at that, and it dawned on me
4 who was involved there.

5 Q At that time, what rank did you hold?

6 A I was a second lieutenant.

7 Q Were you in the Judge Advocate General Court?

8 A No, I was not.

9 Q Were you in training at that time?

10 A No. I had gone through officer basic, and I actually
11 was in a slot in the Air Defense Artillery, which is what
12 Fort Bliss was at the time, and --

13 Q Let me interrupt you a minute about that.

14 When you joined the Army, did you join to
15 become a lawyer in the Army?

16 A No. I joined ROTC in law school, actually. Those
17 were the days of the Vietnam War. And I joined ROTC to
18 stay out of the draft, so I could go all the way through
19 law school, knowing that at the end of law school I would
20 be commissioned.

21 If you wanted to join the JAC Corps where --
22 the Army legal service, you had to agree to give them --
23 at that time I think it was four years. And ROTC is a
24 two-year commission. So I took the ROTC commission.

25 Q After you saw in the paper a picture that you

1 recognized, did you have any contact with Dr. MacDonald?

2 A I recall I sent him a letter of sympathy. It seems
3 to me I called the base, Fort Bragg, just to get an
4 address. I didn't talk to him. I talked to some
5 information officer, postal officer, just to get an address,
6 and they -- apparently, I wasn't the first call, because
7 they knew right away. And I sent a letter, I recall, to
8 him.

9 Q Did he communicate to you after you sent a letter to
10 him?

11 A No. I don't recall he did at any rate.

12 Q What was the next contact you had with him?

13 A Well, the next contact was, I wrote him another letter
14 after I heard he had been charged with -- or at least, he
15 hadn't been formally charged. The news carried that he --
16 the news carried the story that he had been interrogated
17 and named as a suspect in the murders of his family.

18 And I wrote him a letter, offering him my --
19 whatever help I could and some good advice, I thought.

20 MR. KORNSTEIN: Your Honor, I have not made
21 any objections on relevance grounds. I understand that
22 some background is appropriate; but I don't know that it
23 has gone on long enough. So I do object to this continuing
24 line on this -- on relevance grounds.

25 THE COURT: All right. Mr. Bostwick, are we

1 finished almost with the background information?

2 MR. BOSTWICK: I think we're fairly close to
3 the end of the background information and are beginning
4 the actual facts. I think the jury's heard enough of
5 Mr. Malley's background and how he came to know
6 Dr. MacDonald, yes, sir.

7 THE COURT: All right.

8 BY MR. BOSTWICK:

9 Q Mr. Malley, did you -- sometime after the letter you
10 just mentioned -- have any further contact with
11 Dr. MacDonald?

12 A Yes. I had gone to Fort Benning to go to infantry
13 school on my way to Vietnam. And after that, I was driving
14 up to Washington, D.C., to look for a job before I went
15 to Vietnam.

16 Q How did the contact come about?

17 A I stopped in at Fort Bragg. It was not -- it was
18 pretty close to on my way. I knew another officer there
19 whom I had known at Fort Bliss. I stopped in to see him,
20 and while I was there, I wasn't even sure whether I could
21 see Jeff. But I looked him up, and it turned out I could
22 see him. And we had a little talk.

23 Q What did he say to you?

24 A Well --

25 MR. KORNSTEIN: Your Honor --

1 MR. BOSTWICK: Let me withdraw the question,
2 your Honor.

3 THE COURT: All right.

4 BY MR. BOSTWICK:

5 Q Mr. Malley, did Dr. MacDonald say anything to you
6 about your aiding him in the investigation?

7 A Yes. After some conversation --

8 MR. KORNSTEIN: Excuse me, your Honor, move
9 to strike anything past yes.

10 THE COURT: After yes. All right.

11 BY MR. BOSTWICK:

12 Q What did he ask you?

13 A He asked me --

14 THE COURT: Wait just a minute. Are you
15 objecting?

16 MR. KORNSTEIN: I object. It's calling for
17 hearsay, and depending on the answer, we may have other
18 objections to it, in addition to hearsay.

19 MR. BOSTWICK: Your Honor, it doesn't call for
20 hearsay at all. All I'm asking is what he said to him.

21 THE COURT: I'm not so concerned about hearsay.
22 But he's concerned about other matters besides hearsay as
23 well, and what might have been said by your client to him,
24 which may be admissible and may not be.

25 MR. BOSTWICK: Let me try to rephrase the

1 question.

2 Q Mr. Malley, let me try to give you some instruction
3 about my question. What we'd like to have, if possible,
4 in order to avoid any objections as to potential hearsay,
5 is an answer to the question directly without having to
6 worry Mr. Kornstein about whether or not you're going to
7 talk about something you haven't been asked.

8 THE COURT: Well, excuse me just for a second.
9 Mr. Malley, in answering this question, are you going to
10 have to repeat what somebody else told Dr. MacDonald, that
11 he then told you? Is it going to be that type of situation?

12 THE WITNESS: No, your Honor. As I understood
13 the question, it was what did Jeff ask me concerning
14 whether I'd be interested in representing him. And so the
15 answer will really relate to what he told me and what I
16 told him.

17 THE COURT: So we're not going to be involved
18 then with what someone else might have said outside you two?

19 THE WITNESS: No, sir.

20 THE COURT: All right. I think then, as long
21 as that's the case, what did he ask you concerning this
22 investigation?

23 THE WITNESS: Well, your Honor, I thought the
24 question was what he asked me whether I'd be interested in
25 representing him.

1 THE COURT: I'm sorry. Why don't you state
2 your question again?

3 MR. BOSTWICK: I'll do that, your Honor.

4 Q What did Dr. MacDonald ask you to do with respect to
5 the investigation that he was undergoing?

6 A Well, he asked me if I would be interested in being
7 one of his attorneys.

8 Q Did he tell you why he wanted to have you help him?

9 A He indicated that he had an appointed military
10 attorney on the base, and that he had retained a civilian
11 attorney; but that at that point he didn't really know
12 enough about them. And in the case of his military
13 attorney he said, while he liked him, he didn't know how
14 good an attorney he was; that he liked essentially a
15 friendly face that he trusted to be there as part of his
16 defense team.

17 Q Did you agree with him at that time to be a defense
18 attorney for him in the Article 32 investigation?

19 A No, I did not.

20 Q What did you reply to him?

21 A I told him that for a couple of reasons I thought
22 it was a really bad idea. One was, I said that I was a
23 relatively young attorney at the time and because of our
24 friendship I would feel very, very uncomfortable and indeed
25 not competent to defend him in a case like that.

1 And secondly, I was on my way to Vietnam, and I
2 had no expectation that the Army was going to allow me to
3 stay at the post and be one of his defense counsels. So I
4 told him I thought it was really flattering and I
5 appreciated it, but I didn't think it was such a good idea,
6 and I doubted if it would ever come to pass.

7 Q Is that the way you left that subject between the two
8 of you?

9 A I believe so.

10 Q After you left Fort Bragg on that trip, did you have
11 any further communication from anyone about your being on
12 the defense team for the Article 32 investigation?

13 A Yes. I believe I had a phone-call discussion with --
14 I really can't remember it was Jim Dalfitt or Bernie Segal,
15 or somebody, somebody I hadn't met, who mentioned to me --

16 MR. KORNSTEIN: Move to strike, your Honor,
17 anything --

18 THE COURT: Yes. I think you better skip what
19 he said to you.

20 BY MR. BOSTWICK:

21 Q Mr. Malley, did you sooner or later become assigned
22 to Fort Bragg to aid in the defense of the Article 32
23 investigation?

24 MR. KORNSTEIN: Your Honor, objection. Leading.

25 THE COURT: Well, it's preliminary. Overruled.

1 THE WITNESS: Yes, sir, I did.

2 BY MR. BOSTWICK:

3 Q When did you receive your orders for that?

4 A I believe it was late in April or early in May of 1970.

5 Q When did you arrive in Fort Bragg?

6 A I believe I was already there. I had a month's leave
7 between the time we were talking about, the time I was to
8 report to Oakland for shipment to Vietnam. And since I
9 really didn't have anything to do, I came back to Fort Bragg
10 since I was already on the east coast, to just meet Jeff's
11 attorney, and Jim Dalfitt, his military attorney, and kind
12 of help out and do whatever I could. So I think I was at
13 Fort Bragg when I got the orders.

14 Q Once you were assigned there at Fort Bragg as part of
15 the Article 32 investigation defense, who gave you the
16 duties that you were supposed to do?

17 A Generally, the duties were -- from the orders were to
18 assist in the Article 32, and that came from the order --
19 and I was a military officer, so that came from the orders.
20 The details came essentially from Bernie Segal who was the
21 civilian defense lawyer that I understood, and everyone
22 understood, would be in charge of the case.

23 Q What did he tell you you should do?

24 A He told me to try to find out as much as possible about
25 the Government's case, about the evidence that the

1 Government might present; to try to find out what possible
2 motives the Government might allege; to find out, if I
3 could, about the assailants that Jeff had described; and
4 just generally to find out as much about the case, which
5 was something of a mystery to the defense at the time, as
6 I could.

7 Q Mr. Malley, let me move beyond the Article 32, and
8 we'll come back to that later in somewhat more detail.
9 But let's try to give the jury, if possible, a framework
10 of time.

11 What year was that that the Article 32 started?

12 A It started -- the actual hearing started right after
13 the Fourth of July, 1970. The preparation, which is the
14 time we're talking about, is, I think, May and June of 1970.

15 Q And when did you leave Fort Bragg?

16 A I left Fort Bragg right around Labor Day of 1970.

17 Q Had there been any findings yet, or conclusion of the
18 Article 32?

19 A The hearings themselves were virtually over, although
20 I believe that my orders came through shortly before the
21 last couple of witnesses were put on the stand. So, no,
22 there were no findings.

23 Q And were you then sent to Vietnam?

24 A Yes, I was.

25 Q And did you serve there?

1 A Yes, I did.

2 Q Did you have anything to do with the case of
3 Dr. MacDonald while you were there?

4 A Not in the -- the only thing I had to do with it was,
5 my recollection was, when the Article 32 came to the
6 conclusion the charges should be dismissed, I filed a letter
7 with the commanding general at Fort Bragg based on my
8 discussions with the other counsel, asking that the Army
9 conduct an internal investigation of itself, because we
10 thought they had botched the case so badly and I alleged,
11 and in concurrence with Jim Dalfitt, the military lawyer,
12 that we thought that we had reason to believe they had
13 crossed the bounds from merely incompetence into gross
14 negligence, which would have been a military crime.

15 Q Now, after --

16 A That's the only connection I actually had with the
17 case while I was in the Army.

18 Q Other than that, you had no further contact with any
19 of the attorneys that were defending the case?

20 A While I was in the Army?

21 Q In Vietnam, and in the Army, yes.

22 A Other than Christmas cards, no.

23 Q Did you -- after leaving the Army -- have any further
24 contact with Dr. MacDonald?

25 A Yes, I did.

1 MR. KORNSTEIN: Your Honor, I objected before,
2 because I thought the questions were not relevant. This
3 is all history. But if every witness is talking about all
4 their contact with the case, the evidence, the hearings,
5 we'll never get out of here.

6 THE COURT: I haven't heard every witness.
7 This is only the third witness, and I don't know whether
8 your concerns are justified as of now. Let's wait and see.

9 MR. KORNSTEIN: All right. I object on
10 relevance.

11 BY MR. BOSTWICK:

12 Q Did you have any further contact after leaving the
13 Army? With Dr. MacDonald?

14 THE COURT: Objection is overruled.

15 THE WITNESS: Yes, I did.

16 BY MR. BOSTWICK:

17 Q Christmas cards again?

18 A No. It was more than Christmas cards. I mean there
19 were times when, I suppose, months went by where we didn't
20 either see each other or talk to each other. But over a
21 period of the next several years, not only did I have
22 personal, friendly contact with him, but I continued to be
23 involved in the defense of his case as that process moved
24 into the civilian courts.

25 Q Were you involved in the Grand Jury that took place

1 in North Carolina in 1974 and 1975?

2 A Yes, I was present in the early part of the Grand Jury
3 testimony. I helped Bernie Segal represent Jeff MacDonald,
4 and I, myself, was a witness before the Grand Jury.

5 Q Did you conduct any investigation of your own or any
6 interrogation of witnesses during the Grand Jury testimony?

7 A No.

8 Q Did you cooperate with Dr. MacDonald in the defense
9 and in preparing him for his testimony before the Grand
10 Jury?

11 A Yes, I did.

12 Q After the Grand Jury returned an indictment, did you
13 have any further contact with Dr. MacDonald's case?

14 A Yes, I did.

15 Q And what was that?

16 A Well, I helped in drafting various briefs and motions
17 that Bernie prepared. I took a leave of absence from my
18 law firm in Washington to move out to San Francisco where
19 Bernie was, again, to assist Bernie in assembling evidence,
20 and in preparing to go to trial.

21 I did further work on -- there were many
22 appeals and other court proceedings that I helped Bernie
23 in. And ultimately, when there was a trial in 1979, I again
24 left my law practice -- this time I didn't have to take
25 a leave of absence because I was a partner and I could do

1 what I wanted.

2 I left my law practice to go to North Carolina,
3 again, because I knew a lot about the case to help Bernie.
4 And then after the trial, I again helped in drafting and
5 writing briefs on appeals.

6 Q And since 1979, when the criminal trial ended, have
7 you continued to be a friend of Dr. MacDonald's?

8 A Yes.

9 Q How have you manifested that friendship yourself?

10 A Well, I visited him in prison from time to time. I've
11 corresponded with him; I've kept in touch with his family.

12 Q Did you also work on any appeals after the conviction?

13 A Yes, I did.

14 Q Let's go back now, now that we have this framework of
15 time. Let's go back to the work that you did during the
16 Article 32 investigation.

17 You said that one of your duties assigned to
18 you by Mr. Segal was to look into the evidence. Mr. Malley,
19 let me warn you that we don't necessarily want to know what
20 you found. But I am interested in having you tell the
21 jury what evidence you specifically investigated and looked
22 at during the Article 32 investigation.

23 A Well, there were two broad categories. Let me address,
24 let me just tell you what they were.

25 First, there was physical evidence, the things

1 that were -- the Government was going to rely on to prove
2 the crime.

3 The other was witnesses, the people that not
4 only the Government was going to rely on, but we would rely
5 on to discuss not only these physical things, the physical
6 evidence, but to discuss the defendant; what kind of a
7 person he was, what kind of motives he might have.

8 So in general, I worked on those two broad
9 categories. And if you want to discuss one of them at a
10 time or both of them, I'd be glad to.

11 Q What I'd like to know is what evidence you specifically
12 investigated.

13 A Well, let's -- specifically, let's talk about the
14 witnesses. I -- because one of the big issues in this
15 case from the very beginning was going to be why would he
16 do it? -- I spent an awful lot of time looking for
17 witnesses, evidence about a motive.

18 Q How did you do that?

19 A I interviewed, I would say dozens, but that probably
20 understates it, I think. I interviewed a lot of people who
21 knew MacDonald over various parts of his life, from
22 basically his childhood all the way through his military
23 service.

24 Q Where did you find these witnesses?

25 A Some of them I found -- I visited his hometown. I

1 visited the hospital where he was moonlighting --

2 Q Let me interrupt you. You said his hometown, where
3 was that?

4 A Patchogue in Long Island. I visited the hospital
5 where he was moonlighting, which I believe was Cape Fear
6 Valley Hospital, something like that, near Fayetteville.

7 Q Could you tell us what "moonlighting" means?

8 A My understanding was, since Jeff's military job didn't
9 take up his evenings, he worked as an emergency room doctor
10 in the evenings, some evenings, at this hospital.

11 Q Do you know how many evenings a week?

12 A No, I don't. It was a few. I think it was sporadic,
13 but I don't really recall.

14 Q Okay. Please. You were answering the question of how
15 you found these witnesses --

16 A Well, I talked --

17 Q -- and where you found them.

18 A -- to people who -- his commanders, his subordinates,
19 their families, the people who knew Collette, the people
20 who knew the kids, as many people as I could find to find
21 out independently of what I thought of Jeff, what other
22 people did; because this was a crime that seemed to me,
23 as a defense counsel, was going to have -- if they said
24 Jeff did it, there ought to be a motive for it.

25 We ought to be able to find that motive or at

1 least find out what the Government's going to say that
2 motive was. So I did a lot of that kind of work.

3 Q What kind of physical evidence did you investigate?

4 A There are literally hundreds and hundreds of pieces
5 of physical evidence. It consists almost entirely of the
6 contents of Jeff's house that were taken apart by criminal
7 investigators after the crime, and then subjected to various
8 kinds of sometimes laboratory analyses, sometimes just
9 eyeball analyses.

10 And laboratory reports were written, photographs
11 were taken. It was a massive amount of physical evidence
12 that essentially played a key role in the Government's
13 case.

14 Q Did the Government let you see that?

15 A Not at first. We -- the defense counsel, particularly
16 Jim Dalfitt and me who were down there all the time, and we
17 were assigned to the post, I would say spent the better
18 part of two months on and off badgering the Government,
19 the prosecutors, the CID, the staff judge advocate,
20 everybody who had control over this evidence, to give it to
21 us. And they dribbled it out in little pieces, usually
22 unwillingly, but they'd get ordered to do it.

23 So, we got a fair amount of it before the
24 Article 32 hearings actually started, although we didn't
25 get all of it until some of it we saw in court for the first

1 time.

2 Q When you were given physical evidence or documents
3 that related to physical evidence, did you personally
4 review that evidence and discuss it with the other
5 attorneys?

6 A Yes, I did.

7 Q Was there any aspect of that case, in terms of
8 physical evidence, before the Article 32 hearings that you
9 know of that you had no contact with?

10 A No.

11 Q As far as you know, you were involved in everything?

12 A As far as I know, yes; to one degree or another, I
13 mean, some things I didn't spend as much time on as others,
14 but yes.

15 Q I might have misunderstood you, but I thought I heard
16 you say something about the number of witnesses you
17 estimated you interviewed. Do you have any recollection
18 at all?

19 A Well, first I don't want to quibble with you about
20 witnesses. These are not necessarily people who came to
21 testify at the proceedings. These are people that, one
22 way or another, came to my attention as maybe knowing
23 something about either the case or the man.

24 And I have no way of saying, other than it
25 was dozens, and maybe as many as a hundred or so. It was

1 a lot of people; because this was a very prominent case,
2 lots of people passed into and out of it.

3 Q When you said that you were looking for motives that
4 the Government might try to prove for the crime, did the
5 Government communicate to you in any way what motives they
6 suspected?

7 A No.

8 Q Did you ever obtain any information about what motives
9 the Government was investigating?

10 A Well, yes. I --

11 MR. KORNSTEIN: Move to strike anything beyond
12 yes, your Honor.

13 THE COURT: All right.

14 BY MR. BOSTWICK:

15 Q What motives did you determine the Government was
16 investigating?

17 A I determined the Government was investigating the --
18 principally one motive, and that was marital infidelity.

19 Q And what did you do to try to find all the information
20 you needed to find out about that subject?

21 A I talked to Jeff. I talked to a lot of Jeff's friends.
22 I talked to a lot of Collette's friends, or some of
23 Collette's friends. I talked to her mother, her father-in-
24 law --

25 Q When you say her mother, are you talking about Mildred

1 Kassab?

2 A Mildred Kassab.

3 Q You're saying her father-in-law -- I'm sorry, you
4 said her father-in-law.

5 A Yes. He's actually her stepfather --

6 Q Her stepfather.

7 A -- Freddy Kassab. I talked to just as many people as
8 I could find who knew Jeff and Collette, and knew about
9 their marriage from, you know, college all the way through
10 that point, which was 1970 into the Army.

11 As I said, I personally had relatively little
12 firsthand information about it. So that was one of those
13 things where whatever I felt, I needed to investigate
14 myself, because I just didn't know.

15 Q How much contact did you have with Dr. MacDonald
16 during the Article 32 investigation?

17 A I saw him every day for an hour, two hours, three
18 hours, or something like that.

19 Q You were living there --

20 A Sometimes more.

21 Q You were living there on post in Fort Bragg?

22 A Yes. I was temporarily assigned to a BOQ -- Bachelor
23 Officer Quarters -- and it was -- yeah, I did live on the
24 post.

25 Q Were there other motives that you were concerned with

1 as a defense counsel in defending against?

2 A Yes.

3 Q What other motives were you concerned about defending
4 against?

5 A Two, other than the marital infidelity. One was drugs,
6 and the other was mental aberration; insanity, or, you know,
7 that he went bonkers somehow or another.

8 Q Let's talk about drugs for a moment. What did you do
9 specifically to look into the possibility that there was
10 a motive somehow in the ingestion of drugs behind these
11 killings?

12 A Well, the first thing I did was, I not only once but
13 several times, discussed the matter at great length with
14 Jeff to find out -- he was my client and I assumed that he
15 would tell me the truth, or at least, you know, try to find
16 out if he'd tell me the truth about drugs.

17 And then I went out and checked his story with
18 other people.

19 Q Who did you check with?

20 A I talked to his commander. I talked to people who
21 worked at that hospital with him. I talked to people who
22 worked with him during the daytime. I talked to just people
23 who knew him, people who knew Collette -- just family,
24 whether they worked with him or not. I remember I even
25 talked to a couple of his escort officers. He was assigned

1 guard essentially by his unit. He couldn't move around
2 the post without them.

3 And some of them were his friends. I talked
4 to them. I talked to as many people as I could to see if
5 there was any indication that Jeff was in any way -- he
6 either looked like he used drugs to other people; or as
7 I said in talking to him, whether he admitted using drugs.
8 That's what I did.

9 Q Maybe you could help the jury a little bit. How would
10 you ask -- how did you ask a witness or a person -- I'm
11 sorry to use that word witness. How did you ask a person
12 that you were talking to, about Dr. MacDonald's possible
13 use of drugs?

14 Let's say one of his commanders. Do you recall
15 any of those?

16 A Yes. I recall talking to, I think the man's name was
17 Colonel Kingston, or Colonel Kane, I guess was the guy
18 there. And there were other medical people that I talked
19 to.

20 Yeah, I would say, "One of the things that I'm
21 interested in is, have you ever noticed any changes or any
22 abnormalities that you'd consider abnormal in MacDonald's
23 behavior that in your experience --" You have to remember
24 drugs were a terrible problem at that post. So a lot of
25 these people knew what drugs were like and what they did to

1 people.

2 And I'd ask them, have you ever seen anything
3 in MacDonald's behavior or know anything about him that
4 indicates he used drugs; have you ever heard anything
5 about it? Because I fished for hearsay. I would ask them,
6 did you ever see him use drugs; did you ever hear he used
7 drugs; did anybody ever complain about his behavior?

8 I had, you know, I had pretty frank
9 conversations with some of these people.

10 Q Did you ask Dr. MacDonald to write you some notes about
11 the events surrounding the date of February 17th?

12 A Some notes were written. I don't know whether I asked
13 him, or whether Bernie Segal asked him; but there were
14 notes written by him to his lawyers, yes.

15 Q When you say they were written to his lawyers, what do
16 you mean by that?

17 A By that I mean that whoever asked him to do it,
18 whichever attorney, these were notes written essentially
19 to give the attorneys as good a working knowledge of what
20 he said happened, and what he said the problems were, as we
21 could have within the context of the attorney/client
22 privilege.

23 We expected these would be notes, treated them
24 as notes that we would never divulge to anyone without his
25 permission, so that he could tell us the absolute truth.

1 Whether he did it, whether he didn't do it. You know,
2 whatever he wanted to. We wanted him to tell us the truth,
3 because we were in a position, all of us, all of the
4 lawyers, were in a position for the first time finding out
5 about the case, our client, what the Government was going
6 to say about him; and we wanted as much candor as we could
7 get from him. That was the purpose of those notes.

8 Q You've read the book "Fatal Vision," have you?

9 A Yes, I have.

10 Q You saw in there the reference to the notes about
11 Eskatrol Spansules?

12 A I recall it, yes.

13 Q Did you read all the notes that Dr. MacDonald prepared
14 for his attorneys -- you, Captain Dalfitt, and Bernie Segal?

15 A Yes, I did. To the best of my knowledge, I did, yes.

16 Q About how -- what volume were they?

17 A Well, it's been an awfully long time since I've seen
18 them. I think they are 10, or 15, or 20 pages of
19 handwritten notes, but I have not seen them in years.
20 I recall more than a few pages. I just don't recall how
21 many more than a few pages.

22 Q And at the time in 1970, when you were defending the
23 Article 32 investigation, did you read Dr. MacDonald's
24 reference to diet pills?

25 A Yes, I did.

1 Q Did you do anything to inquire further into that
2 subject of diet pills?

3 A Yes, I did.

4 Q Could you tell the jury what you did once you'd seen
5 the notes?

6 A Well, again, the first thing I did was talk to Jeff
7 about it, and find out what they were, why he was using
8 them --

9 Q When you say "they" --

10 A -- how many he used.

11 Q -- you mean the pills?

12 A The pills, yes, the Eskatrols, or the diet pills,
13 whatever they were. I tried to find out as much as I
14 could from him; and then I asked him a question. I remember
15 saying, "Well, what if I don't believe you? What if
16 somebody doesn't believe you? Who else do I go to see?
17 Who would be able to tell me about it other than you?"

18 And he gave me some lists. He said, "Well,
19 talk to any doctor. Talk to a psychiatrist. Talk to
20 various kinds of people who are familiar with them." And
21 I did.

22 Q How many different people did you talk to about that
23 subject?

24 A Well, that subject was -- what I was really looking
25 for mostly, when I was talking to all of those people I

1 mentioned, about drugs, because that was the only
2 indication that I had that there was -- there were any
3 kind of drugs involved. So when I was talking to those
4 other people, although I didn't mention drugs particularly,
5 I usually got around to talking about amphetamines; and,
6 again, this was a psychiatrist that I believe that I saw
7 him in the hospital; and talked to other doctors who were
8 on post. I believe I talked to Dr. Sadolf who was the
9 psychiatrist to be retained.

10 And then, in general, I would talk to lay people
11 who were familiar, or, you know, who knew something about
12 "Speed."

13 Q Did you ask Dr. MacDonald how many he had been taking?

14 A Yes.

15 Q What did he say?

16 A I think he told me that it was a relatively small
17 number, a few total.

18 Q Over the course of what period of time?

19 A A few weeks.

20 Q Did he tell you why he was taking them?

21 A Yes.

22 Q What did he say?

23 A He was running a weight control program for his unit.
24 And that was part of a weight control program that was --
25 they were used as part of the diet -- appetite control

1 program under medical supervision.

2 Q After your investigation of the possible motive of
3 drugs and of your interview of all the witnesses, did you
4 come to a conclusion as to whether you'd be able to defend
5 against that charge if it were made?

6 A Yes.

7 Q And what was your conclusion?

8 A My conclusion was, it was not a problem, and we
9 basically put it aside as a problem.

10 Q During the criminal trial in 1979, jumping ahead just
11 for a little bit, nine years, during 1979, did the
12 Government raise any speculation as to drug ingestion as
13 being a cause for the crimes?

14 A No.

15 MR. KORNSTEIN: Your Honor, I want to know, if
16 Counsel is opening the door to Government's evidence, it
17 may relate to summary trial rulings by your Honor and may --

18 THE COURT: Well, the question is rather vague
19 to me. I don't know whether he's talking about the trial
20 or the proceedings that took place before trial. I'm not
21 sure I understand that last question.

22 MR. BOSTWICK: Let me rephrase the question
23 for Mr. Malley.

24 Q Mr. Malley, in your role as an aide to the defense
25 team in 1979, did you have any cause for concern about the

1 possibility of the Government raising drugs as a possible
2 motive for the crimes?

3 MR. KORNSTEIN: Objection.

4 THE COURT: Well, are you asking him if he
5 had reason to believe that the Government was going to
6 raise that during the trial that was upcoming?

7 MR. BOSTWICK: Your Honor, I think that's a
8 great question. I'd like to adopt that.

9 THE COURT: Well, why don't you answer that
10 question.

11 THE WITNESS: Okay, your Honor.

12 No, I had no reason to believe the Government
13 was going to raise it.

14 BY MR. BOSTWICK:

15 Q All right. Let's go back to 1970. Did you tell
16 Dr. MacDonald what the results of your investigation, or
17 examination, or interviews were with respect to the diet
18 pills?

19 A To an extent. I don't think I ever sat him down and
20 said these are all the people I talked to, and this is what
21 they said. But I did, in general, tell him that I didn't
22 think drugs were going to be a problem with the Article 32.

23 Q Before you told him that, had he expressed any concern
24 to you other than giving you these notes and talking to you
25 about it? About the subject of drugs?

1 A No, not really. I think they came up in the notes,
2 and the reason they came up in the notes is, we told him
3 to tell us everything. We gave him a list of things to
4 tell us about that we were just sort of speculating
5 ourselves, including drugs. I think that's where it came
6 from.

7 I don't recall his ever independently bringing
8 it up until I saw the notes. And then I asked him about it.

9 Q During the Article 32 investigation, you mentioned
10 that you investigated the other persons that the CID was
11 suspecting as possible assailants. Who were those persons?

12 A Well, the CID claimed they never suspected anyone other
13 than Jeff. Are you talking about the people Jeff said were
14 involved?

15 Q Yes.

16 A Those people were -- at least one of them, and by that
17 time we probably knew about two of them -- were pretty well
18 known drug abusers and drug dealers in the Fayetteville
19 area, one of whom happened to be an informant for the CID.

20 Q Did you interview either of those two people that you
21 knew at that time?

22 MR. KORNSTEIN: Your Honor, objection as to
23 relevance. This isn't a retrial of the criminal case.

24 THE COURT: Well, I guess we've talked about
25 that for five weeks, about not retrying the criminal case.

1 Where are we going on this examination? I guess you better
2 come to the side bar; in fact, we'll take our recess at
3 this time.

4 Can you tell me, Mr. Bostwick, what your plan
5 of approach is so I can be apprised.

6 MR. BOSTWICK: I'd be glad to, your Honor.

7 THE COURT: All right. We'll take a 15-minute
8 recess, ladies and gentlemen. Remember the admonition of
9 the Court.

10 (Morning recess.)

11 (Outside the presence of the jury:)

12 THE COURT: Mr. Bostwick, before we bring the
13 jury out, we continually have these objections about trying
14 the criminal case all over again. And you recall from the
15 very beginning Mr. Kornstein has made that position well
16 known. And I hope that you're not intending to do that.

17 MR. BOSTWICK: No, I'm not, your Honor.

18 As a matter of fact, there's a good deal that went on in
19 the Article 32 investigation, went on in the Grand Jury,
20 and also in the criminal trial that Mr. Malley, as an
21 example, is aware of and could testify to. He's not going
22 to be asked any questions about that.

23 He's being asked questions about subjects that
24 are touched upon or dealt with in great detail in the book.
25 And he is being questioned about that to show the jury how

1 informed he was of all of these very complex subjects that
2 Mr. McGinniss then had the chance to discuss these matters
3 with one of the prime sources. As an example, just on
4 these notes from Dr. MacDonald to his attorneys, Mr. Malley
5 was one of those attorneys.

6 THE COURT: But you see, Mr. McGinniss didn't
7 get into the case until 1979.

8 MR. BOSTWICK: Right.

9 THE COURT: So why are we spending so much time
10 on the Article 32 hearings, and the preparation, and so
11 forth?

12 MR. BOSTWICK: Because Mr. McGinniss was aware
13 of the fact, he became aware of the fact in 1979, and
14 through '79 and up through '83, that Mr. Malley had been
15 present during the Article 32 investigation at the time
16 when the evidence was the freshest, at the time when the
17 witnesses were available; and that Mr. Malley had conducted
18 a serious investigation as part of the defense team, and
19 yet he never inquired of him as to these matters; and that
20 in addition to the extent that he was told certain things,
21 he portrayed them falsely in the book.

22 THE COURT: Now, what proof do you have that
23 Mr. McGinniss knew all that?

24 MR. BOSTWICK: Mr. Malley will testify later
25 on when he talks about the contact between Mr. McGinniss

1 and Mr. Malley, that they were together through the entire
2 weeks of the trial, and that they met on only two other
3 occasions after that, and there were two or three telephone
4 calls. But that Mr. McGinniss, for example, was aware of
5 the fact that Mr. Malley was one of the prime addressees of
6 these notes.

7 THE COURT: And you expect him to testify that
8 all during those weeks of the trial in 1979, that
9 Mr. McGinniss never inquired --

10 MR. BOSTWICK: Not that he never inquired. We
11 intend to show what he did inquire about and what he did
12 not inquire about. Therefore, it's necessary for the jury
13 to know what it is that Mr. Malley knew about these subjects.
14 I'm not going into everything that Mr. Malley knew. I can
15 assure you of that.

16 THE COURT: Mr. Kornstein, now you know what his
17 intent is.

18 MR. KORNSTEIN: Your Honor, as I understand the
19 offer of proof, it becomes a selective retrial. And what
20 happens is, it becomes a side effect or a by-product where
21 there are suggestions made from the witnesses, through the
22 evidence, to the jury that perhaps there was a wrongful
23 conviction; that perhaps this man was not properly convicted
24 and it --

25 THE COURT: That necessarily flows with the

1 theory of the plaintiff's case, doesn't it, namely that if,
2 to some extent; but how else can they prove that
3 Mr. McGinniss did not maintain the essential integrity of
4 Dr. MacDonald's life story, if he knew facts that he didn't
5 put in the book or that he wrote about in a manner that
6 wasn't accurate or whatever. That's their case.

7 MR. KORNSTEIN: Your Honor, if that is so,
8 though. We're saying it opens doors for us to show the
9 evidence that will support our theory, and it may involve
10 some of the evidence from the trial.

11 THE COURT: I presume that's going to have to
12 be part of your defense, to show that Mr. McGinniss was
13 justified in writing what he did and in supporting his
14 belief that he was maintaining the essential integrity of
15 Dr. MacDonald's life.

16 I don't know what your defense is going to be,
17 but certainly if you have evidence that's going to
18 contradict or bear upon the matters that Mr. Bostwick is
19 delving into, certainly you will be entitled to do that.

20 MR. KORNSTEIN: I just wanted to make that
21 clear, because some of it is from the criminal trial itself.

22 THE COURT: Well, it may be. It may be, and
23 I suppose it's almost an impossibility not to have some
24 overlap. I don't see how you can possibly keep it out.

25 MR. KORNSTEIN: Very well. I just wanted to

1 clarify that because of the pretrial ruling.

2 THE COURT: All right. Ready for the jury?

3 MR. BOSTWICK: Yes, sir.

4 THE COURT: Please, get the jury.

5 (In the presence of the jury:)

6 THE COURT: All right. Mr. Bostwick, you may
7 resume.

8 DIRECT EXAMINATION (CONTINUED)

9 BY MR. BOSTWICK:

10 Q Mr. Malley, did you at any time interview any of the
11 persons that were suspected by Dr. MacDonald to have been
12 in his house on the night of February 17th, 1970?

13 A I personally did not, but the defense team did.

14 Q You told the jury that you had contact with the
15 defense during the Grand Jury proceedings in 1974 and 1975.

16 A Yes, sir.

17 Q You also testified that you were called as a witness
18 in that proceeding. How long did you testify?

19 A It was very short. Five minutes, ten minutes,
20 something like that.

21 Q At the time were you living in Phoenix?

22 A No, I was living in Reston, Virginia and working at
23 Washington, D.C.

24 Q Did you have to take time off from work to go down to
25 the Grand Jury proceedings?

1 A Yes, I did.

2 Q How many days did you spend doing that?

3 A Three or four, something like that.

4 Q Was that three or four days at a time, or was it on
5 different occasions?

6 A It was on at least two occasions, and it might have
7 been more than that; but I don't think I ever spent more
8 than two days down there at one time during the Grand Jury.

9 Q What was your personal attitude about your role during
10 the Article 32 investigation and the Grand Jury testimony.

11 How did you view your role?

12 A Well, they were slightly different. At the Article 32,
13 I was clearly assigned to be a member of the defense team.
14 I was ordered to be a member of the defense team. And I
15 was a lawyer who was part of Dr. MacDonald's representation.
16 As such, I did everything other than appear in court,
17 because I made it very clear to Bernie Segal that I did not
18 want to appear in court in that case. And Bernie agreed,
19 although I did appear in court once, in Federal Court, on
20 another matter -- I mean on a kind of ancillary matter
21 in that case.

22 During the Grand Jury, I was partly there as a
23 friend, just because I'd been asked both by Bernie and Jeff
24 to help out. But I was a friend who had a considerable
25 amount of both factual and legal knowledge about this

1 proceeding. So that in some sense I was functioning as a
2 lawyer, too.

3 Q Did Dr. --

4 A It was not quite so clear to me, at least during the
5 Grand Jury, that I was part of the legal defense team at
6 that point.

7 Q On the occasions that you were there, did the subject
8 of sodium amytal ever come up?

9 A There being at the Grand Jury?

10 Q Yes.

11 A Yes, sir.

12 Q And how did that come to your attention?

13 A I was waiting with Mr. Segal while Jeff testified
14 before the Grand Jury, and he came out of the Grand Jury
15 room and mentioned to us that one of the prosecutors, I
16 think the man's name was Woerheide, had suggested to him
17 and the Grand Jury that he take a sodium amytal test. And
18 he came out to ask us what he ought to do about that.

19 Q When you say "came out to ask you," where were you?

20 A We were waiting in a room outside the Grand Jury room.

21 Q What did he say to you? What did Dr. MacDonald say
22 to you?

23 A Pretty much what I just told you, that the Grand Jury
24 had been made aware of the fact that there was this test,
25 the sodium amytal test, some truth serum test, and that

1 would he be prepared to take one. And he said he wanted
2 to consult his counsel who were waiting outside. And they
3 said, go out and talk to them.

4 Q And did you tell Dr. MacDonald anything at that point?

5 A I don't know whether it was right then or later. We
6 did give him some advice about it. As I said, I don't know
7 whether it was right then, or whether we told him to go
8 back in and tell them we'll think about it, and give you
9 an answer later; but at some point, yes, we did give him
10 some advice.

11 Q Did you give the advice, or did Mr. Segal give the
12 advice?

13 A Well, I gave the advice, and I guess Bernie Segal
14 blessed it. Again, I was not -- I was there to help, but
15 I didn't feel that I was capable of because of my personal
16 relationships with Jeff. I just didn't feel that I was
17 capable of taking final responsibility for this. And so,
18 I think this was one of those things that I gave my opinion,
19 and my opinion was quite strong about it; and Bernie said
20 okay. And that was, I think, the advice that we gave Jeff.

21 Q When you say that Dr. MacDonald came out of the Grand
22 Jury room, was that during Dr. MacDonald's testimony before
23 the Grand Jury?

24 A Yes, it was.

25 Q Do you know how many times he testified before the

1 Grand Jury?

2 A My recollection is twice. But I'm not absolutely sure.

3 Q Were the -- could you tell the jury when those two
4 times occurred?

5 A The first time, and it may have been more than a day
6 the first was, I believe in the summer or late fall of
7 1974; and the second time was in, I think it was January of
8 1975.

9 Q And it was on this first occasion that Dr. MacDonald
10 exited the Grand Jury room and to talk to you?

11 A That's my recollection, yes.

12 Q What advice did you give to Dr. MacDonald?

13 A My advice was not to take the sodium amytal test.

14 Q Did he say anything to you about his desire to take it?

15 A My recollection is that he said he would take it, but
16 he didn't want to, depending on what we told him, because
17 he really -- since he was enmeshed in legal affairs, had
18 to kind of rely on us, us being Bernie and me.

19 Q Did you tell him why you didn't want him to take it?

20 A Yes.

21 Q Why was it? What did you tell him?

22 A I told him that based on my understanding of what that
23 test was -- it is a drug-induced test done under clinical
24 supervision by a psychiatrist and often in a hospital, that
25 causes people, for reasons I'm not exactly sure, I mean I

1 don't know the physiology of it, but the effect I do know.
2 At least it was told to me, it causes people simply to
3 relive an event with the same emotions and the same
4 understanding as when they actually lived through it the
5 first time.

6 Q What was it that you knew at that time that made you
7 believe that that was the case?

8 A I had talked to at least one, and maybe two,
9 psychiatrists about the test, both in connection with this
10 case -- with Jeff's case -- and in connection with other
11 cases that I had worked on in the Army. And it was my
12 understanding that it is -- it can be a very, very, very
13 painful experience for the person who has to undergo it.

14 Q Was that part of what you told Dr. MacDonald at the
15 time?

16 A Yes, it was. And I told him I didn't think it was
17 in his mental health's best interest to take that test.

18 THE COURT: When you say painful, are you
19 talking about physically painful?

20 THE WITNESS: No, sir. I'm talking emotionally
21 painful. I mean if you go through a traumatic experience,
22 such as the assaults on his family and murders, that --
23 those emotions, those feelings will come back as if you
24 were --

25 MR. BOSTWICK: Mr. Malley, when you're talking

1 to the judge, we can't hear you.

2 THE WITNESS: I'm sorry. Do you want me to
3 repeat?

4 MR. BOSTWICK: I'm not sure whether the jury
5 heard it. I wasn't able to hear all of it, but I think we
6 caught most of it.

7 THE COURT: I think that the question was
8 answered. The jury heard it, that it is not painful.
9 You weren't speaking of physical pain, but you were speaking
10 emotional --

11 THE WITNESS: Yes, sir, that's right.

12 BY MR. BOSTWICK:

13 Q Were you considering at the time that you gave that
14 advice that if he took the sodium amytal and it came out
15 well, that he might avoid an indictment altogether?

16 A Well, that was certainly something that both Bernie
17 and I discussed. Our consensus was, at that stage of the
18 proceedings we had no great confidence that the prosecutors
19 were going to play that game. So even if it came out well,
20 we weren't sure that they would necessarily abide by the
21 results. And since they made no representations about what
22 they were going to do even if he took the test, we came
23 down on the side of not taking it then.

24 Q Did you tell Dr. MacDonald that you had considered
25 that aspect that the prosecution wasn't promising anything?

1 MR. KORNSTEIN: Objection, your Honor. That's
2 leading.

3 THE COURT: Sustained.

4 BY MR. BOSTWICK:

5 Q Mr. Malley, did you tell Dr. MacDonald anything about
6 your considerations regarding the Government's strategy
7 about a sodium amytal?

8 A Yes, I did.

9 Q And what did you tell him?

10 A Well, pretty much what I said, that if we realized
11 that this could be a game; that if we played and the test
12 came out fine, and the prosecutors said, "Fine. We're
13 awfully sorry about this whole affair," that could happen.
14 But that wasn't likely to happen, because the prosecutors
15 were not in that kind of mood. They were in the mood to
16 indict.

17 And we were not sure, in fact, we were pretty
18 sure that even if he had taken the test at that stage, the
19 prosecutors would have just ignored it and sought an
20 indictment anyway.

21 MR. KORNSTEIN: Your Honor, I move to strike
22 unless that's what he said to Dr. MacDonald. If we're
23 starting just to get his internal thoughts, I'd move to
24 strike that.

25 MR. BOSTWICK: Your Honor, I don't understand

1 on what grounds he can't describe his own personal thoughts.

2 THE WITNESS: Well, those are not my --

3 MR. KORNSTEIN: Your Honor. Wait. Excuse me.
4 The objection is that he's describing the thoughts of
5 third persons. He's now speculating as to what was going
6 on in the mind of other people.

7 THE COURT: I don't think that was your
8 question. I think your question was, what did he advise,
9 not what his thoughts were.

10 MR. BOSTWICK: That's true, your Honor.

11 THE WITNESS: And I was answering that question,
12 I thought.

13 THE COURT: So that's what you did advise.

14 THE WITNESS: The advice didn't come in a little
15 written opinion initially. It came by discussing it; but
16 it was discussed, and those very considerations, in my
17 recollection, all were discussed.

18 BY MR. BOSTWICK:

19 Q Did you advise Dr. MacDonald on how he should tell the
20 Grand Jury what his decision was with respect to the sodium
21 amytal?

22 A Yes. We -- by we I mean Bernie and I -- both discussed
23 with him that, you know, it's one of those things you tell
24 a Grand Jury. And this is what we told him: You go back
25 in. You, Jeff MacDonald, tell the Grand Jury no, you're not

1 going to take this truth serum test that the prosecution
2 has told about, they're going to wonder why.' And we
3 decided --

4 MR. KORNSTEIN: Move to strike, your Honor,
5 unless this is exactly what was said. The question was
6 what was said --

7 THE COURT: Are you recounting for us what you
8 and Bernie Segal said to Dr. MacDonald?

9 THE WITNESS: Yes, sir, I am.

10 THE COURT: All right.

11 THE WITNESS: So we think we ought to be able
12 to give you something, at least to try to inform the Grand
13 Jury other than in your own words, why it is that your
14 lawyers don't want you to take the test.

15 BY MR. BOSTWICK:

16 Q Did you give him something to take in?

17 A Yes.

18 Q Was it a statement that was written?

19 A Yes.

20 Q After Dr. MacDonald went back into the Grand Jury room,
21 did he come back out and tell you that he had read the
22 statement?

23 A I believe he did, yes.

24 Q Was there anything more to do with sodium amytal in the
25 Grand Jury proceedings that you know of for the balance of

1 1974?

2 A No.

3 Q Did you personally do any further investigation as to
4 whether it would be advisable to have a sodium amytal test?

5 A I did -- I had discussions with Mr. Segal. I don't
6 think I did any what you call investigation. But I had
7 discussions with him, yes.

8 Q Did the two of you change your mind about the advice
9 given to Dr. MacDonald to refuse to take the test?

10 A Yes.

11 Q When did that happen?

12 A It happened-- that's why I hesitated about your
13 question -- it may have been very late in 1974, around
14 Christmas time, or in early '75; but in any event, around
15 that time. We concluded that because we had -- at least
16 Bernie and I had talked to a psychiatrist who was willing
17 to administer the test, who said, well, if it's necessary,
18 it's necessary, and I'll go ahead and do it.

19 We came to the conclusion that if that's what
20 the Grand Jury wanted, that that's what they were going to
21 get.

22 Q In spite of the dangers?

23 A In spite of at least the dangers I perceived, yes.

24 Q Did you talk to Dr. MacDonald about that?

25 A Yes.

1 Q Did you tell him that that was the conclusion you and
2 Mr. Segal had come to?

3 A Yes.

4 Q Did he object?

5 A Well, he wasn't happy; but he said he would do it.

6 Q Did you advise the Grand Jury or advise Dr. MacDonald
7 to advise the Grand Jury of that decision shortly after it
8 was made?

9 A Yes.

10 Q Do you recall how the Grand Jury was advised of that?

11 A My recollection is that a telegram was sent, I think,
12 by Mr. Segal to -- I don't know whether it was addressed
13 to the Grand Jury foreman or whether it was addressed to
14 the prosecutors, but it was addressed to somebody, saying
15 he would take it.

16 Q You said that Dr. MacDonald testified a second time
17 before the Grand Jury. Was that in late January?

18 A I believe so.

19 Q And at that time, did the Grand Jury make another
20 request that Dr. MacDonald take a sodium amytal?

21 A I believe they did.

22 Q Do you recall Dr. MacDonald communicating that request
23 to you and Mr. Segal?

24 A I believe so, yes, sir.

25 Q Do you know what you told him at that time?

1 A I think that's the time we said, let's do it.
2 Dr. Sadolf if willing to do it. We'll make arrangements
3 that had to be done.

4 Q Did you participate in making any arrangements to
5 have the test taken?

6 A I think the only arrangements I participated in was
7 essentially travel arrangements. I think I was going to
8 be there in Philadelphia where it was going to be done.
9 But I, myself, did not arrange the operating room or
10 anything else, no.

11 Q Did you already have reservations to be in
12 Philadelphia?

13 A I believe I was in the process of making them, yes.

14 Q And the mailgram was sent to the Grand Jury or the
15 foreman, you say?

16 A I think that's who it was sent to, yes, sir.

17 Q Why wasn't the test taken?

18 A I believe the Grand Jury returned an indictment before
19 we could have the test taken.

20 Q You testified that you worked then on certain appeals
21 and other proceedings that were going on after the
22 indictment up to the trial in 1979. Let's jump up to 1979.
23 When was the first time you ever heard of Joe McGinniss?

24 A It was sometime, I think, in late spring of '79.

25 Q Who did you hear his name from?

1 A I heard it -- I can't say who first -- around the
2 same time I heard it both from Bernie and from Jeff.

3 Q Why don't you tell us what Dr. MacDonald said to you
4 about Joe McGinniss?

5 A Well, I remember talking to Jeff, and he said he met
6 this guy, Joe McGinniss; and that Joe had known Bernie back
7 in Philadelphia; and Joe had come out to his place and
8 talked to him; seemed like a nice guy and seemed interested
9 in doing a book. That's in a nutshell what I recall from
10 my first conversation with Jeff about Joe.

11 Q Did Dr. MacDonald say to you that Joe McGinniss was
12 the right kind of guy to do a book that found Dr. MacDonald
13 innocent?

14 A No.

15 Q Did he ever say anything like that to you?

16 A No.

17 Q Did he ever tell you that he had made a deal with Joe
18 McGinniss that McGinniss would write a book that concluded
19 that Dr. MacDonald was not responsible for the deaths of
20 his wife and children?

21 A No.

22 Q Is that true up to today?

23 A It's true up to today.

24 Q On the first occasion that you talked to Bernie Segal
25 about Joe McGinniss, what did Bernie tell you about him?

1 A I think Bernie told me pretty much the same thing.
2 My recollection is that Bernie told me a little bit more
3 about how he met Joe. I think there was some case that
4 Bernie had been involved in in Philadelphia, and he covered
5 it -- it had to do with a fraternity house fire or
6 something, but my recollection about that is pretty hazy.

7 Anyway, he said that Joe seemed to be a pretty
8 good guy, and that he was interested in this. And I think
9 it was Bernie who mentioned to me -- I probably already
10 knew it, but he mentioned to me that Joe had written a
11 book called "The Selling of the President" in 1960. And
12 then it dawned on me who Joe McGinniss was.

13 Q You may have your year wrong, but that's all right.

14 A I may have my year wrong.

15 Q On the occasion that you talked to Dr. MacDonald about
16 Joe McGinniss, the first time, did you express any reaction
17 to this idea of having Joe McGinniss write a book?

18 A I expressed a reaction, not about Joe in particular,
19 but about writers in general. That while I understood the
20 need and the desire to have a book written, that I was from
21 the beginning -- and was to that day -- continually
22 skeptical about that process; and that my opinion about
23 that hadn't changed; and I basically said, if you're going
24 to do something like this, you're going to have to be
25 careful because the press to date had been particularly

1 fair about the MacDonald case, from my point of view. And
2 I didn't like him. That wasn't directed at Joe, that was
3 directed in general at the process of writing about the
4 case.

5 Q Did Dr. MacDonald say anything to you in response to
6 your warnings?

7 A I don't recall whether he said anything then. He said,
8 when those warnings came up, in general that he understood
9 it, but the case had become very expensive and he needed
10 some kind of help on his defense. And also, frankly, he
11 said he wanted his side of the story told.

12 And I do remember when, you know, when Joe
13 specifically came up, Jeff said he liked him and felt Joe
14 would be a very fair, sympathetic guy.

15 Q When was the first occasion you met Joe McGinniss?

16 A The first time I met him, I believe, was at a
17 fundraising party just before the trial that many of Jeff's
18 friends put on in -- I can't remember whether it was
19 Huntington Beach or Long Beach. It was down there someplace.
20 And I flew over from Phoenix to go to it, and I met Joe
21 at that party.

22 Q Did you talk to him?

23 A Yes.

24 Q Do you recall anything you said to him at the time?

25 A I recall it was just pleasantries, but I do recall --

1 I'm sure there was a smile on my face -- but I do recall
2 telling him that I wasn't particularly enthused about
3 having a writer around all the time; but that he shouldn't
4 take it personally, because that's just in general what I
5 was saying. But, you know, he seemed very pleasant and I
6 liked him, and I was not adamant about that.

7 Q Who had put on this fundraiser?

8 A My recollection was, it was a group of Jeff's friends
9 made up of, I think there were some policemen, and there
10 were people from his hospital; and I think there were some
11 firemen involved; and friends. I don't remember all the
12 people on the committee who put that on.

13 Q Did you see any movie stars there?

14 MR. KORNSTEIN: I object, your Honor.

15 THE COURT: Sustained.

16 BY MR. BOSTWICK:

17 Q Mr. Malley, at the time you talked to Mr. McGinniss
18 at the fundraiser, had anyone told you that an agreement
19 had been entered into to write a book?

20 A No.

21 Q Did you know from any source whether there were other
22 writers who were being talked to?

23 A Yes.

24 Q Who told you?

25 A I believe both Jeff and Bernie, if not that night, at

1 least prior to that had told me there had been other
2 writers interested and had been talked to.

3 Q When was the next occasion that you saw Joe McGinniss
4 or had any contact with him at all?

5 A It was in North Carolina a few days before the trial
6 started.

7 Q Would you describe for the jury what your role was, as
8 you understood it, at the trial itself, so we've got that
9 clear before we talk any more about Mr. McGinniss?

10 A Yes. I was asked by both Jeff and Bernie to come to
11 North Carolina to essentially do what I did at Fort Bragg,
12 but with some modifications. I helped them review evidence
13 that we expected would be put on by the Government. I
14 helped them interview witnesses that we expected we would
15 put on. I helped coordinate the activities of our
16 investigators such as they were.

17 I tried to keep the motions practice going.
18 There were lots of papers that were filed with the court;
19 and I tried to help do that. And I tried to -- by that
20 time, since I had been involved in the case longer than
21 anybody else except Jeff and Bernie, there was another
22 lawyer, there was a North Carolina trial lawyer -- I tried
23 to bring these other people up to date on what had
24 happened in the intervening seven or eight years.

25 Q Who was the attorney that was from North Carolina?

1 A A man named Wade Smith.

2 Q He hadn't been on the case earlier?

3 A No. Wade was retained, I believe, in spring of '79 to
4 be the local trial counsel with Bernie because Bernie
5 wasn't from North Carolina.

6 Q Did you provide him with information about the
7 investigation that you had conducted in 1970?

8 A Oh, yes. .

9 Q Was Perry MacDonald there in North Carolina?

10 A Yes, she was.

11 Q What was her role?

12 A Well, Perry did whatever she could. I mean, she took
13 people's laundry to the cleaner's, and she shopped, and
14 she ran errands, and she picked people up at the airport.
15 It was a very, very busy time and Perry just tried to do
16 whatever she could to be helpful and to lend moral support
17 as well.

18 Q Did you attend the trial sessions?

19 A I attended some of them. I didn't go every day, but
20 I attended some of them.

21 Q Was there a reason that you didn't attend all of them?

22 A Yes. A lot of what I was doing was getting ready
23 essentially for the next day. And so, not only was my
24 presence in court not needed, it would have been counter-
25 productive because I wouldn't have been doing what I was

1 supposed to be doing, that is, getting things ready to go
2 the next day.

3 Q When did you arrive in North Carolina? In relation
4 to the trial?

5 A I think it was three or four days before it started.

6 Q Did anyone tell you before you got there that Joe
7 McGinniss was going to be there?

8 A Yes.

9 Q Who told you that?

10 A Jeff and Bernie did, both of them.

11 Q What did Dr. MacDonald tell you about the fact that
12 Joe McGinniss was going to be there during the trial?

13 A Well, he told me that Joe was not only going to be
14 there, he was going to live in this fraternity which we were
15 going to live in. That's pretty much what he told me, that
16 he would be around for the whole trial.

17 Q Did he tell you that he was going to write a book?

18 A I believe he did. I believe he said that he and
19 Bernie had decided on Joe as the writer for the book.

20 Q Did you respond in any way to Dr. MacDonald when he
21 told you that Joe McGinniss would be there during the trial?

22 A Yes.

23 Q What did you say?

24 A I said I was very unhappy about it. And again, it
25 wasn't Joe personally, it was the idea of having a writer

1 around during the planning of defense strategy and just
2 getting ready for trial. I didn't like the idea of having
3 a writer around.

4 Q Did you express that same reservation to Bernie Segal
5 when he told you Joe McGinniss would be there?

6 A I think I may have been more emphatic with Bernie, yes.

7 Q Did you tell Bernie Segal in legal terms why you didn't
8 want to have a writer there?

9 A Well, we did -- we had a discussion about the
10 attorney/client privilege, and how I felt that if Joe were
11 there all the time, we had a real problem about whether
12 we had waived the attorney/client privilege.

13 Q What does that mean?

14 A It means that in the course of the preparations for
15 trial, in the process of giving advice and in having your
16 client asking for advice, there is a privilege that
17 attorneys have, actually clients have. The privilege is
18 that anything you say to your attorney isn't going to go
19 beyond the attorney and the client, unless the client
20 agrees to it. But if there is an outsider present, somebody
21 who doesn't belong to the defense team, the privilege is
22 waived. And Joe, to me, clearly seemed to be an outsider,
23 and I simply didn't like it.

24 Q When you say a privilege would be waived, do you mean
25 you could no longer keep the conversations secret?

1 A You could only keep it secret if everybody agreed to
2 keep it secret and if the prosecution didn't have some way
3 of trying to pry it out of the defense. But there would be
4 no legal way that I saw of keeping it secret if somebody
5 really wanted to make an issue out of it. So I was not
6 happy that Joe was -- and again, it wasn't personal with
7 Joe, it was just having a writer around.

8 Q Did Mr. Segal tell you that he agreed with your views
9 on that?

10 A He told me that he was prepared, and so was Joe, in
11 fact, I think they were negotiating, to work out an
12 agreement whereby Joe would become part of the defense team,
13 such as a paralegal -- as I think you have a paralegal here
14 in court. Those people share in the attorney/client
15 privilege because they work for the defense. And Bernie
16 said that he believed that Joe could be made part of the
17 defense team, such that the problem that I saw wouldn't
18 exist. And I said, well, I hope so, because I'm just not
19 comfortable with it.

20 Q Before you arrived at Raleigh, North Carolina, did
21 you have any further conversations with either Dr. MacDonald
22 or Professor Segal about the fact that Joe McGinniss was
23 going to be there in the Kappa Alpha House?

24 A I can't recall any others, other than what I have
25 talked about. I think both of them -- I think one of them

1 was over the phone. I think the one with Bernie was over
2 the phone, and the one with Jeff, I think, was face to face.
3 But I can't recall any others.

4 Q When you arrived in North Carolina, did you live in
5 the Kappa Alpha House?

6 A Yes, I did.

7 Q And did Mr. McGinniss arrive before or after you?

8 A I can't be certain. I think he arrived shortly after
9 I did, but I -- it was within a day or so, and I really
10 can't be certain whether he arrived before or after I did.

11 Q Did you talk to him shortly after either he arrived
12 or you arrived, whoever arrived first?

13 A Yes.

14 Q Do you recall what you said to him on the first
15 occasion?

16 A No. Again, I think it was just pleasantries, about,
17 you know, the weather and what an awful place this was.

18 Q Were you able to observe Mr. McGinniss over the course
19 of the next several weeks as he lived in the Kappa Alpha
20 House?

21 A Yes.

22 Q Why was that possible?

23 A Well, I saw him everyday, except for a few days that
24 I wasn't there. I had to leave for a day or two for
25 business. And I think he was not there for a couple of

1 days. But in general I saw him every day. I ran with him
2 at Night Cave (phonetic) sometimes.

3 Q You ran with him?

4 A Yeah. I ran with him -- he and Jeff and I, and
5 sometimes Wade Smith would go running at a track in the
6 evenings, and I must confess I am the slowest of them. So
7 lots of times I didn't keep up with them, but, yes, I ran
8 with them.

9 Q Did you eat together?

10 A Yes.

11 Q Was that generally the habit that the meals were
12 shared there?

13 A Yes.

14 Q What other kinds of opportunities did you have to
15 observe Mr. McGinniss over that course of time?

16 A We had lots of conversations, sometimes with other
17 people present, sometimes just between him and me. I mean
18 we became friends over that period of time.

19 Q Did you consider him a friend?

20 A Yes, I did.

21 Q Did he ever tell you that he considered you a friend?

22 A Yes, he did.

23 Q Did you ever express your reservations during the trial
24 to him of his being there?

25 A I think very early on -- and it would have been within

1 the first couple of days -- I told him probably not as
2 bluntly as I had told Jeff and Bernie, that I was not
3 comfortable in having -- again, I'm pretty sure I said it's
4 not you personally, because I like you, but I'm just not
5 comfortable in having somebody around all the time.

6 But by that time, I was much less uncomfortable
7 because I think there had been some kind of arrangement
8 worked out or it was in the process of being worked out.

9 Q Did Mr. McGinniss tell you that?

10 A No, he never told me -- he didn't tell me that until
11 after the deal had been done. Bernie told me that, and
12 Jeff told me that. So, since I wasn't part of that
13 negotiating process, I didn't know exactly what had been
14 worked out until it was done. By that time I knew what had
15 happened.

16 Q Did you observe Mr. McGinniss spending a good deal of
17 time with Dr. MacDonald?

18 A Yes.

19 Q How many hours a day would you estimate you saw them
20 together?

21 A I would say on a typical day it was, you know, an hour
22 in the morning before court, and three or four hours in the
23 evening. Not always exclusively, but Joe was around, and
24 he was always around Jeff; not always, but most of the time
25 he was around Jeff.

1 Q Did that concern you that he was spending too much
2 time with Dr. MacDonald?

3 A No.

4 Q Did it relieve you?

5 A Yes.

6 Q Why?

7 A Well, at some point I didn't want to be the only
8 reservoir of sympathy that Jeff had. At Fort Bragg, because
9 of just the way things were, sometimes because Bernie
10 wasn't there and Jim Dalfitt, the other military lawyer,
11 went home at night. Sometimes I spent two or three hours
12 an evening with Jeff. And while it certainly tightened our
13 friendship, it was also very, very hard on me. And I
14 didn't want to go through that again in North Carolina that
15 he had just only me to talk to. And Joe filled the bill
16 nicely. I mean he and Jeff wound up, from my observation,
17 being as close as Jeff and I were at Fort Bragg.

18 So, they had each other to talk to, and I could
19 concentrate on what I was trying to do. I mean, I didn't
20 back off from Jeff, but I wasn't there to be a friend.

21 Q Could you describe a typical court day, in terms of
22 the schedule and how the logistics of the day would work?

23 A Yeah. The court started about 10:00, my recollection
24 is. Maybe it was 9:30, I'm not sure. Generally the --
25 Bernie and his young assistants, his young lawyers -- some

1 were not lawyers -- and Jeff, and Joe, and his mother, and
2 sometimes I, and sometimes not, would pile into -- we'd have
3 breakfast and talk about the day. And then we'd get into
4 these Rent-a-cars that we had and drive to court.

5 Sometimes I would go to the office. We had an
6 office there, and I would get dropped off at the office
7 and work. But mainly, in general, the rest of them would
8 usually go to court. And they'd sit through court. They'd
9 break for lunch. Fairly often, at least when I was there,
10 reporters would be there. There were reporters everywhere.

11 And fairly often, Bernie and Jeff, and I'm not
12 sure about Joe, I think occasionally Joe would have lunch
13 with either reporters or by themselves. Sometimes they
14 would be -- you know, lunch was much more flexible. Court
15 would start again in the afternoon. I didn't Joe too much
16 during the day, because I think Joe spent most of his time
17 in court, and a lot of times I did not.

18 Court went to late afternoon. They'd break,
19 everybody drive home back to the fraternity house. And
20 we would talk about the day, talk about what was going to
21 happen the next day.

22 Q Did you fix yourself a drink?

23 A That's for sure.

24 Q Did everybody else fix themselves a drink?

25 A Sure.

1 MR. KORNSTEIN: Objection, your Honor --

2 THE COURT: Sustained.

3 MR. KORNSTEIN: Relevance.

4 BY MR. BOSTWICK:

5 Q How late in the evening would the conversations
6 typically go on on a night before a court day?

7 A Eleven, sometimes midnight.

8 Q Would there be defense strategy sessions in the
9 evening?

10 A Yes.

11 Q In the Kappa Alpha House?

12 A Yes.

13 Q Sometimes were there defense meetings that took place
14 in the office as well?

15 A Sometimes. That tended to be more, I think, on
16 weekends and off days, you know, before off days. But
17 sometimes they were in the office. Usually, though, it was
18 more in the fraternity house. I mean, we had -- we would
19 bring home stuff to work on in the evenings, so we -- to
20 get ready for the next day.

21 Q During those conversations and defense meetings, did
22 you ever observe Mr. McGinniss to be present?

23 A Yes.

24 Q On how many of those occasions would you say?

25 A Well, as I said, I think he was there almost every

1 night he was physically there. It's very hard to recall .
2 when Joe wasn't around. And as I said, the only times that
3 I'm pretty sure he wasn't around, I think he went home for
4 a day or two. And I know that I was gone for a day or two.
5 So those days I can't speak for, but all the days I was
6 there that he was there, he was around.

7 Q Was he allowed to speak at those meetings?

8 A Yeah.

9 Q Did he make suggestions?

10 A I don't recall suggestions in a sort of lawyer-like
11 way. I recall sort of comments about how people looked,
12 and how witnesses performed, and things of that sort.

13 Q Did he ever say anything about how he thought Helena
14 Stoeckley had performed?

15 A Yes.

16 Q Do you recall what he said about her?

17 A Well, you mean on the stand or prior --

18 Q Let's split it up. Let's split it up. Make sure we
19 are clear on this. Helena Stoeckley did testify at the
20 trial; did she not?

21 A Yes, she did.

22 Q Did Mr. McGinniss express in your presence at any time
23 an opinion of her testimony?

24 A Yes.

25 Q What did he say?

1 A My recollection is -- and this is a paraphrase --
2 I cannot quote, but my recollection is he said he thought
3 she was lying.

4 Q Did he say why he thought that?

5 A No. I can't really recall. He wouldn't have had to
6 tell me, because we had talked a lot about her and I kind
7 of, I mean, I shared his views. So, I don't think we would
8 have talked about why.

9 Q When he said that he thought she was lying, what did
10 he say he thought she was lying about?

11 A That she couldn't recall where she was that evening.
12 That was the -- that was the point -- it was the most
13 critical point about her testimony. Because she talked
14 about everything that happened that evening up to the time
15 of the crimes, and then she said she didn't have any memory
16 after that. That's oversimplifying, but that was the net
17 effect.

18 Q Did Mr. McGinniss express to you at any time his
19 opinion of Helena Stoeckley outside the courtroom?

20 A I'm sorry. Do you mean when he was outside of the
21 courtroom or --

22 Q No. I'm sorry, when she was outside the courtroom.

23 A It's hard to say opinion. He sat in when Bernie
24 Segal interrogated her before her court appearance. And
25 after that he indicated to me he thought she was an

1 incredibly evasive person. I think that's a summation,
2 I think, of what he expressed to me.

3 Q Did he ever express an opinion to you as to whether
4 he believed that she had been in the house at 544 Castle
5 on the night of February 17th, 1970?

6 A I don't think he said that. I mean, I inferred that,
7 but I don't think he said that.

8 Q You were not included in the group that interrogated
9 Helena Stoeckley before her court appearance?

10 A No.

11 Q Did Mr. McGinniss report to you any questions or
12 comments that he had suggested to Mr. Segal during that
13 interview?

14 A No. If he did, I don't recall. He reported in
15 general what happened. He told me, because I was not there.
16 That was by design. But I don't recall whether he told me
17 that he suggested some questions or not.

18 Q What did he report to you about that interview?

19 A He told me that -- basically he said that he thought
20 Helena had made a fool out of Bernie. That was the bottom
21 line, that he thought that Bernie had tried very hard to
22 break her; and that she almost kind of -- she seemed to
23 kind of enjoy leading him right up to the point where she
24 was going to say something definitive, and then backing off.
25 And he indicated to me that he thought that Bernie had not

1 done a particularly good job of dealing with her.

2 Q Did he ever describe to you at any other time during
3 the trial, what his opinion was of Mr. Segal's performance?

4 A Yes.

5 Q On how many other occasions?

6 A Well, as the trial wore on, it became increasing. And
7 I must confess -- I mean, I can't answer that question. It
8 was several.

9 Q Did he express to you at any time that he felt that
10 Professor Segal was not conducting the case properly?

11 A I don't think he ever used the word "properly." He
12 indicated he didn't think Bernie was doing a particularly
13 effective job.

14 Q Did he tell you that he thought Dr. MacDonald could
15 get a better defense from someone else?

16 A He indicated from time to time that he really thought
17 Wade Smith would have been much more effective a lawyer
18 than Bernie was in that court.

19 MR. BOSTWICK: Your Honor, we've reached a
20 break in the subject matter to a certain extent. If you
21 find this a convenient time.

22 THE COURT: All right. Very well, we'll take
23 our noon recess.

24 Ladies and gentlemen, today we're only going
25 to take a one-hour recess, and we are going to adjourn at

1 4 o'clock because I have a Rules Committee meeting to
2 attend at 4 o'clock. So, we'll resume at 1:00 p.m. today
3 rather than 1:30. You're excused until then.

4 (Noon recess.)
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1 LOS ANGELES, CALIFORNIA; WEDNESDAY, JULY 15, 1987; 1:00 PM

2 - - -

3 (In the presence of the jury:)

4 THE COURT: Mr. Malley, you may resume the
5 witness stand, please.

6 DIRECT EXAMINATION (CONTINUED)

7 BY MR. BOSTWICK:

8 Q Mr. Malley, you testified as to the relationship you
9 observed between Mr. McGinniss and Dr. MacDonald. Did you
10 have the opportunity to establish a friendly relationship
11 with Mr. McGinniss during the trial?

12 A Yes, I did.

13 Q What was the first occasion that you can recall where
14 you spoke with him about the subject matter of the case?

15 A Well, in general, probably the first time I saw him,
16 whenever that was. But in particular about what the
17 defense was going to do, what we thought the prosecution
18 was going to do, what the trial was going to look like,
19 probably not until I was told that he had signed an
20 agreement with Jeff and Bernie to be part of the defense
21 team.

22 Q Did you ever see the agreement?

23 A I have since the trial. I'm not sure that I ever
24 saw -- I guess I did see it before the end of the trial.

25 Q Let's show you Exhibit 7, if we could. It's in

1 Volume I.

2 THE CLERK: Exhibit 7 before the witness.

3 BY MR. BOSTWICK:

4 Q Do you have Exhibit 7 in front of you, Mr. Malley?

5 A Yes, sir, I do.

6 Q Do you recall seeing that document at any time during
7 the trial?

8 A Yes, I do. I saw it sometime after it was signed.
9 I'm not sure exactly when, but sometime while the trial
10 was still going on.

11 Q Did you see this form signed with anyone other than
12 Mr. McGinniss' name filled in, and signed by anyone other
13 than Mr. McGinniss?

14 A Did I personally?

15 Q Yes.

16 A No.

17 Q Did you see the blank form there in the Kappa Alpha
18 House at any time?

19 A I can't be sure. It seems to me that I did, but I
20 really cannot be sure.

21 Q Did you say that Professor Segal told you that
22 Mr. McGinniss had signed the Employment Agreement?

23 A Yes.

24 Q Did you refrain from discussing the subject matter
25 of the case until you heard that?

1 A The details of the case?

2 Q Yes.

3 A Yes.

4 Q Why did you do that?

5 A Because in my own mind I was -- I'm just maybe more
6 conservative than Bernie was, but I was not sure, and again,
7 it had nothing to do with Joe personally. I just felt
8 reluctant to discuss defense strategy with anyone outside
9 of the defense team until I knew there was some kind of
10 an arrangement that would protect the attorney/client
11 confidences.

12 Q Did you ever tell Mr. McGinniss what your concerns
13 were at the trial in talking to him?

14 A I think right after I -- it was right after both of
15 us got there, and it was before the trial started. I'm
16 sure that I mentioned to him in passing, but I was --
17 again, I'm sure that I said it's nothing personal, but I
18 was uncomfortable about it; but that I understood it was
19 being worked out, because that's what Joe -- I mean Jeff
20 and Bernie were telling me.

21 And so that I, you know, I told him as soon as
22 I find out it's been done, I'll be glad to talk to you,
23 because you're going to be part of the team and they seem
24 to be very comfortable with you; and I am, too, in a
25 sense that I am personally comfortable with you.

1 Q Did you talk to Mr. McGinniss throughout the trial
2 after you found the agreement had been signed?

3 A Yes.

4 Q Did you talk to him about the defense strategy?

5 A Yes.

6 Q Did you talk to him about the defense theories that
7 were going to be used or being considered?

8 A Yes.

9 Q Would you have done that if you hadn't been told the
10 work agreement had been entered into?

11 A No.

12 MR. KORNSTEIN: Objection, your Honor.

13 THE COURT: Grounds?

14 MR. KORNSTEIN: Hypothetical.

15 THE COURT: The grounds of your objection is
16 it's a hypothetical question?

17 MR. KORNSTEIN: Yes, sir.

18 THE COURT: Is there anything improper about
19 asking a hypothetical question?

20 MR. KORNSTEIN: To someone who's not an expert,
21 yes. It's speculative.

22 THE COURT: We have a licensed attorney on the
23 witness stand. Are you suggesting he's not an expert?

24 MR. KORNSTEIN: But he's not being asked a
25 question of law. He's being asked a question of -- in fact,

1 he's being asked, would he have done something if something
2 else had not happened.

3 THE COURT: Maybe you're asking -- maybe it's
4 speculation that you're talking about.

5 MR. KORNSTEIN: Qualify my grounds, the question
6 is objectionable because it's speculative.

7 THE COURT: Sustained.

8 BY MR. BOSTWICK:

9 Q Mr. Malley, in your own mind, did you reserve any
10 discussion with Mr. McGinniss until you knew that there was
11 a work agreement signed?

12 A Yes.

13 Q Did anyone at any time tell you that the work agreement
14 had been rescinded or withdrawn?

15 A No.

16 Q After you knew the work agreement had been entered
17 into, did you have discussions on a regular basis with
18 Mr. McGinniss about the case?

19 A It was more than regular. It was continuing, because
20 he was there all the time, I was there all the time. We
21 didn't schedule these things on a regular basis; we saw
22 each other every day, and sometimes several times a day;
23 and the primary topic of conversation was the trial and
24 what we were doing about it.

25 Q Did McGinniss report to you anything that was happening

1 in the courtroom?

2 A Yes.

3 Q On those days that you weren't there, did he tell you
4 testimony that had occurred from witnesses?

5 A Sometimes he did, sometimes he would talk about his
6 impressions of how Bernie had done that day, what the judge
7 had done that day. Sometimes the judge was the primary
8 topic of conversation and I think shared the topic pretty
9 often.

10 Q Did Mr. McGinniss express to you any feelings that
11 the criminal trial judge was biased in any way?

12 A Yes.

13 Q What did he say to you about that?

14 A He, you know, pretty much joined in conversations
15 with me, and sometimes face to face, where we talked about
16 Judge Dupree's obvious -- at least from what we could tell
17 just by looking at him -- dislike for Bernie and his
18 fairly obvious distaste for the whole case that we were
19 presenting, we being the defense.

20 And Joe would generally bring the conversations
21 around to "But that wasn't Bernie provoking him." And I
22 would generally defend Bernie and say, "No, I don't think
23 Bernie is provoking him. I think the judge just doesn't
24 like him. It's a tough job being in there every day with
25 the judge that doesn't like you. And Bernie's kind of

1 doing the best he can."

2 Those conversations went on all the time. As to
3 individual witnesses, sometimes I would ask, if I wasn't
4 there that day; sometimes I would ask how a witness did.
5 Sometimes he'd just volunteer it. Generally, we'd just
6 talk about the trial, what happened that day, and what was
7 going to happen the next day.

8 Q During the period of the trial, did you tell him or
9 did you hear anyone else tell him the basic elements of
10 the defense strategy?

11 A Yes.

12 Q What did you hear him being told, or what did you tell
13 him yourself?

14 A Well, if you want it separately. I can actually
15 separate them, if you want and --

16 Q Mr. Malley, I'm sorry. It sounds like you're objecting
17 to my question on the grounds that it is compound. And
18 that's the trouble with having a litigator on the stand.

19 A I'm sorry.

20 Q Did you hear anyone else tell Mr. McGinniss -- I'll
21 sustain your objection. Did you hear anyone else tell
22 Mr. McGinniss what the basic elements of the trial strategy
23 were?

24 A Yes.

25 Q What did you hear him being told?

1 A Well, I heard Bernie and Wade Smith essentially set
2 forth our strategy, and our strategy was that A), the
3 Government's physical evidence was weak because it had
4 been so badly handled when it was gathered that you couldn't
5 trust it; B), our evidence was going to be -- to some
6 extent we were going to be able to show that. Also our
7 strategy was simply to show that, because the prosecution
8 had announced in open court in their opening statement
9 that if we prove that this man did it, we don't have to
10 prove why he did it or he's the kind of man who could have
11 done it.

12 We thought that was a very unsatisfying view
13 of life to give to a jury, and we were going to spend a
14 lot of time -- if the judge would let us -- trying to prove
15 what kind of man Jeff MacDonald was, to prove he was not
16 the kind of man who could have done this crime.

17 Q Did Mr. McGinniss participate in sessions in which
18 that was discussed on more than one occasion?

19 A Yes.

20 Q How many hours would you say you spent in Mr. McGinniss'
21 presence over the course of the trial?

22 A As I said, it's really hard to estimate. It was the
23 better part of, you know, morning, early mornings and
24 evenings for six or eight weeks, however long we were there.
25 I can't give you a number without --

1 Q Did he ever ask you for any documents?

2 A No. I don't recall his specifically asking for
3 documents.

4 Q Did you ever --

5 A I mean we had documents present and he looked at a lot
6 of them, but I don't recall his asking for any.

7 Q Do you know of anything at the trial that was kept
8 from his view?

9 A Do I know?

10 Q Yes.

11 A No.

12 Q Did you ever refuse to answer any questions that he
13 posed to you, or discuss any subjects?

14 A I don't believe so. My recollection is, after I found
15 out this agreement was in place, I answered everything he
16 asked me and talked freely, for two reasons. Partly, I
17 liked him; and partly, he seemed to have everybody else's
18 confidence, that he was part of the defense team.

19 Q Did he know that you had participated in the Article 32
20 investigation?

21 A Yes. At least I believe he did.

22 Q What made you believe that?

23 A For one thing, I told him. But he was pretty
24 conversant, you know. I mean he had the Article 32
25 transcript. I know that he had talked to Jeff and talked

1 to Bernie, and talked to a lot of other people about the
2 Article 32. Even if I hadn't told him, I assume my name
3 would have come up at one point or another.

4 And besides I didn't think, you know, I kind
5 of explained to him why I was there to begin with; that I
6 had a working knowledge of this case that hardly anybody
7 except Bernie and Jeff really had.

8 Q Did he talk to you at any time about your interview
9 of persons in Dr. MacDonald's hometown, in Patchogue?

10 A I don't recall. I don't think he did, no.

11 Q Did he talk to you at any time during the trial about
12 the investigations you had made of persons in order to
13 determine whether a possible motive for the crimes was
14 related to drugs?

15 A I do not recall that conversation ever -- that topic
16 ever coming up with Joe.

17 Q Did he ever ask you either then or any other time
18 about the notes that had been written by Dr. MacDonald that
19 talk about Eskatrol Spansules?

20 A No.

21 Q Even after the trial, he didn't ask?

22 A No. Yes, he did not ask after the trial.

23 Q Did you talk to him about any specific witnesses that
24 you can recall that you haven't testified to here so far?

25 A Specific witnesses?

1 Q Yes.

2 A Well, I recall talking to him at great length about
3 our psychiatric witnesses that we hoped to call. I remember
4 telling him because it was a topic of some sensitivity on
5 Jeff's part, that we were going to put on, if the judge
6 would let us, a lot of psychiatric evidence about what a
7 normal human being Jeff is.

8 And so I talked to him about Sadolf, and
9 Dr. Hallick (phonetic), and I talked to him that we might
10 call the Army psychiatrist that we had called in -- the
11 Article 32 investigator had appointed in 1970. I think his
12 name was Dr. Bailey (phonetic). I talked to him in great
13 length about those, I remember, because it was a topic of
14 great conversation.

15 Q I'd like to show you a copy of Exhibit 402, which is
16 the book itself in hardcover version. We've got a spiral-
17 bound version that's the exhibit.

18 THE COURT: What page are we looking for?

19 THE CLERK: 402 before the witness.

20 MR. BOSTWICK: I'd like to direct the witness to
21 Page 607.

22 THE WITNESS: Okay, I have it.

23 BY MR. BOSTWICK:

24 Q On Page 607, there is the first full paragraph from the
25 bottom, the words "I then found the one document which,"

1 comma, "during trial," comma, "Bernie Segal had not
2 permitted me to see:" colon, "the report of the
3 prosecution's psychiatric team," comma, "based upon their
4 examination of MacDonald in August." Period.

5 Who conducted that psychiatric examination that
6 is being referred to there, that is, the report of the
7 prosecution's psychiatric team?

8 A I believe it was done by a man named Brussels (phonetic)
9 and another man named Silverman.

10 Q Were you present during these psychiatric examinations?

11 A No.

12 Q Were you on any occasion given the opportunity to talk
13 to either Dr. Brussels or Dr. Silverman?

14 A I talked to Dr. Brussels very briefly before the
15 examination.

16 Q Did you talk to him after the examination?

17 A No. I did not talk to him, no.

18 Q Did you talk to Mr. McGinniss after the psychiatric
19 examination?

20 A About the examination?

21 Q Yes.

22 A Yes.

23 Q What did Mr. McGinniss say to you, if anything, about
24 it?

25 A Well, I think he was -- he seemed to be somewhat irate

1 that Jeff's lawyers would have permitted such a thing to
2 go on.

3 Q What made you think that --

4 MR. KORNSTEIN: Move to strike, your Honor --

5 THE COURT: Wait just a minute.

6 MR. KORNSTEIN: Move to strike. Only what was
7 said by Mr. McGinniss, not an impressionistic version of it.

8 THE COURT: Yes, everything other than what was
9 said will be stricken.

10 THE WITNESS: Okay. To the best of --

11 BY MR. BOSTWICK:

12 Q Mr. Malley, what did Mr. McGinniss say about his
13 reaction to the Brussels situation?

14 A To the best of my recollection -- you have to -- the
15 context is that Jeff (sic) came back very angry about this
16 and told us all why he was angry. And I recall Jeff (sic)
17 saying to me and probably to other people, too, "How could
18 you have done something like this?" to -- basically to --
19 to the lawyers, to Bernie. And when Bernie wasn't there,
20 more emphatically to Jeff about how he thought it was
21 total incompetence for Bernie to have let that sort of
22 thing happen.

23 Q Did he describe his reaction to Dr. Brussels?

24 A Did Joe?

25 Q Yes.

1 Q Did you --

2 A It turned out to be maybe a bad call, given what these
3 guys did; but that's why we did it. And I remember telling
4 him at some length that that was our rationale. It's the
5 same rationale we used to let the prosecution at the
6 Article 32 have a psychiatric exam, which turned out to be
7 very helpful to us.

8 Q Did you tell Mr. McGinniss why it was that you felt
9 that your psychiatric reports were sufficiently laudatory
10 to defend against Dr. Brussels'?

11 A Well, first of all, we didn't know what Dr. Brussels'
12 report said. I never saw that thing until Judge Dupree
13 wrote his opinion. But judging by the questioning that
14 Jeff reported to us, we assumed it wasn't going to be
15 very nice. And we did tell -- I remember telling Joe,
16 and other people, too, that would be the law clerks and
17 other people who were there, that Dr. Sadolf who's a very
18 eminent man and very well respected was a very good
19 witness. He would in my opinion present a marked contrast
20 to this guy Silverman -- I mean to this guy Brussels. Joe
21 had met himself, I believe, Dr. Hallick whom we retained.
22 He was at the University of North Carolina.

23 We were considering calling the Army
24 psychiatrist that the prosecution used in the Article 32,
25 Dr. Bailey, and I said Dr. Bailey's a pretty good witness.

1 So we, you know, whatever this guy has found, and I didn't
2 know, but again, I said I assumed that he was -- judging
3 by the tone of his questions -- at least as they were
4 reported to us, I assumed he was a hostile expert.

5 We were willing to go with the experts we had.
6 We were willing to put them on in court, and let the jury
7 decide. Of course, that didn't happen. But --

8 Q Psychiatric testimony was not allowed?

9 A No. The judge would not allow anybody's psychiatric
10 testimony after that.

11 Q Did you tell Mr. McGinniss anything that you had
12 observed about Dr. Brussels?

13 A Yeah, I think I told him that I talked to Brussels
14 for a couple of minutes, just to find out who he was and
15 that Brussels literally -- he was kind of an old man, and
16 he looked decrepit, and he literally drooled. And I
17 remember saying when I first saw that, I was not encouraged
18 by all this. But, you know, that was the limit of my
19 knowledge of Brussels before the examination itself.

20 Q After the examination -- let me back up. I want to
21 go back again to a point to that paragraph on Page 607,
22 where it says -- Mr. McGinniss is speaking there as the
23 author and he says, "I then found the one document which,
24 during trial, Bernie Segal had not permitted me to see."

25 I'd like to ask you a few questions about that.

1 Did you ever hear or observe in any other fashion
2 Mr. Segal refuse to let Mr. McGinniss see any document?

3 A No.

4 Q Did you have a copy among the defense team members of
5 Brussels' report during trial, which it says here on
6 Page 607?

7 A Not to my knowledge, we didn't.

8 Q It wasn't available to you personally?

9 A I never saw it.

10 Q Did Bernie tell you you had it?

11 A No.

12 Q When was the first time you heard of it appearing?

13 A First time I knew that there, not only was there a
14 report, I mean that Brussels actually had written a report,
15 was when I read Judge Dupree's decision denying bail where
16 he quoted from it. I didn't even realize that Brussels
17 had written anything other than, you know, given whatever
18 opinions he had to the prosecutors, because Judge Dupree
19 almost right away, like in the next day, said there was
20 going to be no psychiatric testimony. And I didn't even
21 realize that Brussels had gone back and written a report.

22 Q Can you recall any specific topics that Mr. McGinniss
23 asked you about during the trial regarding the previous
24 ten years' experience that you had on the case? I take it
25 back. Nine years.

1 A I'm sorry?

2 Q Can you recall any questions, any specific questions
3 about any specific items that Mr. McGinniss asked you
4 during the trial about your nine years' experience and
5 investigation on the case?

6 A Well, I recall topics. I can't truthfully say I
7 recall his asking this question, and this was my response
8 on this occasion. But I do recall general topics that we
9 discussed; and I can recall that, you know, essentially
10 what I told him.

11 Q What were those topics?

12 A Well, a lot of them we've already talked about. Some
13 of the topics had to do with, partly, about how Jeff felt
14 about this. Some of it had to do with our views about
15 why we were going to put on psychiatrists; some of it had
16 to do with our views about what the head Government's
17 evidence was; some of it had to do -- I mean, I recall
18 talking to him on several occasions, about Jeff's purported
19 marital infidelities as a reason for the trial, and I
20 remember telling him that that's not an issue anymore; the
21 Government knows about it, they're going to -- they know
22 who some of these people are, but they aren't going to
23 bring them to court. I just know they aren't, and they
24 didn't.

25 I remember having discussions about that,

1 because those kinds of things just, you know, came up.
2 And we were talking to him about -- I remember talking to
3 him at great length about -- Joe kept saying he couldn't
4 understand why this case was even going on, because he
5 thought there was no indictment. And I explained to him
6 the tortuous procedural history of the case, and I did
7 spend a fair amount of time about that. Those are the
8 things that come to mind.

9 Q Would you take a look at Page 510 of the Exhibit 402
10 that you have in front of you.

11 A Yes, sir.

12 Q On Page 510 there are a series of paragraphs beginning
13 with a dash in the top half of the page, the last paragraph
14 beginning with a dash on Page 510, starting with the words
15 that, quote, "when the pajama top was folded as near as
16 possible to the way it was folded," and then it goes on
17 describing a demonstration that was carried out by a man
18 by the name of Stombaugh (phonetic), I believe, at the
19 trial.

20 Do you see that?

21 A Yes, sir, I do.

22 Q Were you familiar with the demonstration that had
23 been made in trial?

24 A Yes, I am.

25 Q Did you observe it?

1 A I observed -- I had seen photographs of it, and I did
2 see the actual demonstration in the courtroom, yes.

3 Q Did you talk to Mr. McGinniss about it at any time?

4 A Yes.

5 Q Did you observe him talking to or listening in meetings
6 in which the defense talked about the defense's
7 countervailing theory to this Stombaugh demonstration?

8 A Yes.

9 Q Did you ever observe him obtaining information that
10 there was a different explanation to the physical evidence
11 than Mr. Stombaugh had set forth?

12 MR. KORNSTEIN: Objection to the question as
13 assuming a fact not on the record. There may have been
14 a different possible theory advanced, but not a different
15 explanation necessarily.

16 THE COURT: Would you read that question back,
17 please.

18 (Record read.)

19 THE COURT: Now, I have to say I don't
20 understand that question. I'd like you to rephrase it.

21 MR. BOSTWICK: Yes, sir.

22 Q Mr. Malley, were you ever present when Mr. McGinniss
23 was able to hear the defense hypothesis explaining the
24 physical evidence regarding the pajama top?

25 A Well, I hate to agree with Mr. McGinniss' counsel,

1 but --

2 MR. KORNSTEIN: Go ahead.

3 MR. BOSTWICK: I hate it, too.

4 THE COURT: I don't understand that question
5 either in that there were explanations about why the
6 Government's demonstration was wrong; I don't recall ever
7 having heard discussions about a different, right
8 interpretation of that, other than the one Jeff gave.

9 BY MR. BOSTWICK:

10 Q Could you tell us whether there was any time where
11 Mr. McGinniss was able to observe the defense team
12 discussing why Mr. Stombaugh's demonstration was wrong?

13 A Yes.

14 Q And on how many occasions did that occur?

15 A Well, again, I can't be precise. It was several, but
16 I'm fairly confident. We had an expert witness from
17 Berkeley, a professor of criminology up there, to
18 essentially give the defense's views about why this
19 demonstration made no sense at all, but it really was that
20 kind of a phony demonstration. And I believe Joe sat in
21 on the preparation of that, and I'm pretty sure he sat
22 through the testimony.

23 Q Did you ever observe him talking to the expert from
24 Berkeley?

25 A I believe he did. I don't have any clear recollection

1 specifically of him talking to John Thorton (phonetic),
2 but John was there a fair amount and Joe was there a fair
3 amount, I presume, I believe that they talked.

4 Q When was the last time you read "Fatal Vision"?

5 A When it first -- right after it came out. I haven't
6 read it since really. No, I take that back. I read it
7 before he wrote a book review about it; and that was three
8 years ago, something like that.

9 Q At the time you read it, do you recall seeing any
10 mention in the book "Fatal Vision" of the defense
11 explanation for why the Government demonstration about the
12 pajama top was wrong?

13 A No.

14 Q Where were you sitting on the day the verdict in the
15 criminal trial was announced?

16 A I was sitting in the front row of the spectators'
17 portion of the court. I think I was sitting next to Joe.

18 Q What was his reaction when the verdict was announced?

19 A Well, I don't know, because I was concentrating on my
20 own reaction.

21 Q Did you have a chance to talk to him or observe his
22 reaction within the next eight or nine hours after the
23 verdict was announced?

24 A Yes.

25 Q Where?

1 A Back at the motel -- we had moved from the fraternity
2 house because the kids were coming back to school. So we
3 had moved into a motel. And I talked to him at some
4 length that evening at that motel.

5 Q What did he say to you?

6 A Well, I think we were both saying to each other how
7 shocked we were. And that's my recollection of what --
8 that's the sum and substance of what he said. The
9 conversation went on much longer than that, but to be
10 honest, I, myself, was kind of emotionally upset and don't
11 remember details. I do remember my clear impression and
12 my clear recollection that he said he was shocked, and I
13 said so am I.

14 Q Did he give you any reason to believe, in your own
15 mind, that he had decided by the time the jury came back
16 that Dr. MacDonald was guilty?

17 A Absolutely none.

18 Q Did he give you any reason to believe that he decided
19 after Helena Stoeckley had left the stand that Dr. MacDonald
20 was guilty?

21 A No.

22 Q Did he ever, at any time, up to the day you read
23 "Fatal Vision," indicate anything to you that made you
24 believe that he believed that Dr. MacDonald was guilty of
25 the crimes?

1 A No.

2 Q Did he give you a copy of his book he wrote?

3 A He gave me a copy of several books he wrote.

4 Q Did he ever inscribe them?

5 A One of them, yes.

6 Q Was that "Heroes"?

7 A Yes.

8 Q Do you recall what he said there?

9 A It was a very friendly inscription. I don't recall
10 the exact words.

11 Q Do you know when he gave it to you?

12 A It was right within a couple of months of the trial,
13 the end of the trial.

14 MR. BOSTWICK: Your Honor, may I approach the
15 witness to --

16 THE COURT: Yes.

17 BY MR. BOSTWICK:

18 Q Mr. Malley, would you take a look at that book and
19 the flyleaf on the inside.

20 A Yes, sir.

21 Q Is that the book that Mr. McGinniss gave you?

22 A Yes, it is.

23 Q Looking at that flyleaf, do you see an inscription
24 from him to you?

25 A Yes, I do.

1 Q Reading it now, does it refresh your recollection as
2 to what it says?

3 A Yes.

4 Q Could you read it to the jury?

5 A It's dated September 7th, 1979. It says, "To Mike,
6 whose friendship provided one of the very few bright spots
7 in a sad and tragic summer." And it's signed
8 "Joe McGinniss."

9 Q Did you feel that same friendship to him at that time?

10 A Yes, I did.

11 Q Did you have any further contact with Mr. McGinniss
12 after the trial?

13 A Yes, I did.

14 Q What type of contact did you have? I'm talking about
15 face to face, telephonic, or written?

16 A All of them.

17 Q How many times did you either write or receive letters
18 from Mr. McGinniss?

19 A After the trial and up to today, a few, three or four.

20 Q In any of those letters, did he ask you any questions
21 about the case that you can recall?

22 A No.

23 Q What did he write in those letters to you?

24 A They were in general about other things. One of them
25 came with this book. It was just, you know, "Mike -- " I

1 think I told him I was having a hard time finding "Heroes"
2 and he sent me a copy.

3 I don't really recall that. But they were
4 generally short letters about -- I think I really can't
5 remember. I know they weren't about the case.

6 Q Did he -- did you have a telephone conversation with
7 him shortly after the trial?

8 A Yes.

9 Q How many telephone conversations with him from the
10 trial up to today?

11 A Ten, something like that.

12 Q Did you talk about the case?

13 A Yes.

14 Q What, if you can remember -- let me ask you this first.
15 Can you distinguish between all ten conversations what was
16 said in Number 1, and Number 6, and Number 2?

17 A No. The only telephone conversation that I
18 specifically remember the contents of, other than, you know,
19 pleasantries. A couple of times I called him, because I
20 was going to be in the Princeton area, I set up an
21 appointment to see him, to spend the day with him. But the
22 one I specifically remember, which was specifically about
23 the case, was a telephone conversation after the argument
24 in the Fourth Circuit on the appeal.

25 And he said I didn't go to Richmond. I was back

1 in Phoenix. I talked to several people and talked to Joé
2 about it. I don't know whether or not he called me or I
3 called him, but we talked about the appeal.

4 Q Do you recall anything he said about it?

5 A In general, I recall his saying that he thought that
6 Bernie had done a pretty good job; and Ralph Spritzer
7 (phonetic), the other lawyer that was handling the appeal
8 seemed to have done a good job. And he told a little job
9 about Fred Kassab and the prosecutor spending an evening
10 together that he observed. I didn't really care about
11 Freddy Kassab. I was more interested in how the panel of
12 the appeals court seemed to be reacting and how the lawyers
13 performed.

14 Q In face-to-face meetings that you had with him, how
15 many were there?

16 A There was at least one. It seems to me there were two,
17 but I know for sure there was one at Joe's house -- it was
18 right outside Princeton.

19 Q When did that occur?

20 A Sometime in the fall of 1979. We spent the night at
21 his house.

22 Q Were you in that area on business?

23 A Yes. I was in Philadelphia, and I had a fairly large
24 antitrust case that was pending in Federal Court in
25 Philadelphia. And Princeton is an hour away. So I had to

1 go for a hearing, and I gave him a call and stopped by to
2 see him.

3 Q What happened on that evening?

4 A Well, he and his wife were very hospitable and cooked
5 dinner, and talked, and drank, and talked, and drank,
6 talked about lots of things.

7 Q Did he talk to you about the case?

8 A Yes.

9 Q Did he ask you anything about Jeff's relationships
10 with women?

11 A No.

12 Q Did he ask you about what they think about Jeff's
13 attitude toward women at all?

14 A No.

15 Q During the entire time that you talked to him and
16 communicated with him, in any way, did he ever talk about
17 Dr. MacDonald's relationship or attitude toward the female
18 sex?

19 A Well, at some point we talked about Jeff's extramarital
20 affairs, because that's part of the concerns I had with
21 the case. But I don't think we ever talked about Jeff's
22 overall attitude toward women, other than Jeff's family.
23 We did talk about Jeff's toward Collette.

24 Q What did you tell him about Jeff's attitude towards
25 Collette?

1 A I told him that from my own personal recollection,
2 which wasn't much because you have to remember that goes
3 back to college, they seemed to be a very happy couple.
4 And that everything that had been found out since then,
5 indicated the same thing. That's why we were never worried
6 the Government was going to put on evidence about an
7 unhappy marriage; in fact, the Government never did.

8 Q Would you look at Page 617 of the exhibit in front of
9 you, 402.

10 Do you have that, Mr. Malley?

11 A 617, yes, sir.

12 Q Do you see at the top there, there's a paragraph
13 starting, "Might it be too much to surmise ..."

14 Would you read that paragraph to yourself, please.

15 A (Complies.)

16 All right.

17 Q Did you ever tell Mr. McGinniss that your investigation
18 had showed that Dr. MacDonald was suffering from the effects
19 of the strain of anything in February of 1970?

20 MR. KORNSTEIN: Objection. It's leading, your
21 Honor.

22 THE COURT: Sustained.

23 BY MR. BOSTWICK:

24 Q Did you, Mr. Malley, at any time tell Mr. McGinniss
25 anything that would counter the surmisa that is set forth

1 there in that paragraph that I just asked you to read to
2 yourself?

3 MR. KORNSTEIN: Objection to the form of
4 characterization of the paragraph.

5 MR. BOSTWICK: You mean it's not a surmisal?
6 I'm sorry.

7 MR. KORNSTEIN: It's a question.

8 THE COURT: All right. Sustained.

9 BY MR. BOSTWICK:

10 Q Mr. Malley, did you ever tell Mr. McGinniss anything
11 at all about the subjects set forth in the paragraph that
12 I asked you to read to yourself on Page 617?

13 A Well, I did tell him about what my view of Jeff's
14 relations with women, as far as I knew, were, yes.

15 Q Did the two of you ever discuss, quote, "psychological
16 maladjustment," close quote?

17 A No.

18 Q Did you talk about boundless rage?

19 A No.

20 Q Did you talk about repressed boundless rage which
21 caused Dr. MacDonald to feel anything towards the female
22 sex?

23 A No.

24 Q Is there anything else you can recall about the trip
25 to Princeton where you visited with Mr. McGinniss?

1 A Well --

2 Q In terms of what you discussed and --

3 A No. As I said, it was kind of a pleasant evening.
4 And we talked about a lot of things; as generally happened,
5 the topic that came up most that I do recall, was
6 essentially Bernie Segal's performance, because Joe, after
7 the trial, at least to me seemed to be more and more
8 convinced that Bernie hadn't done a very good job. And I
9 do recall, that evening talking about Bernie. And I, you
10 know, that I recall at some length; and I recall telling
11 him just what the appeals process was, and what we were
12 going to do on appeal, and that sort of thing.

13 I don't recall any specifics other than that.

14 Q How long did you stay in Princeton?

15 A A day and a half, something like that.

16 Q Did you have discussions the next day, after the
17 evening with the dinner and the drinking, and so forth?

18 A Yeah, but I think we were talking more about -- I don't
19 think we talked much about the case. I think at that
20 point we were talking about Joe's Alaska book, which, as I
21 recall, was in the final stages of the editing process; and
22 Joe's running, and things like that.

23 Q Anything else that stands out in your mind about the
24 next day and a half?

25 A I'm not -- that's what's a puzzle. I'm not sure

1 whether it was that time or a later time; but at any event,
2 during the day we did have lunch, or we were going to have
3 lunch, and Joe got very sick. We had to call an ambulance
4 and have him taken to the hospital. I'm not sure whether
5 it was that time, or there was another time. I really
6 don't recall that.

7 Q Did Mr. McGinniss ever ask you to send him any
8 documents from Phoenix, or wherever you were, regarding the
9 case?

10 A I think he asked me to send him our briefs on appeal,
11 which I did.

12 Q When did he ask that?

13 A Oh, I think it was sort of -- maybe it was around
14 this time, maybe it was a little later. It was one of
15 those things, you know, when it's done, send me a copy;
16 I'd like to see it. I don't know -- that's the fall of
17 1979. The briefs were filed around Thanksgiving, and it
18 was -- it would have been sometime prior to that. And,
19 again, I'm not exactly sure under what context that came
20 up, but I know he asked me to send them, and I did.

21 Q Did you continue to work on the case through 1980?

22 A Oh, yes.

23 Q And 1981?

24 A Yes.

25 Q You still consider yourself a friend of Dr. MacDonald's?

1 A Yes.

2 Q Do you still consider yourself a friend of
3 Mr. McGinniss?

4 A Today?

5 Q Yes.

6 A It's a very hard question to answer. You know, Joe
7 has never done anything to me personally, so I can't say
8 that he has ever personally offended me; but I certainly
9 was absolutely outraged at the book. I consider that to
10 be a real detriment to our friendship.

11 Q Well, what was it about the book that you considered,
12 let us say, outrageous?

13 A Primarily two things. One is his portrait of Jeff,
14 which I believe to be wrong. I mean, just his personality.
15 And the other is the putting forward of a motive by -- or
16 a method by which Jeff would have done this, this
17 drug-induced craziness, which from everything I know, is
18 so contrary to what the facts really are. That -- it's --
19 to me it's just made up.

20 And I consider that to be a serious, serious
21 impediment to friendship.

22 Q Did Mr. McGinniss ever tell you that he was
23 interviewing the attorneys on the other side of the case?

24 A No.

25 Q Did you ever know that he was?

1 A No.

2 Q Did you continue to talk to him and cooperate with
3 him through the period of the appeals until the book came
4 out?

5 A I continued to talk to him; cooperation wasn't really
6 a matter of much import, because -- except for this
7 conversation I had about how the oral argument went at the
8 Fourth Circuit. Our conversations really became very
9 perfunctory and didn't really focus on this case at all.

10 Q If you had known he was talking to the prosecutors,
11 would you have continued to discuss with him the case?

12 MR. KORNSTEIN: Objection. Speculation.

13 THE COURT: Sustained.

14 BY MR. BOSTWICK:

15 Q Mr. Malley, did you continue to believe that the
16 work agreement that Mr. McGinniss had entered into with
17 the defense team in 1979, was in effect throughout the
18 period after the trial?

19 A As far as I knew, it was, yes.

20 Q If you had been told any different, would you have
21 acted differently towards McGinniss?

22 MR. KORNSTEIN: Objection. Speculation.

23 THE COURT: Sustained.

24 MR. BOSTWICK: I have no further questions,
25 your Honor.

1 THE COURT: All right. Mr. Kornstein, you may
2 examine.

3 CROSS-EXAMINATION

4 BY MR. KORNSTEIN:

5 Q Mr. Malley, there was a moment on your direct
6 examination where you said you hated to agree with
7 Mr. McGinniss' counsel, don't let that inhibit you through
8 cross-examination. If you agree with me, feel free to
9 say so.

10 A All right, sir.

11 Q We've never met before today, have we?

12 A No, sir, I don't think so.

13 Q You're a very close friend of Dr. MacDonald; aren't
14 you?

15 A I believe I am, yes, sir.

16 Q And would you say that your becoming involved with
17 Dr. MacDonald as a friend was more, or closer that you'll
18 ever become involved with anyone else again?

19 A I have no way of knowing that. I mean, I certainly
20 got very closely involved personally, you know, with his
21 case and with him; but I have other friends who are very
22 good friends.

23 Q Do you recall writing a document, a letter, or a memo
24 that was over a hundred pages long, typewritten, around
25 1979 about the case and your relationship to Dr. MacDonald?

1 A In 1979?

2 Q Well, at any time.

3 A Yes, I do.

4 Q And when was that?

5 A I recall writing a very long, sort of debriefing of
6 myself --

7 Q Uh-huh.

8 A -- in 1971, after I got out of the Army.

9 Q And in that document, on Page 1, didn't you say,
10 "Having become involved with Jeff, is, I think, I'll never
11 become involved with anyone else again." Didn't you say
12 that first, yes or no?

13 A I think I did. It's been a while since I've seen
14 that document, so I don't know; but I think I did.

15 Q May I refresh your recollection by showing it to you?

16 A Sure.

17 MR. KORNSTEIN: Your Honor, may I approach?

18 THE COURT: Yes. Will you show it to
19 Mr. Bostwick?

20 MR. BOSTWICK: Your Honor, may we request that
21 if the witness' recollection is going to be refreshed with
22 the document, that he be allowed to look at the whole
23 document?

24 THE COURT: Well, if he needs to, he can see it
25 all. If he could look at one page and it's refreshing his

1 memory, I wouldn't think he'd have to look at all hundred
2 pages.

3 BY MR. KORNSTEIN:

4 Q Does that refresh your recollection whether you wrote
5 that?

6 A I have no reason to believe I didn't. To be honest,
7 just looking at this one page itself, it looks like
8 something I wrote; but I really have not read this in a
9 long time. And I can say that that's probably what I said.

10 THE COURT: Is that in your handwriting?

11 THE WITNESS: No, sir, it's typed.

12 BY MR. KORNSTEIN:

13 Q Did you type this document yourself?

14 A I believe I did. If this is the document I'm thinking
15 of, and I'm pretty sure it is, yes, I typed it myself.

16 Q Would you like to look at the rest of it?

17 A Yeah, I'd like to look at the whole thing, if I could,
18 just to get a context for what this is.

19 Q I've pulled out another page that I'll ask you, Page 13

20 A Yeah, this looks pretty much like what I recall this
21 document looks like. As I said, I haven't seen it in a
22 long time, though.

23 Q And do you recall also saying in that document, on
24 Page 13 now -- I have Page 13, and I'll show it to you in a
25 moment -- the following, that "Jeff wants and needs to be

1 liked by other people. He works hard at being likable.
2 When Jeff knew someone liked him, I think he assumed his
3 innocence was no longer in serious question; but that was
4 not the case, except with pretty close friends. It was
5 hard for Jeff to realize that people made a conscious
6 effort to separate their feelings about him from what he
7 was supposed to have done."

8 First, do you recall saying that?

9 A No, I don't. I don't recall that.

10 MR. KORNSTEIN: Your Honor, may I approach to
11 refresh?

12 THE COURT: Yes.

13 THE WITNESS: While you're doing that,
14 Mr. Kornstein, I'd like to see it better. I wouldn't be
15 surprised if I did say that; but I just don't recall that.

16 (Looks at the document.)

17 Again, this looks like something I wrote, and without
18 having read the whole thing all the way through for content,
19 context and content, I assume this is what I wrote.

20 BY MR. KORNSTEIN:

21 Q And when you wrote it, it was what you felt to be true
22 at the time; isn't that correct?

23 A Yes.

24 Q Now, based on what you wrote on Page 13, about Jeff
25 thinking that anyone who likes him must think he's innocent;

1 isn't that exactly what happened with his relationship to
2 Joe McGinniss?

3 A First of all, I think you badly mispara -- you
4 misparaphrased what I wrote. I don't know to this day what
5 Jeff's deepest feelings are about Joe. What I could observe
6 was, Jeff liked Joe, and Joe liked Jeff. And I don't -- I
7 certainly can't speculate about whether, once Jeff came
8 to like Joe, he believed -- Joe believed he was innocent.
9 I just don't know that.

10 Q Let's go on to another subject.

11 You mentioned that there were three areas of motive
12 that you were looking into early on in the case. I think
13 it was with the Article 32 investigation. The three areas
14 were: marital infidelities, drugs, and mental aberration
15 or insanity?

16 A Right.

17 Q You never told us the results of your investigation
18 about the marital infidelities. Do you want to tell us
19 that?

20 A Sure. We knew, because the CID knew -- it's on a tape
21 that they asked questions of Jeff, "Wasn't it true you had
22 some one-night stands during the Army?" And I went out
23 and investigated those people, talked to them; and that, in
24 fact, was true. He had had one-night stands. What we also
25 concluded, though, because there was a woman named

1 Elizabeth -- I think her last name is Christia (phonetic) --
2 who was the last person to see Collette alive. She drove
3 Collette to school that night. And Miss Christia, who was
4 the wife of another Army officer, told us, in fact --

5 MR. KORNSTEIN: Excuse me. Move to strike,
6 your Honor. Anything about that. I just asked for the
7 results of the investigation, not for hearsay.

8 THE WITNESS: Well, the results were that we
9 were pretty convinced that as far as anyone in the world
10 knew, Jeff had a very happy marriage; including as far as
11 Collette knew, he had a very happy marriage.

12 MR. KORNSTEIN: My question was simply --

13 THE WITNESS: So there was no -- no, we did not
14 feel there was going to be a problem with the prosecutor's
15 proving any motive having to do with his marital
16 infidelities.

17 BY MR. KORNSTEIN:

18 Q How many marital infidelities did you discover?

19 A Two or three.

20 Q Did you ever talk to Dr. MacDonald about it?

21 A Yes.

22 Q And did he tell you about Gloria Lloyd?

23 A No, I don't -- well -- maybe yes, and maybe no. You
24 have to remember if you're talking about the names of these
25 girls all these years ago, I probably wouldn't recognize

1 them. I may or may not. The --

2 Q Did he tell you about the --

3 A -- name's not familiar at all.

4 Q Did he tell you about the secretary in the firm in
5 Long Island?

6 A No, I don't recall that discussion.

7 Q Do you know that he has talked about that under oath
8 elsewhere?

9 MR. BOSTWICK: Your Honor, I'm going to object.
10 It assumes facts not in evidence.

11 MR. KORNSTEIN: Withdrawn. Withdrawn.

12 Q Did you ever have any discussion with the plaintiff
13 about a woman named Jeannie Morell (phonetic)?

14 A Jeannie Morell testified at the Article 32.

15 Q Did she discuss the nature of her relationship with
16 Dr. MacDonald?

17 A I think she did at the Article 32. She was one of his
18 friends. She's one of Collette's friends, I believe.

19 Q And weren't they having an intimate relationship?

20 A I -- if they were, I don't know.

21 Q That wasn't one of the ones that you knew about?

22 A I don't think so, no.

23 Q Okay. You never had a discussion with Dr. MacDonald
24 about that?

25 A About Jeannie Morell?

1 Q Yes.

2 A Well, at some point, yes, because I knew that -- I mean
3 on a much later date, I believe that Jeannie Morell or,
4 actually, her husband became very -- I think it was her
5 husband, became very upset about something that happened
6 in the past.

7 Q Do you know what that something was?

8 A I surmise that there was some kind of an extramarital
9 relationship, but I didn't know, because Jeannie didn't
10 tell me. I mean, Jeannie's something of a friend of mine,
11 too. She and her husband used to come to Phoenix
12 occasionally; and I saw them when they came to Phoenix
13 after they got out of the Army.

14 But I never really sat down and talked to
15 either Jeannie or her husband about the details of that;
16 and I never really, at that point, came back and talked
17 to Jeff about it. I just said that we were looking for
18 witnesses; again, Jeannie wasn't going to testify.

19 Q So you're saying that Dr. MacDonald never told you
20 about his affair with Jeannie Morell while he was at
21 Northwestern Medical School, while she was the wife of
22 another doctor?

23 A Not that I recall, no.

24 Q And did he discuss with you his relationship with a
25 woman in San Antonio in 1969, late 1969?

1 A Well, I don't know whether relationship is the right
2 word. There was a -- there was some discussion about
3 somebody in San Antonio, yes.

4 Q What was the discussion? That he spent the evening
5 together with her while they were both in their underwear?

6 A The discussion was that he had had some kind of
7 one-night stand with her in San Antonio, and that he said
8 basically nothing happened; as strange as that may seem,
9 nothing happened. And I said, look -- my response was,
10 I don't care whether anything happened or didn't happen.
11 It looks bad, but the real question is, did Collette know.
12 He said, "No."

13 Q Do you remember how many weeks before February 17th
14 that one-night stand in San Antonio was?

15 A My recollection -- well, it's been a long time ago,
16 since the prior summer, or maybe in the fall. But I don't
17 know for sure.

18 Q Wasn't it in December of 1969, about six weeks before?

19 A Again, my recollection is that it was the summer or
20 the fall. I don't know -- I don't know about December.
21 I just don't think that's right.

22 Q Did you ever read any CID reports on the incident in
23 San Antonio with that woman?

24 A It seems to me that I did.

25 Q Do you recall what they said?

1 A No, I don't at this point. I recall the CID found
2 somebody down there, but I don't recall what the report
3 said.

4 Q And do you recall ever speaking with a woman named
5 Linda Matthews?

6 A The name is very familiar, sir, but I just cannot
7 place who that is.

8 Q Well, was she the woman who had an affair with
9 Dr. MacDonald in the BOQ while the investigation was going
10 on?

11 MR. BOSTWICK: I'm going to object, your Honor.
12 It assumes facts not in evidence.

13 MR. KORNSTEIN: Well, I was just trying to
14 refresh the witness' recollection.

15 THE WITNESS: To my knowledge that never
16 happened. I mean, to the best of my knowledge that never
17 happened. But, yes, now that you mentioned it, I have
18 heard that somebody said that he had an affair while the
19 Article 32 was going on. But if he did, I didn't know
20 about it.

21 BY MR. KORNSTEIN:

22 Q Didn't you interview her?

23 A No.

24 Q You never spoke to her about that?

25 A No.

1 Q And did you ever hear about that part of her testimony
2 to the Grand Jury?

3 A I heard -- again, it's very -- it's vague. If she is
4 the person -- at some point the prosecutor, in 1979, brought
5 a woman to Raleigh that we believed was going to testify.
6 And I -- if this is the woman, I did interview her in
7 Raleigh. And it seems to be coming back to me. My
8 recollection is, I talked to her; and she said whatever
9 affair they'd had, was well after the Article 32 was over
10 with. And the prosecutors never called her.

11 Q Are you familiar with the name Carol Lawson?

12 A Yes. Again, it's one of those names that I sort of
13 know, but don't know real well.

14 Q Isn't it true that Dr. MacDonald had a continuing
15 relationship with her, both before and after he was married
16 to Collette?

17 MR. BOSTWICK: I'm going to object to the
18 question, your Honor, as calling -- assuming facts not in
19 evidence and being vague and ambiguous.

20 THE COURT: Would you read that back for me,
21 please, Sherrill?

22 (Record read.)

23 THE WITNESS: Well, again --

24 THE COURT: Wait. I've got to rule on that.

25 THE WITNESS: I'm sorry. I'm really sorry.

1 MR. BOSTWICK: I would like to add one more,
2 your Honor. That it's also not relevant as to that portion
3 of the question asking about after the marriage.

4 THE COURT: This is cross-examination. I think
5 it's a proper question. Overruled. You may answer.

6 THE WITNESS: Again, if she's the person I'm
7 thinking of, I think she was somebody that Jeff saw before
8 he was married. To my knowledge, again, I do not know -- I
9 never heard that he had a relationship with her after his
10 marriage.

11 BY MR. KORNSTEIN:

12 Q Isn't it correct that the day after Kimberley, the
13 older child, was born, and Collette was in the hospital,
14 that Dr. MacDonald left Collette in the hospital to visit
15 Carol Lawson in Patchogue?

16 A That is something I heard only from Joe McGinniss in
17 the book.

18 Q And you said that when you visited with Mr. McGinniss
19 in, near Princeton, you discussed Dr. MacDonald's
20 extramarital affairs at that time as well, didn't you?

21 A If I did testify to that, I didn't mean to. I don't
22 recall, when I visited him at Princeton, talking about his
23 extramarital affairs. I did talk to him at some length at
24 other times during the summer about it. But I don't recall
25 at Princeton talking about that. What I do recall talking

1 at Princeton most, and I thought I testified to it, was
2 Bernie Segal's conduct of the trial and where we went from
3 there.

4 Q Did you ever see any CID reports or statements from
5 any neighbors of the MacDonalds about extramarital affairs
6 by Dr. MacDonald?

7 A Neighbors?

8 Q Yes.

9 A I don't recall, no.

10 Q Does the name Vicky Callan (phonetic) refresh your
11 recollection?

12 A There was a girl named Kalin (phonetic), but I don't
13 think her first name was Vicky. Pam? Pam Kalin?

14 Q Wasn't Pam the baby-sitter?

15 A Yes.

16 Q And didn't she have a sister named Vicky?

17 A Maybe she did. I don't know.

18 Q You don't know anything about that. Right.

19 Now, you did mention that Dr. MacDonald was
20 moonlighting -- to use your phrase -- he had another job
21 in addition to his Army job?

22 A Yes. I don't think it was a full-time other job, but
23 occasionally he worked as emergency room physician.

24 Q In the evenings?

25 A I believe so, yes.

1 Q And, in fact, wasn't he also in the process of trying
2 to get a second extra job?

3 A I think he was talking about it, but I don't -- it
4 seems to me that's correct.

5 Q Sure wasn't spending a whole lot of time at home with
6 his family; was he?

7 A Surprisingly enough, he was, at least from what I
8 could find out.

9 Q Well, the --

10 A Wait a minute. You have to understand, sir, that from
11 my -- what I found out about this, his job during the
12 daytime, like a lot of stateside post jobs for officers
13 like Jeff who was not with a hos -- he was not based at
14 a hospital, it was not even a nine-to-five job most days.
15 And you could come home at lunch, and sometimes you could
16 come home early in the afternoon. There was what was called
17 PT, which was supposed to stand for Physical Training but
18 often stood for Personal Time. Even during the Vietnam Era
19 a lot of stateside posts -- and Jeff had one -- was not on
20 a day-to-day basis a full-time job.

21 Sometimes it was more than a full-time job.
22 Sometimes they went out, and they actually did things out
23 in the field; but a lot of days, Jeff had a lot of time,
24 and everything I could find out was that he spent a lot of
25 it at home.

1 Q How many evenings a week did he work?

2 A I don't know. It was two or three, I think, sometimes.
3 Not always, but sometimes.

4 Q The second area was drugs that you were looking into
5 as well?

6 A Yes.

7 Q And you testified about Eskatrol. Can you tell us
8 what you understand Eskatrol to be?

9 A Well, again, it's one of those things I really hadn't
10 thought about in a long time until I read the book. But I
11 understand Eskatrol is a form of amphetamine, popularly
12 known as "Speed."

13 Q In fact, isn't it a combination of an amphetamine,
14 Speed, plus a "Downer," that gets a double reaction, not
15 just the one; isn't that true?

16 A I don't know.

17 Q You don't know.

18 A To this -- at this time, no, sir, I don't. I had not
19 looked at what the formula for Eskatrol is in years.

20 Q Do you know anything about the risks or dangers of
21 taking Eskatrol?

22 A I know only what I was told by not just Jeff, but other
23 doctors that I talked to at the time.

24 Q Apart from who you talked to, do you have any other
25 sources of information about Eskatrol?

1 A No. I'm not a pharmacologist or anybody else qualified
2 other than to sort of gather information for the purposes
3 that I gathered it.

4 Q Are you familiar with any of the authorities that
5 Mr. McGinniss cites in the book on Pages 612 to 615 about
6 Eskatrol?

7 A Can you -- that's four or five pages. Can you kind of
8 point me to where you're looking?

9 Q Yes. Absolutely, sir. On Page 612, about the middle
10 of the page, the paragraph beginning, "Ten years later ..."
11 there's a reference to "Pills That Don't Work."

12 A I've never heard of that book.

13 Q All right. Then there is a reference a few paragraphs
14 down to the "Physicians' Desk Reference." I think it's
15 popularly known as PDR.

16 A Yes, I am familiar with that.

17 Q And are you familiar with the comments in the PDR about
18 the dangers of amphetamines?

19 A No. I didn't go look this up. I didn't check on
20 whether he accurately quoted it or not.

21 Q Well, are you aware that the PDR says one possible
22 consequence to be marked insomnia, tenseness and
23 irritability, hyperactivity, confusion, assaultiveness,
24 hallucinations, panic states, and the most severe psychosis.

25 MR. BOSTWICK: Your Honor, I'm going to object

1 to the question as calling -- as assuming facts not in
2 evidence. He's reading from the book "Fatal Vision"; and it
3 is the plaintiff's position that that's a misquote of the
4 "Physicians' Desk Reference," in the first place. So
5 reading it as if it were from the "Physicians' Desk
6 Reference" is definitely assuming facts not in evidence.

7 THE COURT: He's only asking him if he's
8 familiar with that. So, overruled.

9 THE WITNESS: I don't know whether that's what
10 the "Physicians' Desk Reference" says or not.

11 BY MR. KORNSTEIN:

12 Q Now, you mentioned about some notes that you asked --
13 you and/or Bernie Segal asked Dr. MacDonald to write around
14 April of 1970?

15 A Well, I -- to the best of my recollection, it would
16 have been around that time. It would have been certainly
17 after the CID called Jeff in for questioning, which was
18 April 6th, and sometime prior to the Article 32 beginning,
19 which was in July. So, my guess is it was around April or
20 May, around in there.

21 Q And you asked him to prepare some notes of his
22 activities of the day in question?

23 A Right.

24 Q And did you instruct him to put down anything that he
25 thought might be relevant?

1 A Yes. Actually, we instructed him to put down more
2 than he thought might be relevant, because at that point
3 we, the lawyers, didn't know very much about this case at
4 all. And we didn't want Jeff censuring, you know, putting
5 down only the stuff that he thought was important. So we
6 asked him to put down as much as he could think of.

7 And I don't think we confined him to relevant
8 things. I think we asked him to put down everything that
9 he could think of.

10 Q How quickly after you assigned him this task, did he
11 return to you with notes?

12 A Well, sir, I don't know, because I don't have a clear
13 recollection of whether those notes were already in
14 existence when I got there, or whether that was something
15 that I and Bernie assigned him to do. I do have a clear
16 recollection that it's something that, once I got them, I
17 spent a fair amount of time looking through and then
18 discussing with him, and then with other people, other
19 lawyers and other people.

20 Q Do you remember the range of subjects discussed in
21 the notes that were prepared by Dr. MacDonald?

22 A Not really, because those notes were something that I
23 spent a lot of time with prior to the beginning of testimony
24 at the Article 32. And to be honest about it, I forgot about
25 them until I read about it in the book. I don't think I've

1 ever looked at those things again.

2 Q We'll allow you to very soon. Now, would you turn to
3 Pages 610 and 611 of the book. Starting at the lower end
4 of Page 610, the paragraph running over from the bottom of
5 610 to the top of 611. Isn't that taken from the notes
6 prepared by Dr. MacDonald?

7 A Again, without looking at the notes, I can't really
8 tell. It sounds right, but I really -- as I said, I have
9 not looked at those notes in years, and I certainly didn't
10 try to compare this with the notes. But I haven't seen
11 them to this day, I don't think.

12 Q Would it refresh your recollection if I showed you the
13 notes?

14 A Yes.

15 MR. KORNSTEIN: Your Honor, may I approach?

16 THE COURT: Yes.

17 (Pause.)

18 THE COURT: If you want to examine those with
19 greater depth, we'll take our afternoon recess, if you
20 want.

21 MR. BOSTWICK: Your Honor, that would be
22 helpful. There are some discrepancies we're trying to
23 figure out. Thank you.

24 THE COURT: All right. We'll take our
25 afternoon recess, ladies and gentlemen. We'll be in recess

1 for 15 minutes.

2 (Recess.)

3 THE COURT: Something to be taken up out of the
4 presence of the jury?

5 MR. BOSTWICK: Your Honor, we would like to
6 move that Mr. Kornstein would be restricted in his
7 cross-examination to questions in which he is relying,
8 even upon cross-examination, upon facts that are in evidence,
9 rather than the assumptions and hypotheticals that he's
10 been posing. We make that motion on two grounds. Number
11 One, that it is prejudicial to the jury to hear suppositions,
12 particularly when Mr. Kornstein is leafing through papers,
13 supposedly reading from something.

14 And we make it on the grounds of hearsay as well.
15 Mr. Kornstein is attempting by his questions to put hearsay
16 evidence before the jury by asking questions, such as:
17 Did you ever hear that there was a premarital affair with
18 Vicky Kalin? for instance. I might well ask, if I were in
19 his shoes, whether he's heard of a premarital affair and
20 then list another 14 or 15 people. Those are not proper
21 questions. We know of no evidence, for instance, on that
22 subject that shows that.

23 THE COURT: Let's find out about that, now that
24 you've raised it. Are you going to have evidence on that
25 subject?

1 MR. KORNSTEIN: Your Honor, for every question
2 I ask, there is evidence to support the question. I was
3 not at any point asking any fishing questions. Every
4 question was done in good faith. I just didn't know
5 whether this witness was or was not aware of it from
6 conversations that --

7 THE COURT: The point is that if you make an
8 offer of proof to this Court, you're going to have to have
9 evidence to back up these assumptions you're making.

10 MR. KORNSTEIN: Yes.

11 THE COURT: That's one thing. But if you're
12 just asking questions without any foundation, without any
13 hope of ever having evidence to support your premise, then
14 that would be wrong.

15 MR. KORNSTEIN: It's the former, not the latter,
16 your Honor.

17 MR. BOSTWICK: Your Honor, we assert that that
18 is not the case. For instance --

19 THE COURT: Well, I mean -- look, I can't
20 prejudge his evidence, Mr. Bostwick. If he represents to
21 this Court that he's going to have evidence to support
22 the facts that he's basing his questions upon, then I have
23 to accept that. He's an officer of this court, and if he
24 makes that representation, even though you don't know about
25 it, that doesn't mean it isn't going to happen.

1 MR. BOSTWICK: That's true, your Honor. But I
2 would say that I am quite concerned that Mr. Kornstein may,
3 in fact, be making the representation that he is going to
4 have the evidence, and the evidence itself will not be
5 admissible; that it will be hearsay from someone that has
6 spoken to Mr. McGinniss on that one subject, for instance,
7 of Vicky Kalin. I would challenge him to set forth right
8 now the admissible evidence of any sort of an extramarital
9 affair with Vicky Kalin, of any kind.

10 On that past question, rather than prejudging
11 anything, that is one example. And those are the kinds of
12 things I'm concerned about. I know of no statement
13 anywhere that is sworn, admissible, and nonhearsay about
14 that subject.

15 MR. KORNSTEIN: Does your Honor want me to
16 respond in open court about this?

17 THE COURT: Can you just answer that in court?

18 MR. KORNSTEIN: Yes. We have a statement from
19 Vicky Kalin's mother on this subject. And it was something
20 that affected the state of mind of Mr. McGinniss when
21 writing the book. And it was something that he relied on;
22 it was a statement given to the CID, the official
23 investigating agency.

24 THE COURT: There's your evidence.

25 MR. BOSTWICK: Your Honor, it's hearsay.

1 THE COURT: It may be hearsay, but we've let
2 in a lot of hearsay for one reason or another.

3 MR. BOSTWICK: But that declarant will not be
4 here in court, your Honor.

5 THE COURT: I don't know. But that goes to
6 his state of mind; doesn't it? Mr. McGinniss', I mean.

7 MR. BOSTWICK: I do not think it goes
8 Mr. McGinniss' state of mind.

9 THE COURT: Pardon? I didn't hear you.

10 MR. BOSTWICK: No, sir, I don't think it goes --

11 THE COURT: You don't think so?

12 MR. BOSTWICK: -- to Mr. McGinniss' state of
13 mind.

14 THE COURT: No?

15 MR. BOSTWICK: It goes -- the cross-examination
16 of Mr. Malley was what kind of investigation Mr. Malley had
17 done; and it is not relevant to Mr. Malley's investigation.

18 THE COURT: Now you're on a different subject.
19 You're saying that he has no proof of things, these things.
20 I don't know that he doesn't have proof of them. Whether
21 it's admissible or not, I guess we'll have to wait and see
22 when he offers it. But when you say you have absolutely
23 no knowledge of this ever happening, he's now told you
24 about it. Now, you may not believe that that's true, you
25 may object to the evidence; but there is. That's why he's

1 asking the question.

2 MR. BOSTWICK: I understand that, your Honor.

3 THE COURT: Now, I do think that rather than
4 to assume something to be a fact, at this point in time,
5 Mr. Kornstein, I think you should phrase your questions so
6 that you're not assuming something which may or may not
7 come into evidence later.

8 MR. KORNSTEIN: Very well, your Honor.

9 THE COURT: All right.

10 MR. BOSTWICK: Thank you, your Honor.

11 THE COURT: Let's get the jury in.

12 (In the presence of the jury:)

13 THE COURT: Mr. Kornstein, you may resume.

14 MR. KORNSTEIN: Yes, your Honor. Just before
15 we recessed, I was about to approach the witness to refresh
16 his recollection with a document.

17 THE COURT: You may.

18 MR. BOSTWICK: It's fine. We got it cleared up.

19 BY MR. KORNSTEIN:

20 Q Mr. Malley, would you take a few moments to review
21 those papers that I gave you?

22 A All right, sir.

23 (Pause.)

24 You just want me to go to the first two pages. Is that
25 it?

1 Q I believe so.

2 A Okay.

3 Q All right. First of all, do you recognize those
4 pages?

5 A Yes. These appear to be -- this appears to be a
6 photo copy of the notes, if I recall, that Jeff wrote to me,
7 or not -- wrote to the defense.

8 Q And those are in the handwriting of Jeffrey, of
9 Dr. MacDonald?

10 A I believe so, yes.

11 Q Now, to your knowledge, did the Government prosecutors
12 have copies of these notes at the time of the

13 A No. I have no indication they did.

14 Q So, they were unaware of Eskatrol possibly being a
15 motive?

16 A Oh, I think you're absolutely wrong about that. That
17 was a topic, I believe, that was discussed at the Article 32.

18 Q All right. Now, when you gave the assignment to
19 Dr. MacDonald to write the notes, you didn't tell him any
20 particular order to put his thoughts on paper; did you?

21 A Again, Counsel, I don't want to quibble with you, but I
22 didn't give him the assignment, that I can recall. The
23 assignment, as I understood it, as I kind of recall, was to
24 put down everything he could think about. And I don't think
25 we told him to do it in chronological fashion or anything

1 else. But I don't specifically recall giving him the
2 assignment. That's the only point.

3 Q Isn't it correct that the very first topic in the
4 notes that he writes about is the taking of Eskatrol?

5 A The very first topic is, we ate dinner together at
6 5:45.

7 Q And why don't you read the rest of --

8 A Then after that it's possible, I had a diet pill at
9 this time. I do not remember.

10 Q Well, why don't you read the first page and-a-half?

11 A Okay. Out loud?

12 Q Yes, please.

13 THE COURT: You mean out loud?

14 MR. KORNSTEIN: With the Court's permission,
15 or --

16 THE COURT: Well, all right.

17 Read slowly, please, so the court reporter can
18 keep up with you.

19 THE WITNESS: All right, sir.

20 "We ate dinner together at 5:45 p.m., all four.
21 It is possible I had one diet pill at this time. I do not
22 remember and do not think I had one, but it is possible.
23 I had been running a weight control program for the 6th
24 Special Forces group, my unit, and I put my name at the top
25 of the program to encourage participation. I had lost 12,

1 15 pounds in the prior three to four weeks, in the process,
2 using three to five capsules of Eskatrol Spansule,
3 15 miligrams"-- and then I will have to spell it, well,
4 maybe I can pronounce it -- "Dextroamphetamine ('Speed');
5 70.5 miligrams" -- and I will have to spell this,
6 "P-r-o-c-h-something -o-r-p-e-n-a-z-i-n-e (Compazine) to
7 counteract the excitability of the 'Speed'.

8 "I was also losing weight because I was working
9 out with the boxing team, and the coach told me to lose
10 weight. In any case, the reason I could have taken the
11 pill was twofold. One, to eat less in the evening when I
12 snacked the most; and two, to try to stay awake after
13 dinner since I was baby-sitting. It didn't work if I did
14 take a pill, because I think I had a one-half-hour nap on
15 the floor from 7:30 to 8:00 p.m. after I put Christie to
16 bed and was lying on the floor with Kim.

17 "It was very common for me to nap on the floor.
18 I also had a very strong nap urge after a full meal."

19 Q That's enough. Okay. You can stop there.

20 Now, Mr. Malley, didn't it strike you at the time
21 when you got these notes, that the very first item in the
22 list of the notes written by Dr. MacDonald to reconstruct
23 his activities was his Eskatrol?

24 A No.

25 Q Didn't strike you as special?

1 A No.

2 MR. KORNSTEIN: Your Honor, we would move to
3 introduce the notes into evidence as the next exhibit for
4 the defendant. It would be 155.

5 THE COURT: Any objection?

6 MR. BOSTWICK: Your Honor, I need to consult
7 for a moment about the authenticity of that one.

8 (Pause.)

9 MR. BOSTWICK: Your Honor, we don't have any
10 objection to that document being admitted into evidence,
11 but we do have an objection to there not being a sufficient
12 foundation laid as to why there are pages missing from it,
13 and perhaps whether or not that is the total document, on
14 the total notes that were written. And that -- but we
15 don't have an objection to that compilation of papers
16 being put in as an exhibit. But there are obviously
17 missing pages, there are three or four missing; and we're
18 not sure that that's the entire document that was written
19 at that time either. And I don't believe a foundation's
20 been laid. If it was --

21 THE WITNESS: Mr. Bostwick, if I may. The
22 document before me also contains, at least the last page,
23 some handwriting that clearly doesn't go with the preceding
24 document. And I don't -- you might take a look at this,
25 but --

1 THE COURT: Well, we'll mark it for
2 identification at this time and talk about it later.

3 (Defendant's Exhibit 155 marked for identification.)

4 BY MR. KORNSTEIN:

5 Q Now, Mr. Malley, didn't Dr. MacDonald also write
6 another set of notes at the same time, that he entitled
7 "Parallel Memo"?

8 A I don't recall. That rings a bell, but I really don't
9 recall it right offhand.

10 Q Would it refresh your recollection if I showed it to
11 you?

12 A Yes, it would. I presume it would.

13 MR. KORNSTEIN: Your Honor, may I approach the
14 witness?

15 THE COURT: Yes.

16 BY MR. KORNSTEIN:

17 Q Do you recognize the document?

18 A Yes. I believe these were also notes that Jeff wrote
19 to his attorneys; and, again, I'm not clear -- I don't know
20 whether they were exactly contemporaneous, or whether we
21 asked him to elaborate on specific items in this first set
22 of notes; but they went together.

23 Q Those were notes written by Dr. MacDonald?

24 A My recollection is yes.

25 Q And that's his handwriting?

1 A It looks like his handwriting, yeah.

2 Q And it was more or less around the same time as the
3 prior set of notes?

4 A I believe so. Again, I have not -- I don't have a
5 specific recollection about the chronology, except that
6 they are about contemporaneous. They may be a few days
7 apart, and maybe they have been actually written one after
8 the other. I just don't know. I think the second set of
9 notes, which doesn't have an exhibit number, was a sort
10 of flushing out of some of the points in the first one.
11 And I don't exactly know whether we asked him to do it, or
12 whether he just did it.

13 MR. KORNSTEIN: Your Honor, we would move the
14 second set of notes into evidence as Defense Exhibit 155 --
15 156. now.

16 THE COURT: Any objection?

17 MR. BOSTWICK: Your Honor, we have the same
18 objection as to the lack of authentication. We're not sure
19 that that was all the notes. And I don't believe
20 Mr. Malley's testimony has said anything more than he
21 recognizes the testimony, and he believes that those are
22 part of the notes. And I'm concerned about that.

23 THE COURT: Well, are we going to, before the
24 trial is over, supplement Exhibits 155 and 156 with the
25 missing parts, if there are missing parts?

1 MR. KORNSTEIN: Your Honor, I'm not aware of
2 missing parts, but the plaintiff may have the missing
3 parts. Those are the ones that were given to Mr. McGinniss.

4 THE COURT: I'll retain this for identification
5 also, and we'll argue about it later.

6 (Defendant's Exhibit 156 marked for identification.)

7 BY MR. KORNSTEIN:

8 Q Mr. Malley, does looking at the second set of notes,
9 the one entitled "Parallel Memo," refresh your recollection
10 as to whether Eskatrol or diet pills were discussed in that
11 second memorandum?

12 A Yes, it's in here. And I definitely recall discussing
13 Eskatrol with Jeff in 1970.

14 Q All right. Now, and isn't it also the very first item
15 discussed in the second memo?

16 A Yes. In the second memo it is, and apparently because
17 it goes with Item One on the first memo, which covers many
18 topics.

19 Q But it is the very first topic on the second memo?

20 A Yes.

21 Q And the very first sentence is, "The CID knows nothing
22 about the possible diet pill"?

23 A Yes, that's what it says.

24 Q And it goes on for a few paragraphs, talking about the
25 possibility of having some residue in either his blood or

1 his urine?

2 A Well, he says that the CID knows nothing about the
3 possib -- the possible diet pill, the reason being I only
4 remembered its possibility when I went back to my office
5 after the day of the questioning.

6 Only later on does he talk about the Eskatrol
7 which you just referred to.

8 Q Well, he does talk about obtaining bottles of Eskatrol;
9 doesn't he?

10 A Where are you? It says, "I went into my office to
11 clear out my books on Tuesday. And 7 April on the weight
12 control chart caught my attention; and I remembered the
13 bottle of Eskatrol Spansules and my using" Seconal -- or
14 "several of them over the three weeks prior to the" --
15 something.

16 THE COURT: Mr. Malley, would you push that
17 mike just a little bit away from you --

18 THE WITNESS: I'm sorry.

19 THE COURT: -- because you're getting feedback,
20 I think.

21 THE WITNESS: Okay.

22 THE COURT: Thank you.

23 THE WITNESS: Is that better?

24 "And then the second point is, if I did take
25 the pill, it is conceivable my urine and blood 11:30 a.m.

1 Tuesday would still have some residue. We would have to
2 research the breakdown and excretion of what was in the
3 pill. We'd also have to find out if the excretion products
4 are definitely different than normal breakdown products of
5 adrenaline taken from the body, which would be increased
6 in the excitement of the attack and so on."

7 BY MR. KORNSTEIN:

8 Q Now, these were written, these notes were approximately
9 April 1970?

10 A I believe so.

11 Q All right. And the murders --

12 A Late April, late April 1970, around in there.

13 Q And the murders were in February 1970.

14 A That's right.

15 Q So we're talking about something about two months
16 after the event?

17 A When he's writing the notes?

18 Q Yes.

19 A Yes.

20 Q Didn't it occur to you at the time that these notes,
21 both the first memo and then the parallel memo, showed that
22 prominent in Dr. MacDonald's thinking then, nearly two
23 months afterwards, was the fear that testing of his blood
24 and urine would reveal the presence of drugs that could
25 have induced the violence that night?

1 A No.

2 Q And that thought never occurred to you?

3 A No. What occurred to me --

4 MR. KORNSTEIN: Move to strike, your Honor.

5 THE COURT: All right.

6 THE WITNESS: That thought occurred to me --

7 MR. KONRSTEIN: Move to strike.

8 THE WITNESS: -- that it was --

9 THE COURT: Next question.

10 BY MR. KORNSTEIN:

11 Q Now, you also mentioned the third area that you
12 investigated was mental aberration and possible insanity
13 for that evening.

14 A Yes.

15 Q Now, in your direct testimony you talked about the
16 Government's psychiatric examination.

17 A Correct.

18 Q You kept on mentioning Dr. Brussels' name. You
19 described him a little bit; in fact, wasn't the Government's
20 psychiatric report signed by Dr. Silverman?

21 A You're now talking about 1979?

22 Q Yes.

23 A And I'm talking about the Article 32. I don't know.
24 I really don't know.

25 MR. KORNSTEIN: Move to strike anything beyond

1 that.

2 Q So you don't know who signed the Government's
3 psychiatric report in 1979?

4 A No, I don't.

5 Q Wasn't it the 1979 report that you referred to as
6 being cited or included in Judge Dupree's decision about
7 bail?

8 A Yes. That's what I think I was referring to, yes.

9 Q All right. So have you seen that report?

10 A No.

11 Q You don't know what's in that report?

12 A Today? No, I don't. I only know what I've read and
13 as part of an opinion.

14 Q Well, on your direct examination, Counsel referred you
15 to Page 607 of the book, near the bottom of Page 607, the
16 paragraph beginning, "I then found" -- talking about the
17 document. And on the next page, 608, the book begins to
18 quote the report from Dr. Silverman. Did you read those
19 excerpts in the book?

20 A Well, I read the excerpts in the book, but I had no --

21 MR. KORNSTEIN: Move to --

22 THE WITNESS: -- way of knowing then --

23 MR. KORNSTEIN: Move to strike anything beyond
24 the answer, your Honor.

25 THE COURT: You read the excerpts in the book.

1 All right. Next question.

2 BY MR. KORNSTEIN:

3 Q Mr. Malley, did you read in the book that the report
4 of the Government's psychiatric team began by describing
5 MacDonald as, quote, "A man unhappily confused about his
6 own masculinity." Did you read that?

7 MR. BOSTWICK: Your Honor, I'm going to object
8 on the grounds of hearsay.

9 THE COURT: Overruled. Did you read that in
10 the book?

11 THE WITNESS: Yes, sir, I did.

12 THE COURT: All right.

13 BY MR. KORNSTEIN:

14 Q Did you read through the, and said the next quotation,
15 "His thought processes are distinctly marked with
16 unconscious feelings of considerable inadequacy in great
17 part consciously and deliberately concealed by a facade of
18 assertiveness which he confuses with manliness." Did you
19 read that?

20 A Yes, I did.

21 Q Did you also read in the next paragraph, quote, "There
22 seems to be an absence in him of deep emotional response,
23 coupled with an inability to profit from experience. He's
24 the kind of individual who is subject to committing asocial
25 acts with impunity. He lacks a sense of guilt, he seems

1 bereft of a strong conscience, and he appears incapable of
2 emotionally close or mutually cooperative relationships
3 with women." Did you read that?

4 A Yes, I did.

5 Q Did you read the next paragraph, quote, "Derivatively,
6 he apparently avoided, even resented, the demands on him
7 to fulfill the responsibilities of having been a husband
8 and father of female children. Parenting for him, may have
9 been viewed as threatening and potentially destructive."
10 Did you read that?

11 A I certainly did.

12 Q Did you read the next paragraph --

13 MR. BOSTWICK: Your Honor, I'm going to object
14 to this continued reading from this hearsay document, unless
15 it's going to be connected up in some sort of fashion for
16 relevance.

17 THE COURT: I can only assume it's leading up
18 to a question.

19 MR. KORNSTEIN: Well, your Honor --

20 THE COURT: You're not just having him read
21 the book for the benefit of all of us here?

22 MR. KORNSTEIN: No, your Honor. On direct
23 examination this area was gone into at some length, the
24 document was referred to.

25 THE COURT: All right. But I hope this is going

1 to be followed up with some line of questioning.

2 MR. KORNSTEIN: Yes, your Honor.

3 THE COURT: All right.

4 MR. BOSTWICK: Your Honor, I would like to make
5 one more point for the record. It was not allowed on direct
6 examination either before Professor Segal or with Mr. Malley
7 to put in any of the findings of the psychiatric reports
8 of Drs. Sadolf, Hallick, or Bailey.

9 THE COURT: Were they offered?

10 MR. BOSTWICK: Several questions were proffered
11 at several times, or asked at several times, and the
12 objection was that it was hearsay; and the objection was
13 sustained at that time.

14 THE COURT: All right.

15 MR. BOSTWICK: It obviously depends upon --

16 THE COURT: The record will stand on whatever
17 the record says. Proceed.

18 BY MR. KORNSTEIN:

19 Q Did you also read, quote, "That he is subject to being
20 amnesic, concerning what he would wish to blot out from his
21 consciousness and very conscience. His credibility leaves
22 much to be desired. In testing, he proved himself to be
23 considerably pathological and impulsive with feministic
24 characteristics and concealed anger. He has a disdain for
25 others with whom he differs, and he is subject to respond

1 with anger when his person is questioned on whatever basis."

2 Did you read that?

3 A Yes. Do you want my opinion?

4 THE COURT: No. Just, did you read it. Just
5 answer the question, Mr. Malley, and we'll get along a lot
6 better with this.

7 BY MR. KORNSTEIN:

8 Q Next quotation, "He handles his conflicts by denying
9 they even exist. He is not in touch with his feelings, and
10 essentially is not comfortable with himself. He has only
11 an authoritarian image of himself as a machismo type of
12 male." Did you read that?

13 A Yes, I did.

14 Q Did you read the next paragraph, "In terms of mental
15 health and personality functioning, he's either an overt
16 or a repressed sexual invert, characterized by expansive
17 egotism and delusions of persecution. He's preoccupied with
18 the irrelevant and is unable to face reality. To suit his
19 whims, he has the faculty to manufacture and convolute
20 circumstances. He seeks attention and approval, and is
21 given to denial of truth." Did you read that?

22 A Yes. It's in the book.

23 Q Did you read the next paragraph, the conclusion, quote,
24 "The inanimate movement responses in his Rorschach indicate
25 latent homosexuality, approaching homosexual panic; and the

1 depreciated female contents in his projections suggest
2 more than a possibility of homosexuality, latent or
3 otherwise. The animal content in the Rorschach further
4 indicates homicidal tendencies." Did you read that
5 paragraph?

6 A Yes. It's in the book.

7 Q And the final two. "Dr. MacDonald may well be viewed
8 as a psychopath subject to violence under pressure, rather
9 effeminate as an individual, and given to overt behavior
10 when faced with emotional stress. There is also, however
11 unclear, a fear in him of what he is subject to do with
12 his hands. In essence, Dr. MacDonald is in need of
13 continuous, consistent psychotherapeutic intervention,
14 coupled with psychiatric attention." Did you read that?

15 A Yes. That's in the book, too.

16 Q Now, during your investigation of possible mental
17 aberration and insanity, did you explore any of the avenues
18 covered by this report by Dr. Silverman?

19 A Well, funny you should ask.

20 Q It requires just a yes or no answer.

21 A Yes, we did. That was part of -- I believe almost all
22 of the psychiatrists and psychologists who evaluated him,
23 both for the defense and for the Government in 1970, and I
24 think that it's fair to say that not one of those people
25 came anywhere near close to agreeing with Dr. Silverman and

1 Dr. Brussels.

2 Q All right. Now --

3 A That's why we were so confident of putting them on the
4 stand.

5 Q Are you familiar with Dr. Silverman's credentials?

6 A I saw them once. I don't really know a whole lot about
7 him.

8 Q Dr. Silverman was not the fellow who you testified to
9 was old and drooling?

10 A No. That was Dr. Brussels.

11 Q Right. And when you -- you met Dr. Silverman?

12 A I believe I saw him. I'm not sure that I said
13 anything to him, but I saw him.

14 Q He looked of sound mind and body?

15 A I don't recall him very much. So I can't say. He --
16 the guy that was introduced to me as the psychiatrist, the
17 guy who was going to do this testing, and the guy who, as
18 I understand it, did all the questioning was Brussels. So
19 Silverman may have, you know -- I don't know how he managed
20 to write this report, but, you know, he did something, I
21 suppose.

22 Q Well, you weren't present at the examination itself,
23 were you?

24 A No, I was not.

25 Q And did anyone ever tell you what happened at that

1 examination?

2 A Yes, they did.

3 Q Was that Dr. MacDonald?

4 A Yes, it was.

5 Q Did anyone else tell you?

6 A No.

7 Q So your only information about the examination came
8 from Dr. MacDonald himself?

9 A That's correct.

10 Q Have you ever known Dr. MacDonald to lie?

11 A Yes.

12 Q On how many occasions?

13 A A couple. And that's about it. I mean, in most cases
14 my experience with him, he's very truthful; but on a couple
15 of occasions I know that he has lied.

16 Q Well, are you aware of his ever telling anyone about
17 his finding and doing something to any of the intruders of
18 that night?

19 A Yes, I'm aware of that.

20 Q And, in fact, didn't he tell his father-in-law that he,
21 Dr. MacDonald, found and killed one of the intruders?

22 A That is part of the story, yes.

23 Q And wasn't that a false statement?

24 A Yes. And he admitted it was a false statement.

25 Q And didn't he tell the same story to a fellow named

1 Bob Stern?

2 A I don't know about that.

3 Q What are the other occasions when you know

4 Dr. MacDonald lied?

5 A That is primarily it; that's the one that comes to mind.

6 Q That's a pretty big one; isn't it?

7 A Yes, it is a pretty big one. And it was one that

8 Jeff has expressed great sorrow over having done.

9 Q Now, let's talk about the sodium amytal, the so-called
10 truth serum asked for by the Grand Jury. You testified
11 that there were two Grand Jury appearances by Dr. MacDonald,
12 one in the summer of 1974 and one in January of 1975;

13 correct?

14 A Yes.

15 Q And you testified that a telegram or mailgram was sent,
16 informing the Grand Jury that he would be willing to take
17 the sodium amytal test; is that correct?

18 A That's correct.

19 Q And that was sent after his second appearance; right?

20 A Yes.

21 Q And isn't it correct that the decision about whether
22 or not he would agree to take that test was made after his
23 second appearance?

24 A I don't think so. I think it was made during his
25 second appearance. But the actual arrangements were made

1 right afterwards; and I think -- and I think the telegram
2 was sent shortly thereafter.

3 Q So there was never any decision before the second
4 appearance made that he would agree to take the sodium
5 amytal test; was there?

6 A I don't believe there was a decision made before the
7 second appearance. I believe there was some discussion
8 about it, but I don't think there was a decision made, no.

9 Q Because, in fact, when he went on the second occasion
10 and was asked before he came out to meet with counsel, he
11 did not agree to take such a test; isn't that correct?

12 A I don't recall that one way or another. I'm sorry.

13 Q Now, on direct you said that you were quite
14 uncomfortable with having a writer being in such close
15 quarters with the people working on the defense of
16 Dr. MacDonald; correct?

17 A Correct.

18 Q You perceived Mr. McGinniss as a writer from the
19 start; didn't you?

20 A Yes.

21 Q You knew he was going to write a book about this case?

22 A Yes.

23 Q You knew that all along that summer?

24 A Yes. Yeah, I mean, I knew that was one of his -- his
25 intent was, I assumed, that that was eventually going to

1 happen.

2 Q You knew that that was his purpose for being there
3 that summer, to gather material for the book?

4 A Well, after he signed that agreement, that was only
5 part of his purpose.

6 Q Well, you knew he was a writer?

7 A Yes, I did.

8 Q Did you think he was giving up his career as a writer
9 to be a full-time person working on Dr. MacDonald's defense?

10 A Well, he was there. He was not only a writer taking
11 notes; he worked for us. And I expected, and in fact, it
12 turned out that he would report to us on his contacts with
13 the press, because he was talking to the press about various
14 things; his perceptions of how things were going. I
15 expected that he would be part of, and in fact, I perceived
16 that he was part of our effort to put on before the jury
17 as much evidence as we could to contradict the Government's
18 case. And I believe that Joe was part of that.

19 Q Do you think for one moment that Mr. McGinniss would
20 have been in Raleigh, North Carolina, that summer if he
21 had not signed a book agreement with Dr. MacDonald?

22 A Well, I can't speculate on why Joe did anything. But
23 I assumed he was there at least in part to write a book. I
24 don't know what his other personal reasons were.

25 Q Now, let's talk about this so-called agreement, the

1 July 13th agreement. I believe it's Exhibit 7. That's the
2 one that would prevent Mr. McGinniss from being subpoenaed
3 by the prosecution, so that he wouldn't have to give up
4 any attorney/client privilege matter; isn't that correct?

5 A Well, among other things, that was its purpose.

6 Q Now, are you aware that three days after -- on July
7 16th, 1979 -- an agreement was signed between MacDonald
8 and McGinniss for the book?

9 A Yes, I'm aware of that. I'm not sure of the date, but
10 that sounds right to me.

11 Q All right. So that the -- isn't it correct that the
12 agreement to do the book coming after this piece of paper
13 to prevent disclosure to the prosecution, released
14 McGinniss to use the information for the book?

15 A I would look at it in exactly the opposite, Counselor.
16 If you want my opinion, he signed on first as a member of
17 the defense team, and then he signed on to write a book.
18 And if you really want -- if you want to look at it that
19 way, I could construe that as saying he signed on to write
20 a book essentially as a defense member.

21 Q Now, but doesn't Exhibit 7, the first agreement of
22 July 13th, say at the end of it that you can't release the
23 information unless expressly authorized by Jeffrey
24 MacDonald?

25 A Right.

1 Q And doesn't the contract coming a few days later,
2 constitute precisely that authorization, else what's the
3 book contract all about?

4 MR. BOSTWICK: Objection, your Honor. Calls
5 for a legal conclusion on the part of the witness. I
6 realize Mr. Malley is a lawyer, but he's not here as an
7 expert witness.

8 THE COURT: Well, I think it's argumentative
9 in form; and I'll sustain it on that ground.

10 MR. KORNSTEIN: All right.

11 Q Now, you are a lawyer, Mr. Malley. When you went to
12 the Havard Law School, they still taught about the First
13 Amendment; didn't they?

14 MR. BOSTWICK: Your Honor, I'm going to object
15 to this.

16 THE WITNESS: Do they not any more? Yes, sir,
17 they did.

18 BY MR. BOSTWICK:

19 Q And they taught about the importance of freedom of
20 expression?

21 A Well, the First Amendment doesn't cover all freedom
22 of expression, but yes, they covered what freedom of
23 expression is, covered by the First Amendment; yes, sir.

24 Q Some of the heroes of the Harvard Law School, Oliver
25 Wendell Holmes and Louis Brandeis are known to history as

1 champion of freedom of expression; aren't they?

2 A To some extent, I suppose, yes.

3 MR. BOSTWICK: Your Honor, I'm going to object
4 to the question. Move to strike the answer as being not
5 relevant and --

6 THE COURT: Well, let's get to the point you're
7 going to make there. The motion is 'denied, but let's get
8 to your point.

9 BY MR. KORNSTEIN:

10 Q Mr. Malley, isn't this attempt by the plaintiff, to
11 punish an author for writing a book, the equivalent of
12 book burning?

13 A No, sir, it is not.

14 MR. BOSTWICK: I object on the grounds it's
15 argumentative.

16 THE COURT: Objection sustained. Do you want
17 the answer stricken? The answer was no, but we'll strike
18 the answer.

19 MR. BOSTWICK: Your Honor, in the interest of
20 reciprocity, I think that's the only fair thing to do. I
21 love the answer, but I object to the question.

22 BY MR. KORNSTEIN:

23 Q Mr. Malley, you mentioned that you disagreed with the
24 personality portrait that Mr. McGinniss made of
25 Dr. MacDonald in his book; that's correct?

1 A That's correct.

2 Q Certainly you agree that authors are allowed to draw
3 their own conclusions when writing about subjects?

4 A Yes, in general that's true.

5 Q And that not everybody is going to agree with what
6 every author writes.

7 A That's also true, at least I suppose it is.

8 Q And that a writer should have as much discretion and
9 liberality in coming to his own conclusions; isn't that
10 correct?

11 A Well, that is a very broad proposition that I will
12 not agree with you. I mean a writer does not have the
13 discretion, for example, to lie and then pretend that it's
14 the truth.

15 Q Now, does plaintiff have the discretion to lie, as he
16 did about the one incident you described?

17 A No, it's -- I mean I've never defended Jeff's lying
18 about that. I have -- I mean Jeff has freely admitted that
19 it was the wrong thing to do. He has admitted it on the
20 stand.

21 Q Now, you agree, don't you, that a writer who gets
22 close to a subject, and then begins writing about that
23 subject, may well come to a conclusion that the subject
24 does not like; you agree with that, don't you? It's
25 self-evident.

1 A Well, if it's self-evident, I suppose, yes, I do agree
2 with that. I'm not particularly conversant with the thought
3 processes of either Joe or any other writer doing this, but
4 I suppose if that's -- if it's self-evident, it's self-
5 evident.

6 Q And a writer who spent the summer with the people
7 involved in the defense of a murder defendant, might well
8 conclude that despite his closeness to that defendant, that
9 the defendant was, in fact, guilty; isn't that possible?

10 A It's possible.

11 Q And if it happened that way, wouldn't the writer have
12 a duty to his calling and the truth to report the facts as
13 he saw them?

14 A Again, only if he -- you're now talking about what,
15 in a hypothetical situation or about this particular case
16 with this author and this book?

17 Q Well, first --

18 A Because they're different.

19 Q I'm -- first you answer the questions that I frame,
20 though, please.

21 A Well, in --

22 MR. BOSTWICK: Your Honor, I'm going to object to
23 the question as being vague and ambiguous, and it's not
24 relevant what this witness says about a purely hypothetical
25 question of an abstract nature.

1 THE COURT: I'm not sure of the question that
2 I'm being called upon to make a ruling. State your
3 question again.

4 MR. KORNSTEIN: Could the reporter read it
5 back, your Honor?

6 THE COURT: No, I'd like you to state it again.
7 because I'm not sure it was all in one place.

8 MR. KORNSTEIN: I was asking the witness --

9 THE COURT: Well, he asked you a question.
10 Then you qualified your answer -- or your question. I'd
11 like to know your question.

12 BY MR. KORNSTEIN:

13 Q If a writer after spending the summer with the members
14 defending a murder defendant, and getting close to that
15 murder defendant, afterwards concludes that the defendant
16 was, in fact, guilty, doesn't he have an obligation -- a
17 moral obligation to the truth and his calling to write the
18 facts as he sees them?

19 MR. BOSTWICK: We want to assert the same
20 objection, your Honor.

21 THE COURT: What is it again?

22 MR. BOSTWICK: It was not relevant and calling
23 for speculation on the part of this witness.

24 THE COURT: I've got to have clarification here.
25 Are you examining this witness now as an expert witness,

1 not as a percipient witness? This seems to me to be in the
2 nature of an opinion. And if you're now calling him and
3 treating him as an expert, a legal expert, then that's one
4 thing. If you're examining him as a percipient witness,
5 that's something different. So I'd like to have some
6 clarification on this.

7 MR. KORNSTEIN: All right. I am examining him
8 as a percipient witness, and, if the question I posed sounds
9 like a hypothetical to an expert witness, I'll withdraw
10 the question, your Honor.

11 THE COURT: All right. Then I think you should
12 withdraw it.

13 MR. KORNSTEIN: No further questions, your Honor.

14 THE COURT: Mr. Bostwick.

15 REDIRECT EXAMINATION

16 BY MR. BOSTWICK:

17 Q Mr. Malley, did Mr. McGinniss ever express to you that
18 he was writing a book of fiction?

19 A No.

20 Q Was it always clear to you that the book was to be a
21 book of nonfiction?

22 A Yes, it was.

23 Q Do you still have what's been identified as Exhibit 156
24 in front of you, I believe that's correct "Parallel Memo"?

25 A My copy doesn't have numbers on it, but if you wait a

1 second, I'll find it.

2 I'm sorry. Now, you're looking at --

3 Q I'm asking you to look for --

4 A -- on "Parallel Memo."

5 Q -- I believe it's Exhibit 156 for identification. It's
6 a series of pages 11 -- excuse me -- 8 -- I think it's
7 8½ by 14, down in the left-hand corner is a 1 with a circle
8 around it.

9 THE COURT: Excuse me, Mr. Bostwick.

10 MR. BOSTWICK: Yes.

11 THE COURT: The clerk hasn't had an opportunity
12 to mark these papers yet. So maybe we should take that
13 time now and have her mark them, mark the two exhibits.

14 All right. I want Mr. Kornstein to step up to
15 the witness stand and hand the clerk the Exhibits 155 and
16 156.

17 THE WITNESS: I think this is the first one
18 and that's the second one.

19 MR. KORNSTEIN: This is 156, and this is 155.

20 THE CLERK: Thank you.

21 THE COURT: All right. Now, you're asking the
22 witness about Exhibit 1-5-6?

23 MR. BOSTWICK: Yes, I am, your Honor. And I
24 would like also at the same time to ask the witness to look
25 at Exhibit 402, that's the book, Chapter One, and the page

1 -- I would like to direct your attention to Page 611.

2 THE WITNESS: Okay, I have Page 611; and I have
3 Exhibit 156.

4 BY MR. BOSTWICK:

5 Q And I would also like you to look at then Exhibit 155
6 for identification.

7 A Now, I have to move the water. Okay.

8 Q Now, looking at Exhibit 155, these are the notes that
9 you've identified as being in Dr. MacDonald's handwriting.
10 Do you see the start of it -- at the start of the document
11 it says "Activities, Monday 5:00 p.m."

12 A Yes, sir.

13 Q Something, "16 February, 17 February"?

14 A Yes, sir, I do.

15 Q You see it starts with the words, "We ate dinner
16 together at 5:45 p.m. (all four)" close paren?

17 A Yes, sir.

18 Q Now, if you'd look back at Page 610 of the book, you
19 see that that paragraph at the bottom of the Page 610 starts
20 off with the words, "We ate dinner together at 5:45 p.m.
21 (all four)"?

22 A Yes, sir.

23 Q Now, what I'd like you to do as well is to look then
24 at the bottom of the page of Exhibit 155 where it says,
25 "After I put Christie to bed," that's the fourth from the

1 and the third from the last line.

2 A Yes, sir.

3 Q Now, look at the book on Page 611.

4 A Okay.

5 Q Do you see that the author has put in four periods
6 there, showing that he's left out some material?

7 A Yes, I do.

8 Q Now, would you read the words to the jury that come in
9 the memo after the words "to bed," comma?

10 A You're now talking about from the text of the book?

11 Q No, I'm sorry. From Exhibit 155 in Dr. MacDonald's
12 handwriting. In the book it stops after I -- I'll start
13 a little earlier, "I think I had a one-half-hour nap on the
14 floor from 7:30 to 8:00 p.m. after I put Christie to bed."
15 Then comes the ellipsis. Now would you continue reading
16 the notes.

17 A What's to follow is, "and was lying on the floor with
18 Kim. It was very common for me to nap on the floor. I also
19 had a very strong nap urge after a full meal. And knowing
20 this, I would want to prevent the nap, at least until
21 Christie was in bed."

22 Q Now, there is a second paragraph that starts right
23 after that in Dr. MacDonald's handwriting; isn't that true?

24 A Yes.

25 Q And does it tell what Dr. MacDonald did after dinner?

1 A Yeah. It says, "After dinner I put the dishes in the
2 sink. Collette got ready for school and left 6:15 p.m."

3 Q And the next paragraph talks about the kids and
4 Dr. MacDonald playing?

5 A Yes, sir.

6 Q Now, without going through this entire Exhibit 155,
7 I would like you to take a look now at this other exhibit,
8 Exhibit 156.

9 A Okay.

10 Q You'll see that the first words are, "The CID knows
11 nothing about the possible diet pill"?

12 A Yes.

13 Q Would you look back at Page 611 of the book?

14 A I have it.

15 Q Are those the words that the author puts in there?

16 A Yes, sir.

17 Q Do the words, "The CID knows nothing about the possible
18 diet pill" in fact, follow in Dr. MacDonald's handwriting
19 on Page 155 anywhere that you know of?

20 A You mean Exhibit 155?

21 Q Exhibit 155.

22 A No, they don't.

23 Q They appear in Exhibit 156; don't they?

24 A That's right.

25 Q Now, after the sentence, "The CID knows nothing about

1 the possible diet pill," there is another ellipsis?

2 A Right.

3 Q Isn't that correct, those four periods?

4 A Yes, sir.

5 Q And the next line of the book on Page 611 is, "If I
6 did take the pill, it is conceivable that my urine and
7 blood 11:30 a.m. Tuesday would still have some residue."

8 Do you see that?

9 A Yes, I do.

10 Q Now, what I want you to do is to go to Exhibit 156
11 and look at that first page. You've already read the first
12 line that ends up with the words "diet pill." Now, look
13 down until you find the sentence where Mr. McGinniss takes
14 up the narrative again, "If I did take the pill, it is
15 conceivable."

16 A Yeah. That appears about two thirds of the way down
17 the page under Item Two of Exhibit 156.

18 Q You're going to have to move away from the mike.

19 A I'm sorry.

20 Q Thank you. Now, Mr. Malley, would you read for the
21 jury all of that material in the notes following the
22 sentence, "The CID knows nothing about the possible diet
23 pill," that is represented in the book by four periods, all
24 of that material that Mr. Ginniss left out.

25 A Okay. It says, "The CID knows nothing about the

1 possible diet pill, the reason being I only remembered its
2 possibility when I went back to my office --

3 Q Mr. Malley.

4 A Yes.

5 Q We have a court reporter here. Would you go a little
6 slower.

7 A Oh, I'm sorry. I truly sympathize with you. I'm
8 sorry.

9 "The CID knows nothing about the possible diet pill,
10 the reason being I only remembered its possibility when I
11 went back to my office after the day of questioning; and the
12 news conference about" -- quote -- "suspect lead," --
13 close quote, paren -- "(on 6 April 1970). The questioning
14 about pills and" -- oh -- "had been very cursory right after
15 the crime. But Monday, April 6th, the questioning had
16 been more intense about pills. And when I went into my
17 office to clear out my books on Tuesday, 7 April, the weight
18 control chart caught my attention and I remembered the
19 bottle of Eskatrol Spansules and me using several of them
20 over the three-weeks period prior to the crime."

21 And the next sentence is where this quote in
22 the book takes up, "If I did take the pill, it is
23 conceivable" and so on.

24 Q So, all that material that you read from after the
25 words "diet pill" until "If I did take the pill,"

1 Mr. McGinniss left out of the book?

2 A That's right.

3 Q Did you talk to Dr. MacDonald about Exhibit 156 and
4 the notes he wrote in the parallel memo, to your
5 recollection?

6 A Yes.

7 Q And did you talk to him about the fact that he said
8 that he had used several of them over the three weeks prior
9 to the crime?

10 A Yes.

11 Q Did you see any mention of those notes that you just
12 read, that had been left out in the book "Fatal Vision"?

13 A No.

14 Q Did you see some conjecture that, in fact,
15 Dr. MacDonald had been taking three to five of those pills
16 a day?

17 A I recall that in the book. You'll have to point me
18 to where it is right now, because I haven't read this for
19 a while.

20 THE COURT: Go to Page 613.

21 MR. BOSTWICK: I think you're right, your Honor.

22 THE COURT: In the middle of the page here.

23 BY MR. BOSTWICK:

24 Q Do you see that --

25 A Yes, I do see that.

1 Q -- indication there, your Honor -- uh, Mr. Malley?

2 A Yes.

3 Q Where it says, "Three to five Eskatrol Spansules over
4 a three-to-four-week period also would not have accounted
5 for the weight loss"?

6 A Yes, I do.

7 Q "Three to five per day, however, could have had a
8 marked effect"?

9 A Yes, I see that.

10 Q Did you ever see any version of this "Parallel Memo,"
11 Exhibit 156, where someone had redacted this portion up
12 here that you just read to the jury that was left out of
13 the book?

14 A You mean covered it over?

15 Q Covered it over, copied it without it being in there,
16 cut it out, cut and pasted it?

17 A No. The last time I saw this, which, as I said,
18 probably was God knows how many years ago, it looked just
19 like it does today, to my recollection.

20 Q After you read this book "Fatal Vision," where it
21 said on Page 613 that three to five per day could have had
22 a marked effect, did you talk about that passage with
23 Dr. MacDonald?

24 A I believe I did.

25 Q Did you recall with him the conversations that you had

1 had about that back in 1970?

2 A With him? Yes.

3 Q Do you recall anything that he said to you after
4 reading the book and upon that subject?

5 A I recall his telling me that it was crazy, and I agreed
6 with it. It was crazy.

7 Q On cross-examination someone asked you why
8 Dr. Silverman may have signed the report; do you recall any
9 reason Dr. Silverman signed the report?

10 A I have no idea how those two guys worked together.
11 So, no, I don't.

12 Q Do you know whether Dr. Brussels suffered a stroke
13 shortly after the examination?

14 A I heard that he did, but I don't know that for a fact.

15 MR. BOSTWICK: Your Honor, I don't know if
16 we've identified Exhibit 154, which was offered by the
17 defense about two or three days ago. It's a portion of
18 the Grand Jury testimony of Dr. MacDonald. And it's been
19 offered into evidence. Whether it's been marked, I don't
20 know.

21 The entire document wasn't the exhibit.

22 MR. KORNSTEIN: Just a few pages.

23 THE COURT: I don't think they've been received
24 in evidence; have they?

25 (Pause.)

1 THE COURT: What is it about these two pages?

2 MR. BOSTWICK: Your Honor, I want to ask

3 Mr. Malley if --

4 THE COURT: Well, I --

5 MR. KORNSTEIN: We have them, your Honor.

6 THE COURT: You're offering them into evidence?

7 MR. KORNSTEIN: We did at the time. I believe
8 they were accepted, but --

9 THE COURT: Well, her notes don't reflect that,
10 neither do mine. Are you now offering 154 in evidence?

11 MR. KORNSTEIN: Yes, your Honor. It's Pages 88
12 through 103 of Dr. MacDonald's Grand Jury testimony on
13 January 21st, 1975.

14 THE COURT: All right. No objection?

15 MR. BOSTWICK: No, your Honor.

16 THE COURT: They will be received in evidence.

17 (Defendant's Exhibit 154 admitted into evidence.)

18 THE COURT: Are you going to examine him on
19 this?

20 MR. BOSTWICK: Yes, your Honor.

21 Q Mr. Kornstein asked you, Mr. Malley -- do you have
22 Exhibit 154 in front of you?

23 A Yes, I do.

24 Q Mr. Kornstein asked you whether upon the return of
25 Dr. MacDonald to the Grand Jury for his second stint as a

1 witness, he refused to take a sodium amytal test. Have you
2 ever seen a copy of Dr. MacDonald's Grand Jury testimony
3 before?

4 A Yes, I have.

5 Q Would you look through that very quickly --

6 A I would.

7 Q -- and see if you recognize it as being what you read
8 before?

9 A It appears to be, yes, sir.

10 Q Did Dr. MacDonald leave the Grand Jury room and
11 explain to you what he had said to the Grand Jury about
12 his willingness to take the sodium amytal in late January
13 1975?

14 A Yes. My recollection is, as I said, it's not precise;
15 but my recollection is, this is something that came up
16 before the Grand Jury again. And that's why we revisited
17 it at that time. As I said, once one of those things, you
18 know, once the jury finds out there is this test, it isn't
19 going to go away just because nobody mentions it anymore;
20 and the jury had a chance to ask the question and it came
21 up again. That's why we revisited the issue.

22 Q And had you and Mr. Segal advised Dr. MacDonald to
23 respond in the fashion that is shown in this Exhibit 154?

24 A I don't think we had advised him particularly, because
25 this came up spontaneously. We had previously advised him;

1 and I think he came out to find out what we thought.

2 Q Does that testimony show that Dr. MacDonald refused
3 to take the test, or that he conditionally accepted the
4 test?

5 MR. KORNSTEIN: Objection, your Honor. The
6 testimony speaks for itself.

7 THE COURT: It's a compound question.

8 BY MR. BOSTWICK:

9 Q Mr. Malley -- let me rephrase it. Mr. Malley, does
10 that testimony indicate that Dr. MacDonald refused to take
11 the test?

12 A It doesn't appear to me that way. I haven't read the
13 whole thing all the way through, but it doesn't appear
14 that that's what he did, and that's not my -- my
15 recollection is that he did not refuse.

16 Q Do you know of any other communication with the Grand
17 Jury, other than what you have before you and the mailgram
18 in either January or February of 1975?

19 A Regarding the sodium amytal?

20 Q That's right.

21 A No, I don't.

22 Q Mr. Kornstein read to you several passages from his
23 client's book, purporting to be passages from the
24 prosecution's psychiatric report that was conducted in
25 August of 1979.

1 A Right.

2 Q Did Mr. McGinniss ever call you and talk to you about
3 the findings in that report after August '79 up to the
4 date of publication of the book?

5 A No.

6 Q Did you ever talk to him in person about those
7 findings?

8 A No.

9 Q Did he ever indicate to you that he had those findings?

10 A No.

11 Q Did you know at any time that anyone had seen them,
12 other than the attorneys and Dr. MacDonald?

13 A Well, as I said, since I hadn't seen them, I knew
14 they existed and I knew the judge had seen them, but I
15 didn't know that anybody other than the judge -- and
16 therefore, I presume the prosecutors had it -- until I saw
17 it in the book.

18 Q Had you on an earlier occasion told Mr. McGinniss any
19 of the findings of Dr. Hallick?

20 A I believe we had discussed what Dr. Hallick would
21 testify to, if called. Hallick was in, I guess, Chapel
22 Hill, which is not far from Raleigh. And I think he spent
23 one or two evenings at the fraternity house discussing
24 his testimony. And I think Joe was there.

25 Q What did Mr. McGinniss hear that Dr. Hallick would

1 testify to if he had been allowed to testify?

2 A My recollection is that Hallick, like, say, would
3 basically say that Jeff's personality configuration is
4 normal. He appears to be a very sane, well-composed man
5 who does not have any pathological symptoms at all. And
6 that Sadolf would have said -- and Hallick -- I mean they
7 discussed this. Sadolf would have said in his opinion it
8 was highly unlikely Jeff would have committed these crimes.

9 I think Hallick was a little bit less
10 comfortable about making those kinds of predictive
11 statements; but Hallick certainly would have said, and did
12 say, he saw nothing in Jeff's personality, or in any of
13 the tests, or whatever else they did, to indicate that
14 Jeff had any kind of problem which would explain the kind
15 of behavior that one supposes a man, you know, the kind
16 of behavior that the Government supposed Jeff engaged in
17 in killing his family. And I believed Hallick would have
18 testified as to that; Sadolf would have testified to that --

19 Q Did Mr. McGinniss have any opportunity to hear what
20 the proposed testimony of Dr. Sadolf was, if he had
21 testified?

22 A I don't recall. I don't recall whether Sadolf talked
23 there or not. He -- I'm pretty sure Joe at least had
24 Sadolf's reports from 1970 and his testimony from 1970.
25 In 1970, that is exactly what Sadolf testified to before

1 the Grand -- before the Article 32. And Sadolf was not
2 going to back off in 1979.

3 Q You were contemplating as well, as member of the
4 defense team, in 1979 during the criminal trial, putting
5 on the stand psychiatric evidence that had been developed
6 by the Army in 1970; weren't you?

7 A Yes.

8 Q And was that Dr. Bailey?

9 A Well, Dr. Bailey was the psychia -- he was the chief
10 psychiatrist at Walter Reed Hospital there, the Army
11 Hospital in Washington. He actually led a team of, I think
12 there was another psychiatrist and one or two psychologists
13 that administered several batteries of tests over a two-
14 or-three-day period; and then they conducted all sorts of
15 personal interviews; and then Bailey came down to testify
16 at Colonel Rock, the hearing officer's request.

17 He, I suppose, was technically a prosecution
18 witness, but he was really the -- for want of a better word
19 -- he was the judge's witness.

20 Q Did Mr. McGinniss at any time have the opportunity to
21 either read or hear what Dr. Bailey's findings had been?

22 A Well, he certainly had the opportunity to read it,
23 because it was in the Article 32 transcript, which Joe had.
24 I don't think -- I did talk to Dr. Bailey that summer.
25 Bailey happened to be in Phoenix at that time, I believe.

1 He was working for the VA Hospital then. And I did talk
2 to Bailey about whether he would be willing to come to
3 North Carolina and repeat his testimony; and he expressed
4 some hesitancy to do so, mostly because it interfered with
5 his job.

6 So he never really came to North Carolina. But
7 I think we would have pursued the matter intensively, had
8 the judge allowed us to bring in psychiatric testimony,
9 because Bailey was essentially a Government psychiatrist.
10 And he had done at least as extensive testing -- I mean,
11 as I said, it took several days -- and extensive
12 evaluation of Jeff contemporaneously with the crimes or
13 shortly thereafter as anybody, including Sadolf.

14 So we would have made a real effort to get him
15 into court.

16 Q Do you know how long Drs. Silverman and Brussels
17 interviewed Dr. MacDonald before they came to the opinion
18 that was so abundantly read in here in court?

19 A I understand it was an hour or so.

20 Q When you talked to Dr. MacDonald after reading
21 "Fatal Vision," about the references to either
22 Dr. Silverman's or Dr. Brussels' report, signed by
23 Dr. Silverman, did you talk to him about the fact that
24 there was no reference in the book about Drs. Sadolf,
25 Hallick, and Bailey, and their conclusions?

1 A Yes.

2 Q And what did Dr. MacDonald say about that?

3 A He was outraged.

4 Q And you?

5 A I was outraged, too.

6 MR. BOSTWICK: I have no further questions.

7 RE-CROSS-EXAMINATION

8 BY MR. KORNSTEIN:

9 Q Mr. Malley, isn't it true that "Fatal Vision" does,
10 in fact, include Sadolf's testimony to the Grand Jury?
11 Just yes or no.

12 A I don't recall. If you point it to me, I can tell you.
13 It seems to me there are -- my recollection is there are
14 excerpts from it, but I don't recall specifically.

15 Q So then your answer to Mr. Bostwick's question is
16 not correct?

17 A Well, my recollection is, there may be an excerpt or
18 two from Sadolf's testimony. But I don't recall that there
19 is any kind of extensive discussion of it.

20 Q And isn't it also true that "Fatal Vision" includes
21 portions of Sadolf's testimony before the Article 32?

22 A Wait a minute. I thought your question just was about
23 the Article 32.

24 Q No, the Grand Jury.

25 A Oh, I have no idea about the Grand Jury. I've never

1 seen Sadolf's testimony.

2 Q But doesn't "Fatal Vision" include some of his
3 testimony before the Grand Jury?

4 A I don't know whether it contains testimony before the
5 Grand Jury.

6 Q You just -- you just said that you expressed outrage
7 because it wasn't in there. And now I'm asking you if it's
8 in there, and you can't recall.

9 A You know, you've got me confused, Counsel. Are we
10 talking now about Sadolf's testimony before the Grand Jury?

11 Q Yes.

12 A Okay. It's my recollection, without knowing -- you
13 are going to have to point me in here, because I haven't
14 read this book for quite a while -- that there are excerpts
15 of testimony purporting to be testimony of psychiatrists.
16 But I don't think they're identified as Sadolf, and I don't
17 know whether that's Sadolf or not before the Grand Jury.
18 But that's only my recollection. If you point me to it,
19 maybe -- I may be wrong about that.

20 Q Isn't it true that testimony by Sadolf is included
21 from the Article 32 in the book as well?

22 A Again, my recollection without reading this book again
23 is, there are very limited excerpts, but I don't -- in fact,
24 I did not recall that when Gary Bostwick asked me that
25 question. I don't recall how much of it was, but not --

1 certainly, my impression in reading it through was,
2 whatever it was, it wasn't enough to give the real flavor
3 of what Sadolf was going to testify about or did testify
4 about.

5 Q Doesn't the book "Fatal Vision" include testimony by
6 Bailey?

7 A I don't recall whether there is such testimony. I
8 think there is, but again, I don't think it's enough to
9 give -- my recollection of it is that there was not much
10 enough there to give a real flavor of what Bailey testified
11 to.

12 Q Don't you think you should have refreshed your
13 recollection before you were so quick to say something
14 about outrage when you don't even know whether it's
15 included or not?

16 MR. BOSTWICK: Objection, your Honor. It's
17 argumentative and --

18 THE COURT: Sustained.

19 MR. BOSTWICK: -- was not the question that
20 was asked.

21 BY MR. KORNSTEIN:

22 Q Well, isn't it true that Dr. Silverman had been
23 involved in the case since 1971?

24 A Well, that is something that I heard very, very late
25 in the day, in fact, quite after the fact. I don't know

1 whether that's true or not. But if you're telling me it's
2 true, I suppose it is. I don't know.

3 Q I'm just asking the question. You don't know when
4 Dr. Silverman was involved in this case for the first time?

5 A No. I had heard that, again, that Brussels had been
6 involved in the case pretty early on, essentially as a
7 criminal investigator. That's what I heard, that Brussels
8 had been retained by the Army pretty early on to give sort
9 of, you know, armchair opinion about psychiatric questions,
10 kind of off the top of his head; that's what I heard about
11 Brussels.

12 Since Brussels and Silverman were a team, they
13 kind of worked together. It may be that he was part of
14 that consulting arrangement with the Army. I just don't
15 know.

16 Q Now, you mentioned on redirect some comments about
17 portions of Exhibits 155 and 156 being deleted or quoted
18 in the book in a certain fashion. Are you familiar with
19 the consent and release that is Exhibit 6 in the case?
20 Would you check Exhibit 6, in the first volume?

21 MR. BOSTWICK: Your Honor, I'm going to object
22 to -- I think I'm one question too early.

23 THE CLERK: Exhibit 6 before the witness.

24 BY MR. KORNSTEIN:

25 Q My first question, Mr. Malley, is, have you ever seen

1 that document before?

2 A I think so, but I'm not sure.

3 Q Do you know under what circumstances you saw it before?

4 A It seems to me -- No, I really can't recall. It seems
5 to me I've seen this before, but I really don't know.

6 Q It's entitled "Consent and Release"; isn't it?

7 A That's what it says.

8 Q Can you recognize Dr. MacDonald's signature on the
9 second page?

10 A Appears to be from what I know about his signature,
11 yes.

12 Q And would you take a moment to read the paragraph
13 Arabic numeral 1 to yourself, just to familiarize yourself
14 with it.

15 A Okay.

16 (Pause.)

17 MR. BOSTWICK: Your Honor, while he's doing
18 that, may I inquire of the Clerk if this has been admitted
19 into evidence?

20 MR. KORNSTEIN: It's Exhibit 6, your Honor, it
21 has.

22 THE COURT: Yes, it is in evidence.

23 MR. BOSTWICK: Thank you, your Honor.

24 THE WITNESS: I have read it.

25 //

1 BY MR. KORNSTEIN:

2 Q Doesn't that document and that paragraph give
3 Mr. McGinniss, in his sole discretion, the right to edit
4 and use materials he gets from Dr. MacDonald for the book?

5 MR. BOSTWICK: Object to the question as calling
6 for legal conclusion on the part of this witness.

7 THE COURT: Sustained.

8 BY MR. KORNSTEIN:

9 Q Doesn't that paragraph contain the language, in the
10 middle of it, saying that Mr. McGinniss has the, quote,
11 "unlimited right as you may in your sole discretion deem
12 proper to quote directly, to paraphrase, to edit, to
13 rewrite, to add material to, and/or delete material from,
14 and otherwise make use of such recordings and other
15 reproductions and interviews," and then it goes on, "to
16 describe, impersonate, simulate, depict, and portray me
17 under my own or any fictitious name, and to use my name,
18 and to make any use of any episodes of my life, factionally
19 or fictionally, in any and/or all of the aforesaid media
20 as you may in your sole discretion deem proper."

21 Doesn't that document say that?

22 A Well, that -- I mean yes, you're reading from it.

23 Q Now, going to the Grand Jury episode in January of
24 1975, you said your reading of that Exhibit 154 indicated
25 that the witness was not refusing to take the sodium amytal

1 test. Isn't it correct, Mr. Malley, that before he left
2 the Grand Jury on that occasion to consult with counsel,
3 he did not consent to take the sodium amytal test; isn't
4 that correct?

5 A Well, that's correct. But that's not the same thing
6 as the prior question.

7 Q I just asked my question.

8 MR. KORNSTEIN: No further questions, your
9 Honor.

10 THE COURT: That's it for this witness?

11 MR. BOSTWICK: Yes, your Honor, that's it.

12 THE COURT: All right. You may step down,
13 Mr. Malley.

14 Ladies and gentlemen, we are going to adjourn
15 at this time. We'll reconvene tomorrow morning at 9:30.

16 Remember the admonition of the Court.

17 (Court adjourned.)

18 - - -

19
20
21 I certify that the foregoing is a true and correct
22 transcript of proceedings had on the record in the
23 above-entitled matter.

24
25 _____
Official Court Reporter

_____ Date