UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 3:75-CR-26-F
No. 5:06-CV-24-F

UNITED STATES OF AMERICA	)	
	)	
v.	)	GOVERNMENT'S RESPONSE
	)	TO MOTION FOR A NEW TRIAL
JEFFREY R. MacDONALD,	)	PURSUANT TO 18 U.S.C.§ 3600
Movant	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, pursuant to the Court's order of November 10, 2011, [DE-204] hereby submits the following response to movant's motion for a new trial under the Innocence Protection Act ("IPA") (18 U.S.C. § 3600(g)(2)) based upon prior DNA test results[1], filed September 20, 2011 [DE-176], and respectfully shows unto the Court the following:

SUMMARY OF ARGUMENT

MacDonald's 1997 Motion For DNA Testing did not constitute a motion for DNA testing under § 3600(a) of the IPA. Consequently, the instant motion for a new trial pursuant to § 3600(g)(2) is (1) untimely; (2) precluded by failing to comply with several mandatory provisions of § 3600(a); (3) not based upon a motion for new trial under §3600(g)(1) as required; and (4) insufficient to meet the "compelling evidence" requirement of §3600(g)(2). MacDonald's

[1] Movant's filing DE-176 of September 20, 2011, included two distinct motions: one seeking a new trial under the IPA based on the results of DNA testing completed in 2006 and a second seeking, alternatively, an order for new DNA testing under the IPA. The Government proposes to file separate responses to the two motions. This one deals with the motion for a new trial.

overstated claims as to the import of the DNA results, unsupported by the record or any affidavits from competent experts, are refuted by the affidavits of the Government's experts filed with this response. MacDonald has not met, and cannot meet, his burden of proof on his IPA claim.

PROCEDURAL CONTEXT

1. On August 29, 1979, a jury of the United States District Court for the Eastern District of North Carolina found MacDonald guilty on three counts of murder for the killing of his wife Colette, and infant daughters Kimberly (age 5½) and Kristen (age 2½) in violation of 18 U.S.C. § 1111. He was sentenced to three consecutive life terms of imprisonment by the trial judge, the Honorable Franklin T. Dupree. MacDonald appealed his conviction, which was ultimately affirmed by the court of appeals in 1983. *United States v. MacDonald,* 688 F.2d 224 (4th Cir. 1983).

2. On April 22, 1997 MacDonald filed a third petition for habeas relief captioned: *Motion to Reopen 28 U.S.C. § 2255 Proceedings And For Discovery.*

3. On September 2, 1997, this Court denied the Motion to Reopen and for Discovery insofar as it was based on the "fraud-on-the-court" claim involving the affidavit of Special Agent Michael Malone. *United States v. MacDonald*, 979 F. Supp. 1057, 1069 (1997). Concerning the motion for discovery involving DNA testing this Court ruled that since it was denying the request to reopen the 1990 habeas proceeding, it had no basis upon which to allow MacDonald discovery. *Id*. at 1067. Finally, in regard for

MacDonald's motion for a new trial based upon newly discovered evidence, this Court determined that under 28 U.S.C. § 2255, as amended by AEDPA in 1996, it was without jurisdiction and transferred the case to the Fourth Circuit Court of Appeals for consideration of certification as a successive motion pursuant to 28 U.S.C. § 2244.

4. On September 18, 1997, MacDonald filed his motion with the court of appeals under 28 U.S.C.§ 2244.

5. On October 17, 1997, the Clerk of Court for the Fourth Circuit entered an order which in its entirety stated:

> Upon consideration of the motion of Jeffrey R. MacDonald filed pursuant to 28 U.S.C. Section 2244, IT IS ADJUDGED AND ORDERED that **the motion with respect to DNA testing is granted** and this issue is remanded to the district court.
>
> In all other respects, the motion to file a successive application is denied.

DE-67 (emphasis added).

6. While the DNA testing ordered by the court of appeals was being conducted by the Armed Forces DNA Identification Laboratory (AFDIL), a component of the Armed Forces Institute of Pathology (AFIP), on October 30, 2004, Public Law 108-405, Title IV, §§ 401- to 432, 118 Stat. 2278, known as the Innocence Protection Act of 2004, went into effect and was codified in 18 U.S.C. §§ 3600, 3600A.

7. On January 17, 2006, MacDonald filed his fourth motion to vacate his 1979 murder conviction [DE-111], based on what he alleged to be newly discovered evidence, i.e., the November 3,

2005, affidavit of Jimmy B. Britt ("Britt affidavit").

8. On March 10, 2006, the results of the court ordered DNA testing were reported by AFIP-AFDIL, and the report was furnished to the parties. That same day, and pursuant to a previous order of this Court, the Government filed the AFDIL Report as a Notice of Filing. DE-119.

9. On March 22, 2006, MacDonald filed a motion [DE-122] to add an additional predicate to his previously filed §2255 motion in which he asserted a free standing claim of actual innocence based in part on the DNA test results reflecting three unsourced hairs.

10. The Government opposed the motion on jurisdictional grounds, but noted that it would contest the factual allegations.[2]

11. On November 4, 2008, this Court entered an order denying, *inter alia*, MacDonald's motion to add an additional predicate based upon DNA test results. DE-150. In denying the motion to add the DNA predicate, this Court held that it lacked subject matter jurisdiction to consider this new claim in the absence of a Prefiling Authorization ("PFA") from the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), pursuant to 28

[2] "Should this Court not agree with our submission that the instant motion should be dismissed for lack of jurisdiction, or transferred to the court of appeals for a 'gate keeping' determination, we anticipate contesting all the factual allegations MacDonald has made in support of this motion. In that event, we request an opportunity to reply on the merits, as well as an evidentiary hearing at which MacDonald will be required, in the absence of accurate citations to the record, to present evidence in the form of testimony to substantiate the factual allegations and expert opinions contained in his motion. FN 1: MacDonald has filed no affidavits in support of the instant motion to substantiate the factual representations he makes, and the sparse citations to the record that are present, do not support the propositions for which they were cited." DE-134 at 2.

U.S.C. §§ 2244(b) and 2255. See Order at 4, 20.

12. After briefing and oral argument, on May 6, 2010, the Fourth Circuit asked for supplemental briefing after modifying the COA in pertinent part to read:

> (1). . . and
>
> (2) Whether the district court's procedural decision with respect to the freestanding DNA claim, requiring additional prefiling authorization from this Court, was erroneous in light of 28 U.S.C. § 2255(h).

United States v. MacDonald, 641 F.3d 596, 608 (4th Cir. 2011). On April 19, 2011, the Fourth Circuit vacated this Court's Order and remanded the case for further proceedings. *Id*. at 616.

13. On June 23, 2011, this Court scheduled a status conference for July 28, 2011, "to clarify appropriate procedures, establish deadlines and explore the parameters of matters on remand from the Fourth Circuit . . . ." DE-168 at 1. On MacDonald's motion [DE-169], the conference was continued to September 21, 2011. DE-171.

14. On September 19, 2011, the Government's Memorandum For Status Conference was filed [DE-174]. The Government's memorandum concluded with the request that " . . . in considering this matter anew on remand, this Court require as an initial matter that MacDonald prove his alleged newly discovered evidence on both the Britt claim and the DNA claim." Id. at 11.

15. The following day, on the eve of the status conference, MacDonald filed his Request For Hearing [DE-175] in which he (1) listed potential witnesses he wished to call on both the Britt and

DNA claims (*id*. at 4-5) and (2) raised for the first time a new claim that Special Agent Examiner Michael Malone made "another false statement in his February 14, 1991 affidavit when he concluded that a hair found under Colette MacDonald was Jeffrey MacDonald's." *Id*. at 5. This new claim was based on the assertion that "[t]he DNA test on the hair [Specimen 75A] showed that it belonged to an unidentified person." *Id*. MacDonald concluded by requesting ". . . a hearing to include live testimony to enable the Court's consideration of all the evidence, including but not limited to the DNA evidence, in evaluating Defendant's 2255 claim and to determine whether Defendant's initial request for DNA testing in 1997 and the 2006 results of that testing entitle Defendant to relief under the Innocence Protection Act of 2004, 18 U.S.C.§ 3600." *Id*. at 6.[3]

16. Also filed on September 20, 2011, was MacDonald's "Motion Pursuant To The Innocence Protection Act of 2004, 18 U.S.C. § 3600, For New Trial Based On DNA Testing Results and Other Relief" [DE-176] ("the instant IPA motion"), which was supported by an affidavit of Christine Mumma [DE-176-1] and a Notice of Appearance [DE-177] filed by Christine Mumma reflecting that she was appearing as counsel of record for MacDonald.

17. At the September 21 status conference, this Court heard from the parties on the way forward to resolve the pending issues remanded by the Fourth Circuit, and how to address the new motions

[3] MacDonald's motion in this regard appears to be a claim that he is entitled to a new trial under 18 U.S.C. § 3600(g)(2), based upon DNA results obtained in connection with a 1997 motion for discovery under 28 U.S.C.§ 2255, and not a new § 2255 claim based upon Malone's alleged false statement.

filed under the IPA. Ultimately, this Court decided to move forward with an evidentiary hearing on the Britt claim, leaving any evidentiary hearing on the DNA claim under § 2255 until after briefing on MacDonald's newly filed motions.[4] The evidentiary hearing on the Britt claim was initially set for the week of October 31, 2011. DE-180. As a result of motions to withdraw subsequently filed by four of MacDonald's counsel, the evidentiary hearing on the Britt claim was continued, on MacDonald's motion [DE-191], until the week of April 30, 2012. DE-201.

18. On November 10, 2011, this Court entered an order extending the deadline for filing of the Government's response to Movant's Request for a Hearing [DE-175] and Motion for New trial Pursuant to the Innocence Protection Act [DE-176] to December 13, 2011, and the deadline for the Movant's reply to January 6, 2012.

DISCUSSION

ARGUMENT ONE: MACDONALD'S 1997 MOTION FOR DNA TESTING WAS NOT A TIMELY FILED MOTION FOR DNA TESTING UNDER 18 U.S.C. § 3600(a)(10) OF THE IPA.

19. This response will first address the impact, if any, of the 1997 DNA Testing Motion on the instant DNA-based motion with regard to timeliness and jurisdiction, and then turn to the Movant's claim that the instant motion provides a basis for the immediate grant of a new trial. In order to avoid confusion, the Government will refer to MacDonald's IPA claim raised for the first time in the court of appeals on March 17, 2010, as his "previous IPA claim", and

[4] This Court invited MacDonald's counsel to file a brief on the efficacy of a free standing claim of actual innocence as a basis for relief. MacDonald's counsel agreed to brief the issue, but to date, no brief has been filed. *See* Tr. of Status Conference at 12-13, 31-32.

the IPA claims raised in this Court on September 20, 2011, [DE-176] as the "instant motion."

20. MacDonald's previous IPA claim was raised in his Opposition To Government's Motion To Dismiss Appeal [CA4 DE-77][5]. The Government's Motion to Dismiss Appeal was based on the argument that the COA, as initially issued by the court of appeals, was improvidently issued under 28 U.S.C.§ 2253(c) because "the legal claims embraced by the COA are not of constitutional magnitude." CA4 DE-75 at 1. The Government's Brief of Appellee had argued that the only means provided by Congress for MacDonald to collaterally attack his conviction in the district court was to seek a PFA pursuant to 28 U.S.C. § 2244, which he had not done. CA4 DE-60 at 38-39. In a footnote to this assertion, the Government made a reference to the inapplicability of the IPA.[6] MacDonald responded to the motion to dismiss the appeal by asserting that, pursuant to 18 U.S.C. § 3600(h)(2) [sic],[7] MacDonald's DNA-based claim for a new trial "is not to be considered as a motion under section 2255 for purposes of determining whether the motion or any other motion is a second or successive motion under section 2255." Further, according to MacDonald, the court of appeals was "obliged by subsection (h)(2)

[5] References to docket entries ("DE") in this response refer to documents filed in this Court in the case of *United States v. MacDonald*, No. 75-CR-26-3-F (EDNC), unless preceded by "CA4", which indicates that the document referred to was filed in the United States Court of Appeals for the Fourth Circuit in *United States v. MacDonald*, No. 08-8525.

[6] "MacDonald does not meet the statutory requirements for a new trial under the Innocence Protection Act, because the DNA test results do not exclude him as the source of the biological evidence used to convict him. See 18 U.S.C.§ 3600(g)." CA4 DE-60 at 46 n.16.

[7] This was likely intended to be a reference not to subsection (h)(3) rather than subsection (h)(2).

[sic] not to treat MacDonald's DNA testing claim as a section 2255 motion under the IPA." CA4 DE-77 at 9. Consequently, MacDonald asserted he " . . . is entitled to review of the district court's refusal to consider the DNA results without having to satisfy section 2253(c)'s COA requirements." *Id*. at 10. "MacDonald contends that this Court's decision to grant DNA testing in 1997 permits MacDonald to obtain relief under the IPA, as all of the elements have been met." *Id*. MacDonald also told the court of appeals: "[t]here can be no question that MacDonald's request for DNA testing is timely under the IPA, as it was made and allowed by [the court of appeals] seven years prior to the enactment of the IPA. 18 U.S.C. § 3600(a)(10)." *Id*. at 8. The court of appeals did not embrace this view and instead granted a PFA to MacDonald by treating his notice of appeal and appellate brief as motion to file a successive § 2255 motion. 641 F.3d at 616. The appellate court added:

> In these circumstances, we need not reach MacDonald's alternative theories of jurisdiction with respect to the DNA claim: ... (2) that no prefiling authorization is necessary, because the DNA claim is properly asserted under the Innocence Protection Act of 2004 (the "IPA"), 18 U.S.C. § 3600, rendering it free from the strictures of AEDPA. Nonetheless, on remand, the district court may consider in the first instance whether the IPA–a statute initially mentioned in this appeal by the government and subsequently invoked by MacDonald–is applicable to the DNA claim.

Id. n.13 (emphasis added).

21. MacDonald now relies on footnote 13 for the proposition that "[t]he Court of Appeals authorized this Court to consider

whether the IPA is applicable to the defendant's DNA-based claim." DE-176 at 3 n.1. Actually, no authorization from the court of appeals is necessary because Congress has given jurisdiction over IPA DNA claims, in the first instance, to the "the court that entered the judgment of conviction . . .", and not to the court of appeals. 18 U.S.C. § 3600(a). The aside in the Fourth Circuit's Footnote 13 merely recognizes this jurisdictional reality.

22. MacDonald's instant IPA motion [DE-176] further asserts that, even though Congress did not pass the IPA until 2004, "Defendant's 1997 request for DNA testing (while the AFIP testing was being conducted in 2004) constitutes a request for relief under the IPA." DE-176 at 2. No citation of authority for this proposition or further explanation as to how this occurred *ex ante* is provided in the instant motion. MacDonald has also moved the timeliness clock forward seven years, based upon the October 30, 2004 enactment of the IPA, and appears to have abandoned his prior position in the court of appeals to the effect that his 1997 DNA motion was effective for IPA purposes when the court of appeals granted his motion for DNA testing on October 17, 1997. MacDonald further argues that "[t]he 5th, 6th, 8th and 14th Amendments to the U.S. Constitution require that MacDonald's 1997 request for DNA testing be given the benefit of the procedures established by the 2004 Innocence Protection Act, and that his 1997 request and the subsequent DNA test results constitute evidence that supports a motion for a new trial under 18 U.S.C.§ 3600(g)." DE-176 at 2. The instant motion provides no citation to the specific constitutional

provision or further explication as to how the Constitution can be read to require application of the IPA to MacDonald's DNA claim.

23. In the instant motion, MacDonald appears to be asking, as he did in his Request For Hearing [DE-175 at 1], to rule that his 1997 Motion To Reopen And For Discovery, in which he sought DNA testing of specific exhibits but nothing more regarding DNA, by some unexplained process of metamorphosis became a timely filed motion for DNA testing under 18 U.S.C. § 3600(a) upon the passage of the IPA in 2004. Moreover, he claims that upon receipt of the DNA test results in 2006, he had met the jurisdictional prerequisite of § 3600(g)(1) of having "DNA test results obtained under this section," thereby permitting MacDonald to file the instant motion [DE-176] for a new trial under §3600(g)(1) and have the Court to grant him a new trial under §3600(g)(2).

24. This argument should be rejected for several reasons. First, MacDonald is seeking to circumvent the untimeliness presumption of 18 U.S.C. § 3600(a)(10), applicable to convictions older that 36 months, that any motion for DNA testing under § 3600(a) must be filed within 60 months of the enactment of the enactment IPA on October 30, 2004.[8] The instant motion was filed on September 20, 2011, more than 82 months after the IPA became law.

[8] In pertinent part, § 3600(a)(10) delineates one of the ten requirements for relief under § 3600: "The motion is made in a timely fashion, subject to the following conditions: (A) There shall be a rebuttable presumption of timeliness if the motion is made within 60 months of enactment of the Justice For All Act of 2004 or within 36 months of conviction, whichever comes later." The Movant can rebut the resulting presumption of untimeliness by obtaining a court finding that one of the four circumstances listed in § 3600(a)(10)(B) is applicable. MacDonald has not shown how any of these exceptions would be applicable to him, and the Government submits that none of them are.

MacDonald also seeks to circumvent the jurisdictional pre-requisite of §3600(g)(1) to the grant of a new trial under §3600(g)(2), namely that there had previously been a timely motion under 18 U.S.C. § 3600(a) for DNA testing which was granted, and DNA results were obtained "under this section." Only then, as the wording of §3600(g)(1) clearly conveys, may an applicant file a motion under §3600(g)(2)for a new trial:

> (g) Post-testing procedures; motion for new trial or re-sentencing.–
>
> > (1) In general–Notwithstanding any law that would bar a motion under this paragraph as untimely, **if DNA test results obtained under this section exclude the applicant as the source of the DNA evidence**, the applicant may file a motion for new trial or resentencing, as appropriate. The court shall establish a reasonable schedule for the applicant to file such a motion and for the Government to respond to the motion.
> >
> > (2) Standard for granting motion for new trial or re-sentencing.–The court shall grant the motion of the applicant for a new trial or resentencing, as appropriate, if the DNA test results, when considered with all the other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal of–
> >
> > > (A) in the case of a motion for a new trial, the Federal offense for which the applicant is under a sentence of imprisonment . . ..

Id. (emphasis added).

25. Notwithstanding his assertions about his 1997 motion for DNA testing, in reality, MacDonald relies exclusively on § 3600(g)(2) to support his claim that he is entitled to a new trial

under the IPA. Such reliance simply misapprehends the construction of the statute. Subsection (g)(1) requires that, as a threshold matter, "the DNA test results obtained under this section [must] exclude the applicant as the source of the DNA evidence"—a condition not satisfied here.[9] In this respect, paragraphs (1) and (2) of subsection (g) are not disjunctive alternatives as MacDonald appears to assume. Ordinarily, when Congress intends consecutive paragraphs of this nature to constitute alternative rather than conjunctive requirements of a statute, it separates them by the use of the word "or." *See, e.g., United States v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979). In this case, Congress plainly demonstrated that, when it intended the IPA's various provisions to be read as alternatives, it knew how to do so, by separating the pertinent provisions with the word "or." *See, e.g.*, 18 U.S.C. § 3600(a)(3)(A)(i) and (ii). It did not do so with respect to the paragraphs of subsection (g).

26. Had Congress intended that there be no time limit whatsoever on the filing of a motion pursuant to § 3600(g)(2), then it would not have enacted §3600(a)(10). But Congress did enact § 3600(a)(10) as part of the IPA, and further in § 3600(g)(1) made "DNA test results obtained under this section" a prerequisite to the filing of a motion for a new trial under § 3600(g)(2). The timeliness of a motion for a new trial under § 3600(g)(2) is dependent upon it being timely under § 3600(a)(10). Therefore,

[9] This response will address, *infra*, our contention that notwithstanding the fact that the DNA test results eliminate MacDonald as the source of the three hairs in question, this still does not satisfy the requirement that the DNA test results establish that he is not the source of the DNA evidence within the meaning of § 3600(g)(1).

MacDonald's failure to have moved for DNA testing under §3600(a) within 60 months of the passage of the IPA is not a mere failure to cite the right statute. This is so because timeliness is one of ten specific requirements of § 3600(a), all of which the district court must find to apply before ordering DNA testing. 18 U.S.C. § 3600(a)(1)-(10). As demonstrated *infra,* MacDonald failed to meet several of these requirements, in addition to timeliness, in his 1997 Motion For Discovery, in addition. This is not surprising since the 1997 motion was filed over seven years before the statute was enacted.

27. MacDonald's 1997 Motion For Discovery, like the instant IPA motion, did not contain an assertion under penalty of perjury, that the applicant is innocent of the Federal offense for which MacDonald is under imprisonment, as required by 18 U.S.C. § 3600(a)(1). That MacDonald has long protested his innocence is not a substitute for this jurisdictional requirement, as Congress, by enacting subsection (f)(2) of § 3600 clearly intended that there be administrative sanctions for applicants who make false claims of innocence and for whom the DNA results are inculpatory. By enacting § 3600(f)(3), it is clear that Congress also provided for the possibility of criminal prosecution. To avail oneself of the possible benefits of the IPA, a movant must include the required sworn assertion in his motion and thereby subject himself to possible penalties under § 3600(f)(2) and (3).

28. The Government had no notice until September 20, 2011, that the testing conducted by AFIP before or after October 30, 2004,

was being done pursuant to a motion under the IPA, because no IPA motion had been filed prior to that point. Moreover, no notice, formal or informal, was given of the metamorphosis of the 1997 DNA motion. The only mention of the IPA prior to the completion of the AFDIL testing was an letter agreement between the parties that no motion under the IPA would be filed prior to the completion of the DNA testing then being conducted by AFDIL. This agreement was contained in a letter dated January 14, 2005, signed by Timothy D. Junkin, Counsel for Jeffrey R. MacDonald, and Department of Justice Attorney Brian M. Murtagh. The 15-page letter reflected the resolution of a number of issues necessary to the completion of the ongoing DNA testing.[10] For instance, because the $75,000 that the Department of Justice had obligated under a reimbursement agreement with AFIP would not be sufficient to cover the remaining estimated testing costs, and Prosecutor Murtagh agreed to seek authorization to expend an additional $15,000. *See* Exhibit 1 at 13. As part of the General Conditions to Agreement, which encompassed the additional funding, MacDonald's counsel agreed to a condition as follows:

> c. The defendant agrees not to file any other motion for DNA testing, ~~pending~~ *prior to* the completion of the instant testing, and the filing of the report with the District Court by AFDIL reflecting the results of that testing;
>
> *With the further clarification by the Government that this provision does not preclude the defense from ever filing a motion for DNA testing under the Innocence Protection Act (IPA), the defense agrees to this*

[10] *See* Exhibit 1 attached.

> *condition. By this clarification the Government makes no concession with respect to the merits of any future motion which may be filed under the IPA.*

Id. (emphasis and edits in original). It is clear from this letter agreement that the 1997 DNA motion was not deemed by MacDonald to be a motion under the IPA. MacDonald is now estopped from contending that the 1997 motion for DNA testing became a motion under § 3600(a) upon the passage of the IPA.

29. If the 1997 DNA testing motion became a motion for DNA testing under the IPA, it was a "stealth motion" of which neither this Court nor the Government was aware. This lack of notice to the Court has consequences under the IPA that are fatal to the efficacy of the 1997 DNA motion as a motion under § 3600(a). Section 3600(b)(1) provides that "[u]pon the receipt of a motion filed under subsection (a), the court shall– (A) notify the Government; and (B) allow the Government a reasonable time period to respond to the motion." Of course, no notice to the Government was provided because no motion for DNA testing under §3600(a) had been filed. Had such a notice been given, the Government's first response, in light of the ongoing DNA testing and the fact that by late 2004 most of the questioned samples had already been consumed in testing by AFIP, would probably have been to call the Court's attention to the provisions of § 3600(a)(3)(B). This prerequisite to DNA testing under the IPA requires that when the specific evidence to be tested (in this instance, that identified in Cormier Affidavit No. 2) was previously subjected to DNA testing but the applicant must show that he ". . . is requesting testing using a new methodology or

technology that is substantially more probative than the prior DNA testing." Of course, no such showing was made.

30. If Congress had intended to convert all ongoing DNA testing into IPA testing pursuant to §3600(a), they could have done so. Clearly they did not do so, and there is nothing in the legislative history which supports the argument that this was their intent. The stringent requirements for granting a motion for DNA testing found in § 3600(a)–all of which must apply–demonstrate an entirely opposite intent by Congress. Further, the Government knows of no provision in the Fifth, Sixth, Eighth, or Fourteenth Amendments, nor decisions by the Supreme Court interpreting them, which would require applying the IPA to the previously ordered DNA testing. It is true that MacDonald has the benefit which Congress intended that he, and all similarly situated federal prisoners, have under §3600(h)(3), namely his instant IPA motion is not successive for purposes of §2255. But his IPA motion must meet all the prerequisites of § 3600(a), and it does not.

31. As demonstrated above, MacDonald's 1997 Motion For DNA testing did not then or in 2004, and does not now, constitute a motion for DNA testing under §3600(a) because: (a) there was an agreement by MacDonald that no motion under the IPA would be filed prior to the filing of the AFDIL Report, which is an admission that none had been filed to that point; (b) no actual filing under the IPA took place prior to the instant motion; (c) no notice to the Government, as required by the IPA, or opportunity for the Government to respond occurred; and (d) the 1997 DNA motion did not meet all 10

requirements for DNA testing mandated by § 3600(a). Therefore he must rely on the instant motion, filed September 20, 2011, and it was not timely filed for purposes of 18 U.S.C. § 3600(a)(10), because it was filed almost seven years after the effective date of the IPA in 2004, not within five years as required.[11] Further, MacDonald's 1997 Motion For DNA testing, and the AFIP DNA test results are not " . . . DNA test results obtained under this section . . ." for purposes of § 3600(g)(1). Consequently, MacDonald's 1997 Motion For DNA Testing and the filing of the AFIP DNA test results do not authorize MacDonald to seek a new trial pursuant to § 3600(g)(2).

32. Even if MacDonald could find a way to surmount these procedural hurdles, MacDonald is still barred from relief under § 3600(g)(2), because the DNA test results obtained under this section were inculpatory.[12] At trial, Government Exhibit (GX) 281 (CID E-5, FBI Q119)-"Debris from the left hand of Colette MacDonald"-was a glass microscope slide containing the distal portion of a Caucasian limb hair that was not suitable for comparison purposes. Trial Tr. 4156-60. In closing argument, defense counsel Bernard Segal argued that this unidentified hair was from the perpetrator and "proof of

[11] Even if MacDonald argues that the letter agreement of January 14, 2005, tolled the running of the statutory presumptive time limit, the clock would have begun to run again upon the filing of the AFDIL DNA test results on March 10, 2006, which is more than sixty months prior to the filing of the instant motion on September 20, 2011, without even counting the two and half months that elapsed between the effective date of the IPA and the date of the letter agreement.

[12] Section 3600(f)(2)provides that "If DNA test results obtained under this section show that the applicant was the source of the DNA evidence, the court shall– (A) deny the applicant relief; . . ."

intruders."[13] After being turned over to AFIP in 1999, GX 281 (Q119) was designated as AFDIL Specimen 51(A). DE 123-2 at 11. The questioned hair, which was mounted between two known hairs of MacDonald, was later designated AFDIL Specimen 51(A)(2). *Id*. at 8. Analysis of AFDIL Specimen 51(A)(2) and Jeffrey MacDonald known blood sample (AFDIL 199A) ". . . yielded mitochondrial DNA sequences consistent with one another (Group B). . ." *Id*. Thus, the day has come when the Government can ascribe this hair found in the murdered victim's hand to a member of the family (and perpetrator)–defendant Jeffrey MacDonald. As expected, MacDonald now tries to explain away the presence of this hair as resulting from his efforts to revive his wife.[14] Alleged efforts at first aid was MacDonald's explanation at trial for any physical evidence which would otherwise be inculpatory (e.g., saying that he covered Colette with his pajama top which could explain the presence of her blood on his garment). The jury by its verdict rejected this and other exculpatory statements as false. The same analysis applies to the instant example. Another problem with this explanation is that the reason that this hair–which is also bloody–is "without a root" is because the proximal (root) end of the hair has been broken off. *See* Glisson Aff. at Exhibit 2 (diagram of

[13] "The Government says also that there were no intruders in this case. There is no proof of intruders in this case. The list of evidence that supports Jeff's story will surprise you when we pull it all together right now...Unidentified Hair– There is hair in this case. The Government has found and they have had MacDonald's sample which was given to them and they still, to this day, cannot ascribe it to any member of the family." Tr. 7266-67.

[14] "The following specimens were consistent with the DNA of Jeffrey MacDonald: 51(A)(2), 58A, 112A3. (One of these, #51A2, was a hair without a root found in or on Colette MacDonald's hand. The defense contends that this is in no way inculpatory given that Jeff MacDonald testified that he repeatedly tried to revive his injured wife, and gave her mouth to mouth resuscitation, moved her body, etc.)" DE-122 at 3 n.5.

hair E-5 #13 at p. 756 of Glisson's July 27, 1970 bench notes).

ARGUMENT TWO: THE EVIDENCE PROFFERED BY MacDONALD IS INSUFFICIENT TO WARRANT THE GRANT OF A NEW TRIAL UNDER THE IPA.

33. Even if his motion for a new trial was proper under the IPA, MacDonald cannot meet the standard for granting a motion for a new trial under §3600(g)(2).

34. The instant IPA motion in ¶4 asserts that: "[O]n March 10, 2006, the AFIP issued a DNA testing report that included the discovery of DNA in critical places that was not the DNA of Jeffrey MacDonald or any member of his family. DNA of unidentified individuals was found under Kristen Macdonald's fingernail, on Kristen MacDonald's bedspread, and under Collette (sic) MacDonald's body." DE-176 at 2 (emphasis in original). No direct citation to the AFIP report was provided, nor was any other pleading, affidavit, or exhibit mentioned or incorporated by reference. Without any further proof as to the proffered DNA claims, and by merely invoking consideration of " . . . all the other evidence in the case," MacDonald asserts that he has established by ". . . compelling evidence that a new trial would result in an acquittal of [MacDonald]. 18 U.S.C. §3600(g)(2)." *Id*. MacDonald's assertions are without merit, and therefore he has not, and cannot, meet his burden of proof on this issue.

35. The AFDIL DNA test results reported in 2006, the reliability of which, if taken as a whole, are not in dispute, do not, and cannot, prove when, where, and by whom the three unsourced hairs were found (the so called "critical places"). Nor can the AFDIL Report prove that the hairs were bloody or forcibly removed and

not naturally shed. Yet the only evidence proffered in support of the IPA motion for new trial is the AFIP report. Consequently, the Government will treat MacDonald's Motion To Add An Additional Predicate [DE-122], the Memorandum Of Evidence and Authorities in Support thereof and accompanying Appendix One [DE-123], all filed by MacDonald in 2006, as if they had been incorporated by reference in the instant motion. MacDonald is bound by these previously filed pleadings.

36. In order to even make an argument for a new trial either under 28 U.S.C. § 2255 or 18 U.S.C. 3600(g)(2) ("IPA") on any of his DNA claims, MacDonald must prove not just the AFIP DNA test results, i.e., that three of the hairs tested do not contain the same mitochondrial DNA ("mtDNA") sequence as any of the other specimens tested (including those of Helena Stoeckley and Greg Mitchell), but also that the unsourced hairs could only have been deposited at the crime scene by three different perpetrators (since each of the three hairs has a different mtDNA sequences) at the time of the murders, and not at any other time. Recognizing that three naturally shed unsourced hairs, which bear no evidence of bloodstains, are not exculpatory, MacDonald has resorted to embellished claims that the hairs were bloody, forcibly removed, or both, and, in the case of AFDL Specimen 91A, was lodged under Kristen MacDonald's fingernail at the crime scene. The Government disputes these unsupported assertions. In particular, the Government vigorously disputes that the three hairs (AFDIL Specimens 58A(1), 75A, and 91A) could only have come from the perpetrators during the commission of the murders,

or that it ever argued to the jury that MacDonald was the source of any of these hairs. In fact, the three unsourced hairs played no role in MacDonald's trial and conviction. Further, none of the DNA test results call into question any evidence that was used against him at trial.

37. In response, the Government is filing herewith affidavits from each of the laboratory examiners, whose notes or reports MacDonald has misinterpreted or misquoted, and then relied upon for his overstated claims.[15] Collectively, these affidavits demonstrate that these hairs did not appear bloody. None of them, including the hair claimed to have been lodged under Kristen's fingernail, underwent "chemical analysis" and, consequently, there was no "finding of blood on the hair," and none of these examiners offered any opinion that these hairs were forcibly removed.[16] The Government is also submitting affidavits from Robert A. Fram and Joseph A. DiZinno, two eminently qualified FBI hair examiners, each of whom examined all three hairs in 1999, prior to the destructive DNA testing, and recorded, *inter alia*, that all three hairs had "club" roots, indicating that they were naturally shed hairs.[17]

A. AFDIL Specimen 91A

38. MacDonald has particularly overstated his case with respect to AFDIL 91A. There is no evidence, and MacDonald has proffered

[15] *See* Affidavits of Janice S. Glisson, Craig S. Chamberlain, Dillard O. Browning, and Grant D. Graham, which are being filed immediately following this response.

[16] *See* DE-123 at 8 for MacDonald's claim to the contrary.

[17] *See* Affidavits of Robert Fram and Joseph A. DiZinno, which are being filed immediately following this response.

none, that a hair was seen or collected from under a fingernail of Kristen MacDonald at the crime scene. Similarly, there is no evidence, and MacDonald has proffered none, that a hair was observed in the fingernail scrapings, or collected during the autopsy of Kristen MacDonald. The most that can be said is that the hair was first noted at a Fort Gordon, Georgia, crime lab, almost six months after the initial examination of the evidence. As demonstrated below, the most likely explanation is that the hair's presence appears to be the result of contamination.

39. With respect to AFDIL Specimen 91A, MacDonald has stated:

- "One of three unidentified hairs found at the crime scene."
- "Found with its root intact along with blood residue underneath the fingernail of three-year old Kristen Macdonald, who at the crime scene was found murdered in her bed."
- "Chemical analysis of the hair[D-237] by the CID indicated a finding of blood on the hair."
- "It was described by AFIP Lab Technicians as a human hair with root in tact(sic)."
- "Suggests that while she was defending herself against the blows from an intruder, she grabbed at or scratched back at the intruder such that as a result the intruder's hair came to reside under her fingernail."
- "The hair is strongly probative of his innocence."

DE-122 at 3;DE-123 at 8-9. Each of these assertions is inaccurate as shown by the following careful analysis.

40. After the vials containing the evidence collected at autopsy were transported from Fort Bragg to the U.S. Army Criminal Investigation Laboratory ("USACIL") Fort Gordon, Georgia, chemist Craig S. Chamberlain assigned alpha-numeric designations "D-232 - D-

239" in his notes for the autopsy vials to be examined by other chemists for possible blood stains. *See* Supplemental Affidavit of Craig S. Chamberlain at ¶ 17. Chamberlain did not mark the exterior of the vials with these designations. *Id*. Chamberlain's inventory for February 26, 1970, reflects that "D-237" was used in his notes to describe a vial described as : Vial c/fingernail scrapings marked "L. Hand Chris". *Id*. at ¶ 18 and Exhibit 2 thereto (quotation marks in original).[18] As the court may recall from the proceedings in 1998-99, the vial itself was never marked "D-237" or "237". *See* DE-102 or DE-105 at 310-313 (GPS Vol. Seven, Photo ## 310-313). Chamberlain states in his Supplemental Affidavit that exhibit D-237 was not described as a vial labeled *"fingernail scrapings L. Hand Chris";* rather it was as a vial c/fingernail scrapings marked "L. Hand Chris", which indicates that the words "L. Hand Chris" were written on some surface (possibly a piece of paper) that was associated with the plastic pill vial. Chamberlain Aff. at ¶ 19.

41. On March 9, 1970, USACIL Chemist Dillard O. Browning, who was assigned to do hair and fiber--but not serology--examinations, inventoried the contents of the vial which had been designated, but not marked, "D-237". Browning recorded the presence of a blue polyester-cotton-fiber matching the composition of Jeffrey MacDonald's pajama top. *See* Affidavit of Dillard O. Browning at 6, ¶ 8, and Exhibit 3 thereto. Browning testified to this identification before the grand jury in 1974. *Id*. at 6, ¶ 9 and

[18] Each of the Affidavits being filed immediately after this response have attached Exhibits filed with them to which portions of the Affidavits refer.

Exhibit 4. Browning's March 9, 1970 bench notes for "Exhibit #D-237" do not reflect the presence of any hair in the vial. *Id*. at Exhibit 3. There is no question in Browning's mind ". . . that what [he] removed from the fingernail scrapings of Exhibit #237 was a fiber and not a hair." *Id*. at 6, ¶ 10. Browning turned over the residual fingernail scrapings from Exhibit #237 to Janice Glisson so that she could attempt to type the blood. *Id*. at ¶ 12. Browning has no personal knowledge of the serology testing of the scrapings from Kristen's left hand, nor any subsequent examinations of the residual contents of the vial. *Id*. at 7, ¶ 13.

42. Also on March 9, 1970, USACIL Serologist Janice Glisson examined the actual fingernail scrapings, which came to her on a folded piece or paper marked "L. Hand Chris". She found the presence of blood, and reflected this in her notes. *See* Glisson Aff. at 8, ¶ 8-9 and Exhibit 1 thereto. Her notes do not reflect the presence of a hair or that she performed any chemical analysis on a hair for the presence of blood. *Id*. at Exhibit 1. Had either of these events occurred, Glisson would have recorded it in her notes. *Id*. at 9-11, ¶ 13. Glisson did not perform any chemical analysis on a hair from "L. Hand Chris". Id. Glisson did not use "D-237" in her notes in reference to her serological testing of "L. Hand Chris". Rather, someone with a different handwriting from hers added the right hand column on her March 9 bench note (*Id*. at 6, ¶ 10 and Exhibit 1) reflecting the correlation of "D-233 through D-239" with the description that Glisson had entered by origin in the left hand column. This right hand column was added sometime between March 9,

1970, and the issuance of the April 6, 1970 CID Preliminary Laboratory Report. *Id*. Glisson states that this was not written by her and that the handwriting resembles that of Craig Chamberlain. Glisson Aff. at 6, ¶10. Glisson's serology examination results for "Exhibit D-237 - Fingernail Scrapings from left hand of Christine MacDonald" appear in Paragraph 20 of the CID Preliminary Laboratory Report: "Examination of Exhibits . . . D-237 . . . indicated the presence of blood. Further examinations were precluded due to the paucity of the stain." *See* Glisson Aff. at Exhibit 12, p.13. Glisson states these results are in relation to the fingernail scrapings themselves and not in relation to any hair because she did not ". . . perform any chemical analysis for the presence of blood on any hair in this case." *Id*. at 9-10 ¶ 13.)[19] Glisson's March 9, 1970 serology results reported for D-237 do not, however, appear in the copy of the CID Preliminary's Laboratory report of April 6, 1970, filed by MacDonald with this Court, because page 13 has been omitted. See DE-123-2 at 50-51. This omission is significant because the hair that later became AFDIL 91A was not found until July 27, 1970, more than four months after Glisson's and Browning's examinations.

43. During the course of the Article 32 investigation, all the autopsy vials, which had previously been returned to Fort Bragg, were sent back to USACIL Fort Gordon, Georgia, in connection with the requested comparison of hairs from Colette MacDonald's hands, with

[19] Glisson further states that this same observation also applies to the tabulation of blood test results ("Incl.5") and the tabulation of blood test results in conjunction with hair, fiber and other examinations results performed by Dillard Browning ("Incl.6") (Exhibits 14 and 15, respectively, to her Affidavit), incorrectly relied upon by MacDonald (DE-123 at 8). Glisson Aff. at 9-11, ¶¶ 13-14.

the known hair exemplars of Jeffrey MacDonald. Glisson Aff. at 12, ¶¶ 15-16. On July 27, 1970, Glisson numbered the vials 1-13 (which were otherwise unmarked except for "17Feb70 BJH" on the bottom) and marked them with her initials "JSG" on the cap. *Id*. at Exhibit 2. Glisson next conducted a macroscopic inventory of the contents of the vials. *Id*. With respect to vial #7, she wrote "#7 fingernail scrapings left hand smaller female McDonald (not labeled by Browning) 1 hair 2 fragments". *Id*. at 13, ¶ 17, and Exhibit 2. Glisson points out that this description in her July 27, 1970 notes corresponds exactly with the words written on the piece of ruled paper depicted in GPS Photo No. 314. *Id*. at Exhibit 7. Glisson also states that she did not record in her July 27, 1970 notes the contents or origin of this vial as being from "L. Hand Chris", "237", or D-237". *Id*. From these facts, Glisson concluded that she had not previously examined the contents of this vial as presented to her on July 27, 1970. *Id*. Glisson further concluded that the container Craig Chamberlain had described on February 26, 1970 as fingernail scrapings marked "L. Hand Chris", the contents of which she had previously subjected to serology tests, was not present in the vial on July 27, 1970. *Id*. With respect to the contents present as of July 27, 1970, Glisson mounted them on a glass slide and wrote on a paper label affixed to the slide: "7 fibers Hair". *Id*. at 14, ¶ 18, and Exhibit 16. Glisson examined slide #7 under the microscope and recorded her observations in her notes: "fibers + <u>one light brown narrow hair, no medulla, striated, intact</u> root, tapered end." *Id*. at 14, ¶ 19, and Exhibit 2 (emphasis in original). Glisson states:

> I have no basis to believe that prior to July 27, 1970 I had ever seen this hair before. From the absence of any mention in my notes of suspected blood stains, or red brown stains, I conclude that I observed nothing on the hair under the microscope which indicated that this hair was, or had been, bloodstained. In any case, prior to mounting this hair on a slide#7, I performed no chemical analysis for the presence of blood. Nor did I wash this hair. Had I observed any indication of blood I would have recorded this in my notes, as I did in the case of the long ”bloody” head hair (E-3) in vial #1, the debris from around the mouth of Colette MacDonald, the “bloody” hair (E-4) from vial #10, “R. Hand Mother” and the “bloody” hair (E-5) from vial #13, “left hand Mother”.

Id. at Exhibit 2.[20] Glisson further states that:

> My use of the term “intact root” in relation to the hair I mounted on slide #7, does not imply that the hair was pulled or otherwise forcibly removed, but rather, only records that I observed under the microscope the presence of a root on the hair, as distinguished from the absence of a root.

Id. at 15, ¶ 20. On July 27, 1970, Glisson compared the hair mounted on slide #7 with the known hair exemplars of Jeffrey MacDonald and found them not to be microscopically similar. *Id*. at 15, ¶ 21, and Exhibit 2.

44. In February 1999, the slides containing all three hairs in question were microscopically examined at the FBI Laboratory for the purposes of inventorying what was being surrendered to AFIP, and for a DNA suitability and divisibility assessment. *See* Affidavit of Robert B. Fram and Affidavit of Joseph A. DiZinno, filed with this response. The “# 7" slide, previously mounted by Glisson, was

[20] The “bloody” E-5 hair would later be designated AFDIL Specimen 51A(2) and testing would reveal Jeffrey MacDonald’s mitochondrial DNA sequence. App. One at 4.

designated “Q137" by Special Agent-Examiner Fram. Fram Aff. at 2-6, ¶¶ 7-9. Both Fram and DiZinno, who was then the Chief of the FBI’s Mitochondrial DNA Unit and also a qualified hair examiner, independently examined the Q137 hair and determined that it had a “club“ root indicating that it had been naturally shed. *See* Fram Aff. at 6-9, ¶¶ 10-13; DiZinno Aff. at ¶ 24 and Exhibit 3. Neither examiner reported the presence of suspected bloodstains. *Id*.

45. The Q137 slide was later designated AFDIL Specimen 91A. *See* DE-123-2 at 12. As part of AFDIL’s own divisibility and suitability assessment, Specimen 91A was examined and photographed under the microscope by Air Force M/Sgt Grant D. Graham, who recorded in his bench notes that the slide “[c]ontains one human hair with root but no tissue.” *See* Affidavit of Grant D. Graham, Sr., at ¶¶ 14-19. Graham did not record the presence of any suspected blood stains, and offered no opinion that the 91A hair had been forcibly removed. *Id*. at ¶ 19.

46. In summary with respect AFDIL Specimen 91A, the fact that it is still unsourced after the AFIP DNA testing has no exculpatory value for MacDonald. This tiny hair was not bloody and not forcibly removed. Given that Kristen MacDonald’s hands were not bagged at the crime scene, that the hair only came to the attention of lab personnel after the vial containing it had been opened several times and had artifacts placed in it, and that, unlike the fingernail scrapings examined several months earlier, the hair was not bloody, the preponderance of evidence indicates that the hair did not come from Kristen’s left hand but instead got in the vial from

contamination. Even if it did come from Kristen's hand, however, it would merely be another example household detritus, like the dog hair found on her bed spread.

B. AFDIL Specimen 75A

47. With respect to AFDIL Specimen 75A, MacDonald has stated counsel stated that:

- Specimen #75A is a "hair" that was previously identified as CID exhibit E-303, and FBI Exhibit Q79.
- "In . . . Dillard Browning's handwritten notes (Browning collected the specimen) . . . Ex 303 is further described as fiber and debris from under the trunk and legs of Colette MacDonald, containing "one human pubic or body hair."
- "Specimen 75A was a 63 mm. (2 1/4 inch) hair with root follicle intact retrieved at the crime scene from off or under the body of Colette MacDonald."
- "Specimen 75A was described by the laboratory technicians at AFIP as a human hair with both hair root and follicular tissue attached."
- "The fact that it had both the root and follicular tissue attached is indicative that it was pulled from someone's skin and lends great weight to this specimen as probative that there were unknown intruders in the home with whom Colette struggled and from whom she extracted a hair."

DE-122 at 3; DE-123 at 9-10. The assertions are misleading in many respects.

48. AFDIL Specimen 75A was actually collected from the body outline on the bedroom rug on March 16, 1970-almost a month after Colette's body had been removed-by CID Agents Robert B. Shaw and William F. Ivory. Browning Aff. at 2-5, ¶¶ 3-6, and Exhibit 1. *See also* masking tape on original evidence bag marked "Fibers & Debris from Area of trunk & legs of Rug under body-Master bed Room WFI-RBS 16 Mar 70(14)", also initialed "DOB", depicted in FBI Photo #33 and

attached as Exhibit 1 to Browning's Affidavit.

49. Colette MacDonald showed no signs of having been sexually assaulted, and MacDonald has never claimed that such occurred on the night of the murder. Graham's affidavit, at paragraph 20, makes clear that he did not describe Specimen 75A as a "hair with root and follicle intact." Rather, he described the 75A hair as having "a root with adhering follicular tissue." Further Graham states: I did not expressly, or by implication, offer any opinion as to whether this hair was naturally shed or forcibly removed, nor could I offer such an expert opinion." Graham Aff. at ¶ 20.

50. As the affidavits of Fram and DiZinno reflect, this hair (FBI Q79/AFDIL 75A) had a "club" root indicating that it was naturally shed. Fram Aff. at 11, ¶¶ 14-18; DiZinno Aff. at ¶ 23 and Exhibit 3. Further, as the affidavit of Fram reflects, naturally shed pubic hairs frequently have some follicular tissue attached, a fact which does not indicate that the hair was forcibly removed. Fram Aff. at 12, ¶ 18). Stripped of the embellishments, MacDonald can only point to a naturally shed pubic hair found on a rug that was moved from MacDonald's prior residence when he reported to Fort Bragg in the Fall of 1969. *See* Trial Tr. at 6687 (admission of Defense Exhibits 101, 101(a), and 101(c); property Claim to JAG for rug). In contrast to the 15 purple seam threads and 3 blue polyester cotton yarns matching MacDonald's pajama top found in the same location, and collected in the same vial GX-327 (E-303, Q79; *see* DE-132-13, Vol. VI, Tab 4 (GX 984, summary chart)), which had to have fallen on the rug on the night of February 16-17, 1970, because that's the occasion

on which the pajama top was torn, there is no evidence as to when the 75A hair was shed and came to be on the rug, or even if the rug was in the Fort Bragg apartment when that occurred.

51. In summary with respect to AFDIL Specimen 75A, the fact that it is still unsourced has no exculpatory value to MacDonald. The hair was not forcibly removed and was not found on Colette's body. It is just another piece of household debris that have been known throughout this litigation to have existed in the MacDonald apartment.

C. AFDIL Specimen 58A(1)

52. With respect to AFDIL Specimen 58A(1), MacDonald's has stated that:

- "According to the AFIP laboratory notes, it is a hair with root intact, and measured approx. 5mm. in length."
- "Thus, this unidentified hair was found on the bedspread on the bed where Kristen was found murdered."

DE 122 at 3; DE-123 at 10.

53. AFDIL Specimen 58A(1) was one of two hairs collected, along with other debris, from Kristen MacDonald's bedspread.[21] The two hairs had been mounted on a slide marked Q87 by the FBI. DE-102 (Government's Photographic Submissions ("GPS") Vol. Two, photos 85-86). The Q87 slide was also examined by FBI examiners Fram and DiZinno, who each independently determined that both the hairs were of Caucasian origin, and that both hairs had "club" roots, indicating that they had been naturally shed. *See* Fram Aff. at 12-13, ¶¶ 19-21;

[21] At trial, GX-362 (E-52NB, Q87) was offered to show the presence on Kristen's green bedspread of a purple cotton sewing thread matching the seam threads of MacDonald's pajama top (which MacDonald had previously said he was not wearing when he first entered Kristen's room). *See* DE-132-15, Tab 6 (GX982 (summary chart)).

DiZinno Aff. at ¶ 22. At AFIP, the Q87 slide was designated AFDIL Specimen 58A. DE-123-2 at 11.[22] Subsequently, Specimen 58A was microscopically examined by M/Sgt. Grant Graham. Contrary to MacDonald's claim, Graham recorded that the slide contained: "two human hairs both have roots but no tissue." Graham Aff. at ¶ 21, and Exhibit 2 at 3. Graham states that by this statement he offered no opinion as to whether hair was naturally shed or forcibly removed. *Id*. Graham designated the two hairs from Specimens 58A as number "1" and number "2". *Id*. As reported by AFIP, analysis of Specimen 58A(1) yielded a mitochondrial DNA sequence that was not consistent with any other sample tested. DE-123-2 at 8. Analysis of Specimen 58A(2), however, yielded a mitochondrial DNA sequence consistent with that of Jeffrey MacDonald. *Id*. The presence of an unsourced naturally shed hair of Caucasian origin (58A(1)) is no more probative than the presence of Jeffrey MacDonald's naturally shed hair (58A(2)) on the bedspread, because there is no way of determining when either hair was shed. This assessment is supported by the additional presence on Kristen's bedspread of unsourced black dog hairs, unsourced brown and white animal hairs, plant material, and hundreds of unsourced fibers. *See* photomicrographs of AFDIL Specimen 55A from GX 362(Q87/E-52NB).[23]

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[22] By 1999, FBI Exhibit Q87 consisted of the original pill vial (E-303) used to collect the evidence, three slides, and a round pill box. AFIP assigned a different specimen number to each container: 60A (vial Q87), 55A, 56A, 58A (3 slides)and 59 (pill box container). Only slide 58A revealed the presence of human hairs. DE-123-2 at 11, 44.

[23] DE-10-8 (2/21/91), ¶ 15; DE-10-9, Photo Exhibits: 55, 56, 57, 58, 59, and 60; Graham Aff., Ex. 2 (Photo Log, Roll 3 and Roll 4); DE-147; DE-147-1; DE-147-2, Disc 2 of 3, Roll 3, Images of AFDIL 55A, slides 23, 24, 26, 32, and 36; Roll 4, Images of AFDIL 55A, slides 02, 06, 08, 14, 16, and 18.

54. In summary with respect to AFDIL Specimen 58A(1), the fact that it is still unsourced is of no exculpatory value to MacDonald. It was not forcibly removed. It is yet another example of miscellaneous household debris.

D. The AFIP DNA results provide no grounds for new trial

55. The standard for granting a motion for a new trial under the IPA is set forth in §3600(g)(2):

> The court shall grant the motion . . . if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal of --
>
> > (A). . . the Federal offense for which the applicant is under a sentence of imprisonment . . .

The adoption of the "compelling evidence" standard was one of the changes made in the text of § 3600 at the final stages of Congress' work on the DNA legislation. The intended meaning of this standard was explained in detail in a floor colloquy between Senator Cornyn and Senator Hatch, the Chairman of the Senate Judiciary Committee, and principal sponsor of the DNA legislation in the Senate. Senator Cornyn called upon Senator Hatch to clarify for the record the thinking that went into the House and Senate's selection of the word "compelling". Cong. Rec. S10913-14, October 9, 2004, attached hereto as Exhibit 2. In pertinent part, the exchange reveals:

> Senator Hatch: . . . In choosing the term "compelling" we relied on previous interpretation of that term in such cases as *United States v. Walser* [3 F.3d 380 (11th Cir. 1993)] a 1993 case out of the Eleventh Circuit. That court analyzed a previous jury's decision-

and whether it disadvantaged the defendant–under a standard of "compelling prejudice." The court there made clear that it could not find "compelling prejudice" if "under all the circumstances of [the] particular case it is within the capacity of jurors to reach the proper result–in the case of this bill, to find that the defendant committed the crime. If in light of the DNA test, it would not be within the capacity of jurors to conclude that the defendant is guilty, a new trial must be granted under 3600(g). But if they could possibly find guilty, no new trial is allowed. As the Eleventh Circuit explained, under the "compelling" standard, if a decision is "within the jury's capacity"–if it is reasonably possible–then "though the task be difficult [for the hypothetical jury], there is no compelling prejudice"–or in our case, no compelling evidence requiring a new trial.

* * *

As the *Walser* case also explains, you look to the trial transcript to decide what constitutes "compelling" evidence. Obviously, it is the defendant's burden to produce this evidence by other means if there is no trial transcript ... It remains the defendant's burden of persuasion and production to show that it would not have been possible for the jury to have concluded that he is guilty. This is again implicit in the adoption of the term of art "compelling"– as *Walser* elaborates, under the "compelling" standard, "absent evidence to the contrary, we presume that the jury could properly reach the result that it did."

The other case to which I believe that you referred is the Seventh Circuit's 1979 decision in *NLRB v. Austin Development[al] Center* [606 F.2d 785 (7th Cir. 1979)] which makes clear that previously available evidence is not "compelling" evidence. The relevant passage from that case for our purposes was that only "[t]he discovery of new evidence is a compelling circumstance justifying relitigation. The proffer of evidence not presented earlier, however, will not justify relitigation where it is not shown that the evidence was unavailable at the time of the prior proceeding." [606 F.2d

> at 788.] **In other words, for our purposes, if the DNA evidence that a prisoner relies on is something that would have been available to him earlier, it does not qualify as "compelling" evidence justifying a new trial. If he failed to seek a test when he could have, he cannot later use that test result to argue for a new trial, once witnesses have died or become unavailable or had their memories fade, and other evidence has deteriorated and disappeared. To allow a new trial under these circumstances would be fundamentally unfair to society and its interests in the finality of criminal judgments. As some of my colleagues have noted, Federal Rule of Criminal Procedure [33] specifically limits its liberal new-trial rule to new evidence discovered within three years. Implicit in this view is the judgment that the same evidence cannot carry the same weight in new trial motion if it is brought at a later time. By adopting the "compelling" standard in this bill, we make the same judgment, and we protect these same societal interests.**
>
> I hope that this conforms to your previous understanding of this provision and clarifies matters for the record, Senator. We have chosen a tough standard here–in fact, I believe tougher than all those that we have discussed previously. This is not a standard that will grant new trials to people who probably did it–and then allow them to walk free when prosecutors are unable to try them after the passage of time. I hope you can have confidence in that, Senator.
>
> Senator Cornyn: It does conform to my previous understanding and I do have confidence in it, Senator. Thank you.

Exhibit 2, attached, at 2 (emphasis added). The Government submits that this colloquy demonstrates that by enacting the "compelling evidence" standard for granting relief under 3600(g)(2), Congress intended that the granting of a new trial is limited to cases in which the DNA test results, considered in conjunction with all other evidence in the case, point so conclusively to the defendant's

innocence that it would be impossible for a jury to convict if apprised of all the evidence. In other words a new trial is permitted under the "compelling evidence" standard of subsection (g)(2) only if the evidence is such that it would compel a jury to acquit.

56. Evidentiary claims which are disputed and not proven cannot be "compelling evidence." Evidence which has to be embellished or misstated in order to avoid being characterized as household detritus or artifact is not "compelling evidence." And evidence which did not indisputably emanate from the perpetrator of the crime cannot be deemed "compelling."

57. MacDonald has not cited any case in which a new trial has been granted under the IPA. Subsection (g)(1) provides the sole authorization in the IPA for an applicant to file a motion for a new trial on the basis of DNA test results. It provides that "if the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, the applicant may file a motion for a new trial or resentencing, as appropriate." Section 3600 does not define the term "the DNA evidence," although Section 3600A of the IPA ("Preservation of biological evidence") does define the term "biological evidence."[24]

58. If the language of §3600(g)(1) were interpreted literally to mean that applicant could obtain a new trial if he was not the source of any item of DNA evidence in the case, the results could be

[24] "For purposes of this section, the term "biological evidence" means–(1) a sexual assault forensic examination kit: or (2) semen, blood, saliva, hair, skin tissue, or other identified biological material."

absurd. For instance, it would be nonsensical if the statute allowed a defendant to seek or obtain a new trial by pointing to DNA results from bloodstains that the prosecution had always maintained were from the victim and this was confirmed by DNA testing.[25] As Congress did not intend to bring about such absurd results, one must look to the requirements of subsections 3600(a)(6)(B) and 3600(a)(8)(A) to avoid this seeming incoherence in the IPA.[26] Read together, and in conjunction with § 3600(g)(1), the DNA testing must have been undertaken to determine if the applicant is the source of biological material which indisputably derives from the perpetrator. Thus, before a new trial is granted based on DNA test results which conclusively show that the defendant is not the source of the biological material tested, he must also establish the authenticity of the biological material as crime scene evidence (and not the result of contamination or artifact) and that the biological material (e.g. hair, semen, blood) could only have been deposited by the perpetrator at the time of the commission of the crime. Put another way, going into the testing, there must be only two possible results: Either the DNA test of the biological material that indisputably came from the perpetrator is shown to have come from someone other than the defendant or the test reveals that it did come from the defendant and therefore his petition under § 3600 is a lie subjecting him to

[25] The IPA does not provide for relief when DNA test results exclude the victim as the source of the DNA evidence.

[26] § 3600(a)(6) provides: "The applicant identifies a theory of defense that–... (B) would establish the actual innocence of the applicant of the Federal offense ... ." §3600(a)(8) provides "The proposed DNA testing may produce new material evidence that would– ....(B) raise a reasonable probability that the applicant did not commit the offense."

further criminal sanctions for filing it. The possibility that the biological material tested derived from some person or source other than the perpetrator of the offense precludes such evidence from being "the DNA evidence" for purposes of § 3600(g)(1), and for granting a new trial under §3600(g)(2). In another context, but analogous to a determination under § 3600(a)(8)(B), the Fourth Circuit has rejected the claim of a habeas petitioner that the presence of blood on the petitioner's shirt and hair in his car, which DNA testing established was neither the petitioner's nor the victim's, established his innocence, in light of the "mountain of evidence" that he was the perpetrator. *O'Dell v. Netherland*, 95 F.3d 1214, 1248, 1250-54 (4th Cir. 1996).

59. The Government submits that the affidavits submitted and exhibits filed with this response demonstrate by a preponderance of the evidence (though it's not the Government's burden) that the three unsourced naturally shed hairs derived from sources other than the perpetrator. In order to obtain a new trial, the Movant has to begin by meeting his burden of proof to show that the DNA evidence could only have come from the perpetrator. For the reasons set forth above, Jeffrey MacDonald has not met, and cannot meet, this burden of proof. Using AFDIL Specimen 91A as an example, to meet this burden of proof would require MacDonald prove: (a) the absence of any foreign matter, or possibility of the presence of any foreign matter, in the crime scene prior to the murders; (b) the impossibility of contamination adhering to Kristen's unprotected hands during the removal of her body to the mortuary at Womack Army Hospital; (c) that the 91A hair was actually in the fingernail scrapings marked "L. Hand

Chris"; (d) the impossibility of contamination being introduced into the vial used to collect the fingernail scrapings at autopsy when artifact (i.e, the ruled piece of paper) was inserted inside the vial as a means of identifying the contents; and (e) the impossibility of contamination being introduced into the vial during inventory or examination of the vial by the CID, when it would have been necessary to open the vial and remove the ruled piece of paper in order to determine what the vial was supposed to contain. Even if he proved all this, he still would be left to prove how this un-bloody, naturally shed, light colored hair of only 5mm in length and of unknown origin being recovered from the left hand of Kristen MacDonald exculpates Jeffrey MacDonald as the murderer. This he cannot do.[27]

CONCLUSION

For all the foregoing reasons, it is respectfully requested that this Court deny MacDonald's motion for new trial pursuant to the IPA.

Respectfully submitted, this 12th day of December, 2011.

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[27] In the instant motion, MacDonald makes passing reference to his "pending" 28 U.S.C. § 2255 claim regarding DNA (DE-176 at 2), for which the Fourth Circuit issued a PFA, but he makes no attempt to develop or support this claim. To the extent that this claim necessitates response from the Government at this time, it will be addressed in the Government's response to MacDonald's "Request for Hearing" [DE-175], which response will be also be filed on or before December 13, 2011.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the movant in this action either electronically or by placing a copy of same in the United States mail, postage prepaid, and addressed to counsel for defendant as follows:

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This, the 12th day of December, 2011.

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