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 ADDITIONAL
	)	DNA TESTING
JEFFREY R. MacDONALD,	)	
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 alternative motion for additional DNA testing under the Innocence Protection Act ("IPA"), 18 U.S.C. § 3600(a), filed September 20, 2011, and respectfully shows unto the Court the following:

SUMMARY OF ARGUMENT

The instant motion for additional DNA testing fails to meet numerous requirements of § 3600(a) of the IPA and should be denied. It is untimely under § 3600(a)(10). MacDonald has failed to file an assertion of actual innocence under penalty of perjury as required by § 3600(a)(1). He is seeking to test evidence that he failed to test in earlier proceedings contrary to § 3600(a)(3)(A) and (a)(8). He is seeking to test evidence which this Court previously rejected, contrary to § 3600(a)(10)(A)(i). MacDonald is seeking to retest evidence that has previously been subjected to DNA testing (and in the case of the fingernail scrapings, no longer

exists), which does not involve new, substantially more probative technology, contrary to § 3600(a)(3)(B). His request is unreasonable in scope and made for the purpose of delay, contrary to § 3600(a)(5). His request is inconsistent with his defense at trial, contrary to § 3600(a)(6)(A) and (a)(7.) The requested testing is not capable of producing new evidence material to the establishment of actual innocence, contrary to § 3600(a)(6)(B) and (a)(8)(A). The requested testing is not capable of establishing a reasonable probability that MacDonald did not murder his wife and children, as required by § 3600(a)(8)(B). Even if new testing were ordered under the IPA, it could not produce evidence that would be "compelling" for purposes of granting a new trial based upon the results under § 3600(g)(2).

PROCEDURAL CONTEXT

The Government incorporates by reference the "Procedural Context" exposition set forth in paragraphs 1-10 of the *Government's Memorandum For Status Conference* [DE-174] filed September 19, 2011, the "Facts" set forth in paragraphs 1-9 of the *Government's Response To Movant's Motion For Appointment of Counsel* filed October 24, 2011 [DE-194], and the "Procedural Context" of the *Government's Response To Motion For A New Trial Pursuant to 18 U.S.C. § 3600* ("Response to New Trial Motion") filed December 12, 2011 [DE-212]. Also set forth is such additional procedural history as is necessary to a resolution of the issues:

1. 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 [DE-46]. The discovery sought was the DNA testing of exhibits specifically identified in the Affidavit of *Philip G. Cormier No. 2 – Request For Access to Evidence To Conduct Laboratory Examinations – In Support of Jeffrey R. MacDonald's Motion To Reopen 28 U.S.C. § 2255 Proceedings and For Discovery* ("Cormier Aff. 2")[DE-49].

2. On September 2, 1997, this Court denied the Motion to Reopen and for Discovery. *United States v. MacDonald,* 979 F. Supp. 1057, 1069 (EDNC 1997). *See* DE-212 at 2-3, ¶ 3.

3. After the Fourth Circuit granted MacDonald's motion for DNA testing, MacDonald filed, on September 11, 1998, a *Motion For An Order To Compel The Government To Provide Access To All Biological Evidence For Examination And DNA Testing by His Experts.* ("Motion to Compel") [DE-73].

4. On December 11, 1998, this Court entered an order granting in part, and otherwise denying, MacDonald's Motion to Compel production of the universe of exhibits [DE-86]. MacDonald did not appeal this order.

5. Following a hearing on March 23, 1999, and further orders of this Court of March 26, 1999 [DE-96], and April 14, 1999 [DE-99], on May 17, 1999, the FBI delivered almost 200 hundred items (AFDIL Specimens 1-188) to the Armed Forces DNA Identification Laboratory ("AFDIL") for evaluation of DNA testing [DE-123-2, pp.10-14].[1] Out of an abundance of caution, this transfer included

[1] Citations to AFIP and other documents are to the electronically generated page numbers, rather than to the pagination in the original document. For example, page 1 of the AFIP Report is cited as DE-123-2 at 5.

many items in addition to the 15 items specifically identified in Cormier Affidavit No. 2. *Id*.

6. On October 30, 2004, The Innocence Protection Act of 2004 came into effect and was codified in 18 U.S.C. §§ 3600, 3600A.

7. On March 22, 2006, MacDonald filed a motion to add an additional predicate to his previously filed § 2255 motion [DE-122]. This motion was based, in part, on the AFIP Report of March 10, 2006, and on additional documents set forth in MacDonald's "Appendix One" [DE-123-2, DE-123-3 and DE-123-4].

8. 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].

9. On April 19, 2011, the Fourth Circuit vacated this Court's Order and remanded the case for further proceedings. *United States v. Jeffrey R. MacDonald*, 641 F.3d 596 (4th Cir. 2011).[2]

10. On September 20, 2011, on the eve of the scheduled status conference, MacDonald filed his *Request For Hearing* [DE-175] in which, *inter alia*, he listed potential witnesses he wished to call on both the Britt and DNA claims. Id. at 4-5. 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

[2] There is nothing whatsoever in the court of appeals decision that even mentions additional DNA testing under the IPA, much less directs this Court to grant a motion under §3600(a), because MacDonald had yet to make any such request in any court. *See* 641 F.3d at 616 n.13.

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.

11. 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]. *See* DE-212 at 6, § 16. The "Other Relief" sought was additional DNA testing, notwithstanding movant's assertion that: "...his actual innocence has already been established by the prior DNA testing results and other exculpatory evidence, and is entitled to relief from his convictions pursuant to his pending application for relief under either 28 U.S.C. § 2255 or 18 U.S.C. § 3600, or both without additional DNA tests." *Id*. at 2. The motion for additional DNA testing was made "[a]lternatively, should the court deny relief from his convictions without additional DNA testing..." *Id*. The additional testing was premised ostensibly on additional advances that had been made in DNA testing, specifically "Touch DNA" and Y-STR DNA. DE-176-1.

12. The previously scheduled status conference took place before this Court on September 21, 2011, and there was extensive colloquy between the Court and counsel as to the sequence and scope of the evidentiary hearings to be held in light of the mandate of the court of appeals, and the motions filed on the eve of the status hearing, for an evidentiary hearing and under the IPA for a new trial and, alternatively, for additional DNA testing under the IPA. (*See* Hr. Tr. at 2-37). Upon determining from counsel that

MacDonald's DNA claim was a free standing claim of actual innocence, not involving an alleged constitutional violation, the Court stated that if that was the case, MacDonald needed to brief the issue. *Id*. 31-32). Lead defense counsel Hart Miles agreed to brief the issue. *Id*. at 32. The Court then set the hearing date for October 31, 2011. After that matter appeared to have been settled, there followed a colloquy with the Court on Government's counsel question about the admissibility of hearsay evidence for both sides. *Id*. at 34-38. Mr. Miles asked the Court to allow Movant's counsel to revisit the DNA issue, asking that co-counsel, Ms. Mumma, be permitted to address the Court. Whereupon Ms. Mumma stated:

> Your Honor, my concern is that the DNA testing that was already conducted on the hair evidence that issue is still an open issue that has to be heard.
>
> I think it makes more sense to have all of the DNA testing considered at the same time in the same light. And we can move forward quickly *or* we can brief the issue about whether this additional DNA testing is tagged on to the open hair testing that's already been done.
>
> In fact, I think it would be –to put everything on October 31, would be premature if we are to consider new DNA testing.
>
> So I would suggest that the Britt claim be heard on October 31, <u>that we brief the issue of whether additional DNA testing is timely or meets the requirements of IPA</u> and then consider the DNA at a later date.

Id. at 35-36. Based upon this revised position this Court limited the hearing set for October 31st to the Britt claim. *Id*. at 36. The Court directed MacDonald to provide the Government with a list

of exhibits they wished to subject to additional DNA testing within 14 days. *Id*. at 40.

13. On October 10, 2011, *Jeffrey MacDonald List of Trial Exhibits For Additional DNA Testing Pursuant To The IPA* was filed [DE-189]. Attached was a list of 84 items (none of them identified by trial exhibit number) captioned "MacDonald-Recommendations for Additional DNA testing-miniSTR and/or Y-STR testing" [DE-189-1].[3]

14. On MacDonald's motion [DE-191], by its order of November 8, 2011 [DE-201], this Court set the date for the evidentiary hearing on the Britt claim for the week of April 30, 2012.

MacDonald's Motion For DNA Testing
Fails to Meet All Ten Requirements of §3600(a)[4]

15. In pertinent part § 3600(a) states: "... the court that entered the judgment of conviction shall order DNA testing if the court finds that all of the following apply:...[5]" We will address those specific requirements that MacDonald either ignores or fails to meet. As a preliminary matter, we note that while MacDonald appears to rely on a number of Amendments to the Constitution as mandating additional DNA testing, the Supreme Court has expressly held that there is no constitutional right to post conviction DNA testing. *See District Attorney's Office For the Third Judicial District v. Osborne*, 557 U.S. 52 (2009).

[3] The omission of "Touch DNA" testing here is consistent with Counsel/Affiant Mumma's concession during the Status Hearing that because the weapons had been "contaminated" they may not be suitable candidates for Touch DNA. Hr. Tr. at 8.

[4] The Government gives notice that it contests every factual, legal, and scientific assertion in DE-176 and DE-176-1.

[5] *See* § 3600(a)(1)-(10).

MacDonald Has Failed to Comply
With The Requirements of 18 U.S.C.§ 3600(a)(1)

16. Section 3600(a)(1) requires that: "The applicant assert[], under penalty of perjury, is actually innocent of (A) the Federal offense for which the applicant is under a sentence of imprisonment ..." We incorporate by reference our previous analysis in the Response To Motion For a New Trial [DE-212] as to the mandatory nature of this requirement and that MacDonald's prior assertions of innocence in various contexts are ineffective.

MacDonald's Motion Is Untimely

17. Section 3600(a)(10) requires that any motion for DNA testing "is made in a timely fashion ..." and subject to several conditions. In MacDonald's case, since he was convicted on August 29, 1979, the applicable condition is that the motion be made within 60 months of the enactment of the Justice For All Act of October 30, 2004. The instant motion for additional DNA testing under the IPA was filed on September 20, 2011, 82 months after the statute came into effect. MacDonald claims that this requirement doesn't apply to him, however, because his 1997 "request" for DNA testing granted by the court of appeals "...constitutes a request for relief under the IPA." DE-176 at ¶5). We have previously set forth the reasons why this claim is without merit and should be rejected, and we hereby incorporate them by reference. MacDonald has not asserted any of the grounds set forth in § 3600(a)(10)(B) for rebutting a presumption of untimeliness for failure to meet the requirements of subparagraph (A). MacDonald has never been incompetent. *See* subsection (B)(i). He has known about the

evidence he seeks to test, reflected in the CID Laboratory reports[6], for years before his 1979 trial, and, consequently, this evidence is not newly discovered within the meaning of § 3006(a)(10)(B)(ii). MacDonald does not meet the requirements for a showing of "manifest injustice" under § 3600(a)(10)(B)(iii).[7] In the first place, MacDonald has not asserted his innocence within the meaning of § 3600(a)(1), and the only other conceivable basis would be his reliance on the AFIP DNA test results. DE-176 at 2, ¶ 4. The relevant circumstances surrounding his motion are (1) MacDonald's assertion that "... his actual innocence has already been established by the prior [AFIP] testing results and other exculpatory evidence, and [he] is entitled to relief from his convictions pursuant to his pending application for relief under either 28 U.S.C. § 2255 or 18 U.S.C. § 3600, or both without additional DNA testing" [DE-176 at 2-3]; (2) the prior AFIP testing did not cost MacDonald anything, but rather was financed at taxpayer's expense at a cost of almost $600,000.00;[8] (3) MacDonald has sought an evidentiary hearing on both his pending Britt and AFIP DNA claims [DE-175]; and (4) MacDonald's motion is filed "alternatively" and is made "... should the court deny the

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[6] *See* DE-123-2, DE-123-3.

[7] "(iii) the applicant's motion is not based solely upon the applicant's own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice;..." 18 U.S.C.§ 3600(a)(10)(C)(ii) provides that: "the term 'manifest' means that which is unmistakable, clear, plain, or indisputable and requires that the opposite conclusion be clearly evident."

[8] *See* Exhibit 10, Statement of Cost Incurred by AFIP; if salaries and administrative costs incurred by the Department of Justice/FBI are added, the cost to the taxpayers probably exceeds $1,000,000.

defendant relief from his convictions without additional DNA testing..." DE-176 at 2, ¶ 9. Under these circumstances, there is no "manifest injustice" if the Court defers granting additional DNA testing at this time, or later denies the motion. Finally, MacDonald has not asserted, and in any case has failed to demonstrate, "good cause shown", under § 3600(a)(10)(B)(iv), as a basis for rebutting the untimeliness of his motion.

The Requested Testing Was Available In Earlier Proceedings

18. Section 3600(a)(3)(A)(ii) renders ineligible for DNA testing evidence if the applicant "knowingly fail[ed] to request testing of that evidence in a prior motion for postconviction DNA testing."[9] (Emphasis added.) This prohibition applies even if the prior motion for DNA testing occurred before the effective date of the IPA.[10] It is of no consequence that MacDonald now refers to his 1997 *Motion To Reopen Section 2255 Proceedings And For Discovery* as a "request" [DE-176]; it may well have been a request, but it was contained in a motion for post-conviction DNA testing. Certainly the court of appeals considered it *a motion for DNA testing* because their order, in pertinent part states: "Upon consideration of the motion of Jeffrey R. MacDonald filed pursuant to 28 U.S.C. Section

[9] As initially formulated the language of § 3600(a)(3)(A)(ii) did not address the situiation in which the applicant had failed to seek DNA testing of evidence in a prior post-conviction motion, such as a § 2255 motion. This omission was remedied in the final version of § 3600(a)(3)(A)(ii). *See* Cong. Rec. H8203 (Oct. 6, 2004)(remarks of Rep. Sensenbrenner)("The amendment... includes tighter language to ensure that defendants cannot make repetitive motions for relief.").

[10] In contrast to the language of Section 3600(a)(3)(A)(i)-"knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the enactment of the Innocence Protection Act of 2004"-subsection 3600(A)(3)(ii) contains no such limitation.

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." *See* DE-67. Consequently, any evidence, of which MacDonald was on notice, that was not included in *The Motion To Reopen And For Discovery* filed in this Court on April 22, 1997 [DE- 46], or the same exact motion filed with the Fourth Circuit on September 18, 1997, as part of the *Motion Under 28 U.S.C. § 2244 for Order Authorizing The District Court To Consider Second or Successive Application for Relief Under 28 U.S.C. § 2255,* is barred from testing under the IPA. The inquiry, therefore, becomes whether or not MacDonald failed in 1997 to include the specific evidence that he now seeks to have tested. As the Court may recall, the specific evidence to be tested under either 1997 motion was contained in the *Affidavit Of Philip G. Cormier, No.2 – Request For Access To Evidence To Conduct Laboratory Examinations–In Support of Jeffrey R. MacDonald's Motion To Reopen 28 U.S.C.§ 2255 Proceedings And For Discovery* ("Cormier Aff. No.2")[DE-49]. Cormier Aff. No. 2 sought access to all of the physical evidence that had been examined by Special Agent Michael Malone (*Id*. at 3), whether or not it was biological evidence suitable for DNA testing (e.g. saran fibers). In addition, Cormier Aff. No. 2 sought "hairs, skin and blood... found in critical locations" for DNA testing, which Malone was not alleged to have examined. (Id.) The specific exhibits listed in Cormier Aff. No. 2, which were potentially suitable for DNA testing, and had allegedly been examined by Malone, consisted of five exhibits identified as follows: "(a) E-211/Q-125 brown body

hair of Caucasian origin, which appears to be forcibly removed and which appears to have a piece of skin tissue attached to the basal area of the hair" (Id.,11-12); "(b) a brown hair of Caucasian origin' in Exhibit Q-87 (E-52-NB)"; "(c) an unmatched brown limb hair of Caucasian origin in Exhibit Q-93 (E-124)" ; "(d) "Q-79/E303, debris from the rug underneath the trunk and body of Colette" (Id., 13); and "(e)Q-119/E-5, debris removed from Colette MacDonald's left hand." (Id.) In addition to the five Malone Exhibits, Cormier Aff. No. 2 identified an additional ten exhibits by number which were alleged to contain hair or blood (or both) and were identified by Cormier as follows[11]: "(a) Exhibit D-237, the fingernail scrapings form the left hand of Kristen MacDonald..."; "(b) Exhibit D-238, scrapings from the right hand of Kristen Macdonald..."; "(c) Exhibit D-236, the fingernail scrapings from the left hand of Kimberly MacDonald..."; "(d) Exhibit D-235, the fingernail scrapings from Kimberly's right hand..."; "(e) Exhibit D-233 and D-234, the fingernail scrapings from Colette MacDonald..."; "(f) Exhibit E-4/Q118, debris removed from the right hand of Colette MacDonald..."; "(g) Exhibit D-256, red crusts removed from the hands of Colette MacDonald..."; "(h) Exhibit E-301/Q78, debris removed from the vicinity of Colette MacDonald's left hand and arm..."; and "(i) Exhibit D-229/Q96, the debris from the bedspread found on the floor of the master bedroom..." (Id.,

[11] In repeating the alpha-numeric exhibit designations and descriptions used by Cormier, the Government does not concede, in any fashion, that he was using them accurately or consistently with the actual evidence, whether the evidence was in the container, how the container was marked, or in the bench notes of the relevant examiner.

14-16). Other than these 15 exhibits identified above, Cormier Aff. No.2, and consequently, MacDonald's 1997 motions for DNA testing, did not identify or request any other evidence--either by Exhibit number or generic description. *See* DE-86.

19. The effect on the instant motion for DNA testing of having failed to include any additional evidence in this prior motion for post-conviction DNA testing, are straightforward and are summarized in Exhibit 4 ("Schedule A"). Of the 84 exhibits identified in Attachment 1 of "MacDonald- Recommendations for DNA testing- miniSTR and or YSTR" [DE 189-1], 76 of them are not eligible for DNA testing under the IPA because they were not included in either of the 1997 motions for DNA testing. Only 8 were included in the 1997 motions for DNA testing.[12] All 8 of these Exhibits were subsequently examined by AFIP/AFDIL, including the 7 vials alleged to contain residual blood debris from the hands of the victims, and, after much back and forth, no blood debris was found.[13] The eighth exhibit, E-5 [Q119] (the hair from Colette's left hand), was subjected to destructive DNA testing by AFIP as Specimen 51A(2), and found to have the same mitochondrial DNA sequence as MacDonald. (DE-123-2, at p.8). The AFDIL 51A(2) hair was fully consumed in DNA testing requested by MacDonald. *Id*. at 15.

20. Another effect of MacDonald's failure to include items in

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[12] D-233 through D-238, D-256 and E-5. *See* Exhibit 4 ("Schedule A").

[13] D-233 (Vial#6/AFDIL 43A), D-234 (Vial#2/AFDIL 67A),D-235 (Vial #4/AFDIL 65A), D-236 (Vial #8 /AFDIL 64A), D-237 (Vial #7, AFDIL 92A, repeat, AFDIL 92A), D-238 (Vial #9/AFDIL 61A) and D-256 (Vial #13/ AFDIL 02A). *See* Exhibit 7 (AFDIL Contents of Vials). *See also* DE-123-2 at 6-9.

his 1997 DNA testing motion, is that, if subsequently tested under the IPA, those results can never qualify as "compelling" evidence justifying a new trial motion under §3600(g)(2).[14]

MacDonald Is Precluded From
Making Any Additional Motions
Under The IPA For Testing

21. The same analysis set forth in ¶ 26, above, applies to the instant motion, notwithstanding being characterized as a "request," and the listing of the items to be tested only as "recommendations." In addition to any prior procedural defaults under the IPA, the instant IPA testing motion's 84 "recommendations" do not include the overwhelming number of bloodstains introduced in evidence at trial. *See* GX-639 - GX-651). This does not appear to be in recognition of the fact that almost all of the trial blood exhibits were attributed to the victims, however, and, therefore are not subject to DNA testing under the IPA merely to confirm those findings.[15] MacDonald had ample time to identify the 7 dozen exhibits he moves to have tested under the IPA; his failure to identify any other trial exhibits or other evidence to have tested under the IPA, was done both "knowingly and voluntarily." Consequently, any evidence not included in Attachment 1 [DE-189-1] is barred under § 3600(a)(3)(A)(i), in addition to any other applicable provisions.

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[14] *See* remarks of Senator Hatch in relation to NLRB v. Austin Development[al] Center. Cong. Rec. S10914, October 9, 2004 [DE-212-2 at 2.]

[15] The only two trial blood exhibits of which MacDonald was the undisputed source that he now seeks to test are D-25K (GX- 136) and D-26K (GX-137). *See* Exhibit 4 ("Schedule A"), and Exhibit 6 ("Schedule C").

The Requested Testing Was Previously Made
In A Motion Which Was Denied

22. Section 3600(a)(10)(A)(i) bars testing of evidence based solely upon information used in a previously denied motion. *Jeffrey R. MacDonald's Motion For An Order To Compel The Government To Provide Access To All Biological Evidence For Examination And DNA Testing by His Experts* ("Motion to Compel") [DE-73] was filed on September 11, 1998. MacDonald contended that the mandate of the court of appeals entitled him to "the full universe of exhibits that contain biological evidence-hairs, bloodstains, tissue and body fluids-collected from the crime scene to which the government has full access." (Memorandum in Support at 2.) Appended to this motion were: "Spreadsheet A-Hair", "Spreadsheet B-Blood" and "Spreadsheet-C -Known Exemplars" listing 76, 232, and 6 exhibits, respectively. (*See* Exhibits 1, 2, and 3, respectively.) The Government opposed this motion [DE-73]. On December 11, 1998, this Court entered an order which in pertinent part at Page 3 states:

> The court has examined carefully the parties' respective arguments in light of the context of the appellate court's order, and concludes that the Fourth Circuit Court of Appeals has mandated that the Government provide to MacDonald's experts access to the existent and known unsourced hairs, blood stains, blood debris, tissue and body fluids specifically identified in the April 22, 1997, Affidavit of Philip G. Cormier No. 2-Request for Access to Evidence to Conduct Laboratory Examinations-In Support of Jeffrey R. Macdonald's Motion to Reopen 28 U.S.C.§ 2255 Proceedings and for Discovery, for ...DNA testing in all current and existing forms, including without limitation, both nuclear and mitochondrial testing."

[DE-86].

23. By this order, this Court rejected MacDonald's Motion To Compel DNA testing of all the exhibits listed on Spreadsheets A, B, and C (Attached Exhibits 1, 2, and 3, respectively) other than the 15 specifically identified exhibits also contained in Cormier Aff. No. 2,[DE-49] described above.[16] The effect of that ruling on the instant motion for DNA testing under the IPA is also reflected in Exhibit 4 ("Schedule A") to this response. Of the 84 exhibits that MacDonald now wants to test, the first 41 exhibits listed on his Attachment 1 [DE-189-1] are also reflected on Spreadsheets A or B. Of these 41, the testing of 8 exhibits was granted by this Court's order of December 11, 1998,[17] and the testing of the remaining 33 was denied. *Id*. Of the remaining 43 exhibits listed on MacDonald's "Attachment 1" [DE-189-1], 42 were listed neither in Cormier Aff. No. 2, nor the Motion To Compel's spreadsheets.[18] *See* Attachment....Schedule A. Consequently, the testing of these remaining 42 exhibits, not listed in Cormier Aff. No. 2, or the Motion To Compel, are barred because of § 3600(a)(3)(A)(I). The testing of the first 41 Exhibits listed in MacDonald Attachment 1 are barred either under § 3600(a)(3)(ii) because he failed to seek their testing in 1997, or under § 3600(a)(10)(A)(i) because he did include them in his 1998 Motion To Compel, and this Court denied

[16] The single exception was Exhibit E-324, the known exemplar hairs of Helena Stoeckley which were listed on MacDonald's Spreadsheet C appended to his Motion to Compel.

[17] D-233 - D-238, D-256 and E-5. *See* attached Exhibit 4 ("Schedule A").

[18] The exception again being the Stoeckley exemplar hairs, Ex. E-324.

the motion.[19]

The Motion To Test Evidence That Was Previously Subjected To DNA Testing Is Not Based On New, Substantially More Probative Technology

24. Section 3600(a)(3)(B) requires the rejection of a motion to re-test evidence which: "was previously subjected to DNA testing [unless]... the applicant is requesting DNA testing using a new methodology or technology that is substantially more probative than the prior DNA testing." At the outset it should be noted that the provisions of the IPA regarding "new methodology or technology" only apply in the case where the specific evidence was "previously subjected to DNA testing." *See* 18 U.S.C. § 3600(a)(3)(B). In other words, new technology or methodology does not trump procedural defaults on the same evidence which was not included in a prior motion for DNA testing, or was included in a prior motion which was denied. *See* § 3600(a)(3)(A)(ii) and (10)(A)(i). Accordingly, the first question that MacDonald should have answered is which specific items of evidence that he seeks to test now were previously subjected to DNA testing. But MacDonald has made no attempt to do this; rather has lumped together items which were never tested with items that were previously subjected to DNA testing, and in some cases were fully consumed in that process. MacDonald has ignored the Court's order [DE-180] to provide "a list of the trial exhibits on which he seeks to conduct additional DNA

[19] We address, infra, the issue of retesting exemplars which were subjected to DNA testing, when we respond to the assertions about new methodology or technology.

testing pursuant to the IPA," and instead has identified the 84 items, whether or not they were admitted as "trial exhibits," and only by CID Lab number. DE-189-1.[20] MacDonald should be required to identify in his Reply the exhibits listed in DE-189-1 by trial exhibit number, if they were in fact admitted in evidence, and to provide the basis for testing them. *See* Exhibit 4 "Schedule A").

25. Of the exhibit numbers listed on MacDonald's Attachment 1 [DE-189-1] the only items subjected to DNA testing by AFIP (as distinguished from examination for evaluation for DNA testing) were hairs from Colette's right and left hands, Exhibits E-4, and E-5, respectively, and the known reference samples of: Colette, Kimberly, Kristen and Jeffrey MacDonald, Helena Stoeckley and Greg Mitchell.[21] We will address the hairs first before turning to the reference samples. At trial, the E-4 hair (GX-280/Q118) hair was microscopically matched to the known exemplar head hair of Colette MacDonald (Tr. 4156-60). DNA testing of this same hair (AFDIL Specimen 52A) revealed the same mitochondrial DNA sequence as the reference sample of Colette MacDonald, a paraffin block from her autopsy, Specimen 195N.(*See* DE-123-2, p. 7). As we have previously explained, at trial the testimony was that the E-5 hair (GX-

[20] The filing to which Attachment 1 [DE-189-1] was appended was captioned *Jeffrey MacDonald's List of Trial Exhibits For Additional DNA Testing Pursuant to the IPA* [DE-189] and expressly states that: "...MacDonald hereby files and serves upon the Government the attached list of trial exhibits on which he seeks to conduct additional DNA testing pursuant to the IPA." (Id.) The Government's understanding of the Court's use of the term "trial exhibit" is straightforward--an exhibit that was admitted in evidence at trial.

[21] MacDonald has provided no exhibit numbers of any kind for the reference samples, merely stating that mini-STR and or YSTR testing should be done on "All reference samples needed- MacDonald, Colette, Kimberly, Kristen, Mitchell, Stoeckley." DE-189-1 at 2.

281/Q119) was the distal portion of a Caucasian limb that lacked sufficient microscopic characteristics to be of value for comparison purposes. Tr. 4156-60. DNA analysis of this same E-5 hair, now designated AFDIL Specimen 51A (2), which consumed the entire hair, revealed the same mitochondrial DNA sequence as the reference blood sample (Specimen 199A) of Jeffrey MacDonald. (DE-123-2 at 8, 19. MacDonald apparently intends to challenge these findings, but offers no specifics as to how "Touch DNA", Y-STR, or miniSTR technology would produce results which are "substantially more probative" than those produced by the independent laboratory (AFIP) he selected in 1999. Whatever the limitations of Touch DNA, this is not evidence that somebody touched; it is hair. This is not a situation involving a sexual assault, and therefore, we are not dealing with a mixture of male and female DNA. Nor are we dealing with samples that have been degraded due to environmental insult. In terms of Colette's own hair in her right hand (E-4), Y-STR's have no applicability because the Y chromosome is only present in males.[22] In the case of the E-5 hair found in Colette's left hand, which matches MacDonald's mtDNA sequence, there is nothing left to test. Consequently, MacDonald seeks to re-test his own reference sample in the hopes of neutralizing this inculpatory evidence, which played no role in his conviction. Leaving aside for the moment that such a misuse of DNA testing stands the purpose of the IPA on its head, it is incomprehensible how this could be accomplished since AFIP did not obtain an STR profile from the E-5

[22] *See* Affidavit of Tina Delgado, Biometrics Analysis Section Technical Leader, FBI Laboratory at ¶¶ 12-14.

(Specimen 51A(2)) hair because it had no root (*See* Exhibit 11). MacDonald has pointed to no provision of the IPA which authorizes the retesting of reference samples in order to contest DNA results which were never used against him at trial. This analysis applies with equal force to any retesting of any of the reference samples in this case.

26. By challenging the DNA sequences obtained from the reference samples by AFIP, MacDonald is attempting to have it both ways. For purposes of his motion for a new trial and § 2255 motion, MacDonald has relied on the AFIP DNA results to show that the unsourced hairs do not match any other sample tested, particularly his own reference sample. Yet, in the context of his request for additional DNA testing contained in the same motion [DE-176], he identifies "all reference samples..." for "mini-STR and or YSTR testing." DE-189-1. As four of the six reference samples came from females, YSTR testing will have no application to them because they do not have the Y chromosome. The STR's (Short Tandem Repeats) recoverable from conventional polymerase chain reaction ("PCR") DNA testing (as was performed by AFIP) are the same STR's recoverable through mini-STR testing. The difference, as Tina Delgado explains in her affidavit at ¶¶ 12-13 is: "Degraded DNA often does not amplify during the PCR process, resulting in no results. MiniSTR analysis amplifies the same locations. The DNA profiles obtained from properly preserved samples from miniSTR and conventional STR analysis will be the same." The conventional PCR testing of MacDonald's fresh blood reference sample revealed a full STR profile. DE-123-2 at 24. STR testing of Mitchell's paraffin

block reference sample revealed a partial STR profile. *Id*. STR testing of the Amelogenin locus for both Mitchell and MacDonald resulted in the recovery of both the X chromosome gene and the Y chromosome gene for each individual. *Id*. Consequently, it does not appear that any more relevant sex determination information can developed by re-testing their reference samples.

27. MacDonald also attempts to insert into the record through Attachment 1 [DE-189-1] the assertion that Mitchell had Type O blood. If Mitchell did have Type O, MacDonald will have to prove that assertion with his own evidence. The reference sample for Greg Mitchell was a paraffin block with tissue--reputed to be from his diseased liver--received by AFIP directly from the UVA Health System, Charlottesville, VA, on January 5, 2005. DE-123-2 at 17. Neither AFIP nor the Department of Justice ever obtained a blood reference sample from Mitchell, much less typed it.

MacDonald's Motion To Retest The Blood Evidence
Is Inconsistent With His Defense At Trial

28. As MacDonald's counsel told the Court at the status conference on September 21, 2011: "But clearly blood evidence was a big part of the Government's case in chief and that is and we would propose that that is a prime source of relevant evidence in this case." Hr. Tr. at 7. Indeed the blood evidence was key to an understanding by the jury of where the victims were injured and how the crime scene was rearranged by MacDonald to divert suspicion from himself. That evidence, which was reflected on 13 charts (Summary of Blood Analyses, GX639-GX651) is beyond the scope of this Response

and may be the subject of a later filing.[23] As the Court may be aware, and as Judge Dupree noted, each of the four members of the MacDonald family had a different one of the four ABO blood groups, enabling the investigators to reconstruct the sequence of events in the MacDonald apartment on the night of the murders *United States v. MacDonald*, 640 F. Supp. 286, 290, n.2; *see also* Chart "ABO Blood Factors" GX-638, App., Vol. VI, Tab 3. Because of the presence (or absence) of antibodies, and antigens (also referred to as "specific factors"), if there was sufficient blood to do the Crust test (for antibodies), and the confirmatory absorption elution test (for antigens or specific factors), then it was possible to conclude that the particular blood stain was of the same ABO group as one of the murder victims or MacDonald. If there was not sufficient sample to do both Crust and Absorption Elution tests, depending on which test was performed and the results obtained, it was sometimes still possible to identify the ABO Type based upon the antigen or specific factor revealed. For example, only Kristen's blood type of those in the family would have the specific factor H. Results from the Crust test could be less definitive because the absence of either the Anti-A or Anti-B antibody could mean that it simply was not present--as for example, Kimberly's AB blood would have neither the Anti-A or Anti-B antibody--or the antibody was not detected because it had deteriorated. Consequently, when there was not enough blood to do the Absorption Elution test, and the Crust test revealed only one antibody, it wasn't always possible to discriminate between two

[23] Although the Army tested hundreds of blood stains, the prosecution introduced only the most probative ones. *See* DE-123-2 at 56-83; GX639-GX 651.

family members. For example, if the Anti-B antibody was all that was present, the blood could have come from Colette (Type A) or Kristen (Type O), but not Kimberly or MacDonald. *See* GX 638. Similarly, if the Anti-A was present, the blood could have come from Kristen (Type O) or MacDonald (Type B), but not Colette(Type A) or Kimberly (Type AB). This exposition will hopefully provide some context to the stains with previous "A or O", or "B or O" results that MacDonald now seeks to test.

29. It was painfully clear to the jury that Kimberly and Colette had been bludgeoned and all three victims had been stabbed dozens of times. Although the Government's contention that Colette and Kimberly's bodies had each been moved was disputed by MacDonald, that all three had bled to death in the three bedrooms in which they were later found was never disputed. MacDonald and the Government both maintained that he had bled at the crime scene, the Government explaining that some minor injuries were inflicted by Colette and the pneumothorax was self-inflicted, while MacDonald claimed that the intruders wounded him. Against this background, it would have been ludicrous for MacDonald to have disputed that the blood consistent with the victims's types was not from them, but rather from an intruder. In fact, MacDonald never disputed that the Types A, AB, and O blood were from Colette, Kimberly, and Kristen.[24] It would have been even more ludicrous for MacDonald, who was trying desperately to claim ownership of as many of the bloodstains as possible in order to corroborate his account, and to explain the

[24] MacDonald's counsel did attempt to challenge the chemists as to which one of the family members was the source of some particular blood stains.

dramatic disparity between his few drops of blood, and the quarts of blood that drained from the victims, to have asserted that any of the Type B blood was not his. *See* Tr. 2281-83. Further, MacDonald never claimed to have stabbed or bludgeoned any of his alleged assailants. The location of the blood stains which the Government argued demonstrated that MacDonald inflicted the pneumothorax on himself in the hall bathroom, with a scalpel obtained from the linen closet where they were stored, and obtained the surgical gloves under the kitchen sink, are set forth in Exhibit 6 ("Schedule C").[25] MacDonald never disputed that he was the source of these bloodstains; rather he sought to explain their presence by various movements within the crime scene. *Id*.

30. In closing argument, prosecutor Brian Murtagh told the jury that, although during the trial the Government had always referred to the blood as the same type as that of a victim, now he was asking them to find that the Type A blood was Colette's blood, the Type AB was Kimberly's, the Type O was Kristen's, and the Type B was from MacDonald. That MacDonald didn't dispute these conclusions is clearly demonstrated by defense counsel Bernie Segal's final argument to the jury. He did not ask the jury to reject Murtagh's submission. This was evident from Segal's assertions about what did constitute "proof of intruders":

> 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

[25] Curiously, of the eight Type B stains introduced at trial, MacDonald only seeks to test the two stains from the kitchen floor (D-25K and D-26K). (*See* DE-189-1.) It is not clear whether MacDonald is now contending that he is the source of these stains.

> when we pull it all together right now.
>
> First of all, the latex gloves...
>
> What about the fiber on Jeff's glasses in the livingroom? ...
>
> Unidentified hair–there is hair in this case.
>
> There are fingerprints....
>
> What about the candle wax?
>
> The knives–weapons are consistent with intruders. ...
>
> The club-there is a little bit of slippery business, I think on the part of the Government here.
>
> There is more proof that there were intruders besides the latex, the fibers, the hair, the wax, the fingerprints, and the weapons. There is more. The list goes on.

Tr. 7265-7273. The list only went on, however, to describe MP Kenneth Mica's sighting en route to the scene of a girl in a floppy rain hat, and James Milne's (who was gluing a model airplane together at the time) "utterly bizarre" account of seeing three people with candles (and choir robes) walking toward MacDonald's house. Tr. 7274-75. But nowhere in Segal's 10 pages of "... pulling all the evidence of intruders together right now," does he mention the words blood or bloodstains. Consequently, MacDonald cannot claim now that he ever even attempted to argue that any of the bloodstains were left by intruders. While the issue of the identity of the perpetrator- which the jury determined beyond a reasonable doubt was MacDonald- was very much an issue at trial, the identity of the donors of the bloodstains as members of the household was never an issue.

MacDonald Has Failed To Identify A Theory Of Defense That Is Not Inconsistent With That Presented At Trial That Would Establish His Actual Innocence And Raise A Reasonable Probability That He Did Not Commit The Offense

31. Subsection 3600(a)(6) requires that when an applicant is seeking DNA testing under the IPA: "The applicant identifies a theory of defense that- (A) is not inconsistent with an affirmative defense presented at trial; and (B) would establish the actual innocence of the applicant of the Federal ... offense referenced in the applicant's assertion under paragraph (1)." To the extent that MacDonald has complied at all with this requirement, it is to be found in the Affidavit of his attorney Christine Mumma at ¶ 9.[26]

32. Subsection 3600(a)(8) requires that "the proposed testing of the specific evidence may produce new material evidence that would -(A) support the theory of defense referenced in paragraph (6); and (B) raise a reasonable probability that the applicant did not commit the offense." MacDonald has deliberately failed to file an assertion of actual innocence as required by § 3600(a)(1) and, consequently, has failed to identify any theory of defense with respect to the dozens of items he seeks to have tested, most of which involve the same ABO blood types as the victims. MacDonald cannot ignore this requirement and obtain testing under the IPA.[27] If MacDonald is now asserting that some of the A, AB, or O Type

[26] "Items collected into evidence which would be significant for testing include ... blood drops and smears taken from areas where it appears the perpetrator touched things or may have bled while moving through the home."

[27] *See United States v. Martin*,377 Fed. App'x 395 (5th Cir. 2010) (unpublished), upholding the district court's denial of Martin's motion under 18 U.S.C.§ 3600(a). "Martin makes no attempt to explain how DNA testing would raise a reasonable probability that he did not commit the bank robbery offense, so as to satisfy the requirements of § 3600(a)(8)." *Id*. at 396.

stains are not from the victims, but rather were left by intruders, not only is this inconsistent with his defense at trial, but the IPA does not provide for DNA testing under these circumstances.[28] As we have previously explained, DNA testing can only be ordered under the IPA in two circumstances: (1) biological evidence was used to convict the applicant at trial; or (2) there is biological evidence which could only have come from the perpetrator.[29] (Or the Government concedes that the evidence to be tested was used by the perpetrator.[30]) In addition, it is required that appropriate DNA testing could be reliably performed that will include or exclude the applicant as the source of the DNA, and raise a reasonable probability that the applicant did not commit the offense.[31] Since it is beyond dispute that each of the three victims bled to death in the crime scene, to obtain an order for testing bloodstains that

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[28] As stated in the Government's Response To Motion For New Trial, Congress intended only to provide post-conviction DNA testing to determine if the applicant was "...the source of the DNA evidence". *See* § 3600(e)(3)(A)-(C); § 3600(f)(2); and §3600(g)(1)-(2) (all of which involve whether or not the applicant "was the source of the DNA evidence" and make no mention of whether or not a victim or other person was the source of the DNA evidence.

[29] For example, the semen found on the underwear of a nine-year old murder and sexual assault victim which had not been initially detected or tested. Kirk Bloodsworth had been twice convicted of the girl's murder, before DNA testing in 1993 revealed that Bloodsworth was not the source of the semen. *See Bloodsworth -The True Story of the First Death Row Inmate Exonerated By DNA*,by Tim Junkin, Algonquin Books Of Chapel Hill, 2004, at 13-16, 21-23, 31. The Congressional Record reflects that the IPA's drafters were motivated by cases like Bloodsworth's. *See* 150 Cong. Rec. S11610 (Nov. 19, 2004)(Statement of Sen. Leahy); 149 Cong. Rec. S11751 (Sep. 22, 2003) (Statement of Sen. Leahy); *see also Bloodsworth v. State*, 543 A.2d 382 (Md. Ct. Spec. App. 1988).

[30] *See United States v. Fasano*, 577 F.3d 575, 576-7 (5th Cir.2009) ("There is little or no question but that the clothing and glasses were items worn by the robber.").

[31] All the cases publicized by the North Carolina Center on Actual Innocence as "DNA Exoneration Cases" involve a rape in which the applicant/defendant was shown through DNA testing not to be the donor of the biological evidence left by the rapist. *See* Exhibit 15.

he could not possibly have been the source of, MacDonald must also identify, consistent with his defense at trial, which specific stains among the dozens he seeks to test that he asserts could only have come from an intruder. But he must do more than merely assert this to be the case, he must provide the Court with evidence that is not overstated or contested which proves this to be the case. This MacDonald has not and cannot do with respect to any of the bloodstains which are consistent with having come from one or more of the victims.[32] *See* Exhibit 4, "Schedule A".

33. With respect to the Type B bloodstains, MacDonald's position is untenable. As reflected in Exhibit 6 ("Schedule C"), at trial, the prosecution introduced nine Type B bloodstains, which the jury was asked to find were from MacDonald himself, and which the Government argued collectively showed: that his blood on the left sleeve of his pajama top was the result of a wound inflicted by Colette using the dull Geneva Forge knife (Exhibit B-2); his chest wound was self-inflicted in the hall bathroom using a scalpel blade obtained from the linen closet; and the blood drops on the kitchen floor were left when he went to the kitchen to obtain the

[32] To cite but one example, Affiant Mumma speculates that DNA testing will identify blood drops or smears "from areas where it appears that the perpetrator touched things or may have bled while moving through the home." DE 176-1 at ¶ 9. How these bleeding injuries were inflicted is not described. One such stain which MacDonald seeks to test in order to prove this hypothesis is "D26- rb stain on ceiling near light in east bedroom," which prior testing revealed was Blood Type "A or O". DE-189-1. At trial, the Government introduced a plethora of evidence to prove that Colette MacDonald (Type A blood) was repeatedly struck with the club (Ex. 306/A/Q14)in the master (east) bedroom, and that Colette's blood type was spattered, apparently by centrifugal force as the club was swung, on the ceiling near the light. GX-128/D-27,GX-351/D-27R, GX-129/D-28, GX-643. There was no evidence that Kristen (Type O Blood) sustained any blunt trauma injuries from the club. GX 970. Given this evidence, what is MacDonald's basis for asserting that stain D-26 on the ceiling--but not stains D-27,D-27R or D-28 in the same area--came from an intruder?

surgical gloves stored under the sink. Of these nine stains, all of which the Government maintains came from the perpetrator--Jeffrey MacDonald--MacDonald only seeks to test two: D-25K [GX-136] and D-26K [GX-137]. *See* DE-189-1. Consequently, MacDonald must articulate, consistent with his defense at trial, how these two stains could only have come from an intruder/perpetrator.

34. Although MacDonald maintains that his defense at trial of intruders suffices for purposes of the IPA (DE-176 at ¶1), and we have previously explained why it does not meet the requirements of § 3600(a)(1), courts have construed § 3600(a)(6) strictly and have denied motions for DNA testing where the theory would not explain other evidence of the applicant's guilt. In upholding a district court's denial of post-conviction DNA testing of swabs from a gun, the Tenth Circuit in *United States v. Roberts*, 417 Fed. App'x 812, 823-24, (10th Cir. 2011) (unpublished) quoted Chief Justice Roberts: "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." *Dist. Attorney's Office for the Third* Judicial *Dist. v. Osborne*, 557 U.S 52., 129 S. Ct. 2308, 2316 (2009). The instant motion does not address in any fashion how DNA testing is going to change any of the evidence used to convict MacDonald.[33] For example, how would it

[33] In rejecting MacDonald's claim that the evidence adduced at trial did not justify a finding of guilt beyond a reasonable doubt under *Glasser* v. *United States*, 315 U.S. 60 (1942), Senior Circuit Judge Bryan, writing for a unanimous panel of the Fourth Circuit, wrote: "Our canvass of the record, however, gives ample warrant for the trial verdict. With no merit in any issue on this appeal, the judgment of conviction is affirmed. *United States v. MacDonald*, 688 F.2d 224, 234 (4th Cir. 1982).

alter the jury's finding that MacDonald stabbed his wife through his pajama top which he--and not an intruder--had placed on her chest? In *United States v. Collins*, No. 3:95-CR-35, 2009 WL 1117269, at *6 (D. Nev. April 24, 2009) (unpublished) the U.S. District Court for the District of Nevada, pursuant to § 3600(a)(6), denied a motion for testing of postage stamps linked to a mail bomb, in which previous testing had excluded the applicant as the source of the DNA, where the theory of defense (that neither the applicant's ex-wife or daughter had licked the stamps either), even if supported by DNA results would not rebut other evidence of guilt. The district court held that such a result would not establish applicant's innocence where he "failed to provide any argument rebutting the additional evidence presented by the government supporting [his] guilt." *Id*. at 16.

35. In *United States v. Woods*, No. CR-97-H-159-E, 2006 U.S. Dist. LEXIS 72192 (N.D. Ala. Sept. 26, 2006) (unpublished),[34] the U.S. District Court for the Northern District of Alabama similarly rejected an IPA applicant's theory of actual innocence where it would not call into question other evidence of guilt. The applicant sought re-testing of a ski mask worn by the perpetrator of one robbery of which he was convicted, contending that a DNA exclusion would establish "absolute doubt" as to his guilt. *Id*. The U.S. District Court denied the motion, holding that a theory eliminating the applicant would not establish his innocence--even if DNA results implicated the alleged true perpetrator--where other evidence of the

[34] The case is not available through "Westlaw."

applicant's guilt "compel[led] the conclusion that Woods was involved in the Count 6 robbery, even if [the alleged true perpetrator] were also involved." *Id*. at 14-15.

36. In a state case which is analogous to MacDonald's IPA testing claim, the Supreme Court of Florida rejected a post conviction application from a death row inmate, Thomas Overton, a "cat burglar," who had been convicted of the murders of a husband and wife, Michael and Susan MacIvor, and for the killing of their unborn child. Susan MacIvor had also been sexually assaulted and her ankles had bound with masking tape, in addition to a belt and a clothesline. *See Overton v. State*, 976 So. 2d 536 (Fla. 2007). Overton sought DNA testing of hairs stuck to the masking tape which were not his nor the victims, and his application was denied. In affirming the denial, the Supreme Court of Florida, after detailing the numerous ways that hairs could have become attached to the sticky tape, stated:

> Thus, the conclusionary assertion that if the hair does not belong to Overton or the victims, it must belong to a person who committed or participated in the crime, is far too tenuous because there is no way to determine when, why, where, or how the hairs attached to the tape. This assertion is the type of speculation that this Court has found to be the basis for denying a [Florida Rule of Criminal Procedure providing for post-conviction DNA testing] motion.

Id. at 568.

37. Courts most frequently deny IPA testing motions on the basis of § 3600(a)(8), which requires the court to find that the proposed DNA testing "may produce new material evidence that would

...support the theory of defense referenced in [subsection (a)(6)]" and "raise a reasonable probability that the applicant did not commit the offense." In the absence of legislative history to the contrary, we submit that the statute should be read as codifying the *Bagley-Strickland* standard for materiality and reasonable probability: "The evidence is material only if there is a reasonable probability that ... the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). As with § 3600(a)(6), courts have relied on § 3600(a)(8) to deny IPA motions that would not call into question other evidence of guilt and thus probably would not change the outcome.

38. In *United States v. Jordan,* 594 F.3d, 1265 (10th Cir. 2010), the court of appeals affirmed the district court's denial of Mark Jordan's motion under the IPA to test a prison "shank," a piece of cloth and a bloody glove, all linked to the murder of fellow prisoner, David Stone. Jordan had been convicted of Stone's murder in the U.S. Penitentiary in Florence, Colorado. Stone was stabbed as he sat at a picnic table in the prison yard while numerous other inmates were nearby, including Mark Jordan and Sean Riker. Other inmates saw Jordan stab Stone and then run after Stone. A corrections officer observed one inmate (Jordan) running after another inmate (Stone), then start walking back to a housing unit and throw something on the roof of the housing unit. *Id*. at 1266. Later authorities discovered a bloody knife or "shank" with its

handle wrapped in cloth on the roof of the housing unit, and a blood-stained glove in the prison yard. Victim Stone's DNA was on the shank and the cloth, and a small amount of DNA that did not belong to applicant Jordan or victim Stone was also found on these objects. Scientists could not determine the source of this DNA, nor could they determine the source of the blood on the glove, or even whether that source was human. *Id*. at 1267. At trial, Jordan did not dispute that he had handled the shank (although no DNA evidence was offered to corroborate this), run after Stone, and thrown the murder weapon on the roof of the housing unit. Instead, Jordan denied killing Stone and claimed that Riker was the actual assailant. *Id*. After his conviction, Jordan sought additional DNA testing under the IPA of the shank, the cloth, and the glove. The district court denied the motions pursuant to § 3600(a)(3)--new testing is not substantially more probative than the prior DNA testing--and § 3600(a)(8)--proposed testing would not raise a reasonable probability that Jordan did not commit the offense. The Tenth Circuit affirmed, emphatically rejecting the defendant's assertion that:

> DNA testing of the shank, the cloth and the bloody glove may reveal Mr. Riker's DNA on those objects, and that this evidence would raise a reasonable probability that Mr. Jordan did not stab Mr. Stone. We disagree. Such evidence would only show that Mr. Riker handled those items at some point, which is not at all inconsistent with the government's theory of the case such that it calls into question the strength of the evidence against Mr. Jordan. *Cf*. *United States v. Fasano*, 577 F.3d. 572, 578 (5th Cir. 2009)(ordering DNA testing under the IPA when favorable results would cause a "strong case" against the defendant to

"evaporate").

Id. at 1268.

39. The *Fasano* case, although not cited in the instant motion, is clearly distinguishable.[35] *Fasano* involved the robbery of a bank in Morton, Mississippi, by a person who handed the teller a note, and wore a white hard hat, a work shirt and black sunglasses which he discarded near the bank. 577 F.3d at 574. At trial, the following evidence was introduced: (1) bank video camera footage showing a man with Fasano's build robbing the bank; (2) four eyewitnesses identified Fasano as the robber; (3) vehicle records showing Fasano either owned or had access to a vehicle which matched eyewitness descriptions of the robbers vehicle; and (4) Fasano's fingerprints were found on the demand note. *Id*. The district court denied the motion on chain of custody grounds under § 3600(a)(4). The evidence could not be immediately located, but as the opinion of the court of appeals reflects, "[s]ome time later the government found a paper bag with all the physical evidence in a closet next to the office of the government prosecutor in the case, who had in the meanwhile retired from service." *Id*. at 577 (footnote omitted). Judge Higginbotham's opinion goes on to state: "That it lay quiet in a paper bag in a courthouse closet may suggest an unwarranted casualness but that it was unseen, forgotten, and untouched is of no moment here." *Id*. (emphasis added). In reversing the district court's denial, the Fifth Circuit focused on provisions of § 3600(a)(8) and the potential of the DNA testing to raise a

[35] MacDonald cites no case authority for any proposition in the instant motion.

reasonable probability that the applicant did not commit the offense:

> Fasano's defense at trial attacked the reliability of the eyewitness testimony and pointed the finger at Mark Westly Hughes. Hughes has a criminal record and had been staying in his old room as a guest of Fasano's brother. The defense argued that Hughes had access to the green shirt, hard hat and glasses; that although Fasano's fingerprints were on the demand note, the paper on which the demand was written came from his old room. The state of course put the clothes on Fasano with the eyewitness testimony and Fasano would put them on Hughes. That the robber wore them and presented the note was never at issue. ...
>
> The question here is whether testing may produce new material evidence that would raise a reasonable probability that the applicant did not commit the offense. ... There is no question but that the conviction is well supported by the evidence as we concluded in affirming Fasano's conviction. If, however, testing does not find Fasano's DNA on the clothing and glasses but finds Hughes' the strong case evaporates; here the strength of the evidence by no means makes fanciful a conclusion that there is a reasonable probability that Fasano was not the robber. That is, unless we are to refuse to accept the weakness of eyewitness testimony, a legal reality that DNA testing has forced upon the legal community.

Id. (emphasis added). Thus viewed, the situation in *Fasano* is in no way analogous to that presented to this Court. In the first place, this is not an eyewitness identification case, and whatever the problems with eyewitness identification, they have no applicability here. Second, Fasano's motion is entirely consistent with his defense at trial. Third, Fasano's request involves testing the items to determine if Hughes' DNA is present rather than Fasano's. Fourth, MacDonald cannot possibly know the source of most

of the items he seeks to test, under either parties' arguments at trial. Fifth, the Fifth Circuit may have been confident that those items of evidence in Fasano had been "untouched" in the intervening years, but in this case there is no question that the physical evidence has been touched extensively since 1970.

40. At the status conference, this Court questioned whether recovery of DNA from an unidentified individual would be relevant. Hr. Tr. at 6. Although the Government is in total agreement, this is not a position that MacDonald has accepted. The MacDonald position is that any matter that cannot be directly tied to the occupants of the house is evidence of intruders. If past experience is any indication, any unsourced DNA--like any unsourced hair--will be the basis for another meritless motion to overturn his conviction.

41. Affiant Mumma states that over 273 individuals who have been wrongfully convicted have been exonerated by DNA testing since 1989. DE-176-1 at ¶2.[36] If that is indeed the case, it is of course regrettable that so many individuals have been convicted--primarily of crimes involving sexual assault--on the basis of incorrect eyewitness identification and/or physical evidence that ultimately proved not to have come from the defendant. That said, MacDonald has not called the Court's attention to any case in which a conviction has been vacated which did not result from biological evidence that had been central to the prosecution's case at trial being seriously called into question or from biological evidence

[36] No statistics are offered as to how many defendants' guilt has been confirmed by DNA testing.

indisputably left by the perpetrator during the commission of the crime being later determined not to be the defendant's.

The Motion Is Not Reasonable In Scope, Does Not Use Scientifically Sound Methods And Is Not Consistent With Accepted Scientific Practices

42. Subsection 3600(a)(5) requires that: "The proposed testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices." The instant motion meets none of these requirements. Contrary to the response of counsel about the number of items to be tested ("I cannot imagine that it would be more than a couple of dozen items." Hr. Tr. at 21), MacDonald has subsequently identified 84 items to be tested. DE-189-1. And notwithstanding the statement of counsel regarding the scope of the testing ("We understand the importance of the relevance of the evidence that would be tested." Hr. Tr. at 21), the list contains numerous items that have no importance or relevance. DE-189-1. For example, under the heading "Other Possibilities," MacDonald has listed 19 stains from the kitchen (D-1K- D-19K) which are "not blood" and recommends that they be subjected to "miniSTR and/or YSTR testing". DE-189-1. How important and relevant can these stains be if they are "not blood"? Similarly, MacDonald seeks the same testing for a cup and four drinking glasses (from the dish drainer) and does not allege any biological evidence to test in relation to these items.[37] *Id*. Clearly, such items do not qualify as "biological evidence" under § 3600A, and therefore are not subject to exploratory DNA testing under § 3600(a).

[37] MacDonald has never alleged that the "intruders" ate or drank anything or paused to wash dishes.

43. Besides failing to identify any of the 84 listed items by their trial exhibit number, and thereby not informing the Court whether or not the item figured in the trial, MacDonald has failed to specify which of the three different types of DNA testing he wishes to have an as-yet-unidentified laboratory perform on any particular item.[38] Although "Attachment 1" [DE-189-1] requests "miniSTR testing, (which is not defined) and or YSTR testing" (but not "Touch DNA" testing), the Affidavit of Christine Mumma [DE-176-1], however, makes no reference to "miniSTR testing," but suggests that "Y-STR testing and Touch DNA testing of evidence collected from the investigation of the murders could be very probative." *Id*. at ¶ 8). At the status conference, Counsel Mumma appeared to concede that "Touch DNA" testing could not be reliably done because the weapons had been "contaminated by other parties touching the evidence ..." (Hr. Tr. at 8). These three different methodologies are not all potentially applicable to each requested item. *See* Affidavit of Tina Delgado filed herewith. For example, "Touch DNA" testing for the presence of skin cells has no application to bloodstains or spatters. This eliminates almost all the requested items as candidates for this form of testing. *See* Exhibit 5 ("Schedule B"). YSTR DNA testings application is to male-female DNA mixtures--of which there are none here--or to questioned samples where there is a factual basis to believe they are not from a female victim-donor. *See* Delgado Aff. at ¶ 14. This qualification eliminates all the bloodstains except those in MacDonald's Type B

[38] Section 3600(c)(1) generally requires that any court-ordered DNA testing be carried out by the Federal Bureau of Investigation.

blood. *See* Exhibits 4("Schedule A") and 5("Schedule B"). MiniSTR analysis is a methodology that may be used on degraded DNA samples to help recover information lost during conventional Short Tandem Repeat ("STR") analysis. As we explained in greater detail in relation to MacDonald's request to test items which have already been subjected to DNA testing, mini-STR produces the same STR information as conventional PCR STR testing. The key to proper employment is whether or not the samples have been subjected to degradation by virtue of environmental insult, bacteria, humidity, etc. Delgado Aff. at ¶ 13. The prerequisite of specimen degradation for miniSTR testing--purportedly based on this new technology--eliminates all of the items listed on DE-189-1, and puts MacDonald back in the realm of conventional STR testing--which is what AFIP performed. DE-123-2 at 5-37. Further, because he did not previously seek STR testing of these items in 1997 [DE-46], or such testing was denied in 1998 [DE-49], these items are not subject to miniSTR testing now by virtue of § 3600(a)(A)(3)(ii) and § 3600(a)(10)(A)(i). *See* Exhibit 4 ("Schedule A")and Exhibit 5 ("Schedule B").

44. Turning to the issue of the requested "Touch DNA" testing of the weapons and other items, we will also address the related issue of "Low Copy Number" ("LCN") DNA testing. As the Affidavit of Tina Delgado relates: "'Touch DNA' refers to DNA from skin cells which are deposited when an individual touches or comes in contact with an object. The Nuclear DNA Unit of the FBI Laboratory has demonstrated that samples containing low levels of DNA may not only

recover cells from a person of interest, but also from other individuals who have been in contact with the item at some point." *Id*. at ¶ 7. "LCN analysis utilizes the same techniques as conventional STR analysis with modifications to increase sensitivity including the increase of amplification cycles in PCR and post amplification purification of the DNA samples. LCN analysis is an enhancement strategy used for items of evidence potentially containing 'touch DNA.' LCN analysis generally increases the risk of DNA typing inaccuracies and is not permitted in NDIS. The National DNA Index System created by Congress as part of the IPA and whose standards all DNA test results must meet. [*See* § 3600(e) and Exhibit 4 ("Schedule A").] Studies have shown that LCN analysis can profoundly alter the performance characteristics of the PCR and result in demonstrable losses of fidelity and reproducibility." *Id*. at ¶ 8.

45. "LCN typing results fall within a 'stochastic' zone, in which random fluctuation in the quantity of detected DNA types is known to occur and can lead to erroneous DNA typing if not properly addressed. DNA types can randomly 'drop out' and 'drop in', resulting in an incomplete and/or erroneous profile which can compromise the reliability of the typing system. Additionally, several artifacts of the analysis method may become more prominent and have a heightened chance of being misinterpreted as part of the true DNA profile. Because of these factors, LCN typing results are generally not reproducible and by its nature less robust than traditional STR analysis." *Id*. at ¶ 9.

47. "One of the fundamental limitations of the LCN approach on items of evidence containing 'touch DNA' is that results typically exhibit a combination of the various individuals who have handled an item, not exclusively those individuals involved in a criminal act. There is also a greater opportunity for adventitious transfer of DNA in the field (which may preclude testing of 'old', unsolved cases), as well as during the manufacture of reagents and consumables that are used in testing. As a result, the potential exists for these materials to contain low-level biological contaminants that may be detected together with, or instead of, sample DNA. It may be impossible to determine if a LCN DNA profile is derived from primary or secondary transfer, casual contact, or from 'background' DNA. Because of these limitations, any results not matching a reference sample cannot be assumed to be exclusionary in the context of a case. Id. at ¶ 10 (emphasis added).

48. Given these profound limitations on the reliability of "Touch"(and LCN DNA) testing, it is remarkable that "Touch DNA" was advocated for this case. DE-176-1 at ¶ 2. This suggests that the requested testing is not "ultimately...about the truth" (Hr. Tr. at 7-8), but instead is just MacDonald's latest attempt to reopen his case with "specious evidence." *United States v. MacDonald*, 966 F.2d 854, 861 (4th Cir. 1992). This may seem a harsh assessment at first, but we ask the Court to appreciate that this is the reverse of the type of case (e.g., Bloodsworth) for which Congress intended the IPA, in which an innocent person seeks reliable DNA results because the applicant believes they will exculpate him. For MacDonald, the exact opposite is true. Unsourced DNA--while not

truly exculpatory--provides the basis for further litigation. Moreover, from MacDonald's perspective, the only thing better than an unsourced DNA profile is one that can never be sourced because it does not come from any one individual but instead derives from a composite profile from several individuals and/or the "stochastic" effect. Such a specious DNA profile avoids the risk of later being identified as that of a neighbor, investigator, evidence custodian, attorney, or juror.

49. Because of the recognized unreliability of LCN results--including those from "Touch DNA"–-to our knowledge, no Federal Court has accepted what is indisputably LCN DNA test results, and MacDonald has cited no cases at all [DE-176]. To the extent that there is case law in this area, the cases involve whether or not particular results constitute LCN results requiring a *Daubert* Hearing. *See United States v. Davis*, 602 F. Supp. 2d 658 (D. Md. 2009); *United States v. Williams*, No. CR 05-920, 2009 WL 1704986 (C.D. Cal. June 17, 2009) (unpublished).[39]

50. The Court may find more helpful a recent decision of September 15, 2011, by the District of Columbia Court of Appeals, involving the denial of a motion for Touch DNA testing. In *Hood v. United States*, 28 A.3d 553 (D.C. Ct. App. 2011), the D. C. Court of Appeals upheld the denial of a motion made in the Superior Court for the District of Columbia seeking to test for skin cells on physical evidence used in a 1989 felony murder on an elderly woman

[39] For a basic overview on DNA testing and terminology, we draw the Court's attention to *United States v. Trala*, 162 F. Supp. 2d 336 (D. Del. 2001).

in her home. The motion was made under the District of Columbia Innocence Protection Act of 2002, D.C. Code §22-4133, which was enacted while the Federal IPA was still pending in Congress. The D.C. Court of Appeals upheld the denial on two grounds: (1) Under § 22-4133(a) skin cells were not "biological material" within the definition of that term provided by § 22-4131(2) which, in pertinent part, defines that term as "*visible* skin tissue", in contrast to the definition of "biological evidence" found in § 3600A(b)(2) of the IPA (which states "skin tissue..."). Without conceding that invisible epithelial skin cells provide a basis for DNA testing under § 3600(a), we do not rely on this ground of the decision. Rather, we cite *Hood v. United States*, for the alternative basis of the ruling, namely, that the defendant failed to demonstrate a reasonable probability that additional DNA testing would produce non-cumulative evidence that would help establish that he was actually innocent under § 22-4133(d).[40] *Id*. at 564-566. After canvassing the evidence the opinion of the D.C. Court of Appeals states:

> Moreover, if we nonetheless entertain the suggestion that another person somehow *could* have committed the assault, traces of a third person's skin cells on the items of evidence in this case would not prove it. These items

[40] The statute provides that: "The court shall order testing pursuant to an application made under subsection(a) of this section upon a determination that the application meets the criteria set forth in subsections (a)-(b) of this section and there is a reasonable probability that testing will produce non-cumulative evidence that would help establish that the applicant was actually innocent of the crime for which the applicant was convicted or adjudicated as a delinquent." The corresponding provision of the Federal IPA, in addition to the 9 other requirements of § 3600(a), is § 3600(a)(8): "The proposed DNA testing of the specific evidence may produce new material evidence that would–(B) raise a reasonable probability that the applicant did not commit the offense." If anything, the Federal IPA imposes a higher standard.

> were ordinary personal and household objects that Mrs. Chappelle wore (the rings) or carried around with her (the purse) or that she and others put to everyday use (the knife, scissors and wrench). As the judge below found, the presence of third-party skin cells on these objects might mean someone other than appellant or Mrs Chappelle touched them *at some point in time;* but that proves nothing, because it would not mean that the cells were deposited on the items during or around the time of the attack. They just as easily could have been left on the objects before or after the crime was committed, under circumstances having nothing to do with it– for example by ...investigators or unknown persons who could have handled the objects after the police acquired custody of them.
>
> FN 47. There is no indication that the police took any measures to prevent the items from being handled (and "contaminated" with stranger DNA) after they were collected as evidence. Although the IPA requires law enforcement agencies to preserve biological material that was seized or recovered as evidence, *see* D.C. Code § 22-4134, this requirement was not in effect when the police were investigating Mrs. Chappelle's murder.
>
> In short, the discovery of a stranger's DNA in trace skin cells would do exceedingly little, if anything, to rebut the overwhelming evidence of appellant's guilt.

Id. at 566 (emphasis in original).

51. This analysis applies directly to MacDonald's motion for "Touch DNA" testing of the weapons, which, after their initial processing by the CID Lab in 1970, have been handled by dozens of people over the last 41 years.

52. MacDonald also asserts that the inside of the finger section of the surgical rubber glove (I-21/GX-105) " ... is a very good conduit for collecting skin cell *when that comes off the finger*, is something that could be tested." (Hr. Tr. 8-9). We

agree, when such an item comes off a finger, is immediately collected and preserved for DNA testing, and no other destructive testing is done before the ultra sensitive DNA testing is attempted, it could be an excellent source of DNA.[41] The problem, however, is this piece of latex came off MacDonald's finger almost 42 years ago, and it has not lain "untouched" since then. In 1970, the finger section (I-21) was subjected to serology testing along with the other latex fragments (I-3, I-213 and I-226) found on the master bedroom floor and on Colette's body. The results were reported in the USACIL Preliminary Report; I-21 was found to have Colette's Type A blood on it. *See* DE-123-2 at 28, 49-50. Sometime in 1971, the latex fragments (GX 105, GX-106 and GX-109) were sent to the ATF Laboratory for neutron activation comparison with the known exemplars of the "Perry Brand Latex Disposable Gloves-Size 8" (GX-134) found in packages under the kitchen sink. (Tr. 3910-3914). ATF Assistant Director Michael Hoffman testified at trial to the two types of examinations--microscopic and neutron activation analysis--that he conducted. *Id*. "Yes, some of the samples contained blood, and it was necessary to remove some of the blood from those that had smears on them." *Id*. at 3913. "The activation process was used, as I have mentioned, and all

[41] The finger section was recovered from the top sheet (GX- 103) of the master bed, which was found on the floor of the master bedroom. The sheet contained bloody fabric impressions from MacDonald's pajama top, but in his wife's blood type. *See* Summary Chart GX 978 in DE-132-15 (App. Vol. VI, Tab 6). Inside the sheet was the multi-colored bedspread (GX-104) which also contained Colette's hair entangled with a seam thread from MacDonald's pajama top. *Id*. The government's argument was that the sheet and bedspread were used by MacDonald to move his wife's body from Kristen's room to the master-bedroom. The glove apparently shattered when MacDonald was removing it from his hand and landed on the sheet before it was balled-up in a pile.

that is required is that the specimen be placed into a small plastic vial, numbered, sealed placed into a larger plastic container, which is called a 'rabbit'. This is taken to the [nuclear] reactor, shot into the core of the reactor, retrieved after a sufficient period of time when the samples are radioactive, and then counted by a process I have previously described to determine what elements are present; and that was done in this case."[42] *Id.*

53. As we informed the Court at the status conference, the finger section (I-21) was also tested with a chemical in an effort to obtain a fingerprint from inside the glove. Hr. Tr. at 10. Near the end of the Grand Jury's investigation, USACIL-Fort Gordon was asked to attempt to obtain a fingerprint from I-21 when the prosecutors learned of a process that involved the chemical ninhydrin, which might be successful.[43] This was attempted; however, examination of I-21 did not reveal any latent fingerprints (perhaps because of the prior nuclear tests). *See* attached Exhibit 8. As reflected in attached Exhibit 9 at page 2, "many of the solvents used in ninhydrin are toxic and flammable, while even dry ninhydrin itself is harmful. Therefore, adequate safety precautions must be taken. Nitrile gloves should be worn, rather than latex, as latex is soluble in many of the reagents but nitrile is resistant to chemicals." USACIL repackaged I-21 and

[42] Based upon the elements - sodium, copper, zinc, and gold traces- common to both the questioned and the known exemplars, Mr. Hoffman concluded that they could have come from the same manufacturer. (Tr.3913-15).

[43] As reflected in *Ninhydrin: Basic to Advanced*, by Pat A. Werheim, ninhydrin, is an amino acid reagent, that may be applied to porous surfaces in an attempt to develop latent fingerprints. *See* Exhibit 9.

marked it to reflect the potential health hazard, based upon the application of a toxic chemical. When CID Agent William Ivory was asked to authenticate I-21 (GX-105), the transcript reflects his reluctance to open the evidence envelope. Tr. 1761. Based upon the prior serological and nuclear examinations, and treatment of the inside of I-21 with ninhydrin a toxic- if not carcinogenic - chemical, the Government submits that it is extremely unlikely that any DNA would be recovered at this late date. If by some miracle DNA could be recovered, it would not yield an authentic and reliable sequence.

54. It is MacDonald's burden to establish as a pre-requisite to any proposed DNA testing that "the specific evidence to be tested ... has been ... retained under conditions sufficient to ensure that such evidence has not been ... contaminated ... or altered in any respect material to the proposed testing." § 3600(a)(4). Based upon what has happened to the evidence over the last 41 years, MacDonald cannot meet this burden with respect to the weapons or the finger section of the latex glove, particularly when "Touch DNA" is the proposed method of DNA testing. DE-189-1.

Conclusion

MacDonald has fallen far short of demonstrating all ten prerequisites of court-ordered DNA testing under the IPA. Therefore, for all of the foregoing reasons, it is respectfully requested that his motion for new DNA testing be denied.

Respectfully submitted, this the 13th day of December, 2011.

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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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