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	)	
	)	REPLY IN SUPPORT OF MOTION FOR
v.	)	ADDITIONAL DNA TESTING
	)	PURSUANT TO 18 U.S.C. § 3600
JEFFREY R. MacDONALD,	)	
Defendant.	)	

Jeffrey R. MacDonald, by and through undersigned counsel, pursuant to the Court's order of November 10, 2011 [DE-204], hereby submits the following reply to the Government's Response to Motion for Additional DNA Testing [DE-227], filed December 13, 2011, and respectfully shows unto the Court the following:

SUMMARY OF ARGUMENT

Jeffrey MacDonald has maintained his innocence for over forty years. The Government has consistently fought any effort on MacDonald's part to prove that intruders were responsible for the murder of his family – even now when modern scientific advances could aid in conclusively proving, once and for all, that MacDonald has been convicted of a crime he did not commit. The Fourth Circuit has noted that there is an "unease one feels with this case," *United States v. MacDonald*, 966 F.2d 854, 860 (4th Cir. 1992), and a concurring member of that Court earlier expressed a "substantial misgiving" and "strong uneasiness" that one has with the result. *United States v. MacDonald*, 688 F.2d 224, 234 (4th Cir. 1982) (Murnaghan, J., concurring). Deoxyribonucleic acid ("DNA") testing under The Innocence Protection Act ("IPA") has the ability to contribute valuable evidence to efforts to bring the finality to this case that the

Government repeatedly claims is its central goal, as well as establish the truth in the interest of justice.

When the IPA was enacted, Congress made it clear that it intended for the courts to take full advantage of DNA testing technology in the search for justice. DNA evidence can confirm guilt, exclude a defendant from suspicion, identify the actual perpetrator(s), or, at the very least, cast serious doubt as to a defendant's guilt due to the redundant appearance of another's genetic materials.

The instant motion for additional DNA testing meets all ten requirements of the IPA, 18 U.S.C. § 3600(a), and should be granted. MacDonald asserts, under penalty of perjury, that he is actually innocent of the Federal offense for which he is currently serving a life sentence. *See* 18 U.S.C. § 3600(a)(1)(A). The specific evidence to be tested was secured in relation to the investigation or prosecution of the Federal offense for which MacDonald is claiming innocence. *See* 18 U.S.C. § 3600(a)(2). Some of the items to be tested were not previously subjected to DNA testing and MacDonald did not knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the IPA was enacted. *See* 18 U.S.C. § 3600(a)(3)(A). Furthermore, MacDonald did not knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing. *See id.* The remaining items to be tested were previously subjected to DNA testing and MacDonald is requesting DNA testing of those items using a new method or technology that is substantially more probative than the prior DNA testing. *See* 18 U.S.C. § 3600(3)(B). The specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing. *See* 18

U.S.C. § 3600(a)(4). The proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices. *See* 18 U.S.C. § 3600(a)(5). MacDonald has a theory of defense that is completely consistent with his defense at trial and would establish his actual innocence of the Federal offense for which he is currently incarcerated. *See* 18 U.S.C. § 3600(a)(6). MacDonald was convicted at trial and the identity of the perpetrator was at issue in the trial. *See* 18 U.S.C. § 3600(a)(7). The proposed DNA testing of the specific evidence MacDonald requests to have tested may produce new material evidence that would raise a reasonable probability that he did not commit the offense. *See* 18 U.S.C. § 3600(a)(8). MacDonald certifies that he will provide a DNA sample for purposes of comparison if the Court determines the prior samples taken for use in earlier testing are not sufficient. *See* 18 U.S.C. § 3600(a)(9). MacDonald acknowledges that the motion is presumed untimely. *See* 18 U.S.C. § 3600(a)(10). That presumption is rebutted, however, as the evidence to be tested is newly discovered DNA evidence. 18 U.S.C. § 3600(a)(10)(B)(ii). Additionally, MacDonald's motion is not based solely upon his 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)(B)(iii). Further, the presumption of untimeliness is rebutted as a result of good cause shown. 18 U.S.C. § 3600(a)(10)(B)(iv). As MacDonald has met all ten requirements set out in the IPA, his motion for DNA testing should be granted. *United States v. Jordan*, 594 F.3d 1265, 1269 (10th Cir. 2010) (Lucero, J., concurring) (noting that because the word "shall" is used in the statute, the judge does not have discretion when all ten requirements have been met).

The results of additional DNA testing, if granted under the IPA, when considered with all the other evidence in the case, are highly likely to establish by compelling evidence that a new

trial would result in an acquittal. *See* 18 U.S.C. § 3600(g)(2). Congress carefully decided the standard to be used when determining whether a defendant should be permitted DNA testing under the IPA, and was "guided by the principle that the criminal justice system should err on the side of permitting testing, in light of the low cost of DNA testing and the high cost of keeping the wrong person locked up." S. Res. 1700, 108th Cong., 150 CONG. REC. S11609-01, at *S11611 (2004). The Court should grant testing under the IPA in order for any questions about the defendant's guilt or innocence to be answered. [1]

PROCEDURAL HISTORY

1. MacDonald incorporates by reference the "Procedural Context" contained in paragraphs 1-18 of the *Government's Response to Motion For a New Trial Pursuant to 18 U.S.C. § 3600* [DE-212], filed on December 12, 2011. Also set forth is such additional procedural history as is necessary for a resolution of the issues currently before the Court:

2. In 1997, MacDonald filed a *Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery* [DE-46] on the ground that the Government and the FBI forensic examiner had perpetrated a fraud on the court. In conjunction, MacDonald sought access to all physical evidence analyzed by the forensic examiner, as well as DNA testing of other biological evidence in order to conduct newly available DNA tests. This Court denied the motion. *United States v. MacDonald*, 979 F. Supp. 1057, 1069 (E.D.N.C. 1997). On appeal, the Fourth Circuit granted the motion with respect to the DNA testing, and remanded for further proceedings.

[1] During the Status Conference on September 21, 2011, the Government indicated it would determine whether the Federal Bureau of Investigation was willing to do the DNA testing should MacDonald's IPA motion be granted, and would address that issue in their response. However, the Government's responses do not address that issue. A determination regarding which laboratory will conduct the testing, should the motion be granted, will impact the cost of testing and how long it will take.

3. On October 30, 2004, prior to the completion of the DNA testing by the Armed Forces DNA Identification Laboratory, the Innocence Protection Act of 2004 ("IPA") came into effect and was codified in *18 U.S.C. § 3600.*

4. In March 2006, the results of the DNA testing ordered in 1997 finally became available.

5. On September 20, 2011, MacDonald filed a *Motion Pursuant to the Innocence Protection Act of 2004, 18 U.S.C. § 3600, For a New Trial Based on DNA Testing Results and Other Relief* [DE-176]. The "Other Relief" sought was additional DNA testing under the IPA should the Court deny the motion for a new trial based on the results of the hair testing already conducted.

6. On September 21, 2011, at a status conference, this Court directed the Government to file a response to MacDonald's *Motion Pursuant to the Innocence Protection Act of 2004, 18 U.S.C. § 3600, For a New Trial Based on DNA Testing Results and Other Relief* [DE-176]. This Court also directed MacDonald to file a reply to the Government's response thereafter.

7. On October 10, 2011, based on this Court's Order, MacDonald filed *Jeffrey MacDonald's List of Trial Exhibits for Additional DNA Testing Pursuant to the IPA* [DE-189]. Attached was a list of eighty-four items captioned "MacDonald-Recommendations for Additional DNA testing-miniSTR and/or Y-STR testing" [DE-189-1].[2]

8. In response to MacDonald's motion [DE-191], on November 8, 2011, this Court set the date for the evidentiary hearing for the week of April 30, 2012 [DE-201].

[2] MacDonald regrets any confusion caused by the lack of inclusion of trial exhibit numbers of these items and acknowledges that the heading should not have included the word "trial." Many of the items MacDonald is requesting to have tested were not admitted at trial. Therefore, for consistency purposes, MacDonald referred to CID lab reference numbers for all items. In order to avoid further confusion, in the future MacDonald will refer to exhibits that were admitted at trial with both the trial exhibit number and the CID lab reference number.

Additionally, contrary to the Government's assertion in DE-227 at n.3, there has never been a concession that none of the items MacDonald is requesting be tested are suitable for "touch DNA" testing. The appropriate process used when conducting DNA testing on any given item should be decided through consultation with the lab.

BACKGROUND ON DNA EXONERATIONS AND THE POWER OF DNA TESTING TO REVEAL THE TRUTH

1. Since 1989, postconviction DNA testing has freed 289 innocent people. The Innocence Project, http://www.innocenceproject.org/know/ (last visited Feb. 15, 2012). Presumably in all of those 289 cases, the police, prosecutors, and judges involved in the conviction believed the evidence of guilt to be very strong. *See* Hilary S. Riter, *It's the Prosecution's Story, But They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 Fordham L. Rev. 825, 834 (2005) ("In many cases where convictions appeared to be based on solid, and in some cases overwhelming, evidence, results of postconviction DNA testing have proven actual innocence."). In many of the cases the innocent person had to engage in protracted litigation to obtain DNA testing that could prove whether they had actually committed the crime. *Id.* at 827. In each case, DNA testing proved that the evidence presented at trial – which once appeared so strong – was simply wrong, and that the person convicted was actually innocent.

2. DNA technology can now identify the guilty and exonerate the innocent with such precision that lawmakers and law enforcers have described it as "a kind of truth machine." *Justice Dep't Acts to Clear DNA Backlog*, Miami Herald, Aug. 2, 2001, at 19A (quoting then-U.S. Attorney General John Ashcroft); *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308, 2316 (2009) ("Modern DNA testing can provide powerful new evidence unlike anything known before . . . It is now often possible to determine whether a biological tissue matches a suspect with near certainty.").[3] Like the 289 individuals before

[3] *Accord* 146 Cong. Rec. S11645-02, at *S11647 (describing "DNA testing" as "truth-seeking technology") (Senator Patrick Leahy's comments); NAT'L INST. OF JUST., DEPT. OF JUST., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (comments by then Attorney General Janet Reno); *People v. Wesley*, 533 N.Y.S.2d 643, 644 (Cty. Ct. 1988) (calling DNA evidence the "single greatest advance in the 'search for truth' . . . since the advent of cross-examination.").

MacDonald, untested biological evidence has the potential to reveal the truth, including proving that intruders were in the MacDonald home the night of the murders.

3. The Government has erroneously concluded that the IPA, which was created so that DNA testing could be used to seek the truth, permits testing only to exclude MacDonald as a contributor of crime scene evidence. The Government ignores the fact that DNA testing has often been used to match the identified DNA profile to a third party, the existence of which would be entirely consistent with MacDonald's theory at trial.[4]

4. One of the approaches used to establish truth through DNA testing has been called "redundancy," because it involves finding the same unknown profile on multiple items of crime scene evidence. Redundancy becomes important when an unknown profile, excluding the defendant, is obtained from testing a single piece of evidence but that result is not enough to prove innocence because it is only *possible* (not *certain*) that the unknown profile came from the perpetrator. If that same unknown profile is found on not one, but multiple items of crime scene evidence on which the perpetrator would likely have left DNA, then the conclusion becomes inescapable that the unknown profile belongs to the perpetrator.[5] If the defendant does not match

[4] *See United States v. Amerson*, 483 F.3d 73, 87 (2d Cir. 2007) ("The greater accuracy and speed with which CODIS allows the government to apprehend and convict those guilty of crimes has, as we have seen, an equally important corollary – its use in exonerating innocent people criminally suspected, convicted, or charged.").

[5] Stephen Cowans was exonerated in 2004 after using redundancy to prove his innocence. Cowans was convicted in the 1997 shooting of a Boston police officer. David Weber and Kevin Rothstein, *Man Freed After 6 Years; Evidence was Flawed*, BOSTON HERALD, Jan. 24, 2004, at 4. During the shooting, the perpetrator dropped his baseball hat and then fled through a nearby home where he drank from a glass of water and removed his sweatshirt. At trial, the injured officer identified Cowans as his shooter and an expert testified that a latent thumbprint left on the drinking glass matched Cowans'. Despite the apparent strength of the evidence against him, in May 2003, Cowans obtained DNA testing of the drinking glass, sweatshirt and baseball hat. Not only was Cowans excluded from all three items, but the three items contained the same unknown male profile. Redundancy of the three items was crucial to proving Cowans' innocence because, unlike semen left behind in a sexual assault, the baseball hat, drinking glass, and sweatshirt were not certain to contain the perpetrator's DNA. Because all three items excluded Cowans and matched each other, Cowans was exonerated.

Redundant DNA results also led to Larry Peterson's exoneration. A New Jersey jury convicted Peterson of rape and murder in 1989. Prosecutors premised their case on the following evidence: (1) Peterson supposedly had fresh "fingernail" scratch marks on his arms shortly after the victim went missing; (2) Peterson confessed to three friends; (3) Peterson confessed to a jailhouse informant; (4) hairs recovered from the victim's pubic combings "matched" Peterson's pubic hair; (5) hairs collected from one of the sticks match Peterson's public hair sample; and

the redundant unknown profile, and there is no other credible explanation for the redundancy, then the defendant must be innocent.

5. Obtaining a DNA database hit to the actual perpetrator is also more than just a mere possibility. In forty-five percent of the first 250 DNA exonerations, the actual perpetrator was identified through the postconviction DNA testing. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 5 (Harvard 2011). The possibility of identifying the actual perpetrator(s) in this case is not insignificant, particularly given the alternate suspects described early in the investigation of this crime.

6. The process of entering a DNA profile taken from crime scene evidence into a DNA database is increasingly used by law enforcement agencies to solve crimes at the investigative stage of a case.[6] In fact, if DNA testing existed in the 1970s, law enforcement undoubtedly would have performed the very tests MacDonald is now requesting during their initial investigation of the crime. Decisions ignoring the ability to match DNA on crime scene evidence to third parties not only potentially prolongs the incarceration of the innocent, but also aids the guilty in escaping apprehension for their crimes. The unique power of DNA testing to

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(6) there was semen on the victim's jeans and sperm on her underwear. A New Jersey trial judge granted Peterson's DNA testing motion in 2003. The DNA testing identified the same male DNA profile on the victim's fingernail scrapings and on the anal, oral, and vaginal swabs from the rape kit. The DNA profile was inconsistent with Peterson's DNA profile. Based on the redundant DNA results, a New Jersey trial judge vacated Peterson's conviction in July 2005 and prosecutors ultimately dropped all charges on May 26, 2006. *See Larry Peterson*, Innocence Project, http://www.innocenceproject.org/Content/Larry_Peterson.php (last visited Feb. 4, 2012).

Nicolas Yarris was exonerated in 2003 through redundant DNA results after being sentenced to death and serving two decades in prison for a Pennsylvania murder he did not commit. Yarris' conviction was based primarily on a false confession and the testimony of a jailhouse informant. STR DNA testing was able to determine that the same person—someone other than Yarris—was the source of the sperm, foreign DNA under the victim's fingernails, and DNA left in gloves found at the scene. In light of these results, the court vacated Yarris' conviction and the District Attorney's office dropped all charges against him. *See Yarris v. County of Delaware*, 465 F.3d 129, 132–133 (3d Cir. 2006).

Redundant DNA results in MacDonald's case could similarly prove his innocence.

[6] The Department of Justice operates a comprehensive web site outlining the capabilities of DNA testing and its importance to ensuring reliability in the criminal justice system. The web site, DNA Initiative: Advancing Criminal Justice Through DNA Technology, is available at www.dna.gov.

find the truth should not be obstructed by the Government's interpretation of the strength of the trial evidence or by a narrow reading of a statute designed to find the truth.

7. DNA exoneration cases powerfully demonstrate that a prosecutor's assessment that the evidence of guilt at trial was strong should not trump the need to examine new evidence. If the justice system can learn anything from these cases, the lesson should be that the evidence is often not as strong as it may appear; and therefore, courts should approach requests for postconviction DNA testing without rigid or fixed judgments about the evidence.[7]

8. Significantly, DNA technology rapidly evolves, which means that evidence previously tested with inconclusive or incomplete results may in the future be tested again and a complete DNA profile may be revealed. The Government's interest in finality carries much less weight if the defendant's claim is one of actual innocence, which is exactly why Congress – through the IPA – has wisely chosen not to erect the usual barriers to postconviction relief.

PURSUANT TO § 3600(a)(1)(A), MacDONALD HAS ASSERTED,
UNDER PENALTY OF PERJURY, THAT HE IS ACTUALLY INNOCENT OF THE
FEDERAL OFFENSES FOR WHICH HE IS UNDER A SENTENCE OF IMPRISONMENT.

9. Pursuant to the IPA, the defendant must "assert[], under penalty of perjury, that the [defendant] is actually innocent" of the crimes for which he was convicted. 18 U.S.C. § 3600 (2006). This issue has never been litigated and the congressional record does not reflect any

[7] Trial Counsel for former Texas inmate Chris Ochoa told Wisconsin Innocence Project attorneys that there was "not a chance" that Ochoa was innocent, because, among other things, he had confessed to the crime, provided details of the crime that police claimed only the perpetrator could have known, and testified convincingly against his co-defendant. Keith A. Findley and Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 332. DNA testing proved Ochoa and his codefendant were innocent and identified the real perpetrator. *Id.*

The prosecutor in the case of Florida inmate Frank Lee Smith accused defense attorneys of "playing games" by requesting DNA testing in an effort to delay Smith's execution. DNA testing eventually proved Smith was innocent. (Smith died in prison during the legal battle over whether he was entitled to DNA testing). Sidney Freedberg, *DNA Clears Inmate Too Late*, ST. PETERSBURG TIMES, Dec. 15, 2000, at A1.

specific intent behind the chosen wording. Therefore, one must look to the plain language of the statute in order to determine what steps are necessary for compliance.

10. MacDonald testified at his 1979 trial, under penalty of perjury, and asserted that intruders entered his home and murdered his family. Further, he has maintained his innocence through numerous court filings in the more than thirty years since his conviction.

11. The Government has indicated that MacDonald is required to "file" an assertion of actual innocence, under penalty of perjury, in order to fulfill the requirements of 18 U.S.C. § 3600(a)(1) and claims that "his prior assertions of innocence in various contexts are ineffective." DE-227 at ¶ 16. The statute makes no mention of the defendant needing to file the assertion in any particular manner in order to successfully be granted DNA testing under the statute. MacDonald's prior assertions of innocence fulfill the requirement set forth in 18 U.S.C. § 3600(a)(1). Regardless, in order to remove any question on this issue, MacDonald has included an affidavit of innocence, under penalty of perjury, with this reply. DE-238-11.

PURSUANT TO § 3600(a)(2), THE SPECIFIC EVIDENCE TO BE TESTED WAS SECURED IN RELATION TO THE INVESTIGATION AND PROSECUTION OF THE FEDERAL OFFENSE FOR WHICH MacDONALD IS CURRENTLY IMPRISONED.

12. Any and all evidence MacDonald is requesting be tested was collected by the Army Criminal Investigation Division during the investigation of the crime in 1970. This includes all items listed in the attachment to *Jeffrey MacDonald's List of Trial Exhibits for Additional Testing Pursuant to the IPA* [DE-189-1], as well as any items the Federal Bureau of Investigation delivered to the Armed Forces DNA Identification Laboratory ("AFDIL") in 1999.

PURSUANT TO § 3600(a)(3)(A), THE EVIDENCE TO BE TESTED WAS NOT PREVIOUSLY SUBJECTED TO DNA TESTING AND MacDONALD DID NOT KNOWINGLY AND VOLUNTARILY WAIVE THE RIGHT TO REQUEST DNA TESTING OF THAT EVIDENCE IN A COURT PROCEEDING AFTER 2004. MOREOVER, MacDONALD DID NOT KNOWINGLY FAIL TO REQUEST DNA TESTING OF THAT EVIDENCE IN A PRIOR MOTION FOR POSTCONVICTION DNA TESTING.

13. Pursuant to 18 U.S.C. § 3600(a)(3)(A)(i), the evidence to be tested was not previously subjected to DNA testing and MacDonald did not knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after 2004. 18 U.S.C. § 3600(a)(3)(A)(i). Congress has indicated that "[a] waiver of the right to request DNA testing must be knowing and voluntary, and will ideally be made *on the record and inquired into by the court* before it is accepted." *See* S. Res. 1700, 108th Cong., 150 CONG. REC. S11609-01, at *S11611 (2004) (emphasis added). MacDonald has never waived his right to request DNA testing, in any court or other setting, prior to or since the enactment of the IPA.

14. Moreover, MacDonald did not knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing. 18 U.S.C. § 3600(a)(3)(A)(ii). In fact, in MacDonald's 1998 Motion for An Order to Compel The Government to Provide Access to All the Biological Evidence for Examination and DNA Testing by His Experts, he specifically: 1) requested that "all laboratory exhibits which constitute or include biological evidence" be made available to the defense's experts to determine which were suitable for DNA testing; and 2) stated that he was reserving the right to request access to additional exhibits . . . at some later date." [DE-73 at 1–2; DE-73 at 2 n.1]. It is irrelevant that the court later denied his motion. The fact remains that MacDonald not only requested to review all of the evidence for testing, he also reserved his right to request additional testing in the future. It cannot be said that MacDonald failed, knowingly or otherwise, to request DNA testing of *any* evidence as he clearly requested

testing of *all* evidence in the case in 1998. It also is not logical that MacDonald should have asked for a DNA test that did not exist at the time of his prior filing.

15. Furthermore, given the nature of DNA testing available in 1998, testing may have consumed the evidence without producing probative results. Advances in DNA testing technology make it much more likely that DNA testing will now yield a probative result as accurate DNA profiles can now be constructed from the testing of even minute samples of genetic material.

PURSUANT TO § 3600(a)(3)(B), THE EVIDENCE TO BE TESTED WAS PREVIOUSLY SUBJECTED TO DNA TESTING AND MacDONALD IS REQUESTING DNA TESTING USING A NEW METHOD THAT IS SUBSTANTIALLY MORE PROBATIVE THAN THE PRIOR DNA TESTING.

16. In 1997, this Court granted DNA testing to MacDonald on a limited number of items collected during the investigation of this case – even though MacDonald had requested access to *all* of the evidence. At that time mitochondrial DNA ("mtDNA") testing had been recently developed. As a result, the focus of the mtDNA testing in MacDonald's case was on the hair evidence collected at the crime scene. The testing MacDonald's recent IPA motion requests is based on newer and more discriminating forms of DNA testing to be conducted on other relevant items of physical evidence in this case.

17. Since 1997, the development of "Short Tandem Repeat" ("STR") DNA analysis and the ability to collect and test minute samples through processes such as "touch DNA" has revolutionized forensic analysis. Further, modern testing is sensitive enough to uncover genetic data that would otherwise have been hidden, or "masked," because of its relative scarcity in a mixture of two or more individuals' DNA profiles. For example, an item of evidence containing blood from a murder victim may also contain far smaller – but still significant – traces of skin

cells from the perpetrator's genetic material; STR testing is sensitive enough to uncover that genetic material.

18. Touch DNA, on the other hand, is a process that utilizes genetic material found in skin cells to produce a DNA profile that can be found on anything a particular person has touched. Examples of items that are suitable for such testing include, but are not limited to, doorknobs, items of clothing, weapons, or drinking glasses. The process of touch DNA testing allows for the collection of minute amounts of genetic material to produce an accurate DNA profile; as few as seven or eight skin cells from the outermost layer of skin are required to produce an accurate profile. *See* Max and Lucy Houck, *What is Touch DNA?*, Scientific American, Nov. 2008, at 108, *available at* http://www.scientificamerican.com/article.cfm?id=experts-touch-dna-jonbenet-ramsey. The genetic material found in those skin cells is replicated using the traditional polymerase chain reaction ("PCR") amplification technique, and the material is then analyzed like any other biological sample. *See id.*

19. The scientific community began to take note of touch DNA in 2006, as it circulated through various forensic courses and conferences. Touch DNA received national recognition in 2007, when Boulder County District Attorney Mary Lacy utilized the technique to exclude the parents of JonBenet Ramsey in the child's well-known murder case. Lacy used touch DNA technology to test skin cells found on the murdered child's pajamas. *See* Karen Ague and John Ingold, *DA Clears Ramsey Family: "Touch DNA" Test Cited as Significant, Powerful Evidence*, Denver Post, July 10, 2008, at A01. Since 2007, several private laboratories have been performing touch DNA analysis, and many crimes have been solved on the basis of touch DNA evidence. *See*, *e.g.*, Matt Zapotosky, *DNA Technology Moves Forward; Lifting Skin Cells Pivotal in Getting Match on '96 Rape Suspect*, Wash. Post, Sept. 22, 2008, at B05; Michael

Laris, *Stringing Together the Clues of DNA: Fairfax Lab Solves World's Mysteries*, Wash. Post., Sept. 12, 2008, at B01.

20. A particularly timely and relevant example of the importance and probative value of touch DNA is Michael Morton's recent exoneration in Williamson County, Texas. Morton was convicted of killing his wife in a murderous rage in 1986. He was convicted and sentenced to life in prison. For approximately six years, the District Attorney in Williamson County fought Morton's request for DNA testing on a bandana collected near the crime scene.[8] *See* Chuck Lindell, *Morton Freed From Life Term*, Austin Am. Statesman, Oct. 5, 2011, at A1; *see also In re Morton*, 326 S.W.3d 634 (Tex. App.-Austin) (Jan. 8, 2010). The DNA testing of the bandana eventually yielded a DNA profile from the perpetrator's skin cells that were left on the bandana, and the profile was sufficient for comparison to the DNA database. The comparison yielded a "hit" to a convicted offender. With the assistance of an investigation performed by the Innocence Project®, authorities investigating a similar cold case in a neighboring county used the DNA results in Morton's case to connect the same offender to another brutal home invasion murder. *See* Brandi Grissom, *DNA Evidence Leads to Morton's Release After 25 Years*, Texas Tribune, Oct. 4, 2011, http://www.texastribune.org/texas-dept-criminal-justice/texas-department-of-criminal-justice/morton-released-prison-after-25-years/. The DNA results in Morton's case thus proved Morton's innocence and helped solve a second murder. These results were no doubt shocking to the Williamson County District Attorney who had fought for so many years to prevent the DNA testing.[9]

[8] The District Attorney dismissed counsel's continued efforts to obtain DNA testing on the bandana after an initial failure to secure such an order as "grasping at straws" (Rick Casey, *New Science Panel Chief Fights DNA*, Houston Chronicle, Oct. 11, 2009, at B1).

[9] The District Attorney apologized to Morton on the courthouse steps: "Twenty-five years ago, Michael Morton was convicted of murdering his wife. The jury's verdict was based on the evidence as we knew it at the time. DNA testing was not available at the time of the trial. It is now. In hindsight, the verdict was wrong. Mr. Morton was

21. Another advance in DNA testing is the development of Yfiler kits[10], which are capable of analyzing minute quantities of male DNA that may be present in a large background of female DNA. Yfiler kits became available in 2006, but were not widely used until more recently. *See* DE-238-21. Since MacDonald was the only male living in the MacDonald home, this is the optimal case for the use of Yfiler kits. If this Court grants testing under the IPA, it is possible that a redundant Y profile could be detected and, if different than MacDonald, be incredibly probative. Given the amount of blood at the crime scene and the fact that all of the victims were female, the Yfiler testing would be better suited than previous testing to identify the male intruders MacDonald described the night of the crimes

22. Moreover, additional testing should be conducted on certain items already tested because Minifiler kits were not previously available and could reveal DNA profiles that previous testing was unable to ascertain.

23. At the time of MacDonald's conviction in 1979, DNA technology was non-existent. Today's sophisticated DNA technology, however, is capable of creating an accurate genetic profile of the true perpetrator(s) in this case from trace amounts of genetic material likely to be found on the evidence in the Government's possession.

PURSUANT TO § 3600(a)(4), THE SPECIFIC EVIDENCE TO BE TESTED IS IN THE POSSESSION OF THE GOVERNMENT AND HAS BEEN SUBJECT TO A CHAIN OF CUSTODY AND RETAINED UNDER CONDITIONS SUFFICIENT TO ENSURE THAT SUCH EVIDENCE HAS NOT BEEN SUBSTITUTED, CONTAMINATED, TAMPERED WITH, REPLACED, OR ALTERED IN ANY RESPECT MATERIAL TO THE PROPOSED DNA TESTING.

24. All of the physical evidence in this case, including the items MacDonald is requesting to have tested under the IPA, "is in the possession of the Government and has been subject to a

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and is innocent of that crime." Jim Bergamo, *Michael Morton's Former Prosecutor Apologizes*, http://www.kvue.com/news/local/Michael-Mortons-former-prosecutor-apologizes-133997758.html.

[10] Yfiler and Minifiler kits are specialty kits utilized by forensic labs for specific types of DNA testing.

chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect *material* to the proposed testing." 18 U.S.C. § 3600(a)(4) (emphasis added). *United States v. Fasano*, 2008 WL 2954974, *4 (S.D. Miss. 2008) (holding that if samples are retained by the government, the court presumes they were retained under appropriate conditions to satisfy § 3600(a)(4) and the standard requires only a showing that the "evidence was continuously in the possession of one or more of the parties and the circumstances of any transfers." *United States v. Fasano*, 577 F.3d 572, 576 (5th Cir. 2009)). While the Government claims it is possible the physical evidence in this case has been contaminated, no contamination would be material to the testing MacDonald is seeking. He seeks to test the evidence in question in order to either obtain a DNA profile that matches the DNA profile of Greg Mitchell[11] or Helena Stoeckley; obtain a DNA profile that matches an individual whose DNA profile is currently in the Combined DNA Index System (CODIS); obtain an unknown profile within a spot of blood; or obtain a redundant DNA profile on pieces of evidence that the perpetrators would undoubtedly have come into contact with. If any of these four scenarios results from the testing, contamination will not have affected the outcome and it would be compelling evidence of MacDonald's innocence.

25. Further, although "[c]ontamination . . . is always a possibility when analyzing evidence . . . [t]he validation tests and resulting publications clearly show that even if a mixture is obtained, it may be possible to discern a major profile (major contributor) from a minor profile (minor contributor)." [DE-238-21]. Modern DNA testing can also "subtract out a known profile of a victim from a mixture to deduce an unknown profile." *Id.* Thus, even if some of the evidence in this case were contaminated, despite remaining in the Government's custody and under the

[11] In its response, the Government indicated that MacDonald must prove that Greg Mitchell's blood type was "O". Attached to this reply is a copy of a "University of Virginia Hospital Blood Bank Compatibility Label," dated May 26, 1982, which clearly identifies Mitchell's blood type as "O." DE-238-20.

Government's complete control, it is still entirely possible that modern testing techniques would reveal a relevant DNA profile that does not match MacDonald.

26. The evidence in this case has been in the possession of the Government since MacDonald's conviction in 1979. Although the Government has argued the evidence has been contaminated, typically one explains results after getting them rather than discounting results before obtaining them. Despite the Government's speculation about the condition of potential DNA samples, and its self-incriminating statements regarding the opportunities that were created for potential contamination of evidence in its complete control, in light of the circumstantial nature of the evidence used to prosecute MacDonald, an order granting the requested DNA testing is appropriate both under the IPA and in accordance with its underlying spirit of justice.

PURSUANT TO § 3600(a)(5), THE PROPOSED DNA TESTING IS REASONABLE IN SCOPE, USES SCIENTIFICALLY SOUND METHODS, AND IS CONSISTENT WITH ACCEPTED FORENSIC PRACTICES.

27. The Government claims that MacDonald's request for additional DNA testing is "unreasonable in scope and made for the purpose of delay . . ." [DE-227 at 2]. It is inconceivable that any amount of testing – in this specific case – could be unreasonable. The purpose of the IPA is to conduct DNA testing in cases where that testing could contribute to a definitive answer as to guilt or innocence.[12]

28. When conducting DNA testing, the best approach is to first "inventory all items to determine if samples and/or stains still remain" and thereafter "attempt to extract DNA from the

[12] The Government specifically points out that MacDonald has requested testing of drinking glasses, even though he "has never alleged the 'intruders' ate or drank anything or paused to wash the dishes." DE-227 at n.37. First, MacDonald has never claimed that he witnessed the entire crime taking place, so it is entirely possible the intruders did, in fact, touch or use the drinking glasses he now requests to have tested. Second, if the drinking glasses were not possibly linked to the perpetrator(s) of this crime, then the Army Criminal Investigative Division would not have collected them into evidence. That same logic applies to *any* item collected as evidence at the crime scene. It should also be noted that the Government claims it spent close to a million dollars on testing that it now finds irrelevant because results could have been impacted by contamination due to incompetence during the crime scene investigation and lack of controls in the lab environment.

samples." DE-238-21 at ¶ 8. Until the samples have been extracted, it is not appropriate to determine specifically which kit is most suitable to use in order to develop a DNA profile for any particular item of evidence. *Id.* However, "since all the victims in this case are female, it may be probative to use Y Filer, which ignores all female DNA, if a sample indicates the presence of male DNA." *Id.* Alternatively, "[i]f upon quantification there is very little DNA present it may be best to utilize the Minifiler kit." *Id.* Both of these methods were developed in recent years, are scientifically sound, and are consistent with accepted forensic practices.

29. Additionally, it is absurd for the Government to assert that the request for testing under the IPA was made for the purpose of delay. No one has a greater incentive than MacDonald to have the testing completed as quickly as possible. It is sometimes argued that defendants with a sentence of death file motions in order to delay their ultimate sentence. For a defendant facing life in prison, there is no means by which to delay a sentence he is already serving. *See United States v. Bryant*, 2010 WL 5185794, *2 (D.Md. 2010) (noting that the defendant would not benefit from a delay because he is not seeking to delay a death sentence but rather to cut short a lengthy prison sentence). The *Bryant* court also rejected the government's argument that the motion was made solely to cause delay because the type of testing sought by the defendant was not available during trial or direct appeal and the IPA was not passed until two years after the defendant's habeas petition was denied. *Id.* Similarly, the testing sought by MacDonald was not available during his trial or direct appeal and his first habeas petition was denied well before the passage of the IPA.

PURSUANT TO § 3600(a)(6), MacDONALD IDENTIFIES A THEORY OF DEFENSE THAT IS NOT INCONSISTENT WITH AN AFFIRMATIVE DEFENSE PRESENTED AT TRIAL AND WOULD ESTABLISH HIS ACTUAL INNOCENCE OF THE FEDERAL OFFENSES FOR WHICH HE IS CURRENTLY INCARCERATED.

30. Pursuant to 18 U.S.C. § 3600(a)(6)(a), MacDonald must "identif[y] a theory of defense that is not inconsistent with an *affirmative* defense presented at trial. 18 U.S.C. § 3600(a)(6) (emphasis added). The statute is very clear that it is only concerned with an *affirmative* defense.[13] MacDonald did not raise an affirmative defense at his 1979 trial and, therefore, clearly satisfies the requirement under § 3600(a)(6)(a). Regardless, he has consistently maintained, including throughout his trial, that intruders entered his home and murdered his family. His version of events has never wavered and the request for DNA testing under the IPA is consistent with his defense presented at trial.

31. As explained above, MacDonald seeks to test the evidence in question in order to either obtain a DNA profile that matches the DNA profile of Greg Mitchell or Helena Stoeckley; obtain a DNA profile that matches an individual whose DNA profile is currently in CODIS; obtain an unknown profile within a spot of blood; or obtain a redundant DNA profile on pieces of evidence that the perpetrators would undoubtedly have come into contact with. Should any of these results be obtained through DNA testing of the requested items, MacDonald's actual innocence would be conclusively established.

32. Moreover, MacDonald was prosecuted and convicted based solely on the Government's theory of the crime that MacDonald's description of murderous intruders was a lie. The Government's theory, based exclusively upon the opinions of its own experts at the time of trial, was that the physical evidence contradicted MacDonald's account and failed to support his claim

[13] An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the . . . prosecution's claims, *even if all the allegations in the complaint are true*." *Black's Law Dictionary* (8th ed. 2004) (emphasis added).

that intruders entered his home and murdered his family because there was no evidence of intruders. MacDonald should be granted DNA testing under the IPA, as modern DNA testing could prove intruders were in the MacDonald home and effectively dispute the entire basis for the Government's assertion that the physical evidence proves MacDonald's guilt.[14]

PURSUANT TO § 3600(a)(7), THE IDENTITY OF THE PERPETRATOR WAS AT ISSUE AT MacDONALD'S 1979 TRIAL.

33. The identity of the perpetrator(s) was at issue during MacDonald's 1979 trial. MacDonald has maintained, since the night of the crime in 1970, that intruders entered his home and murdered his family. Further DNA testing under the IPA could prove that was exactly what happened. Any time a defendant claims innocence for a crime the identity of the perpetrator is at issue. *See, e.g., People v. Thornton* 11 Cal.3d 738, 760, 523 P.2d 267, 281 (1974) (noting that the defendant "placed the matter of identity squarely in issue" because his "testimony on direct examination was essentially a general denial of guilt.").

PURSUANT TO § 3600(a)(8), THE PROPOSED DNA TESTING OF THE SPECIFIC EVIDENCE MAY PRODUCE NEW MATERIAL EVIDENCE THAT WOULD SUPPORT MacDONALD'S THEORY OF DEFENSE AND RAISE A REASONABLE PROBABILITY THAT MacDONALD DID NOT COMMIT THE OFFENSE.

34. As previously stated, MacDonald seeks to test the evidence in question in order to either obtain a DNA profile that matches the DNA profile of Greg Mitchell or Helena Stoeckley; obtain

[14] It should be noted that although the Government claims that "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 the night of the murders," DE-227 at ¶ 28, this is not necessarily correct. Blood typing is not as specific as DNA testing. All that the blood typing of the evidence shows is that an individual with a certain blood type donated the specific evidence found at the crime scene. It in no way guarantees which specific individual left behind that evidence or even that the evidence was left by a MacDonald family member. It is known that Greg Mitchell and Kristen MacDonald have the same blood type—"O". It is entirely possible that blood evidence the Government has previously maintained belonged to Kristen, was in actuality, evidence left behind by Mitchell. If there was an intruder in the MacDonald home that night, it is inevitable that he or she had the same blood type as one of the MacDonald family members. Only DNA testing, which MacDonald is requesting in his IPA motion, can determine which individual's DNA profile is on any given item of evidence.

a DNA profile that matches an individual whose DNA profile is currently in CODIS; obtain an unknown profile within a spot of blood; or obtain a redundant DNA profile on pieces of evidence that the perpetrators would undoubtedly have come into contact with. If any one of these four scenarios occurs, it would be new material evidence that would support MacDonald's claim that intruders murdered his family and raise more than a reasonable probability that he did not commit the offense.

35. The IPA requires only that "[t]he proposed DNA testing . . . *may* produce new material evidence . . . ." 18 U.S.C. § 3600(a)(8) (emphasis added). The phrasing of this standard was carefully considered by Congress prior to the enactment of the final version of the IPA in 2004. S. Res. 1700, 108th Cong., 150 Cong. Rec. S11609-01, at *S11610–11 (2004).[15] MacDonald is not required to show that new DNA testing *will* produce new material evidence; he must only show that it *may* produce such evidence.

36. While it is true that this evidence contains biological material, there is no way in advance to know whether DNA testing will yield a DNA profile. The only way to do this is to have a qualified DNA laboratory analyze each item of evidence. As part of the DNA analysis, the lab will quantify the amount of human DNA on each item as a preliminary step before determining the appropriate DNA testing procedure. At this point, it is impossible to determine how much biological material is on any one item without actually having access to the evidence. All MacDonald can do now is assert what he has already asserted – that items containing biological material are suitable and relevant for DNA testing.[16]

[15] "During the final round of negotiations on H.R. 5107 . . . the standard for ordering a DNA test was modified . . . [A]s introduced in both the House and the Senate, section 3600(a)(8) appeared to impose on applicants the virtually impossible burden of showing that a DNA test 'would' produce new material evidence of innocence. Under 3600(a)(8) as enacted, applicants need only show that a test 'may' produce such evidence." S. Res. 1700, 108th Cong., 150 CONG. REC. S11609-01, at *S11611 (2004).

[16] *See DNA Technology Advancements*, DNA INITIATIVE, http://www.dna.gov/solving-crimes/cold-cases/longandshort/technologyadvancements/ (last visited Feb. 15, 2012) ("Newer DNA analysis techniques enable

37. The Government has asserted that "[e]ven 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)." DE-227 at 2. The Government's assertion suggests that MacDonald cannot be exonerated because it contends there was other evidence to convict him of the crime, or that it is unlikely that DNA testing would ever exonerate him because there was sufficient other evidence to convict him of the crime. Both conclusions are incorrect and a misapplication of the IPA. Additionally, that logic is directly contradicted by the Fifth Circuit's decision in *United States v. Fasano*. 577 F.3d 572 (5th Cir. 2009).

38. *Fasano* involved the robbery of a bank by a person who handed the teller a note and wore a white hard hat, a work shirt and black sunglasses, all of which the perpetrator discarded near the bank. *Id.* at 574. The evidence used to convict Fasano included video footage from the bank showing a man with Fasano's build; four eyewitnesses identifying Fasano as the robber; vehicle records showing Fasano's vehicle and another vehicle to which he had access matching the descriptions of the robber's vehicle; and Fasano's fingerprints on the note handed to the teller during the robbery. *Id.* at 574. Fasano's defense at trial had included the assertion that another man, Mark Westly Hughes, was the true perpetrator. *Id.* at 577. The Fifth Circuit determined the question at issue in the *Fasano* case was "whether testing may produce new material evidence that would raise a reasonable probability that the applicant did not commit the offense." *Id.* The Court acknowledged that the case against Fasano was strong, but emphasized that "[i]f . . . testing does not find Fasano's DNA on the clothing and glasses but finds the DNA of Hughes *the strong case evaporates*." *Id.* (emphasis added).

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laboratories to develop profiles from biological evidence invisible to the naked eye, such as skin cells left on ligatures or weapons. Unsolved cases should be evaluated by investigating both traditional and nontraditional sources of DNA. Valuable DNA evidence might be available that previously went undetected in the original investigation.").

39. Similarly, if MacDonald's motion for additional testing under the IPA is granted and the DNA profile(s) obtained on that evidence either match the DNA profile of Greg Mitchell or Helena Stoeckley; match an individual whose DNA profile is currently in CODIS; obtain an unknown profile within a spot of blood; or obtain a redundant DNA profile on pieces of evidence that the perpetrators would undoubtedly have come into contact with – *the Government's case evaporates*.

40. Further, the Government claims that 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 indisputably left by the perpetrator during the commission of the crime being later determined not to be the defendant's." DE-227 at 37. Although the IPA does not put such a burden on MacDonald, there are DNA exoneration cases that do not fall into either of the categories described by the Government.

41. One example of such a case is the wrongful conviction of Cody Davis. Davis was convicted in 2006 of the robbing of a bar at gunpoint in Florida. The Innocence Project, http://www.innocenceproject.org/Content/Cody_Davis.php (last visited Feb. 15, 2012). The only evidence against Davis was the testimony of an informant who stated Davis bragged about committing the crime and two eyewitnesses who identified him as the robber. *Id.* One of those witnesses, however, said the robber had a tattoo on his hand. *Id.* Davis has no such tattoo. *Id.* Law enforcement recovered a ski mask from outside the bar, but did not consider it a priority to test as none of the witnesses indicated the robber had been wearing a ski mask. *Id.* The results of the DNA testing on the ski mask were completed after Davis' conviction and revealed the DNA profile of another man. *Id.* That profile was compared to a DNA database and it was

discovered it matched Jeremy Prichard. *Id.* Unlike Davis, Prichard has a tattoo on his hand similar to the one the witness had described to law enforcement during the initial investigation. *Id.* Prichard confessed to robbing the bar and Davis was released. *Id.* The ski mask was not part of prosecution's case and there was no evidence suggesting it had been worn by the perpetrator or was in any way related to the crime other than the mere fact it had been found in the vicinity of the crime scene. Nonetheless, DNA testing on that ski mask led to Davis' exoneration.

42. The Government clearly fails to understand that the standard for determining whether a defendant meets the requirement set forth in § 3600(a)(8) is whether testing of the specific evidence may produce new material evidence that would raise a *reasonable* probability that the defendant did not commit the offense. 18 U.S.C § 3600(a)(8). For the reasons set forth previously, should the DNA testing result in any of the four scenarios presented above, there would certainly be more than a reasonable probability that MacDonald did not commit the offenses for which he is currently incarcerated.

PURSUANT TO § 3600(a)(9), MacDONALD CERTIFIES THAT HE WILL PROVIDE A DNA SAMPLE FOR THE PURPOSES OF COMPARISON.

43. The FBI lab is already in possession of a sample of MacDonald's DNA from earlier testing, but he is willing to provide a second sample if the court deems it necessary.

PURSUANT TO § 3600(a)(10)(B), THE MOTION IS TIMELY BECAUSE THE EVIDENCE TO BE TESTED IS NEWLY DISCOVERED EVIDENCE; MacDONALD'S MOTION IS NOT BASED SOLELY UPON HIS OWN ASSERTION OF INNOCENCE AND, AFTER CONSIDERING ALL RELEVANT FACTS AND CIRCUMSTANCES SURROUNDING THE MOTION, A DENIAL WOULD RESULT IN A MANIFEST INJUSTICE; AND FOR GOOD CAUSE SHOWN.

44. MacDonald acknowledges that his motion is presumed untimely under the IPA because it was not made within sixty months of the enactment of the Justice for All Act of 2004. However,

his presumed untimeliness is rebutted because "the evidence to be tested is newly discovered DNA evidence; [] the [defendant's] motion is not based solely upon the [defendant's] own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; [and as a result of] good cause shown." 18 U.S.C. § 3600(a)(10)(B)(ii)(iii)(iv).

45. The motion is timely because the evidence to be tested is "newly discovered DNA evidence." Though "newly discovered" is not a defined term under the IPA, courts have defined it in other contexts. For example, "newly discovered evidence" in the context of a motion for a new trial under Rule 33 of the *Federal Rules of Criminal Procedure* means "evidence that could not have been discovered with due diligence at the time of trial." *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978). To prevail on a Rule 33 motion, defendants must show, among other things, that the evidence was not known or available to the defendant at the time of trial. *See, e.g. United States v. Colon-Munoz*, 318 F.3d 348, 358 (1st Cir. 2003); *United States v. Garcia*, 19 F.3d 1123, 1126 (6th Cir. 1994). Specifically, whether DNA testing of items collected during the investigation of the crime will constitute "newly discovered evidence" depends on whether the testing sought was available during trial. *See Osborne*, 129 S. Ct. at 2321 (denying a request for DNA testing because the type of testing sought by the defendant existed at the time of trial); *see also Osborne*, 129 S.Ct. at 2333 (Stevens, J., dissenting) (disputing that the type of DNA testing sought was previously available but further indicating that whether the testing existed during trial is determinative of the "newly discovered" question).

46. MacDonald's motion, in part, seeks testing of items using Minifiler kits, which were not available until the fall of 2006. The DNA analysis previously ordered in 1997 was completed in March 2006, before Minifiler kits became available. Similarly, Yfiler kits were not available

until 2006 and were not widely used until even more recently. Furthermore, no form of DNA analysis was available at the time of MacDonald's 1979 trial as DNA testing only truly gained acceptance in the early 1990s. As a result, failure to conduct DNA testing on the items at the time of trial does not demonstrate a lack of due diligence by MacDonald or his counsel. Given that he is seeking a form of DNA testing not previously available either during trial or when prior testing was conducted, the requested testing constitutes "newly discovered DNA evidence," rebutting the presumption of untimeliness under the IPA.

47. Additionally, 18 U.S.C. § 3600(a)(2) states that the evidence the defendant requests to have tested under the IPA must have been "secured in relation to the investigation or prosecution" of the offense for which the defendant is claiming innocence. 18 U.S.C. § 3600(a)(2). Therefore, when (10)(B)(ii) is read in conjunction with (a)(2), it is evident that "newly discovered evidence" could only logically be describing a newer, more accurate method of DNA testing than was available in the past.

48. Moreover, pursuant to 18 U.S.C § 3600(a)(10)(B)(iii), MacDonald's motion is not based solely upon his own assertion of innocence, but rather, is coupled with an abundance of exculpatory evidence gathered since the time of trial. This includes, but is not limited to, the Britt Claim, the results of the previous round of DNA testing, the affidavit of the elder Helena Stoeckley, the affidavits regarding Greg Mitchell's repeated confessions, and the blonde synthetic hair-like fibers found at the crime scene. Considering all of the relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice – a life sentence for an innocent man who has not been given the chance to conclusively prove his innocence in a court of law.

49. Indeed, the Supreme Court has stated that "the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The Court added:

> [C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected . . . in the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. *Id.* at 325.

50. Finally, MacDonald's motion should be considered timely because the delay in filing the motion was at the request of the Government. In a series of correspondence in January 2005 between a Department of Justice attorney, Brian Murtagh, and MacDonald's former counsel, Timothy Junkin, several conditions were agreed upon. [DE-212-1]. Included in that agreement was that MacDonald would stipulate "not to file any other motion for DNA testing, . . . prior to the completion of the instant testing" and that in exchange MacDonald would not be "preclude[d] from ever filing a motion for DNA testing under the [IPA] . . ." *Id.* In light of that correspondence, the Government's stance that MacDonald's IPA motion is untimely is disingenuous.

51. Although the previous round of DNA testing was completed in March 2006, the litigation concerning that testing still continues today. Certainly when MacDonald agreed, in 2005, that he would wait to file an IPA claim he could not have anticipated that the litigation from the 1997 motion would still be ongoing in 2012.

52. The Government cannot have it both ways. It cannot enter into an agreement with MacDonald that MacDonald will not file another postconviction DNA motion until the testing from the 1997 motion is complete, *including specifically that he will not be precluded from filing an IPA motion in the future*, and then later argue that MacDonald is untimely under the IPA. MacDonald complied with the agreement and did not file a motion under the IPA until the

previous DNA testing results were released. Accordingly, the Government should not oppose MacDonald's IPA motion on the basis of it being untimely.

53. Last, the Congressional Record illustrates that Congress intentionally created multiple ways to rebut the presumption of untimeliness in order to allow most claims filed under the IPA after the time limits set in § 3600(a)(10(A) had expired to proceed to the DNA testing stage. S. Res. 1700, 108th Cong., 150 Cong. Rec. S11609-01 (2004). In particular, Senator Leahy stated:

> As I explained in an earlier floor statement, the Justice Department has complained that the "good cause" exception is so broad you could drive a truck through it, and its stubborn opposition to the IPA turned in large part on the inclusion of this language. But while I agree that the language is broad, it is intentionally so; I would not agree to a presumption of untimeliness that could not be rebutted in *most* cases. *Id.* at *S11611 (emphasis added).

Senator Leahy continued to explain that "[m]any of the individuals who have been exonerated by post-conviction DNA testing did not win freedom until many years after they were convicted and could still be in prison, or executed, if an arbitrary limitations period had been applied to their requests for DNA testing." *Id.* He goes on to assert that "[a]n inmate's interest in pursuing his freedom—and possibly saving his life—is surely sufficient to outweigh any governmental interest in withholding access to potentially exculpatory evidence." *Id.* at *S11612. It is clear that Congress carefully constructed § 3600(a)(10)(B) with the intent for the majority of claims to be considered timely by the courts.[17]

[17] *See also United States v. Boose*, 498 F.Supp. 2d 887, 889 (N.D. Miss. 2007) ("[T]he entire purpose of the statute is to permit collateral review of convictions through DNA testing – no matter how much time has transpired – or what other deadlines have passed.").

CONCLUSION

DNA testing has the potential to reveal the truth in powerful ways. This Court should interpret the IPA statute to permit DNA testing in cases like this, where DNA testing – with the potential to identify an alternative perpetrator(s) or identify redundant crime scene DNA profiles – might demonstrate that what was presented at trial as strong evidence of guilt could be wrong. When interpreting a statute designed to cut through traditional legal barriers in order to find the truth, it makes little sense to read that same statute narrowly, as the Government would have it, to create new legal barriers that inhibit truth–seeking. The IPA statute should be read in the context of its overall purpose – allowing DNA testing to find the truth – a purpose which, in some cases, can only be achieved considering third party matches and redundancy. However, none of these options are possible if the evidence continues to sit in storage facilities shielded from modern and reliable scientific analysis.

In this case, there is physical evidence suitable for DNA testing that has the power to establish MacDonald's innocence. Each item for which MacDonald seeks testing may contain trace amounts of genetic material sufficient to construct a DNA profile using modern DNA testing processes. Such evidence has the potential to produce an accurate genetic profile of the true perpetrator(s) in this case, establishing MacDonald's factual innocence and possibly identifying the victims' true killer(s). Most importantly, MacDonald has met all ten prerequisites for DNA testing under the Innocence Protection Act of 2004. For all the foregoing reasons, it is respectfully requested that this Court grant MacDonald's motion for additional DNA testing pursuant to the Innocence Protection Act of 2004.

Respectfully submitted, this the 17th day of February, 2012.

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 17, 2012, the foregoing **REPLY IN SUPPORT OF MOTION FOR ADDITIONAL DNA TESTING PURSUANT TO 18 U.S.C. § 3600** was electronically filed with the Clerk of Court, United States District Court for the Eastern District of North Carolina, using the CM/ECF system. The CM/ECF system will send electronic notification of such filing to all parties.

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