INFORMAL BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 14-7543

UNITED STATES OF AMERICA,

Appellee,

vs.

JEFFREY R. MACDONALD,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

INFORMAL BRIEF OF THE UNITED STATES

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STATEMENT OF JURISDICTION

Jurisdiction in the district court was based on 18 U.S.C. § 3600(a). Jurisdiction for the appeal to this Court is based on 28 U.S.C. § 1291, in that the district court's denial of Appellant's motion below was a final decision.

STATEMENT OF ISSUES

I. Whether the district court properly found that Appellant had not rebutted the presumption of untimeliness with respect to Appellant's motion for new DNA testing under the Innocence Protection Act by showing good cause for the delay.

II. Whether the district court properly found that Appellant had not rebutted the presumption of untimeliness by showing that denial of new DNA testing, not included in his previously granted DNA testing requests, would result in a manifest injustice.

STATEMENT OF FACTS

I. Procedural history of *United States v. MacDonald*

The Appellant, Jeffrey R. MacDonald (hereinafter "MacDonald" or "Jeffrey MacDonald"), has appealed from an order entered by the district court on August 8, 2014, denying his motion for new DNA testing under the Innocence Protection Act of 2004 ("IPA"), codified at 18 U.S.C. § 3600.

The case of *United States v. MacDonald* has a very lengthy procedural history. In 1975, Jeffrey MacDonald was indicted by a federal grand jury in the Eastern District of North Carolina for the murders of his pregnant wife Colette, age 26, and his two daughters, Kimberly, age 5, and Kristen, age 2, in violation of 18 U.S.C. § 1111. The murders had occurred on February 17, 1970, on the Fort Bragg Military Reservation, which is under exclusive federal jurisdiction. In 1979, after a seven-week jury trial, Jeffrey MacDonald was convicted of the murders. A partial summary of the ensuing appeals and collateral attacks on the conviction is set forth in the note below.[1] The text of this brief will set forth only the portion of the procedural history relevant to this appeal.

[1] After his conviction was affirmed by this Court, *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982), MacDonald filed a § 2255 motion based largely on alleged post-trial "confessions" of defense trial witness Helena Stoeckley, who had died in 1983. After hearing, this was denied, *United States v. MacDonald*, 640 F. Supp. 286 (EDNC 1985), and subsequently affirmed. *United States v. MacDonald*, 779 F.2d 962 (4th Cir. 1985). He filed his second habeas in 1990, based largely on an allegation that lab bench notes obtained by FOIA had constituted improperly withheld exculpatory evidence. This was denied, *United States v. MacDonald*, 778 F.Supp.1342 (EDNC 1991), and this Court once again affirmed. *United States v. MacDonald*, 966 F.2d 854 (4th Cir. 1992). The trial judge, Franklin T. Dupree, Jr., died in 1995. In 1997, MacDonald filed in the district court a Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery. This motion was assigned to Judge James C. Fox, who has had district court jurisdiction over the case ever since. The district court denied MacDonald's motion to reopen § 2255 proceedings, *United States v. MacDonald*, 979 F. Supp. 1037 (EDNC 1997), and MacDonald appealed. While the case was pending before the Fourth Circuit, counsel for MacDonald, Mr. Cormier, filed a motion asking for a PFA to file another habeas motion and for DNA testing. On October 17, 1997, the Fourth Circuit granted "the motion with respect to DNA testing . . . [and remanded] this issue to the district court. In all other respects, the motion to file a successive application [was] denied." DE-67, In re MacDonald, No. 97-713 (4th Cir. Oct. 17, 1997) (unpublished). Later, the Fourth Circuit issued an opinion affirming the district court's refusal to reopen the 1990 § 2255 proceedings. *United States v. MacDonald*, 161 F.3d 4, 1998 WL 637184 (4th Cir. 1998).

On January 17, 2006, after obtaining a Pre-filing Authorization ("PFA") from this Court, MacDonald filed yet another motion attacking his conviction pursuant 28 U.S.C. § 2255, based on an affidavit from former Deputy U.S. Marshal Jimmy Britt ("the Britt claim"). DE-111, GX 2088. [2] While this motion was pending, MacDonald sought to add an additional "predicate" to his § 2255 claim based on DNA results completed in March 2006.[3] DE-122, 123.

On November 4, 2008, the district court entered an order denying, inter alia, MacDonald's successive § 2255 motion and his motion to add an additional predicate based on DNA test results—as to the latter, citing lack of jurisdiction in the absence of a PFA. DE-150 at 20. MacDonald appealed.

On April 19, 2011, this Court remanded the case for further proceedings. *United States v. MacDonald*, 641 F.3d 596, 616 (4th Cir. 2011).[4] Regarding the motion to add predicate based on the 2006 DNA results, this Court mooted the issue by granting MacDonald a PFA "for the DNA claim so that the district court may proceed directly to the § 2255(h)(1) evaluation."[5] *Id*. at 616.

Back in the district court, on September 20, 2011, MacDonald filed a motion pursuant to 18 U.S.C. § 3600(g) for a new trial based on DNA testing results, and in the alternative for an

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[2] Given the more than 45-year history of this case, it has become necessary to develop systems of identification for the various exhibits and transcripts referenced in these filings. For purposes of this Informal Brief, "GX" signifies a Government Exhibit entered into evidence at trial or an evidentiary hearing. Additionally, "TTr." signifies a reference to the original trial transcript, and "HTr." signifies a reference to the 2012 evidentiary hearing transcript. Additionally, citations to "DE" refer to documents filed in the district court under the cited docket entry number in Case No. 3:75-CR-26-F. Citations to "Doc" refer to documents filed in this Court.

[3] The relevance of this litigation to the instant appeal is discussed in more detail, *infra*, at 12.

[4] This Court held that the district court, in evaluating the Britt claim for gatekeeping purposes, pursuant to 28 U.S.C. § 2255(h), had taken an "overly restrictive view of what constitutes 'evidence as a whole' . . . " 641 F.3d at 614. The case was remanded for a "fresh analysis," using a broader view of the relevant evidence, but this Court emphasized that its decision was "not intended to signal any belief that the Britt claim passes muster under § 2255(h)(1) or ultimately entitles MacDonald to habeas corpus relief." *Id*.

[5] Here again, this Court noted that MacDonald had a "daunting burden" to establish that he was legally entitled to habeas corpus relief on this claim, noting that even if a legal vehicle for such relief existed, a claimant would have to meet a "high standard." *Id*. at 616-17.

order authorizing inspection and DNA testing of all biological evidence under the IPA. DE-176. [6] After extensive briefing, the district court ruled that the IPA motion was separate from the pending § 2255 claims and that the evidentiary hearing on those claims need not be delayed because of the IPA motion. DE-266 at 1-4. The district court denied the IPA motion on August 8, 2014. DE-356. MacDonald's counsel on the IPA motion filed a timely notice of appeal on October 7, 2014, and then withdrew from the case.[7] DE-366.

After numerous extensions and failures to meet court deadlines, on September 15, 2015, MacDonald, acting pro se, filed an Informal Brief seeking to reverse the district court's Order denying additional DNA testing (DE-356).[8] Doc-36. MacDonald contends that his September 20, 2011, IPA motion was not untimely as he was awaiting the district court's response to his motion to add an additional predicate (DE-122) as a result of the March 10, 2006, AFIP DNA test results, which was not denied until November of 2008. Doc-40 at 1.[9] MacDonald also asserts that it would constitute a "manifest injustice" not to permit DNA testing of "certain key blood and other exhibits," not further identified, using 2015 technology, because the fact that all four [ABO] blood types are present "opens up the whole universe of perpetrators." *Id.* at 1-2.

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[6] The circumstances surrounding the filing of this motion are discussed in more detail, *infra*, at 13.

[7] Meanwhile, the district court denied MacDonald's successive § 2255 claims on July 24, 2014. MacDonald's § 2255 counsel filed a motion to amend the judgment, pursuant to Fed. R. Civ. P. 59(e). DE-357. This motion was extensively briefed and was ultimately denied. DE-383. MacDonald's § 2255 counsel filed a timely notice of appeal on July 16, 2015. DE-385. That appeal is numbered 15-7136, and MacDonald is represented in that appeal by Mr. Joseph E. Zeszotarski, Jr., of the firm Gammon, Howard, and Zeszotarski, PLLC, in Raleigh, NC. A briefing order has been entered. The issues raised by MacDonald's § 2255 counsel in the Rule 59(e) motion are completely irrelevant to the pro se IPA appeal, but they are referred to in MacDonald's informal brief. DE-40 at 2-3. This is discussed *infra*, at 26-27 n.40.

[8] MacDonald submitted the untimely informal brief by facsimile at 6:04 p.m. on September 14, 2015. Doc-36. On October 1, 2015, without leave of court, he filed a new version of it. See Doc-40. Assuming that this Court has accepted the later version, references to MacDonald's informal brief in this document will be to Doc-40.

[9] Neither the district court nor this Court had reached the merits of MacDonald's 2006 DNA claim as of September 20, 2011. DE-150 at 20; 641 F.3d at 616, n.13. The district court did not deny that claim until July 24, 2014. DE-354 at 133-136.

Further, MacDonald argues that the Government led the jury to believe that it had determined that blood typing results actually came from a particular victim because the witnesses "often lapsed into calling its blood evidence 'Colette's blood' or 'Kimberly blood' . . . leaving out even the word 'type'" *Id.* at 2.

II. Facts and Procedural Detail Regarding IPA Motion

The evidence at trial, which led to MacDonald's convictions for the 1970 murders of his wife, Colette, and young daughters, Kimberly and Kristen, despite his testimony that intruders had invaded his quarters on Fort Bragg and attacked him and killed his family, was overwhelming.[10]

Because MacDonald claims "the blood evidence is crucial to the truth," and has failed to identify any other type of evidence in his Informal Brief, the Government confines its Informal Brief to the blood issue.[11] Doc-40 at 1.

The trial judge also noted the importance of the blood evidence.

> As fate would have it, MacDonald, his wife and two daughters all had different blood types: Colette MacDonald—Type A, Jeffrey MacDonald—Type B, Kimberly MacDonald—Type AB and Kristen MacDonald—Type O. This allowed investigators to reconstruct the sequence of events occurring in the MacDonald apartment on the night of the murders.

[10] In the interest of brevity, no attempt will be made in this brief to recite the evidence that supported the jury's guilty verdict. Perhaps the best summary in this long-running case is the published opinion of the district court denying relief on MacDonald's first collateral attack. *United States v. MacDonald*, 640 F. Supp. 286, 289-90, 310-315, 332 (EDNC 1985). *See also* DE-354 at 15-33 (Judge Fox's own summary) and n.11 (Judge Fox recommending "Judge Dupree's meticulous summary of the trial.").

[11] Because MacDonald has provided no exhibit numbers of any kind, it is impossible to discern whether he is referring only to blood exhibits admitted at trial (*see* GX 639-651), a few of which are also in his IPA "Recommendations for DNA Testing" (DE-189-1), or merely to those listed in that document. DE-189-1. In any case, the number of blood exhibits which he sought to have tested under the IPA cannot exceed those identified on DE-189-1, as discussed *infra* at 14. When MacDonald filed his "corrected" informal brief 17 days after the untimely filing of the first informal brief, he inserted in the last paragraph the phrase "on certain exhibits (which can be enumerated for the Court) . . . ." Doc-40 at 3. This is inadequate to raise on appeal any issue regarding unspecified exhibits. MacDonald has purported to appeal from the denial of his motion under the IPA for new DNA testing. It was incumbent upon him to specify in his informal brief which items of evidence he claims that the IPA entitles him to test.

640 F. Supp. at 290, n.2.

Each of the MacDonald family members had bleeding injuries. MacDonald's were minimal, but Colette, Kimberly, and Kristen all bled to death. Consequently, the issue at trial was not the identity of the contributor of a typed stain, but rather when, and how, it was deposited at the crime scene.[12]

A. The Blood Evidence At Trial

In 1970, the United States Army Criminal Investigation Laboratory (USACIL) examined 283 items of evidence which had been collected from the crime scene, or at autopsy, for the presence of human blood, and attempted to type these stains under the ABO system. GX 3021.

The Government adduced evidence regarding which antibodies and antigens would be present, or absent, in each of the four different ABO blood groups found in the MacDonald family. GX 638. The Government adduced serology testimony concerning approximately 65 exhibits. *See* GX 639-651. Of this number, seven (7) stains were in Type B blood, which the Government ultimately argued were from Jeffrey MacDonald.[13] The "key" bloodstains were: a large soaking stain on the rug in the master bedroom in Kimberly's type; Colette and Kimberly's types on MacDonald's pajama top (which MacDonald claimed to have placed on Colette's chest); Colette and Kimberly's types on the top sheet found in the pile of bedding on the master bedroom floor (which MacDonald claimed not to have touched); and the presence of MacDonald's bare footprint in Colette's blood type exiting Kristen's bedroom, where there were no other stains of Colette's type on the floor. *See* GX 640, 644, 645, 648.

[12] Defense counsel at trial briefly raised the same issue MacDonald raises in his informal brief, i.e., that each blood type belongs to millions of people, and therefore cannot be attributed solely to one of the victims. TTr. 3786. The Government suggested a clarifying instruction to the jury, which the defense rejected. TTr. 3788.

[13] For the location of these stains, the prosecution's theory, and MacDonald's explanations as to how he could have innocently left them, *see* DE-227-7 at 1-4.

As each chemist testified to the test results from a specific exhibit, or stain, that chemist simultaneously wrote the results on acetate sheets covering the relevant Summary of Blood Analyses chart. GX 639-651. During the direct examination of its witnesses, the Government specifically addressed the fact that neither chemists nor serologists could determine that a typed stain came from a particular person. TTr. 3598, 3640. Janice Glisson, a senior serologist, used the cumulative test results reflected on the charts to testify to the ABO Group "Conclusion" regarding whether each family member's blood was the "Same Group as," "Consistent With," or "Inconsistent With" a particular blood type located on an item of evidence. *See* GX 639-651.

MacDonald's lawyers never suggested through cross-examination, or otherwise, that any of the bloodstains came from intruders. Additionally, the defense did not contest any of the blood-type evidence or include "blood" in the list of evidence that the defense argued proved the presence of intruders. *See* TTr. 7265-7263.

B. The 1997 Motion For DNA Testing

MacDonald proffered an affidavit from his attorney, Philip G. Cormier, for "access to all of the physical evidence that has been examined by Agent Michael Malone for the purpose of ascertaining whether or not Malone's examinations were properly conducted and his conclusions were reliable, accurate, and truthful." DE-49 at ¶6.[14] MacDonald also sought "other unsourced hairs, skin and blood … found in critical locations at the crime scene," as described in Cormier's affidavit for examination and DNA testing. *Id*.

Citing the then-recent availability of mitochondrial DNA testing (mtDNA), which could be used to obtain results from hairs without root follicles, and also to eliminate blood sources, MacDonald asserted that "either this new form of DNA testing or the more commonly used

[14] Malone, a hair and fiber expert, but not a serologist, had no involvement in the MacDonald case before 1990, and, consequently, did not testify at MacDonald's 1979 trial. DE-10-8. Nor was the hair that Malone examined in 1990 introduced into evidence at trial. *Id*.

'nuclear DNA testing' might appropriately be used in this case to examine unsourced hairs and blood debris, as well as conduction (sic) re-examinations on certain items found in critical locations which have been identified through more primitive techniques." *Id*. at ¶23. Cormier also cited a June 1995, National Institute of Justice report discussing 28 case studies where defendants were exonerated by DNA testing. *Id*. at ¶29.[15]

Cormier Affidavit No. 2 identified 15 specific exhibits, primarily hairs, but also alleged blood and blood debris from the victims' hands, for DNA testing, which he identified as follows: E-211/Q125, Q87(E52-NB), Q93(E-124), Q79/E303, Q119/E5, E-4/Q118*, D229/Q96*, D-233*, D-234*, D-235*, D-236*, D-237*, D-238, D-256*, and E-301/Q78. *See* DE-49 at ¶¶30-63 (exhibits marked with an asterisk allegedly contained blood).[16] Neither Cormier Affidavit No. 2 (DE-49), nor MacDonald's 1993 motion (DE-46), sought to have any of the 65 bloodstains introduced by the Government at trial (GX 639-651) subjected to DNA testing, including what his informal brief calls "key" stains. *See* Doc-40 at 2.

C. The 1997 Order of the District Court and Appeal

The district court denied the motion and transferred the remaining matters to this Court for consideration as a petition for leave to file a successive § 2255 motion. *United States v. MacDonald*, 979 F. Supp. 1057, 1069 (EDNC 1997). In his memorandum in support of his petition, MacDonald characterized the evidence to which he sought access as "highly specific and crucial" to proving the presence of intruders, and requested DNA testing for the specified

[15] In each of 17 of these cases, PCR-based DQ alpha ("DQα") DNA testing was used to exclude an individual as the donor of questioned biological material. DE-84, Appendix E at ¶8 (Affidavit of Jenifer Lindsey-Smith).

[16] In using the exhibit numbers and descriptions corresponding to those numbers as reflected in Cormier Affidavit No. 2, and subsequent defense filings, the Government does not concede that MacDonald's use of these numbers and descriptions is accurate or corresponds to the physical items themselves as they existed in 1997, but merely that this is how Cormier described them and their contents in his affidavit. Of these 15 exhibits, eight (8) also appear on the instant IPA list (DE-189-1). They are: E-4, E-5, D-233, D-234, D-235, D-236, D-237 and D-256.

hairs and blood debris.[17]

This Court denied MacDonald authorization to file a successive § 2255 motion, but granted his motion with respect to DNA testing and remanded the matter to the district court to oversee the DNA testing. DE-67, *In re MacDonald*, No. 97-713 (4th Cir. Oct. 17, 1997) (unpublished). *See*, *supra*, n.1.

D. 1998 Motion To Compel Access to All Biological Evidence and For DNA Testing

On September 11, 1998, following remand, MacDonald filed his *Motion for an Order to Compel the Government to Provide Access to All Biological Evidence for Examination and DNA Testing by His Experts*. DE-73. Therein, MacDonald contended that this Court's mandate entitled him to the "full universe of exhibits that contain biological evidence—hair, bloodstains, tissue and body fluids—collected from the crime scene to which the government has full access." DE-74 at 2. MacDonald attached three spreadsheets detailing the various items to which he sought access.[18] DE-356 at 3. MacDonald also argued, based on his assertions in ¶23 of Cormier Affidavit No. 2, that he should not be limited only to mtDNA testing, but should also be permitted to employ nuclear DNA testing to examine, inter alia, blood debris. DE-73 at 15.

On December 11, 1998, the district court entered an Order interpreting this Court's mandate to mean "that the Government provide to MacDonald's experts access to the existent and known unsourced hairs, bloodstains, blood debris, tissue and body fluids specifically identified in the April 22, 1997, Affidavit of Philip G. Cormier No. 2 . . . for non-destructive DNA testing in all current and existing forms including, without limitation, both nuclear and

[17] *Mem. in Supp. of Jeffrey MacDonald's Motion for an Order Authorizing the District Court for the Eastern District of North Carolina to Consider a Successive Application for Relief Under 28 U.S.C. § 2255*, filed September 17, 1997, USCA-4, No. 97-713 at 6-7.

[18] "Spreadsheet B- Blood" listed 232 exhibits by USACIL exhibit number; "Spreadsheet C- Known Exemplars" listed 6 exhibits consisting of the known hairs of Helena Stoeckley and the MacDonald family members. *See* DE-227-3, and DE-227-4, respectively.

mitochondrial testing." DE-86 at 3. The district court denied MacDonald's request for further discovery as beyond the mandate of this Court. *Id*. MacDonald did not appeal. *See* DE-117.

E. FBI Inventory of Microscopic Slides

Prior to turning over the evidence to the AFIP for DNA testing, FBI Hair and Fiber Examiner Robert Fram conducted microscopic examinations of slides, upon which hairs had previously been mounted by CID and FBI examiners, to verify the contents of the slides. DE-219 at 3. Prior to 1999, Fram, who was not a serologist, had no involvement in the case.[19] Moreover, he did not perform any of the DNA testing subsequently conducted by AFIP/AFDIL pursuant to the orders of the district court. *Id*. at 2-3.

F. AFIP Preliminary Examinations

At the Court's direction, in June 1999, AFIP examined 17 vials, including those from the autopsy, and found that they did not contain blood or other biological material suitable for DNA testing. DE-227-8.[20] These were the only "blood" exhibits identified in Cormier Affidavit No. 2. *See* DE-49 at ¶¶21(a)-(i).

The testing continued until 2006, with neither party bringing any issue to the district court for resolution.[21]

G. 2005 Agreement Relating to the IPA

The Innocence Protection Act of 2004 ("the IPA") came into effect on October 30, 2004.

[19] The hair that Fram microscopically examined in 1999 was not introduced in evidence at the 1979 trial. As part of the DNA testing MacDonald successfully sought in 1997, this hair was found to have the same mtDNA sequence of the MacDonald females. DE-382 at 5. MacDonald's mention of Fram in his informal brief is a non-sequitur. *See also*, *infra*, at n.39.

[20] In light of the prior serology testing, and the mounting of any hairs or fibers from these vials on glass microscopic slides, it was not remarkable that in 1999 the vials were empty.

[21] This is not to imply that there were no disputes about testing parameters, but the reality was that AFDIL required agreement of the parties before any destructive testing was performed; consequently, all such disputes were settled between the parties without either party seeking the involvement of the district court. *See* district court docket sheet (showing no substantive filings in the district court between October 1999 and January 2006).

By December 2004, a number of issues had arisen in the DNA testing being conducted in the MacDonald case. The IPA was first mentioned in this matter in a letter dated January 14, 2005, memorializing discussions between Government and defense counsel regarding the particulars of the ongoing DNA testing. *See* DE-212-1. At that time, other than the ongoing DNA testing, there was no other pending litigation in the case. *See* DE-67, DE-122.

The "General Conditions" set forth in the letter provided that MacDonald would not file any other motion for DNA testing, including a motion under the IPA, prior to the completion of the ongoing DNA testing and the filing by AFDIL with the district court of a report reflecting the results of that testing. DE-212-1 at 13; *see also* DE-356 at 5.

The DNA testing was subsequently completed at an actual cost incurred by AFDIL of $594,321, for which they charged the Department of Justice $90,500.[22]

H. 2006 DNA Claim

On March 10, 2006, AFDIL issued a report reflecting the results of the mtDNA and/or autosomal (nuclear) Short Tandem Repeats (STR) DNA testing of 29 questioned specimens found suitable for DNA testing,[23] and 14 reference samples from the MacDonald family, Helena Stoeckley and Greg Mitchell,[24] and the inter-comparison of these results, which was provided to the parties and immediately filed with the district court by the Government. DE-119. AFDIL reported, inter alia, that hair Specimens, 75A, 91A, and 58A(1) contained mtDNA sequences

[22] *See* AFDIL letter of March 24, 2006, DE-227-11, at 2.

[23] AFDIL Specimens: 46A, 48A, 51A(2), 52A, 58A(1), 71A(1), 71A(2), 71A(3), 75A, 91A, 93A, 97A(1), 98A, 101A(1), 101A(2), 104A(1), 104A(2), 112A(1), 112A(2), 112A(3), 112A(4), 112A(5), 112A(6), 112A(7), 112A(8), 112A(9), 112B(2), and 113A. DE-306 at ¶22.

[24] Nuclear (STR) results for Colette MacDonald - 195A/195E/195J; Kimberly MacDonald - 196A/196G; Kristen MacDonald - 197A/197E; Greg Mitchell - 198A; and Jeffrey MacDonald - 199A; and Mitochondrial DNA results for: Colette MacDonald - 195A/195B; Kimberly MacDonald - 196A/196E; Kristen MacDonald - 197A/197E; Jeffrey MacDonald - 199A; Helena Stoeckley - 05A; and Greg Mitchell - 198A. *See* DE-306 at ¶21.

which were "not consistent with any other sample tested." DE-119-3 at 4; *see also* DE-306 at ¶28.

On March 22, 2006, based solely upon the AFDIL mtDNA test results for Specimens 75A, 91A, and 58A(1) eliminating family members as donors, MacDonald filed a motion to add an additional predicate to his pending § 2255 motion, namely a "DNA" claim or "unsourced hairs" claim predicated upon these AFDIL results. DE-122, 123. In his filings, MacDonald claimed that these three unsourced hairs were bloody or forcibly removed, or both. DE-122, 123.[25] This motion contained no request for further DNA testing.

On November 4, 2008, the district court denied MacDonald's various motions, and he appealed. DE-150,[26] DE-151.

On appeal, MacDonald argued that no PFA was necessary to add the DNA results as a predicate to his pending § 2255 motion. Alternatively, MacDonald argued, inter alia, that the IPA provided jurisdiction for his motion to vacate his conviction based on the 2006 DNA results. This Court did not embrace his view, stating:

> In these circumstances, we need not reach MacDonald's alternative theories of jurisdiction with respect to the DNA claim . . . (2) that no pre-filing authorization is necessary, because the DNA claim is properly asserted under the Innocence Protection Act of 2004 (the "IPA"), 18 U.S.C. § 3600, rendering it free from the strictures of AEDPA. Nonetheless, on remand, the district court may consider in the first instance whether the IPA . . . is applicable to the DNA claim.

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[25] Defense counsel Gordon Widenhouse conceded in 2012 that there was no evidence that the hairs were bloody or forcibly removed. HTr. 1396-97. *See also* DE-354 at 133-134 and n.49.

[26] This Court had granted a pre-filing authorization ("PFA") based on the affidavit of former Deputy U.S. Marshal Jimmy Britt ("the Britt claim"). MacDonald sought to add the DNA results as a predicate. The district court held that with respect to the Britt claim, MacDonald had failed to meet the gatekeeping standard of 28 U.S.C. § 2255(h). DE-150 at 46. With respect to the motion to add the DNA results as a predicate, the district court held that this constituted a new successive § 2255 claim for which MacDonald would need a PFA from this Court. DE-150 at 20, 26.

United States v. MacDonald, 641 F.3d 596, 616 n.13 (4th Cir. 2011).[27]

I. Motion For Additional DNA Testing Under the IPA

On remand, the district court promptly scheduled a status conference, but it was delayed at MacDonald's request. *See* DE-169. It was scheduled for September 21, 2011. DE-171. On the eve of the status conference, attorney Christine Mumma filed a notice of appearance and filed on MacDonald's behalf a 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 (hereinafter the "IPA motion"). DE-176. In his motion, MacDonald claimed that his 1997 request for DNA testing constituted a request for relief under the IPA. *Id*. at ¶5.

The IPA motion was really two separate motions: one seeking a new trial under 18 U.S.C. § 3600(g)(2), but based solely on the same 2006 AFDIL test results as the "unsourced hairs" claim then pending pursuant to § 2255; and, in the alternative, one for additional DNA testing under § 3600(a) of the IPA premised upon then-recent advances in DNA testing. *See* DE-176 at ¶¶4, 6-8. Although MacDonald claimed that he had already established "actual innocence" through the existing DNA results and other evidence, he requested the opportunity to inspect the physical evidence and conduct further DNA testing should the district court deny him relief. *Id*. at ¶9. MacDonald later abandoned the IPA new trial claim (DE-237 at 6), which was also denied by the district court (DE-356 at 6 n.2), and he did not include it in his Notice of Appeal (DE-366) and filed no docketing statement forecasting issues.[28]

As a result of MacDonald's IPA motion, the district court ordered that he provide the

[27] With respect to the 2006 DNA results, this Court issued a PFA in its opinion and directed the district court to consider this claim along with the Britt claim using a more expansive view of the "evidence as a whole" in its gatekeeping analysis. *See*, *supra*, at 3, n.4 and n.5.

[28] From February 9, 2015, to June 30, 2015, MacDonald was represented by counsel in this appeal. Doc-16, Doc-30. During that time, nothing was filed delineating the issues to be raised in this appeal. MacDonald has not raised the denial of the IPA new trial motion in his informal brief (Doc-40). Therefore, it is not at issue here.

Government "a list of the trial exhibits on which [he] seeks to conduct additional DNA testing pursuant to the IPA." DE-180.

J. MacDonald's List of Items for Additional DNA testing (miniSTR and/or YSTR)

On October 10, 2011, pursuant to order of the district court, MacDonald filed a list of 79 trial exhibits for which he wanted additional DNA testing under the IPA. DE-189-1. Nineteen (19) of the exhibits for which DNA testing by miniSTR and/or YSTR testing was sought were listed as "Not Blood." DE-189-1 at D1K-D19K. There was no indication as to which exhibits should be subjected to any particular form of DNA testing. *Id.*[29]

Twenty-three (23) of the 79 exhibits had previously been subjected to DNA testing, but of the remaining 56 exhibits which had never been subjected to DNA testing, none had been identified in Cormier Affidavit No. 2, or in the 1997 motion for DNA testing. DE-356 at 16, DE-49, DE-46, DE-227-5 at 1-15. Thirty-one (31) had been listed in the 1998 Motion to Compel (DE-73), but not in Cormier Affidavit No. 2 (DE-49), which accompanied the 1997 motion for DNA testing (DE-46). Consequently, DNA testing for those 31 exhibits was denied in the district court's order of December 11, 1998 (DE-86), a ruling that MacDonald did not thereafter contest. Of the remaining 25 IPA exhibits, none were listed in either Cormier Affidavit No. 2 or the 1998 Motion to Compel.

K. Government Response to Additional DNA Testing

The Government's Response to Motion For Additional DNA Testing (DE-227) opposed the testing motion, filed more than 80 months after the passage of the IPA, as untimely under 18

[29] Of the 79 items—including the 14 reference samples already used in the AFDIL DNA comparisons—at least 50 had never been introduced at trial, nor been the subject of testimony: D26, D29, D31, D49, D108, D121, D130, D132, D151, D239, D22K, D33K, D34K, O, P, Q, R1, R2, 195A, 195B, 195E, 195J, 195N,196E, 197A, 197C, 197E, 198A, 199A, D1K, D2K, D3K, D5K, D6K, D7K, D8K, D9K, D10K, D11K, D12K, D13K, D14K, D15K, D16K, D17K, D18K, and D19K. *See* DE-227-5. These items were listed in 1970 USACIL laboratory reports provided to the defense in pre-trial discovery and were fully available to the defense for pretrial examination. *See* DE-117-3 at 4, Order June 19, 1979; *see also* DE-354 at 161.

U.S.C. § 3600(a)(10), and also for failure to meet all ten requirements under § 3600(a). DE-227 at 1-2. The Government noted that belatedly challenging the blood typing evidence was inconsistent with MacDonald's defense at trial, which was not to dispute the family members as the source. *See* DE-227 at 26-28.

L. MacDonald's Reply in Support of Motion for Additional DNA Testing

MacDonald's Reply to the Government's Response insisted that he met all ten requirements of the IPA, and that he had not knowingly failed to request DNA testing of the previously untested 56 exhibits in a prior post-conviction motion under § 3600(a)(3)(A)(ii) because he had requested "all laboratory exhibits which constitute or include biological evidence" in his 1998 Motion To Compel. DE-238 at 11, DE-73 at 1-2. MacDonald claimed that it was irrelevant that the district court later denied his Motion to Compel. *Id.*[30]

Pertinent to the instant appeal, MacDonald asserted that the presumption of untimeliness is rebutted as a result of good cause shown under 18 U.S.C. § 3600(a)(10)(B)(iv). *Id.* at 25. Pointing to the 2005 letter agreement (DE-212-1), he contended that his motion should be considered timely because the delay was at the Government's request, since he did not file a motion under the IPA until after he received the DNA test results. DE-238 at 27-28.

M. DNA Stipulation

On September 15, 2012, just prior to the evidentiary hearing on his pending § 2255 claims, Jeffrey MacDonald and his counsel signed an 11-page stipulation regarding the DNA testing and results in this case. DE-306. Regarding the 23 exhibits previously examined by AFDIL, which MacDonald had, in his separate IPA motion, sought to subject to additional DNA

[30] MacDonald did not address the Government's contention (DE-227 at 15-17) that it was his failure to have included the 56 exhibits in his 1997 DNA Testing Motion (DE-46, DE-49) which caused the district court to deny DNA testing requested in the 1998 Motion To Compel (DE-73) except as to exhibits which had been "specifically identified" in Cormier Affidavit No. 2 (DE-49) as beyond the mandate of the Court of Appeals. *See* DE-86. MacDonald does not mention the 1997 motion.

testing in 2011 (including the 14 known exemplars), MacDonald stipulated to any DNA results obtained from those 23 exhibits, and further agreed not to contest any determinations by AFDIL as to non-suitability for DNA testing or insufficiency of sequencing results obtained. *See* DE-306 at ¶¶ 21, 22, 23, 30, 31, 32.

N. District Court Order Denying the IPA Motion

On August 8, 2014, the district court entered an order denying as untimely MacDonald's motion for additional DNA testing under the IPA, which he now appeals. DE-356. Contrary to MacDonald's assertion that "the district court did not dispute that the Defendant qualified for protection under nine of the ten prerequisites he must meet for IPA eligibility" (Doc-36), the district court did not reach the other disputed requirements because it determined that "MacDonald's IPA motion is untimely under the statute, and it is therefore DENIED." *Id.* at 12.

The district court further clarified that, "[h]ere, it is undisputed that MacDonald's motion is presumed to be untimely. He filed the motion on September 20, 2011, which was 82 months after the enactment of the Justice for All Act of 2004." *Id.* The district court noted that even though the parties agreed that MacDonald would not file any other motion for DNA testing prior to the completion of the instant testing and the filing of the report with the district court by AFDIL, "that report was filed on March 10, 2006 [DE-119]—meaning that MacDonald waited 66 months to file the instant IPA motion. Having conceded that his motion is presumed untimely, MacDonald contends that he has nonetheless rebutted the presumption. Specifically, he argues that (1) he has shown good cause; (2) the evidence he seeks to have tested is newly-discovered DNA evidence; and (3) the denial of the motion would result in a manifest injustice." *Id*. at 12-13.

The district court did not agree, and observed that MacDonald's good cause argument

appeared to be premised on the agreements in the 2005 DNA testing letter. *Id*. At 13. After reviewing the pertinent language of the letter, the district court noted the absence in the correspondence of any mention of the defense refraining from filing a motion for DNA testing while he pursued § 2255 litigation based on the AFDIL report, and that the IPA itself provided in § 3600(h)(3) that any motion under that statute "shall not be considered to be a motion under section 2255." *Id*. at 14. "Accordingly, MacDonald's attempt to attribute his inaction to the fact that the § 2255 proceeding was still ongoing is misplaced. Moreover, the Government explicitly qualified in the agreement that it was not conceding the merits of any future IPA motion filed by MacDonald." *Id*. This included the right to challenge any claim based on its timeliness. *Id*.

The district court also found that MacDonald could not rebut the presumption of untimeliness based upon his claim of "newly discovered" DNA evidence. *Id*. In his motions, MacDonald attempted to argue that the availability of new DNA testing methodologies (MiniSTR and YSTR) would yield newly discovered evidence that was unable to be obtained during the previous DNA testing. *See* DE-176-1, DE-228, *et seq*. The district court explained:

> The record shows that Y-STR and mini-STR testing and analysis are useful mainly where conventional testing cannot or does not yield accurate results. *See* Aff. of Delgado [DE-228] ¶¶12-13 (explaining that 'MiniSTR analysis should only be used when samples have been subject to degradation or the quality is poor' and that because '[t]he DNA profiles will be the same...there is no additional benefit in using miniSTR analysis over conventional methodologies'); ¶14 ('Y-STR analysis does provide valuable information when the overwhelming amounts of female DNA prevent the detection of male DNA in lower concentration, typically in cases of sexual assault.'); ¶15 ('[T]he applications of [miniSTR and Y-STR] methodologies are quite specific and don't replace conventional STR typing.'). Out of the at least 79 exhibits that MacDonald now seeks to test, approximately only 23 of them were previously examined by AFDIL . . . The 56 remaining items have never been subjected to conventional STR analysis. Given that neither miniSTR nor Y-STR testing are meant to replace conventional STR analysis, it is difficult to attribute MacDonald's

> delay in filing his IPA motion to advancement in those methodologies . . . The belated nature of MacDonald's IPA motion does not, therefore, appear to be caused by the advancements in DNA testing. The court accordingly concludes that the fact that MacDonald now seeks miniSTR and Y-STR testing does not rebut the presumption of untimeliness, pursuant to § 3600(a)(10)(B)(ii).

DE-356 at 15-16.

Finally, the district court found that denial of MacDonald's IPA motion would not result in a "manifest injustice," which analysis is incorporated herein by reference. DE-356 at 16-18.

SUMMARY OF ARGUMENT

The district court properly denied MacDonald's motion for new DNA testing under the Innocence Protection Act because it was untimely. The district court found that the motion was filed 82 months after the passage of the Act and 66 months after the conclusion of court-ordered DNA testing that MacDonald requested in 1997, and these district court findings certainly do not constitute clear error. The district court properly applied the provisions of the IPA by further finding that MacDonald had not rebutted the conceded presumption of untimeliness by showing that the evidence he proposed to test was newly-discovered DNA evidence, by showing good cause for the untimeliness, or by showing that the denial of further testing would result in a manifest injustice. Even if MacDonald had made a timely motion for DNA testing under the IPA, his request fails to meet many other requirements of the Act, but the district court properly declined to adjudicate those requirements because of its finding of untimeliness.

ARGUMENT

I. STANDARD OF REVIEW

Findings of fact related to whether a prisoner is entitled to DNA testing under the IPA are reviewed for clear error. *United States v. Pitera*, 675 F.3d 122, 128 (2nd Cir. 2012). Interpretations of the statute are questions of law that are reviewed de novo. *United States v. Fasano*, 577 F.3d 572, 575 (5th Cir. 2009). *Accord United States v. Kivanc*, 714 F.3d 782, 789 (4th Cir), *cert. denied*, 134 S. Ct. 302 (2013).

II. MACDONALD DID NOT HAVE GOOD CAUSE TO DELAY FILING OF THE IPA CLAIM SUFFICIENT TO REBUT THE PRESUMPTION OF UNTIMELINESS

MacDonald's current "good cause" argument rests solely on the unsupported assertion that he was entitled under the IPA to wait until he had a response from the district court on his collateral 2006 motion (DE-122), based upon the 2006 AFDIL DNA results (DE-119), which decision was not rendered until November of 2008. This does not explain why MacDonald waited an additional 34 months after the district court's November 8, 2008, ruling before filing his IPA motion on September 20, 2011. DE-176. Rather, the Government submits that the timing of the motion for additional DNA testing on the eve of the status conference (DE-172), accompanied by a request that the court defer ruling on the pending AFDIL DNA unsourced hairs claim until the proposed IPA DNA test results were obtained in the future (HTr. at 7-9, 35-36), suggests that the IPA motion was filed for the purpose of delaying the resolution of the 2006 unsourced hairs claim, which was ripe for adjudication in September 2011.

As the district court found, the AFDIL Report was filed in March of 2006, and the IPA motion was not filed until 66 months later. DE-356 at 12-13 (noting that MacDonald had conceded that the motion was presumptively untimely). There was no agreement between the parties, in 2005 or otherwise, preventing or dissuading MacDonald from filing a motion under

the IPA for DNA testing, or tolling the time period for such filing, while any § 2255 litigation was pending.[31] Nor is there any provision in the IPA that permits such intentional delay as a basis to rebut a presumption of untimeliness. *See* 18 U.S.C. § 3600(a)(10)(B).

MacDonald, who was at all times competent and represented by able and experienced counsel, knowingly chose not to file until after the period of limitation. DE-356 at 17. This was a tactical decision. As the district court correctly found, he has failed to show "good cause" to rebut untimeliness. *Id*. at 13.

III. MANIFEST INJUSTICE DOES NOT RESULT FROM THE DENIAL OF ADDITIONAL TESTING OF BLOOD EVIDENCE

MacDonald's claim, without any citation to the trial transcript, that the jury was misled by the Government's presentation of the blood evidence is simply false. Nothing prevented MacDonald's lawyer from suggesting by cross-examination, or in argument, that the bloodstains came from intruders and not the family members. Trial counsel did neither.

As noted, *supra*, at 14, Cormier Affidavit No. 2, the document in which MacDonald identified the items for which he wanted DNA testing, did not identify any of the Government's blood evidence (GX 639-651), much less the "key" bloodstains as items to be subjected to any form of DNA testing. At the time MacDonald requested testing, Nuclear DNA technology was applicable, it was available, and MacDonald was on notice of the existence of the blood evidence presented at trial, and its significance. PCR-based nuclear DNA testing was available prior to 1997, and Short Tandem Repeat typing likely was also.[32] Each of these could have been used to

[31] At the time of the letter agreement in January 2005, there was no § 2255 claim pending and, if MacDonald was contemplating filing a new successive § 2255 motion, neither the Government nor the district court was aware of such plans. MacDonald did file a new § 2255 motion in January 2006, and it was still pending when he filed his IPA motion in September 2011. The district court correctly found that the correspondence between the parties contained nothing preventing MacDonald from filing an IPA motion after March 10, 2006. DE-365 at 12-14.

[32] MacDonald's expert stated in1998 that STR technology had become available for forensic DNA testing "[w]ithin

discriminate between DNA profiles present in the bloodstain evidence. *See* DE-84, Appendix E; DE-85 at 8; DE-76 at ¶10. Additionally, MacDonald could have requested then-available mtDNA testing to exclude MacDonald family members from the blood evidence, but he did not. DE-49, Exhibit 6. None of the bloodstains had been degraded by exposure to weather, nor was there any issue of sexual assault resulting in mixed DNA, so there is no basis for claiming that conventional nuclear DNA testing was unsuitable for testing the bloodstains and that Mini-STR kits or YSTR kits were required. *See* DE-356 at 7-11. Nor would "touch" DNA appear to have any application to a determination as to the contributor of a particular bloodstain. *Id*.

In light of these facts, the Government submits that failure in 1997 to seek any form of DNA testing of the Government's trial blood evidence (GX 639-651) was a tactical decision. DNA testing of the key bloodstains had the risk of confirming, that it *was* Colette's and Kimberly's blood on MacDonald's pajama top, as well as the bed sheet, and that it *was* Colette's blood that MacDonald's bare foot tracked out of Kristen's room.[33] In consequence, all the blood exhibits listed on DE-189-1 in 2011, which were not identified in Cormier Affidavit No. 2 in 1997, constitute "specific evidence . . . that the applicant knowingly fail[ed] to request DNA testing of . . . in a prior motion for post-conviction DNA testing." Testing such evidence is now precluded under the IPA by 18 U.S.C. § 3600(a)(3)(A)(ii).

In 1998, when MacDonald sought DNA testing of the universe of blood and other evidence in his Motion to Compel (DE-73), the district court denied this motion as beyond the scope of this Court's mandate. DE-86. Nothing prevented MacDonald from appealing that

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the last few years." DE-76 at ¶10.

[33] None of what MacDonald calls in his informal brief "key" bloodstains, and few of the other trial exhibits are to be found on the list he filed in the district court in 2011. *Compare* DE-189-1 *with* GX 639-651 (bloodstains that were trial exhibits).

decision to this Court. If he thought that having the additional items DNA-tested was critical to establishing his innocence, he should have appealed the district court's ruling to this Court (which had ordered the testing) or moved the district court to reconsider his argument to expand the list during the eight-year time period between the order and the completion of the AFDIL DNA testing in March 2006. When the DNA results came back and were not exculpatory, MacDonald's then-counsel[34] first tried exaggerating them by claiming the unsourced hairs were bloody and forcibly removed. DE-122 at 3-4, DE-123 at 2-6. By September 2011, it had become apparent that that argument was not going to work,[35] so new counsel entered the case and embarked on a new fishing expedition with the IPA motion.

Therefore, even if MacDonald's IPA motion had been presumptively timely, the presumption of timeliness would have been rebutted by the fact that his motion for DNA testing was "based solely upon information used in a previously denied motion." 18 U.S.C. § 3600(a)(10)(i). Likewise, his motion is precluded by § 3600(a)(3)(ii) because he "fail[ed] to request DNA testing of that evidence in a prior motion for post-conviction DNA testing," i.e., the 1997 motion that this Court granted. Under these circumstances, it cannot be a manifest injustice to deny his motion on timeliness grounds.[36] The consequences of that decision were: (1) he only requested examination for blood from the autopsy vials, which turned out to be empty; and (2) as to any exhibit listed on 'Schedule B' of the Motion to Compel, for which testing was denied in 1998, that was also on the belated IPA list (DE-189-1), such request was untimely under 18 U.S.C. § 3600A(10)(A)(i), even if it had been filed within the 60-month time period.

[34] This counsel, Timothy Junkin, withdrew from the case on February 12, 2009. DE-163.

[35] Also, at this time it was clear to MacDonald that the Britt claim was not standing up to scrutiny. *See* DE-152.

[36] Even if such testing were to be permitted, the results could never meet the "compelling evidence" requirement of 18 U.S.C. § 3600(g)(2) for a new trial, as the legislative history clearly demonstrates. *See* DE-212 at 34-37.

The Government submits that it cannot be a manifest injustice to deny testing for a motion that is both untimely *and* which clearly fails to meet the requirements of § 3600(a)(3)(A)(ii) as well as § 3600(a)(10)(A)(i).

MacDonald does not seek testing only "to exclude [MacDonald] as the source of the DNA evidence." 18 U.S.C. § 3600(g)(1). With respect to the blood evidence in this case, the only items attributed to Jeffrey MacDonald were two bloodstains from the kitchen floor (D25K and D26K). In his informal brief, however, MacDonald seeks to dispute that dozens of bloodstains came from the three victims, as well as disputing the AFDIL results by re-testing the reference samples. Doc-40 at 2; *see also* DE-189-1, Document 6 at ¶6. As noted above, the IPA does not authorize such testing, but is limited to permitting him to show that he is not the source of the "DNA evidence" that the Government attributed to him at trial, or alternatively, could only have been deposited during the course of the crime by the perpetrator. *See* DE-227 at 26-29. MacDonald has not identified any bloodstain that could only have been left by an intruder.[37] The Government submits that denying DNA testing of such bloodstains that, if offered in evidence at all, were not asserted by the Government to have been the blood of Jeffrey MacDonald, or re-testing of AFDIL DNA reference samples that were not trial exhibits and to whose DNA results MacDonald later stipulated and agreed not to dispute, could not be a manifest injustice under the IPA.

IV. THE FINDINGS OF THE DEPARTMENT OF JUSTICE REGARDING MICROSCOPIC HAIR EXAMINATIONS ARE INAPPLICABLE TO MACDONALD'S APPEAL UNDER THE IPA AND WERE FULLY VETTED IN HIS § 2255 LITIGATION

In his informal brief, MacDonald makes a number of false or exaggerated claims regarding an FBI review completed in 2014 of microscopic hair comparisons in more than

[37] In MacDonald's various accounts of events on the night of the murders, he never alleged that any of the alleged intruders were wounded.

20,000 cases. He claims that the Office of the Attorney General found that "three government forensic experts misrepresented scientific fact in this case . . ." Doc-40 at 2. He says that one of these experts, Robert Fram, was "involved in the first round of DNA testing." *Id.* He states the "DOJ was ordered (by the OAG) not to impose any procedural bars on any defendant affected by the fraudulent work of any of its experts." *Id*. at 3. Finally, he asserts that "DOJ announced that new DNA tests would be offered to any affected defendant at no cost." *Id*.

This issue was not raised below with respect to MacDonald's IPA motion. When he received an adverse ruling on his IPA motion, MacDonald chose not to file any motion to alter or amend the judgment, pursuant to Fed. R. Civ. P. 59, or for relief from the judgment, pursuant to Fed. R .Civ. P. 60(b). In contrast, MacDonald did so move with respect to the adverse decision on his § 2255 claims, and argued vigorously the results of the FBI review in support of said motion, citing it as newly-discovered evidence. *See* DE-364, 379.

There is good reason why MacDonald did not argue the results of the FBI review with respect to his IPA motion, because the review had no relevance to that motion.

On September 22, 2014, the U.S. Attorney for the Eastern District of North Carolina received a letter from Norman Wong, Special Counsel, U.S. Department of Justice, regarding the recently completed FBI review of cases involving microscopic hair comparisons. DE-363-2. The next day, the Government counsel in the MacDonald case filed the letter and its enclosures with the district court, thereby making them immediately available to all of MacDonald's counsel of record. DE-363.

The findings of the FBI hair review pertaining to the MacDonald case are summarized in the Government's Response to Movant's Supplemental Memorandum Supporting Rule 59(e) Motion, DE-382 at 2-6. Only one of the three statements of Government experts found to be

"inappropriate"[38] occurred during the trial.[39] *Id*. at 2; *see also* DE-363-3 at 6. Expert Paul Stombaugh, testifying on cross-examination, stated that "the only conclusion on the hair examination that I was going to make was its origin." DE-382 at 3. In other testimony presented during the Government's case, it was made clear that microscopic hair comparisons cannot be the basis of a specific or definite determination as to the donor of the hair. *Id*. at 8.

The main reason the results of the FBI hair evidence review are irrelevant to MacDonald's appeal of the denial of his IPA motion for new DNA testing is that all three of the hairs involved in the statements of experts flagged in the review have already been subjected to DNA testing. *See* DE-382 at 5-6, 30. Moreover, MacDonald stipulated to the accuracy of those DNA results. *See*, *supra*, at 15-16.

Regarding MacDonald's assertion about "procedural bars," it should be noted that DOJ was not "ordered" to do anything with respect to the results of the FBI hair evidence review. The DOJ voluntarily agreed to take certain steps regarding the results of the review. One of the DOJ agreements was that if the defendant sought "post-conviction relief under 28 U.S.C. § 2255, based on the Department's disclosure . . ., in the interest of justice, the United States is waiving reliance on the statute of limitations under Section 2255(f) and any procedural-default defense." DE-363-2 at 3 (emphasis added). Accordingly, when MacDonald relied on the FBI hair review results in his still-pending § 2255 claims in the district court (*see* DE-364 and DE-379), the

[38] "Inappropriate statement," according to the lexicon adopted by the reviewers, means: "The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. This type of testimony exceeds the limits of science." DE-363-3 at 2.

[39] The two others occurred in lab reports generated in the 1990s. As noted, *supra* at 10, one of these statements was made by Robert Fram. MacDonald falsely claims in his informal brief that Fram was involved in the AFDIL DNA testing completed in 2006. Doc-40 at 2. In fact, the statement of Fram that was flagged by the FBI review occurred in a lab report dated May 19, 1999, reporting on a microscopic hair examination. DE-363-3 at 6. The third statement flagged in the FBI review was made in a report of a microscopic hair examination, prepared by Michael Malone on February 4, 1991. *Id*. at 5; *see also*, *supra*, at 7 n.14.

Government agreed that the court should consider the issues raised (*see* DE-373 at 2) and did not invoke the statute of limitations or procedural-default. *See* DE-382 at 39, n.27. Thus, this argument is irrelevant to this appeal from the denial of the IPA motion.[40]

Regarding DNA tests of evidence that was flagged by the FBI review as having been the subject of "inappropriate statements" regarding microscopic hair comparisons, the DOJ agreed as follows:

> In the event that [the applicable U.S. Attorney's Office] determines that further testing is appropriate or necessary or the court orders such testing, the FBI is available to provide mitochondrial DNA testing of the relevant hair evidence or STR testing of related biological material if testing of the hair evidence is no longer possible, if (1) the evidence to be tested is in the government's possession or control, and (2) chain of custody for the evidence can be established.

DE 363-2 at 3. In this case, the "relevant hair evidence" has already been subjected to DNA testing and the results have been stipulated to. Thus, there is no further testing that is "appropriate or necessary" to address any issue raised in the FBI hair evidence review.

[40] If MacDonald's counsel in the pending appeal from the denial of his § 2255 claims believes that the results of the FBI hair evidence review are important to this Court's consideration of that appeal, he will doubtless raise the issue and brief it thoroughly.

CONCLUSION

For the reasons stated herein, the order of the district court denying MacDonald's motion pursuant to the IPA should be affirmed.

Respectfully submitted, this the 27th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the Appellant in this action by placing a copy of same in the United States mail, postage prepaid, and addressed as follows:

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