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	)	
	)	GOVERNMENT'S SUR-REPLY
v.	)	TO MOTION FOR ADDITIONAL
	)	DNA TESTING UNDER
JEFFREY R. MacDONALD,	)	18 U.S.C. § 3600
Movant	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this sur-reply to Movant's *Reply in Support of Motion for Additional DNA Testing Pursuant to 18 U.S.C. § 3600*, filed February 17, 2012 [DE-238], in accordance with this Court's Order of April 17, 2012 [DE-262], and respectfully shows unto the Court the following:

SUMMARY OF ARGUMENT

MacDonald's motion, filed September 20, 2011, seeking new DNA testing under the IPA is untimely because: (1) it is based solely on information used in a previously denied motion; (2) the evidence he proposes to test is not newly discovered; and (3) he has failed to demonstrate good cause for delaying the motion more that 60 months after the latest point at which such time period could be construed to have begun. The motion is also barred because: (1) MacDonald knowingly failed to request this testing in a prior motion for post-conviction DNA testing; and (2) the evidence was previously tested and the proposed new testing is neither new nor

substantially more probative. Under the circumstances of this 42-year old case, the proposed testing does not meet the requirements of the IPA because (1) the evidence has not been retained under conditions ensuring that it has not been contaminated; (2) the testing is not reasonable in scope and would not use sound methods consistent with accepted forensic practices; and (3) the testing could not produce new material evidence that would raise a reasonable probability that MacDonald did not commit the offenses of which he was convicted.

PROCEDURAL CONTEXT

1. On April 22, 1997, MacDonald filed with this Court a Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery. DE-46. In pertinent part, MacDonald moved that:

> ... the Court should (a) grant MacDonald discovery, including access to various items of physical evidence which were examined by the FBI in connection with the 1990 petition, as well as other items such as unsourced hairs which were found in in critical locations at the crime scene, and if subjected to testing using new DNA technology, may very well permit Dr. MacDonald to further demonstrate his innocence ... The items to which Dr. MacDonald seeks access for the purpose of conducting his own independent laboratory examinations are detailed in the Affidavit of Philip G. Cormier No. 2 - Request For Access To Evidence To Conduct Laboratory Examinations - in Support of Jeffrey R. MacDonald's Motion To Reopen and for Discovery, which is filed herewith.[1]

[1] We have previously set forth in the Government's Response To Additional DNA Testing [DE-227 at 11] that Cormier Affidavit No. 2 [DE-49] sought access to all evidence which had been examined by Special Agent Malone, whether or not it was suitable for DNA testing (e.g. saran fibers). In addition, Cormier Aff. No. 2 sought "hairs, skin, and blood ... found in critical locations" for DNA testing, which Malone was not alleged to have

2. Also filed on April 22, 1997, was a 75-page Memorandum Of Law In Support of Jeffrey R. MacDonald's Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery. DE-46. In pertinent part, the Memorandum states:

> Cormier Aff. No. 2, ¶¶17-20, lists a series of [Malone] exhibits which the defense seeks to test. In addition, the Cormier Aff. No.2 lists a series of exhibits which Malone apparently did not examine, but which contain unsourced hairs, blood debris and fibers, found in critical locations such as underneath the fingernails of the victims, which may very well contribute toward a demonstration of Dr. MacDonald's factual innocence.FN41 The defense seeks access to these exhibits, as well, *for the purpose of conducting independent laboratory examinations on these items, including, if appropriate, DNA testing.* Cormier Aff. No. 2 at ¶21. *(Emphasis added).*
>
> FN 41
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> Many of the handwritten lab notes indicate the presence of unsourced hairs and fibers, as well as agent Malone's 2/14/91 affidavit in which he identified hairs that he claimed he could not source due to insufficient characteristics for comparison purposes.

3. On September 2, 1997, and following extensive filings by the parties, this Court, *inter alia*, denied MacDonald's Motion for Discovery. DE-64. *United States v. MacDonald*, 979 F. Supp. 1057, 1069 (EDNC 1997).

4. On September 8, 1997, MacDonald filed his notice of appeal of this Court's order of September 2, 1997. DE-66.

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examined. *Id.* We incorporate by reference the description of the 15 specific exhibits identified in Cormier Aff. No. 2 as being potentially suitable for DNA testing set forth in our Response. DE-227 at 11-13.

5. In connection with his appeal, on September 17, 1997, MacDonald filed, *inter alia*, a Memorandum in Support 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. See ¶9 below.

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

> Upon consideration of the motion of Jeffrey R. MacDonald filed pursuant to 28 U.S.C. Section 2244, IT IS ADJUDGED AND ORDERED that *the motion with respect to DNA testing is granted* and this issue is remanded to the district court.
>
> In all other respects, the motion to file a successive application is denied.
>
> DE-67.

7. On September 11, 1998, MacDonald filed with this Court a Motion for an Order to Compel the Government to Provide Access to All Biological Evidence for Examination and DNA Testing By His Experts and a memorandum in support thereof. Motion to Compel, DE-73. MacDonald contended that the mandate of the court of appeals entitled him to "the full universe of exhibits that contain biological evidence - hairs, bloodstains, tissue, and body fluids - collected from the crime scene to which the government had full access." Memorandum in Support at 2.

8. On October 23, 1998, the Opposition of the United States to Petitioner's Motion for an Order to Compel the Government to Provide Access to All Biological Evidence for Examination and DNA

Testing By His Experts [DE-84] was filed.

9. On December 11, 1998, this Court entered an order rejecting MacDonald's contention that he had moved for the universe of biological evidence for DNA testing, and the Court of Appeals had granted that motion. DE-86. In pertinent part, this Court noted that in his Memorandum In Support 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 at 6-7, MacDonald explained precisely what evidence he sought to re-test, and how.

> Further, MacDonald requested that the district court order the government to give him access to certain items of physical evidence in the case which, if properly analyzed, would demonstrate his actual innocence. These items, which are documented in the handwritten laboratory bench notes of the Army and FBI examiners, consist primarily of hairs and debris found in extraordinarily telling locations – namely, *under the fingernails of the victims, on their hands, on their bodies or in their bedding*. The lab notes reveal that the government's lab examiners had attempted to source these hairs by comparing them to known hairs taken from the victims and from Dr. MacDonald, but *they were never able to match these hairs to any member of the MacDonald family*, resulting in the obvious and highly exculpatory conclusion that these strategically-located hairs came from outsiders, thus corroborating MacDonald's account. With respect to certain blood debris found under the fingernails or on the hands of the victims, the government was able to determine the blood type in some instances but not in others. See Affidavit of Philip G. Cormier No. 2 - Request For Access To Evidence To Conduct Laboratory Examinations - in Support of Jeffrey R. MacDonald's Motion To

> Reopen 28 U.S.C. § 2255 Proceedings and for Discovery ... which describes these hairs and blood debris in detail.
>
> MacDonald sought access to this highly specific and crucial category of physical evidence for the purpose of subjecting these unsourced hairs and blood debris to *DNA testing* in an effort to further establish MacDonald's innocence by demonstrating definitively that these items did not originate from any family member nor from MacDonald himself, but instead originated from one or more of the intruders whom MacDonald described seeing in his home on the night of the murders.
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> *Id.* (*Emphasis in original*).

Further, this Court ruled that: "The court has examined carefully the parties' respective arguments in light of the context of the appellate court's order, and concludes that the Fourth Circuit Court of Appeals has mandated that the Government provide to MacDonald's experts access to the existent and known unsourced hairs, bloodstains, blood debris, tissue and body fluids specifically identified in the April 22, 1997, Affidavit of Philip G. Cormier No. 2 ... for ... DNA testing in all current and existing forms including, without limitation, both nuclear and mitochondrial testing." DE-86.

> I. PURSUANT TO § 3600(a)(10)(B), THE MOTION IS UNTIMELY BECAUSE THE EVIDENCE TO BE TESTED IS NOT NEWLY DISCOVERED EVIDENCE WITHIN THE MEANING OF THE IPA; THE MOTION IS BASED SOLELY UPON HIS OWN ASSERTION OF INNOCENCE AND, AFTER CONSIDERING ALL THE FACTS AND CIRCUMSTANCES SURROUNDING THE MOTION, A DENIAL WOULD NOT RESULT IN A MANIFEST INJUSTICE; AND MacDONALD HAS NOT DEMONSTRATED GOOD CAUSE FOR HIS FAILURE TO FILE WITHIN THE PRESCRIBED 60 MONTH PERIOD

10. MacDonald acknowledges, as he must, that his motion for additional DNA testing filed September 20, 2011 [DE-176], must be presumed untimely under the IPA because it was not filed within 60 months of the enactment of the IPA. DE-238 at 24.[2] MacDonald contends, however, that this presumption is rebutted because, *inter alia*, (1) the evidence to be tested is newly discovered evidence; (2) the motion is not based solely on his own assertion of innocence, and, after considering all the facts, a denial would result in a manifest injustice; and (3) as a result of good cause shown. See 18 U.S.C. § 3600(a)(10)(B)(ii), (iii), (iv). DE-238 at ¶44. We have previously explained the reasons why denial of his motion as untimely would not result in a manifest injustice and will not repeat them here. DE-227 at ¶17. We will address the remaining contentions below.

11. MacDonald's reliance on *District Attorney's Office For The Third Judicial Circuit v. Osborne*, 557 U.S. 52, 129 S.Ct. 2308 (2009) for the proposition that what is determinative under the IPA is whether or not the testing sought was available during trial [DE-238 at ¶45] is misplaced. *Osborne*, *supra*, did not involve the IPA and cannot be read as interpreting any provisions of the IPA. We submit that, where the proposed new

[2] MacDonald has also abandoned his prior contention that his 1997 request for DNA testing [DE-46] constituted a request for testing under the IPA [DE-176,¶5], "as that motion was filed prior to the enactment of the IPA." DE-237 at 1.

testing is applicable to a specific item to be tested, the inquiry begins with the question of whether or not the new method or technology that MacDonald now seeks to employ was available in 1997 when the prior request for testing was made, or became available at any time during the prior testing which spanned the period 1999-2006.[3]

12. MacDonald claims that because Minifiler kits were not available until the fall of 2006, and Y-Filer kits were not available until 2006, he is seeking a form of testing not previously available either at the time of trial or when prior testing was conducted and, therefore, his request constitutes newly discovered evidence. DE-238 at ¶46. Conceding that the IPA does not define the term "newly discovered evidence" [*Id*. at ¶ 45], MacDonald further contends that when 18 U.S.C. § 3600(a)(10)(B)(ii) is read in conjunction with 18 U.S.C. § 3600(a)(2) - the evidence must have been secured in relation to the investigation or prosecution - 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." *Id*. at ¶47.

13. MacDonald seeks to apply the "new method" exception of § 3600(a)(3)(B) to all the evidence listed in DE-189-1, whether

[3] Although, as we have demonstrated above, the DNA testing was limited to specific items, this Court's order of December 11, 1998, permitted him to do DNA testing in all current and existing forms including, without limitation, both nuclear and mitochondrial testing. See ¶9, *supra*.

or not it was previously tested. This provision actually applies only to evidence that was previously tested. Clearly, this exception has no application to evidence for which he knowingly failed to request testing, because the language of § 3600(a)(3)(A)(ii) neither contains such an exception nor incorporates it by reference. Further, if the exception permitting testing for new methodology contained in (a)(3)(B) applies when there has been a prior failure to request testing of that evidence, then the restrictions of subsection (a)(3)(A)(ii) precluding testing when there has been a prior failure to request testing of that evidence are meaningless.

14. Essentially, MacDonald is arguing that testing, or retesting, is mandated by the IPA anytime that a new commercial "kit" comes on the market regardless of when the technology underlying such kits was initially available. Congress could not have intended such a result, or they would not have enacted § 3600(a)(3)(B).[4] By 2004, Congress was well aware that the sensitivity of DNA testing was continuously evolving, but that watershed breakthroughs in DNA testing, such as the advent of PCR-STR or mtDNA testing, were quite limited. Consequently, Congress required that the requested testing must use "a new method or technology." On its face, this language does not mandate re-testing whenever there has been *some incremental*

[4] "The specific evidence to be tested–(B) was previously subjected to DNA testing and the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing."

improvement in an existing DNA method or technology. Rather, the method or technology itself must be new. DE-49 at 17-18.

15. At the time of MacDonald's 1997 motion for DNA testing, both nuclear DNA PCR-STR analysis and mitochondrial DNA testing (mtDNA) were widely employed. See Affidavit of Defense DNA expert Terry Melton. DE-75. Indeed, the basis for MacDonald's 1997 motion was the capability of the new mtDNA testing to obtain results from hairs which lacked roots- and, therefore, nuclear DNA to test. DE-49 at 17-18. Both nuclear and mtDNA use PCR technology to copy their respective areas of interest; the region of interest in nuclear DNA, which comes from both parents, is the so-called Short Tandem Repeats or "STRs". DE-228 at ¶¶4-5. The process upon which the MiniFiler kit is based produces a nuclear STR profile from degraded samples and gives the same DNA profile as conventional STR analysis. DE-228 at ¶¶12-13. In other words, MiniFiler is an incremental improvement in sensitivity on a pre-existing methodology or technology, i.e. PCR/STR. Even then, its use is only indicated when you have degraded specimens.

16. The process upon which the Y-Filer kit is based ignores female DNA and uses PCR to detect a male version of STR that exists on the Y chromosome. DE-228 at ¶14. As we have previously explained, Y-STR analysis does provide valuable information when the overwhelming amount of female DNA prevents detection of male DNA in lower concentrations, typically in

cases of sexual assault, which is not applicable here. *Id*. Y-STR/Y-chromosome testing is an incremental improvement on the existing PCR-STR methodology and not a new methodology under the IPA. Under the circumstances of this case, MacDonald seeks to demonstrate, *inter alia*, that neither he nor his family members, all of whom by his account had bleeding injuries inflicted by intruders, are the source of the AB bloodstains. Conventional PCR/STR testing, which was available to MacDonald in 1997, would have demonstrated whether or not any MacDonald family member, or hippie "suspect," was or was not the donor of any of the bloodstains. As such, additional Y-STR/Y-chromosome testing, which ignores all female DNA, is not substantially more probative than the DNA testing previously available to MacDonald.

17. The Government submits that the availability, or use by a particular private laboratory of a commercial kit, is irrelevant for purposes of § 3600(a)(10)(B)(ii). Rather, what is relevant, but not fully determinative, is when the "new method or technology that is substantially more probative than the prior DNA testing" became available. MacDonald has supplied the Court with no evidence which addresses the critical issue of when the methodology, as distinct from a kit, became available. Leaving aside the questions of whether MiniFiler, Y-Filer, or Touch DNA is substantially more probative or meets the requirements of § 3600(a)(8), which we will address separately,

MacDonald has failed to meet his burden under § 3600(a)(10)(B)(ii).

18. This is particularly the case with regard to his implied assertion that "Touch DNA" constitutes a previously unavailable form of testing. We characterize this assertion as "implied" because his filings are devoid of any mention of when Touch DNA, which is actually a collection methodology that employs conventional PCR amplification in order to obtain an STR sequence, became available. Nor is there any mention of a Touch DNA "kit". In fact, Touch DNA technology has been available since the mid-1990s.[5] MacDonald could have requested Touch DNA testing at anytime during the period AFIP was conducting the testing from 1999-2006. The same analysis applies to Y-Chromosome methodology. As we have previously demonstrated, and MacDonald has not disputed [DE-238], the use of Y-chromosome STR was being reported in the *International Journal of Legal Medicine* in 2002. DE-227-14. In fact, subsequent research reflects the Y-chromosome technology was being reported as early as 1996. Exhibit 5 at 8; see also Exhibit 7 at 93.

19. MacDonald asserts that his "motion should be considered timely because the delay in filing the motion was at the request of the Government." DE-238 at ¶50. This request was purportedly contained in an exchange of correspondence in

[5] We will demonstrate this fact, *infra*, in relation to our analysis of § 3600(a)(3)(B).

January 2005, in which 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] ..." [DE-238 at ¶50]. According to MacDonald, although the DNA testing was completed in March of 2006, he could not possibly have anticipated that the *litigation* concerning the testing would continue until today. DE-238 at ¶51. MacDonald further contends that he complied with the agreement and did not file the instant motion until the previous DNA test results were released. *Id.* at ¶52. Consequently, he argues that it is "disingenuous" for the Government to maintain that his motion is untimely. *Id.* at ¶50.

20. Congress may well have created multiple ways to rebut a presumption of untimeliness,[6] but this is not one of them. To

[6] MacDonald also argues that Congress created multiple ways to rebut a presumption of untimeliness, including the use of "good cause" to rebut a presumption of untimeliness in "most cases." DE-238 at ¶53. The remarks of Senator Leahy relied upon by MacDonald [*Id.*] have been selectively quoted so as to distort their context. The sentence in the Congressional Record which immediately follows Senator Leahy's opposition to "a presumption of untimeliness which could not be rebutted in *most* cases," states: "At the same time, this provision should allow courts to deal summarily with the [Justice] Department's bogeyman- the guilty prisoner who `games the system' by waiting until the witnesses against him are dead and retrial is no longer possible, and only then seeking DNA testing." DE-238-2 at 4. The deleted sentence which precedes the quotation "[m]any of the individuals who have been exonerated by post-conviction DNA testing..." states: "That need [for a post-conviction DNA testing law] is likely to diminish over time as pre-trial DNA testing becomes more prevalent, but there will always be cases that fall through the cracks due to a defense lawyer's incompetence, a defendant's mental illness or mental retardation, or other reasons that we in Congress cannot and should not attempt to anticipate." DE-238-2 at 4. Viewed in proper context it is clear that Senator Leahy was referring to the situation involving an initial but untimely motion from an incompetent or otherwise helpless prisoner, and not to one involving the failure to timely file a second (and in this case third) motion for DNA testing. The latter situation falls under § 3600(a)(3), which

begin with, the referenced agreement has been disingenuously parsed. What it actually says is:

> The Defendant agrees not to file any other motion for DNA testing, ~~pending~~ *prior to* the completion of the instant testing, *and the filing of the report with the District Court by AFDIL reflecting the results of that testing.*
>
> *With the further clarification by the Government that this provision does not preclude the defense from ever filing a motion for DNA testing under the Innocence Protection Act (IPA), the defense agrees to this condition. By this clarification the Government makes no concession with respect to the merits of any future motions which may be filed under the IPA.*

DE-212-1 at 13 (emphasis added).

21. Thus viewed, and without the excision of the phrase "and the filing of the report with the district court by AFDIL reflecting the results of that testing," it is abundantly clear that the event which lifted any prior restriction on MacDonald's filing for testing under the IPA was the filing of the AFDIL report on March 10, 2006. DE-119. Nothing prevented MacDonald's counsel from filing for additional testing after March 10, 2006.[7] And while it is true that "he did not file until the previous DNA results were released,"

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is not what Senator Leahy was addressing. Of much greater applicability is the portion of the Congressional Record containing the remarks of Senator Hatch concerning the consequences of an applicant's failure "to seek a test when he could have" to a later claim of compelling evidence, which MacDonald has not addressed. See DE-212 at 34-35 and DE-238, Ex. 2.

[7] The IPA became effective on October 30, 2004; the agreement between counsel was reached two months and 14 days later on January 14, 2005 [DE 212-1]; the agreement remained in effect for 13 months and 24 days until March 10, 2006; and MacDonald didn't file for DNA testing until September 20, 2011, 66 months and 10 days after the removal of any impediment to filing.

it is also true that he waited 66 months and 10 days before filing, and the Government had nothing to do with this delay. He has demonstrated no other good cause for his failure to file. Even if all the time from the passage of the IPA to the filing of the DNA test results is excluded, that 66 months and 10 days is sufficient to render the instant motion untimely under § 3600(10)(B).[8]

II. MACDONALD KNOWINGLY FAILED TO REQUEST DNA TESTING OF EVIDENCE IN A PRIOR MOTION FOR POSTCONVICTION TESTING, CONTRARY TO § 3600(a)(3)(A)(ii).

22. MacDonald maintains that he did not knowingly fail to request DNA testing in a prior motion for postconviction testing, a failure which would be disqualifying under 18 U.S.C. § 3600(a)(3)(A)(ii). DE-238 at ¶14. MacDonald argues:

> "In fact, in MacDonald's 1998 Motion For An Order to Compel The Government To Provide Access to All The Biological Evidence for Examination 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."

Id. MacDonald indeed sought to test the full universe of biological

[8] MacDonald's reliance on *United States v. Boose*, 498 F. Supp. 2d 887, 889 (N.D. Miss. 2007), [DE-238, n.17], for the proposition that the IPA permits DNA testing - "no matter how much time has transpired - or what other deadlines have passed" is misplaced. In *Boose, the district court denied the motion for DNA testing on other grounds, but in dicta* rejected the Government's argument that the statute "is not intended to provide a method to collaterally attack a conviction years after the possibility of review of the conviction by the Supreme Court by writ of certiorari or by district court under *Title 28, United States Code, Section 2255 have expired."* In fact, *Boose* did not involve an interpretation of § 3600(a)(10).

evidence, but he so moved on September 11, 1998, 17 months after the initial request for DNA testing had been sought and granted in October 1997. The Government's argument under § 3600(a)(3)(A)(ii) is based on his *1997* Motion To Reopen 28 U.S.C. § 2255 Proceedings and for Discovery filed April 22, 1997. DE-46. See DE-227, ¶¶18-20 at 10-14, and Exhibits 1-4. Accordingly, MacDonald has failed to demonstrate a basis for relief with respect to the items which he did not seek to have tested in 1997. DE-238. Consequently, and in light of the Court's Order of December 11, 1998 [DE-86], the Court should consider the Government's assertions as unrebutted.[9]

III. MACDONALD IS ALSO SEEKING TO TEST EVIDENCE WHICH WAS PREVIOUSLY INCLUDED IN A MOTION THAT WAS DENIED, CONTRARY TO § 3600(a)(10)(A)(i).

23. The Government has previously set forth in detail its arguments as to why specific evidence listed in MacDonald's 1998 Motion To Compel [DE-73] are barred from testing at this time under § 3600(a)(10)(A)(i). DE-227 at 15-16, and Ex. 1-4. MacDonald's only reply was to conflate the IPA provisions applicable to the 1997 DNA Testing Motion with those applicable to the 1998 Motion to Compel, and proclaim that: "[i]t is irrelevant that the court later denied his [1998] motion. DE-238 at ¶14. Actually, this Court

[9] In his New Trial Reply [DE-237, ¶3 at 3], MacDonald states that: "The Government incorrectly claims that in his 1997 Motion For DNA Testing, MacDonald sought testing of 'specific exhibits but nothing more regarding DNA.' DE-212 at ¶23. In fact, MacDonald requested access to all evidence in the Government's possession, including unsourced hairs, skin, and blood, but was only granted testing on specific items." Of course, no citation is provided for this assertion, which is erroneous at best in light of what his 1997 motion actually said (see ¶¶1-2, *supra),* and the Court's subsequent ruling of December 11, 1998. DE-86 (see ¶9 *supra*).

granted MacDonald's motion in part and denied it in part. DE-86. The relevance of this Court's 1998 ruling is that, in addition to determining for purposes of § 3600(a)(3)(A)(ii) what was, and was not, covered by the 1997 motion, it also renders untimely under § 3600(a)(10)(A)(i) MacDonald's request to test the identical evidence included in the instant motion [DE-176, DE-189-1]. The same evidence was also included in the 1998 motion [DE-73], and this Court denied his request to test. See DE-227-5, Exhibit 4 Schedule. As the instant motion [DE-176, DE-189-1] is based solely on the same information, i.e., the 1970 CID Lab report used in the 1998 motion, and that motion was denied, testing in 2012 of the same evidence is untimely. Further, the Court's 1998 ruling precludes the testing of non-biological evidence (glasses, cups, etc.) which was neither listed in the 1997 motion [DE-46] nor the 1998 motion [DE-73]) because MacDonald previously failed to request testing of these exhibits. See 18 U.S.C. § 3600(a)(3)(ii).

IV. MacDONALD SEEKS TO RE-TEST EVIDENCE THAT WAS PREVIOUSLY SUBJECTED TO DNA TESTING USING METHODOLOGY WHICH IS NOT NEW AND WHICH IS NOT SUBSTANTIALLY MORE PROBATIVE THAN THAT USED IN THE PRIOR TESTING, CONTRARY TO §3600(a)(3)(B).

24. MacDonald contends that the previous testing focused on hair evidence collected at the crime scene and "[t]he 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." DE-238 at ¶16. This last assertion is a non-sequitur: § 3600(a)(3)(B), by its very

language, only provides for re-testing of items which have previously been tested. It does not provide for the initial DNA testing of items which he failed to include in a prior request (§3600(a)(3)(A)(ii)) nor items contained in a prior motion that was denied (§3600(a)(10)(A)(i)). In actuality, he is seeking to test both categories and also to re-test the same items tested by AFIP between 1999-2006 [DE-189-1], which was not limited to hair, but also included blood, and the methodologies he seeks to employ are neither new, nor substantially more probative under the circumstances of this case. Further, the IPA provides no authority for challenging prior test results which were definitive, PCR/STR sequences for example, merely because the results do not support the defendant's theory. Rather, § 3600(a)(3)(B) is intended to allow re-testing where there has been a watershed development in DNA technology which provides discrimination that is "substantially more probative than the prior DNA testing" of that exhibit. Absent this criteria, the IPA does not authorize re-testing every time a new commercial kit becomes available.

25. MacDonald seeks to employ "Touch" or Low Copy Number ("LCN") DNA testing, but refuses to identify with particularity which items he seeks to have tested using this methodology.[10] LCN DNA testing has been reported in the scientific literature since

[10] As set forth in DE-227, Exhibit 5, Schedule B, we asserted that none of the exhibits which MacDonald seeks to test are suitable for Touch DNA testing. MacDonald has not replied to this assertion, and the Court should consider it as unchallenged. Nevertheless, we assume MacDonald proposed to use Touch DNA on all exhibits.

the mid-1990s. The earliest article we have been able to find so far was published in 1996, prior to MacDonald's first DNA motion.[11] By 1997, the scientific literature was reporting *DNA fingerprints from fingerprints*[12], and *DNA fingerprinting from single cells.*[13] Also in 1997, it was reported that scientists analyzed epithelial cells transferred from an assailant after strangulation.[14] In 1998, the ability to analyze fingerprints and skin debris from tools was reported.[15] MacDonald could have requested this technology between 1997-2006, but did not.

26. Y-STR methodology was extensively reported in the scientific journals in the late 1990's including: *Evaluation of Y-chromosomal STRs: a multi center study(Kayser, et al.); Chromosome Y microsatellites: population genetic and evolutionary aspects* (deKniff, et al. Int. J. Legal Med. 110; (141-149) 1997; and *New, Male-Specific Microsatellite Markers from the Human Y Chromosome*, Genomics 1999.[16] Attached as Exhibit 7 is an article entitled

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[11] Pierre Taberlet, *Reliable genotyping of samples with very low DNA quantities using PCR*, Nucleic Acids Research, 1996, Vol. 24 , No. 16 3189-3194. (Attached as Exhibit 1.)

[12] van Oorschot, Nature Vol. 387, 19 June 1997. (Attached as Exhibit 3.)

[13] Findlay, Nature, Vol. 389, 9 October 1997. (Attached as Exhibit 2.)

[14] P. Wiegnand & M. Kleiber, *DNA Typing of Epithelial Cells After Strangulation, 110* Int'l J. Legal Med. 181-3 (1997)

[15] David E. O. Van Hoofstat, ET AL., *Dna Typing of Fingerprints and Skin Debris: Sensitivity of Capillary Electrophoresis in Forensic Applications Using Multiplex PCR*, *In* Proceedings of the 2nd European Symposium of Human Identification, 1998. Promega, Innsbruck, Austria, at 131-7.

[16] See also Exhibit 5, Y-STR References-Bibliography

Recent Developments in Y-short Tandem Repeat and Y single Nucleotide Polymorphism Analysis, published in 2003 by J.M. Butler of the National Institute of Standards, which discusses the development of Y-Short Tandem Repeat technology beginning in 1992, including the availability in 2003 of numerous commercial Y-STR kits. *Id.* at 100.

27. The use of the mini-STR methodology began in 1994, and with the U.K.'s Forensic Science Service testing of degraded remains from the Branch Davidian fire in WACO, Texas. See Whitaker, et al. (1995) BioTechniques 18(4):670-677 and Lygo, et al. (1994) In. J. Legal Med, 107:77-89. *A Timeline of Events surrounding Development and use of miniSTR Loci for Forensic DNA Typing* is attached as Exhibit 8.

28. Neither Y-Chromosome nor mini-STR testing will be substantially more probative in testing the evidence which MacDonald has identified. The same is true with respect to Touch DNA testing, which, if permitted, could be used to collect the DNA from some exhibits, and once collected that DNA could be tested using mini-STR or Y-Chromosome methodology. As the sensitivity of Touch DNA collection methodology, and the inability to later distinguish between authentic and artifact DNA profiles, raises great concerns which are more appropriately explicated in relation to § 3600(a)(4), we will address them *infra*.

29. MacDonald contends that since he was "the only male living in the MacDonald home, this is the optimal case for the use

of Y-filer kits." DE-238 at ¶21. And further, [g]iven the amount of blood at the crime scene and the fact that all the victims were female, Y-filer testing would be better suited than previous testing to identify the male intruders MacDonald described the night of the crimes." *Id.* There are several things wrong with this hypothesis: (1) although MacDonald may have been the only male living there at the time of the murders, he cannot establish that he was the only male who ever visited the quarters; (2) until 2012, MacDonald has always maintained that he too was a victim who sustained numerous stab wounds which resulted in the Type B blood found in the hall bath area and kitchen. See DE-227-7, Schedule C, Exhibit 6. MacDonald is trying to show that neither he nor his murdered wife and children are the source of the less probative bloodstains. There is a much more efficacious way to confirm or eliminate a potential donor of a bloodstain. That is PCR/STR DNA analysis, which was available to MacDonald in 1997, had he chosen to test these bloodstains. In addition, mtDNA testing is fully effective for elimination purposes, and it eliminated Stoeckley and Mitchell as the source of any of the hairs. DE-123-2 at 6.

30. MacDonald also argues that "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." DE-238 at ¶22. MacDonald fails to identify the "certain" items from which AFIP was unable to obtain an STR profile, although he previously has

identified for retesting a total of 24 questioned and known specimens tested by AFIP. DE-189-1. Of the 10 questioned samples he has identified, 8 consist of pill vials that at one time contained debris collected at autopsy, which in 1999-2006 were found to contain no biological residue. Consequently, AFIP performed no DNA testing on these items. DE-123-2 at 6-9.

31. Not surprisingly, MacDonald would like to retest the hair found in his wife's left hand (Exhibit E-5/AFDIL 51A(2)). DE-189-1. As this hair had no root or follicular tissue, it was not suitable for nuclear DNA STR testing. DE-227-12. If there is no nuclear DNA to test, miniSTR is of no use. The hair was subjected to mtDNA testing and found to contain the same mtDNA sequence as MacDonald. DE-123-2 at 8. Further, as the AFIP report reflects, sample 51A(2)/E-5 was "consumed" in the testing process. DE-123-2 at 19.

32. MacDonald also seeks to re-test the hair found in his wife's right hand (E-4/ AFDIL 52A). DE-189-1. AFIP's STR analysis yielded insufficient data to render a conclusion with respect to the hair root of specimen 52A (E-4, Q118). DE-123-2 at 6. Mitochondrial DNA analysis of the hair shaft of 52A, however, revealed an mtDNA sequence which matched those of Colette, Kimberly and Kristen. DE 123-2 at 7. Consequently, the hair cannot have originated with either Stoeckley or Mitchell. At trial, there was unchallenged testimony that the E-4/GX 280 hair microscopically matched the head hair exemplar of Colette MacDonald. Tr. 4156-57.

33. AFIP's STR analysis of the hair roots of Helena Stoeckley (Specimen 05A) yielded data which was insufficient to render a conclusion. DE-123-2 at 6. Mitochondrial analysis of 05A revealed an mtDNA profile that was not consistent with any other sample tested. DE-123-2 at 8. Consequently, Stoeckley's mtDNA profile was sufficient to eliminate her as a source of any of the questioned samples tested.

34. AFIP's STR analysis of Greg Mitchell's reference tissue sample (Specimen-198A) revealed a full STR profile, which was not consistent with any other evidentiary sample tested. DE-123-2 at 6. Mitochondrial DNA analysis of Mitchell's reference sample also yielded an mtDNA sequence which was not consistent with any other sample tested. DE-123-2 at 8.

35. The remaining specimens tested by AFIP all involved reference samples from MacDonald family members. Although some of these paraffin blocks did not yield full profiles, others did. DE-123-2 at 6-7. Consequently, AFIP was able to obtain full STR profiles on all the family members: Colette (195A/195/E and 195/J); Kimberly (196A/196G); Kristen (197A/197E); and Jeffrey(199A).

36. MacDonald has identified no existent specimen, which was previously examined by AFIP for STRs, for which MiniFiler testing would not be redundant. DE-189-1, DE-123-2 at 6.

V. THE SPECIFIC EVIDENCE TO BE TESTED HAS NOT BEEN RETAINED UNDER CONDITIONS SUFFICIENT TO ENSURE THAT SUCH EVIDENCE HAS NOT BEEN CONTAMINATED OR ALTERED IN MATERIAL RESPECTS.

37. The evidence which MacDonald seeks to test was collected and initially examined in 1970. Once the initial laboratory examinations were conducted, the items were returned to Fort Bragg, and were not handled thereafter in accordance with the standards that IPA would now require, because there was no such thing as DNA testing, much less Touch DNA, at the time. The evidence went through the hands of numerous evidence custodians over the last 42 years, including the Army CID, the FBI, the Clerk of Court, and the U.S. Marshal for the Eastern District of North Carolina, as well as persons working on the MacDonald defense team. In short, the handling of the evidence has not preserved the reliability of Touch DNA testing, not as a result of any improper intent or negligence, but because the potential for Touch DNA testing was entirely unforeseeable at the time. Forensic practitioners have long recognized the problems of defining when Low Copy Number DNA transfers occurred in relation to an item of evidence since "DNA can be transferred at any time before, during, and after the crime."[17] One prominent scientist, Bruce Budowle, has called for limiting LCN DNA's use to cases of missing persons or investigative leads, and not using it in the criminal justice system, because of the numerous reliability problems.[18] MacDonald contends that so long as the evidence has been continuously retained by the

[17] Gill, Peter, *Application of Low Copy Number DNA Profiling*, CMJ Foreum, 42(3):229-232, 2001, attached as Exhibit 4.

[18] See Exhibits 9-10.

Government "the court presumes they were retained under appropriate conditions to satisfy §3600(a)(4)," citing *United States v. Fasano*, 577 F.3d 572, 576 (5th Cir. 2009). DE-238 at ¶24. *Fasano*, as we have previously explained in detail [DE-227, ¶39 at 34-35], is distinguishable from the case at hand. This is so because not only was it uncontested that the items to be tested were used in the robbery, but the context of the testing was limited to two individuals: Fasano and Hughes. If the DNA did not come from Fasano but rather was that of Hughes, "the strong case against Fasano evaporates ...." While noting that the possible presence of DNA from multiple handlers was "also relevant to the question of spoliation of DNA under [§ 3600] (a)(4,)" the court was persuaded "... that the relevant tests can be performed in compliance with the limits of (a)(4), leaving other consequences of the possibility of multiple donors of DNA for (a)(8) where it is apt." 577 F.3d at 577.[19] It is clear from the opinion that the court was relying on the expert's testimony that "DNA mixtures in which each component is present at high enough quantity and quality for detection have no bearing on the ability to exclude a person's DNA [presumably Fasano's] from the profiles present in the mixture." *Id.* But this is not the situation facing this Court. MacDonald is seeking to employ the ultra-sensitive Touch DNA methodology, which could

[19] The reference to § 3600(a)(8) clearly reflects that the inquiry does not end with whether the evidence has been in the Government's custody continuously ((a)(4)), but must also include a determination that the evidence may raise a "reasonable probability that the applicant did not commit the offense."

detect the DNA of anyone who handled an item within the last 42 years, in the hope that any unsourced DNA profile will form the basis to overturn his conviction on the theory that any unsourced DNA *per se* proves the presence of intruders on the night of the murders. Even if separate but unsourced DNA profiles are obtained from a specimen, the examiner will be able to determine when and how the unsourced profile came to be on the substrata. The crime scene was a ground floor residence occupied by the MacDonald family for approximately six months before the murders, and by many other families before that. There can be no dispute that other family members, neighbors, and members of MacDonald's Army unit all visited the residence before the murders.[20] Consequently, the potential for adventitious DNA transfer to the house and its contents before the crime cannot be eliminated. Similarly, contamination occurring after the crime cannot be eliminated. Even if an unknown profile is obtained, DNA testing is incapable of

[20] At Christmas 1969, Colette's mother and stepfather, Mildred and Alfred Kassab (now both deceased), visited the residence. Tr. 3263-65. Mildred Kassab recalled that the neighbors (the Kalins) were invited over by Jeffrey MacDonald, and this delayed the Christmas dinner. *Id*. Mildred also testified that she used an ice pick to remove ice so that she could store her puff pastry in the MacDonald's freezer. Tr. 3266. Pamela Kalin Cochran recalled that, while babysitting, she also used the ice pick to free popsicles from the freezer. Tr. 3554, 3559-60. Major Frank Moore recalled MacDonald inviting him home for lunch on multiple occasions and Colette fixing them sandwiches, which he ate with glasses of milk. Tr. 6406. Carole Butner, a friend of Colette, recalled visiting their home on different occasions. Tr. 6473-75. These excerpts from the trial likely recount only a fraction of the visits to 544 Castle Drive by persons other than Jeffrey, Colette, Kimberly, and Kristen MacDonald during the months preceding the murders. Any profiles raised by Touch DNA from objects in the MacDonald home are far more likely to belong to these visitors than to alleged hippie intruders on the night of February 17, 1970.

determining the age of the profile in relation to the age of any other profile.[21] The movant must be able to identify a methodology that will be able to accurately distinguish between authentic DNA and artifact or contaminate DNA in order to demonstrate that "contamination will not have affected the outcome." See DE-238 at ¶24.

38. In its Response, the Government set forth in considerable detail the pitfalls of LCN DNA testing, including Touch DNA, which are the basis of the FBI Laboratory's policy decision not to utilize this methodology. DE-227 at ¶¶44-54, DE-228 at ¶¶7-10. MacDonald has essentially chosen to ignore these concerns, both with respect to the methodology and to specific exhibits (e.g. the latex glove fragments). DE-238. Instead, MacDonald's expert, while, not disputing the concerns, merely opines that because of the availability of various kits "...it may not be necessary to employ the techniques she [Tina Delgado] describes as low copy number (LCN)." MacDonald's expert cannot specify what "kit" or methodology will accurately explain when and how contaminate DNA came to be on an item because one does not exist. These concerns have been recognized by the scientific community.[22] Based upon MacDonald's lack of an effective response to these concerns, the Court should consider them as unrefuted and should not presume the

[21] See Exhibit 4 at 229-31.

[22] See Budowle, Bruce: *Validity of Low Copy Number Typing And Applications to Forensic Science* (Attached as Exhibit 9); Budowle, Bruce, *Low Copy Number Typing Lacks Robustness and Reliability* (Attached as Exhibit 10).

requirements of § 3600(a)(4) have been met. *Fasano* is not the law of this Circuit and is factually distinguishable in that not all of the items have been continuously in the Government's custody, and, therefore, this Court is not required to follow its reasoning.[23] Instead, as we suggested in our Response [DE-227 at ¶50], the alternative basis for the decision in *Hood v. United States*, 28 A.3d 553 (D.C. 2011) is fully applicable to the facts in this case. DE-238-21 at ¶5.

VI. MacDONALD HAS FAILED TO DEMONSTRATE THAT THE PROPOSED TESTING IS REASONABLE IN SCOPE, USES SCIENTIFICALLY SOUND METHODS, AND IS CONSISTENT WITH ACCEPTED FORENSIC PRACTICES AS REQUIRED BY § 3600(a)(5)

39. MacDonald's only reply to the detailed assertions in the Government's Response about the unreasonableness of the scope of the proposed testing [DE-227 at 37-47, ¶¶42-54] is to state that "it is inconceivable that any amount of testing – in this specific case – could be unreasonable." DE-238 at ¶27. This is so, MacDonald asserts, because "[t]he purpose of the IPA is to conduct DNA testing where the testing could contribute to a definitive answer as to guilt or innocence." *Id.* This statement has a

[23] In *Fasano,* the court placed great weight on the fact that the evidence "was held *in government custody." 577 F.3d, at 577.* In this case all of the prosecution's evidence admitted at trial, including many of the items MacDonald now seeks to test, were held from 1979 to 1984, not by the Government, but by the Clerk of Court. See DE-227-5, Exhibit 4. (If the item has a "GX" number, it was held by the Clerk's Office.) Of course, clerk's office personnel would not knowingly "contaminate" exhibits. They merely moved them from place to place, a practice no one considered contamination prior to the 1990s. Because the known forensic techniques of the 1970s, such as fingerprinting and blood-typing, had already been performed on these exhibits, no one thought that merely touching them would constitute contamination.

superficial appeal, until one realizes that MacDonald has carefully structured his request so as to avoid testing any of the bloodstains that were key to the prosecution's case.[24] Clearly, in this so-called "search for the truth," MacDonald wants to avoid any DNA testing which would confirm the victims as sources of the key bloodstains, because this would be an inconvenient truth.

40. MacDonald has failed to respond to any of the legitimate concerns raised about the use of Touch DNA methodology to collect a sample for further DNA testing. DE-238. The problem with Touch DNA is its hyper-sensitivity in collecting skin cells - not just from perpetrators - but from anyone and everyone who ever handled an object, combined with the lack of any scientifically sound method to distinguish between primary and secondary transfer.[25] These problems were recognized by the Supreme Court in *Osborne*, *supra*.[26] This flaw is further exacerbated by the fact that Touch

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[24] For example: the presence of Colette and Kimberly's blood types on MacDonald's pajama top (GX 101, GX640); the presence of Kimberly's blood type soaked into the rug in the master bedroom (GX 309, GX 645); the presence of bloody fabric impressions, in Colette's blood type, matching the right sleeve of MacDonald's pajama top, and found in the sheet on the master bedroom floor (GX-978); or the presence of Colette's blood type on the top sheet of Kristen's bed (GX 9820).

[25] See Exhibits 9 and 10.

[26] Justice Alito's concurring opinion, in noting that experts have written that "the extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process," cites the following example: "Indeed, modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence. STR tests, for example, are so sensitive that they can detect DNA transferred from person X to a towel(with which he wipes his face), from the towel to Y(who subsequently wipes his face), from Y's face to a murder weapon later wielded by Z (who can use STR technology to blame X for the murder ...[citation omitted]. Any test that is sensitive enough to pick up such trace evidence will be able to detect even the

DNA/LCN results fall within a "stochastic zone" [DE-228 at ¶9] which can compromise the reliability of the typing system. If Touch DNA methodology is used to initially collect the sample, which is then subjected to STR testing (including mini-STR), the validity of the testing has already been compromised by the introduction of specious DNA. That the risks of Touch DNA testing far outweigh the potential benefits to law enforcement is demonstrated by the FBI's policy decision not to conduct Touch/LCN testing, or to permit results from same in the National DNA Index System (NDIS). DE-228 at ¶¶6-10. When the nation's premier forensic laboratory refuses to conduct Touch DNA testing, the proposed DNA testing has not been demonstrated to use scientifically sound methods that are also consistent with accepted forensic practices. MacDonald has failed to meet his burden under § 3600(a)(5).

VII. MacDONALD HAS FAILED TO MEET HIS BURDEN UNDER 18 U.S.C. § 3600(a)(8) THAT THE PROPOSED TESTING OF THE SPECIFIC EVIDENCE MAY PRODUCE NEW MATERIAL EVIDENCE THAT WOULD SUPPORT HIS THEORY OF DEFENSE *AND* RAISE A REASONABLE PROBABILITY THAT HE DID NOT COMMIT THE OFFENSE.

41. MacDonald sets up four self-serving scenarios, and asserts that if any one occurs, then this would be new material evidence that would support MacDonald's claim that intruders murdered his family and would raise *more* than a reasonable

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slightest, unintentional mishandling of evidence." *Osborne*, 129 S. Ct. at 2327-28.

probability that he did not commit the offense. [DE-238 at ¶34. He asserts that "[t]he IPA only requires that '[t]he proposed testing ...*may* produce new material evidence .... 18 U.S.C. § 3600(a)(8) (emphasis in original). DE-238 at ¶35.

42. The language of § 3600(a)(8) which MacDonald has chosen to excise is material:

> The proposed DNA testing of the specific evidence may produce new material that would–
>
> (A) support the theory of defense referenced in paragraph (6); *and*
>
> (B) raise a reasonable probability that the applicant did not commit the offense.

(Emphasis added.) It is not sufficient for the requirements of § 3600(a)(8) that the proposed testing *may* produce evidence which supports MacDonald's flawed theory (unsourced DNA could only have come from intruders). It must also "*raise a reasonable probability* that [MacDonald] did not commit the offense." Further, § 3600(a)(8) must be read in conjunction with § 3600(a)(6)(B)'s provision that the results of such testing "would establish the actual innocence of the applicant of ... the offense ... ." The meaning of actual innocence under the IPA is to be found in § 3600(g)(2), which must be read together with subsection (g)(1). "The court shall grant the motion of the applicant for a new trial ... if the DNA test results ['exclude the applicant as the source of the DNA evidence'], when considered with all other evidence in the case ... establish by compelling evidence that a new trial

would result in an acquittal."

43. MacDonald ignores the § 3600(g) requirement that the testing under § 3600(a)(8) be of "specific evidence." He instead "... seeks to test the evidence in question in order obtain a DNA profile ..." that falls into one of his four hypothetical scenarios, disregarding § 3600(g). DE-238 at ¶34. The IPA, however, does not provide for such unlimited testing, as we have previously set forth in detail. See DE-227 at 26-33, ¶¶ 32-38. As previously demonstrated in the Government's Response to Motion for New Trial Pursuant to the IPA [DE-212], testing under the IPA is limited to two categories: (1) biological evidence used to convict the applicant at trial which the Government claimed came from the applicant; or (2) biological evidence the applicant establishes (or the prosecution agrees) could only have come from the perpetrator. DE-212 at 37-39. MacDonald has ignored this limitation in his Reply. DE-238. In this case, the only biological evidence which the Government offered at trial as coming from MacDonald that he seeks to test are the two Type B bloodstains on the kitchen floor (D25K & D26K). DE-189-1; see also photographs attached hereto as Exhibits 11 and 14.[27] Other bloodstains which the Government never claimed came from Jeffrey MacDonald, because the blood type was inconsistent with his, are simply not subject to testing under the

[27] We note in passing that MacDonald has not sought testing of the Type B blood on the rim of the sink in the hall bath (GX-338, GX-339; see also Exhibit 16 (photograph) nor the Type B blood on the door of the linen closet (GX-344) where the disposable scalpel blades were kept. DE 227-7, Schedule C (attached as Exhibit 6).

IPA.

44. In regard to the second category, MacDonald seeks to do DNA testing in order to: " ... obtain a redundant DNA profile on pieces of evidence that the perpetrators would undoubtedly have come into contact with." DE-238 at ¶34. MacDonald never identifies what specific "pieces of evidence" he is referencing, or how he has established that a perpetrator (other than MacDonald) would have "undoubtedly" come into contact with them - an apparent reference to Touch DNA testing.[28] Section 3600(a)(8)(B) requires that the proposed DNA testing be capable of producing new material evidence that "would raise a reasonable probability that the applicant did not commit the offense." This requirement is not satisfied unless evidence for which testing is requested can be identified with confidence as deriving from the perpetrator of the crime. Biological evidence which could certainly have come from the victims cannot meet this requirement.

45. We are not dealing here with ski masks, bandanas, robbery notes, or anything related to a sexual assault, which indisputably came from the perpetrator. Instead, based upon his list [DE 189-1], we are dealing with items which include oven gloves (D 34K) and items in the kitchen dish drainer (O, P, Q, R-1 and R-2). See Exhibits 12 and 13 (photographs). It is difficult to conceive of a plausible scenario in which intruders would have

[28] This unsupported hypothesis would have no application to MacDonald's request to re-test "all reference samples." DE-189-1.

handled the kitchen items in committing these heinous murders. At trial, other evidence showed that the blood from the blades of the Old Hickory knife and the ice pick, two of the murder weapons, had been wiped off onto the Hilton bath mat (GX-314) found on Colette's body. See Exhibits 18-20 (photos). (MacDonald claimed to have covered Colette with "a towel," in addition to his pajama top. Tr. 2893-94. MacDonald has not sought to test the bloodstains on the bath mat, or even more tellingly, his own pajama top. DE-189-1.

46. MacDonald also seeks to obtain a "redundant" DNA profile on pieces of evidence claiming that the presence of the same unidentified profile on more than one unspecified item of evidence–which the perpetrator "undoubtedly" also came in contact with–identifies the donor of that profile as the perpetrator. DE-238 at ¶34. This argument is flawed, given the fact that skin cells are not only deposited on substrata by perpetrators but by anybody who ever came in contact with the item. The inherent inability to distinguish between authentic DNA and artifact DNA collected by Touch DNA methodology. The same visitor, investigator, examiner, custodian, attorney, expert, court clerk, or juror could have touched these items at various times and left his or her DNA profile on more than one item. "Redundant" DNA without temporal context proves nothing.

47. MacDonald also asserts that the proposed testing may "obtain an unknown profile within a spot of blood," but again fails to identify any specific exhibit. It is unclear whether he is

talking about a secondary blood spot within a larger bloodstain–a mixture–or a touch DNA profile superimposed upon a bloodstained item. In the case of the former, he has proffered no evidence to support his speculation that such a stain within a stain exists on any specific item.[29] Nor has he provided any clear evidence that a methodology even exists for testing a "spot of blood" within a larger blood stain.[30] In any case, at this late stage we are not dealing with any pristine or untested spots of blood, in relation to the items he has identified. Rather, at best, we are dealing with stains that were swabbed or otherwise collected from the original substrata - walls, floors, beds, etc. - into some secondary container, and the container itself may now pose issues of contamination. In the case of the latter Touch DNA scenario, MacDonald has not sought to test any bloodstained garments or items of apparel which might contain the secondary DNA profile of the wearer. This lends weight to the concern that he may be intent on performing Touch DNA collection on any residual swabs or swatches of gauze originally used to collect the stains, which, once subjected to serological testing, may have been reportedly handled in the intervening years. This undefined form of testing on

[29] This methodology would have no application to any of the listed items under "other possibilities" whose stains were previously determined to be "not blood". [DE-189-1] Nor to any of the listed items (cups, drinking glasses or locking devices) for which there is no indication that they even had red-brown stains, much less blood stains. *Id*.

[30] The affidavit of his expert, Meghan Clement, does not address this methodology, he has cited no scholarly articles, and, for that matter none of the media articles he has filed describe this technique. DE-238, DE-238-21.

unspecified items is of no validity and lacks the ability to establish a reasonable probability that MacDonald did not murder his family.

48. MacDonald hopes that any profile he obtains can be matched to an individual whose DNA profile is already in CODIS. DE-238 at ¶34. We note that, other than Greg Mitchell, he does not name any of the other individuals at times identified by Stoeckley as participants.[31] The FBI's National DNA Index System or "NDIS" is considered one part of the Combined DNA Index System or "CODIS," which contains DNA profiles contributed by federal, state and local participating forensic laboratories. DE-227-15, Exhibit 14. In order to participate - that is contribute DNA profiles and search for them in NDIS - in addition to stringent quality control and accreditation requirements, the DNA Identification Act of 1994 ((42 U.S.C. § 14132(b)) requires that the laboratory is a federal, state, or local criminal justice agency. That access to the DNA samples and records is limited in accordance with Federal law. Although MacDonald has yet to identify a specific laboratory to conduct the tests, unless he plans to use a state, federal or local laboratory, the results of any testing conducted by a private lab cannot be submitted to NDIS/CODIS.

49. MacDonald proclaims that if any of the four hypothetical DNA scenarios occurs, then "the Government's case evaporates." DE-

[31] Don Harris, Bruce Fowler, Dwight Smith and Allen Mazzerolle. *United States v. MacDonald*, 640 F.Supp. 286, 321-323 (EDNC 1985).

238 at ¶39. Of course, MacDonald provides no authority for this assertion, other than to erroneously rely upon the *dicta* in *Fasano.* The Supreme Court has already spoken on this contention. Chief Justice Roberts, in delivering the opinion of the Court in *Osborne*, *supra*, and after noting the advances in DNA technology, culminating in STR technology, wrote:

> At the same time, DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. See *House v. Bell,* 547 518, 540-548, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). The availability of technologies not available at trial cannot mean that every criminal conviction, or every conviction involving biological evidence is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of justice.

Id. at 2316.

50. This is precisely what MacDonald seeks to do here: Harness the hypersensitivity of Touch DNA in order to manufacture an "unknown profile" without regard to the inadvertent contamination over a period of decades in the pre-DNA era of evidence by dozens of individuals–some now deceased–and the inability of the Touch DNA methodology to distinguish between authentic DNA and contaminate DNA. This is not "a search for the truth." Rather it is a search for specious evidence resulting from spoliation. An "unknown profile," in the paradigm MacDonald has created, proves the presence of intruders, and causes all of the

Government's evidence–whether or not affected by DNA testing–"to evaporate." MacDonald proposes to achieve his goals, without ever risking that the DNA testing will confirm his guilt. In enacting the IPA, Congress did not intend to enable such a stratagem.

CONCLUSION

51. MacDonald has failed to satisfy the requirements of18 U.S.C.§3600(a), all of 10 which the Court must find apply before ordering DNA testing. As the foregoing analysis has demonstrated, MacDonald's motion fails because it is:

a. Untimely, based on information in a previously denied motion-- (a)(10)(A)(i)

b. Untimely, evidence not newly discovered-- (a)(10)(B)(ii)

c. Untimely, failure to demonstrate good cause for more than 60-month delay-- (a)(10)(B)(iv)

d. Knowing failure to request testing in a prior motion-- (a)(3)(A)(ii)

e. Previously tested and the method is neither new nor substantially more probative-- (a)(3)(B)

f. Evidence not retained under conditions ensuring it has not been contaminated-- (a)(4)

g. Testing does not use sound methods consistent with accepted forensic methods-- (a)(5)

h. Testing will not raise a reasonable probability MacDonald did not commit the murders--(a)(8)

Consequently, the mandatory language of § 3600(a) ("shall order DNA

testing") is inapplicable to his motion to authorize additional DNA testing under the IPA. For the reasons set forth herein, and any others which the Court may find applicable, the Government submits that the motion is untimely and without merit on numerous grounds.

52. MacDonald has asserted that "... his actual innocence has already been established by the prior DNA testing results and other exculpatory evidence, and that he is entitled to relief from his convictions under either 28 U.S.C. § 2255 or 18 U.S.C. § 3600, or both, without additional DNA testing." DE-176 at §9. "Alternatively, should the court deny defendant relief from his convictions without additional DNA tests, defendant moves for ... DNA testing of additional biological evidence that the defendant will identify ..." *Id.* MacDonald's §2255 motions (Britt and DNA, having been remanded from the Fourth Circuit) and § 3600 motion (new trial motion filed on September 20, 2011) are pending before the Court. He moved in the alternative for new DNA testing if denied relief on his pending motions. It is respectfully submitted that MacDonald's motions be decided in the order in which he filed them.

53. If, despite the arguments set forth herein, the Court orders further DNA testing, the Government urges the Court not to defer resolution of the pending §§ 2255 and 3600 motions for new trial until the completion of new DNA testing, which could take years. The Government also respectfully requests that any new testing be limited as set forth below in ¶¶54-56 below.

54. Touch DNA testing or other forms of Low Copy Number DNA testing, either separately or in combination with other STR testing, should not be permitted by any laboratory, because of the documented unreliability of the processes and its results. See Exhibits 9 and 10.

55. DNA testing by PCR for STR's should be limited to the two Type B blood stains which the Government contended at trial came from Jeffrey MacDonald (GX-136/D25K and GX-137/D26K), and which MacDonald has sought to test. DE-189-1. It is further requested that the Court not order the testing or retesting of any other items unless the Court finds that MacDonald has met his burden of demonstrating that the specific biological evidence to be tested could only have been left by the perpetrator during the commission of the crime. It is further requested that the Court direct this testing of these exhibits be carried out by the Federal Bureau of Investigation, pursuant to 18 U.S.C. § 3600(c)(1), within their established policies, which will not include LCN/DNA.

56. Should the Court determine that the testing of the evidence described above in ¶55, or any other evidence, be carried out by another qualified laboratory, the Government requests an opportunity to be heard, pursuant to 18 U.S.C. § 3600(c)(2), on such issues as the existence of the evidence at this time, as well as its divisibility and suitability for testing, and the scope of all necessary orders by the Court to ensure the integrity of the specific evidence and the reliability of the test results.

Respectfully submitted, this 10th day of May, 2012.

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CERTIFICATE OF SERVICE

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

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This, the 10th day of May, 2012.

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