RAW

RESPONSE BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 14-7543

UNITED STATES OF AMERICA v. JEFFREY R. MACDONALD

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

RESPOSNE BRIEF OF APPELLANT JEFFREY R. MACDONALD

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INTRODUCTION

Jeffrey MacDonald ("MacDonald") was a 26-year old Army captain and doctor stationed at Fort Bragg when his pregnant wife and two young daughters were brutally murdered on 17 February 1970.

MacDonald was severely wounded and found unconscious by military police. Since his first statement to responders to his emergency call on that date, MacDonald has consistently maintained that the murders of his family were committed by a group of intruders.

Upon resuscitation, MacDonald described a woman with long blond hair wearing a floppy hat, who along with at least three others entered his home in the middle of the night and attacked him and killed his family.

Now 72 years old, MacDonald has never wavered from his initial account of these events, nor his assertion that he is innocent. He has now been imprisoned for almost 35 years.

MacDonald was convicted at a trial in the United States District Court for the Eastern District of North Carolina in 1979 -- nine years after the murders, and after he had been cleared of the crimes by a military tribunal.

The Government's case at trial was entirely circumstantial, and there was no direct proof of MacDonald's alleged involvement in the murders.

In 1970, shortly after recovering from wounds sustained in the attacks at his family's apartment, MacDonald voluntarily submitted to lengthy interrogation by the Army CID without legal representation because he knew he himself was not involved in the crimes and understood that spouses are, perhaps necessarily, initially viewed as suspects in such investigations. He recounted the events of that tragic night in hopes that the intruders he had described would be apprehended and brought to justice.

In June, 1970, the Army convened an Article 32 hearing. This tribunal was held to determine which was accurate: The CID's theory or MacDonald's voluntary account. After approximately 7 weeks of testimony and evidence, the presiding authority (Colonel Warren Rock) determined that the allegations against (Captain) MacDonald were "*not true*". He added that "the alibis of Helena Stoeckley and her associates should be investigated."

MacDonald was honorably discharged from the Army, and returned to his native New York where he worked at a local hospital and moonlighted making medical house calls.

MacDonald, now 28 years old, moved to Long Beach, California in 1972 and became Director of Emergency Services at St. Mary Hospital, supervising a staff of over 55 doctors and nurses. He was an innovator in state of the art life-saving techniques which were taught and published. On more than one

occasion, he risked his own life to save others and in 1975 became the first Honorary Member of the Long Beach Police Association not only because he had only saved several officers' lives, but because he had risked his own life in the process.[11]

Indeed, when MacDonald was indicted by a Grand Jury, it was the LBPA that organized and funded a dinner dance to raise funds for his defense.

In 1979, when MacDonald's federal trial was held, St. Mary Hospital kept his job open for him. Even post-conviction, his job was kept open for him, and the American Medical Association (ABA) kept his medical license(s) in good standing.

In 1980, when MacDonald was released on appeal by this Court, he returned to his position at St. Mary and continued to practice medicine until 1982 when the USSC reinstated his conviction. At that time, MacDonald voluntarily surrendered his medical licenses, believing that, because he was innocent, he would soon be released again and have his privileges reinstated.

Through the ensuing decades of imprisonment, MacDonald sought to uncover evidence not available to the trial jury via the Freedom of Information Act (FOIA). Many requests were disallowed; what did result were largely highly redacted documents, released piece meal over decades of time.

When something highly exculpatory surfaced, perhaps by accidental oversight, procedure dictated that MacDonald move the Court to reverse his convictions on that one piece of evidence alone (within one year of discovering something the government had known all along) or lose the right to appeal forever.

In this manner, the government systematically doled out long-suppressed evidence in its keeping over decades of time; decades in which each piece of exculpatory evidence that came to light was deemed "not enough" (by itself) to overturn MacDonald's conviction.

However, over time MacDonald had amassed enough evidence, including newly discovered evidence, that this Court was moved to reverse the District Court's November 2008 denial (May 2010) leading to an evidentiary hearing (September 2012) in which, for the very first time the "totality of the evidence" was to be considered "as a whole".[12]

Incredibly, new exculpatory evidence arose during the evidentiary hearing itself, as well as after it, and even after the district court's 2015 decision, once again denying MacDonald relief.

Despite specious and hyperbolic media accounts, myths proliferated by own our government, and the inherent difficulties of fighting for one's innocence without resources or access to evidence long-held by federal authorities, MacDonald has held fast to his belief that the Truth should dictate justice and responds herein to the government's brief regarding his request for appeal relating to the Innocence Protection Act.

STATEMENT OF FACTS

Facts and Procedural detail Regarding IPA Motion

The government continues to repeat that the evidence of MacDonald's guilt was "overwhelming". Yet several experienced judiciary officials thought otherwise.

Just months after the murders in 1970, after an exhaustive 7 week Army hearing, replete with 78 witnesses and the presentation of all of the authorities' evidence, the military tribunal headed by Colonel Warren Rock concluded that the charges against MacDonald were "not true".

Trial Judge Franklin Dupree declared in 1979, in a letter to defense paralegal Wendy Rouder that he "fully expected MacDonald to be acquitted".

Judge Francis D. Murnaghan, Jr. wrote in 1982:

> **"I conclude .... that the case provokes a strong uneasiness in me.....Still, the way in which a finding of guilt is reached is, in our enduring system of law, at least as important as the finding of guilt itself. I believe MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted. "**

That this case provoked "a strong uneasiness" in Judge Murnaghan, and that he pondered the fairness of MacDonald's trial given that seven witnesses to the confessions of key witness Helena Stoeckley were disallowed, is remarkably telling. His statement that *"The way in which a finding of guilt is reached is, in our enduring system of law, at least as important as the finding of guilt itself"* is unyielding and haunting because these words are true and self-evident.

As late as 2012, former North Carolina District Court Judge Jerry Leonard, a witness at MacDonald's evidentiary hearing, recounted his serious concerns about the inequities and bias he perceived during just a brief attendance at MacDonald's trial.

The reality is that the government's statement has been contradicted, not only by the plethora of exculpatory evidence that has come to light, but by the faultiness and inherent weakness of the government's "evidence" itself , which has been methodically articulated to the Court.

I. Facts Regarding the Blood Evidence in this Case

The government quotes the trial judge [Page 5 at 13-19] regarding the importance of the blood evidence as presented to the 1979 jury:

> **As fate would have it, MacDonald, his wife and two daughters all had different blood types: Colette MacDonald- Type A, Jeffrey MacDonald- Type B, Kimber(ley) 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.**

One can only imagine the devastating impact these words had on the jury, and yet they are totally false. Science dictates that blood "typing" is nothing more than a designation- it is not a means to determine a sequence of events, much less to reveal the identity of the person(s) involved.

The judge's words to the jury here are yet another example of the incredible amount of faulty evidence that infected MacDonald's trial. If the *trial judge* believed that blood typing could be used to reconstruct what occurred in the MacDonald apartment, who was defense counsel Bernard Segal, much less MacDonald, to tell them otherwise?

In its current brief, the government states [pg 6 at3-5]:

> **".....the issue at trial was not the identity of the contributor of a typed [blood] stain, but rather when, and how, it was deposited at the crime scene."**

Yet the *identity* of the contributors of blood at a murder scene IS the issue. For the government to contend otherwise is absurd, and simply shows how unscientific the prosecution's presentation at trial was at its very core. How could the identity of who contributed the typed stains not be the *only* relevant detail as to their value in the course of a murder trial? *Without knowing WHO contributed the typed stains, what does it matter when and how they were deposited?*

When and how the blood was deposited (which also cannot be determined by blood typing) is irrelevant if the identities of those who shed the blood are indeterminate.

It is incomprehensible that the prosecution was permitted to mislead the jury in this grossly injurious fashion. Like the "pajama top experiment" it so heavily relied on as "proof of guilt" at trial, the "reconstruction of events" using a blood type chart was completely without scientific merit. It is yet another indication of the inherent weakness of the government's case.

The government relied so heavily on the blood type chart shown to the jury that, in fact, it somehow "left off" one particular blood stain consisting of Type B blood [Jeffrey MacDonald's "type"] in the hallway adjacent to the living room. *Given that the jury believed it was looking at a "road map" of what happened in*

the MacDonald apartment that night, and the blood stain was located at the precise location where MacDonald said he first fell unconscious, omitting it was a particularly cruel example of prosecutorial misconduct.

The jury, believing there was no blood of any "type", much less MacDonald's, at the location where he said he had been wounded and knocked unconscious, was another government "evidentiary" item that wrongly led them to disbelieve MacDonald's account of events.

As Judge Dupree noted at a bench conference late in MacDonald's trial:

"I think this case is going to rise or fall on one thing and one thing only and this is whether or not the jury buys the Defendant's story as to what happened. That is all there is in this case. We have been here five weeks, and that is still all there is in this case." (TT 5256-57)

This is why DNA testing of the blood evidence in this case has always been crucial:

DNA testing has been proven to be a 100% accurate scientific way to learn the identity of who contributed the blood at the MacDonald crime scene, yet the government vehemently opposed any DNA testing in this case in 1997, and now in 2015. If any of the blood was DNA tested and found not to be the blood of a MacDonald family member, it would be astoundingly powerful evidence of intruders.

Importantly, why *does the government continue to vehemently oppose DNA testing?*

The blood evidence was central to the government's case at trial- but it's nothing more than a bold assumption- an assumption that egregiously misled the jury- to state that all of the blood stains belonged to MacDonald family members. Given that millions of people have each of the four blood "types" present at the crime scene, and that science dictates blood cannot be identified as belonging to a certain individual based on "type", how in the world could the government's "blood charts" even have been introduced as evidence?

The government goes to great length to explain away the folly of blood typing as a tool to determine guilt or innocence. It contradicts itself by stating [Page 6, FN 12] "that defense counsel *did* raise the issue about each blood type belonging to millions of people", but then stating [Page 7 at 10-11] that defense counsel" did *not* contest any of the blood-type evidence." It omits the fact that the trial judge overruled the defense's vehement objections relating to the blood type charts.

The defense was hamstrung by the trial judge's decision to admit the blood type charts into evidence and his advising the jury that "investigators were able to reconstruct the crime" using this information. MacDonald should not be held accountable for the trial judge's decision to overrule all objections relating to this matter.

II. Facts Regarding the 1997 DNA Testing

The government selectively edits sections of the wording from MacDonald's 1997 request for DNA to paint a picture of thoroughness and transparency throughout the process. Nothing could be further from the truth.

The District Court summarily denied MacDonald's request for DNA tests, and it was only on remand from this Court (1997) that the tests were ultimately allowed.

(Defense attorney) Philip Cormier had requested DNA testing on items "such as" (with accompanying examples). The District Court sided with the government and disallowed any exhibits other than those Cormier used as "examples", thus significantly narrowing the scope of the testing.

Rather than taking a broader view, the judge adopted the narrowest view, thus limiting the testing to specific exhibits, several of which the government conceded had been destroyed or missing in the designated vials- while under its jurisdiction for decades.

MacDonald 1998 Motion to Compel Access to All Biological Evidence and for DNA Testing was denied by the District Court.

In addition, the District Court mandated that the limited DNA tests also exclude any exhibit that would be destroyed in the testing process.

Why would the government care if exhibits were destroyed? By insisting that a portion of each tested exhibit be "kept" by the government, potentially exculpatory exhibits were prohibited from being tested. Moreover, such opposition is contrary to the government's continual demands for "finality" in this case. *Why would the government oppose testing evidence that would be destroyed in the process unless it expected a need to refute exculpatory results or subject the same exhibits to testing by even more modern means in the future?*

No "replacements" were allowed to be substituted for the "missing" exhibits the defense was held to, despite having merely suggested particular exhibits as examples, not a concrete list.

MacDonald respectfully suggests that this game of semantics was simply a tactical move by the government to keep the full range of remaining biological evidence –especially blood-from being DNA tested.

If finding the truth is the goal, why did the government fight to limit the scope of the original testing in any way? How many cases do you have where the defendant is begging for ALL of the remaining evidence to be DNA tested and the government is vehemently opposed to such access?

In its current brief, the government continues to point out procedural reasons why DNA tests should be disallowed on the remaining evidence, but fails to provide a moral reason.

A man's very life is at stake here; shouldn't everything humanly possible be done to get to the truth?

What does the Office of the Attorney General's (OAG's) mandate that "no procedural bars" should be erected by the Department of Justice (DOJ) to obstruct DNA tests or any other means of investigation into the cases of those affected by the malfeasance of its own experts(including MacDonald) mean if the DOJ is permitted to erect such barriers ?

Yet despite the very limited number of exhibits ultimately tested, three (3) were found to be highly exculpatory: Unsourced hairs under the body of MacDonald's wife Colette, in the bedsheet of his eldest daughter Kimberley and most tellingly, lodged beneath the fingernail, with bloody root intact, under the

fingernail of his 2 year old, Kristen. All three exhibits were in strategic locations, and they were not MacDonald's hair.

The government executed an agreement with the defense that the DNA results obtained by the AFIP (Armed Forces Institute of Pathology) would not be disputed by either party. Then, it set about doing exactly that- but only in the case of the three (3) exculpatory exhibits.

After almost a decade, the government tried to explain away the results, their location and their meaning, and ultimately grasped on to the notion that of all the exhibits tested, these three alone must have been contaminated.

How is it possible that, despite years of litigation in which the government's sole mission was to successfully limit the parameters of the DNA tests (and it prevailed) it could then claim "contamination" of the three exhibits consistent with proving that MacDonald is innocent?

Adopting this position on "contamination" calls *all* of the government-held evidence in to question; yet it ultimately chose it because admitting that these three results were exculpatory would be an insurmountable blow to their case: Hard evidence of innocence. The real contamination here was suffered by the trial jury, to which government "experts", now known to be anything but, presented junk science as fact

FBI INVENTORY and AFIP Preliminary EXAMINATIONS

The statements espoused by the government here are simply greater indicia of its resorting to procedural bars and tactical omissions to obstruct the truth.

2006 DNA CLAIM

In attempting to obstruct MacDonald's access to the blood evidence by condoning the District Court's denial of his qualification under the IPA, the government quotes Judge Fox as follows [Page 12 at 15-22]:

> 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] at 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.

How is it possible that the same district court judge, who just one year prior to the evidentiary hearing in this case admitted, *"Well, I need to get an education in DNA anyway."* could then formulate such an extensive analysis, including references, on scientific data he professed (in the vernacular) to know nothing about?

THE SEPTEMBER 2011 STATUS CONFERENCE

This statement from the judge was made in response to defense counsel's concern that the district court had already expressed "futility" in any further proceedings by denying MacDonald relief. November, 2008: [Doc 193 at Page 40 9.21.11]

Further, how is it possible that, having overseen the original DNA testing for nine (9) years (1998-2007), and making numerous decisions about the process, and ultimately denying MacDonald's claims relating to the results, the district court could profess in 2011 that it needed an education in DNA?

Additionally, it is difficult to reconcile the district court's denial of MacDonald's IPA claim when it admitted as early as September, 2011 to having *never read* the 1979 trial transcript, despite being the presiding judge in this case since 1997.

At its September 2011 Status Conference, the district court stated:

> WELL, YOU KNOW, I'VE THOUGHT ABOUT THAT, VIEWING THE EVIDENCE AS A WHOLE, AND I'VE GONE BACK AND READ -- STARTED IN READING THE TRANSCRIPT. DO YOU HAVE ANY IDEA HOW LONG IT WOULD TAKE ME TO READ THE ENTIRE TRANSCRIPT ASSUMING I HAVE SOMETHING ELSE TO DO?"
>
> I MEAN, THE RECORD WOULD BE TREMENDOUS AND, ALSO, IN MY ATTEMPTS TO DO THAT I CANNOT CONVEY TO YOU THE DIFFICULTY IN FOLLOWING A TRANSCRIPT, WHICH IS DISCUSSING ITEMS AND PHOTOGRAPHS THAT ARE NOT BEFORE YOU.
>
> IN A SENSE -- I DON'T MEAN THIS CRITICALLY, BUT IT'S JUST TRUE, IT WOULD BE A MONUMENTAL TASK TO GO BACK AND VIEW THE EVIDENCE IN THE CONTEXT IN WHICH IT CAME OUT IN COURT. IT WOULD BE JUST STAGGERING. IN FACT, I DON'T THINK ANYBODY'S CAPABLE OF DOING IT. I STARTED IN THAT

> AND STARTED MAKING THE EFFORT IN THAT REGARD. I MADE -- I CAME TO THE CONCLUSION AFTER REVIEWING THE FIRST WEEK OF THE TRIAL TESTIMONY THAT I WOULD HAVE TO KIND OF ZERO IN ON WHAT I CONSIDER TO BE SIGNIFICANT, PICKING PORTIONS OF THE TRANSCRIPT TO READ, BECAUSE I DON'T THINK I COULD POSSIBLY READ IT ALL IN LESS THAN HALF A YEAR.

How could the district court come to any decision about the quality of the evidence presented to the jury in 1979, much less the totality of the evidence in this case, having never read the transcript upon which much of his decision depended, in a case he had presided over for nearly 15 years?

THE INNOCENCE PROTECTION ACT OF 2004 (IPA)

Given the increasingly alarming number of wrongful convictions being identified since the advent of DNA testing, the IPA was enacted as one means of providing post-conviction relief for those who are actually innocent.

The government does not contest that MacDonald meets the IPA rules and procedures for federal inmates, and instead relies solely on trying to erect a procedural bar rather than advocating for any and all information that might shed (even further) light on the truth.

At the September 2011 Status Conference, the government stated "We're going to object to any new DNA testing for sure" [Doc 193 pg. 3 at 24-25], which prompted the district court to directly ask "Why?" (especially since the North Carolina Center on Actual Innocence (NCCAI) had just told the court that it was willing to pay for the tests.)

> **"If we order new DNA testing, which you oppose, or new procedures, why would----I'm just curious, if it would produce more information, what would be the objection to it?"**
> [DE 193 pg.5 at 15-18]

The transcript shows the government's various reasons for opposing including:
"We need to look into these new technologies…"
"The high risk of contamination….."
"The case does not fit the paradigm of how DNA exculpates people"
"….too late, we content to come back and say we want to test more…"

And
"….continuing to come up with unsourced things, liked unsourced hairs, adds nothing to the mix."

This last statement by the government is telling in that it seems to be conceding that, although all of the evidence in this case has been in its sole possession since day one that unsourced evidentiary items will "continue to come up".

Why, if the crime scene was so well managed, the investigation so thorough, and all evidence, inculpatory or exculpatory been identified, would there be unsourced items continuing to surface?

Why, if the government truly believes that its case against MacDonald is "overwhelming" would it be concerned with what might surface?

Further, the District Court asked:

> **"Well, I mean if they were hits [DNA matches] from unknown people, would it be relevant?"** [DE 193 pg. 6 at 7-8]

To which the government replied:

> **"No, we agree with that, and that's why we don't see the need for further DNA testing."** [DE 193 pg. 6 at 9-10]

Clearly, this makes no sense.

The blood "evidence" proffered to the jury as fact has been shown to be not only misleading, but false. This blood evidence was central to the government's case in chief in 1979. Thus, it is a prime source of relevant evidentiary material in this case, should this Court decide that something more is needed to decide whether MacDonald is, as he has steadfastly maintained through nearly 35 years of imprisonment, actually innocent.

If there is additional information that can be obtained via DNA testing items such as the blood exhibits , central to the government's case, using newer testing methods now available, why in the world would the government object?

SUMMARY

The government asserts in its brief that allowing MacDonald to pursue his rights under the Innocence Protection Act would amount to nothing more than a "fishing expedition".

How can continuing to look for something that may be valuable in proving a man's innocence be categorized so cavalierly?

What reasonable explanation does the government have to oppose available testing on exhibits that still exist if one is interested in the truth?

The government consistently maintains that this case must be "finalized". MacDonald maintains that his case needs to be *resolved* before it can be finalized, and

believes that the information proffered within his current appeal involving the 2255 habeas petition will move this Court to reverse his convictions.

However, as long as there are unanswered questions in this case, justice demands that they be answered.

MacDonald is now 72 years old; he has spent the better part of his adult life imprisoned for crimes he did not commit. To deny him any avenue of recourse that is still available to him in his quest to prove his innocence would be a manifest injustice.

What is to be gained by allowing the government to use procedural bars to protect remaining evidence in its care from scrutiny?

What does the government stand to lose if additional DNA tests are needed in order to establish MacDonald's actual innocence? Keeping MacDonald's convictions intact?

By relentlessly trying to narrow the picture rather than widen it, the government appears to be much more concerned about keeping MacDonald in prison –innocence be damned- then about its duty to seek out the truth and uphold justice.

Blackstone's seminal tenant in criminal law reverberates:

> **All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer.**

And, as the Founding Father John Adams prophetically espoused:

> **"It is more important that innocence should be protected, than it is, that guilt be punished; for guilt and crimes are so frequent in this world, that all of them cannot be punished.... when innocence itself, is brought to the bar and condemned.....the subject will exclaim, 'it is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this were to take hold in the mind of the subject that would be the end of all security whatsoever."**

CONCLUSION

The Innocence Protection Act is legislative recognition that wrongful convictions are a significant problem within our justice system. Limited DNA testing in this case has already uncovered exculpatory evidence. A federal marshal has come forward to report prosecutorial misconduct. A lawyer (and former judge) has reported that his client Helena Stoeckley confessed to being in the MacDonald home. Jeffrey MacDonald did not manufacture this evidence, but certainly all of it corroborates his claim of innocence.

Objecting to new testing and explaining away exculpatory evidence are prosecutorial positions that have gone the way of the dinosaur. In the end, the truth must prevail even if the cruel reality is that an innocent man has spent most of his life in prison.

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

Respectfully submitted, this 15th day of December, 2015.

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CERTIFICATE OF SERVICE

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

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