UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 3:75-CR-26-F
No. 5:06-CV-24-F

UNITED STATES OF AMERICA	)	
	)	REPLY TO GOVERNMENT'S RESPONSE
v.	)	TO MOTION FOR A NEW TRIAL
	)	PURSUANT TO 18 U.S.C. § 3600
JEFFREY R. MacDONALD,	)	
Defendant.	)	

Jeffrey R. MacDonald, by and through undersigned counsel, pursuant to the Court's order of November 10, 2011 [DE-204], hereby submits the following reply to the *Government's Response to Motion for a New Trial Pursuant to 18 U.S.C. § 3600* [DE-212], filed December 12, 2011, and respectfully shows unto the Court the following:

SUMMARY OF ARGUMENT

MacDonald acknowledges that his *Motion to Reopen 28 U.S.C. § 2255 Proceedings and Discovery* ("1997 Motion for DNA Testing") [DE-46] does not constitute a motion for DNA testing under The Innocence Protection Act of 2004 ("IPA") as that motion was filed prior to the enactment of the IPA. The results of the 1997 testing, however, are relevant as to § 3600(10)(B)(iii) with respect to MacDonald's motion for additional DNA testing under the IPA. The results constitute additional evidence to be considered in conjunction with MacDonald's assertion of actual innocence, rebutting a presumption of untimeliness under the IPA. Furthermore, the results of the 1997 testing, pursuant to the direction of the Fourth Circuit, are to be considered as part of the "evidence as a whole" with respect to MacDonald's successive petition for a writ of habeas corpus.

PROCEDURAL HISTORY

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

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

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

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

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

6. On September 21, 2011, at a status conference, this Court directed the Government to file a response to MacDonald's *Motion Pursuant to the Innocence Protection Act of 2004, 18 U.S.C.*

§ 3600, For a New Trial Based on DNA Testing Results and Other Relief [DE-176]. This Court also directed MacDonald to file a reply to the Government's response thereafter.

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

DISCUSSION

1. MacDonald acknowledges that his 1997 Motion for DNA Testing does not constitute a motion for DNA testing under the IPA. However, the Government's arguments that the results of the 1997 testing are irrelevant are without merit.

2. MacDonald submits this reply to clarify and dispute some of the Government's assertions. Additional relevant clarifications and arguments are addressed in MacDonald's *Reply to Government's Response to Motion for Additional DNA Testing* [DE-238]. In the interest of brevity and efficiency, MacDonald does not repeat them in this reply.

3. 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.

4. While the AFIP report of DNA test results released in 2006 did not conclusively state that the hairs tested were "bloody or forcibly removed and not naturally shed" [DE-212 at ¶ 35], the opposite—that the hairs *were* naturally shed—was also not stated. Thus, the Government's conclusion that the hairs were naturally shed, as indicated by its reference to the hairs as "naturally shed unsourced hairs" [DE-212 at ¶ 36], is incorrect and unsupported by AFDIL's report. Furthermore, contrary to the Government's assertion [DE-212 at ¶ 51], the fact that a hair

was naturally shed—which has not been proven—does not preclude the hair from belonging to the perpetrator. The appropriate time to argue the issues of whether the hair was naturally shed or forcibly removed and when the hair was deposited in the crime scene is during an evidentiary hearing.

5. The Government argues that MacDonald must prove that each of the three hairs was deposited at the crime scene by three different perpetrators. However, MacDonald only needs to demonstrate that one of the unsourced hairs is connected to the crime for it to be considered exculpatory. The relevance of the three hairs will be even greater if the requested additional DNA testing is granted and it is shown that any of the three hairs match an unsourced DNA profile found in a place with which the perpetrator(s) would undoubtedly have come into contact. This redundancy will serve to exclude the possibility of contamination or that the hairs are not in any way connected to the crime.

6. The Government also asserts, by quoting their own brief as authority, that the IPA requires that the DNA test results conclusively exclude the defendant as the source of biological evidence used to convict him before a motion for a new trial can be filed. DE-212 at 8 n.6. This assertion, made several times, is false. 18 U.S.C. § 3600(g)(1) does not require that a defendant be excluded as the source of evidence used to convict him. In order to file a motion for a new trial under the IPA, MacDonald need only be excluded as the source of probative biological evidence collected *during the investigation or prosecution of the crime*, which would demonstrate the presence of intruders in the home during the crime.

7. Contrary to the Government's assertion [DE-212 at ¶ 32], the existing DNA test results are not inculpatory of MacDonald when viewed with the totality of the evidence in this case. The Government seems to argue that if any piece of evidence matches MacDonald, then the

result is automatically inculpatory. As MacDonald's home was the crime scene, it is not surprising that his DNA was found throughout. In addition, MacDonald has always maintained that he was present, although unconscious, when the crime occurred. Thus, the origin of any evidence *which does not match* MacDonald is relevant to his claim of innocence.

8. The Government argues that the jury's verdict in the original trial somehow demonstrates the irrelevance of the DNA test results obtained in recent years. As DNA testing was not available during the original trial, the jury was unable to include in its determination the fact that unsourced hairs were found at the crime scene.

9. The Government repeatedly refers to the presence of fibers "matching MacDonald's pajama top" [DE-212 at ¶ 50] as evidence of his guilt because the fibers were found in locations which MacDonald stated he entered after his pajama top was removed. The Government, however, completely ignores the fact that MacDonald's matching pajama bottoms were also torn and could have been the source of the fibers—consistent with MacDonald's version of events.

10. The Government states that MacDonald has not cited a case where a new trial has been granted under the IPA, apparently as an indication that a new trial should not be granted under the IPA in this case. DE-212 at ¶ 57. While Defendant has acknowledged that the results of the 1997 testing do not fall under the purview of the IPA, MacDonald is not obliged in any motion under the IPA to point out previous cases in which a new trial was granted as the IPA clearly provides that a court may order a new trial. *See* 18 U.S.C. § 3600(g)(2).

11. The Government argues that the hair that was labeled as coming from underneath Kristen MacDonald's fingernails (labeled D-237/AFDIL Specimen 91A) resulted from contamination of the vial containing her fingernail scrapings. This admission of negligence during the crime scene investigation and the later evidence chain of custody does not prove contamination. Such

admitted negligence makes it entirely possible the hair was overlooked earlier in the evidence collection and evaluation processes.

12. The Government asserts that "[e]ven if the hair did come from Kristen's hand . . . it would merely be another example of household detritus, like dog hair found on her bed spread." DE-212 at ¶ 46. The Government offers no support or documentation to prove that is the case. Based on the location and condition of the hair, it is more probable that if the hair did come from Kristen's hand, which MacDonald contends it did, that it is relevant evidence to be considered in conjunction with the other evidence in this case.

13. Finally, any argument that the hairs are the result of contamination or are mere household debris and, thus, that the hairs are automatically irrelevant was implicitly rejected by the granting of DNA testing in 1997 and the Government's subsequent testing of the hairs at its expense. It is irrational to think that the Government spent over $600,000 to conduct DNA testing on items of biological evidence it believed were irrelevant to the determination of MacDonald's guilt or innocence.

CONCLUSION

MacDonald acknowledges that his 1997 Motion for DNA Testing did not constitute a request for testing under the IPA. However, for all the foregoing reasons, MacDonald files this reply to dispute erroneous claims made by the Government and to emphasize the probative value of the results of the 1997 testing.

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

/s/ Christine Mumma_____
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CERTIFICATE OF SERVICE

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

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