

anticipate contesting all the factual allegations MacDonald has made in support of this motion. In that event, we request an opportunity to reply on the merits, as well as an evidentiary hearing at which MacDonald will be required, in the absence of accurate citations to the record, to present evidence in the form of sworn testimony to substantiate the factual allegations and expert opinions contained in his motion.¹ The United States also respectfully requests an opportunity to cross-examine any witnesses or affiants offered by MacDonald in support of his petition, and an opportunity to present evidence in rebuttal. Finally, should the Court determine that it has jurisdiction over the DNA motion, we respectfully request that the Court defer any such hearing until the pending petition for relief, based upon the allegations made by retired Deputy U.S. Marshal Jimmy Britt, has been resolved. The United States is not requesting that the Court delay ruling on the Britt matter, which is unrelated to the instant motion to add the DNA predicate. We respectfully request that the Court dispose of the Britt petition before addressing the merits of the DNA motion. In any event, the United States is requesting that this Court not entertain the merits of the DNA motion until it has clear jurisdiction to do so, and the parties have had sufficient time for their experts to review the voluminous technical data generated in the course of the DNA testing between 2000-2006.²

¹MacDonald has filed no affidavits in support of the instant motion to substantiate the factual representations he makes, and the sparse citations to the record that are present, do not support the propositions for which they were cited.

² Neither the government, nor MacDonald, have yet received, much less reviewed, the DNA bench notes generated by the DNA testing. Some of the DNA testing identifies MacDonald as the source of Specimen 51A(2) the hair found in Colette's left hand. He maintains that this is in no way inculpatory of him. For the present MacDonald also appears not to challenge the testing which identifies Colette MacDonald as the source of a forcibly removed hair (Specimen 46A) found in the sheet used by MacDonald to transport his wife's body. Nor has MacDonald yet challenged the AFIP results which were inconclusive. MacDonald is free to

Should the Court not agree with our legal argument and a response on the merits becomes necessary, it is further respectfully requested that the Court not require such a response until the United States Supreme Court has handed down the decision in House v. Bell, No. 04-8990.³ While House v. Bell, *supra*, is distinguishable from MacDonald in that none of the evidence used to convict MacDonald has been negated by the DNA testing, this is the first case which has come before the Supreme Court on the merits that will address the impact of newly discovered DNA evidence in the context of a claim of actual innocence. The imminent decision in House v. Bell may provide guidance to this Court, and the court of appeals, in the resolution of the instant claim.

argue that these testing results are not inculpatory, and the government is free to argue that they are. However, in terms of the results of the testing, MacDonald waives any claim as to the correctness of the methodology, or the validity of the examiners conclusions if he forges ahead with only the three hairs he has identified. In addition a second petition for relief based on the DNA results involving other specimens, is certainly successive under 28 U.S.C. §§ 2244 and 2255. A second DNA petition is also potentially subject to dismissal as an abuse of the writ. See McCleskey v. Zant, 499 U.S. 467 (1991); United States v. MacDonald, 966 F2d 854, 860 (4th Cir. 1992). (App. Vol. 1, Tab 13). We respectfully suggest that it would be in the interest of judicial economy if all possible claims of newly discovered exculpatory DNA evidence, or attacks on newly discovered inculpatory DNA evidence, were litigated in a single proceeding.

³The Supreme Court granted *certioari* in House v. Bell , 125 S.Ct. 2991, 386 F.3d 668, to review the divided *en banc* decision of the Sixth Circuit rejecting House's claim of colorable innocence under Schlup v. Delo, 513 U.S. 298 (1995), and his freestanding claim of innocence under Herrera v. Collins, 503 U.S. 390 (1993), notwithstanding the results of DNA testing that negated or called into question semen and blood evidence introduced at trial by the prosecution to establish House's guilt. The case was argued on January 11, 2006, and a decision could be handed down at any time.

Respectfully submitted, this 13th day of April 2006.

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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 13th day of April 2006.

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