

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
FAYETTEVILLE DIVISION

No. 75-26-CR-3  
No. 90-104-CIV-3-F

**FILED**

MAR 26 1999

DAVID W. DANIEL, CLERK  
US DISTRICT COURT  
E. DIST. NO. CAR.

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 JEFFREY R. MacDONALD, )  
 )  
 Defendant. )

ORDER

This matter came before the court on March 23, 1999, for hearing on the Government's request for leave to conduct preliminary steps to prepare evidence for DNA testing, and on MacDonald's request for additional relief. Present on behalf of the Government were Messrs. Brian M. Murtagh and John F. DePue of the Terrorism and Violent Crimes Section of the U. S. Department of Justice, and Mr. Eric Evenson, Assistant United States Attorney, E.D.N.C. On behalf of MacDonald appeared Messrs. Wade M. Smith, Barry Scheck, Philip G. Cormier and Andrew Good, and Ms. Melissa Hill. This order memorializes rulings made from the bench.

The court shall designate an independent laboratory (hereinafter "laboratory") to perform DNA testing on exhibits and exemplars identified herein. The parties shall confer and attempt to reach agreement on a laboratory (or on a short prioritized list of qualified candidates) which is appropriately certified, is capable of conducting both nuclear and mitochondrial DNA testing, and which has had no prior involvement with this case. The parties shall report to the court in writing on or before **April 7, 1999**, on

Exhibit #2

their selection(s) of the laboratory or list of laboratories from which this court will select one to perform the DNA testing.

The Government shall consult with the laboratory as to the protocol to be observed by the Government in the unpackaging and mounting of exhibits, and shall comply with such protocol in the absence of agreement of the parties to the contrary. The Government is DIRECTED to generate detailed still photographs, and to videotape and narrate the entire inventory, unpackaging and mounting process. The Government shall provide copies of the photographs accompanied by written explanations, as well as a videotape with a transcript thereof to MacDonald, and contemporaneously shall file copies with the court. The Government shall complete this process on or before **May 17, 1999**.

The exhibits which are subject to this order are the existent and known sourced and unsourced hairs, blood stains, blood debris, tissue and body fluids specifically identified in the April 22, 1997, Affidavit of Philip G. Cormier No. 2.

MacDonald's motion seeking an order directing the Government to produce exemplars for appropriate DNA testing is ALLOWED. The Government is DIRECTED to prepare for DNA testing by the laboratory to be designated by the court all exemplars within the possession or control of the Government which were taken from known individuals in this case. The Government shall employ the same exacting process and protocol in inventorying and preparing the exemplars as ordered herein above for the exhibits. The Government is DIRECTED to complete the process on or before **May 17, 1999**, at which time it shall provide copies of the photographs accompanied by written

explanations, as well as the videotape with a transcript thereof to MacDonald, and contemporaneously shall file copies with the court.

Upon the Government's completion of its inventory, unpackaging and mounting of the exhibits and exemplars as herein directed, the exhibits and exemplars shall be delivered to the laboratory, which initially shall conduct a "divisibility analysis" in order to determine which of the exhibits and exemplars are divisible. From each exhibit and exemplar which is capable of division, the laboratory shall retain such portion as is necessary for DNA testing, and shall return the remainder to the Government which thereafter shall have unrestricted use thereof. As to non-divisible items, the parties shall attempt to agree to the order in which such items should be tested. In the absence of agreement, the parties shall bring prioritization issues before the court. The testing of the items will be sequential, and during the course of such testing, either party may petition the court for discontinuance of the testing process in order to preserve the samples to the fullest extent consistent with the resolution of the issues before the court.

The parties' respective experts may attend and observe the testing process, and shall defer to the procedures, methods and protocol employed by the laboratory. Each party shall bear those expenses and costs as are incurred by its experts in attending and observing the testing process.

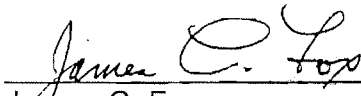
The laboratory shall prepare and file with the court a detailed report of the results of all DNA testing with copies furnished to counsel.

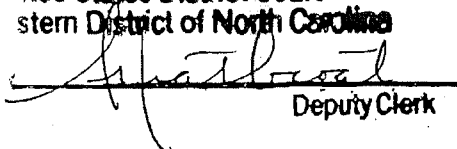
Finally, MacDonald's suggestion that the Government should finance this phase of his § 2255 case is not well-taken. Because this action is civil in nature, MacDonald is

not entitled to prosecute it at taxpayers' expense. Nevertheless, the court will ensure that laboratory and related test expenses are met, and ultimately will adjust allocation of the costs depending on the outcome of the case. Should the Government prevail, and should the court determine that MacDonald must bear the costs and expenses incurred as a result of this phase of the litigation,<sup>1</sup> MacDonald may be required to file an affidavit detailing the amount and source of all assets subject to his direction and control which are or have been used to finance the prosecution of this litigation.

SO ORDERED.

This the 25<sup>th</sup> day of March, 1999.

  
\_\_\_\_\_  
James C. Fox  
United States District Judge

By the foregoing to be a true and correct  
copy of the original.  
David W. Daniel, Clerk  
United States District Court  
Western District of North Carolina  
  
\_\_\_\_\_  
Deputy Clerk

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<sup>1</sup> "This phase of the litigation" refers to proceedings, both legal and scientific, occurring subsequent to the Fourth Circuit Court of Appeals' remand for DNA testing, and which are related to such testing.