UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 75-CR-26-3
No. 5:06-CV-24-F

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
v.	)	MOTION OF THE UNITED STATES
	)	TO STRIKE EXHIBITS SUBMITTED IN
JEFFREY R. MacDONALD,	)	CONNECTION WITH PETITION FOR
Movant	)	RELIEF UNDER 28 U.S.C. § 2255, AND
	)	FOR ADDITIONAL RELIEF
	)	
	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby moves to have stricken from the record of these proceedings certain exhibits submitted in connection with MacDonald's fourth motion for habeas relief under 28 U.S.C. § 2255. One of the exhibits at issue, the March 1, 2005 affidavit of Bryant Lane (MacDonald Exh. 7) substantially replicates an affidavit he executed on July 15, 1988, that MacDonald submitted in connection with a previously-rejected habeas petition. The other two affidavits, those of Everett Morse and Donald Buffkin (also MacDonald Exh. 7), relate to the same claim and, in addition, contain information known to the defense more than a year prior to submission of the instant petition. All three submissions are, therefore, untimely under 28 U.S.C. § 2255(4).

STATEMENT

As explained in the Government's Response to MacDonald's Petition For Habeas Relief under 28 U.S.C. § 2255, filed this date, and detailed in a prior decision of this Court, United States v. MacDonald, 640 F. Supp. 286, 327-28 (E.D.N.C. 1985), during post-trial interviews conducted of Helena Stoeckley by defense investigators between 1980 and 1982, Stoeckley made statements that at times implicated herself in the murders of the MacDonald family. In doing so, she also implicated her friend, Greg Mitchell (who died of alcohol-related illness on June 3, 1982), by alleging that Mitchell was with her in the MacDonald home and was responsible for murdering Colette MacDonald.[1] On November 24, 1981, Gregory Howard Mitchell voluntarily appeared at the Charlotte field Office of the FBI, and provided a written statement to Special Agent Brendan J. Battle. Mitchell, as he had previously stated to the CID, denied involvement and recounted his conversation with Helena Stoeckley on the day following the murders.[2]

On April 5, 1984, MacDonald filed in this Court motions for a new trial and for habeas relief under 28 U.S.C. § 2255, alleging, *inter alia*, that Stoeckley had testified falsely at MacDonald's trial in denying any involvement in the murders of his family. In support of those motions, MacDonald presented "newly discovered" evidence which he maintained indicated that Mitchell had made

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[1]Mitchell had been investigated by the Army CID in the period 1970-71. In a sworn statement of May 21, 1971, Mitchell told the CID: "I know I was not with Helena on the night of the murders of the MacDonald family." When asked how he knew that she was not with him that night, Mitchell responded: "I remember talking to her about it the next day or shortly after it." In response to the investigator's question whether Helena ever told him she was involved, Mitchell responded: "She told me she was not." Upon being asked whether he was involved in any way in the MacDonald murders, Mitchell said: "No, I was not." When asked if there was anything else he could add, Mitchell responded: "No, except that I didn't have anything to do with it."(App. Vol. V, Tab 15).

[2]See: Affidavit of Brendan J. Battle #1 (App. Vol. V, Tab 10).

statements to others implicating himself in the murders. Two of the supporting declarations executed on April 14, 1984, were from Bryant and Norma Lane who became friends with Mitchell in the 1970's [3] According to their statements, in 1977, Mitchell came to the Lane home in a depressed state. When the Lanes asked Mitchell what was wrong, he responded that something was bothering him that was too horrible to talk about. In 1982, Mitchell again allegedly told the Lanes "that something had happened while he was in the service and if anyone found about it he would have to leave the country." 640 F. Supp. at 327.

On May 25, 1984, Noah Bryant Lane ("Bryant Lane") was interviewed by Special Agent Brendan Battle of the FBI.[4] Lane told Special Agent Battle that several years ago, when Mitchell was helping him work on a boat which Lane had bought, Mitchell appeared to be depressed. Lane did not recall asking Mitchell why he was depressed and what it was that was so terrible that he could not talk about it, or tell his wife about it. At one time, Mitchell told Lane that there was a certain "bitch" and that if she ran her mouth it would mess things up. Id.

Lane further told the FBI that Mitchell made one other statement to him concerning the fact that he had done something terrible. This was about two or three weeks before Mitchell died. Lane was drinking one night at the Hule (sic) Bar in Charlotte, and Mitchell was there. Mitchell told Lane that he had to talk with him. Mitchell called Lane the next day and said that he could not talk on the telephone because the "cheap sons-of-bitches have my phone tapped," or words to that effect. When Mitchell subsequently came to Lane's house he was "white as a ghost". Mitchell stated that he might

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[3] See: Addendum to Motion for New Trial, Declarations of Bryant Lane, filed April 25, 1984 by Messrs. Wade M. Smith and Brian O'Neill. (App. Vol. V, Tab 11).

[4] See: Affidavit of Brendan J. Battle-#2, Government's Response to Motion for New Trial, Appendix ,Volume I, filed July 20, 1984. (App. Vol. V, Tab 12).

have to leave the country because something had happened in the service, and if the authorities found out about it that he would definitely have to leave. Mitchell did not say what this was, but he stated that it was too horrible to talk about it, and at that time he had tears in his eyes. Lane thought that Mitchell must have been talking about something that happened in Vietnam. Id.

Addressing the Lane's declarations, this Court found them "unpersuasive because Mitchell made no specific reference to having been involved in the MacDonald slayings . . . . " 640 F. Supp. at 328. And, characterizing the totality of the evidence relating to Mitchell's "confessions" as "speculative and circumstantial," this Court observed that "Mitchell, like Stoeckley, may have been tormented by accusations that he was involved in the murders but the court is unable to conclude from the evidence submitted that there is any real likelihood that he was involved." Accordingly, it concluded that MacDonald's claim relating to Mitchell was "without merit." Id.

On July 15, 1988, Bryant Lane executed another declaration apparently designed to remediate the absence of specificity in its predecessor.[5] On this occasion, Lane recalled that sometime in the 1970s, while depressed and under the influence of alcohol, Mitchell had told him that he "personally kn[ew] MacDonald is innocent because I was the one that killed the MacDonald family." Lane further recounted that he (Lane) called Mitchell one night and Mitchell told him he was being harassed by the FBI. Mitchell told Lane to be careful because he thought the phone was bugged. On another occasion, while working on Lane's boat, Mitchell admitted to Lane's wife that he was guilty of the murders. "Well that's it, I did do it, I am guilty." He later told Lane that a "bitch was out there which if she didn't keep her mouth shut she could get a lot of us in trouble." Lane further

[5] See: Declaration of Bryant Lane, attached as "Exhibit 8" to Affidavit of John J. Murphy (#2), filed May 14, 1991.(App. Vol. V, Tab 13).

explained that the declaration he had previously furnished defense investigators lacked these details because he "did not at the time feel comfortable about telling strangers the whole story." When subsequently interviewed by an FBI Agent, he also declined to provide the agent the full story of Mitchell's admissions to him because, according to Lane, the agent treated him in a sarcastic and judgmental manner. This 1988 declaration was submitted in support of MacDonald's second petition for habeas relief filed with this Court on October 19, 1990 which alleged, *inter alia*, that the government had withheld laboratory notes and physical evidence, including information relating to the presence of blond synthetic fibers from the MacDonald household. Such evidence, MacDonald argued, indicated the presence of a wig-wearing hippie at the time of the murders of the MacDonald family. This Court denied that petition both on the merits and on the ground that it constituted an abuse of the writ. See United States v. MacDonald, 778 F. Supp. 1342, 1360 (E.D. N.C. 1991).

On March 1, 2005, Lane executed a third sworn statement, an affidavit, apparently drafted by someone other than Lane, in contemplation of the instant litigation.[6] Like its 1988 predecessor, it asserts that he and his wife were friends of Greg Mitchell and that, during the early 1980s, Mitchell stated that "he personally knew MacDonald is innocent because I was the one who killed the MacDonald family." As in the case of its predecessor, Lane also explained that he had not divulged this specific information earlier out of concern for Mitchell. Lane states in paragraph 12 that he had

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[6] (See: App. Vol. V, Tab 14). The presence of pen and ink corrections on the 2005 affidavit, which bear the initials "NBL" (Noah Bryant Lane), are evidence that someone other than Lane drafted this affidavit. That the drafter used both the1988 declaration of Lane, as well as the 1984 affidavit of SA Battle, in the process, is evident from the repetition of the misnomer "Brandon Battle" (1988 declaration) and the exact date of Lane's May 25, 1984, FBI interview (1984 affidavit of SA Brendan Battle #2 (Id. Tab 12). See also: Affidavit of Brendan J. Battle #1 (which immediately precedes the Affidavit of Brendan J. Battle #2) in Appendix Vol. I of the Government's Response to Motion for New Trial. See: Joint Appendix, Volume III, filed in the Fourth Circuit in No. 85-6208, at pp. 1093-1104. Id. TAB 10).

"... given previous signed statements to the defense, via investigator Raymond Shedlick, dating back to the mid-1980's." He makes no mention, however, that he had executed the July 15, 1988, declaration (App. Vol. V, Tab 13) for authors Jerry Potter and Fred Bost.[7] Current defense counsel have neither included Lane's July 15, 1988, declaration in any of their voluminous filings, nor informed the Court of its existence.

MacDonald's instant petition is accompanied by two additional affidavits in which the affiant claims to have overheard Mitchell acknowledge responsibility for the murders of the MacDonald family. The affidavit of Donald Buffkin, executed on June 14, 2005, asserts that he knew Mitchell from 1980 until 1982 and that the two frequented the Hull Bar in Charlotte, North Carolina. On one occasion, Mitchell told him that he had been involved in the murders of the MacDonald family and that he and his associates committed the murders because MacDonald "wouldn't do what they wanted," i.e., to provide them with money or dope. According to the affidavit, Buffkin first contacted MacDonald's defense counsel regarding these revelations on May 22, 2003.

On July 25, 2003, Everett Morse executed an affidavit stating that between 1972 and 1974, while a college student, he lived across the street from Mitchell and that he was a co-worker of Mitchell's at an employment agency. On one occasion, Morse asked Mitchell to obtain some golf balls for him. When Mitchell subsequently procured some through what Morse suspected involved illicit means, Morse refused either to accept or to pay for them. At this, Mitchell allegedly threatened to kill him in the same manner as he had murdered the MacDonald family.

MacDonald has submitted these affidavits to bolster his previously rejected claim that his convictions should be set aside, *inter alia*, because other persons, including Stoeckley and Mitchell,

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[7]See Murphy Affidavit , *supra,* at p. 4,¶ "d". (App. Vol. V, Tab 13).

have confessed to the crimes.

ARGUMENT

Two separate legal principles governing habeas law require that these affidavits be stricken from the record of these proceedings.

A. MacDonald's Claims Relating to Greg Mitchell's "Confessions" Were Previously Considered and Rejected.

Relying principally upon Schlup v. Delo, 513 U.S. 298 (1995), MacDonald further argues that a gatekeeping assessment of the impact of his present claim of "newly discovered" evidence upon the outcome of a hypothetical retrial, affords him a license to seek consideration of other items of "newly-discovered" evidence proffered and rejected in the course of his preceding three habeas petitions. See Section 2255 Mot. at 21-26, 32-33; Motion To Expand the Record To Include Itemized Authenticated Evidence (filed March 23, 2006).[8] Schlup, however, provides no escape hatch to circumvent judicial bars to repetitive habeas litigation.

In Schlup, supra, the Supreme Court held that, in assessing the adequacy of a habeas petitioner's showing with respect to the second gatekeeping requirement–that of "actual innocence,"–the reviewing tribunal's consideration of the evidence should include "relevant evidence that was either excluded or unavailable at trial," such as "evidence tenably claimed to have . . . become available only after trial." 513 U.S. at 327. Thus, under Schlup, this Court's assessment of whether the impact of MacDonald's "newly-discovered" evidence is so significant that no reasonable juror would have voted to convict, could properly include favorable evidence elicited at trial see ("Statement

[8] MacDonald's "Motion to Expand the Record" was accompanied by a "Statement of Itemized Material Evidence" which contained 48 paragraphs itemizing matters that MacDonald claims should be considered in assessing the sufficiency of his instant Section 2255 motion. The new affidavits of Lane, Buffkin, and Morse are referenced in paragraph 41, at footnote 6.

of Itemized Material Evidence" paras. 1-30), Stoeckley's excluded pretrial admissions to others suggesting that she participated in the murders of the MacDonald family (id. para. 31), as well as the "newly-discovered" evidence relating to her alleged admissions to Deputy Marshal Jim Britt (id. para. 32).

Nothing in Schlup, however, suggests that, in the guise of a "gatekeeping motion," a habeas petitioner has license to revisit "evidence" that a prior habeas court has already reviewed and found utterly lacking in probative value. Moreover, as the Schlup Court recognized, even before the enactment of the AEDPA, the Supreme Court adopted "a qualified application of the doctrine of res judicata" (Schlup, 513 U.S. at 319, quoting McCleskey v. Zant, 499 U.S. 467, 490-91 (1991)) in habeas cases which precluded the use of Section 2255 as a mechanism to raise claims that were litigated and rejected in prior habeas petitions. See Sanders v. United States, 373 U.S. 1, 15 (1963) ("controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief, . . . (1) if the same ground [is] presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; (3) the ends of justice would not be served by reaching the merits of the subsequent application.") See also Cabrera v. United States, 972 F.2d 23, 25 (2d Cir. 1992) (rejecting claim in a second Section 2255 petition because it encompassed a claim raised in a previously-rejected petition); cf. Williams, 330 F.3d at 282 (holding, in the context of a PFA review, that claims "recycled" from a previous § 2254 application cannot form the basis for a pre-filing authorization). A construction of the language from Schlup, which would permit a habeas petitioner to rely anew upon evidence previously considered and rejected by a preceding decision, would effectively thwart the objectives of the Supreme Court in seeking to "curtail the abusive petitions that in recent years have threatened to undermine the integrity of the

habeas corpus process . . . . [and] undermine the orderly administration of justice." McCleskey, 499 U.S. at 496. We briefly recount those decisions below.

Thus, as the Fourth Circuit has explained, this rule prohibits the "recycling" of claims presented and rejected in previous motions for collateral relief including their submission as part of the basis for a pre-filing application. In Re Williams, 330 F.3d 277, 282 (4th Cir. 2003). See, e.g., Schlup v. Delo, 513 U.S. 298, 318 (1995) (noting that the Court has "held that a habeas court may not ordinarily reach the merits of successive claims); Sawyer v. Whitley, 505 U.S. 333, 338 (1992) ("[u]nless a habeas petitioner can show cause and prejudice . . . a court may not reach the merits of *[ ]successive claims* that raise grounds heard and decided on the merits in a previous petition"); Altman v. Benik, 337 F.3d 764, 766 (7th Cir. 2003) (pre-filing authorization "is completely barred by § 2244(b)(1) because [petitioner] presented [instant] claim in his prior untimely petition"); Turner v. Artuz, 262 F.3d 118, 123 (2d Cir. 2001) ("[a] successive petition does not satisfy § 2244(b) if it contains a claim that was presented in a prior application.").

MacDonald has, on two prior occasions, argued that Greg Mitchell's "confessions" to others of participation in the murders of the MacDonald family constitutes a basis for affording him habeas relief. On the first of those occasions, this Court expressly rejected the argument after a thorough analysis of all of the facts relating to it, including a finding that Lane's initial affidavit was vague. See MacDonald, 640 F. Supp. at 328. On the second occasion, MacDonald supported his claim relating to Mitchell with a more detailed affidavit of Bryant Lane. Like its predecessor, that petition–which similarly argued that physical evidence demonstrated the murders of the MacDonald family was committed by a band of hippies, including Mitchell–was rejected.

United States v. MacDonald, 778 F. Supp. 1242 (E.D.N.C. 1991). (App. Vol. I, Tab 12.)

Lane's instant affidavit, which MacDonald now touts as a "clarification" of his 1984 affidavit, which this Court found to be vague, (Motion at 24 n. 16), contains virtually the same salient information, expressed in identical terms as that in the 1988 declaration which MacDonald submitted in October 1990 – i.e., that MacDonald was innocent of the murders of his family because Mitchell "was the one who killed the MacDonald family." In essence, MacDonald has virtually "recycled" the facts contained in the 1988 Lane declaration by redrafting the document as an affidavit, making additional cosmetic changes, including irrelevant information about puppy dogs, and then having it re-executed with a 2005 date to make it appear that this information is truly newly-discovered evidence. And, as a consequence, he has failed to disclose to this Court the fact that his prior attorney, Mr. Wade Smith, submitted virtually the same information to this Court on MacDonald's behalf as part of his effort to obtain relief in 1990. Particularly when predicated upon such practices, the entertainment of yet additional evidence and argument relating to Mitchell's "confessions" contravenes the Supreme Court's jurisprudence developed to establish a measure of finality in habeas litigation. See Schlup, 513 U.S. at 318; McCleskey v. Zant, 499 U.S. 467, 491 (1991). Compare In Re Mills, 101 F.3d 1369, 1371 (11th Cir. 1996) (declining to issue PFA because second habeas application based, in part, upon restated claims supported by an "affidavit . . . substantially identical to the one quoted in [prior decision rejecting habeas relief]").[9]

B. MacDonald's "Newly Discovered Evidence In Support of His Claim Relating to Mitchell Is Untimely.

Even if MacDonald's instant claim did not involve subject matter recycled from previously

[9] In our Response to MacDonald's instant habeas motion, we have addressed his argument that, under Schlup, supra, claims of "newly-discovered evidence" that have been rejected by a previous habeas court can be reasserted to support a second or subsequent motion addressing yet additional factual claims. See Gov't Response. at 46.

rejected petitions as prohibited by the cases cited in Part "A," supra, it is still not properly before this Court. Under 28 U.S.C. § 2255 ¶6 (4) a one year period of limitation applies to an application to a writ of habeas corpus which runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." None of the three affidavits now filed by current defense counsel on MacDonald's behalf to support his claim that Mitchell confessed to the murders of the MacDonald family (and that for that reason MacDonald is entitled to relief) fall within the one year deadline. As explained previously, the entire scope of Mitchell's alleged admissions to Lane were known to the defense as early as July 1988 and were employed to support MacDonald's 1991 habeas petition.

Although the affidavit of Donald Buffkin was executed on June 14, 2005, it acknowledges that the information it contained was provided to MacDonald's defense counsel on May 22, 2003, over two years earlier, and two and a half years prior to the date of the instant petition. Finally, the affidavit of Everett Morse bears an execution date of July 25, 2003, making the information it contained untimely by over two years. MacDonald has made no attempt to explain his procedural default for failing to file within the statutorily mandated one-year period, consequently, he cannot invoke the Court's power to equitably toll the limitations period. For such treatment, MacDonald must establish that extraordinary circumstances prevented him from filing his petition on time, and that he acted with reasonable diligence throughout the period he seeks to toll. Doe v. Menefee,

391 F.3rd 147, 175 (2nd.Cir. 2004)

CONCLUSION

For the foregoing reasons, affidavits submitted by MacDonald, relating to his claim that Greg Mitchell admitted murdering the MacDonald family, should be stricken.

Prayer for Relief

In order to prevent the recurrence of additional recycled claims, the United States respectfully moves the Court to issue an Order requiring that any future claims based upon newly discovered evidence be accompanied by affidavits from all previous counsel stating under penalty of perjury that the substance of the information contained therein was neither known to any of them, nor the subject of a previous claim filed in any Court of the Untied States.

Respectfully submitted, this 30th day of March, 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 30th day of March, 2006.

By: /s/ Brian M. Murtagh
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