UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8525

UNITED STATES OF AMERICA, Appellee, v. JEFFREY R. MACDONALD, Appellant.	APPELLEE'S RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AS *AMICI CURIAE*

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby opposes the Motion For Leave To File [a Supplemental] Brief As *Amici Curiae* filed on June 15, 2010, by the Innocence Project, the North Carolina Center On Actual Innocence, the New England Innocence Project, and the National Association of Criminal Defense Lawyers on behalf of appellant Jeffrey R. MacDonald.

Procedural Background

On March 31, 2009, while the Appellant's application for a COA was pending before this Court, all of the current *amici*, with the exception of the National Association of Criminal Defense Lawyers, moved for, and over the Government's opposition, were granted, leave to file a brief as *Amici Curiae*. On May 6, 2010, following oral argument on March 23, 2010, this Court issued an Order amending the original Certificate of Appealablity ("COA") and stating:

> As amended, our COA encompasses the following issues:
>
> 1. Whether the district court erred in assessing the Britt claim by applying the standard of 28 U.S.C. § 2244(b)(2)(B)(ii), rather than 2255(h)(1); by prohibiting expansion of the record to include evidence received after trial and after the filing of the 28 U.S.C. § 2255 motion; and by excluding, and thus ignoring, relevant evidence and drawing flawed conclusions from the evidence it did consider; and
>
> 2. Whether the district court's procedural decision with respect to the freestanding DNA claim, requiring additional prefiling authorization from this Court, was erroneous in light of 28 U.S.C. § 2255(h).

This Court's Order further provided:

> "The parties are directed to file supplemental briefs on the issues identified in the amended COA that were not addressed in their formal briefs. . . ." Order at 7-8.

Pursuant to a separate Order from the Clerk, the Appellant was required to file his supplemental brief by June 15, 2010, which has been timely filed. At 10:46 a.m. on June 15, Government counsel received an email from Philip G. Cormier, MacDonald's attorney since 1990, and Counsel for the New England Innocence Project, stating that *Amici* were filing a motion for leave to file a brief in the Fourth Circuit in the MacDonald case, in response to the Fourth Circuit's order for further briefing on the amended COA that issued on May 6, 2010, and requesting to know by midday June 15 whether the Government assented to said motion for leave. (See Exhibit 1). Not having seen either the motion or the proposed

brief of *Amici*, the Government replied by email that it was opposed and intended to respond to the motion. The electronic version of the motion by *amici* indicated the Government's opposition and intent to file an opposition.[1] Id. On June 15, 2010, the Clerk issued an Order directing the Government to file its Response by June 28, 2010. This submission responds to that Order.

We have previously set forth in our Response in Opposition filed April 7, 2009 (the "2009 Opposition"), to *amici*'s original Motion For Leave To File a Brief As *Amici Curiae* the reasons and authorities why that motion should have been denied. Those reasons include, *inter alia*, the fact that four of the attorneys who seek to appear as *amici* previously have appeared as advocates on behalf of MacDonald and played a substantial role in the 1997 DNA litigation, see 2009 Opposition at 2-7; and the fact that MacDonald is adequately represented by retained counsel, see 2009 Opposition at 7-9. Because those reasons and authorities apply with equal, if not greater, force to the instant *amici* motion, we need not repeat them in their entirety; instead, we hereby incorporate them by reference into this Opposition.

In addition, and as explained below, the instant Motion, which distorts the amended COA[2], should be denied for the following

[1] A paper copy that Amici had attempted to file on June 14, 2010, did not do so.

[2] Foreshadowing the tendentious content of their proposed brief, a*mici* in their Motion reworded the COA in a partisan fashion to

reasons: (1) *amici* propose to argue issues, including an extensive attack on Judge Dupree's findings in the 1979 trial, that are not properly before this Court because they are outside the scope of the COA, were not advanced by MacDonald, or both; (2) *amici*'s uninvited response to the amended COA offers no special expertise with respect to the DNA evidence, the exclusion of which is a purely jurisdictional question; and (3) *amici* propose to argue these issues in an inappropriately partisan manner, rather than as a friend of the Court.

1. *Amici* Propose to Raise and Argue Issues Outside the Scope of the COA and Never Advanced by MacDonald.

Potential a*amici* inappropriately have raised and argued issues not contained within the amended COA or advanced in MacDonald's opening or supplemental briefs. *Amici* in their proposed response have vastly exceeded the scope of the COA. First, *amici* devote substantial space to an argument premised on the Innocence Protection Act. (Proposed Suppl. Amici Br. at 29-32). That issue is not properly before this Court, both because it was not raised in the district court, see 18 U.S.C. § 3600, and because it is not even arguably contemplated by the COA. See 18 U.S.C. § 2253(c). Citing United States v. Golding, 168 F.3d 700 (4th Cir. 1999),

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encompass "[w]hether the district court erred by . . . (2) drawing flawed conclusions from *newly discovered and overwhelming evidence of prosecutorial misconduct; failing to consider* all the evidence, including *powerfully exculpatory* results of DNA testing which was conducted pursuant to this Court's authorization in 1997. . . ." Mot. at 4-5 (emphasis added).

amici argue at length that the Government "exploited" in final arguments its allegedly unconstitutional misconduct (Proposed Suppl. Amici Br. at 9-11), which, as discussed below, is a gross mischaracterization of the trial record. (*Infra,* pp. 12-13). MacDonald, by contrast, mentions this issue only parenthetically, without analysis or example. (MacDonald's Supplemental Br. at 10-11).

Most egregiously, *amici* unilaterally offer this Court an exegesis deconstructing Judge Dupree's 1979 findings (Proposed Suppl. Amici Br. at 11-19), hypothesizing at length about the potential impact of time-barred or otherwise excluded evidence on the 1979 trial. This line of argument is clearly outside the scope of the COA, which refers only to Judge Fox's 2008 decision with respect to MacDonald's successive Section 2255 application, and thus is not properly before this Court. This latter line of argument is doubly improper because MacDonald has not raised it in either his opening or supplemental briefs. *Amici* should not be heard to argue issues raised neither by this Court nor by the parties themselves. See Russian River Watershed Prot. Comm. v. City of Santa Rosa, 142 F.3d 1136, 1141 (9th Cir. 1998) ("We do not review issues raised only by an amicus curiae.")

To allow *amici* to raise issues not advanced by MacDonald would be implicitly to permit MacDonald to circumvent the word limitation

for the parties' briefs.[3] In effect, MacDonald and *amici* would tag-team the Government, splitting the issues addressed and emphasized by their submissions in order to maximize their treatment. As the Federal Circuit held in Amoco Oil Co. v. United States, a case cited approvingly by this Court on more than one occasion, this strategy of issue-splitting should be disallowed. 234 F.3d 1374, 1378 (Fed. Cir. 2000) ("An appellant and an amicus may not split up the issues and expect the court to consider that they have all been raised on appeal."); accord, e.g., United States v. Buculei, 262 F.3d 322, 333 (4th Cir. 2001). This strategy is evident not only on the face of *amici*'s argument, but also in *amici*'s citation to virtually none of the same case law as MacDonald.

2. *Amici* Offer No Special Expertise and Merely Duplicate MacDonald's Submission on the Purely Jurisdictional Question Regarding the Exclusion of DNA Evidence.

Potential *amici* refer in their Motion generally to The Innocence Project's "groundbreaking use of DNA technology to free innocent people," but they have not shown that this case presents any particular legal issue in which they possess specialized expertise. The Government has never contested the DNA testing

[3]MacDonald's Supplemental Brief contains 8975 non-exempt words (p. 36), and when added to the 9443 words of the proposed supplemental brief of his *amici* (p. 40), MacDonald's collective advocates have effectively submitted a brief totaling 18,418 words, to which the Government must respond within the word limitation.

results provided by the Armed Forces Institute of Pathology. The issue at this stage is not whether those results demonstrate MacDonald's innocence, which they emphatically do not. Instead, the issue is whether the district court erred when it determined that, in the absence of a pre-filing authorization (PFA) from this Court, it lacked jurisdiction to entertain the motion to add the DNA predicate to the pending § 2255 application because of the requirements of 28 U.S.C. §§ 2244(b)(3)(A) and 2255(h).

The resolution of this issue, according to *amici*, essentially turns on whether this Court's Order of October 17, 1997, entered in No. 97-713, granting Appellant's motion for DNA testing, but in all other respects denying his application to file a successive § 2255 application (J.A. 889), which was in response to MacDonald's September 17, 1997 motion "filed pursuant to 28 U.S.C. Section 2244" (id.), implicitly conferred jurisdiction on the district court to entertain the motion eventually filed in 2006 based upon the DNA testing results, which were unknown in 1997, notwithstanding the provisions of §§ 2244(b)(3)(C) and 2255(h)(1). Separate and apart from these issues -- did the order implicitly say what *amici* now contend it said, and could this Court have made the PFA determination under §§ 2244 and 2255, in advance of knowing all the DNA test results and where they fit in the context of the trial evidence -- there is a more fundamental jurisdictional question which *amici*, who were personally involved

in the tactical decisions relating to the 1997 filings, have sought to obfuscate. (See Exhibits 2, 3). And that is whether *amici* counsel's filing on MacDonald's behalf of a § 2244 motion in this Court on September 17, 1997, after the one-year period of limitation provided by 28 U.S.C. § 2255 ¶ 6 (now § 2255(f)) had run, could ever result in a legally valid grant of authorization to file a successive application under § 2255.[4] This issue

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[4]When, on April 22, 1997, present *amici* counsel, then representing MacDonald, filed in the district court on his behalf a "Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery," there were two days left to run under § 2255(f) on the one-year grace period for filing any § 2255 motion which came into effect when the statute became law on April 24, 1996. Assuming for the sake of argument that a motion to discover DNA test results in the future, filed in the district court, could ever substitute for a motion under § 2244 for a PFA filed in the appropriate court of appeals, and further assuming equitable tolling while the motion was before the district court, the clock started running again on September 2, 1997, when the district court's order denying the Motion To Reopen And For Discovery was filed with the Clerk. (Supp. App. 127). *Amici* do their best (Proposed Suppl. Amici Br. at 26-27) to mislead this Court into believing that the district court transferred to this Court the (DNA) Motion For Discovery by its order of September 2, 1997, by quoting the introductory portion of the district court's order at page 2 (Supp. App. 128), but not the comprehensive portion which appears at page 29 (Supp. App. 155). The latter states: "Thus, MacDonald's Motion To Reopen 28 U.S.C. § 2255 Proceedings and For Discovery is DENIED. His claim that newly gathered evidence that saran fibers were in fact used in the manufacture of human wigs prior to 1970, added to the weight of previously amassed exculpatory evidence, demonstrates his factual innocence and that he is entitled to a new trial, is TRANSFERRED to the United States Court of Appeals for the Fourth Circuit. . . ." Consequently, the denial of his Discovery Motion was not automatically transferred to this Court, but rather needed to be appealed, which MacDonald recognized by filing a notice of appeal of the denial on September 8, 1997, six days after the district court's order, or filed in this Court as part of a § 2244 motion. But it was not until September 17, 1997, at least 12 days after the

(continued...)

involves this Court's interpretation of its own order, in light of the procedural posture of the case at the relevant time, and in light of the statutory scheme for resolving collateral attacks on convictions brought by Federal prisoners under 28 U.S.C. § 2255, as amended. *Amici* have sought only to mislead the court and confuse the issues because of their partisan roles as MacDonald's advocates.

As the issue is purely jurisdictional, the fact that the allegedly exculpatory evidence is based on DNA testing is of no consequence because neither § 2255 nor § 2244 makes any distinction to the type of newly discovered evidence. Consequently, the extensive experience of the Innocence Project and its New England and North Carolina subsidiaries with the mechanics of DNA testing, and in obtaining the exoneration of unrepresented state prisoners through the use of DNA test results, is irrelevant to this Court's resolution of the jurisdictional question.[5]

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[4](...continued)
statute ran that current *amici* counsel filed on MacDonald's behalf the § 2444 Motion which they now contend resulted in this Court's granting a PFA in futuro for the DNA results. (Proposed Suppl. Amici Br. at 24-25).

[5]Had the district court found jurisdiction and reached the merits of MacDonald's claims based on the DNA results, it surely would have granted no relief, because nothing in the testing results called into question the evidence used to convict MacDonald, or in any way demonstrated his innocence. If anything, the results added force to the case against MacDonald by identifying a hair found in his murdered wife's hand, which he had argued to the jury
(continued...)

Indeed, *amici* largely duplicate the distorted and factually incorrect arguments already advanced by MacDonald with respect to the DNA evidence, and thus the *amici* brief would have the practical effect of doubling the length of MacDonald's submission, an outcome expressly disallowed by the Seventh Circuit and other courts. See Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (holding that amicus briefs "should not be allowed" where they "are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief"); JPMorgan Chase Bank v. Fletcher, 2008 U.S. Dist. LEXIS 1069, at *2-4 (N.D. Okla. Jan. 7, 2008) (denying leave to appear and file brief as *amicus* because the proffered brief "essentially duplicate[s] arguments made by defendant's counsel" and "places the proposed amicus in the position of an additional counsel for the defendant rather than a friend of the Court").

3. The Proffered *Amici* Brief Improperly Argues Issues of Fact in a Highly Partisan Fashion.

The proposed *amici* brief is not only unnecessary; its contents are also improper. *Amici* both improperly argue the facts of this case and inappropriately frame that argument in a partisan fashion. The proposed brief adds no value to this Court's

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(...continued)
came from an intruder, to be Jeffrey MacDonald's own hair.

consideration of the legal issues at hand, and the Motion should be denied.

Amici devote a great deal of time arguing the merits of Judge Dupree's 30-year-old factual findings and hypothesizing as to the impact on that court of various items of newly discovered evidence. These issues are neither properly before this Court under the COA nor properly presented by *amici*, whose role is not to re-litigate prior fact-bound decisions. The brief even goes so far, without any factual citation, as to allege that Judge Dupree's 1985 findings that Stoeckely's post-trial detailed confessions -- in which she never mentioned any confession to, or threat by, Blackburn who left the Government in 1980 -- "were fraudulently-obtained." (Proposed Suppl. Amici Br. at 13).

"The usual rationale for amicus curiae submissions is that they are of aid to the court and offer insights not available from the parties, and help the court with points of law." 4 Am. Jur. 2d, Amicus Curiae § 1 (2010). *Amici* should not be allowed to argue issues of fact, and certainly not to re-argue decades-old issues of fact already litigated unsuccessfully by MacDonald's counsel. See Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 434 n.16 (1984) ("[W]e examine an amicus curiae brief solely for whatever aid it provides in analyzing the legal questions before us."); United States ex rel. Jones v. Franzen, 676 F.2d 261, 266 n.7 (7th Cir. 1982) (finding improper

the submission in an amicus brief of "numerous statements of fact not supported in an unchallenged record before [the court]"); Allen v. County Sch. Bd., 28 F.R.D. 358, 362 n.2 (E.D. Va. 1961) (holding that an amicus "fully advises the Court on the law in order that justice may be attained"); 4 Am. Jur. 2d, Amicus Curiae § 8 (2010).

Amici reach into the past to contend, for instance, that "it is clear that Blackburn threatened Stoeckley as the most effective means at hand to prevent her from repeating her self-inculpatory admissions to the jury." (Proposed Suppl. Amici Br. at 12). *Amici* speculate as to the outcome of the trial "[h]ad the jury heard Britt's testimony." (Proposed Suppl. Amici Br. at 13). They insist that "at a minimum, MacDonald would have been entitled to curative relief, an instruction condemning Blackburn's misconduct." (Proposed Suppl. Amici Br. at 5). They make far-reaching claims as to the probative value of "uncontroverted evidence," "unrebutted evidence," and "physical evidence." (Proposed Suppl. Amici Br. at 22-23). They argue that specific items of evidence "would be admissible and probative of the presence of intruders." (Proposed Suppl. Amici Br. at 21 n.4). These arguments are directed not to the issues contemplated by the COA -- whether the district court in 2008 erred in its application of the law -- but rather to the inner thoughts of the factfinder in MacDonald's 1979 trial.

Amici also have grossly mischaracterized the trial record in arguing that the Government "exploited" its alleged misconduct in closing arguments. (Proposed Suppl. Amici Br. at 23). They have juxtaposed two excerpts from the Government's closing argument -- excerpts argued by two different prosecutors, no less -- and characterized the resulting amalgam as "the key and most effective portion" of the summation. (Id.). The original context puts the lie to *amici*'s contention that these excerpts refer to "the absence of physical evidence." (Id.). Indeed, the first excerpt relates precisely to the *presence* of physical evidence -- namely, "the blood stains, the pajama top, the sheet." (See Exhibit 4, trial transcript page 7056). And the second relates not to the absence of physical evidence but rather to the abundance of conflicting stories offered by the defense to sow confusion; immediately prior to the excerpt so carefully trimmed by *amici*, the Government had argued that after referring to the testimony of Milne who described seeing three candle-carrying individuals wearing bed sheets from his residence across the street, "[the defense doesn't] care which one of those [theories] you buy just so long as you buy one of them." (See Exhibit 5, trial transcript page 7113).

In their partisan zeal, *amici* have exceeded the proper bounds of their office. While there is no rule requiring *amici*'s total disinterest, see Hoptowit v. Ray, 682 F.2d 1237, 1261 (9th Cir.

1982), it is clearly inappropriate for an *amicus* to present a thoroughly partisan account of the factual record. See United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991) ("The position of classical amicus in litigation was not to provide a highly partisan account of the facts, but rather to aid the court in resolving doubtful issues of law."); accord New England Patriots Football Club, Inc. v. Univ. of Co., 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). See also 2009 Opposition at 6-7.

The potential *amici* here have not attempted to assist the Court in the resolution of "doubtful issues of law," see United States v. Michigan, 940 F.2d at 165; indeed, they direct much of their partisan energies to the argument of factual issues neither contemplated by the COA nor advanced by MacDonald. Because the proposed brief improperly directs its focus to factual issues not before this Court, and argues those facts in a highly partisan manner, the Motion should be denied.

CONCLUSION

For all the reasons stated herein the Motion For Leave To File Brief as *Amici Curiae* should be denied.

GEORGE E.B. HOLDING
United States Attorney

/s/ John Stuart Bruce
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/s/ Brian M. Murtagh
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Colin Hunter
Intern
National Security Division
U.S. Department of Justice
Washington, D.C., 20530

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

J. Hart Miles, Jr., Esq.
Hart Miles Attorney at Law, P.A.

Joseph E. Zeszotarski, Jr.
Poyner & Spruill

Andrew H Good
Good & Cormier

I further certify that on June 28 2010, I have mailed the forgoing document by First-Class Mail, postage prepaid, to all case participants, at the following address:

Barry C. Scheck
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/s/John Stuart Bruce
JOHN STUART BRUCE
First Assistant United States Attorney
Eastern District of North Carolina

EXHIBIT 1

From: Phil Cormier <pcormier@goodcormier.com> Date: 06/15/2010 10:45:53

To: Murtagh, Brian (SMO) <brian.murtagh@usdoj.gov>, Hayes, Anne (USANCE) <anne.hayes@usdoj.gov ...

Cc: Andy Good <agood@goodcormier.com>, Josh Good <josh@goodcormier.com>

Folder:

Subject: United States v. Jeffrey MacDonald, 4th Cir. No. 08-8525 - Amicus Brief

Attachments:

Print the page

Dear Mr. Murtagh, Ms. Hayes and Mr. Bruce:

The Innocence Project, the North Carolina Center on Actual Innocence, the New England Innocence Project and the National Association of Criminal Defense Lawyers are filing a motion for leave to file an amicus brief in the 4th Circuit in the MacDonald case, in response to the 4th Circuit's order for further briefing on the amended COA that issued on May 6, 2010.

Please let me know by midday today whether you assent to the motion being filed by the above-named Amici for leave to file the amicus brief.

Thank you.

Phil Cormier, Counsel for the New England Innocence Project

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EXHIBIT 2

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April 22, 1997

Patricia S. Connor,
Clerk of the Court
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street
Room 501
Richmond, VA 23219-3538

Re: United States v. Jeffrey R. MacDonald

Dear Ms. Connor:

I would appreciate it if you would bring this letter to the Court's attention.

I am enclosing herewith Jeffrey R. MacDonald's **"provisional"** motion under 28 U.S.C. § 2244 for an order authorizing the District Court for the Eastern District of North Carolina to consider a successive application for relief under 28 U.S.C. § 2255. The reason that I use the word **"provisional"** is that today Dr. MacDonald filed in the District Court for the Eastern District of North Carolina a motion to reopen his prior § 2255 petition which was filed with that Court in October 1990 because of fraud on the court committed by the government by withholding exculpatory evidence and making a false factual presentation which was material to the District Court's and this Court's consideration of the claims set forth in MacDonald's 1990 petition.[1] I fully expect that the District Court will entertain Dr. MacDonald's motion to reopen. However, as a result of the 1996 amendments to 28 U.S.C. § 2255, and the uncertainty as to whether the one-year statute of limitations applies in this instance (which Dr. MacDonald in no way concedes that it does), out of an abundance of caution, I am filing this **"provisional"** motion to protect Dr. MacDonald's procedural rights in the

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[1] Dr McDonald's 1990 petition was denied by the District Court on July 8, 1991, see 778 F.Supp. 1342 (E.D.N.C. 1991), and the District Court's decision was affirmed by the Fourth Circuit on June 2, 1992. See 966 F.2d 854 (4th Cir. 1992).

unlikely event that a determination is made that the motion to reopen should have been filed in this Court in the first instance. It is only in the event that the District Court determines that Dr. MacDonald's motion to reopen should not be heard in the first instance in that court, that I would then ask this Court to consider this motion for authorization pursuant to 28 U.S.C. § 2244. If the District Court does make such a determination, I will let this Court know immediately that such a determination has been made so that this Court may then act on the enclosed motion.

Enclosed herewith in two boxes please find four copies of the following, all of which comprise this "provisional" motion:

(1) Fourth Circuit form -- Motion Under 28 U.S.C. 2244 for Order Authorizing the District Court to Consider Second or Successive Application for Relief Under 28 U.S.C. § 2255, signed by Jeffrey R. MacDonald, and with attached certificate of service.

(2) Motion to Reopen filed in the Eastern District of North Carolina today (4/22/97), consisting of:

(a) Jeffrey MacDonald's Motion to Reopen 28 U.S.C. §2255 Proceedings and for Discovery;

(b) Petitioner Jeffrey R. MacDonald's Motion for Leave to File an Oversized Memorandum of Law;

(c) Affidavit of Philip G. Cormier No. 1 (Concerning Saran Fibers) in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery;

(d) Affidavit of Philip G. Cormier No. 2 -- Request for Access to Evidence to Conduct Laboratory Examinations -- in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery;

(e) Exhibits to Affidavit of Philip G. Cormier No. 2 -- Request for Access to Evidence to Conduct Laboratory Examinations -- in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery.

(3) Dr. MacDonald's 1990 Petition for 28 U.S.C. § 2255 Relief, filed in the Eastern District of North Carolina on

October 19, 1990, consisting of:

(a) Form motion for relief under 28 U.S.C. § 2255.

(b) Jeffrey R. MacDonald's Brief in Support of 28 U.S.C. Section 2255 Petition Seeking Relief From Conviction Obtained by the Suppression of Exculpatory Evidence.

(c) Appendix of Excerpts from the Record (appendix to item (b)).

(d) Affidavit of John J. Murphy in Support of Jeffrey R. MacDonald's 28 U.S.C. § 2255 Petition Seeking Relief from Conviction Obtained by the Suppression of Exculpatory Evidence.

(e) Affidavits of Anthony P. Bisceglie, Fred H. Bost, Ellen Dannelly, James F. Douthat, Dennis H. Eisman, Orrin L. Grover, Ted L. Gunderson, Michael J. Malley, Wendy P. Rouder, Sara A. Simmons, Wade M. Smith, and John I. Thornton in Support of Jeffrey R. MacDonald's 28 U.S.C. § 2255 Petition Seeking Relief from Conviction Obtained by the Suppression of Exculpatory Evidence.

(f) Affidavit of Bernard Segal in Support of Jeffrey R. MacDonald's 28 U.S.C. § 2255 Petition Seeking Relief from Conviction Obtained by the Suppression of Exculpatory Evidence.

(g) Opinions of the District Court and the Fourth Circuit denying the 1990 petition.

(4) Dr. MacDonald's 1984 application for relief pursuant to 28 U.S.C. § 2255 filed in the Eastern District of North Carolina on April 5, 1984.

(a) Motion for New Trial.

(b) Motion to Set Aside Judgment of Conviction Pursuant to 28 U.S.C. Section 2255.

(c) Motion to Vacate Sentence.

(d) Opinions of the District court and the Fourth Circuit denying relief on items (a) - (c).

In the event that the Court has questions about this, or would like further clarification on this "provisional" motion, Attorney Philip Cormier or I would be happy to provide any additional information that is requested by the Court.

Respectfully,

Harvey A. Silverglate

PGC/ps

Enclosures: 4 "Provisional" Motion Packages.

cc: Eric Evenson, Assistant United States Attorney, EDNC
Via overnight mail
Wade Smith, Esq., Raleigh, NC (w/out enclosures)

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MOTION UNDER 28 U.S.C. § 2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER SECOND OR SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. §§ 2254 OR 2255

United States Court of Appeals for the Fourth Circuit

Name of Movant	Prisoner Number	Case Number (leave blank)
JEFFREY R. MacDONALD	00131-177	
Place of Confinement F.C.I. SHERIDAN - UNIT 4A, P.O. Box 5000 Sheridan, OR 97378-5000		

IN RE: JEFFREY R. MacDONALD , **MOVANT**

1. **Name and location of court which entered the judgment of conviction from which relief is sought:** UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

2. **Parties' Names:** UNITED STATES vs. JEFFREY R. MacDONALD

3. **Docket Number:** 75-26-CR-3 4. **Date Filed:** Indictment filed 1/24/75

5. **Date of judgment of conviction:** 8/29/79 6. **Length of sentence:** 3 consecutive life

7. **Nature of offense(s) involved (all counts):** Count 1-Murder- 18 U.S.C. sec. 1111 - guilty 2nd degree; Count 2-Murder - 18 U.S.C. sec. 1111 - guilty - 2nd degree; Count 3-murder - 18 U.S.C. sec. 1111 - guilty- 1st degree

8. **What was your plea? (Check one)** ☒ Not Guilty ☐ Guilty ☐ Nolo Contendere

9. **If you pleaded not guilty, what kind of trial did you have? (Check one)** ☒ Jury ☐ Judge only

10. **Did you testify at your trial? (Check one)** ☒ Yes ☐ No

11. **Did you appeal from the judgment of conviction? (Check one)** ☒ Yes ☐ No

12. **If you did appeal, what was the**

Name of court appealed to: United States Court of Appeals for the Fourth Circuit

Parties' names on appeal: United States vs. Jeffrey R. MacDonald

Docket number of appeal: 79-5253 **Date of decision:** 8/16/82

Result of appeal: Conviction affirmed

13. **Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, applications for relief, or other motions regarding this judgment in any federal court?** ☒ Yes ☐ No

14. If you answered "Yes" to question 13, answer the following questions:

A. First Petition, Application, or Motion

(1) In what court did you file the petition, application, or motion? U.S. District Court Eastern Dist. of North Carolina

(2) What were the parties' names? UNITED STATES vs. JEFFREY R. MacDONALD

(3) What was the docket number of the case? 75-26-CR-3

(4) What relief did you seek? (See attached sheets)

(5) What grounds for relief did you state in your petition, application, or motion?

(See attached sheets)

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☒ Yes ☐ No

(7) What was the result? ☐ Relief granted ☒ Relief denied on the merits ☐ Relief denied for failure to exhaust ☐ Relief denied for procedural default

(8) Date of court's decision: 3/1/85

B. Second Petition, Application, or Motion

(1) In what court did you file the petition, application, or motion? U.S. District Court Eastern District of NOrth Carolina

(2) What were the parties' names? UNITED SEATES vs. JEFFREY R. MacDONALD

(3) What was the docket number of the case? Nos. 75-26-CR-3 and 90-104-CIV-3-D

(4) What relief did you seek? (See attached sheets)

(5) What grounds for relief did you state in your petition, application, or motion?

(SEE ATTACHED SHEETS)

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☐ Yes ☒ No

(7) What was the result? ☐ Relief granted ☒ Relief denied on the merits ☐ Relief denied for failure to exhaust ☒ Relief denied for procedural default

(8) Date of court's decision: 7/8/91

C. THIRD AND SUBSEQUENT PETITIONS, APPLICATIONS, OR MOTIONS

For any third or subsequent petition, application, or motion, attach a separate page providing the information required in items (1) through (8) above for first and second petitions, applications, or motions.

D. PRIOR APPELLATE REVIEW(S)

Did you appeal the results of your petitions, applications, or motions to a federal court of appeals having jurisdiction over your case? If so, list the docket numbers and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals. Appeals to the 4th Circuit.

First petition, application, or motion	☒ Yes	Appeal No.	85-6208 12/17/85	☐ No
Second petition, application, or motion	☒ Yes	Appeal No.	~~91-6613 6/2/92~~	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No.		☐ No

If you did not appeal from the denial of relief on any of your prior petitions, applications, or motions, state which denials you did not appeal and explain why you did not.

15. Did you present any of the claims in this application in any previous petition, application, or motion for relief under 28 U.S.C. § 2254 or § 2255? (Check one) ☐ Yes ☐ No (SEE ATTACHED)

16. If your answer to question 15 is "Yes," give the docket number(s) and court(s) in which such claims were raised and state the basis on which relief was denied.

(SEE ATTACHED)

17. If your answer to question 15 is "No," why not? This Court will grant you authority to file in the district court only if you show that you could not have presented your present claims in your previous § 2254 or § 2255 application because . . .

A. (For § 2255 motions only) the claims involve "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [you] guilty"; or,

B. (For § 2254 petitions only) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [you] guilty of the offense"; or,

C. (For both § 2254 and § 2255 applicants) the claims involve "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court [of the United States], that was previously unavailable."

I did not present the following claims in any previous petition, application, or motion for relief under 28 U.S.C. § 2254:

I did not present the claims listed above in any previous petition, application, or motion because

(SEE ATTACHED)

Movant prays that the United States Court of Appeals for the Fourth Circuit grant an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255.

Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct.

Executed on 4-14-97
[date]

Movant's Signature

PROOF OF SERVICE

A copy of this motion and all attachments must be sent to the state attorney general (§ 2254 cases) or the United States Attorney for the United States judicial district in which you were convicted (§ 2255 cases).

I certify that on _____ I mailed a copy of this motion and all attachments
[date]

to _____ at the following address:

Movant's Signature

UNITED STATES COURT OF APPEALS for the FOURTH CIRCUIT

Attachment to Jeffrey R. MacDonald's Motion for Order Authorizing District Court to Consider Successive Application for Relief under 28 U.S.C. § 2255.

Question 14.

A. First Petition.

With respect to motions for relief regarding the judgment in this case, on April 5, 1984, I filed the following motions in one consolidated action in the United States District Court for the Eastern District of North Carolina (Dupree, J.): (1) Motion for a New Trial, (2) Motion to Set Aside Judgment of Conviction Pursuant to 28 U.S.C. § 2255, (3) Motion to Vacate Sentence (pursuant to 28 U.S.C. § 2255), and (4) Motion to Recuse.

The parties' names in this proceeding were United States v. MacDonald, and the Docket No. was 75-26-CR-3.

The relief I sought via these motions was an order setting aside the judgment, vacation of sentence and discharge from custody, or in the alternative, a new trial.

The grounds for relief were as follows: newly discovered evidence in the form of witness statements; Brady violations arising from the suppression of exculpatory evidence, interference with my right to counsel, and recusal of the district court trial judge.

B. Second Petition.

On October 19, 1990, I filed a 28 U.S.C. § 2255 Petition Seeking Relief From Conviction Obtained by the Suppression of Exculpatory Evidence in the Eastern District of North Carolina (Dupree, J.).

The parties' names in this proceeding were United States v. MacDonald, and the Docket Nos. were 75-26-CR-3 and 90-104-CIV-3-D.

The relief I sought was a new trial.

The grounds for relief were that (1) my conviction obtained by the government was unconstitutional because the government had withheld exculpatory evidence (different from the evidence undergirding my first petition) favorable to my defense; (2) my conviction was the result of the prosecution's unconstitutional conduct in presenting false evidence to the Court and to the trial jury, (3) the prosecution's failure to fulfill duties under the Constitution and 18 U.S.C. § 3500 to disclose prior

statements of witnesses.

Questions 15, 16 and 17:

Regarding, questions 15, 16, and 17, I have not answered either "Yes" or "No" to question 15 because the application filed herewith seeks to reopen the prior proceedings related to the § 2255 petition I filed in October 1990, which was disposed of by the District Court on July 8, 1991, and by this Court on June 2, 1992. Neither a "yes" nor a "no" would be an appropriate response, because while the claims made in the instant filing are new, both factually and legally, the instant application seeks to re-open my 1990 petition because of fraud on the court committed by the government. Thus, new facts which support my claims of fraud in the last proceeding undergird my motion to re-open the claims made in my October 1990 petition. More specifically, my motion to reopen proceeds on the grounds that the government defrauded the District Court and this Court by withholding exculpatory evidence and making a false factual presentation which was clearly material to the District Court's and this Court's consideration of my 1990 petition. Hence, I have filed the enclosed motion to reopen in the District Court seeking to have that Court reopen the prior proceeding based on fraud on the court grounds. However, as a result of the 1996 amendments to 28 U.S.C., § 2255, and the uncertainty as to whether the one-year statute of limitations applies in this instance (which I am in no way conceding), I am filing this application with this Court, in an abundance of caution, simply to preserve and protect my procedural rights in the unlikely event that a determination is made that my motion to reopen should have been made in this Court, rather than the District Court, in the first instance.

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct.

Executed on 4-14-97
[date]

Jeffrey R. MacDonald

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 1997, true copies of this provisional motion and all attachments were served via first class mail upon Eric Evenson, Assistant United States Attorney, Eastern District of North Carolina, New Bern Avenue, Suite 800, Federal Building, Raleigh, NC 27601

Harvey A. Silverglate
Silverglate & Good
83 Atlantic Avenue
Boston, MA 02110

EXHIBIT 3

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April 22, 1997

VIA HAND DELIVERY/ORIGINAL BY FIRST CLASS MAIL

Diane Burke, Case Management Supervisor
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street
Room 501
Richmond, VA 23219-3538

Re: United States v. Jeffrey R. MacDonald

Dear Ms. Burke:

This morning, I, along with my associate Phil Cormier, spoke with you concerning the **"provisional"** motion under 28 U.S.C. § 2244 for an order authorizing the District Court for the Eastern District of North Carolina to consider a successive application for relief under 28 U.S.C. § 2255, which your office received today in connection with the above-captioned case. You informed us that under the rules, you cannot hold this motion in abeyance pending the District Court's decision on Dr. MacDonald's motion to reopen that was filed in the District Court yesterday, and that if this "provisional" motion is docketed, the Court of Appeals will be required to rule on it within 30 days.

As a result, and since we fully believe that the District Court has jurisdiction to consider our motion to reopen Dr. MacDonald's 1990 petition, we are hereby withdrawing Dr.

MacDonald's "provisional" motion for consideration by the Fourth Circuit Court of Appeals.

Thank your for your assistance in this matter.

Respectfully,

Harvey A. Silverglate

PGC/ps

cc: Eric Evenson, Assistant United States Attorney, EDNC
via first class mail
Wade Smith, Esq., Raleigh, NC via first class mail

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EXHIBIT 4

The Defendant tried, we submit, to obliterate or to account for or to disassociate himself with all of the physical or trace evidence connecting him to commission of the crime. While this case is anything but simple to try or to judge, for that matter, it does boil down to one simple concept. In fact, it is a concept for which juries were invented and for which they have evolved: that is to determine credibility--who is telling the truth and who is lying.

Is the story told by the Defendant and his injuries or the lack thereof credible? Does it ring true? Does it in the light of all the circumstances make you say, "I believe him"? Or is the story told by the crime scene, the physical evidence, the blood stains, the pajama top, the sheet--does it leave you a little uneasy, and does it on a further reflection make you say to yourself, "No way. Impossible. Incredible. I don't believe it." Not to put too fine a point on it, "Has the Defendant lied about the alleged struggle with the intruders?" There were actually, we submit, two struggles--one between the Defendant and Colette which started in the master bedroom and moved to Kristen's room. That struggle ended with Colette unconscious, we submit, in

Kristen's bedroom.

The other struggle started almost immediately and continues to this day in this Courtroom. That is, to make Jeffrey MacDonald's story fit the physical evidence. It is his effort, we contend, to provide an explanation consistent with his innocence for the presence of his wife's blood type--we submit that it is his wife's blood on his pajama top--and to account for his own injuries or lack thereof and make them consistent with the injuries inflicted on the victims.

Milton once said, and if I may paraphrase, "Truth and falsity shall grapple in the Courtroom and truth shall prevail." Well, that is the poet's view and not a prosecutor's. Let me share with you if I may a prosecutor's view of that verse. Truth and falsity have indeed grappled in this Courtroom at least daily and truth shall prevail maybe but only if the jury decides the issues on the basis of the evidence. I submit again that the issue is the credibility of the Defendant's story and not on the basis of emotion.

He is not on trial for being a bad doctor. Truth shall prevail but only if the jury requires the Government to prove each and every element of the offense beyond a reasonable doubt but not--not--beyond

EXHIBIT 5

of defense in this case has sort of been like this: "I tell a story and you are to trust me. I am telling the truth. I loved my family. I loved Colette. I loved Kimberly and Kristen. Trust me. I couldn't have done this. I could not have done this. There has been a lot of character testimony. They say I can't do this; and therefore, because I am not the type of person, I couldn't do that."

Ladies and gentlemen, as Brian Murtagh told you this morning, if we convince you by the evidence that he did it, we don't have to show you that he is the sort of person that could have done it.

The other part of their theory is to attack--attack the Kassabs, attack the CID, attack the Justice Department, and even attack the Government prosecutor. What they really want to do, ladies and gentlemen, they want to create confusion by all the hippie stories and by all the intruder information--create confusion. They don't really care, I suggest, whether you believe Mr. Milne or Helena Stoeckley or the people to whom Helena Stoeckley spoke or the girl that Mica saw. They don't care which one of those you buy just so long as you buy one of them.

I suggest to you, ladies and gentlemen, that if we prove to you that that was MacDonald's footprint

in A Type blood as I will later speak to--if we prove to you that Colette's blood got on that pajama top before and not after it was torn, then it doesn't make any difference if there were 5,000 hippies outside Castle Drive at 4:00 o'clock in the morning screaming, "Acid is groovy; kill the pigs" because they have not shown that those hippies were inside the house. It doesn't matter what was going on outside unless they can also tie that in to the inside. That is where the people died. They didn't die outside on Castle Drive. They didn't die out by Milne's apartment. They didn't die at North Lucas and Honeycutt. They didn't die in Helena Stoeckley's apartment. They died at 544 Castle Drive. For all we know, ladies and gentlemen, the Defendant himself did, in fact, see the people that Milne saw and that is where the story of the intruders came from. We don't know, ladies and gentlemen. I can only tell you from the physical evidence in this case that things do not lie, but I suggest that people can and do lie.

Ladies and gentlemen, the Defendant, by all the evidence, is an outstanding doctor. I don't think anybody could dispute that. In 1970, he had a lot to live for. His wife, Colette, had a lot to live for, too. She had a dream, according to his testimony, of a