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

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | GOVERNMENT'S MEMORANDUM |
| | ) | FOR STATUS CONFERENCE |
| JEFFREY R. MacDONALD, | ) | |
| Movant | ) | |

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby presents the following memorandum for the status conference scheduled for September 21, 2011, and respectfully shows unto the Court the following:

SUMMARY OF ARGUMENT

In order to survive gatekeeping and to obtain habeas corpus relief on either of his claims of newly discovered evidence (the "Britt claim" or the "DNA claim"), MacDonald must prove the newly discovered evidence. As MacDonald has conceded in previous filings, this determination is a necessary predicate to the Court's consideration of the alleged new evidence "in light of the evidence as a whole . . .." 28 U.S.C § 2255(h)(1). The interests of judicial economy would be served by requiring MacDonald as an initial matter to prove the material averments of the affidavit of Jimmy B. Britt and to prove MacDonald's contentions with respect to the DNA evidence. The Government does not concede the truth of Britt's affidavit or the timeliness of the claim on which it was

based. Regarding the DNA claim, the Government likewise does not concede its timeliness. The Government will not contest the reliability of the DNA testing itself by AFDIL, but it does contest MacDonald's contentions regarding the unsourced hairs that were tested, i.e., their alleged location at the crime scene and whether they were "bloody" or "forcibly removed." When MacDonald is put to his proof on the DNA claim, this "newly discovered evidence" will be shown to have no exculpatory value and not to be newly discovered.

PROCEDURAL CONTEXT

1. On January 17, 2006, Jeffrey MacDonald ("MacDonald" or "movant") filed his fourth motion to vacate his 1979 murder conviction [DE-111], based on what he alleged to be newly discovered evidence, i.e., the November 3, 2005, affidavit of Jimmy B. Britt ("Britt affidavit").

2. On March 22, 2006, MacDonald filed a motion to add an additional predicate to his previously filed motion [DE-122]. This motion was based on the results of recently completed DNA testing.

3. On November 4, 2008, this Court entered an order [DE-150] denying both of these motions, as well as two procedural motions MacDonald had filed.

4. In the Order, the Court assumed without deciding that MacDonald had exercised "due diligence" in discovering and acting on Britt's assertions. Order at 28. The Court also accepted for purposes of gatekeeping analysis that Britt's affidavit was true insofar as it reported "what [Britt] heard or genuinely thought he

heard on August 15-16, 1979." Order at 38-39, n.18. See also Order at 46 ("**Assuming proof of the facts alleged therein** in light of the evidence as a whole, **even if Britt's affidavit were deemed 'newly discovered**,' it simply cannot establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found MacDonald guilty." (Emphasis added.))

5. In denying the motion to add the DNA predicate, this Court held that it lacked subject matter jurisdiction to consider this new claim in the absence of a Prefiling Authorization ("PFA") from the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), pursuant to 28 U.S.C. §§ 2244(b) and 2255. See Order at 4, 20.

6. On December 4, 2008, MacDonald filed a notice of appeal [DE-157] and then sought a certificate of appealability ("COA") from the Fourth Circuit, which was granted on June 9, 2009, as to the following issue:

> [W]hether the district court's procedural decision prohibiting expansion of the record to include evidence received after trial and after the filing of the [§ 2255] motion was erroneous in light of 28 U.S.C. § 2244(b)(2)(B)(ii) (2006).

United States v. MacDonald, 641 F.3d 596, 608 (4th Cir. 2011).

7. After briefing and oral argument, on May 6, 2010, the Fourth Circuit asked for supplemental briefing after modifying the COA to read:

> (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
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> (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).

641 F.3d at 608. On April 19, 2011, the Fourth Circuit vacated this Court's Order and remanded the case for further proceedings. Id. at 616.

8. The Fourth Circuit held that this Court "went too far ... when (at the government's urging) it applied the constraints of [28 U.S.C.] § 2244(b)(3), § 2255(f), and 2244(b)(1) to substantially limit the evidence it would consider as part of the 'evidence as a whole' in conducting its assessment of the Britt claim." 641 F.3d at 614. The Fourth Circuit said this Court should have treated the proffered evidence, i.e., "the DNA test results, the affidavit of the elder Helena Stoeckley, the blond synthetic hair-like fibers, and the three affidavits describing confessions made by Greg Mitchell," as part of the "'evidence as a whole' in evaluating the Britt claim under § 2255(h)(1)." Id. The Fourth Circuit stated that this Court should have considered this "proffered evidence–with due regard for 'the likely credibility' and 'the probable reliability' thereof . . . to determine if it, in combination with the newly discovered Britt evidence, would be sufficient to establish that no reasonable juror would have found

MacDonald guilty." Id. (internal citation omitted). The case was remanded for a "fresh analysis of whether the Britt claim satisfies the applicable standard of § 2255(h)(1)." Id. The court further noted as follows:

> We emphasize, however, that today's decision is not intended to signal any belief that the Britt claim passes muster under § 2255(h)(1) or ultimately entitles MacDonald to habeas corpus relief. Indeed, the standards of § 2255(h)(1) and its predecessor, the fundamental miscarriage of justice exception, were designed to ensure that they could be satisfied only in the "rare" and "extraordinary case."

Id., citing *Schlup v. Delo*, 513 U.S. 298, 321 (1995).

9. As to MacDonald's DNA claim, the Fourth Circuit decided that the most efficient use of judicial resources was to treat MacDonald's notice of appeal and appellate brief as a motion for authorization to file a successive § 2255 motion. 641 F.3d at 616. The court then granted a PFA for the DNA claim and remanded the case so that this Court might "proceed directly to the § 2255(h)(1) evaluation." Id.

10. On June 23, 2011, this Court scheduled a status conference for July 28, 2011, "to clarify appropriate procedures, establish deadlines and explore the parameters of matters on remand from the Fourth Circuit ... ." [DE-168]. On MacDonald's motion, the conference was continued to September 21, 2011. [DE-171].

DISCUSSION

11. When this Court entertained MacDonald's Britt claim the first time, the Court, without reaching the merits, found that the claim did not survive the required gatekeeping review under §

2255(h)(1).[1] For purposes of making this analysis of legal sufficiency, this Court assumed the timeliness ("due diligence") of the claim and the truth of the assertions on which it was based (the Britt affidavit). Thus, the Court's prior analysis was akin to that which occurs under Fed. R. Civ. P. 12(b)(6), wherein the Court assumes that the facts pled can be proven, for purposes of deciding legal sufficiency, i.e., whether the complaint states a claim upon which relief can be granted. The Court found that the gatekeeping standard was not met, so it never had occasion to examine the factual merits of the Britt claim or its timeliness.[2]

12. In responding to MacDonald's § 2255 motion based on the Britt affidavit ("the Fourth Motion"), the Government urged this Court to deny it on gatekeeping grounds, as it ultimately did, and noted:

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[1] The Fourth Circuit found that in § 2255 cases, district courts should apply the gatekeeping test set forth in § 2255(h)(1) rather than § 2244(b)(2)(B)(ii), but it also noted that the provisions are "materially identical." 641 F.3d at 610 (citation omitted). Therefore this memorandum refers to the gatekeeping standard using the § 2255 cite.

[2] The Fourth Circuit opined that this Court "may have committed harmless error in holding MacDonald to an additional § 2244(b)(2)(B) requirement: that 'the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.'" 641 F.3d at 610 n.7. Instead, the Fourth Circuit stated that "MacDonald was yet obliged to establish that he acted with due diligence, *see* § 2255(f)(4) (imposing a one-year limitations period for a § 2255 motion running from 'the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence') . . .." Id. The Government has never conceded the timeliness of any of MacDonald's recent claims. As to the Britt claim, the only evidence of timeliness is the assertion in ¶ 10 of the Britt affidavit to the effect that Britt first contacted one of MacDonald's counsel in "January of 2005." DE-115-2 at 3. The Government contests the reliability and credibility of all material assertions in the Britt affidavit; but even taken at face value, this statement fails to establish that the § 2255 motion was timely when filed on January 19, 2006. Now that the Britt claim is back before this Court for a "fresh analysis," *see* 641 F.3d at 614, MacDonald should be required to prove the timeliness of his claims before the Court has to re-conduct its gatekeeping analysis.

> Should this Court not agree with our submission that the instant motion should be denied on these grounds [gatekeeping] or any other grounds, we anticipate contesting the factual allegations MacDonald has made in his motion. In that event, we request an evidentiary hearing, an opportunity to cross-examine the affiants supporting relief, and an opportunity to present evidence in rebuttal.

DE 128 at 1. Because the Court concluded that the Britt claim did not survive the gatekeeping test, it was not necessary for the Court to take evidence as to the facts alleged in the claim. See Order at 42.

13. The Fourth Circuit's remand puts this Court back to "square one" in adjudicating the Britt claim, but now the Court is required in its gatekeeping analysis to use the Fourth Circuit's expansive definition of the "evidence as a whole." See 641 F.3d at 614 ("Such assessment must include the previously excluded evidence discussed herein, and may also include other evidence not mentioned, if it is part of the 'evidence as a whole' properly put before the court.").

14. The Government respectfully submits that this Court is not legally required to re-do the painstaking gatekeeping analysis it completed in 2008, this time having to consider a greater volume of evidentiary submissions by the parties, before it examines the merits of the Britt claim. Gatekeeping was intended to promote judicial economy, not confound it. Therefore, the Government suggests that, as an initial matter, MacDonald be required to prove his "newly discovered evidence." The Government forecasts that he

cannot. The Government disputes every material assertion[3] contained in Britt's affidavit of November 3, 2005, and is prepared to present evidence to negate said assertions in whatever form the Court deems appropriate.[4]

15. To get relief, MacDonald is going to have to meet the standard of § 2255(h)(1), i.e., that there is "newly discovered evidence that, **if proven** and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." (Emphasis added.) Then "he would yet be obliged to prove the constitutional violation alleged in that claim before obtaining any § 2255 relief thereon." 641 F.3d at 614. MacDonald would not be prejudiced if, in the interests of judicial economy, the Court requires him to prove the factual merits of the Britt claim first. If he cannot so prove, his claim must fail, so there would be no need to examine other evidence submitted along with it.[5]

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[3] Likewise, the Government disputes, and is prepared to present evidence to challenge, "the likely credibility" and "the probable reliability" of the additional evidence that MacDonald proffered in support of his Britt claim. To cite but one example for purposes of this memorandum, the Government does not concede the bona fides of the affidavit of the elder Helena Stoeckley (*see* DE-144) which is irregular in form and allegedly obtained, under unusual circumstances, from an 86-year-old, legally blind resident of a nursing home, by MacDonald's current wife. *See* DE-145.

[4] The applicable rules give the court discretion as to whether to receive written materials such as exhibits and affidavits prior to deciding whether an evidentiary hearing is necessary. *See* Rules 7 and 8(a), Rules Governing Section 2255 Proceedings.

[5] Clearly, the burden of proof is on MacDonald to prove the facts that form the basis of his claim. The standard which he must meet to prove these facts is not so clear. The Fourth Circuit has stated that during a "proceeding under 28 U.S.C. § 2255 . . . the burden of proof is upon the petitioner to establish [his claim] by a preponderance of the evidence." Yet § 2255(h)(1) imposes a requirement of showing "by clear and convincing

16. MacDonald himself has endorsed this method of adjudicating his claim. Petitioner's Statement of Itemized Material Evidence, filed March 26, 2006, states:

> The petitioner, if he is able to establish to this Court's satisfaction that the new evidence he puts forward from U.S. deputy marshal Jim Britt is reliable, or if this Court agrees that the DNA test results are reliable and are probative of innocence, is entitled to have *all of the evidence* considered *as a whole*, that which was adduced at trial, and that which has been discovered since the trial.

DE-126 at 20-21 (italics in original; underscoring added). In his Reply to Response to Motion to Supplement Itemized Material Evidence, filed May 11, 2007, MacDonald stated:

> As 28 U.S.C. Section 2255 sets forth, if a defendant is possessed of newly discovered evidence, and that evidence (the predicate evidence) is proven, and if that evidence (the predicate evidence) when viewed in light of the "evidence as a whole" establishes by clear and convincing evidence that no reasonable fact-finder would have found the defendant guilty, then the petitioner is entitled to relief.

DE-146 at 4 (emphasis added).

17. With regard to MacDonald's DNA claim of "actual innocence," MacDonald should likewise be required to prove, as a threshold matter, that he has newly discovered exculpatory evidence. It is not sufficient to point to the DNA test results that establish that three hairs do not match any other sample tested.[6] As the

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evidence" that the claim would prevail. The Government submits that MacDonald cannot meet either standard.

[6] The Government argues that MacDonald's § 2255 claim of actual innocence based upon the existence of three unsourced hairs is an abuse of the writ under the holding in *McCleskey v. Zant*, 499 U.S.467 (1991), because the

Fourth Circuit has previously held, unsourced hairs (or fibers) do not establish the presence of intruders. *See United States v. MacDonald*, 966 F.2d 854, 860 (4th Cir. 1992). MacDonald's DNA claim is somewhat different from the Britt claim in that it does not rest on the credibility of a single witness. Nor does it turn on the reliability of the DNA test results per se. Rather, the DNA claim that MacDonald has alleged rests on the provability of the additional assertions of MacDonald's counsel concerning where, when, and by whom the hairs were found, and whether they were bloody or had been forcibly removed. *See* DE-122.[7]

18. MacDonald's task in proving his DNA claim is far more difficult than just presenting the DNA test results, because they are meaningless without proof of context. He must also prove by competent and reliable evidence the chain of identification of the hairs, any serology testing that he proffers, and that the hairs were forcibly removed and not naturally shed. To state this in less abstract terms, if MacDonald claims that an unsourced, forcibly removed hair with blood residue was found underneath a fingernail of Kristen MacDonald, then he is going to have to prove this by

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existence of the three hairs and that they were unmatched to any known source was known to MacDonald prior to the filing of his first habeas petition in 1984, and that petition did not include these claims. *See United States v. MacDonald*, 966 F.2d 854, 856 (4th Cir. 1992).

[7] Even if MacDonald could prove everything his counsel have alleged about these hairs, it would be highly questionable as to whether this would constitute proof of newly discovered evidence, given that the existence of such evidence has been known for decades and all the DNA test results have added to the equation is that the particular hairs do not match any other sample tested, which is in no way inconsistent with the proof at trial. But assuming that this was found by the Court to be proven newly discovered evidence, it certainly could not survive gatekeeping analysis as it would be insufficient to establish by clear and convincing evidence that no reasonable factfinder would have found MacDonald guilty of the offense.

reliable and credible evidence and not just the mere assertions of counsel.

## CONCLUSION

For the foregoing reasons, the Government respectfully requests that, in considering this matter anew on remand, this Court require as an initial matter that MacDonald prove his alleged newly discovered evidence on both the Britt claim and the DNA claim.

Respectfully submitted, this 19th day of September, 2011.

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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 19th day of July, 2011.

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