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

UNITED STATES OF AMERICA	)	
	)	
v.	)	GOVERNMENT'S RESPONSE
	)	TO MOTION ENTITLED
JEFFREY R. MacDONALD,	)	"REQUEST FOR HEARING"
Movant	)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, pursuant to the Court's order of November 10, 2011 [DE-204], hereby submits the following response to movant's Request for Hearing, filed September 20, 2011 [DE-175], and respectfully shows unto the Court the following:

PROCEDURAL CONTEXT

1. The Government incorporates by reference the "Procedural Context" set forth in the *Government's Memorandum For Status Conference* [DE-174], filed September 19, 2011, the "Facts" set forth the *Government's Response To Movant's Motion For Appointment of Counsel,* filed October 24, 2011 [DE-194], the "Procedural Context" of the *Government's Response To Motion For A New Trial Pursuant to 18 U.S.C. § 3600* ("Response to New Trial Motion") filed December 12, 2011 [DE-212], and the "Procedural Context" of the *Government's Response To Motion For Additional DNA Testing* ("Response to DNA Testing Motion") filed December 13, 2011 [DE-227].

2. The Government's Memorandum for Status Conference concluded with the request 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." DE-174 at 11.

3. On the eve of the status conference, MacDonald filed a *Request For Hearing* [DE-175] ("the instant motion") in which he listed potential witnesses he wished to call on both the Britt and DNA claims. *Id.* at 4-5. MacDonald concluded the instant motion by requesting "... a hearing to include live testimony to enable the Court's consideration of all the evidence, including but not limited to the DNA evidence, in evaluating Defendant's 2255 claim and to determine whether Defendant's initial request for DNA testing in 1997 and the 2006 results of that testing entitle Defendant to relief under the Innocence Protection Act of 2004, 18 U.S.C. § 3600." *Id.* at 6.

4. At the September 21 status conference, MacDonald's counsel amended their request, asking that the evidentiary hearing being scheduled by the Court be limited to the Britt claim, and that any consideration of DNA evidence be postponed until after briefing on issues of timeliness and other requirements of the IPA. Tr. of Status Conference ("Hr. Tr.") at 35-36. The Court agreed to MacDonald's request. *Id.* at 36; *see also* DE-180 at 2.[1]

5. On December 12, 2011, the Government filed its Response

[1] This Court invited Macdonald's counsel to file a brief on the efficacy of a free standing claim of actual innocence as a basis for relief. MacDonald's counsel agreed to brief the issue, but to date no brief has been filed. *See id.* at 12-13, 31-32.

in opposition to MacDonald's Motion For a New Trial supported by seven affidavits and dozens of exhibits.[2] DE-212. On December 13, 2011, the Government filed its response in opposition to MacDonald's motion for additional DNA testing under the IPA [DE-227], supported by the Affidavit of Tina Delgado, Technical Leader of the Biometrics Analysis Section, FBI Laboratory [DE-228] and numerous exhibits.

DISCUSSION

6. MacDonald has the burden of proof with respect to both the Britt and DNA claims. This Court has determined that there will be an evidentiary hearing on the timeliness and veracity of the Britt claim, *see* Hr. Tr. at 30, and it is now scheduled for the week of April 30, 2012. For reasons explained in prior filings and at the status conference, the Government respectfully requests that the hearing on the Britt claim be held without significant further delay.

7. In 2006 and 2011, MacDonald has made factual assertions in relation to his DNA claim, unsupported by any affidavits, that the tested hairs were bloody, were forcibly removed, and, in the case of the hair identified as AFDIL Specimen 91A, was found under Kristen's fingernail. These assertions are based upon misquotes or misinterpretations of the content of Government documents. The Government has responded with affidavits from the authors of the documents and the examiners of the evidence. *See* n.2, *supra*. In summary, the documents do not say what MacDonald represents them to

[2] *See* DE-213 through DE-226.

say, and the only witnesses who can competently speak to these issues have refuted MacDonald's claims. Pending MacDonald's reply to the recently filed responses, there is a serious question as to whether an evidentiary hearing is warranted on his DNA claim. *See* Rule 8(a), Rules Governing Section 2255 Proceedings; *see also* Fed. R. Civ. P. 56(a) (party entitled to summary judgment as to a claim if moving party shows that there is no genuine dispute as to any material fact and that moving party is entitled to judgment as a matter of law).[3]

Witnesses

8. In the instant motion, MacDonald lists a number of potential witnesses. Of course, MacDonald is free to subpoena anyone he wants to testify at any evidentiary hearing this Court orders. However, if MacDonald intends to subpoena, or call as a witness without prior notice or subpoena, any current or former employee of the Department of Justice, the Government draws his attention to the provisions of 28 C.F.R. §§ 16.23 *et seq*. These regulations set forth the requirements that must be followed in any litigation in which the United States is a party before any past or present employee can be authorized to respond to any demand for information or testimony acquired during the course of his or her employment with the Department of Justice.

Michael Malone

9. In his motion for an evidentiary hearing, in relation to

[3] The Government recognizes that resolving the DNA claim on summary judgment would require a motion from the Government. The Government will consider whether to do so after MacDonald files his replies.

witnesses that "should be considered" in the context of his DNA claim, MacDonald identifies retired FBI Agent/Examiner Michael Malone. DE-175 at 5. MacDonald alleges that "Malone [e]xecuted a sworn affidavit in a previous MacDonald habeas petition **that a hair found under Colette MacDonald was Jeffrey MacDonald's hair.** The DNA results in 2006 show **that the hair identified by Malone as MacDonald's pubic hair**, is in fact a hair from an unidentified person." *Id.* (emphasis added). In fact, Malone did not make these statements. What Malone actually said at page 9, paragraph 14, of his Affidavit of February 14, 1992 [DE-10, 2/22/91], filed in proceedings on MacDonald's second collateral attack on his conviction, was:

> In connection with this matter I examined debris from the rug underneath the trunk and body of Colette MacDonald, specimen Q-79 (CID# E-303, GX-327) (See Photo Exhibits 32-52). A brown pubic hair of Caucasian origin was previously removed from this debris and mounted on a glass microscopic slide (See Photo Exhibits 41- 46A). This hair (Q-79) does not appear to have been forcibly removed, and exhibits the same individual microscopic characteristics as the specimen K-22 pubic hair sample of Jeffrey MacDonald (See Photo Exhibits 46B-46I). Accordingly, this pubic hair is consistent with having originated from Jeffrey MacDonald. ...

DE-10 at 9. Malone's affidavit further makes clear that hair comparisons are not an absolute basis for identification:

> Secondly, if the unknown is the same as, is similar to, or exhibits the same individual microscopic characteristics as the known source, then that unknown item is consistent with coming from that particular source. **Only in certain circumstances (i.e. firearms, DNA,**

> **etc.) can this be done with absolute certainty; however, with respect to hairs and fibers, the most that can be said is that the unknown can be 'strongly associated' with a known source.**

Id. at 4 (emphasis added). What Malone said in his sworn affidavit is entirely consistent with what he said in his typed laboratory report. *See* DE-218 (DiZinno Aff.), Exhibit 2. And as former FBI Laboratory Director Dr. Joseph DiZinno states in his affidavit, he confirmed Malone's conclusion on February 4, 1991, by his own independent microscopic examination, and in accordance with standard FBI Lab procedure when he was a Hair Examiner. DE-218 at ¶ 17 and Exhibit 1.

10. AFIP DNA results completed some 14 years later would demonstrate that Specimen 75A (Q79), the naturally shed pubic hair, could not have originated from MacDonald. Dr. DiZinno does not find this conclusion "... at odds with his own determination in 1991 that this hair exhibited the same microscopic characteristics as the known exemplars of Jeffrey MacDonald." *Id*. at ¶ 18. Dr. DiZinno, who led the development of mitochondrial DNA usage at the FBI Lab (*Id*. at ¶ 140), continues: "Microscopic comparison of hairs and the subsequent development of mitochondrial DNA extraction and sequencing are based upon entirely different technologies, with different capabilities to discriminate between donors." *Id*. at ¶ 18. Dr. DiZinno further states that studies conducted a decade later determined that, although not common, it is possible for two hairs that have been associated by microscopic comparison to be found upon DNA analysis to have originated from different

individuals. *Id.* ¶ 19; *See also Correlation of Microscopic and Mitochondrial Hair Comparisons,* by Max M. Houck, MA and then Senior FBI Scientist, Bruce Budowle, Ph.D., attached as Exhibit 1 to this response. As Dr. DiZinno further attests, in 2004, the FBI Laboratory recognized this uncommon but documented phenomena in its publication: *Microscopy of Hair Part 1: A Practical Guide and Manual for Human Hairs*, by Douglas W. Deedrick, Supervisory Special Agent, Scientific Analysis Section and Sandra L. Koch, Physical Scientist, Trace Evidence Unit, which states at page 13:

> Hairs that have been matched or associated through microscopic examination should be examined by mtDNA sequencing. Although it is uncommon to find hairs from two different individuals exhibiting the same microscopic characteristics, it can occur. For this reason, the hairs or portions of hairs should be forwarded for mtDNA sequencing. The combined procedures add credibility to each.

DE-218 at ¶ 19. Notwithstanding the fact that neither Special Agent Malone nor Dr. DiZinno had the benefit of this guidance in 1991, it does not change anything they said, because neither ever said that the Q79 [AFDIL 75A] hair "...was Jeffrey MacDonald's hair." DE-175 at 5. Consequently, before the Court should be asked to hear testimony on this overstated claim, MacDonald must identify precisely what Malone said with respect to the Q79[75A] hair that was false or misleading, and further, how it could have possibly changed the outcome of MacDonald's trial in 1979.[4]

[4] Malone never testified at MacDonald's trial; MacDonald's 1990 habeas was based entirely on the bench note issue. DE-1, 10/19/90. Judge Dupree's decision denying habeas relief does not mention this hair or Malone's conclusion. *United States v. McDonald,* 778 F.Supp. 1342 (1991). Finally, the court of appeals affirmed Judge Dupree on the alternative abuse of the writ grounds, involving the bench notes. See *United States v. MacDonald,* 966 F.2d

Death of Jimmy Britt

11. In the instant motion, MacDonald laments that while his § 2255 Britt claim was under advisement prior to the Court's denial of the claim on gatekeeping grounds, Jimmy Britt died in October 2008. The only action that MacDonald took in this regard while this habeas petition was under advisement was to write two letters to the Court. The first, on September 7, 2007, stated that only that Mr. Britt was suffering from serious heart problems that his "availability for any sort of court proceeding is doubtful." DE-148-2. This letter did not ask for an expedited evidentiary hearing so that Britt could testify. In fact, the letter implies that Britt would not be available if such a hearing was convened. The second letter, dated November 5, 2007, asked for a status conference "due to the unique history of this particular case, the complexity of the issues, and the fragile health of key witnesses." DE-148-3. No formal motion was made, and no specific relief was requested other than to hold a status conference. As the Court pointed out at the September, 2011 status conference, MacDonald never moved to depose Britt or any other witness about whose health he was concerned. Hr. Tr. at 17-18. Moreover, the Court has preliminarily indicated that it will consider Britt's affidavit and other hearsay evidence offered by the parties, subject to reasonable limitations, at the evidentiary hearing on the Britt claim. *Id.* at 34-37.

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854 (4th Cir. 1992).

Blond Synthetic Hairlike Fibers

12. At the status conference, this Court indicated that the evidentiary hearing on the Britt claim might also encompass "blonde synthetic hair like [Saran] fibers" issue. *See* Hr. Tr. at 31. Although the court of appeals did refer to this Court's refusal to entertain revisiting this issue previously raised in 1997, the Government submits that the context, both before this Court in 2006 (DE-150 at 21), and at the court of appeals in 2011, was as "part of the evidence as a whole." *United States v. MacDonald,* 641 F.3d 596, 613-4 (4th Cir. 2011). As the Court may recall, MacDonald raised the Saran fiber issue in his Motion To Expand the Record. DE-125; DE-126. If this Court has accepted the Government's argument that the Court need only consider "the evidence as a whole" after MacDonald has proved his Britt and DNA predicate, *see* 28 U.S.C. 2255(h)(1) ("if proven ..."), the Court is not required to entertain this claim in advance of MacDonald having met his gatekeeping evidentiary threshold.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that this Court grant MacDonald's request for an evidentiary hearing on his Britt claim, but withhold a decision on whether to hold such a hearing on his DNA claim until MacDonald has replied to the Government's responses.

Respectfully submitted, this 13th day of December, 2011.

THOMAS G. WALKER
United States Attorney

BY: /s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant U.S. Attorney
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601
Phone: (919) 856-4530; Fax: (919) 856-4487
E-mail: john.bruce@usdoj.gov;
North Carolina Bar No. 8200

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the movant 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:

Christine C. Mumma
N.C. Center on Actual Innocence
P.O. Box 52446
Durham, NC 27717-2446
Phone: (919) 489-3268

Sue A. Berry
Bowen, Berry, and Powers, PLLC
P.O. Box 2693
Wilmington, North Carolina 28402
Phone: (910) 763-3770

This 13th day of December, 2011.

/s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant U.S. Attorney
310 New Bern Avenue, Suite 800
Raleigh, North Carolina 27601
Telephone: (919) 856-4530
Fax: (919) 856-4487
E-mail: john.bruce@usdoj.gov;
North Carolina Bar No. 8200