UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
3:75-CR-26-3
5:06-CV-24-F

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

MOTION TO ALTER OR AMEND JUDGMENT
and
INCORPORATED MEMORANDUM OF LAW

NOW COMES defendant, Jeffrey R. MacDonald, by and through his undersigned counsel, and moves this Court to alter or amend its judgment entered on 24 July 2014. [DE 354] *See* Fed. R. Civ. P. 59(e). The judgment should be amended to reflect the new evidence regarding Michael Malone, and the motion to vacate should be granted. In the alternative, this Court should amend the judgment to grant a certificate of appealability. In further support of this request, defendant shows the following:

PROCEDURAL BACKGROUND

This matter came back to this Court on remand from the United States Court of Appeals for the Fourth Circuit for determination of defendant's motion to vacate. The resolution of the claims was to be assessed on the basis of the "evidence as a whole" under 28 U.S.C. § 2255(h)(1). *United States v. MacDonald*, 641 F.3d 596, 610-17 (4th Cir. 2011). As this Court noted in its comprehensive order, the materials considered were voluminous. In light of this Court's thorough statement of the procedural history and applicable facts, the procedural and factual background need not be repeated. [DE 354 at 2-13, 15-128]

REASONS TO ALTER OR AMEND THE JUDGMENT

I. This Court Should Amend the Judgment Regarding Michael Malone and Grant the Motion to Vacate.

As noted in the briefing in this matter, the defense learned of the existence of handwritten lab notes that revealed numerous blond synthetic hairs, up to twenty-two inches in length, had been found in a hairbrush in the kitchen of the MacDonald home following the murders. These hairs could not be matched to any known items in the MacDonald home. The analyst who testified as a government witness at the trial never mentioned finding these long blond synthetic hairs. Synthetic hairs possibly coming from a wig would have been powerful corroborating evidence of intruders as Dr. MacDonald's consistent accounts of the evening included a female intruder who

appeared to be wearing a wig with long blonde hair. Furthermore, Helena Stoeckley had been known to have and wear a blonde wig during the time of the incident at the MacDonald home.

The government countered this new evidence with an affidavit from FBI Agent, Michael P. Malone, who opined the blond synthetic hairs were not wig hairs, but were made of a saran fiber used only in doll's hair. Dr. MacDonald later learned Malone's affidavit was false.

The Department of Justice and FBI spent the last several years reviewing Michael Malone's work-product and trial testimony to determine whether Malone provided invalid, unreliable, or false hair identification testimony. The DOJ criticized Malone's testimony because he failed to perform his tests in a scientifically acceptable manner. The DOJ also claimed that Malone's hair statistics overstated the hair evidence's significance.

Synthetic saran fibers found in the hairbrush were routinely used in the manufacture of wigs at the time of the murders. This evidence significantly corroborated Dr. MacDonald's account.

The Office of Inspector General of the DOJ has recently issued its comprehensive report, *An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory* [hereinafter Report]. The report is attached as an

exhibit to this motion. It devotes an entire chapter to forensic analysis and testimony by Malone, who "repeatedly created scientifically unsupportable lab reports and provided false, misleading, or inaccurate testimony at criminal trials." [Report at 45] The report notes "Malone became well known to many judges and the law enforcement community because of his forensic work on several high profile cases, including those of Jeffrey MacDonald . . . ." [Report at 45] Although Malone's credibility became the subject of criticism as early as 1985, which was before he provided the false affidavit in this case, both the FBI and the DOJ did not take disciplinary action against him. He retired from the FBI in 1999. [Report at 46] The report noted "the independent scientists were finding almost all of the cases involving hair or fiber evidence analyzed by Malone to be seriously flawed." [Report at 53]

The report was not considered by this Court in its analysis. It is startling in its depth as to the knowledge within the FBI and the government regarding Malone's unprofessional conduct, along with the false evidence and testimony he produced. This information should have been disclosed to the defense. Setting aside the constitutional implications and due process concerns from this non-disclosure, this analysis of Malone by the Office of the Inspector General is highly disturbing. It calls into question any conviction obtained, in part, by the analysis and or testimony by Malone. Indeed, the report itself noted Malone gained fame through his work in

helping to secure Dr. MacDonald's conviction. [Report at 45]

In its ruling in this proceeding, this Court accepted an earlier rejection of the claims regarding these saran fibers by the district court. [DE 354 at 65-71, 135-36, 149-50] The earlier determination rejected several constitutional claims, including a violation of *Brady v. Maryland*, the use of false evidence, and fraud on the court, was based in substantial part on the affidavit of Malone. [DE 354 at 66-68, 160-61] The revelation of the critical analysis of Malone in the report counsels in favor of amending the judgment and granting the motion to vacate.

II. This Court Should Amend the Judgment and Grant a Certificate of Appealability.

This Court summarily denied Dr. MacDonald a certificate of appealability. [DE at 168-69] It did so without the issue being addressed by the parties. There are sound reasons to grant a certificate of appealability in this case.

"If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." Fed. R. App. P. 22(b)(1). The standard for granting a certificate is not high. Dr. MacDonald need not show this Court's decision was incorrect. Indeed, district courts often issue certificates of appealability where they have rejected the merits of the claims and the Fourth Circuit affirms the rulings. *See Longworth v. Ozmint*, 377 F.3d 437, 441 (4th Cir. 2004) (district court denies relief but grants

appealability on four of nineteen claims, including ineffective assistance and counsel's conflict of interest; ruling ultimately affirmed), *cert. denied*, 543 U.S. 1156(2005). Indeed, the Fourth Circuit often grants certificates of appealability even though it later rejects a claim on the merits. *See Meyer v. Branker*, 506 F.3d 322, 364, 366-68 (4th Cir. 2007) (granting certificate of appealability on voluntariness of guilty plea; ultimately finding plea acceptable), *cert. denied*, 128 S.Ct. 2975 (2008).

While the issuance of a COA is not automatic, a petitioner seeking to appeal from the denial of a petition for wit of habeas corpus "need only demonstrate a 'substantial showing of the denial of a constitutional right.'" *Miller-El v. Cockrell*, 537 U.S. 22, 327 (2003). A reviewing court may not deny a COA on the grounds that the petitioner will not succeed on the merits. Rather, a COA should be granted where the petitioner has "demonstrate[ed] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*, citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000). That is, a court "should be confident that petitioner's claim is squarely foreclosed by statute, rule or authoritative court decision, or is lacking any factual basis in the record … before dismissing it as frivolous." *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983).

The standard for granting a certificate has been clearly articulated and is a low

threshold.

> "A COA should issue if the applicant has 'made a substantial showing of the denial of a constitutional right,' which we have interpreted to require that the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Tennard, 540 U.S. at 282 (citations omitted).

> A prisoner seeking COA [is not required] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus.

Miller-El, 537 U.S. at 338 (internal quotations omitted). This Court must not rely on its adjudication of the merits of a claim in deciding whether to issue a COA. It "should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief." *Miller-El*, 537 U.S. at 337. The question is merely whether reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *Slack*, 529 U.S. at 484.

This Court has explained in detail the factual underpinnings of Dr. MacDonald's claims that necessitated the remand from the Fourth Circuit. Moreover, at the hearing in this matter, Dr. MacDonald developed and presented, for the first time, new evidence of statements Helena Stoeckley made to her attorney during the trial in 1979. This information was not previously available because of the attorney-client privilege. Whatever assessment this Court might make as to the reliability or

credibility of this new evidence, reasonable jurists could disagree both as to its reliability or credibility and as to its impact on the trial jury. In tandem with the testimony of Gene Stoeckley, as well as the statements of deceased United States Deputy Marshal Jimmy Britt and the testimony of his former wife, Mary Britt, reasonable jurists could debate whether Dr. MacDonald has carried his burden.

On the question of whether a certificate of appealability should be granted, this Court should recall the Fourth Circuit's statement when it decided the initial appeal of this conviction, "Had Stoeckley testified as it was reasonable to suspect she might have testified [admitting being present during and participating in the crimes], the injury to the government's case would have been incalculably great." *United States v. MacDonald*, 632 F.2d 258, 264 (4th Cir. 1980), *rev'd*, 456 U.S. 1 (1982). Likewise it should recall the sobering words the late Judge Francis Murnaghan, "this case provokes a strong uneasiness in me" because "MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted." *United States v. MacDonald*, 688 F.2d 224, 236 (4th Cir. 1983) (Murnaghan, J., concurring), *cert. denied*, 459 U.S. 1103 (1983). Notably, this Court learned at the hearing that the trial judge himself had considered the evidence against Dr. MacDonald less than overwhelming. As he stated in a letter after the trial, "At that time I confidently expected that the jury would return a not guilty verdict in the case . . . ." [Defense

Exhibit 5115] Surely these observations indicate reasonable jurists could disagree with the resolution of the issues in this case.

Moreover, courts have very recently granted certificates of appealability on issues involving claims of actual innocence and the emerging legal standards regarding them. *See United States v. Baxter*, 2014 WL 3882427 (D.C. Cir. 2014) (granting certificates on two claims of actual innocence); *United States v. Teleguz*, 689 F.3d 322, 325(4th Cir. 2012) (granting certificate on need for evidentiary hearing on claim of actual innocence). The appropriateness of a certificate in these types of cases is underscored by the type of review involved. An analysis of a claim of actual innocence "requires a holistic judgment about 'all the evidence' and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House v. Bell*, 547 U.S. 518, 539 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 328 (1995)). In this determination, "the inquiry does not turn on discrete findings regarding disputed point of fact" as it is not this Court's independent judgment about whether Dr. MacDonald would have been acquitted. *Id*.

Given the nature of the new evidence presented at the hearing, the substantial materials favorable to Dr. MacDonald previously submitted in this matter, and the numerous challenges to a substantial portion of the government's trial evidence, reasonable jurists could debate the impact on the trial jury. *See Stewart v. Cate*, 2014

WL 1707033 (9th Cir. 2014) (panel divided on whether new evidence satisfied gateway showing of actual innocence under *Schlup*). Just as the reasonable jurists in *Stewart* disagreed, reasonable jurists could disagree here on both the gateway showing and on the determination of the merits. Thus, a certificate of appealability should be granted on the questions of whether Dr. MacDonald made the requisite showing to pass through the procedural, gatekeeping requirement and, if so, whether he has presented new evidence, especially the exculpatory statements of Helena Stoeckley under circumstances showing their inherent reliability, that would lead no reasonable juror to convict him.

CONCLUSION

WHEREFORE, Jeffrey R. MacDonald respectfully requests that this Court alter and amend its judgment as set forth herein.

This the 21st day of August, 2014.

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CERTIFICATE OF FILNG AND SERVICE

I hereby certify that on 21 August 2014, I electronically filed the foregoing Motion to Alter or Amend Judgment and Incorporated Memorandum of Law with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record in this matter.

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