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	)

REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO ALTER OR AMEND JUDGMENT

NOW COMES defendant, Jeffrey R. MacDonald, by and through his undersigned counsel, and replies to the government's response to his motion to alter or amend its judgment. [DE 358] Despite the government's protestations, this Court should amend its judgment in no small part due to the revelations that the Department of Justice (DoJ) and the Federal Bureau of Investigation (FBI) "have determined that a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in this case." [DE 363-2, Letter of Norman Wong, Special Counsel, DOJ, to Thomas Walker, United States Attorney] Specifically, at least three laboratory examiners involved at various stages of this case "exceeded the limits of science by overstating the conclusions that may appropriately be drawn from a positive association between

evidentiary hair and a known hair sample." *Id*.

In further support of this reply, Dr. MacDonald shows the following:

REASONS TO ALTER THE JUDGMENT

I. This Court Should Amend the Judgment Regarding False Evidence From Several Government Analysts and Grant the Motion to Vacate.

At the outset, the significance of this new information should not be understated. The DoJ itself recognized its importance when it decreed that, "in the interest of justice," if a defendant seeks post-conviction relief based on it, "the United States is waiving reliance on the statute of limitations under Section 2255(f) and any procedural-default defense in order to permit the resolutions of legal claims arising from the erroneous presentation of microscopic hair examination laboratory reports or testimony." *Id*. This waiver by the DoJ is extraordinary. Thus, this new information is extremely important and should be fully credited by this Court in its assessment of "the evidence as a whole."[1]

Given this new information, in tandem with the new evidence developed at the evidentiary hearing regarding statements of Helena Stoeckley to her attorney

[1]A full assessment of this evidence is beyond the scope of a reply to the government's response to the motion to vacate. The materials associated with the evidentiary items found wanting by this monumental review of more than 20,000 cases before 31 December 1999 [DE 357 at 14 n.2; DE 363 at 2] are voluminous, including multiple laboratory reports, an affidavit of one examiner (Robert Fram) with 69 exhibits attached to it, and three days of testimony from the trial in 1979. [DE 363] In addition, various other documents contained in the "evidence as a whole" should be reviewed in assessing the import of this new evidence. For this reason, Dr. MacDonald suggests this Court might order further supplemental briefing to aid in its determination of this matter.

and her mother, made under circumstances imbued with trustworthiness, as well as new DNA evidence and previous challenges to various aspects of the case against Jeffrey MacDonald, the motion to vacate should be granted. In the alternative, this Court should allow the parties sixty (60) days in which to file supplemental briefs to aid the Court in its assessment of the evidence underlying the conclusions of the DoJ and the FBI.

As noted in the motion to vacate and other filings in this case, 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. The government responded, in part, with an affidavit from Michael P. Malone, which turned out to be false. Dr. MacDonald submitted a lengthy report indicating Malone had overstated the significance of certain evidence, a report that was not available when this Court issued its judgment in this matter. [DE 357] The gravamen of the government's response focused on its view that "the MacDonald case was not included in the cases examined as part of forming that conclusion [that Malone had given false or misleading testimony and had prepared scientifically unacceptable law reports]." [DE 358 at 9; "[T]he new report does not discuss any analysis he [Malone] performed *in this case*." DE 358 at 2 (emphasis added)] But as the recent filings now reveal, the report indeed deals with Malone's specific

improprieties in this litigation.[2]

Specifically, Malone, as well as two other FBI hair and fiber analysts, Paul Stombaugh and Robert Fram, made an "inappropriate statement" that "exceeds the limits of science" in laboratory reports or testimony in this litigation. [DE 363, Exhibits 2-7] Even a cursory review of the material in DE 363 shows these unreliable, if not false, statements concerned a hair allegedly originating from Dr. MacDonald, a hair allegedly originating from Kimberly MacDonald, and the reliability of associating evidentiary hair to a specific person to the exclusion of all others. [DE 363. Exhibit 2] That three FBI analysts have given this information in this case is both disturbing and unacceptable. *See United States v. Fisher*, 711 F.3d 460, 465-68 (4th Cir. 2013) (vacating guilty plea induced, in part, by misconduct of government agent); *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (violation of *Brady* by government agents); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (due process violation by knowing use of perjured testimony).

The government also argues the findings related to Malone are of little consequence because his lack of credibility has been previously presented and litigated and because he did not actually testify in the MacDonald trial. [DE 358 at 2-9] This position misses the mark. The government has long relied upon

[2]In fairness, it does not appear the government had access to the specific findings regarding Malone in this litigation before it received the Wong letter of 17 September 2014, which it promptly filed with this Court.

Malone in this litigation. Previous efforts by Dr. MacDonald to challenge evidence have been thwarted by Malone's statements. Indeed, the courts have relied upon Malone's statement. That the DoJ and the FBI affirmatively have acknowledged Malone's malfeasance in this litigation cannot be so cavalierly discounted.

Moreover, the new information reveals that two other government analysts acted in a similar way in this litigation, making the revelations about Malone even more disconcerting. The malfeasance by Stombaugh and Fram also relates to important evidence in this litigation. [DE 363] Stombaugh gave at least misleading testimony wrongly asserting the reliability of associating evidentiary hair to a specific person to the exclusion of all others. [DE 363, Exhibit 2, 7] Fram made inappropriate statements that a hair originated from Kimberly MacDonald. [DE 363, Exhibit 2, 6]

The impact of this evidence on Stombaugh's credibility would have been devastating to the government, as he was the architect of the experiment regarding the pajama top, which the government has consistently touted as the seminal evidence against Dr. MacDonald. *See* Brian M. Murtaugh & Michael P. Malone, "'Fatal Vision' Revisited: The MacDonald Murder Case," The Police Chief at 20 (June 1993).[3] [DE 126 Appendix 5; Defense Exhibit 5025] Indeed, the materials

[3]The importance of Malone to the government's litigation and global effort in this case is underscored by his co-authoring this article with the lead prosecutor in this matter.

incorporated into the recent DoJ and FBI report references three days of trial, which encompassed Stombaugh's testimony. [DE 363 at 2] Had the jury known of Stombaugh's malfeasance and proclivity to overstate the reliability of his purportedly scientific findings, including the creation of laboratory reports that exceeded the limits of science, it likely would have disregarded all of his testimony.

In this regard, Judge Dupree forecasted this development. During a colloquy with counsel about Stombaugh's qualifications, he noted defense counsel claimed the government had "a file full of stuff on old Stombaugh and it shows that he –is a stumble bum." The prosecution denied this information existed. Judge Dupree warned, "I tell you right now, you had better not put him up there and vouch for his expertise, and come back here on a motion six months from now, if you should be lucky enough to get a conviction in this case, and try to sustain it, because there is going to be a record of what you told me this afternoon." [Trial Transcript at 3245-46] Even if the government did not have information at that time that Stombaugh was "a stumble bum," DoJ and the FBI have now concluded he was much worse than inept; he was prone to give scientifically unacceptable testimony.

Finally, the new evidence discredits the statements and laboratory reports of Fram. It reveals his inappropriate statement and positive associations of a hair

he attributed to Kimberly MacDonald. [DE 363, Exhibit 2, 6] The government relied on his lengthy affidavit, with 69 attached exhibits, in its efforts to combat the DNA evidence developed during the post-conviction proceedings in this case. New evidence regarding his malfeasance would have a serious impact on the assessment of the new evidence when considered with "the evidence as a whole."

The government has argued the new revelations about Malone would not have affected the outcome of the hearing this Court conducted in September 2012.[4] [DE 358 at 9-10] Aside from the fact that these new revelations also seriously diminish the testimony and statements of Stombaugh and Fram, as well as Malone, this argument ignores the task before this Court: to assess the impact of the new evidence of Helena Stoeckley's inculpatory admissions, which exculpate Dr. MacDonald, to her attorney and to her mother under circumstances showing inherent trustworthiness, as well as the new DNA evidence. This new evidence from the DoJ and FBI about Malone, Stombaugh, and Fram has a very significant impact on the assessment of the evidence as a whole. It impugns important government evidence regarding hairs; it shakes the credibility of three analysts who have given important testimony or statements; it casts serious doubt on a

[4]The government also implied Dr. MacDonald should not be heard regarding Malone because he did not take his deposition or litigate the validity of his statements at the hearing in this matter. [DE 358 at 7-8] The government took this position before the Department of Justice expressly waived any issue as to timeliness or procedural default. [DE 363, Exhibit 1] In light of the newly stated position of the Department of Justice, this Court should not concern itself with the government's response in this regard.

large portion of the government's theory of Dr. MacDonald's guilt. Considering the new information from the DoJ and FBI within the ambit of the evidence as a whole, the new evidence of Stoeckley's exculpatory statements and the DNA evidence would have swayed the jury.

Once again, Dr. MacDonald urges this Court to recall the Fourth Circuit's statement that, "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). Surely, this observation is even more compelling in light of the revelations about three analysts on whom the government has long relied: Malone, Stombaugh, and Fram. Indeed, Judge Francis Murnaghan's observation that "this case provokes a strong uneasiness in me" because "MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted" [DE 357] reverberates even more clearly given these new findings. And Judge Dupree's confident expectation of an acquittal at Dr. MacDonald's trial would be even more pronounced.

At so many stages of this litigation, new information has emerged that casts doubt on the conviction of Jeffrey MacDonald. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba v.*

California, 314 U.S. 219, 236 (1941). As the Fourth Circuit recently noted, it violates due process where gross police misconduct inheres in the heart of the government's case. *Fisher*, 711 F.3d at 466. The new information regarding Malone, Stombaugh, and Fram–developed by the Department of Justice and the Federal Bureau of Investigation–reveals just this sort of misconduct that has pervaded this litigation. This Court should alter its judgment and grant the motion to vacate. At the very least, it should stay the judgment and allow further briefing on this issue.

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

Dr. MacDonald renews his request for a certificate of appealability. The government does not dispute that the standard for granting a certificate is not high. [DE 358 at 12-14] Dr. MacDonald need not show this Court's decision was incorrect. He also need not show that this Court did less than a searching analysis in reaching its conclusion. The thoroughness of this Court's review and explanation for its ruling is not the question. The only question is whether reasonable jurist might disagree with the result.

Dr, MacDonald has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). That showing is greatly augmented by the revelations now before this Court.

Reasonable jurists could disagree with this Court's determination.[5] 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." *Id*. at 337.

The government has not shown how reasonable jurists could not disagree both as to the reliability or credibility of the new evidence or its impact on the trial jury, especially given the revelations about Malone, Stombaugh, and Fram. Reasonable jurists could debate whether Dr. MacDonald has carried his burden. Thus, a certificate of appealability is in order.

[5]The government urges this Court to discount the observations of other courts, including those of Judge Murnaghan and Judge Dupree. [DE 358 at 12-13] But those observations undoubtedly indicate that reasonable jurists could disagree about this matter.

CONCLUSION

For the reasons stated herein, as well as in his previous submissions, Jeffrey R. MacDonald respectfully requests that this Court:

1. Alter and amend its judgment as set forth herein;

2. Withhold ruling on the motion to alter and amend and enter an order allowing the parties sixty (60) days in which to file a supplemental memorandum addressing impact of the newly revealed information on the evidence as a whole; and

3. For such other relief as the Court deems him justly entitled.

This the 25th day of September, 2014.

RUDOLF WIDENHOUSE & FIALKO

/s/ M. Gordon Widenhouse, Jr.
N.C. State Bar #10107
312 West Franklin Street
Chapel Hill, NC 27516
Telephone: 919-967-4900
Telefax: 919-967-4953
Email: mgwidenhouse@rwf-law.com

LAW OFFICE OF KEITH A. WILLIAMS, P.A.

/s/ Keith A. Williams
N.C. State Bar #19333
Post Office Box 1965
Greenville, NC 27835
Telephone: 252-931-9362
Telefax: 252-830-5155
Email: keith@williamslawonline.com

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on 25 September 2014, I electronically filed the foregoing Reply to Government's Response to Motion to Alter or Amend Judgment with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record in this matter.

RUDOLF WIDENHOUSE & FIALKO

/s/ M. Gordon Widenhouse, Jr.
N.C. State Bar #10107
312 West Franklin Street
Chapel Hill, NC 27516
Telephone: 919-967-4900
Telefax: 919-967-4953
Email: mgwidenhouse@rwf-law.com