IN THE 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.	)
	)
JEFFREY R. MacDONALD,	)
	)
Defendant/Movant.	)

REPLY IN SUPPORT OF
MOTION FOR APPOINTMENT OF COUNSEL

In reply to the Government's Response and in further support of his Motion for Appointment of Counsel and in support of the Motion to Withdraw by Hill Allen, Defendant/Movant Jeffrey R. MacDonald ("Defendant") respectfully shows the following:

1. Notwithstanding the Government's ethical advice, undersigned counsel Hill Allen believes he is required to withdraw. As the Government has previously represented, Wade Smith will "undoubtedly" be a witness at the evidentiary hearing and is likely to be subpoenaed by both sides (DE-185, ¶ 4). A central figure in the "Britt Claim" is the prosecutor from Defendant's original trial, James Blackburn, who was previously represented by Wade Smith on felony charges that eventually lead to Mr. Blackburn's incarceration and disbarment from the practice of law. As Mr. Blackburn stands accused of prosecutorial misconduct in the case at hand, his interests are in direct conflict with Defendant's. At the time Hill Allen appeared to assist lead counsel Hart Miles, no one contemplated that Hill Allen would be cross-examining his own partner's former client and taking an active role in publicly condemning Mr. Blackburn's misconduct. *See* Comment 6 to Rule 1.7 of the North Carolina Rules of Professional Conduct

("NC-RPC") ("a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client") and Comment 8 to Rule 1.7 ("Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests."). Nor, indeed, to undersigned counsel's knowledge, had any party indicated that Wade Smith would "undoubtedly" be a witness to be examined. As soon as this conflict situation crystallized, he filed a motion to withdraw as required by Rule 1.16 (a)(1), which states that counsel *shall* withdraw from representation that has already commenced if the representation would result in a violation of the Rules of Professional Conduct. Undersigned counsel can only conclude that he is required to withdraw rather than examine his own law partner (Wade Smith) and his partner's former criminal defense client (James Blackburn) and argue about the import of their testimony in an evidentiary hearing concerning prosecutorial misconduct by Mr. Blackburn.

2. The Government paraphrases a portion of Rule 3.7 (DE-194, ¶ 20, p. 6), but fails to note the further proviso in the last clause of Rule 3.7:

> A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness ***unless precluded from doing so by Rule 1.7 or Rule 1.9***.

Rule 3.7, NC-RPC (emphasis added). Rules 1.7 and 1.9, NC-RPC, address conflicts of interest between current and former clients. Rule 1.7 prohibits representation where "the representation of one or more clients may be materially limited by the lawyer's responsibilities to . . . a former client . . ." How can Hill Allen's representation of Defendant not be limited by his own partner Wade Smith's past representation of a central figure (James Blackburn) on later criminal charges, especially now that lead counsel for MacDonald has withdrawn, thereby putting Allen in a more pivotal role, given all the attendant duties of confidentiality, loyalty, independent

judgment and zeal to current and former clients? *See, e.g.*, Comment 9 to Rule 1.7 ("In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9. . .").

3. Moreover, Rule 1.7 requires, among other things, that "each affected client gives informed consent, confirmed in writing." Rule 1.7(b)(4). Jeffrey MacDonald has not "give[n] informed consent, confirmed in writing." *See* Rule 1.7(b)(4) and Comments 14-15 to Rule 1.7 (some conflicts are "non-consentable"). Although the Government presents Mr. Blackburn's waiver of conflict as dispositive, it is little more than an interesting fact. Certainly, Mr. MacDonald's interest in ensuring there are no potential conflicts in this critical stage in proceedings is of paramount importance. His waiver of conflict is essential and would hinge on Mr. Allen's commitment that his ability to zealously represent his client would not be impacted by the conflict – a commitment Mr. Allen cannot make.

4. Rule 1.9, in turn, prohibits a lawyer whose present or former firm has represented a client from "us[ing] information relating to the representation to the disadvantage of the former client" or "reveal[ing] information relating to the representation." In essence, Rule 1.9 prohibits a lawyer (Hill Allen) from using information obtained by his firm to the disadvantage of his firm's former client (James Blackburn). There is no question that a focus of the hearing will be Mr. Blackburn's conduct as set forth in the sworn affidavit of Deputy United States Marshal Jimmy B. Britt.

5. Under these circumstances, undersigned counsel Hill Allen believes that he is required to withdraw as an ethical matter. "Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved." Comment 6 to Rule 3.7. The Government's vote of confidence in counsel does not relieve Mr. Allen of his own ethical strictures. The

unpublished decision cited by the Government, concerning a civil dispute in the S.D.W.Va., *Stone v. Allstate Ins. Co.*, 2000 WL 35609369 (S.D.W.Va. 2000), is inapposite and offers no comfort. More instructive are *United States v. Kitchin*, 592 F.2d 900, 905 (5th Cir. 1979) (disqualifying counsel from representing interests adverse to those of former client pursuant to Canon 4 of the ABA Model Code and observing: "For a former prosecutor to be associated with the lawyer who represents a person he earlier helped prosecute, even if only at an embryonic stage, would likely provoke suspicion and distrust of the judicial process. Moreover, the nature of the charges leveled against the defendant go to the very heart of the integrity of the prosecutor's office. . .") and *United States v. Tedder*, 801 F.2d 1437, 1443 at fn. 3 (4th Cir. 1986) (discussing cases that concern the disqualification of a law firm or individual because of a prior representation of an adverse party and noting that courts generally impute to the entire law firm any information that will disqualify an individual attorney). Counsel respectfully submits that all parties will be better served by the appointment of counsel who has no conflict, nor even the appearance of a conflict of interest, particularly in a matter involving *inter alia* serious allegations of prosecutorial misconduct. *See Furbush v. Otsego Mach. Shop, Inc.*, 914 F. Supp. 1275, 1282 (E.D.N.C. 1996) (Fox, J.) (disqualifying counsel due to appearance of a conflict, evaluating conflict "with a view of preventing the 'appearance of impropriety,'" "resolv[ing] all doubts in favor of disqualification" and observing that other concerns "must bow to the absolute necessity of preserving the highest ethical standards and the integrity of our profession.").

6. As to Defendant's financial eligibility for appointment of counsel, the Government's arguments are even more specious. The Government concedes that appointment of counsel is required if Defendant is financially eligible (DE-194, p. 3, ¶ 11). It is painfully apparent that Defendant is without resources to pay for counsel to prepare for and conduct the

evidentiary hearing in this matter and associated expenses. Defendant has been incarcerated for over three decades, without a non-prison job or income. Nevertheless, for the record, Defendant has prepared the attached financial affidavit form (CJA 23) to the best of his ability while in custody. It confirms that, as would be expected given his long confinement, he qualifies for appointment of counsel under 18 U.S.C. § 3006A. (Financial Affidavit attached as Exhibit 1 and filed as a proposed sealed document for the protection of his wife's privacy).

7. The Government notes the existence of an independent defense fund (DE-194, p. 5, ¶ 17). That fund presently has a total of $3,316.25 to its name. (*See* Affidavit of Raymond M. Shea, attached as Exhibit 2).

8. Undersigned counsel appeared *pro bono* to assist then-lead counsel Hart Miles. Neither undersigned counsel nor Defendant anticipated that Hart Miles would withdraw. Neither of undersigned counsel has been nor can be compensated by Defendant for their time and expenses. Both undersigned counsel filed notices of appearance in September 2011, in contrast to Government counsel who have litigated the matter for decades. Neither of undersigned counsel have prior experience with a § 2255 evidentiary hearing nor with proceedings under § 2255(h). By contrast with *pro bono* counsel, and a Defendant who has exhausted all financial resources, the Government has vast resources with which to litigate this matter, as evidenced by the extensive past proceedings.

9. The Government also implies that Defendant has a "roster" of attorneys prepared to represent him at the evidentiary hearing (DE-194, p. 5, ¶ 18). The website referenced by the Government as proof of Defendant's representation is not updated on a regular or complete basis, as is evidenced by the fact that the "Case Chronology" ends with March 2010 activity.

http://themacdonaldcase.org/Chronology_5.html.[1] In fact, as the docket confirms, these counsel are not prepared to represent him at the evidentiary hearing. Joseph Zeszotarski has been allowed to withdraw and, as set forth in his motion, was not retained to conduct an evidentiary hearing. Philip Cormier and Andrew Good have not represented Defendant since 2004 (although they filed as amici in 2009), and neither has agreed to or has any intention of representing Defendant at the evidentiary hearing. Timothy Junkin and Hart Miles have withdrawn. Wade Smith has submitted his motion to withdraw and has been identified as a witness. Indeed, all of the attorneys listed on the "Defense Counsel" exhibit touted by the Government (DE-194-3) have either withdrawn or are not attorneys of record, and none intend to appear in this proceeding. This leaves undersigned counsel – Hill Allen, who has a conflict, and Christine Mumma, who has no federal experience and joined on a *pro bono* basis with the limited intention of assisting with the IPA claim for further DNA testing.

10. The Government's detailing of lawyers who have assisted in various capacities over these many years is no substitute for a lawyer experienced in federal practice being appointed as required by Rule 8 of the Rules Governing § 2255 Proceedings. The fact that Defendant was able to retain counsel at a prior stage of the proceedings by exhausting his personal funds, accumulating massive debt, and borrowing of the generosity of family and friends, does not vitiate the requirement that counsel be appointed at this stage. *See* 18 U.S.C.A. § 3006A(c) (authorizing appointment of counsel at any stage of the proceedings if the court finds a person financially unable to pay counsel).

11. Again, the Government does not dispute that Rule 8 requires appointment of a lawyer (DE-194, p. 3, ¶ 11). That Rule specifically provides that if an evidentiary hearing is

[1] Since April 2010, due to a lack of funding, the website has only been updated one time. In April 2011, the 4th Circuit Opinion was added to the "Documents" section and an "Update Letter" was added.

ordered in a § 2255 proceeding, counsel must be appointed. *United States v. Duarte-Hegareda*, 68 F.3d 369 (9th Cir. 1995); *accord United States v. McClaren*, 112 F.3d 511 (4th Cir., decided May 1, 1997) (unpublished decision attached as Exhibit 1 to Motion) ("*McClaren*"); *United States v. Lewis*, 21 Fed. Appx. 843 (10th Cir., decided Oct. 24, 2001) (unpublished decision attached as Exhibit 2 to Motion). Violation of Rule 8(c) requires automatic reversal and is not subject to harmless error review. *United States v. Maxwell*, 184 Fed. Appx. 708, 2006 WL 1587507 (10th Cir., decided June 12, 2006) (attached as Exhibit 3); *McClaren*, above; *Duarte-Hegareda*, 68 F.3d at 369.

12. Given the conflict of interest of the Federal Public Defender's Office, Defendant has identified counsel who is experienced in federal law and available to represent Defendant within a relatively short period of time. The Government's resistance to the appointment of counsel based on delay or "expense to the taxpayers" is disappointing and remarkable given that the Government's own procedural maneuvering has delayed this matter for years and surely has compounded taxpayer expense in terms of judicial time and resources. For the last fourteen years of proceedings on the issues at hand, the Government has tried to block access to and judicial consideration of critical evidence, including complete and independent testing of biological evidence; reliable and credible statements and/or affidavits from important witnesses; and significant misstatements of fact with regard to physical evidence and opinion testimony presented at trial. The record is replete with opposition after opposition from the Government, including motions to dismiss, jurisdictional challenges, motions to strike exhibits or limit the record, and opposition to admission of amicus. The great majority of these challenges were eventually resolved in Defendant's favor and all were defended by attorneys who were paid with whatever funds Defendant had left, or volunteered their time in the interest of justice. In over

thirty years of serious questions regarding the validity of Defendant's conviction, never has the Government, as the "minister of justice," taken a position which reflects an interest in the complete and transparent search for the truth.

13. There would be no prejudice to the Government from any modest delay that attends the appointment of counsel; the Defendant remains in confinement. And, as the Government itself acknowledges, Defendant has never before requested appointed counsel "at taxpayer expense." (DE 194, ¶¶ 15-16). This Defendant has never received the benefit of appointed counsel despite decades of litigation against the vast resources of the Government. That makes it all the more appropriate for counsel to be appointed now, following the mandate from the Fourth Circuit and this Court's order for an evidentiary hearing in a proceeding involving serious underlying allegations, as required by Rule 8 of the Rules Governing § 2255 Proceedings.

14. The Government's opposition to appointment of counsel gives the strong appearance of seeking tactical advantage at the expense of fairness and truth-seeking. This is a proceeding involving, among other matters, prosecutorial misconduct as set forth in Deputy Britt's affidavit. Even though an appointed counsel cannot match the Government's resources and multiple lawyers, the appointment of a lawyer would reduce in some small measure the tremendous disparity in resources and afford at least some minimal measure of fairness.

15. Accordingly, Defendant respectfully renews his request that the Court appoint M. Gordon Widenhouse, Jr. as counsel in this action and continue the evidentiary hearing until February 16, 2012, when the Government previously has said it is available, or until March 16 or shortly thereafter if the Government prefers (*see* email of 11/1/11 from J. Bruce to L. Jordan, attached as Exhibit 4).

16. The Government contends that there is no right to a specific lawyer. Undersigned counsel submit that the Court and all parties, and the interests of justice, would be well-served by the appointment of a lawyer familiar with the intricacies of proceedings under § 2255, as is Mr. Widenhouse. When the withdrawal of lead counsel for Defendant brought the issue to a head, undersigned counsel attempted to identify qualified counsel who would accept the rate of payment for appointed counsel and be willing to take on a case unmatched in history and complexity, and Mr. Widenhouse graciously agreed with the stipulation that the hearing would need to be minimally delayed, to a time the Government has said it is available.[2] The rate of payment would be the same for Mr. Widenhouse as for any other appointed lawyer. Again, for the Government to resist his appointment suggests that it seeks tactical advantage even at the expense of basic fairness and the truth in a proceeding concerning serious accusations of prosecutorial misconduct.

17. Counsel respectfully submit that in light of the crucial nature and stage of these proceedings, and the fact that their protracted history has largely been brought on by the Government's continued unnecessary challenges, the Government's resistance to the Defendant's right to qualified counsel who is given sufficient time to educate himself on thirty years of litigation history is contrary to the intent of the law and the pursuit of justice.

[2] In its October 3, 2011 Response to Motion to Continue, the Government "suggested" that the hearing be held sometime between November 28, 2011 and December 16, 2011, but did not object to the hearing being postponed until after February 15, 2012 so as to avoid conflict with the John Edward's trial. (DE 185 at 5-6). In an email of today, the Government now indicates the period from February 6 to about March 16 is "problematic" because of scheduling in the Edwards trial. (Exhibit 4 hereto.) Defendant would consent to moving the matter to March 16 or shortly thereafter to accommodate the Government's conflict.

This the 1st day of November, 2011.

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 1, 2011, the foregoing **REPLY IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL** was electronically filed with the Clerk of Court, United States District Court for the Eastern District of North Carolina, using the CM/ECF system. The CM/ECF system will send electronic notification of such filing to all parties.

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