

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8525

UNITED STATES OF AMERICA,

Appellee,

v.

JEFFREY R. MACDONALD,

Appellant.

**OPPOSITION TO GOVERNMENT'S MOTION
TO DISMISS APPEAL**

NOW COMES APPELLANT Jeffrey R. MacDonald, through undersigned counsel, and hereby submits this Opposition to the Motion to Dismiss Appeal filed by the Government on March 13, 2010.

INTRODUCTION

Less than two weeks before oral argument, and after filing a lengthy merits brief that failed to raise the issue, the Government for the first time moves to dismiss this appeal on the grounds that the Certificate of Appealability ("COA") issued by this Court was done so improvidently under 28 U.S.C. § 2253(c), purportedly because "the legal claims embraced by the COA are not of

constitutional magnitude.” (Gov’t Motion at 1). The Government’s last-minute request is without merit. Section 2253(c), as explained by the United States Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000), authorizes issuance of a COA in this case. The Government’s Motion is yet another baseless attempt to avoid consideration of the merits of MacDonald’s claims, and should be denied.

PROCEDURAL HISTORY

This appeal involves the denial by the district court of a Motion to Vacate under 28 U.S.C. § 2255 filed by MacDonald in 2006 (hereinafter the “2255 Motion”), after this Court granted MacDonald a pre-filing authorization under 28 U.S.C. § 2244. The 2255 Motion seeks a new trial, asserting claims that MacDonald is entitled to relief because he has been deprived of his rights under the United States Constitution.

The district court denied the 2255 Motion without a hearing, under the standard set out in 28 U.S.C. § 2244(b)(2)(B). In denying MacDonald’s constitutional claims, the district court expressly refused to consider certain pieces of evidence that MacDonald asserts the district court was required to consider under Section 2244(b)(2)(B), which sets out the “gatekeeping” standard by which constitutional claims for relief in successive motions filed under Section 2255 are to be considered. The district court’s application of this standard in assessing MacDonald’s constitutional claims for relief is the basis of this appeal.

MacDonald sought a COA from the district court, but was denied. MacDonald then sought a COA from this Court, and this Court ordered MacDonald to file an informal brief in support of his request. MacDonald did so on February 19, 2009, asserting that the district court erred in denying the constitutional claims in his Section 2255 Motion under the Section 2244 standard.

On June 9, 2009, this Court entered an order granting a certificate of appealability as follows:

The Court grants a certificate of appealability on the issue of whether the district court's procedural decisions prohibiting expansion of the record to include evidence received after trial and after the filing of the 28 U.S.C.A. § 2255 (West Supp. 2009) motion was erroneous in light of 28 U.S.C. § 2244(b)(2)(B)(ii) (2006). The Clerk shall issue a briefing order directing the filing of formal briefs and a joint appendix.

Thereafter, MacDonald filed a brief on the merits, and the Government filed a merits brief in opposition. In its merits brief, the Government failed to challenge the issuance of the COA by this Court.

After filing of the merits briefs, this Court set oral argument in the case for March 23, 2010. On March 13, 2010, just ten days before oral argument, the Government filed the instant Motion to Dismiss.

ARGUMENT

I. The Government's Motion Should be Denied, Because *Slack* Rejects the Premise Underlying the Government's Motion.

The Government argues that the COA is improvidently granted by this Court because the COA addresses the scope of evidence that can be considered under the Section 2244(b)(2)(B) standard, and, according to the Government, “disputes about statutory questions are insufficient to support the issuance of [a COA].” (Gov’t Motion at 6-7). At its core, the Government’s position is that because MacDonald challenges how the district court applied Section 2244 to his constitutional claims, this appeal is one involving an issue of “statutory construction” that cannot be the subject of a COA under Section 2253(c). The Government’s position evinces a misunderstanding of Section 2253(c), and ignores the decision of the United States Supreme Court in *Slack*.

A. *Slack* Forecloses the Government's Position.

As conceded by the Government in the district court, (JA 1631-32), the United States Supreme Court in *Slack* provided the guidelines for lower courts to apply in determining applications for COAs under Section 2253(c). First, the *Slack* court held:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.

Slack, 529 U.S. at 484. In this case, the district court did entertain the merits of MacDonald's constitutional claims, and rejected them under the Section 2244(b)(2)(B) standard. The Government makes no argument that the district court's treatment of the constitutional claims is not "debatable." MacDonald submits that this Court properly issued a COA to determine if the district court followed the law in denying MacDonald relief on his constitutional claims, as it is plainly "debatable" as to whether he is entitled to relief, and that is all that is required under Section 2253.

Nonetheless, even if the issue on which this Court granted a COA -- the district court's application of the Section 2244(b)(2)(B) standard to deny MacDonald relief on his constitutional claims -- could be characterized as "procedural," this in no way prevents issuance of a COA or permits the relief requested by the Government. To the contrary, the *Slack* court addressed denial of habeas motions on procedural grounds, and announced a rule that forecloses the Government's position here:

Citing § 2253(c)'s requirement that a COA may issue only upon the "substantial showing of the denial of a constitutional right," the State contends that no appeal can be taken if the District Court relies on procedural grounds to dismiss the petition. According to the State, only constitutional rulings may be appealed. Under this view, a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss the petition on procedural grounds would be denied relief. We reject this interpretation. ... In setting forth the

preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.



We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 483-484 (emphasis added). In this case, there can be no debate that MacDonald's petition states valid claims of the denial of a constitutional right, and the Government does not argue otherwise in its motion. Likewise, it is plain that the district court's application of the Section 2244(b)(2)(B) standard in this case, in its refusal to consider the "evidence as a whole" despite the plain language of the statute, is "debatable" in its correctness. MacDonald need show nothing more for issuance of a COA on this issue. *Slack* directly rejects the Government's argument in its motion, and the motion should be denied.¹

¹ None of the cases cited by the Government in its Motion support dismissal of this appeal. The Government cites this Court's decision in *Harden*, (Gov't Br. at 6), but a review of *Harden* shows no reliance by this Court on the language quoted by the Government to deny any habeas claim. Likewise, the Seventh Circuit in *Ramunno*, 264 F.3d at 725, noted and applied *Slack* to find that the merits of the petitioner's underlying constitutional claim were not debatable and that therefore a COA should not issue.

B. The Government’s Procedural Arguments Are Without Basis in Law and are a Baseless Attempt to Avoid Consideration of the Merits of MacDonald’s Constitutional Claims.

The Government’s motion to dismiss is another baseless attempt by the Government to raise a procedural bar to consideration of the merits of MacDonald’s constitutional claims. As noted in Appellant’s Brief and Appellant’s Reply Brief, the Government’s position regarding the Section 2244(b)(2)(B) standard is without any support in the caselaw, is contrary to the plain language of the statute, and is a forced attempt to avoid consideration of the merits of MacDonald’s constitutional claims. The Government’s motion to dismiss is without merit, is foreclosed by *Slack*, and should be denied.

II. The Government’s Motion Should be Rejected Because, Alternatively, MacDonald Is Entitled to Appellate Review of his Claims Under the Innocence Protection Act, 18 U.S.C. § 3600.

In its merits brief, the Government raises the issue of the Innocence Protection Act (hereinafter “IPA”), and states wrongly that for MacDonald to be eligible for relief under the IPA, he must show that he is not the source of DNA in

The other cases cited by the Government are likewise distinguishable. In *Langley*, 465 F.3d at 862-63, the Eighth Circuit found that a COA should not have been issued where the district court granted the COA on an issue that was raised by neither party. In *Phelps*, 366 F.3d at 728-729, the Ninth Circuit found that the COA was improvidently granted because the petitioner’s underlying claim was not constitutional, but rather based on Rule 60(b). In *Hendricks*, 307 F.3d at 81-82, the Third Circuit denied COA to claims based solely on a state statute rather than on the Constitution. None of these holdings apply here, where MacDonald’s Section 2255 claims are plainly constitutional in nature.

evidence introduced at trial. (Gov't Brief at 39 n. 16). The Government's argument is incorrect -- under the IPA, all MacDonald must show to obtain relief is that the evidence to be tested for DNA was secured during the investigation of the murders of which he was convicted, not that it was used at trial to convict him. 18 U.S.C. § 3600(a)(2) & (4); *United States v. Fasono*, 577 F.3d 572 (5th Cir. 2009) (discussing IPA requirements).

In 1997, seven years before the IPA was enacted, this Court ordered that certain hairs seized by law enforcement investigators at the scene of the murders for which MacDonald was convicted, and held by law enforcement ever since, be subjected to DNA testing under the district court's supervision. (JA 889); *In re MacDonald*, No. 97-713 (4th Cir. October 17, 1997). Though it took close to ten years, the DNA testing was conducted under the supervision of the district court and the results were reported to the district court in 2006. (JA 1088). There can be no question that MacDonald's request for DNA testing is timely under the IPA, as it was made and allowed by this Court seven years prior to the enactment of the IPA. 18 U.S.C. § 3600 (a)(10). MacDonald testified to his innocence at trial, thereby satisfying the requirements of 18 U.S.C. § 3600 (a)(7). His theory of defense based on DNA testing is the same as his theory of defense at trial, and would establish his actual innocence of the charges. The identity of the perpetrators of the murders was at issue in the trial. 18 U.S.C. § 3600 (a)(6) & (7).

This Court authorized the DNA testing in 1997 because the testing would produce both evidence that would support MacDonald's defense that intruders killed his wife and daughters, and would raise a reasonable probability that MacDonald did not murder his wife and daughters. 18 U.S.C. § 3600 (a)(8). In short, the requirements of Section 3600 are all met by MacDonald

Nor can there be any question that the DNA results were timely raised by MacDonald as a basis for a new trial. Promptly after the district court and the parties received the DNA testing results, MacDonald sought relief from the district court, based on the DNA results, because the results showed that he was not the source of hairs found and seized by law enforcement at critical locations at the murder scene, including underneath the fingernail of one of his daughters where she had been fighting with her attacker. (JA 1088).

Most significant to the Government's motion to dismiss, pursuant to Section 3600(h) MacDonald's DNA-based claim for a new trial "is not to be considered as a motion under section 2255 for purposes of determining whether the motion or any other motion is a second or successive motion under section 2255." 18 U.S.C. § 3600 (h)(2). This Court is obliged by subsection (h)(2) not to treat MacDonald's DNA-testing claim as a section 2255 motion under the IPA. For that reason, section 2253(c) does not apply to the DNA claim, which the district court erroneously refused to consider. Accordingly, the Government's motion to dismiss

the appeal should be denied because MacDonald is entitled to review of the district court's refusal to consider the DNA results without having to satisfy section 2253(c)'s COA requirements.

Under the IPA, the court shall grant MacDonald a new trial "if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was produced at trial), establish by compelling evidence that a new trial would result in an acquittal" for the "federal offense" for which MacDonald was convicted. 18 U.S.C. § 3600 (g)(2). Under this standard, independent of Section 2255, MacDonald is also entitled to relief. MacDonald contends that this Court's decision to grant DNA testing in 1997 permits MacDonald to obtain relief under the IPA, as all of the elements of the statute have been met.

CONCLUSION

In sum, under any post-conviction standard, the combined effect of the newly discovered evidence, when considered with all the evidence, establishes MacDonald's constitutional entitlement to a new trial. MacDonald has suffered years of imprisonment while the Government opposed his request for an evidentiary hearing so that the testimony of former Deputy U.S. Marshal Jimmy Britt could be heard and evaluated with the other newly discovered evidence, including the exculpatory results of DNA testing authorized by this Court in 1997. After Mr. Britt's death and the district court accepted the truth of Mr. Britt's

testimony, the Government belatedly claimed that it could have impeached Mr. Britt, and that MacDonald must seek and obtain a separate pre-filing authorization for each item of newly-discovery evidence, including the DNA test results, before the Court may consider the totality of the evidence. The Government's motion to dismiss this appeal is yet another delaying tactic. Its motion is based on nothing more than a strained, non-contextual reading of this Court's certificate of appealability. The motion is designed to persuade the Court not to fairly examine the evidence and find the truth. The "evidence as a whole" shows that MacDonald is a victim, not the perpetrator, of the murders of his wife and daughters. This Court should not countenance any further governmental effort to delay a judicial examination of the evidence to verify the merit of MacDonald's constitutional claims.

For the reasons set out herein, Appellant Jeffrey R. MacDonald respectfully requests that the Government's motion to dismiss appeal be denied.

This the 17th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing MOTION through the electronic service function of the Court's electronic filing system, as follows:

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This the 17th day of March, 2010.

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