

THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
No. 75-CR-26-3  
No. 5:06-CV-24-F

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JEFFREY R. MacDONALD, )  
 )  
 Applicant/Defendant. )

**REQUEST FOR HEARING**

The Defendant/Applicant (“Defendant”), pursuant to 28 U.S.C. § 2246 and 18 U.S.C. § 3600, as well as the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments of the U.S. Constitution, requests an evidentiary hearing to include live testimony. In light of the United States Court of Appeals for the Fourth Circuit mandate on June 13, 2011, whereby this Court was directed to consider all the evidence, including but not limited to the DNA evidence, in evaluating Defendant’s 28 U.S.C. §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, Defendant respectfully submits the following procedural summary and list of potential witnesses. The list of witnesses is not exhaustive, and Defendant expressly reserves the right to identify and

call other witnesses who may be able to provide testimony relevant to his actual innocence claim, Innocence Protection Act claim, and prosecutorial misconduct claim.

### **PROCEDURAL SUMMARY**

Fourteen years have passed since the Defendant initially requested that DNA testing be done in his case, and over six years have passed since former U.S. Marshal Jim Britt first came forward to reveal serious prosecutorial misconduct during the 1979 trial. In 1997, the Defendant first sought DNA testing as part of his motion to re-open a previous habeas petition--a motion filed on grounds that FBI evidence analyst Michael Malone had made false statements regarding evidence in sworn affidavits filed by the government.<sup>1</sup> This Court denied Defendant's request for DNA testing and referred the issue to the United States Court of Appeals for the Fourth Circuit, who subsequently ordered this Court to oversee DNA testing. The DNA testing process, for reasons that are still unclear but not within Defendant's control, was not complete until March 10, 2006. Meanwhile, in 2004, retired U.S. Marshal Jim Britt came forward to testify by affidavit that he witnessed Jim Blackburn, the lead prosecutor in MacDonald's 1979 trial, threaten Helena Stoeckley with a murder indictment if she testified she was in the MacDonald home the night of the murders. Based on Britt's sworn affidavit regarding Blackburn's prosecutorial misconduct, Defendant received pre-filing authorization from the Fourth Circuit Court of Appeals in late 2005 and filed a new habeas petition in January of 2006. Shortly after that petition was filed, in a report dated March 10, 2006, the lab conducting the DNA tests informed the Court that testing was complete and issued its report. Upon

---

<sup>1</sup> Ultimately 2006 DNA test results demonstrated that Malone had made another false statement in his February 14, 1991 affidavit when he concluded that a hair found under Colette MacDonald was Jeffrey MacDonald's. **The DNA tests on the hair showed that it belonged to an unidentified individual.** (Armed Forces Institute of Pathology DNA Report, Appendix One to Defendant's Memorandum of Evidence and Points and Authorities in Support of Petitioner's Motion to Add an Additional Predicate)

reviewing the DNA report and confirming that it included exculpatory evidence that further supported his actual innocence claim, Defendant promptly made a motion (Motion to Add Additional Predicate) requesting that this Court consider the exculpatory DNA results along with all the other evidence of innocence in the case. That request was made on March 22, 2006. Over the next two and a half years, Defendant made two requests for a status conference. Also during that period, the mother (“Mrs. Stoeckley”) of Helena Stoeckley testified by affidavit that her daughter Helena had confessed to involvement in the MacDonald murders and was fearful of the prosecutor. In April 2007, MacDonald made a motion (Motion to Supplement Itemized Evidence) requesting that the Court consider Mrs. Stoeckley’s affidavit along with all the other evidence in this case. Time passed and counsel informed the Court that key witnesses were in poor health. Those witnesses were Jim Britt and Mrs. Stoeckley. Jim Britt passed away on October 22, 2008. Notably, at the time of his death, the government had never filed any affidavit challenging Britt’s account of Blackburn’s prosecutorial misconduct. The Court denied Defendant’s motions to consider the DNA evidence and the Stoeckley affidavit on November 4, 2008. Mrs. Stoeckley passed away on February 2, 2009.

Now for the first time since the 1979 trial, the Court can evaluate the Defendant’s actual innocence claim in light of all the evidence that accumulated during the last 41 years. In the Court’s November 4, 2008 Order (“Order”), the Court raised futility as an issue for the Defendant and opined: “[T]he passage of time has rendered determination of MacDonald’s prosecutorial misconduct claim factually impossible.” However, the Court also made the following finding in the Order on page 38: “The court accepts Britt’s affidavit as a true representation of what he heard or genuinely thought he heard

on August 15-16, 1979.” Given the power of Britt’s affidavit, certainly Britt’s account of a prosecutor threatening a defense witness with a murder indictment is conduct that deprived the Defendant of a fair trial. *See United States v. Francisco*, 35 F.3d 116, 120 (4<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1133 (1995). Defendant respectfully submits that live testimony is available as it relates to the Britt claim of prosecutorial misconduct and the exculpatory DNA evidence. Defendant submits the following potential witnesses should be considered, particularly in light of the April 19, 2011 decision by the United States Court of Appeals for the Fourth Circuit:

The Britt Claim of Prosecutorial Misconduct

1. James Blackburn: Since the Defendant’s initial filing in the U.S. Court of Appeals for the Fourth Circuit in December of 2005, the government has failed to submit any affidavits from Mr. Blackburn that refuted Jim Britt’s sworn statement that Mr. Blackburn threatened Helena Stoeckley with a murder indictment after she disclosed she was in the MacDonald home on the night of the murders.
2. Jerry Leonard: Mr. Leonard is a licensed attorney in Raleigh, North Carolina who was appointed to represent Helena Stoeckley shortly after she testified in the 1979 trial. His communications with Helena Stoeckley shortly after her testimony could be additional evidence of innocence if Mr. Leonard is ordered by the court to reveal those communications in the interest of justice.
3. Wendy Rouder: Ms. Rouder, as a licensed attorney who worked with the defense team at trial, heard Helena Stoeckley say that she was fearful of the prosecutors shortly after she testified.

4. Gene Stoeckley: Gene Stoeckley had several conversations with his mother, Mrs. Stoeckley, concerning confessions made by his sister, Helena Stoeckley. Helena confessed to her mother that she had been in the MacDonald home the night of the murders. She also expressed to her mother a fear of the prosecutor. Gene was present and witnessed the execution of Mrs. Stoeckley's affidavit on March 31, 2007.
5. Lee Tart: Retired U.S. Marshal and close friend of Jim Britt who discussed Blackburn's threat with him. (See Exhibit 1—letter to counsel regarding affidavit from Lee Tart)
6. Mary Britt: Jim Britt's wife during the 1979 MacDonald murder trial.
7. Nancy Britt: Jim Britt's wife in 2004 when he initially came forward with the Blackburn disclosure.
8. Brian Murtagh: Notably has not executed any affidavits with regard to whether he had any knowledge of the prosecutorial misconduct of Jim Blackburn that Jim Britt said occurred during Blackburn's interview of Helena Stoeckley. Mr. Murtagh served as co-counsel to Jim Blackburn during the 1979 trial.

#### The DNA Claim

1. Michael Malone: Executed 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 Jeffrey MacDonald's pubic hair, is in fact a hair from an unidentified person. Malone's testimony in other cases has led to convictions being overturned due to misrepresentations made by Malone during trial.

2. Terry Melton: Defense DNA expert.
3. Fred Whitehurst: A former F.B.I. agent and co-worker of Michael Malone.
4. Kim Murga: Assistant Technical Leader of the Nuclear DNA Section of the Armed Forces DNA Identification Laboratory who oversaw DNA testing.
5. Grant Graham: Lab analyst at AFIP who wrote laboratory notes that contained observations of the evidence that was tested for DNA.

### **CONCLUSION**

For the foregoing reasons and in light of the mandate of the United States Court of Appeals for the Fourth Circuit, the Defendant/Applicant request 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. Further, Defendant/Applicant requests that the Court enter an Order establishing a schedule for discovery, including depositions, leading up to the requested hearing.

Respectfully submitted this the 20<sup>th</sup> day of September, 2011.

/s/ J. Hart Miles, Jr.  
J. Hart Miles, Jr.  
N.C. State Bar No. 23342  
P.O. Box 361  
Raleigh, N.C. 27602  
Telephone: (919) 834-8650  
Fax: (919) 834-9105

/s/ F. Hill Allen

F. Hill Allen

N.C. State Bar No. 18884

**THARRINGTON SMITH, L.L.P**

209 Fayetteville Street

Post Office Box 1151

Raleigh, North Carolina 27602-1511

Telephone: (919) 821-4711

Facsimile: (919) 829-1583

Email: [hallen@tharringtonsmith.com](mailto:hallen@tharringtonsmith.com)

/s/Christine Mumma

Christine Mumma

Executive Director of the North Carolina

Center on Actual Innocence

N.C. State Bar No.: 26103

P.O. Box 52446, Shannon Plaza Station

Durham, NC 27717-2446

Telephone: 919-489-3268

Fax: 919-489-3285

/s/ Joseph E. Zeszotarski, Jr.

Joseph E. Zeszotarski, Jr.

NC State Bar No. 21310

Poyner Spruill LLP

P.O. Box 1801

Raleigh NC 27602

(919) 783-1005

[jzeszotarski@poyners.com](mailto:jzeszotarski@poyners.com)

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing REQUEST FOR HEARING by electronic means through the CMF system which forwards an electronic notice the following attorney of record:

John Bruce, Assistant United States Attorney  
U.S. Department of Justice - Criminal Division  
Terry Sanford Federal Building  
310 New Bern Avenue, Suite 800  
Raleigh, NC 27601

This the 20<sup>th</sup> day of September, 2011.

/s/ J. Hart Miles, Jr.  
J. Hart Miles, Jr.  
*Attorney for Defendant Jeffrey R. MacDonald*  
N.C. State Bar No. 23342  
P.O. Box 361  
Raleigh, N.C. 27602  
Telephone: (919) 834-8650  
Fax: (919) 834-9105

**CERTIFICATE OF SERVICE**



I hereby certify that I have this day served a copy of the foregoing REQUEST FOR HEARING by electronic means through the CMF system which forwards an electronic notice the following attorney of record:

John Bruce, Assistant United States Attorney  
U.S. Department of Justice - Criminal Division  
Terry Sanford Federal Building  
310 New Bern Avenue, Suite 800  
Raleigh, NC 27601

This the 20<sup>th</sup> day of September, 2011.

/s/ J. Hart Miles, Jr.  
J. Hart Miles, Jr.  
*Attorney for Defendant Jeffrey R. MacDonald*  
N.C. State Bar No. 23342  
P.O. Box 361  
Raleigh, N.C. 27602  
Telephone: (919) 834-8650  
Fax: (919) 834-9105