

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.)	<u>REPLY TO GOVERNMENT'S RESPONSE</u>
)	<u>TO MOTION ENTITLED "REQUEST</u>
)	<u>FOR HEARING"</u>
JEFFREY R. MacDONALD,)	
Defendant.)	

Jeffrey R. MacDonald, by and through undersigned counsel, hereby submits the following reply to the Government's Response to Motion Entitled "Request for Hearing" [DE-229], and respectfully shows unto the Court the following:

PROCEDURAL HISTORY

1. MacDonald incorporates by reference the "Procedural Summary" contained in his Request for Hearing filed 20 September 2011 [DE 175], and the "Procedural History" set forth in the Reply to Government's Response to Motion for a New Trial Pursuant to 18 U.S.C. § 3600 filed 17 February 2012. MacDonald also sets forth additional procedural history as necessary for a resolution of the issues currently before the Court:

2. During MacDonald's 1979 trial, former Deputy United States Marshal Jimmy Britt ("Britt") was responsible for escorting Helena Stoeckley ("Stoeckley"), a key witness in custody on a material witness warrant.

3. Before testifying at MacDonald's 1979 trial, Stoeckley was interviewed independently by both MacDonald's defense counsel and Assistant United States Attorney James Blackburn ("Blackburn").

4. In 1993, Blackburn was convicted of embezzlement, forgery, and obstructing justice, among other similar crimes. The same year he was disbarred by the North Carolina State Bar for misappropriating client funds and funds belonging to his former law firm, forging signatures of judges to a number of false orders, forging the signature of a client to a promissory note, and lying to two clients about the status of matters he was handling for them.

5. In January 2005, Britt approached Wade Smith, counsel for MacDonald, with allegations of prosecutorial misconduct committed by Blackburn during MacDonald's trial.

6. In January 2006, MacDonald presented his successive motion under 28 U.S.C. § 2255 to this Court.

7. In March 2006, the results of the DNA conducted by AFIP became available.

8. On 22 March 2006, MacDonald filed a motion, based on the DNA test results, to raise the freestanding actual innocence DNA claim as an additional predicate to the pending section 2255 motion, and also to have the Court consider the DNA test results as part the "evidence as a whole" in assessing the Britt claim under section 2255(h). [DE-122] Additionally, MacDonald moved to expand the record to include an itemized list of material evidence, which he contended were part of the "evidence as a whole" pertinent to the Court's consideration of the Britt claim and the DNA claim. [DE-126-1]

9. In an order of 4 November 2008, this Court granted the government's motion to strike exhibits from the section motion, denied the DNA motion, denied MacDonald's motions to expand the record, and denied MacDonald leave to file the section 2255 motion. [DE-150]

10. On 13 April 2011, the United States Court of Appeals for the Fourth Circuit vacated and remanded the Court's ruling "for a fresh analysis of whether the Britt claim satisfies the applicable standard of § 2255(h)(1)," stating, "[s]uch assessment must include the previously

excluded evidence discussed herein, and may also include other evidence not mentioned, if it is part of the ‘evidence as a whole’ properly put before the court.” *United States v. MacDonald*, 641 F.3d 596, 614 (2011). [DE-165]

11. On 20 September 2011, MacDonald filed a Request for Hearing [DE-175] and listed potential witnesses who would give live testimony on both the Britt claim and the DNA claim as part of the “evidence as a whole” to be considered in evaluating the section 2255 motion.

12. On 21 September 2011, this Court held a status conference to review the Fourth Circuit directive as to how the evidentiary hearing would be conducted.

DISCUSSION

Consideration of Current DNA Evidence

1. The government asserts that MacDonald agreed to postpone “any consideration” of DNA evidence until after briefing on issues under the Innocence Protection Act (“IPA”). [DE-229 at ¶ 4] During the September 21 status conference, it was agreed that the DNA claim would be considered at a later date along with MacDonald’s motion for DNA testing pursuant to the IPA. [Status Conference Tr. at 36] This agreement did not preclude the inclusion of the previous DNA results as part of the “evidence as a whole” currently available. The Fourth Circuit has made clear that “the court must consider ‘all the evidence,’ old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under [evidentiary rules].” [DE-165 at 29.

Timeliness of the Britt Claim

2. The government is incorrect in its assertion that the forthcoming evidentiary hearing is to determine “the timeliness and veracity of the Britt claim.” [DE-229 at 3] The timeliness of the claim has already been established by both this Court and the Fourth Circuit. In order to be

considered timely, the motion is to be made within one year running from “the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2255(f). As the Fourth Circuit noted, this Court, applying a similar standard found in 28 U.S.C. § 2244(b)(2)(B), assumed that MacDonald had “exercised due diligence in discovering Britt’s assertions.” *MacDonald*, 641 F.3d at 614 [DE-165] Moreover, the motion was filed within one year of Britt’s claims coming to light, thereby meeting the strict timeliness requirement set by AEDPA. Britt first came forward with his assertion of prosecutorial misconduct in January 2005; MacDonald presented his section 2255 motion to this Court in January 2006. Thus, it is timely.

3. MacDonald could not have been aware of the events Britt witnessed without Britt, Stoeckley, or Blackburn coming forward of their own accord. Thus, the earliest possible date MacDonald could have learned of the Britt claim, through the exercise of due diligence, to begin the running on the one-year limitation is January 2005--when Britt approached Wade Smith. This Court, therefore, “essentially answered [the timeliness question] when it accepted that MacDonald had acted with due diligence” *MacDonald*, 641 F.3d at 613–14. [DE 165]

Death of Jimmy Britt

4. While Britt was not deposed before his death in October 2008, he gave several statements under oath before his death, and MacDonald twice sought the opportunity to have Britt testify in person before the Court. *MacDonald*, 641 F.3d at 615 n.11. [DE 165] This Court acknowledged during the September 2011 status conference that it “[doesn’t] think there’s any substitute for somebody testifying in front of whoever the fact-finder is going to be to determine credibility.” [Status Conference Tr. at 27] The Government, however, opposed a hearing at which Britt could have testified, and MacDonald’s requests were never granted. As noted by the

Fourth Circuit, “[d]espite prior notices filed by MacDonald on September 7, 2007, and November 5, 2007, warning that Britt had been ‘suffering from serious heart problems’ and was in ‘fragile health,’ an evidentiary hearing was never scheduled allowing Britt to testify before the Court.” *MacDonald*, 641 F.3d at 615 n.11. [DE 165] Notably, the Fourth Circuit also stated this Court’s “further assessment of the Britt claim will be complicated by” Britt’s death; it did not state the assessment would be barred or impossible. *Id.* MacDonald had no control over whether an evidentiary hearing was held. He took every reasonable step to secure Britt’s live testimony, including requesting an evidentiary hearing and informing this Court and the government of Britt’s failing health.

Evidentiary Hearing

5. According to the Fourth Circuit, the purpose of the remand was “for a fresh analysis of whether the Britt claim satisfies the applicable standard of § 2255(h)(1).” This Court must consider “the previously excluded evidence discussed herein, and may also include other evidence not mentioned, if it is part of the ‘evidence as a whole’ properly put before the court.”

MacDonald, 641 F.3d at 614. [DE 165] Such evidence includes, *but is not limited to*:

- Britt’s affidavit, as well as the statements, affidavits, polygraph results, and the like that corroborate his affidavit;
- the admission made by Stoeckley of her presence in the MacDonald home at the time of the murders to six other individuals, including three law enforcement officers, who were at trial and prepared to testify, as well as her admission to attorney Wendy Rouder during the trial;
- the fact that a woman matching Stoeckley’s description was seen standing in the rain by MP Kenneth Mica at 4:00 a.m. approximately at half-mile from the crime scene on the night of the murders;
- the detailed admissions made by Stoeckley after trial that was the basis of MacDonald’s 1984 new trial motion;

- the affidavit of Helena Stoeckley’s mother, who avers Stoeckley told her that Stoeckley “lied about it [her presence in the MacDonald home at the time of the murders] at the trial ... because she was afraid of the prosecutor;”
- the synthetic blond wig hairs found in the MacDonald home, unmatched to any other fiber in the home, but consistent with Stoeckley’s presence that night wearing a long blond wig;
- Stoeckley’s admission at trial that she was wearing a blond wig and floppy hat the night of the murders and that she burned both the wig and the hat shortly after the murders;
- Greg Mitchell confessing his involvement in the murders to multiple unrelated individuals years after the crime and long after he had separated from Stoeckley;
- the black wool fibers found on the mouth and bicep area of Colette MacDonald and on one of the murder weapons that were not matched to any fabric in the MacDonald home;
- the numerous statements of witnesses submitted with MacDonald’s earlier habeas petition and new trial motions linking Stoeckley and Mitchell to the murders;
- available DNA evidence, including the unsourced hair from the fingernail scrapings of Kristen MacDonald’s left hand, the unsourced hair found under the body of Colette MacDonald, and the unsourced hair found on the bedspread on the bed where Kristen MacDonald was killed; and
- any and all other evidence available at the time of the upcoming evidentiary hearing.

The “evidence as a whole” under section 2255(h)(1) means everything previously presented in the proceedings involving MacDonald--whether through testimony at trial or an evidentiary hearing, through affidavit or statement, through documents or exhibits--prior to, during, and after the trial. *See MacDonald*, 641 F.3d at 612 (evidence as a whole means “‘all the evidence,’ old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under ‘rules of admissibility that would govern at trial.’” (quoting *House v. Bell*, 547 U.S. 518, 538 (2006))). Only through an assessment of the material supporting the Britt claim in

light of the “evidence as a whole” can this Court make the determination required by the Fourth Circuit. It is not necessary to present anew, at the forthcoming hearing, evidence previously proffered to this Court in any of these proceedings. Rather, the previously proffered evidence need only be considered by this Court when it evaluates the forthcoming evidence about the claims to be considered at this hearing.

Prosecutorial Misconduct

6. When determining whether prosecutorial misconduct violated a defendant’s due process rights, a court must ask “whether the [misconduct] so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); see *Hash v. Johnson*, ___ F.3d ___ (2012 WL 628266 (W.D. Va. 2012)). *Hash* found the prosecutor’s failure to disclose exculpatory evidence violated the defendant’s due process rights. *Id.* at *32-35. It explicitly noted that this prosecutorial misconduct alone was sufficient to warrant habeas relief. *Id.* n. 34.

7. The evidence presented at the upcoming evidentiary hearing will show Blackburn’s actions affected the testimony of a key witness, thereby depriving MacDonald of a fair trial in violation of his constitutional rights. Curiously, the government has yet to provide any affidavits countering the sworn statements regarding Blackburn’s threat to Helena Stoeckley proffered by MacDonald as early as 17 January 2006.

Conclusion

13. This Court has scheduled a hearing in this matter. As directed by the Fourth Circuit, the Court's analysis must include all evidence concerning the Britt claim along with all evidence properly put before it—including evidence excluded at trial, submitted in prior post-conviction motions, and obtained more recently—to complete the “evidence as a whole” under 28 U.S.C. § 2255(h)(1). *MacDonald*, 641 F.3d at 614. At an appropriate time, counsel for MacDonald will submit a memorandum to the Court outlining the “evidence as a whole.”

This the 13th day of April, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on 13 April 2012, the foregoing **REPLY TO GOVERNMENT'S RESPONSE TO MOTION ENTITLED "REQUEST FOR HEARING"** 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 the following:

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