UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Crim. No. 75-26-CR-3
	)	No. 5:06-CV-24-F
JEFFREY R. MacDONALD,	)	Judge James C. Fox
	)	
Applicant/Defendant,	)	

MEMORANDUM OF EVIDENCE AND POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S MOTION TO ADD AN ADDITIONAL PREDICATE TO HIS PREVIOUSLY FILED MOTION UNDER 28 U.S.C. SECTION 2255 TO VACATE HIS CONVICTION – NAMELY NEWLY DISCOVERED DNA EVIDENCE PROVING THE PRESENCE OF UNSOURCED HAIRS AT THE CRIME SCENE

The petitioner, Jeffrey R. MacDonald, through undersigned counsel has moved this Court to supplement his Motion Under 28 U.S.C. Section 2255 to Vacate his Sentence, by adding an additional predicate for that motion, namely newly discovered DNA evidence of three unidentified hairs found at the crime scene, one of which was found along with blood residue under the fingernail of three-year-old Kristen MacDonald, who was murdered in her bed, and one of which was over two inches in length with root and follicle intact found under the body of Colette MacDonald.

As support for such motion, the petitioner sets forth the evidentiary basis and the legal basis as follows:

I. New Evidence: The Three Unidentified Hairs Found At the Crime Scene

A. Specimen # 91A

In the Armed Forces Institute of Pathology [hereinafter "AFIP"] DNA Report, p. 4 of 33, it lists Specimen 91A (CID or FBI Nos. D-237, Q137) as a "hair" that was "not consistent with any other samples tested. The samples tested, per the report, included DNA samples from each MacDonald family member, and DNA samples from Helena Stoeckley and Greg Mitchell. (The Report is attached as Appendix 1, tab 1, hereto.] On page 8 of the AFIP DNA Report, it indicates that Specimen No. 91A came off a slide. On page 15 of the AFIP DNA Report, it indicates that Specimen No. 91A was the same specimen as CID No. D-237, and FBI No. Q137, that it was a hair, and that it was consumed in the testing process.

Specimen 91A (CID item D-237) has a clear history. Initially, it is listed in the U.S. Army CID Preliminary Laboratory Report dated April 6, 1970, as "Fingernail scrapings from left hand of Christine [sic] MacDonald." [Attached in Appendix 1, tab 2 (p.7).] In the undated U.S. Army Chart of Exhibit Findings, which exhibits underwent chemical analysis, item D-237 is listed as "Fingernail scrapings from the left hand of Kristen MacDonald," and it is noted that the chemical analysis of the hair indicated a finding of blood on the hair. [Attached in Appendix 1, tab 3 (p. 34).] In the U.S. Army Consolidated Laboratory Report, item D-237 is listed as "Fingernail scrapings from the left hand of Kristen MacDonald. [Attached in Appendix 1, tab 4 p.4A-5).] Additionally, AFIP Exhibit 91A (CID Exh. D-237), after it was sent to the AFIP lab, was described by the lab technicians there as a human hair with the hair root in tact, measuring approx. 5 mm. (approx. ¼ inch) in length.

[AFIP/OAFME Trace Materials Analysis Laboratory Notes (see page 4), attached in Appendix 1, tab 5.]

Kristen MacDonald, by all accounts, was murdered in her bed where she was found. The doctor who performed the autopsy on her testified at the trial that she had numerous defensive wounds on and around her hands and fingers. [Trial Tr. at 2576-77, found in Appendix 1, tab 6.] Thus, to find an unidentified hair, mixed with blood residue, with the hair root intact, underneath one of her fingernails, strongly suggests that while she was defending herself against the blows from an intruder she grabbed at or scratched back at the intruder such that as a result, the intruder's hair came to reside under her fingernail. As such, it is an important piece of evidence that is strongly probative of the petitioner's innocence.

B. Specimen # 75A

In the AFIP DNA Report, Specimen #75A is listed on p. 4 as "not consistent with any other sample tested." Specimen #75A, is a "hair" that was previously identified as CID exhibit E-303, and FBI exhibit Q79. In the Army Consolidated Laboratory Report, and consistently thereafter, Ex. E-303 is described as containing fibers and debris and wood chips from the trunk and leg area of the rug under where Colette MacDonald's body was found. [Appendix 1, tab 4.] In U.S. Army CID laboratory technician Dillard Browning's handwritten notes (Browning collected the specimen), item Ex. E-303 is further described as fiber and debris from under the trunk and legs of Colette MacDonald, containing "one human pubic or body hair…" [Appendix 1, tab 7.] Specimen 75A was described by the laboratory technician at AFIP as a human hair with both hair root and follicular tissue attached. The hair was approx. 63 mm. (approx. 2 ¼ inches) long. [AFIP/OAFME Trace Materials Analysis Laboratory Notes (see page 3), attached in Appendix 1, tab 5.] Thus, it is clear that this

unidentified hair was found underneath where Colette MacDonald's body lay at the crime scene, and that it was a full length body or pubic hair. The fact that it had both the root and follicular tissue attached is indicative that it was pulled from someone's skin and lends great weight to this specimen as probative that there were unknown intruders in the home with whom Colette struggled and from whom she extracted a hair.

C. Specimen 58A1

In the AFIP DNA Report, Specimen 58A1 (CID Ex. No E-52NB, FBI Ex. No. Q79) is also listed as not consistent with any other specimen tested. Looking to the original U.S.Army Consolidated Laboratory Report [Appendix 1, tab 4], Ex. E-52NB is listed as "hairs and fibers from bedspread on the bed in the north bedroom." The north bedroom, by all accounts, was the bedroom occupied by Kristen MacDonald. According to the AFIP laboratory notes, it is a hair with root intact, and measured approx. 5mm. in length. [Appendix 1, tab 5 (p. 3).] Thus, this unidentified hair was found on the bedspread on the bed where Kristen MacDonald was found murdered.

II. Argument

Pursuant to 28 U.S.C. Section 2255, the petitioner has challenged his conviction based on newly discovered evidence, i.e., the sworn allegations of former deputy U.S. Marshal Jim Britt. Prior to filing the motion in this Court, the petitioner sought and received the unanimous authorization to file such motion from a three-judge panel of the U.S. Court of Appeals for the 4th Circuit. Now, while that motion is presently pending, the petitioner has first learned of additional new evidence that supports his claim of innocence, namely three hairs found at the murder scene that DNA testing has proven come from individuals not living in the MacDonald home. One such hair, with its root intact and tainted with blood residue,

was found underneath the fingernail of his daughter, Kristen, who was murdered, one was found on Kristen's bedspread, and one, of over two inches in length with root and follicle intact, was found on or under the body of his wife, Colette, who was murdered.

The DNA evidence that has come to light was the result of prior litigation before this Court, and subsequently before the U.S. Court of Appeals for the 4th Circuit. In that litigation, which occurred in1997, the petitioner sought leave to have biological specimens including human hairs found at the crime scene tested through a new DNA procedure called mitochondrial DNA testing. The petitioner argued in that proceeding that some of the hairs were found in such critical places (such as under the fingernails of the victims) that if they were from unknown individuals, they would provide important evidence of innocence. This Court ruled that MacDonald's request was tantamount to a request for a subsequent habeas proceeding, and referred the matter to the U.S. Court of Appeals for the 4th Circuit. The court of appeals ruled that the DNA should be tested and remanded the matter to this Court to supervise the DNA testing of the specimens.[1] Certainly, implicit in that order, was the decision by the court of appeals, that once tested, the DNA results should be evaluated by this Court.

The petitioner contends that the DNA results amount to newly discovered evidence that could not have been discovered previously through due diligence, that the DNA results

[1] As set forth previously in the petitioner's pleadings, in April 1997, MacDonald filed a motion to reopen his previous 1990 *habeas corpus* petition based on government fraud. The motion also contained a request to have DNA tests run on certain evidence taken from the crime scene. On September 2, 1997, this court denied the motion to reopen the *habeas* proceeding and transferred the remaining matters to the United States Court of Appeals for the 4th Circuit as a petition for leave to file a successive *habeas corpus* petition. *U.S. v. MacDonald*, 979 F.Supp. 1057 (E.D.N.C. 1997). The court of appeals granted defendant's motion for DNA testing. *In Re MacDonald*, No. 97-713 (4th Cir. October 17, 1997.) Per the 4th Circuit's order regarding DNA testing, the case was remanded to this Court, which has been supervising such DNA testing.

are probative of the petitioner's innocence, and that when taken in light of the evidence as a whole, the DNA results establish that no reasonable juror could find guilt beyond a reasonable doubt.

Having discovered this new evidence, probative of innocence, the petitioner seeks to add it as a further predicate for his Motion Under 28 U.S.C. Section 2255 to Vacate his Conviction, now pending before this Court. As a matter of efficiency and convenience, it should be joined with the pending motion, rather than being the predicate for a separate but nearly identical motion.

Consequently this Court should permit this motion and allow the petitioner to add the DNA evidence as an additional predicate for his motion to vacate. Moreover, this new DNA evidence, as a separate predicate for petitioner's motion to vacate, should lead this Court to evaluate the evidence taken as a whole, both that adduced at trial, and that discovered since the trial, in order to determine whether the petitioner has met his burden of proving that no reasonable juror could find guilt beyond a reasonable doubt.

In reviewing a claim of innocence based on newly discovered evidence, which is concomitant to a claim of "manifest injustice," this Court is required to conduct an analysis of the evidence "as a whole," including evidence developed post-trial. 28 U.S.C. Section 2255; *see, also*, *Herrera v. Collins*, 506 U.S. 390 at 442 (1992), (Blackmun, J., *dissenting*) (collecting various versions of Court's "probability of innocence" test for miscarriage of justice); *Sawyer v. Whitley,* 506 U.S. 333 at 339 & n.5: (The prisoner must show "that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of fact would have entertained a

reasonable doubt of his guilt." (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n.17 (1986) ((quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142, 160 (1970))); *Schlup v. Delo*, 513, U.S. 298 (1995).

Consequently, the petitioner requests that this Court add the DNA results as an additional predicate to the petitioner's pending motion to vacate his sentence.

Respectfully submitted,

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