UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 17, 1997

No. 97-713
CR-75-26

In Re: JEFFREY R. MACDONALD

Movant

O R D E R

Upon consideration of the motion of Jeffrey R. MacDonald, filed pursuant to 28 U.S.C. Section 2244,

IT IS ADJUDGED AND ORDERED that the motion with respect to DNA testing is granted and this issue is remanded to the district court.

In all other respects, the motion to file a successive application is denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Murnaghan and Senior Judge Butzner.

For the Court,

/s/ Patricia S. Connor

CLERK

Sincerely,

PATRICIA S. CONNOR
Clerk

/s/ Merlene Smith-Taylor
for Diane Burke
By: _____
Deputy Clerk

cc: David Daniel

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY R. MACDONALD,
Defendant-Appellant.

No. 97-7297

Appeal from the United States District Court
for the Eastern District of North Carolina, at Fayetteville.
James C. Fox, District Judge.
(CR-75-26, CA-90-104-3-F)

Submitted: July 31, 1998

Decided: September 8, 1998

Before MURNAGHAN and NIEMEYER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Wade Marvin Smith, Melissa H. Hill, THARRINGTON, SMITH, L.L.P., Raleigh, North Carolina; Roger C. Spaeder, Bonnie Ilene Robin-Vergeer, ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER, Washington, D.C.; Harvey A. Silverglate, Philip George Cormier, Andrew Good, SILVERGLATE & GOOD, Boston, Massachusetts; John J.E. Markham, II, MARKHAN & READ, Boston, Massachusetts, for Appellant. Brian M. Murtagh, John F. DePue,

UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Jeffrey MacDonald appeals the district court's order denying his motion to reopen his second habeas corpus petition, denied by the district court in 1991 and affirmed by this Court in *United States v. MacDonald*, 966 F.2d 854 (4th Cir. 1992). His motion is based on newly discovered evidence purporting to demonstrate MacDonald's innocence and that agent Michael Malone of the Federal Bureau of Investigation perpetrated a fraud upon the district court and this Court which led to the denial of MacDonald's 1990 petition for habeas corpus relief. The district court denied the motion based on its finding that MacDonald could not establish fraud upon the court, but construed MacDonald's claims of innocence as another request for habeas relief, requiring consideration by this Court under the successive habeas provisions of 28 U.S.C.A. § 2244 (West Supp. 1998). We denied leave to file a successive habeas petition by order on October 17, 1997, but in the same order remanded to the district court for the limited purpose of permitting MacDonald to conduct DNA testing. *See In re Jeffrey MacDonald*, No. 97-713. Hence, this appeal is limited to consideration of MacDonald's claim of fraud upon the court.

We need not restate here the extensive facts and procedural history of this case. Thus, we recount only that which is necessary to understand the issues raised in this appeal. MacDonald has steadfastly contended since the time of the murders that his family was killed by a group of intruders that included a blond woman wearing a floppy hat. The defense believes this blond woman to be Helena Stoekley, who

on numerous occasions confessed to participating in the murders with a group of men.

When the defense called Stoekley to the stand during MacDonald's trial, she testified that, due to heavy drug use, she could not remember her whereabouts during the hours the murders were committed. The defense attempted to call witnesses to whom Stoekley had confessed her participation in the murders to testify, but the district judge, after conducting a voir dire examination of the proposed witnesses, would not allow their testimony because of Stoekley's unreliability and the absence of evidence corroborating her claims that she was in the MacDonald home on the night of the murders.

In his 1990 petition, MacDonald alleged that the prosecution withheld from the defense evidence which could have corroborated Stoekley's presence in the MacDonald home at the relevant time, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Alcorta v. Texas*, 355 U.S. 28 (1957). MacDonald asserted, specifically, that the Government withheld laboratory notes referencing the presence of three blond synthetic hairs made of a substance called saran, found in a clear handled hairbrush in the kitchen of the MacDonald home, as well as unsourced black and green fibers found on the murder weapon and the body of Collette MacDonald. *See MacDonald*, 966 F.2d at 856-57.

The district court denied the 1990 petition on the grounds that the fiber evidence at issue was not material, that the Government violated no duty to disclose exculpatory evidence, and because the petition was barred under the abuse of the writ doctrine. *See United States v. MacDonald*, 778 F. Supp. 1342 (E.D.N.C. 1991). We affirmed on abuse of the writ grounds, agreeing with the district court's assessment that MacDonald failed to establish cause for failing to raise his claims earlier, and further agreeing with the district court that the hair and fiber evidence at issue were insufficient to make a colorable showing of factual innocence so as to place this case within the fundamental miscarriage of justice exception to procedural bar provided in *McCleskey v. Zant*, 499 U.S. 467 (1991).

Both the district court's opinion and this court's opinion relating to the 1990 petition reference affidavits submitted by agent Malone on

behalf of the Government. In those affidavits, Malone cites to the various sources and factors he considered in arriving at his conclusion that the blond fibers found in the hairbrush did not come from a cosmetic wig, but likely came from a doll. In his motion to reopen, MacDonald asserts that since the denial of his 1990 petition, he has discovered new evidence that Malone's affidavits contained false statements which misled the district court and this court about the strength of his claims of innocence, which bear on the application of the abuse of the writ doctrine. MacDonald avers that Malone's failure to disclose this information constitutes a fraud upon the court, and warrants reopening his 1990 petition under Fed.R.Civ.P. 60(b)(6).

The allegedly new evidence relevant to MacDonald's fraud claims consists of two reference texts containing statements contrary to some of Malone's statements about saran and documents reflecting interviews the Government and the defense team conducted with a manufacturer of synthetic fibers and two employees of Mattel Toys, Inc. In denying MacDonald's motion to reopen, the district court found that the new evidence was not material to the disposition of the 1990 petition, and that none of the facts asserted by MacDonald, viewed in a light most favorable to him, established fraud upon the court by clear and convincing evidence.

Initially, we reject MacDonald's assertion that the district court should have applied a less demanding standard of proof. It is settled that the clear and convincing standard applies in Rule 60(b)(3) cases alleging fraud upon the court. *See Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995) (collecting cases); *Square Const. Co. v. Washington*, 657 F.2d 68, 71 (4th Cir. 1981). The policies underlying the application of that standard in Rule 60(b)(3) cases apply with as much, if not greater force, in cases alleging fraud under the savings clauses of Rule 60(b). *See Booker v. Dugger*, 825 F.2d 281, 284 n.4 (11th Cir. 1987). We are also mindful of MacDonald's belief that the district court could not find this standard satisfied without conducting an evidentiary hearing, which it did not do. We find, however, that the district court could properly deny the motion if, assuming the new facts MacDonald asserts to be true, such facts could not establish fraud by clear and convincing evidence. *See Madonna v. United States*, 878 F.2d 62, 64-65 (2d Cir. 1989).

We also reject, however, the Government's position that MacDonald's motion alleging fraud upon the court is foreclosed under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-032, 110 Stat. 1214 ("AEDPA"). The Government contends that MacDonald is effectively attempting to circumvent the amended versions of 28 U.S.C.A. §§ 2244 and 2255, requiring leave from the court of appeals before filing a successive petition, by proceeding under Rule 60(b), in violation of the AEDPA's finality goals. As the Government points out, however, courts recognized, even before the AEDPA, that an aggrieved party may not circumvent the rules prohibiting successive habeas petition by simply labeling such a petition as a Rule 60(b) motion. *See Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996). Nonetheless, this did not prevent a party who had previously filed a habeas petition from asserting that a prior petition had been denied based on fraud, unless the grounds for fraud themselves should have been raised in an earlier proceeding. *See Booker*, 825 F.2d 281 (11th Cir. 1987). The AEDPA does not alter these considerations, and the Government cites no case, before or after the AEDPA, in which a defendant's claims of fraud upon the court under Rule 60(b)(6) were found to be barred under the abuse of the writ doctrine.

The abuse of the writ doctrine bars new actions based on claims that should have been raised earlier. Actions alleging fraud upon the court, by contrast, attack the validity of a prior judgment, based on the theory that "a decision produced by fraud on the court is not in essence a decision at all and never becomes final." *See* 11 Wright and Miller, Federal Practice and Procedure § 2870 at 409 (1995) (quoting *Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, 691 (7th Cir. 1968)). Hence, different finality considerations apply to these distinct actions. We therefore find that neither the abuse of the writ doctrine, nor any codification of that doctrine through the AEDPA, acts as an absolute bar to a litigant's right to attempt to reopen a previously denied habeas petition on grounds that the court's decision was the product of a fraud upon the court.

The precise elements of such a claim are somewhat nebulous. We have said that fraud upon the court is "typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged."

Great Coastal Exp. v. International Broth., Etc., 675 F.2d 1349, 1355-56 (4th Cir. 1982). MacDonald contends that he need only show that Malone acted with reckless disregard for the truth in order to prevail in this case. While the Sixth Circuit's decision in *Demanjuk v. Petrovsky*, 10 F.3d 338, 349 (6th Cir. 1993), supports this position, that decision represents a minority view. *See Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266-67 (10th Cir. 1995). Moreover, it is at odds with our decision in *Great Coastal*, where we rejected a claim of fraud upon the court because "we cannot say that the fraud in this case presents a deliberate scheme to directly subvert the judicial process." *Great Coastal Exp.*, 675 F.2d at 1356.

Our decision in *Great Coastal Express* requires that MacDonald at least establish that the fraud was material and deliberate. *Id.* at 1353-56. We agree with the district court's finding that MacDonald cannot establish that evidence regarding the source of the saran fibers was material to the district court's 1991 decision. Judge Dupree left no doubt that even if evidence tending to corroborate MacDonald's claims of intruders existed, it would not have changed his decision to exclude Stoekley's out of court admissions, because the "primary reason" for the exclusion was Stoekley's "utter unreliability" on the stand. *See United States v. MacDonald*, 778 F.Supp. 1342, 1352 (E.D.N.C. 1991). We have also previously concluded that Stoekley's pretrial and post trial statements would not have produced a different result, and that such evidence was properly excluded at trial. *See United States v. MacDonald*, 779 F.2nd 962, 964-65 (4th Cir. 1985).

Moreover, the evidence at issue is not truly exculpatory. It does not directly bear on the question of innocence but rather provides some evidence to support the theory that the hairs found in the hairbrush came from a wig. The evidence, however, is not particularly compelling on this point, as much of it is equivocal and contradictory regarding the uses of saran, and the overall weight of the evidence still suggests that the fibers most likely did not come from a human wig. Even if it is accepted that the fibers came from a human wig, however, this fact does little more to prove MacDonald's claim of innocence because it merely provides some support for yet another theoretical possibility; that the wig fibers found in the hairbrush came from an intruder.

In our most recent decision in this case, we stated:

> The most that can be said about the evidence is that it raises speculation concerning its origins. Furthermore, the origins of the hair and fiber evidence have several likely explanations other than intruders. The evidence simply does not escalate the unease one feels with this case into a reasonable doubt.

United States v. MacDonald, 966 F.2d at 860.

At the time that we made this comment, MacDonald had already alerted us to the previously mentioned Dembeck and Stout reference texts, and the parties had addressed their significance at oral argument and in written submissions to the court. Thus, it was already clear that the defense might be able to adduce further evidence that saran could be used to make human wigs. Because the evidence MacDonald relies on to support his motion to reopen simply creates further speculation about the origin of the saran fibers in the hairbrush, we find that such evidence is not material to the question of his innocence, and therefore was not material to the outcome of his 1990 petition for habeas corpus relief. We therefore hold that the district court properly denied MacDonald's motion to reopen on materiality grounds.

We also conclude that the district court properly found that MacDonald failed to present facts which could clearly establish that Malone deliberately deceived the district court or this court. There is no evidence that Malone ever consulted the Dembeck and Stout texts, so it is irrelevant that those texts contain statements contrary to the texts Malone consulted and cited to support the statements he made in his affidavits. Although MacDonald avers that the Government listed the Dembeck and Stout texts among the items it actually reviewed in connection with his case in response to his request for such documents under the Freedom of Information Act ("FOIA"), the record discloses that MacDonald's FOIA requests were sufficiently broad as to also request relevant information which was not reviewed by the Government.

Information derived from Edward Oberhuas, an executive at Kaneka America Corporation, which produces modacrylic fibers for

use in making wigs, provides even less support for MacDonald's case. MacDonald's FOIA requests uncovered the FBI's interview summary ("Form 302") of its conversations with Oberhaus, reflecting that he told investigators that he was familiar with the production and use of saran fibers, presently and before 1969-70. He further stated that saran could not be produced as a "tow" fiber (which is essential to the wig-making process) but could only be made as a continuous filament fiber unsuitable for the manufacturing of cosmetic wigs. He further stated that to the best of his knowledge, saran has never been used to make cosmetic wigs.

When, however, the FBI drafted an affidavit consistent with the information in its 302 form, Oberhaus refused to sign it, because he did not consider himself an expert on the uses of saran. Oberhaus then drafted his own affidavit for the Government, stating that wigs made from 1960 forward were "most often ... manufactured with human hair, modacrylic fibers, other fibers or a combination of any of these filaments." During the defense's conduction of its investigation to support MacDonald's motion to reopen, Oberhaus told them that he recalled telling the Government's investigators that saran fibers were used in the doll industry, but that this did not mean that they were not also used in the wig industry.

Neither the information in Oberhaus' form 302, nor the statements made in the affidavit he personally prepared, contradict any statement made by Malone. In fact, they are supportive of Malone's affidavits. Moreover, the fact that Oberhaus refused to sign the Government's affidavit does not mean that he retracted or recanted his prior beliefs. There are a variety of possible motives for this decision, not the least likely of which is Oberhaus' explanation that he did not consider himself sufficiently expert for the Government to rely on him. Finally, Oberhaus' comment to the defense during its independent investigation lacks probative value.

For the most part, the statements of Schizas and Philips also do not contradict Malone's affidavits. Both acknowledged that saran is primarily used to make doll hair, rather than cosmetic wigs. And while both did state that they were unaware of any doll made by Mattel having hair of the length of the fibers found in the clear handled hairbrush (22 and 24 inches), Schizas told investigators that it was

possible that a hair of such length could have come from a doll if the hair was doubled over in the rooting process. She thought this to be possible but not probable, however, because it would be difficult to extract a hair of such length from a doll without breaking the fiber. Because none of these statements directly contradict Malone's affidavits, we find them insufficient to even potentially establish fraud upon the court.

As the district court noted, the only statement from either Schizas or Philips which directly contradicts Malone's affidavits is Philips' statement to the defense team that she recalls telling Government investigators that saran could be manufactured in tow form. To conclude that this statement establishes fraud requires an enormous leap. There is some question whether Philips in fact made this statement. Her 302 form does not reflect it, and MacDonald has not alleged that the Government falsified these forms. Moreover, her statement is based on a recollection made many years after the fact.

Assuming, however, that Philips made the statement, it still could not constitute clear and convincing evidence of fraud. There is no indication that Philips was an expert on manufacturing techniques, and both the manufacturing expert (Oberhaus) the Government consulted as well as the six reference texts reviewed by Malone contradicted this opinion. Viewed in the context of the other evidence before him, Philips' comment is insufficient to support the conclusion that Malone knew his statements regarding the uses of saran to be false. Accordingly, we find insufficient evidence in this record to even potentially establish that the Government, through agent Malone, deliberately deceived the court.

We also conclude that under the circumstances of this case, MacDonald must bear accountability for his failure to present his claims of fraud in his previous petitions. Even actions under the savings clauses of Rule 60(b) must be brought within a reasonable time under the rule. Fed.R.Civ.P. 60, Advisory Note, Subdivision (b). While there is authority stating that an action for fraud upon the court will not be barred due to party dilatoriness if the evidence of injustice is "practically conclusive," *see Booker*, 825 F.2d at 284, or where the fraud at issue would cause injury to the public, *see Hazel-Atlas Glass*

Co. v. Hartford-Empire, 322 U.S. 238, 246 (1944), we find these exceptions inapplicable to this case.

As we noted in our most recent decision in this case, lab notes relating to the synthetic blond hairs at issue were seen and passed over by counsel during MacDonald's first habeas appeal. We observed that the defense team considered the significance of this evidence at the time but deliberately bypassed the opportunity to use it. *United States v. MacDonald*, 966 F.2d at 860. Also, this is not a case where the Government's exclusive control of the evidence should have prevented the defense from uncovering the alleged fraud. The defense team apparently discovered the Dembeck and Stout texts in a public library. And while MacDonald's lawyers could not be expected to know of specific individuals the government interviewed within the manufacturing and retail sectors of the wig and synthetic fiber industries, access to persons with similar if not the same information has always been just as available to the defense as it was to the Government. Indeed, MacDonald's lawyers now attempt to submit such independently acquired evidence.

We are aware that the acquisition of merely contradictory evidence would not necessarily constitute evidence of fraud. But the defense team has been reviewing the Government's evidence through requests under the Freedom of Information Act since 1982, *see United States v. MacDonald*, 778 F.Supp. at 1347, and should have been able to uncover, at least prior to MacDonald's second petition, not only evidence which merely contradicted Malone's statements but also the very same evidence now presented in support of the motion to reopen. MacDonald's attorneys were obligated to investigate all reasonable grounds for relief in connection with MacDonald's previous petitions. *See Booker*, 825 F.2d at 285. Their failure to do so provides another reason why the motion to reopen was properly denied.

We therefore affirm the order of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3
No. 90-104-CIV-3-F

FILED

DEC 11 1998

DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

UNITED STATES OF AMERICA,)
)
v.)
)
JEFFREY R. MacDONALD,)
Petitioner/Defendant.)

On April 22, 1997, Jeffrey R. MacDonald ("MacDonald") filed a Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery in which he alleged the existence of certain physical evidence which, if analyzed properly, would demonstrate his actual innocence. This court construed his claim of innocence as a distinct request for habeas relief requiring consideration by the court of appeals under the successive petition provisions set forth in 28 U.S.C. § 2244. By order of October 17, 1997, the Fourth Circuit Court of Appeals denied MacDonald leave to file a successive habeas petition, but remanded the matter to this court, stating, "the motion with respect to DNA testing is granted and this issue is remanded to the district court." *In re Jeffrey MacDonald*, No. 97-713 (4th Cir. Oct. 17, 1997). Following the issuance of the appellate court's mandate, issues have arisen regarding the scope of items to be tested and the testing methodology to be employed.

In pertinent part, MacDonald explained to the Court of Appeals precisely what evidence he sought to re-test, and how:

> Further, MacDonald requested that the District Court order the government to give him access to certain items of physical evidence in the case which, if analyzed properly, would demonstrate his actual innocence. These items, which are documented in the handwritten laboratory bench notes of the Army and FBI Lab examiners, consist primarily of hairs and blood debris found in extraordinarily telling locations – namely, *under the fingernails of the victims, on their hands, on their bodies, or on their bedding.* The lab notes reveal that the government's lab examiners had attempted to source these hairs by comparing them to known hairs taken from the victims and from Dr. MacDonald, but *they were never able to match these hairs to any member of the MacDonald family*, resulting in the obvious and highly exculpatory conclusion that these strategically-located hairs came from outsiders, thus corroborating MacDonald's account. With respect to certain blood debris found under the fingernails or on the hands of the victims, the government was able to determine the blood type in some instances but not in others. *See* Affidavit of Philip G. Cormier No. 2 – Request for Access to Evidence to Conduct Laboratory Examinations – in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery . . . which describes these hairs and blood debris in detail.
>
> MacDonald sought access to this highly specific and crucial category of physical evidence for the purpose of subjecting these unsourced hairs and blood debris to *DNA testing* in an effort to establish MacDonald's innocence by demonstrating definitively that these items did not originate from any MacDonald family member nor from MacDonald himself, but instead originated from one or more of the intruders whom MacDonald described seeing in his home on the night of the murders.

Memorandum in Support of Jeffrey MacDonald's Motion for an Order Authorizing the District Court for the Eastern District of North Carolina to Consider a Successive Application for Relief Under 28 U.S.C. § 2255, at 6-7 (Sept. 17, 1997) (emphasis in original). It is the Government's position in opposition to the instant motion that the appellate court's mandate limits MacDonald's access to only those items of biological evidence specifically identified in his motions papers before the Fourth Circuit Court of Appeals.

MacDonald, on the other hand, contends the Fourth Circuit Court of Appeals' mandate entitles him to the "full universe of exhibits that contain biological evidence – hairs, bloodstains, tissue and body fluids – collected from the crime scene to which the government has full access." Memorandum in Support of Jeffrey MacDonald's Motion for an Order to Compel the Government to Provide Access to All Biological Evidence for Examination and DNA Testing by His Experts, at 2 (Sept. 11, 1998).

The court has examined carefully the parties' respective arguments in light of the context of the appellate court's order, and concludes that the Fourth Circuit Court of Appeals has mandated that the Government provide to MacDonald's experts access to the existent and known unsourced hairs, blood stains, blood debris, tissue and body fluids specifically identified in the April 22, 1997, Affidavit of Philip G. Cormier No. 2 – Request for Access to Evidence to Conduct Laboratory Examinations – in Support of Jeffrey R. MacDonald's Motion to Reopen 28 U.S.C. § 2255 Proceedings and for Discovery, for non-destructive DNA testing in all current and existing forms including, without limitation, both nuclear and mitochondrial testing.

Accordingly, it hereby is ORDERED that the United States produce and make available to MacDonald's experts within sixty (60) days of the date of this order the biological evidence described in the preceding paragraph so that such experts may conduct any appropriate non-destructive DNA examinations thereof. All testing of such items shall be completed prior to September 1, 1999.

MacDonald's request for further discovery is DENIED as beyond the mandate of the Court of Appeals.

SO ORDERED.

This the 10th day of December, 1998.

JAMES C. FOX
United States District Judge

I certify the foregoing to be a true and correct copy of the original
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3
No. 90-104-CIV-3-F

UNITED STATES OF AMERICA)
)
v.) ORDER
)
JEFFREY R. MacDONALD,)
)
Defendant.)

This matter came before the court on March 23, 1999, for hearing on the Government's request for leave to conduct preliminary steps to prepare evidence for DNA testing, and on MacDonald's request for additional relief. Present on behalf of the Government were Messrs. Brian M. Murtagh and John F. DePue of the Terrorism and Violent Crimes Section of the U. S. Department of Justice, and Mr. Eric Evenson, Assistant United States Attorney, E.D.N.C. On behalf of MacDonald appeared Messrs. Wade M. Smith, Barry Scheck, Philip G. Cormier and Andrew Good, and Ms. Melissa Hill. This order memorializes rulings made from the bench.

The court shall designate an independent laboratory (hereinafter "laboratory") to perform DNA testing on exhibits and exemplars identified herein. The parties shall confer and attempt to reach agreement on a laboratory (or on a short prioritized list of qualified candidates) which is appropriately certified, is capable of conducting both nuclear and mitochondrial DNA testing, and which has had no prior involvement with this case. The parties shall report to the court in writing on or before **April 7, 1999**, on

their selection(s) of the laboratory or list of laboratories from which this court will select one to perform the DNA testing.

The Government shall consult with the laboratory as to the protocol to be observed by the Government in the unpackaging and mounting of exhibits, and shall comply with such protocol in the absence of agreement of the parties to the contrary. The Government is DIRECTED to generate detailed still photographs, and to videotape and narrate the entire inventory, unpackaging and mounting process. The Government shall provide copies of the photographs accompanied by written explanations, as well as a videotape with a transcript thereof to MacDonald, and contemporaneously shall file copies with the court. The Government shall complete this process on or before **May 17, 1999**.

The exhibits which are subject to this order are the existent and known sourced and unsourced hairs, blood stains, blood debris, tissue and body fluids specifically identified in the April 22, 1997, Affidavit of Philip G. Cormier No. 2.

MacDonald's motion seeking an order directing the Government to produce exemplars for appropriate DNA testing is ALLOWED. The Government is DIRECTED to prepare for DNA testing by the laboratory to be designated by the court all exemplars within the possession or control of the Government which were taken from known individuals in this case. The Government shall employ the same exacting process and protocol in inventorying and preparing the exemplars as ordered herein above for the exhibits. The Government is DIRECTED to complete the process on or before **May 17, 1999**, at which time it shall provide copies of the photographs accompanied by written

explanations, as well as the videotape with a transcript thereof to MacDonald, and contemporaneously shall file copies with the court.

Upon the Government's completion of its inventory, unpackaging and mounting of the exhibits and exemplars as herein directed, the exhibits and exemplars shall be delivered to the laboratory, which initially shall conduct a "divisibility analysis" in order to determine which of the exhibits and exemplars are divisible. From each exhibit and exemplar which is capable of division, the laboratory shall retain such portion as is necessary for DNA testing, and shall return the remainder to the Government which thereafter shall have unrestricted use thereof. As to non-divisible items, the parties shall attempt to agree to the order in which such items should be tested. In the absence of agreement, the parties shall bring prioritization issues before the court. The testing of the items will be sequential, and during the course of such testing, either party may petition the court for discontinuance of the testing process in order to preserve the samples to the fullest extent consistent with the resolution of the issues before the court.

The parties' respective experts may attend and observe the testing process, and shall defer to the procedures, methods and protocol employed by the laboratory. Each party shall bear those expenses and costs as are incurred by its experts in attending and observing the testing process.

The laboratory shall prepare and file with the court a detailed report of the results of all DNA testing with copies furnished to counsel.

Finally, MacDonald's suggestion that the Government should finance this phase of his § 2255 case is not well-taken. Because this action is civil in nature, MacDonald is

not entitled to prosecute it at taxpayers' expense. Nevertheless, the court will ensure that laboratory and related test expenses are met, and ultimately will adjust allocation of the costs depending on the outcome of the case. Should the Government prevail, and should the court determine that MacDonald must bear the costs and expenses incurred as a result of this phase of the litigation,[1] MacDonald may be required to file an affidavit detailing the amount and source of all assets subject to his direction and control which are or have been used to finance the prosecution of this litigation.

SO ORDERED.

This the 25th day of March, 1999.

James C. Fox
United States District Judge

I certify the foregoing to be a true and correct
copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
Deputy Clerk

[1] "This phase of the litigation" refers to proceedings, both legal and scientific, occurring subsequent to the Fourth Circuit Court of Appeals' remand for DNA testing, and which are related to such testing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3
No. 90-104-CIV-3-F

FILED
APR 14 1999
DAVID W. DANIEL, CLERK
US DISTRICT COURT
E. DIST. N. CAROLINA

UNITED STATES OF AMERICA,)
)
v.)
)
JEFFREY R. MacDONALD,)
Petitioner/Defendant.)

ORDER

The undersigned having received and having carefully considered the parties' respective prioritized lists of qualified candidates for selection as an independent laboratory to perform DNA testing in this case, it hereby is ORDERED:

1. The Government shall present to the Clerk of Court for filing its April 7, 1999, letter in which it set forth its list of laboratory candidates. The Clerk of Court shall cause the document to be file-stamped as of April 7, 1999.

2. The Government is DIRECTED to employ the Armed Forces Institute of Pathology (AFIP) as the independent laboratory which shall conduct DNA testing consistent with prior orders of this court;

3. The Government is AUTHORIZED to enter into such reasonable financial arrangement with the AFIP as is required to effectuate the orders of this court;

4. The Government shall cause all documentation of its employment of AFIP and of contractual and financial arrangements with AFIP to be made a part of the

record of this case, except as specifically excluded by order of this court upon motion showing good cause;

5. Within fifteen (15) days of the date hereof, Dr. Jeffrey R. MacDonald, *personally*, shall execute (i) a document expressing his personal ratification of his counsel's representations contained in the April 5, 1999, letter to Brian M. Murtagh, filed with this court on April 7, 1999; and (ii) his specific written waiver of the concerns set forth in paragraphs 4 and 5 of that letter (equal/adequate access to defense experts for observation of procedures; AFIP independence).

Again, MacDonald and his counsel are placed on notice that the court will require affidavits regarding the financial condition of MacDonald personally and of any defense fund or organization whose primary purpose is the funding of the prosecution of this action, and the source of all funds available to MacDonald personally or generally for the prosecution of this action, should it become appropriate to consider requiring MacDonald to contribute to the financing of this phase of the litigation.[1]

SO ORDERED.

This the 13th day of April, 1999.

JAMES C. FOX
United States District Judge

...ify the foregoing to be a true and correc...
...py of the original.
...vid W. Daniel, Clerk
...ited States District Court
...stern District of North Carolina
Deputy Clerk

[1] "This phase of the litigation" refers to proceedings, both legal and scientific, occurring subsequent to the Fourth Circuit Court of Appeals' remand for DNA testing, and which are related to such testing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

FILED

MAY 18 1999

DAVID W. DANIEL, CLERK
US DISTRICT COURT
E. DIST. N. CAROLINA

No. 75-26-CR-3
No. 90-104-CIV-3-F

UNITED STATES OF AMERICA,)
)
v.)
)
JEFFREY R. MacDONALD,)
Petitioner/Defendant)

ORDER

For good cause shown and without objection by the defendant,[1] the Government's Motion to Withdraw Request for Authorization to Conduct Additional Preliminary Steps Prior to the Surrender of Exhibits to the Defense is ALLOWED. Accordingly, it is ORDERED that this court's order of March 26, 1999, hereby is AMENDED, such that the second and third sentences of the first full paragraph on page 2 thereof, read as follows:

"The Government is DIRECTED to generate detailed still photographs of the entire inventory process, during which the parties' experts may be present. The Government shall provide copies of the photographs accompanied by written explanations to MacDonald and contemporaneously shall file copies with the court."

SO ORDERED.

This the 14th day of May, 1999.

JAMES C. FOX
United States District Judge

I certify the foregoing to be a true and correct copy of the original
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By _____
Deputy Clerk

[1] Defendant's counsel telephonically advised the court that defendant has no objection to the instant motion.