UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8525

UNITED STATES OF AMERICA, Appellee, v. JEFFREY R. MACDONALD, Appellant.	CORRECTED REPLY BY UNITED STATES TO OPPOSITION TO MOTION TO APPEAL[1]

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby files its Reply to MacDonald's opposition to its motion to dismiss the the appeal. In our preceding motion, we urged that the Certificate of Appealability ("COA") issued under 28 U.S.C. § 2253(c) was improvidently granted because the legal claim embraced by the COA does not allege the denial of a constitutional right. As a consequence, we argued that Court lacks jurisdiction over this appeal and that it should be dismissed.

Responding to that submission, MacDonald claims: (1) that the Supreme Court's decision in Slack v. McDaniel, 529 U.S. 473 (2000), permits issuance of a COA with respect to a "stand alone" non-constitutional, statutory claim; and (2) that, in any event, based upon the results of DNA testing, he is entitled to a new trial under the Innocence Protection Act ("IPA"), 18 U.S.C. 3600, without

[1]The title of the document has been corrected to reflect that this is a reply, rather than a motion, and an extra word has been deleted from page 3.

regard to statutory limitations governing second or subsequent petitions for habeas relief. As we show below, both arguments are devoid of merit.

A. MacDonald Misapprehends the Supreme Court's Decision in Slack.

At the outset, we note that 28 U.S.C. § 2253(c)(3) requires that "[t]he certificate of appealability under paragraph (1) [of Subsection (c)] shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." Paragraph (2), in turn, requires that a COA may issue only if the applicant has "made a substantial showing of the denial of a constitutional right." The plain implication of these paragraphs considered in tandem is that, a least one of the claims upon which a COA is granted must involve the alleged denial of a constitutional right, and that the court issuing the COA must identify the alleged constitutional violation. As the court explained in Bui v. DiPaolo, 170 F.3d 232, 236-37 (1st Cir. 1999), the requirement in paragraph (3) "signals an intent that the courts should accord some significance to [the identification of a constitutional claim]." Consequently, "the better reading of the [provision] is one that links section 2253(c)(3)'s insistence on an issue by issue enumeration of what has been certified for appeal with the substantial showing requirement of section 2253(c)(2)." Id. In this case there is no linkage whatsoever between any constitutional issue identified by

MacDonald in his application to prosecute an appeal and the statutory claim on which the Court granted the COA.

The absence of such a linkage is precisely what distinguishes this case from Slack. In Slack, the district court refused on procedural grounds even to consider the habeas petition. In this case, in contrast, the district court considered MacDonald's habeas petition and rejected it on the merits. Pertinent to this distinction, Slack permits appellate review of a procedural claim, via a COA, when a district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," and "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 484. The procedural rulings implicated in the COA in this case simply prohibited expansion of the record to include evidence received after trial and after the filing of the Section 2255 motion. They did not, as in Slack, constitute procedural barriers to that court's entertainment of MacDonald's constitutional claims, i.e., that a prosecutor's intimidation of a defense witness resulted in the loss of her favorable testimony, and that, thereafter, the prosecutor misrepresented to the trial judge the nature of his conversation with her.

We do not maintain that Slack reflects the entire universe of circumstances in which the misapplication of a statutory barrier might frustrate the entertainment of a constitutional claim – and thereby be judicially cognizable under Section 2253(c) in tandem with the constitutional claim. This, however, is plainly not such a case.

MacDonald appears to suggest that if, instead of rejecting his additional evidentiary proffers on statutory grounds, the habeas court had considered them in conducting his gatekeeping assessment under AEDPA, it might have resolved his constitutional claims differently. (See Opposition at 2). The rejection of MacDonald's proffers however neither had nor could have had any bearing whatsoever upon that court's ultimate disposition of such claims.

The recollections of former Deputy U.S. Marshall Jimmy Britt constituted the centerpiece for both MacDonald's claim that prosecutor James Blackburn threatened putative defense witness Helena Stoeckly with prosecution if she testified favorably on MacDonald's behalf (the "threat" claim), and the related contention that, thereafter, prosecutor Blackburn falsely denied to the trial judge that Stoeckly had made incriminating statements to him during the interview (the "fraud" claim). Although, in addressing the "fraud" claim, the habeas court credited Britt's statement as a true reflection of what Britt *thought had occurred* some 30 years

earlier, it rejected Britt's recollection of what he allegedly overheard as irreconcilable with the contemporaneous record of events reflected in the trial transcript. (J.A. 1550). Specifically, the court observed that defense attorney Wade Smith, himself, represented to the trial judge that, when the defense team interviewed Stoeckley immediately before the interview by prosecutor Blackburn, she had no recollection of her whereabouts on the night of the murders. (See J.A. 1528, 1550). That representation made it highly unlikely that she would have made incriminating statements to Blackburn shortly thereafter. (See J.A. 1550). Moreover, when questioned by the district court out of the presence of the jury, Stoeckley acknowledged that she told both the prosecution and defense teams "the same story," *i.e.*, that she lacked any recollection of her whereabouts on the night of the murders. (J.A. 1528). None of the items rejected by the habeas court, including the results of the DNA testing, could have affected its fact-based rejection of the "fraud" claim predicated upon inconsistencies between the contemporaneous trial record and Britt's belated and flawed recollection.

The inconsistency between Britt's recollection of events and the trial record also put the lie to the alleged "threat" claim. Absent the admission that Britt allegedly overheard Stoeckley made to Blackburn, he would have had no reason to "threaten" Stoeckley with prosecution if she testified on MacDonald's behalf. The

habeas court, however, identified two additional bases for rejecting the "threat" claim. First, noting that "Causation is Lacking," it reasoned that there was no way at this late date to determine whether, but for Blackburn's alleged threat, Stoeckley would have testified favorably to MacDonald or whether, consistently with her undeniable track record as an unreliable witness, she would have denied any recollection of her whereabouts on the night of the murders. (J.A. 1554). Second, it observed that MacDonald's "threat" claim was predicated upon "Speculation as to Context," *i.e.*, particularly in view of Stoeckley's death years earlier, it was impossible to determine at this late date exactly what Blackburn allegedly said to her, what he meant by it, or what Stoeckley understood his alleged words to mean. (J.A. 1555-57). Again, none of the rejected proffers would have affected these fact-bound determinations in the least.[2] As a consequence, neither the holding in Slack nor the adoption of a rule akin to Slack that would permit cognizance of other statutory claims having a bearing upon the disposition of a constitutional claim would entitle

[2] MacDonald's Section 2255 petition also raises a so-called "confession" claim which seeks relief on the basis that, during Britt's alleged trip with Stoeckley from Greenville, South Carolina to Raleigh, North Carolina, she confessed participation in the murders of the MacDonald family to him. The district court rejected relief on this non-constitutional claim on the ground that her alleged admissions were "cumulative evidence of exactly the same nature as the excluded testimony of the Stoeckley witnesses, half of whom were active or former law enforcement officers." J.A. 1544-45. The rejected proffers likewise had no bearing on that assessment.

MacDonald to a COA with respect to the issues identified in this case.

B. The Innocence Protection Act Has No Bearing On this Appeal.

For the first time in the history of this case, MacDonald argues in his opposition to the government's motion to dismiss his appeal that he is entitled to relief under the Innocence Protection Act ("IPA"), 18 U.S.C. § 3600. (Opposition at 7-10). Because MacDonald never presented this claim to the district court, no ruling on the issue has been presented to this Court for review. Moreover, because MacDonald asserted no IPA-based claim either in his opening brief or his reply brief, it is not properly before this Court. See United States v. Leeson, 453 F.3d 631, 638 n. 4 (4th Cir. 2006) (refusing to consider claim asserted only in a post-briefing submission). Because MacDonald has never asserted an IPA-based claim either in the district court or this Court, the IPA cannot provide a basis for subject matter jurisdiction over this appeal.

MacDonald appears to assume that this Court can consider an IPA-based claim because the Government's Brief contains a footnote that refers to the IPA. (See Opposition at 7-8, citing Government's Brief at 39, n.16). This reference to the IPA in the Government's Brief does not change the fact that MacDonald never presented an IPA-based claim to the district court, or that the district court never issued any ruling on such a claim. This IPA

reference in the footnote in the Government's Brief certainly cannot confer subject matter jurisdiction over MacDonald's appeal.

Additionally, MacDonald appears to be asking this Court to consider an IPA-based claim in the first instance. (Opposition at 8-9). The Court must decline to do so, not only because a new claim for relief cannot be raised in a response to a motion to dismiss an appeal, but also because claims under the IPA must be asserted in the first instance in the district courts. See 18 U.S.C. § 3600 (describing procedures for seeking and utilizing post-conviction DNA testing).

MacDonald also notes that under 18 U.S.C. § 3600(h), a claim under the IPA is not subject to the procedural bars that apply to Section 2255 motions. (Response at 9-10). This proposition does not advance MacDonald's arguments in favor of jurisdiction, because he has not presented either the district court or this court with a claim under the IPA. Instead, throughout the district court proceedings and for the purposes of briefing in this Court, MacDonald has treated this case as arising under Federal habeas corpus law. His present attempt to make use of the IPA therefore is unavailing. Indeed, the IPA provides, "Nothing in this section shall provide a basis for relief in any Federal habeas corpus proceeding." 18 U.S.C. § 3600(h)(2).

Finally, even if MacDonald had urged the district court to grant him relief under the IPA based on the results of the DNA

testing, he would not have been eligible for relief. The IPA primarily exists to provide a vehicle by which convicted defendants can obtain DNA testing of certain evidence. See Section 3600(a). The IPA allows for the filing a motion for new trial only if the motion is based on test results obtained under the IPA. See 18 U.S.C. § 3600(g)(1). Moreover, as MacDonald has effectively conceded in his Opposition at 7-8, the DNA results do not exculpate him because they do not call into question any of the evidence which the Government introduced at trial to establish his guilt. See House v. Bell, 547 U.S. 518, 554 (2006). Instead MacDonald claims he is exculpated because he is not the source of the hair which he alleges was "found and seized by law enforcement". . . at the murder scene, including under the fingernail of one of his daughters where she had been fighting with her attacker. (J.A. 1088)." (Opposition at 9). There is no evidence of record that a hair was observed, found, or removed from under Kristen's fingernail, either at the crime scene or at autopsy. (See J.A.89-106). Nor do the documents upon which MacDonald relies for the assertions that this hair was bloody and showed evidence of forcible removal support these claims.[3] Instead, none of the

[3]All of the supporting Joint Appendix citations (J.A. 1095-1097) in MacDonald's brief are actually to Docket Entry 123, MacDonald's own Memorandum Of Evidence, which in turn relies on various military documents appended to his motion. For the assertion that the 91A hair is the same as CID Exhibit D-237, and that "chemical analysis of the hair indicated a finding of blood on the hair" (J.A. 1095) he relies on a chart found at J.A. 1171,

results of the DNA testing exculpate MacDonald under the IPA. See 18 U.S.C. § 3600(g) (setting out the standards for granting a new trial based on DNA test results).[4]

Viewed as a whole the DNA test results in fact inculpate MacDonald because the unidentifiable hair fragment found in his wife's left hand (Ex.281), which he argued to the jury came from an intruder (Tr. 7265-66), has MacDonald's own mitochondrial DNA sequence. (See AFIP 51A(2), J.A. 1107).

---

which simply states that "D-237 - Fingernail scrapings from left land of Kristen - indicated blood." It does not say anything about a hair. See also J.A. 1183. MacDonald also relies on the bench notes of AFIP technician Grant Graham for the assertion that Graham found that the hair had an "intact" root (J.A. 1095-96), which "strongly suggests" that Kristen grabbed at an intruder. In fact Graham never said the hair had an "intact root." What he really said with respect to 91A was "one human hair with root but no tissue." (J.A. 1244).

[4]MacDonald relies exclusively on § 3600(g)(2) to support his claim that he is entitled to a new trial under the IPA. Such reliance simply misapprhends the construction of the statute. Subsection (g)(1) requires that, as threshold matter, "the DNA test results obtained under this Section [must] exclude the applicant as a source of the DNA evidence" -- a condition not satisfied here. In this respect paragraphs (1) and (2) of subsection (g) are not disjunctive alternatives as MacDonald appears to assume. Ordinarily, when Congress intends consecutive paragraphs of this nature to constitute alternative rather than conjunctive requirements in a statute, it separates them by the use of the word "or." See, e.g., United States v. Moore, 613 F.2d 1029, 1040 (D.C. Cir. 1979). In this case, Congress plainly demonstrated that, when it intended the IPA's various provisions to be read as alternatives, it knew how to say so, by separating the pertinent provisions with the word "or." See, e.g., 18 U.S.C. § 3600(a)(3)(A)(i), (ii). It did not do so with respect to the paragraphs of subsection (g).

Conclusion

MacDonald's appeal should be dismissed for lack of jurisdiction under 28 U.S.C. § 2253(c).

Respectfully submitted this 18th day of March, 2010.

GEORGE E. B. HOLDING
United States Attorney

By: /s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant United States Attorney

JOHN F. DE PUE
BRIAN M. MURTAGH
Special Assistant United States Attorneys

310 New Bern Avenue
Federal Building, Suite 800
Raleigh, North Carolina 27601-1461
Telephone: (919) 856-4530

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2010, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

Joseph E. Zeszotarski, Jr.
Andrew H. Good
Philip G. Cormier
Harvey A. Silverglate
James E. Coleman, Jr.

I further certify that on March 18, 2010, I have mailed the foregoing motion by First Class Mail, postage prepaid, to the following non-CM/ECF participant, addressed as follows:

Barry C. Scheck
Benjamin N. Cardozo School of Law
Yeshiva University
Innocence Project
55 5th Avenue
New York, NY 10003

/s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant United States Attorney