

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
3:75-CR-26-3  
5:06-CV-24-F

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

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**MOTION TO CONTINUE EVIDENTIARY HEARING**

NOW COMES defendant, Jeffrey R. MacDonald, by and through his undersigned counsel, and moves this Court to continue the evidentiary hearing schedule for 20 August 2012 to the September 17 setting previously suggested by this Court. In support of this motion, defendant shows the following:

1. This matter is before the Court on remand from the United States Court of Appeals for the Fourth Circuit for an evidentiary hearing on defendant's motion to vacate under 28 U.S.C. § 2255 at which a determination of the issues in the motion must be assessed on the basis of the "evidence as a whole" under 28 U.S.C. § 2255(h)(1). *United States v. MacDonald*, 641 F.3d 596, 610-17 (4<sup>th</sup> Cir. 2011). After receiving input from the parties, this Court scheduled the hearing for 20 August 2012.

2. As then undersigned made this Court aware, the North Carolina General Assembly

effectively repealed the Racial Justice Act (RJA) or at least substantially modified it. *See* SB 416, approved 11 June 2012. A copy of the legislation is attached as Exhibit 1 for the Court's convenience. Although the Governor vetoed the bill, the General Assembly overrode the Governor's veto on 2 July 2012.

3. In part, this new legislation, which took effect on July 2 with the repeal of the veto, requires any inmate under a sentence of death who had previously filed a motion for appropriate relief under the RJA to "amend or otherwise modify the motion" within 60 days of July 2. SB 416, Section 7. This language fixes a statute of limitations for filing an amendment motion for relief. Sixty days from July 2 is August 31.

4. The amended filing under the new law, which is referred to in this motion as the amended RJA, must be accompanied by a waiver signed by the defendant of a number of potential claims and issues, each of which requires study by counsel and close consultation between counsel and client. In addition, the amended RJA made substantial alterations to the way a claim under the RJA can be litigated. A few of these changes illustrate the dramatic differences wrought by the new statute.

5. First, the amended RJA limits potential evidence of discrimination to the particular county or prosecutorial district where the death sentence was imposed, SB 416, Section 3 (f), whereas the original statute allowed proof of discrimination in the state or judicial division. N.C. Gen. Stat. § 15A-2011(b). Most of the previously filed motions under the RJA included and relied on proof of discrimination in the state or judicial division.

6. Second, the amended RJA defines “the time at which the death sentence was sought or imposed” as “the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence,” SB 416, Section 3 (a), whereas there was no similar definition in the original RJA. N.C. Gen. Stat. § 15A-2011. This change is important because it means the data relevant to each defendant is different and will change the evidence previously gathered for and appended to an earlier RJA motion, which included only information and statistics going back to 1990. Indeed, many of the clients whom the undersigned represents committed their crimes in the late 1980s or early 1990s.

7. Third, the amended RJA provides “[s]tatistical evidence alone is insufficient to establish that race was a significant factor under this Article.” SB 416, Section 3 (e), whereas the original statute allowed proof through the use of statistics. N.C. Gen. Stat. § 15A-2011(b). *See generally McCleskey v. Kemp*, 481 U.S. 356 (1987). This change also radically alters the materials previously gathered for and appended to each defendant’s earlier RJA motion. All of these previous motions relied heavily on statistical data.

8. As this Court is aware, the undersigned currently represents eleven (11) inmates under a sentence of death, each of whom had filed a motion for appropriate relief under the RJA. These defendants are William L. Barnes, Stephen M. Buckner, Ricky Cagle, James Campbell, Terry Hyatt, Jeff Kandies, John Davis McNeill, Jeffery Meyer, Alexander Polke, Michael Sherrill, and Kenneth Bernard Rouse. Seven of these inmates are white, three of

them are black, and one of them is a Native American. The dates of their crimes range from the early 1980s to only a few years ago. They were tried in six different counties and even more prosecutorial districts. Clearly, their claims under the RJA and potential claims under the amended RJA are different and require individual analysis based on their race, the county and prosecutorial of their convictions, the date of their crimes, and the date on which they were sentenced.

9. Perhaps most important change in the amended RJA is the new requirement that each defendant “knowing and voluntarily waives any objection to the imposition of a sentence of life without parole based upon any common law, statutory law, or the federal or State constitutions that would otherwise require that the defendant be eligible for parole. The waiver shall be in writing, signed by the defendant, and included in the motion seeking relief under this Article.” SB 416, Section 3 (a1). Each defendant is now required to waive potential litigation. It is difficult to overstate the significance of this change to each individual defendant. They must make an affirmative statement of waiver regarding all potential challenges to a sentence that does not include a possibility of parole, something that would have been available to any defendant whose crime occurred before 1995 and might have been sought by any other defendant. While this waiver may seem inconsequential to someone other than these defendants, it is quite significant to them. Their decision can only come after careful and close consultation with counsel. This consultation can occur only individually, in person, and at Central Prison in Raleigh, where attorney visitation occurs

only on Monday, Tuesday, and Thursday. In most instances, more than one or even two visits will be necessary to provide the necessary counsel and result in a written waiver. Given the stakes involved—a life sentence versus a death sentence—these clients are entitled to zealous and competent representation immediately.

10. As the undersigned has previously informed the Court, he has been inundated with necessary aspects of this representation that changed dramatically on July 2. He could not possibly have foreseen this development. Indeed, if he had known of it, he would have urged an evidentiary hearing in this matter no earlier than the proposed September setting or perhaps even sought to withdraw from this case.

11. The undersigned readily acknowledges that both this Court and the government have been very understanding with regard to scheduling and other issues associated with his representation in this matter. Indeed, the undersigned met personally with opposing counsel on July 12 to discuss this issue as well as procedural matters regarding the pretrial conference. The undersigned sincerely appreciates these considerations, especially the time opposing counsel took to hear his explanation of the new duties he faces regarding the 11 inmates he represents who are affected by the amended RJA. He also recognizes changing the August 20 setting will inconvenience witnesses (including some defense witnesses), opposing counsel, and this Court, and he suspects the government will oppose this motion. However, this situation is truly unique and compelling. The eleven clients mentioned above, as well as defendant herein, are entitled to counsel who is available and focused. The

undersigned respectfully submits those interests must outweigh matters of convenience.

12. In light of these circumstances, then undersigned respectfully submits the interests of justice for the 11 inmates he represents who are under a sentence of death and must file amended pleadings under the amended RJA by August 31, as well as for defendant herein, would best be served by continuing the evidentiary hearing from August 20 to September 17, a setting previously suggested by this Court. A proposed order is attached.

WHEREFORE, Jeffrey R. MacDonald respectfully requests that this Court continuing the evidentiary hearing from August 20 to the September 17 setting previously suggested by this Court.

This the 13<sup>th</sup> day of July, 2012.

**RUDOLF WIDENHOUSE & FIALKO**

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**CERTIFICATE OF SERVICE**

I hereby certify that on 13 July, 2012, I electronically filed the foregoing Motion to Extend Time to File Joint Proposed Schedule with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record in this matter.

**RUDOLF WIDENHOUSE & FIALKO**

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