

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 3:75-CR-26-F

UNITED STATES OF AMERICA)	
)	GOVERNMENT'S RESPONSE
v.)	TO MOVANT'S MOTION FOR
)	<u>APPOINTMENT OF COUNSEL</u>
JEFFREY R. MacDONALD,)	
Movant)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby responds to the Movant's Motion for Appointment of Counsel, filed October 18, 2011, and in opposition to said motion respectfully shows unto the Court the following:

SUMMARY OF ARGUMENT

The Movant, Jeffrey R. MacDonald ("Movant" or "MacDonald") has not demonstrated to the Court that he is without counsel in this matter or that he is financially unable to obtain counsel. MacDonald has previously sought delay in these proceedings on remand in order make changes in his legal team. His requested change now should not be the basis of further delay. Even if he qualifies for appointment of counsel, he has no right to demand the services of a particular attorney. There has been no showing of changed circumstances since Mr. Hill Allen's appearance in the case on September 16, 2011, that would warrant his withdrawal now.

FACTS

1. The Government incorporates by reference the factual recitation contained in its Memorandum for Status Conference, filed July 19, 2011. [DE-174].

2. The United States Court of Appeals for the Fourth Circuit ("the Fourth Circuit") remanded this case to this Court on April 19, 2011. The mandate issued on June 13, 2011.

3. On June 23, 2011, this Court scheduled a status conference for July 28, 2011, "to clarify appropriate procedures, establish deadlines and explore the parameters of matters on remand from the Fourth Circuit" [DE-168].

4. On July 15, 2011, MacDonald filed a motion to continue the status conference, which stated that MacDonald was "attempting to resolve counsel issues and expects, upon information and belief, that at least one new notice of appearance will be filed by another counsel within the next 30 days." DE-169 at 1. The status conference was continued to September 21, 2011.

5. On September 16, 2011, Mr. F. Hill Allen, IV, of the firm Tharrington Smith, LLP, filed a notice of appearance for MacDonald. [DE-173].

6. On September 20, 2011, Ms. Christine Mumma filed a notice of appearance for MacDonald. [DE-177]. On the same day, Ms. Mumma filed an affidavit in which she stated that she had been a licensed attorney since 1999 and that she is the Executive Director of the North Carolina Center on Actual Innocence, where she has worked

since 2001. DE-176, Attachment 1, at 1. Ms. Mumma further noted her "experience litigating claims of actual innocence . . ." Id.

7. At the status conference on September 21, the Court set an evidentiary hearing on MacDonald's "Britt claim" for October 31, 2011. [DE-180-82].

8. On September 30, 2011, Mr. Hart Miles, who had been representing MacDonald since 2006, filed a motion to withdraw as counsel, stating that MacDonald "has other attorneys of record that will represent [him] going forward, and that [MacDonald] consents to this Motion to Withdraw." DE-183 at 1. On the same day, MacDonald filed a motion to continue the evidentiary hearing for "60 or more days." DE-184 at 1. The Court continued the hearing until November 28, 2011. [DE-187].

9. On October 18, 2011, Mr. Allen filed a motion seeking leave to withdraw as counsel for himself and Mr. Wade M. Smith. [DE-192]. Simultaneously, MacDonald filed a motion for appointment of counsel. [DE-191]. In that motion, MacDonald also requested that the evidentiary hearing be continued until at least February 16, 2012. DE-191 at 3.

DISCUSSION

11. The Government does not dispute that a prisoner who has filed a motion pursuant to 28 U.S.C. § 2255 as to which an evidentiary hearing has been ordered is entitled to counsel and, if the movant qualifies under 18 U.S.C. § 3006A, then the Court must appoint counsel. Rule 8(c), Rules Governing Section 2255

Proceedings.

12. The question then is whether the Movant in this matter qualifies for appointed counsel under 18 U.S.C. § 3006A. Section 3006A(b) provides, in pertinent part:

In every case in which a person entitled to representation under a plan approved under subsection (a) appears without counsel, . . . the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, . . . the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him.

18 U.S.C. § 3006A(b) (emphasis added).

14. The United States District Court for the Eastern District of North Carolina has a Criminal Justice Act Plan adopted under Section 3006A(a). See Standing Order 08-SO-2 (EDNC). It states that the "determination of eligibility for representation under the CJA is a judicial function to be performed by a federal judge or magistrate judge after making appropriate inquiries concerning the person's financial condition." Id. at 4 (¶ D.1).

15. In the more than 36 years since the indictment in the instant case was returned, MacDonald has never requested appointed counsel. Yet he has always had multiple, highly-qualified attorneys representing him, as he does now. At present, Mr. F. Hill Allen, IV, Ms. Christine Mumma, and Mr. Joseph E. Zeszotarski, Jr., are all listed as counsel of record on the docket of this

case.

16. Before this Court appoints counsel for MacDonald at taxpayer expense, MacDonald should be required to demonstrate (1) that he is without counsel, and (2) that he is financially unable to obtain counsel. MacDonald should inform the Court whether and to what extent other attorneys, including those who are now representing him and those whose firms or organizations previously represented him, will continue to assist in post-conviction proceedings even if the court appoints new counsel.

17. The Government does not know the financial status of the Movant. He does, however, have a defense fund that he says is registered with the IRS under Section 501(c). See http://www.themacdonaldcase.org/Defense_Fund.html (accessed 10/24/11), attached as Exhibit 1. See also <http://www2.guidestar.org/organizations/a/54-1911063/macdonald-defense-fund.aspx> (accessed 10/20/11), attached as Exhibit 2.

18. MacDonald's website also states that "[t]he MacDonalds are pleased and grateful to have the services of such a strong and dedicated team of attorneys." http://themacdonaldcase.org/Defense_Counsel.html at 1 (accessed 10/24/11), attached as Exhibit 3. The roster of attorneys includes Mr. Miles (now withdrawn), Mr. Zeszotarski, Mr. Phil Cormier, Mr. Andy Good, Mr. Tim Junkin (now withdrawn), and Mr. Wade Smith. Id. at 1-4. See also "Update Letter," April 2011, http://themacdonaldcase.org/Uptate_Letter.html (accessed 10/19/11),

attached as Exhibit 4.¹

19. In the motion to appoint counsel, the stated reasons for the withdrawal of Mr. Allen are that (1) his law partner, Mr. Wade Smith, will be a witness in the evidentiary hearing and (2) that Mr. Smith previously represented Mr. James Blackburn, whose conduct is at issue in this matter, in an unrelated case. DE-191 at 1-2.

20. Assuming that Mr. Smith's role as a witness disqualified him from representing MacDonald at the evidentiary hearing², that disqualification is not imputed to other members of his firm. Rule 3.7(b), N.C. Rules of Professional Conduct.

21. With regard to Mr. Smith's previous representation of Mr. Blackburn, it is the Government's understanding that Mr. Blackburn has waived any conflict of interest arising out of the two representations. See email exchange between Mr. Smith and Mr. Blackburn, 9/21-29/05, attached as Exhibit 6. The Government

¹Mr. Cormier and Mr. Good, along with Ms. Mumma and Mr. Barry C. Scheck, filed a brief in this matter as *amici curiae* in the Fourth Circuit on March 31, 2009. See cover page attached at Exhibit 5. Mr. Cormier has represented MacDonald since 1990. Mr. Good and Mr. Scheck filed notices of appearance before this Court in 1999 [DE 94 and 95]. The Government is not aware of that any of these attorneys have ever formally withdrawn.

²Most jurisdictions do not require such disqualification for the lawyer/witness during pretrial and post-trial proceedings where no jury is present. See, e.g., Stone v. Allstate Ins. Co., 2000 WL 35609369 at *3 (S.D.W.Va. 2000) ("If an attorney is disqualified from trial because of his need to serve as a witness, however, that does not mandate his exclusion from pre-trial or post-trial proceedings, especially where the attorney is uniquely familiar with the case.") However, based on communications from the MacDonald defense team, the Government was not anticipating that Mr. Smith would be in an advocacy role at the hearing and does not oppose his motion to withdraw.

further understands that Mr. Blackburn did not object to Mr. Allen appearing in the case. See email from Mr. Smith to Mr. Blackburn forwarding email to Mr. Miles, 8/17/11, attached hereto as Exhibit 7.

22. MacDonald has not shown any changed circumstances since Mr. Allen filed his notice of appearance on September 16, 2011, that would warrant Mr. Allen's withdrawal.

23. MacDonald's motion asks the Court to appoint a specific attorney. "An indigent defendant . . . has no right to have a particular lawyer represent him and can demand a different appointed lawyer only with good cause." *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988).

24. The attorney whose appointment MacDonald suggests is Mr. Gordon Widenhouse, Jr. Motion at 2. Mr. Widenhouse is a very able attorney, but the motion forecasts that he cannot be ready for the evidentiary hearing until February 2012. The requested change in counsel should not be used as rationale for further delay in the evidentiary hearing.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Movant's motion for appointment of counsel be denied unless he can show that he is without counsel and is financially unable to obtain counsel. The Government further requests that Mr. Allen's motion to withdraw as counsel be denied until the matter of the Movant's representation going forward is finally resolved.

Respectfully submitted, this 24th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the defendant in this action either electronically or by placing a copy of same in the United States mail, postage prepaid, and addressed to counsel for defendant as follows:

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This, the 24th day of October, 2011.

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