

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 NOTICE
v.)	IN RESPONSE TO COURT'S
)	<u>ORDER OF APRIL 12, 2012</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 submits this notice pursuant to this Court's Order of April 2, 2012 [DE-255], continuing the evidentiary hearing in the above-captioned case, and respectfully shows unto the Court the following:

BRITT CLAIM EVIDENTIARY HEARING

1. With regard to the two possible dates identified by the Court for the evidentiary hearing on the "Britt claim," the parties have conferred and both sides respectfully request that the Court set the hearing for August 20-31, 2012.¹

ORAL ARGUMENT ON NEW DNA TESTING

2. In its response to MacDonald's motion to continue the evidentiary hearing from the April 30 date, the Government proposed that the parties appear before the Court in early May for an oral argument on the issue of MacDonald's request for new DNA testing

¹Counsel have identified a scheduling conflict for the September 17-28 alternative date with respect to one witness who could be called by one or both parties: Mr. Wade Smith. Mr. Smith has a trial scheduled for September, 2012, that would conflict with those proposed dates.

pursuant to the Innocence Protection Act ("IPA"). DE-252 at 2-3. In its Order, the Court directed that MacDonald's counsel, Christine Mumma, file an affidavit as to whether she agreed to the convening of such a hearing during the week of May 7, 2012. DE-255 at 2.

3. Ms. Mumma has filed the affidavit this date. DE-258. The affidavit states, inter alia, that "oral argument will not aid in the decisional process." DE-258 at 1.

4. The Government respectfully disagrees.² MacDonald first requested this new DNA testing under the IPA in a short filing [DE-176], filed on September 20, 2011, the eve of the long-scheduled status conference to deal with issues arising from the Fourth Circuit's remand. This document mixed together MacDonald's request for a new trial based on the 2006 DNA test results and a new request for additional DNA testing under the IPA, 18 U.S.C. § 3600. The request for new testing in this filing can fairly be described as "bare bones." No explanation was provided as to how MacDonald's case met the ten statutory prerequisites for DNA testing under the IPA. Neither was there any explication provided as to the

² Contrary to the assertion in the affidavit, DE-258 at ¶ 2, the Government submits that there are disputed issues of material fact to be determined by the Court. For instance, central to a number of MacDonald's legal arguments on the issue of timeliness is his assertion that in 1997 he sought access for DNA testing to "all evidence in the Government's possession. DE-237 at ¶ 3. The Government disputes this assertion, but resolution of the issue will not require taking any additional evidence; rather it will require only an accurate canvas of the record from 1997 to 1998.

timeliness, or lack thereof, of this new request.

5. In order to respond to this new request, the Government received permission from the Court to bifurcate its response into two parts, one to address MacDonald's claim for relief based on the 2006 DNA tests and one to address his new request for additional testing. See DE-220. These were filed on December 12-13, 2011. See DE-212, DE-227.

6. The Government's response filed on December 13, 2011 [DE-227] was the first pleading on this issue before this Court that analyzed application of the provisions of the IPA to the instant case. The Government pointed out many ways in which MacDonald had failed to meet the ten prerequisites for testing, the untimeliness of his motion, and the myriad practical problems with the proposed testing. MacDonald replied on February 17, 2012, making a host of new arguments in support of his request that had not been included in his initial "bare bones" motion. See DE-238.

7. Normally, a movant thoroughly explains the legal basis for the relief sought in the motion, the opposing party then explains its position in a response, and then the movant has an opportunity to reply to the arguments made in opposition to the motion. In this way, each party has an opportunity to respond meaningfully to the other party's arguments. With respect to new DNA testing in this matter, the fact that the Movant waited until his reply to explain his contentions on how the IPA purportedly applied to his case means that the Government has never been

provided an opportunity to respond to these contentions.

8. It was the Government's view that this could be done in an oral argument in which each side could make its arguments on the applicability of the IPA and whether new DNA testing is feasible in this case. However, in light of MacDonald's opposition to an oral argument on this issue, the Government respectfully requests leave to file a sur-reply to MacDonald's reply of February 17, 2012 [DE-238], to be filed on or before May 10, 2012.

CONCLUSION

The Government and the Movant are agreed on August 20-31, 2012, as the date of the evidentiary hearing on the Britt claim. In light of the Movant's opposition to an oral argument on his request for new DNA testing under the IPA, the Government respectfully requests leave to file a sur-reply to the Movant's reply filed February 17, 2012 [DE-238], on or before May 10, 2012.

Respectfully submitted, this 12th day of April, 2012.

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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 12th day of April, 2012.

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