

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

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

**MOTION TO EXTEND TIME TO FILE  
JOINT PROPOSED SCHEDULE**

NOW COMES defendant, Jeffrey R. MacDonald, by and through his undersigned counsel, and moves this Court to extend the time for the parties to file the joint proposed schedule pursuant to this Court’s order of 8 June 2012. [DE 266] For the reasons stated herein, defendant requests that the parties be given ten days from any further ruling by this Court regarding the depositions mentioned in the order of June 8 (and the lists of people to be deposed noted by the parties on June 27 and June 29), [DE 269, 270] in which to file their Joint Proposed Schedule. 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 has scheduled the hearing for 20 August 2012.

2. On 8 June 2012, this Court entered an order indicating it would consider only the “Britt” claim and the “DNA” or “unsourced hairs” claim at the hearing tentatively set for August 20. It indicated it would withhold further analysis of “the IPA motion” until after the hearing. After “several weeks of carefully reviewing all pending motions in light of the Fourth Circuit’s remand” [DE 266 at 1], this Court further suggested the parties might wish to depose various people “prior to commencement of the evidentiary hearing necessitated by the remand of the specific § 2255 claims” and directed them to provide “the identities of the proposed deponents.” [DE 266 at 4] On an unopposed motion of defendant, the Court extended the time for defendant to file his list of people to be deposed until June 27. Defendant filed his list on June 27. [DE 269]

3. The Court also extended the time for the government to file its list until June 29. On June 29, rather than simply filing its list of people to be deposed, the government filed a Notice of Government’s Position Regarding Depositions. [DE 270] Although styled a “notice of position,” this document contained a “conclusion” that suggested depositions were “not warranted;” but if allowed, depositions should be limited to only one deponent on defendant’s list, in which event the government asked that defendant be required to disclose any experts he might call at the hearing, whom the government would then seek to depose. The government further stated that if defendant’s proposed list of deponents was not limited, then the government would seek to depose an additional list of people, whom it named. [DE 270 at 8-9] Quite plainly, the government’s filing of this “notice of position” has

complicated the ability of the parties to prepare a “joint proposed schedule.”

4. The government’s filing has also created a need for defendant to file a “response.” Defendant would like an opportunity to file a responsive pleading to the government’s notice, either in the form of his own “position” or, perhaps more appropriately, a motion to strike the government’s filing. Again, while the government styled its filing a “position,” it is more akin to a motion to reconsider or a motion to alter this Court’s order of June 8. While defendant sees no need for this Court to change an order it entered after “several weeks of carefully reviewing all pending motions in light of the Fourth Circuit’s remand” [DE 266 at 1], he would like an opportunity to respond to the government’s submission. As an observation, defendant notes the first portion of the government’s “notice of position” concerns the bases for a party requesting discovery in a 28 U.S.C. § 2255 proceeding and the discretion vested with this Court in that circumstance. [DE 270 at 1-8] This Court’s order of June 8 reflected this Court’s exercise of this discretion in allowing the parties to name the people each wished to depose and directed the parties simply to list their proposed deponents. Defendant did precisely what this Court directed. Yet the government suggests he has somehow failed to comply.

5. While the undersigned has tried to prepare a responsive pleading, he has not had an adequate opportunity to do so. As this Court is likely aware, the North Carolina General Assembly effectively repealed the Racial Justice Act (RJA) in the past six weeks, SB 416, approved 11 June 2012. Although the Governor vetoed the bill, on July 2, the General Assembly overrode the Governor’s veto of this repeal. In part, this new legislation, which

too 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. The amendments or modifications include waivers by each defendant of a number of potential claims and issues, each of which requires study by counsel and close consultation between counsel and client. 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. Further complicating the undersigned’s situation in the RJA litigation, there is pending litigation in Cumberland County involving at least one of his clients, and a hearing on motions in Cumberland County has been expedited to 6 July 2012. The undersigned has been inundated with necessary aspects of this representation, much of which changed dramatically on July 2, particularly with regard to the defendants he represents who are involved in and impact by the ongoing litigation in Cumberland County. He could not possibly have foreseen this development.

6. In light of these circumstances, the interests of justice would best be served by allowing defendant to have until 11 July 2012 in which to file his responsive pleading to the government’s “position regarding depositions” that will then allow this Court to consider what, if any, directions it will provide the parties. At that point, the parties will be able to comply with this Court’s order of June 8 and submit a Joint Proposed Schedule. Defendant requests the parties have ten days from the entry of any further order by this Court with regard to depositions in which to file their Joint Proposed Schedule. A proposed order is attached.

WHEREFORE, Jeffrey R. MacDonald respectfully requests that this Court allow him until 11 July 2012 to file a response to the Notice of Government's Position Regarding Depositions and that this Court allow the parties ten days from any ruling concerning the Notice of Government's Position Regarding Depositions in which to file their Joint Proposed Schedule.

This the 5<sup>th</sup> day of July, 2012.

**RUDOLF WIDENHOUSE & FIALKO**

/s/ M. Gordon Widenhouse, Jr.

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Attorney for Jeffrey R. MacDonald

**CERTIFICATE OF SERVICE**

I hereby certify that on 5 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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