

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 CONTINUE EVIDENTIARY HEARING

NOW COMES defendant, Jeffrey R. MacDonald, by and through his undersigned counsel, and moves this Court to continue the evidentiary hearing currently scheduled for the 30 April 2012 Session of this Court. For the reasons stated herein, defendant requests that the hearing be continued for at least sixty (60) days and be set no earlier than the last week of June 2012. The undersigned is informed and believes the government agrees the matter should be continued for at least thirty (30) days and will set forth its position in a written response to this motion. 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 (4th Cir. 2011). This Court has conducted a status conference on 21 September 2011 and set an initial date of 31 October 2011 for the evidentiary hearing. Defendant's prior retained counsel, Hart Miles and F. Hill Allen IV, were allowed to withdraw on 3 October 2011 and 18 November 2011, respectively. The evidentiary hearing was continued to 28 November 2011. On 8 November 2011, this Court continued the hearing to 30 April 2012. Subsequently, Sue A. Berry was appointed as counsel for defendant and entered an appearance on 30 November 2011. Since the setting of this date, Ms. Berry was allowed to withdraw on 22 February 2012. The undersigned formally made an appearance in this matter on 14 March 2012. Before the entry of this appearance, the undersigned had no role in the representation of defendant and had only passing familiarity with it.

2. Since making a formal appearance, the undersigned has been diligently reviewing materials in this matter that are voluminous. As this Court is aware, the trial in this matter lasted approximately nine weeks and the transcript exceeds 7500 pages. This Court allowed the transcript to be delivered to counsel by order entered 26 March 2012. There have been multiple opinions from the Fourth Circuit. The matter has also been the subject of several post-conviction motions and attendant evidentiary hearings. It is important to review these materials in order to provide effective representation and also to assimilate the showing necessary for a determination of the issues based on the "evidence as a whole" under section 2255(h)(1).

3. On 20 March 2011, the undersigned met with opposing counsel, First Assistant United States Attorney John S. Bruce, for an informal discussion about the case and upcoming evidentiary hearing. The undersigned believes the government agrees some continuance of the evidentiary hearing is appropriate, although perhaps not for sixty days. The government will set forth its position in a response to this motion.

4. There have been other previously scheduled litigation matters involving the undersigned. On 21 March 2012, the unsigned appeared before the Fourth Circuit and argued *United States v. Shippy*, No. 09-4802. He is currently working on a brief in *State v. Broom*, No. COA12-209, that is due to be filed on 25 April 2012. *Broom* involved a lengthy trial on multiple charges, including first degree murder and attempted first degree murder, with a transcript in excess of 2500 pages. There are multiple issues in the appeal, including a question of first impression regarding the legality of a charge of first degree murder for the death of a child who was unborn at the time the mother was assaulted and who was not harmed by the assault. He has a petition for discretionary review due in the Supreme Court of North Carolina in an appeal involving an issue of separation of powers. He is also scheduled to appear in the Fourth Circuit on 18 May 2012 to argue *United States v. Powell*, No. 11-6152, an appeal involving the retroactivity of *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010), an important issue in this circuit for which multiple cases are being held in abeyance. The government's brief has not yet been filed; thus, the undersigned will be soon be preparing the reply brief in the appeal. In addition to these matters, the undersigned

has other cases that require some attention

5. The undersigned also is scheduled to give presentations at several continuing legal education seminars on May 10, May 11, June 16, and June 18.

6. There is also an issue pending in this matter regarding whether a claim under the Innocence Protection Act will be considered at the forthcoming evidentiary hearing. In his discussions with opposing counsel, the undersigned believes it would be prudent for the Court to hear from counsel regarding this issue before making a final determination. This matter could be dealt with on April 30, if the Court deems it appropriate. The parties would then have a clear understanding of the matters to be considered at the evidentiary hearing.

7. In light of the voluminous materials to be reviewed and the importance of the issues to be addressed, as well as the workload of the undersigned, the interests of justice would best be served by continuing the evidentiary hearing for at least sixty (60) days to an appropriate term of this Court.

WHEREFORE, Jeffrey R. MacDonald respectfully requests that the evidentiary hearing scheduled for 30 April 2012 be continued for at least sixty (60) days.

This the 30th day of March, 2012.

RUDOLF WIDENHOUSE & FIALKO

/s/ M. Gordon Widenhouse, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on 30 March, 2012, I electronically filed the foregoing Motion to Continue Evidentiary Hearing 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

/s/ M. Gordon Widenhouse, Jr.

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