

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-7543
(3:75-CR-00026-F-1)

UNITED STATES OF AMERICA,)	
Appellee)	GOVERNMENT'S RESPONSE TO
v.)	APPELLANT'S "MOTION FOR EXTENSION
)	TO FILE OPENING BRIEF IPA APPEAL"
JEFFREY R. MacDONALD,)	
Appellant)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this Response to Appellant's "Motion for Extension to File Opening Brief IPA Appeal," and shows unto the Court the following:

Procedural Posture

1. On August 8, 2014, Senior United States District Judge James C. Fox entered an Order denying Appellant's Motion Pursuant to the Innocence Protection Act of 2004, 18 U.S.C. § 3600, For New Trial Based on DNA Testing Results and Other Relief. (Docket Entry at 356).¹

2. On October 7, 2014, Appellant entered Notice of Appeal in the District Court. Docket Entry at 366.

3. On October 22, 2014, this Court issued an Informal Briefing Order directing that the Appellant file his informal brief by November 17, 2014. (Docket Entry at 4-2). The defendant did not file an informal brief.

4. On November 25, 2014, the Court received Appellant's first Motion to Extend Time to file Matters Pursuant to Petitioner's Notice of Appeal Regarding Innocence Protection Act Claim 1(18 U.S.C. § 3600), which cited difficulties in retaining counsel, but did not request

¹ The government will cite to the docket entries in the Court of Appeals followed by the appropriate numbers.

appointment of counsel for the appeal. (Docket Entry at 9). This document was dated November 18, 2014, and mailed to the Court by Appellant's wife, Kathryn MacDonald. Id.

5. The Court granted the Motion to Extend, directing that the informal brief be filed by December 26, 2014, unless counsel for the Appellant filed an appearance and moved to rescind the informal briefing schedule. (Docket Entry at 10-1). To this Order, the Court attached a blank financial affidavit form, and warned that “[f]ailure to comply will result in this court’s issuance of a Rule 45 Notice for failure to satisfy briefing requirements.” Id. at 2. Again, Appellant did not file an informal brief.

6. On January 6, 2015, the Court issued a Rule 45 Notice to Appellant, directing that his default be remedied within 15 days, upon expiration of which it would dismiss the case for failure to prosecute. (Docket Entry at 12). For the third time, Appellant did not file an informal brief.

7. On January 27, 2015, six days after the expiration of time to remedy his default pursuant to Rule 45, the Court docketed a second Motion to Extend Time to Obtain Pro Bono Counsel and File Notice of Appearance Regarding Petitioner’s Innocence Protection Act Claim (18 U.S.C. § 3600), postmarked January 22, 2015, mailed by Appellant’s wife, and again citing difficulty in securing counsel. (Docket Entry at 14). Appellant did not request appointment of counsel at that time. Id. That same day, the Court granted the Appellant’s Motion to Extend Time and ordered that his informal brief be filed by February 9, 2014, noting that “[n]o further requests to extend the time for filing the informal opening brief shall be granted.” (Docket Entry at 15).

8. On February 9, 2015, Mr. William M. Palmer, Esq., entered an Appearance of

Counsel for the Appellant. (Docket Entry at 16). The Court then rescinded the informal briefing order and directed that the Appellant's opening brief and appendix be filed by March 17, 2015. (Docket Entry at 17, 18).

10. On March 17, 2015, counsel for the Appellant, with the consent of the Government, filed a Motion to Extend Time to File Opening Brief and Appendix (Docket Entry at 21), citing the need for "more time to study the evidence in this case and appeal; the prior filings that bear on the appeal, which are numerous and lengthy; the science of forensic DNA testing; and the relevant law." The Court granted the extension and set the new deadline for opening brief and appendix for April 16, 2015. (Docket Entry at 22).

12. On April 16, 2015, counsel for the Appellant again filed a Motion to Extend Time to File Opening Brief and Appendix (Docket Entry at 23), with the consent of the Government, citing the complex nature of the case. The Court again granted the extension and set the new deadline for opening brief and appendix for May 18, 2015, stating that "[a]ny further request for an extension of time in which to file the opening brief and joint appendix shall be disfavored." (Docket Entry at 24).

13. On May 18, 2015, counsel for the Appellant filed a third Motion to Extend Time to File Opening Brief and Appendix, with the consent of the Government, again citing the complex nature of the case, but also citing difficulty in communicating with the Appellant in preparation of the opening brief. (Docket Entry at 25). The Court granted Appellant's motion to extend and set the new deadline for opening brief and appendix for June 17, 2015, stating "[n]o further request for an extension of time . . . will be granted." (Docket Entry at 26).

14. On June 17, 2015, counsel for the Appellant filed a fourth Motion to Extend Time

to File Opening Brief and Appendix (Docket Entry at 27), this time requesting seventy-five (75) days to allow for coordination with the appellate attorney in No. 15-7136, the appeal regarding Appellant's claim pursuant to Title 28, United States Code, Section 2255, or, in the alternative, an extension to June 29, 2015, on personal grounds due to the illness of a family member. (Docket Entry at 3-4). The Government consented to a continuance until June 29, 2015, but opposed the extension of seventy-five (75) days. (Docket Entry at 5).

15. On June 18, 2015, the Court granted the extension to June 29, 2015, and noted that no further extensions would be granted. (Docket Entry at 28).

16. On June 29, 2015, counsel for the Appellant, William M. Palmer, Esq., moved to withdraw (Docket Entry at 29), which motion was granted by the Court (Docket Entry at 30).

17. The Court filed a new Informal Briefing Order on June 30, 2015, directing Appellant to file an informal opening brief by July 24, 2015. (Docket Entry at 31). The Appellant did not file an Informal Opening Brief.

18. On July 27, 2015, the Court issued a Rule 45 Notice to Appellant, directing that he remedy his default by August 11, 2015, or his appeal would be dismissed for failure to prosecute. (Docket Entry at 32). Appellant did not file an informal opening brief.

19. On August 24, 2015, thirteen (13) days after the Rule 45 deadline, the Court docketed Appellant's Motion for Extension to File Opening Brief IPA Appeal (18 U.S.C. § 36), dated August 22, 2015, and mailed by Appellant's wife, Kathryn MacDonald. (Docket Entry at 33).

Argument

20. Appellant has been granted seven (7) extensions of time in which to file his opening

brief, whether formal or informal. At no time has Appellant requested that this Court appoint counsel to aid in his appeal. While Appellant has retained counsel for his appeal in Case No. 15-7136, that counsel has not entered an appearance in this matter.

21. In the most recent Motion to Extend, Appellant claims difficulty with sending the Court's notices to his wife as an excuse for his delay in filing. (Docket Entry at 33 at 2). Further, it is notable that the pro se motions to extend have been mailed by the Appellant's wife, and not the Appellant himself. While the Court has taken precautions to account for the lag time sometimes caused by mailing documents from correctional institutions, this same consideration need not be given for mail received by civilians in the regular course of business. There is no excuse, therefore, for the Appellant's untimely motions. The motion that was docketed today was apparently filed and mailed by the Appellant's wife on Saturday, August 22, 2015, eleven days after the deadline for curing the default set in the Rule 45 order.

22. Instead of curing the default by filing an informal brief, the Appellant has belatedly filed yet another vaguely-worded extension motion. The rules of this Court are designed to allow a federal prisoner to file an informal brief explaining in his own words what error he claims occurred in the district court, so that Court staff can review the matter to see if more formal briefing is required. Instead of doing this as any other prisoner would, the Appellant seeks endless delay. It should be noted that the Appellant is a Princeton-educated medical doctor who has been dealing with the federal judicial system since 1970.

23. The Appellant's appeal from denial of multiple successive motions pursuant to 28 U.S.C. § 2255 (No. 15-7136) is completely separate from this appeal. The Appellant's IPA motion in the district court was handled completely separately by the district court and played no

role in the § 2255 evidentiary hearing in September 2012. The district court's denial of the IPA motion was a final order issued on August 8, 2014, and appealed from on October 7, 2014. The § 2255 order did not become final until May 18, 2015, and was appealed on July 16, 2015. Had the Appellant not sought inordinate delays, the appeal in No. 14-7543 would have been completed before any briefing in No. 15-7136 was due.

24. The Appellant's motion is quite vague about the relationship between his two pending appeals. The Government submits that they are separate and there is no legal reason for merging them. As noted by Appellant's counsel in No. 15-7136, the record in that matter is already quite voluminous.²

Conclusion

For the foregoing reasons, the Government respectfully submits that the Motion to Extend should be denied and that the Appellant's appeal should be dismissed for failure to prosecute pursuant to Rule 45 of the Federal Rules of Appellate Procedure and the Court's notice of July 27, 2015. (Docket Entry at 32).

Respectfully submitted, this the 24th day of August, 2015.

Thomas G. Walker
United States Attorney

BY: /s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant U.S. Attorney

² When Appellant's retained counsel contacted the government seeking the Government's consent for a 60-day extension (first extension) of the time within which to file Appellant's informal opening brief in Appeal No. 15-7136, Government counsel made clear that it did not consent to any further extensions in Appeal No. 14-7543. Appellant's counsel in No. 15-7136 stated that he was not appearing in No. 14-7543. An extension has been granted in No. 15-7136 until September 28, 2015 (Docket Entry at 8, No. 15-7136). Therefore, as of September 30, 2015, the requested extension date in the instant motion, it will not yet be known whether the Court will grant a Certificate of Appealability in No. 15-7136. This will likely lead to a request by Appellant for a further extension in No. 14-7543.

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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 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 August, 2015.

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