

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 75-CR-26-3
No. 5:06-CV-24-F

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JEFFREY R. MacDONALD,)
)
 Applicant/Defendant.)

**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**

NOW COMES THE Applicant/Defendant (“Defendant”), by and through his attorneys, and moves this Court pursuant to 18 U.S.C. § 3600(g) to consider the DNA test results from the Armed Forces Institute of Pathology and order a new trial. Alternatively, if the Court denies Defendant’s motion for a new trial without additional DNA testing, Defendant moves this Court pursuant to 18 U.S.C. § 3600(a) for an order authorizing his counsel to inspect all physical evidence in the government’s custody for the presence of biological evidence, and to subject all biological evidence selected by the defendant to additional DNA testing. In support of this motion, Defendant submits the following:

1. On April 22, 1997, Defendant requested DNA testing as part of his motion to re-open 28 U.S.C. 2255 Proceedings. Defendant has consistently maintained his actual innocence through his own sworn testimony and other evidence submitted to the Court in the 1979 trial and subsequent post-conviction filings.
2. On October 21, 1997, the United States Court of Appeals for the Fourth Circuit granted Defendant’s request for DNA testing and the issue was remanded to the District Court.
3. The Armed Forces Institute of Pathology (hereafter “AFIP”) was designated as the independent laboratory and subsequently performed DNA testing on items of evidence pursuant to the District Court’s March 26, 1999, and April 14, 1999, orders.

4. On March 10, 2006, the AFIP issued a DNA testing report that included the discovery of DNA in critical places that was not the DNA of Jeffrey MacDonald or any member of his family. DNA of unidentified individuals was found under Kristen MacDonald's fingernail, on Kristen MacDonald's bedspread, and under Collette MacDonald's body.
5. In 2004, Congress enacted the Innocence Protection Act ("IPA"), 18 U.S.C. § 3600. Defendant's 1997 request for DNA testing (while the AFIP testing was being conducted in 2004) constitutes a request for relief under the IPA.
6. The 5th, 6th, 8th and 14th Amendments of the U.S. Constitution require that MacDonald's 1997 request for DNA testing be given the benefit of the procedures established by the 2004 Innocence Protection Act, and that his 1997 request and the subsequent DNA test results constitute evidence that supports a motion for a new trial under 18 U.S.C. § 3600 (g).
7. The DNA test results, when considered with all other evidence in the case, establish by compelling evidence that a new trial would result in an acquittal of Defendant. 18 U.S.C. § 3600 (g)(2).
8. Attorneys for the Defendant have learned through The North Carolina Center on Actual Innocence and The Innocence Project that recent advances in DNA testing have resulted in new methods and/or technology that may generate additional evidence of the defendant's of actual innocence. (See attached Exhibit 1, Affidavit of Christine Mumma, Executive Director of the North Carolina Center on Actual Innocence).
9. The Defendant asserts that his actual innocence has been already established by the prior DNA testing results and other exculpatory evidence, and is entitled to relief from his convictions pursuant to his pending application for relief under either 28 U.S.C. § 2255 or 18 U.S.C. § 3600, or both, without additional DNA testing. Alternatively, should the court deny the defendant relief from his convictions without additional DNA tests, defendant moves for inspection (including microscopic inspection) of the physical evidence to identify biological evidence, and to conduct further and expeditious DNA testing of additional biological evidence that the defendant will

identify after inspection of the physical evidence under either 28 U.S.C. § 2255 and 18 U.S.C. § 3600(a), or both. See 18 U.S.C. 3600(h)(1)¹.

10. The Innocence Project and The North Carolina Center on Actual Innocence have offered to pay the costs associated with any further DNA testing and for identifying a suitable independent lab to conduct such testing. These organizations assert that any new testing can be completed very quickly.

WHEREBY THE DEFENDANT/APPLICANT, respectfully requests that this Court enter an Order providing for further DNA testing in an expeditious manner using now-available methods and/or technology, granting a new trial and for other relief as requested in this Motion, pursuant to 18 U.S.C. § 3600 and the 5th, 6th, 8th, and 14th Amendments to the United States Constitution.

Respectfully submitted this the 20th day of September, 2011.

/s/ J. Hart Miles, Jr.
J. Hart Miles, Jr.
N.C. State Bar No. 23342
P.O. Box 361
Raleigh, N.C. 27602
Telephone: (919) 834-8650
Fax: (919) 834-9105

/s/ F. Hill Allen
F. Hill Allen
N.C. State Bar No. 18884
THARRINGTON SMITH, L.L.P
209 Fayetteville Street
Post Office Box 1151

¹ The Court of Appeals has already granted pre-filing authorization for the defendant's DNA-based claim, and remanded with a direction to proceed directly to the § 2255(h)(1) evaluation of that claim. *United States v. MacDonald*, 641 F.3d 596, 616 (4th Cir. 2011). The instant Innocence Protection Act (IPA) motion supplements, but does not replace or supplant, the defendant's pending DNA-based claim under 28 U.S.C. § 2255. 18 U.S.C. § 3600(h)(3) provides that "A motion under this section shall not be considered to be a motion under section 2255 for purposes of determining whether the motion or any other motion is a second or successive motion under section 2255." The Court of Appeals authorized this Court to consider whether the IPA is applicable to the defendant's DNA-based claim. *Id.* at n.13.

Raleigh, North Carolina 27602-1511
Telephone: (919) 821-4711
Facsimile: (919) 829-1583
Email: hallen@tharringtonsmith.com

/s/Christine Mumma
Christine Mumma
Executive Director of the North Carolina
Center on Actual Innocence
*Attorney for Defendant Jeffrey R.
MacDonald*
N.C. State Bar No.: 26103
P.O. Box 52446, Shannon Plaza Station
Durham, NC 27717-2446
Telephone: 919-489-3268
Fax: 919-489-3285

/s/ Joseph E. Zeszotarski, Jr.
Joseph E. Zeszotarski, Jr.
NC State Bar No. 21310
Poyner Spruill LLP
P.O. Box 1801
Raleigh NC 27602
(919) 783-1005
jzeszotarski@poyners.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing MOTION PURSUANT TO THE INNOCENCE PROTECTION ACT by electronic means through the CMF system which forwards an electronic notice the following attorney of record:

John Bruce, Assistant United States Attorney
U.S. Department of Justice - Criminal Division
Terry Sanford Federal Building
310 New Bern Avenue, Suite 800
Raleigh, NC 27601

This the 20th day of September, 2011.

/s/ J. Hart Miles, Jr.
J. Hart Miles, Jr.
Attorney for Defendant Jeffrey R. MacDonald
N.C. State Bar No. 23342
P.O. Box 361
Raleigh, N.C. 27602
Telephone: (919) 834-8650
Fax: (919) 834-9105