

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 3:75-CR-26-F

UNITED STATES OF AMERICA)
)
 v.) GOVERNMENT'S RESPONSE
) TO MOTION TO CONTINUE
JEFFREY R. MacDONALD,)
) Movant)

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby responds to the Movant's motion to continue evidentiary hearing, and respectfully shows unto the Court the following:

1. At the status conference in this matter on September 21, 2011, this Court set an evidentiary hearing for October 31, 2011, to receive evidence on the Movant's "Britt claim," with respect to its timeliness and veracity. The Government has been preparing and has issued some subpoenas.

2. As previously stated at the status conference and in the Government's Response to Movant's Motion to Continue Status Conference, filed July 18, 2011, the Government believes that it is in the interests of justice to proceed promptly to a resolution of the issues that were remanded to this Court by the United States Court of Appeals for the Fourth Circuit. See DE-170 at 1-2.

3. In the interest of comity, the Government does not oppose a short continuance of around 30 days, but respectfully opposes any continuance of the hearing into January 2012.

4. A January 2012 setting would be problematic for the Government. Mr. Wade M. Smith of the Raleigh bar will undoubtedly be a witness at the hearing on the Britt claim, likely subpoenaed by both sides, with respect to the circumstances of the Stoeckley interviews of August 16, 1979, and her testimony the next day, as well as the timeliness of the Britt claim. Mr. Smith is currently representing Mr. John Edwards in the case of United States v. Johnny Reid Edwards, No. 1:11-CR-161-1 (MDNC)¹, and is part of the Edwards trial team. Moreover, the Edwards trial will draw on many of the same resources of the USAO-EDNC that the MacDonald hearing would.

5. Accordingly, if the Movant's motion to continue is granted, the Government respectfully suggests, subject to the Court's availability, that the hearing be held sometime between November 28, 2011, and December 16, 2011.

6. If a continuance of the hearing is granted such that the hearing will not occur until 2012, the Government respectfully

¹Attorneys from the Office of the United States Attorney for the Eastern District of North Carolina ("USAO-EDNC") are, along with attorneys from the Public Integrity Section of the Criminal Division of the Department of Justice, representing the United States in the Edwards case. The Edwards trial is set for January 2012.

requests that it not occur until after February 15, 2012, so as to avoid a conflict with the Edwards trial.

7. The Movant's attorney has also requested that the Court order the Government to transport the Movant to attend the evidentiary hearing. The Government opposes this request. "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." 28 U.S.C. § 2255(c).

The Fourth Circuit has stated:

Only in very rare cases, we think, will it be found necessary for a court to order a prisoner produced for a hearing under 28 U.S.C.A. § 2255. Certainly, whether or not the court should require him to be brought into court for the hearing is a matter resting in the court's discretion. Production of the prisoner should not be ordered merely because he asks it, but only in those cases where the court is of the opinion that his presence will aid the court in arriving at the truth of the matter involved.

Gravelly v. United States, 251 F.2d 360 at 361 (4th Cir. 1958) (internal quotations and citations omitted) (emphasis added). See also United States v. McNicholas, 192 F.Supp. 717, 719 (W.D.Va. 1961); Shifflett v. United States, 2007 WL 1555738 (W.D.Va. 2007).

The Movant has not been present at any of his prior post-conviction hearings and appeals. He has not shown why his presence is necessary for this one.

Respectfully submitted, this 3rd day of October, 2011.

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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 3rd day of October, 2011.

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