

I. DEPOSITIONS WILL NOT DEVELOP ADDITIONAL FACTS RELEVANT TO THE DISPOSITION OF MACDONALD'S SUCCESSIVE § 2255 CLAIM.

A court may authorize additional discovery procedures in federal habeas and § 2255 proceedings when it "considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly 'dispose of the matter as law and justice require.'" *Harris v. Nelson*, 394 U.S. 286, 300 (1969) (citing 28 U.S.C. § 1651). The purpose of such additional discovery is to allow for the development of facts the judge deems relevant to the disposition of such a petition. *Id.* at 298.

When a petitioner has been or will be afforded a full evidentiary hearing, as well as numerous other court proceedings attacking his conviction, the court does not abuse its discretion by limiting further discovery. *Loper v. Beto*, 440 F.2d 934, 944 (1971). "Due process postulates a day in court which means that no one shall be personally bound until he has been afforded a full opportunity to be heard. Beyond that there must be a point at which the legality of confinement is conclusively and finally determined unless our courts are to bog down completely." *Id.* Any facts relevant to the disposition of MacDonald's successive § 2255 claim can be fully developed at the already scheduled evidentiary hearing, thereby rendering costly and time-consuming depositions unnecessary.

As the Court noted, MacDonald has not made any effort to depose or to seek to depose any witness in the more than six (6) years that his successive § 2255 claim has been pending. DE-266, p. 4.¹ Because any facts necessary for the Court to “dispose of this matter as law and justice require” are already in the record, or can be adduced at the evidentiary hearing, depositions are not warranted. See also *United States v. Hollis*, No. 3:04-cr-00140-HRH-JDR, 2010 WL 892196, at *1 (D. Alaska Mar. 10, 2010) (explaining that, where witnesses can be adequately questioned at the evidentiary hearing in a § 2255 claim, additional depositions are not necessary). See Exhibit 1. Depositions would only serve to further delay the resolution of MacDonald’s claims, as well as run up the cost to the taxpayers of this litigation.²

**II. IF DEPOSITIONS ARE GOING TO OCCUR,
MACDONALD’S DEPOSITIONS SHOULD BE LIMITED TO
DE-212 AFFIANTS.**

Petitioners in § 2255 claims are not afforded the broad discovery rights that generally accompany civil actions. See *Harris*, 394 U.S. at 295. The nature and extent of permissible discovery is in the discretion of the court and must only be

¹ MacDonald himself has previously asserted that, rather than deposing these witnesses, “The appropriate time to argue the issues of whether the hair was naturally shed or forcibly removed and when the hair was deposited in the crime scene is during an evidentiary hearing.” See DE-237, p. 3-4.

² In the Affidavit filed June 27, 2012, MacDonald’s counsel requests that the Court pay all his expenses related to the depositions, excluding attorneys’ fees, in light of the Court’s previous finding of indigency. That would be in addition to the expenses to the Government for the costs of taking or defending depositions.

granted after a showing of good cause. *Stephens v. Branker*, 570 F.3d 198, 213 (4th Cir. 2009). Such a showing must specify what discovery is being sought and how it will aid the petitioner in prevailing in his § 2255 claim. See *Stephens*, 570 F.3d at 213; *United States v. Roane*, 378 F.3d 382, 403 (4th Cir. 2004); *Wright v. United States*, Criminal No. DKC 06-0038, Civil Action No. DKC 08-2830, 2010 WL 2164469, at *4-5 (D. Md. May 26, 2010), [See Exhibit 2]; *United States v. Smith*, 618 F.2d 507, 509 (8th Cir. 1980); *United States v. Hollis*, No. 3:04-CR-00140-HRH-JDR, 2010 WL 892196, at *1 (D. Alaska Mar. 10, 2010); *Richard v. Girdich*, No. 9:03-CV-0920 (FJS) (GJD), 2007 WL 405863, at *1 (N.D.N.Y. Feb. 1, 2007). See Exhibit 3. Speculation that such information might exist upon further investigation does not satisfy the good cause standard. *Stephens*, 570 F.3d at 213. The grant of additional discovery in aid of § 2255 petitions must not be allowed to turn into a mere “fishing expedition” whereby the petitioner uses discovery as a vehicle to turn up additional § 2255 claims. See *Petrick v. Thomas*, No. 1:09CV551, 2011 WL 1135136, at *2 (M.D.N.C. Mar. 24, 2011); *United States v. Hollis*, No. 3:04-cr-00140-HRH-JDR, 2010 WL 892196, at *1 (D. Alaska Mar. 10, 2010).

It is clear that the only depositions for MacDonald contemplated in this Court’s Order, dated June 8, 2012, are those of “...certain witnesses whose affidavits were appended to the Government’s Response [DE-212]....” DE-266, p. 4. The only one of

the aforementioned affiants MacDonald seeks to depose in his *Affidavit of Counsel Regarding Depositions*, filed June 27, 2012 [DE-269], is Janice Glisson. While the Government contends that no depositions are necessary, any deposition of a current or former government employee must comply with applicable federal regulations governing depositions.³

Regarding the remainder of the proposed deponents, MacDonald's Affidavit is completely devoid of the requisite showing of good cause mandated by Rule 6 of the Rules Governing Section 2255 Proceedings. Not only does MacDonald fail to specify the information sought from these individuals in the pertinent time frame, but also he fails to explain how such information would aid in proving his successive § 2255 claim, rendering his request for additional discovery deficient on its face. See *Stephens*, 570 F.3d at 213; *United States v. Roane*, 378 F.3d 382, 403 (4th Cir. 2004).

³ In the event MacDonald is allowed to depose, or otherwise obtain information from, past or present employees of the Departments of Justice and/or Defense, acquired in the course of their official duties or employment, he must comply with the provisions of 28 C.F.R. § 16.21, *et seq.*, 32 C.F.R. § 97.1, *et seq.*, and 32 C.F.R. § 516.1, *et seq.*, together with any requirements promulgated under the authority of these regulations, including Department of Defense Directive 5405.2. See *United States ex rel. Touhy v. Ragen, et al.*, 340 U.S. 462 (1951).

MacDonald must comply with the applicable regulations for each witness based upon their originating component and the pertinent time frame he seeks to cover with them, because, even though the above regulations are parallel, they are codified in different sections based upon component. The Government would draw MacDonald's attention to the affidavit requirements of 28 C.F.R. § 16.23(c), and the parallel Department of Defense provision found in 32 C.F.R. § 97.1(c)(2). MacDonald did not comply with these regulations with respect to the affidavits previously obtained from Jimmy Britt and Lee Tart, both of whom were former employees of the United States Marshal's Service and subject to the regulations promulgated in 28 C.F.R. §16.23(c).

Absent such a showing, MacDonald's proffered list of deponents can only be seen as a request for a fishing expedition, in contravention of applicable precedent. See *Petrick v. Thomas*, No. 1:09CV551, 2011 WL 113516, at *2 (M.D.N.C. Mar. 24, 2011). See Exhibit 4.

It is notable that these other individuals are all related to MacDonald's Britt claim,⁴ which was not contemplated in the Court's Order of June 8, 2012. DE-266. The Court has, in its discretion, offered MacDonald an opportunity to probe the evidence presented in the affidavits the Government filed with its response (DE-212) to his § 2255 claim discussed in DE-176. Both of these docket entries deal specifically with the DNA or "unsourced hair" aspect of MacDonald's successive § 2255 claim. The Court's Order does not provide for additional discovery with respect to any witness related to the Britt claim and, therefore, the deposition of all

⁴ George M. Anderson was the U.S. Attorney-EDNC at the time of the MacDonald trial in 1979; James L. Blackburn was the First Assistant U.S. Attorney and trial counsel for the Government in the trial; Jack B. Crawley, Jr., was an AUSA who assisted in the trial; and Brian M. Murtagh was trial counsel for the Criminal Division of the Department of Justice and trial counsel for the Government in the trial. He remains a Special Assistant U.S. Attorney for the EDNC and is part of the Government's legal team in this habeas action. MacDonald apparently seeks to depose them about the interview of Helena Stoeckley on August 16, 1979. MacDonald must follow federal regulations prior to attempting to depose the witnesses in connection with their Government service. Even if he were permitted now to conduct depositions relating to his 6.5 year old Britt claim, he cannot show the relevance of proposed testimony of Anderson, Crawley, and Murtagh because the Britt claim is based on Jimmy Britt's affidavit of November 3, 2005. The affidavit explicitly states that only three people were present when Helena Stoeckley "confessed" in a Government interview to involvement in the MacDonald murders: Stoeckley, Britt, and Blackburn. See DE-115-2 at 4-5. Cecil Goins, Dennis C. Meehan, and Lee W. Tart were Deputy U.S. Marshals in 1979. MacDonald has had years to gather whatever evidence he needed from these former deputies. Indeed, he attached an affidavit from Lee Tart to his Britt claim. DE-115-2, Ex. 3.

other witness listed in MacDonald's Affidavit should be denied.

The use of depositions in furtherance of § 2255 claims is appropriate where they are narrowly tailored to address issues relevant to the evidentiary hearing. *Reed v. United States*, 438 F.2d 1154, 1156 (10th Cir. 1971). Typically, they are used by judges as a vehicle to more fully develop an issue that, if resolved, would render an evidentiary hearing unnecessary. *Id.* MacDonald has not articulated any issue related to the Britt claim as to which the defense believes that taking depositions would render the scheduled evidentiary hearing unnecessary.

MacDonald has been provided discovery in a criminal trial, has received numerous documents from extensive FOIA requests, has filed 5 previous collateral attacks on his conviction⁵, and has had six years to develop the evidence related to his current claims. He should not be allowed now, just seven weeks before the oft-continued (at his request) evidentiary hearing, to launch a fishing expedition for more evidence, at great expense to the taxpayers.

Depositions of any additional witnesses related to the Britt claim would not develop relevant facts that cannot be adduced at the evidentiary hearing and would only serve to further delay

⁵*United States v. MacDonald*, 640 F.Supp. 286 (E.D.N.C.), *aff'd*, 779 F.2d 962 (4th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986); *United States v. MacDonald*, 778 F.Supp. 1342 (E.D.N.C. 1991), *aff'd*, 966 F.2d 854 (4th Cir. 1992), *cert. denied*, 506 U.S. 1002 (1992); *United States v. MacDonald*, 979 F.Supp. 1057 (E.D.N.C. 1997), *aff'd*, No. 97-7297, 1998 WL 637184 (4th Cir. Sept. 8, 1998).

resolution of these issues and greatly add to the expense of these proceedings. Therefore, MacDonald should be limited to the one witness he named whose affidavit was appended to the Government's Response [DE-212], i.e., Janice Glisson.

III. IF MACDONALD INTENDS TO CALL ANY EXPERT WITNESSES AT THE EVIDENTIARY HEARING, THE GOVERNMENT SHOULD BE ALLOWED TO DEPOSE SUCH WITNESSES.

MacDonald has not given notice of any expert witnesses that he intends to call at the evidentiary hearing. If MacDonald intends to call any expert witness other than the six affiants in DE-212, or otherwise rely upon such additional experts' opinions, MacDonald should be required to promptly identify these individuals, and the Government should be allowed to depose such experts before the hearing in order to avoid further delay.

IV. IF MACDONALD IS ALLOWED TO DEPOSE THE BRITT CLAIM WITNESSES HE LISTED IN HIS AFFIDAVIT, THE GOVERNMENT SHOULD BE ALLOWED TO DEPOSE WITNESSES BEARING ON THE SAME ISSUES.

Should MacDonald be allowed to depose witnesses related to his Britt claim, the Government would then seek to depose the following individuals.⁶

1. Kathryn MacDonald (played significant role in affidavit of Helena Stoeckley (the elder). See DE-145.)

⁶We interpret the Court's Order [DE-266] as not relieving either party of any of the requirements of the Federal Rules of Civil Procedure or the Local Civil Rules with respect to the taking of depositions.

2. Hart Miles (played significant role in affidavit of Helena Stoeckley (the elder). See DE-145.)
3. Laura I. Redd (notarized Stoeckley Affidavit)
4. Grady Peterson (witness to Stoeckley Affidavit)
5. Eugene "Gene" Stoeckley (son of Helena Stoeckley (the elder))
6. Nancy Britt (former wife of Jimmy Britt)⁷

CONCLUSION

For the foregoing reasons, the Government respectfully submits that the deposing of any witnesses is not warranted under the circumstances in advance of the hearing, and will only serve to further delay the evidentiary hearing and increase costs. If, however, depositions are allowed, the Government further respectfully submits to the Court that any depositions by MacDonald should be limited to Janice Glisson, the only one of the affiants of DE-212 whom MacDonald has named in his filing. In this circumstance, the Government should be allowed to depose any expert that MacDonald promptly names. If MacDonald is allowed to depose any witnesses related to the Britt claim, the Government should be allowed to depose the persons listed in Section IV above. See Exhibit 5.

Respectfully submitted, this the 29th day of June, 2012.

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⁷ By not seeking to depose any individual in advance of the scheduled evidentiary hearing, at which MacDonald has the burden of proof, the Government does not intend that MacDonald should be relieved of any evidentiary burden in relation to that witness or witnesses. The Government's list would have included Wade Smith and Lee Tart but for their inclusion by MacDonald in his list of proposed deponents.

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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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