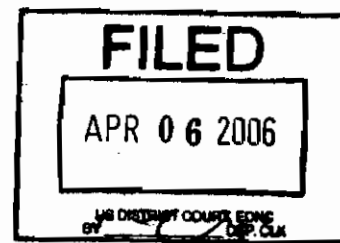


UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA



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

Crim. No. 75-26-CR-3
No. 5:06-CV-24-F
Judge James C. Fox

PETITIONER'S OPPOSITION TO THE GOVERNMENT'S MOTION TO STRIKE EXHIBITS SUBMITTED IN CONNECTION WITH THE PETITION FOR RELIEF UNDER 28 U.S.C. SECTION 2255

The petitioner, through undersigned counsel, respectfully opposes the government's motion to strike certain exhibits, filed by petitioner in support of his Motion Pursuant to 28 U.S.C. Section 2255 to Vacate his Conviction.

These exhibits comprise three affidavits. One is an affidavit by Bryant Lane executed on March 1, 2005 relating to confessions made to him of the MacDonald murders by Greg Mitchell. The second is an affidavit by Donald Buffkin executed on June 14, 2005 relating to confessions to the MacDonald murders made to Buffkin by Greg Mitchell. The third is an affidavit by Everett Morse executed on July 25, 2003, also relating to confessions to the MacDonald murders made to Morse by Greg Mitchell. (Greg Mitchell, who was the boyfriend of Helena Stoeckley at the time of the MacDonald murders, died in 1982. All of these confessions were made by him in the last year or two of his life.)

The government posits two arguments for why the Bryant Lane affidavit should be stricken. It argues that 1) the information provided by Bryant Lane was previously considered by this Court both in 1984 and in 1990, and rejected as unpersuasive, and therefore the petitioner is barred from submitting it under the qualified doctrine of *res judicata* as applicable to federal habeas actions. Secondly, it argues, that both the Lane affidavit and the other two affidavits should be stricken because the information in all three were available to the defense for more than a year, and, thus, they are barred by the one year statute of limitations for “newly discovered evidence” set forth in the U.S. 28 Section 2255.

The petitioner submits that the government’s position is flawed on both counts, and that the government’s motion to strike the affidavits should be denied.

First, regarding the Bryant Lane affidavit, and the fact that affidavits from Bryant Lane have previously been submitted to this Court and found unpersuasive, it is critically important to recognize, that the affidavit submitted by the petitioner herewith contains specific important information that was not previously submitted and considered on its merits by the trialcourt. In 1984, an affidavit from Bryant Lane was submitted in support of the petitioner’s Motion for a New Trial. That affidavit contained rather vague references in it to Greg Mitchell having admitted to having done something “too horrible to talk about.” [Govt. Motion to Strike, p. 3]. That affidavit did not contain any averment that Greg Mitchell had directly confessed to the MacDonald murders. Thereafter, in ruling on that 1984 Motion for a New Trial, the trial court specifically found that the affidavit was “unpersuasive because Mitchell

made no specific reference to having been involved in the MacDonald slayings.” [Id. p. 4]. The court, simply, found it too vague to be persuasive.

A second affidavit by Bryant Lane, one that was more specific and more detailed, and which contained direct admissions by Mitchell to having killed the MacDonald family, was submitted to the trial court in 1990 along with the petitioner’s motion for a new trial filed in that same year. The 1990 motion was based on the predicate that the government had suppressed at trial both fibers and blond wig hairs that were exculpatory, as well as their respective lab notes. *U.S. v. MacDonald*, 778 F. Supp. 1342 (E.D.N.C. 1991). Despite the government’s suggestion in its motion to the contrary, the trial court, in ruling on the 1990 motion, never reached the merits of the second affidavit of Bryant Lane. Rather, the trial court, having found that neither the blond wig hairs nor the black wool fibers (which comprised the predicate for the motion) would have changed the outcome of the trial, denied the motion without ever considering or mentioning the new Bryant Lane affidavit. *Id.* It further found that MacDonald should have raised the issue of the blond wig hairs and black wool fibers in his 1984 motion for a new trial, and that his failure to do so was an abuse of the writ. For the government to suggest, thus, that the merits of the 1988 Bryant Lane affidavit were considered and rejected by the trial court is simply not true, and certainly is not supported by the record.

Bryant Lane’s 2005 affidavit, which was submitted by the petitioner in support of his present motion to vacate, contains specific and direct information linking Greg Mitchell to the MacDonald murders that was not contained in the 1984 Bryant Lane affidavit, and which has never before been considered on its merits by a federal court.

Consequently the principles of *res judicata*, as they apply to habeas petitions, do not bar the petitioner from submitting this new Bryant Lane affidavit, containing new information never before considered by this court.

The government's second argument, which it seeks to apply to all three affidavits in its effort to have them stricken, is equally flawed. The government contends that all three should be stricken because they were not presented to the this court within one year from them time the information contained in them was discovered by MacDonald's defense attorneys.

The petitioner has filed herein a new habeas attack on his conviction. The predicate for this new motion is twofold: 1) the new evidence supplied by retired deputy U.S. Marshal Jim Britt; and, 2) the new evidence supplied by the results of the DNA testing. Both of these predicates for the petitioner's motion, the petitioner submits, meet the requirement in 28 U.S.C. Section 2255, that they comprise newly discovered evidence that could not have reasonably been previously discovered through due diligence, and that taken in light of the evidence as a whole, they establish that no reasonable juror could find guilt beyond a reasonable doubt. Having submitted this new evidence, the petitioner submits that this court is required to conduct an analysis of the *new evidence, taken in light of the evidence as a whole*. And that as part of its consideration of the *evidence as a whole*, this court is empowered and required to consider all of the evidence developed during the trial, evidence that was arguably wrongly excluded during the trial, and importantly, evidence that has become available since the trial. *Herrera v. Collins*, 506 U.S. 390 at 442 (1992); *Sawyer v. Whitely*, 506 U.S. 333, at 339 & n.5 (1992); *Schlup v. Delo*, 513 U.S. 298 (1995).

While it is clear, that for petitioner to file a new successive habeas application based on new evidence, that such evidence, being the predicate for the motion, is subject to the one year statute of limitations for newly discovered evidence set forth in the statute, it is not the case that when this court embarks upon an analysis of the “evidence as a whole” including that which has been developed post trial, that each item of such evidence that has been developed post trial, must also have only been discovered within the past year. Such a result would be non-sensical and somewhat absurd. It also would be inconsistent with this court’s obligation to seek justice for the parties. The issue before this court is whether the newly discovered evidence, taken together with everything else that is now available and relevant to the question of guilt or innocence, tips the balance in the favor of the petitioner. The question is not, as the government would have it in its motion, whether the newly discovered evidence taken together with the evidence from the trial, and evidence discovered only within the last year, tips the balance in favor of the petitioner.

Thus while the “new evidence” which forms the predicate for the successive habeas is subject to the one year statute of limitations set forth in 28 U.S.C. Section 2255, each item of evidence to be considered by the court in its final evaluation of “the evidence as whole” is not subject to such a limitation. This, in fact, is made explicitly clear by the statute itself. The statute reads in this regard as follows:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

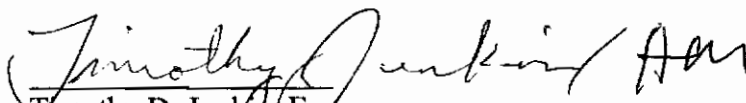
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

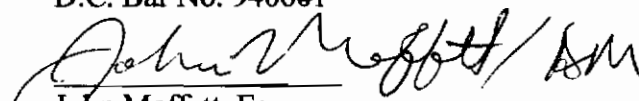
[Emphasis added]. Here, it is the Jim Britt new evidence, and DNA results that support the new claim. The three affidavits that the government seeks to strike, on the other hand, are part of the panoply of the "evidence as a whole" including that which has been discovered since the trial, that must be considered in this court's analysis of the petitioner's claim of innocence.

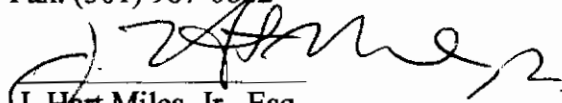
Consequently, the government's motion to strike the three affidavits concerning Greg Mitchell should be denied.

WHEREFORE, the petitioner respectfully requests that the government's motion to strike the three affidavits be denied.

Respectfully submitted,


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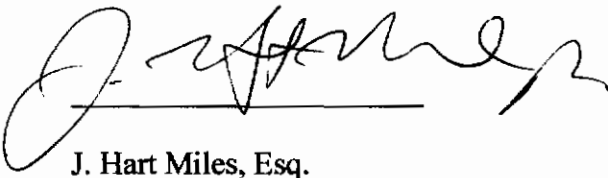
Certificate of Service

I hereby certify that a copy of this Petitioner's Statement of Itemized Material Evidence was mailed by me, first class mail, postage pre-paid, on the 6th day of April, 2006, to the United States Attorney for the Eastern District of North Carolina, at the following address:

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And to U.S. Justice Department counsel of record at the following address:

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