

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Crim. No. 75-26-CR-3
)	No. 5:06-CV-24-F
JEFFREY R. MacDONALD,)	Judge James C. Fox
)	
Applicant/Defendant,)	

PETITIONER’S MOTION, PURSUANT TO RULE 7 OF THE FEDERAL RULES GOVERNING SECTION 2255 PROCEEDINGS, TO EXPAND THE RECORD TO INCLUDE THE ITEMIZED AUTHENTICATED EVIDENCE SET FORTH HEREIN

Petitioner, pursuant to Rule 7 of the Federal Rules Governing Section 2255 Proceedings, respectfully requests that the record herein be expanded to include each item of authenticated evidence set forth in *Petitioner’s Statement of Itemized Material Evidence- With Citations to the Record or to Authenticated Proofs*, which is attached hereto, and incorporated herein by reference. (Such *Statement* includes in it by reference the Exhibits filed with the petitioner’s original memorandum in support of his motion to vacate, the Appendix #1 filed with the petitioner’s motion seeking to add the DNA results as an additional predicate for his motion to vacate, and Appendices 2-3 filed with the petitioner’s *Statement of Itemized Material Evidence*..

In support of this motion, the petitioner states the following:

1. Pursuant to his *Motion Pursuant to 28 U.S.C. Section 2255 to Vacate His Sentence*, which following an order from the U.S. Court of Appeals for the Fourth Circuit authorizing its filing herein as a “successive habeas,” has been filed in this Court, the

petitioner has averred that he has newly discovered evidence that could not have been discovered previously through the exercise of due diligence which proves the existence of a constitutional error. Applicant also contends that such newly discovered evidence, viewed in light of the evidence taken as a whole, is sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the petitioner guilty of the underlying offenses. In reviewing such a claim of innocence, which is concomitant to a claim of “manifest injustice,” this Court should conduct an analysis of the evidence “as a whole,” including evidence developed post-trial. 28 U.S.C. Section 2255; *see, also, Herrera v. Collins*, 506 U.S. 390 at 442 (1992), (Blackmun, J., *dissenting*) (collecting various versions of Court’s “probability of innocence” test for miscarriage of justice); *Sawyer v. Whitley*, 506 U.S. 333 at 339 & n.5: (The prisoner must show “that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of fact would have entertained a reasonable doubt of his guilt.” (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n.17 (1986) ((quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970))))); *Schlup v. Delo*, 513, U.S. 298 (1995).

2. The petitioner has attached hereto a *Statement of Itemized Material Evidence-With Citations to the Record or to Authenticated Proofs*, and requests that each such item be included in the record herein for consideration by this Court, as material to the issues the petitioner has now brought before this Court. Each such item of material evidence consists of the following.

- a. Evidence presented at the petitioner's trial with citations to the trial transcript with the portions of such transcript included in the Appendix 2;
- b. Evidence previously submitted as Exhibits attached to the petitioner's Memorandum in Support of his Motion to Vacate, which include the following:

Exhibit 1: Affidavit of Jim Britt;

Exhibit 2: Polygraph Report, and Resume of Steve Davenport;

Exhibit 3: Affidavit of Lee Tart;

Exhibit 4: Transcript of Trial, U.S. v. MacDonald, Aug. 17, 1979;

Exhibit 5: Affidavit of Wendy Rouder;

Exhibit 6: Newspaper Article: "Woman in MacDonald Case Claims He Was Victim Not Murderer," *The Register*, (Fayetteville, N.C.) 10 Jan. 1981, A20;

Exhibit 7: Affidavits of Everett Morse, Bryant Lane, and Donald Buffkin;

Exhibit 8: FBI Report on Patients Jeff MacDonald had Treated Prior to the Murders;

Exhibit 10: Judgment and Commitment Order of James L. Blackburn, Superior Court of Wake County, N.C., *State v. Blackburn*, Nos. 93-CRS-37345, 43572, (1993).

- c. Affidavits and evidence previously filed in the petitioner's prior motions to overturn his conviction as set forth in the attached *Statement of Itemized Material Evidence*, with accompanying appendices (Appendices 2 and 3) attached thereto;
- d. The DNA results as set forth in the March 10, 2006 report issued by the Armed Forces Institute of Pathology, with the supporting documentation for each relevant DNA specimen, all of which are set forth in the petitioner's Appendix 1, filed along with his motion to add the DNA results as an additional predicate for his motion to vacate his conviction.

3. The petitioner submits that this Court is authorized pursuant to Rule 7 of the Federal Rules Governing Section 2255 Proceedings to include and consider these items of material authenticated evidence as part of the record herein.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of this Motion to Expand the Record was mailed by me, first class mail, postage pre-paid, on the _____ day of _____, 2006, to

the United States Attorney for the Eastern District of North Carolina, at the following address:

Honorable Frank D. Whitney
United States Attorney
Att. John Stuart Bruce
Terry Sanford Federal Building
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And to U.S. Justice Department counsel of record at the following address:

Brian Murtaugh, Senior Trial Attorney
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J. Hart Miles, Esq.