

FILED: May 6, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8525
3:75-cr-00026-F-1
5:06-cv-00024-F

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEFFREY R. MACDONALD,

Defendant - Appellant.

NEW ENGLAND INNOCENCE PROJECT; THE INNOCENCE PROJECT;
NORTHCAROLINA CENTER ON ACTUAL INNOCENCE,

Amici Supporting Appellant.

O R D E R

Pending before us is the Government's March 13, 2010 motion to dismiss this appeal on the ground that the certificate of appealability ("COA") issued to Jeffrey R. MacDonald by this Court on June 9, 2009, is insufficient to establish 28 U.S.C. § 2253 jurisdiction. As explained below, we deny the Government's motion to dismiss. Nevertheless, we amend the COA and direct the parties to file supplemental briefs.

On January 12, 2006, this Court granted MacDonald's motion for authorization to file a successive 28 U.S.C. § 2255 motion (the "§ 2255 motion"). On January 17, 2006, MacDonald filed the § 2255 motion in the district court, alleging Fifth Amendment due process violations based on the newly discovered evidence of former Deputy U.S. Marshal Jim Britt (the "Britt claim"). Thereafter, in March 2006, the results of DNA testing authorized by this Court in 1997 became available. On March 22, 2006, MacDonald filed in the district court, without seeking or obtaining additional prefiling authorization, a motion to add an additional predicate to the § 2255 motion (the "DNA motion"). The DNA motion sought to raise a freestanding actual innocence claim based on the newly discovered results of the DNA testing (the "DNA claim"), as well as to have the district court consider the DNA test results as part of "the evidence as a whole" in assessing the Britt claim under 28 U.S.C. § 2255. MacDonald then filed, on March 23, 2006, a motion to expand the record to include an attached statement of itemized material evidence and, on May 6, 2007, a motion to supplement the statement of itemized material evidence. MacDonald contended that this evidence, including evidence submitted with his prior unsuccessful postconviction motions and evidence more recently discovered, was part of "the evidence as a whole" relevant to the district court's consideration of the Britt claim and the DNA claim.

By its Order of November 4, 2008, the district court denied the DNA motion, on the ground that the court lacked jurisdiction over the motion as a result of MacDonald's failure to obtain additional pre-filing authorization from this Court. See United States v. MacDonald, No. 75-CR-26, slip op. at 18-20 (E.D.N.C. Nov. 4, 2008). In so ruling, the court disallowed both MacDonald's pursuit of the DNA claim and his reliance on the DNA test results as part of "the evidence as a whole" relevant to the Britt claim. The court also denied the motion to expand the record to include the statement of itemized material evidence and the motion to supplement such statement. See id. at 18-22. Additionally, the court granted the Government's March 30, 2006 motion to strike three affidavits in support of the Britt claim that MacDonald had submitted with the § 2255 motion. See id. at 18. As a result, in assessing the Britt claim, the court declined to consider evidence proffered by MacDonald as part of "the evidence as a whole." Finally, after conducting its assessment of the Britt claim under 28 U.S.C. § 2244(b)(2)(B)(ii), the court denied MacDonald leave to file the § 2255 motion. See id. at 46 ("MacDonald has not demonstrated that the Britt affidavit, taken as true and accurate on its face and viewed in light of the evidence as a whole, could establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found MacDonald guilty of the murder of his wife and daughters.").

Following the district court's denial of a COA, MacDonald sought a COA from this Court. In his informal brief of February 20, 2009, MacDonald requested certification of three issues: (1) that the district court erred in denying MacDonald leave to file the § 2255 motion because, in assessing the Britt claim asserted therein, the court failed to consider "the evidence as a whole," including the DNA test results, the evidence in MacDonald's statement of itemized material evidence and the proposed supplement thereto, and the three affidavits stricken at the Government's request; (2) that the district court erred in denying the DNA motion on the ground that MacDonald was required to obtain additional prefiling authorization before either relying on the DNA test results in connection with the Britt claim or asserting the freestanding DNA claim; and (3) that the district court erred in its assessment of the Britt claim both by excluding, and thus ignoring, relevant evidence and by drawing flawed conclusions from the evidence it did consider.

We granted MacDonald the COA of June 9, 2009, on the following issue:

[W]hether the district court's procedural decisions prohibiting expansion of the record to include evidence received after trial and after the filing of the 28 U.S.C.A. § 2255 (West Supp. 2009) motion was erroneous in light of 28 U.S.C. § 2244(b)(2)(B)(ii) (2006).

As such, the COA essentially encompasses the first issue raised in MacDonald's informal brief, plus the aspect of the second issue

involving whether the district court should have considered the DNA test results as part of "the evidence as a whole" in assessing the Britt claim. The COA also touches on the third issue, which in many ways is inextricably intertwined with the first issue; how much of the third issue is encompassed by the COA, however, is a matter of dispute between the parties. The only issue plainly excluded from the COA is the aspect of the second issue involving whether the court erred in ruling that it lacked jurisdiction to consider the freestanding DNA claim of actual innocence because MacDonald did not obtain additional prefiling authorization from this Court.

Following issuance of the COA, the parties filed formal briefs and oral argument was scheduled for March 23, 2010. Ten days before argument, the Government filed its motion to dismiss the appeal on the ground that our COA is insufficient to establish 28 U.S.C. § 2253 jurisdiction. As we understand the Government's position, it is that we failed to certify an issue of constitutional magnitude and, thus, cannot exercise jurisdiction over McDonald's appeal. We disagree. Where, as here,

the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). In granting the COA on the issue of whether the district court erred under § 2244(b)(2)(B)(ii) in its procedural decisions, we necessarily

concluded that jurists of reason would find it debatable whether the § 2255 motion, and more specifically the Britt claim asserted therein, states a valid claim of the denial of MacDonald's Fifth Amendment due process rights. As such, our COA is sufficient to establish jurisdiction and we deny the Government's motion to dismiss.

Nevertheless, we take this opportunity to amend the COA for purposes of clarification of the issues before us with regard to the Britt claim. More specifically, the amended COA recognizes that the district court may have erred in assessing the Britt claim under the standard of 28 U.S.C. § 2244(b)(2)(B)(ii), rather than § 2255(h)(1). See United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003) (recognizing that § 2244(b)(2) applies to state prisoners and that § 2255(h) applies to federal prisoners). Additionally, the amended COA explicitly authorizes consideration of the third issue raised in MacDonald's informal brief of February 20, 2009: whether the district court erred in its assessment of the Britt claim both by excluding, and thus ignoring, relevant evidence and by drawing flawed conclusions from the evidence it did consider. Finally, on further consideration of MacDonald's COA request and the second issue raised therein, we conclude that jurists of reason would find it debatable whether the DNA motion, and particularly the freestanding DNA claim of actual innocence asserted therein, states a valid claim of the denial of a

constitutional right under *Herrera v. Collins*, 506 U.S. 390 (1993), and its progeny. Cf. *Buckner v. Polk*, 453 F.3d 195, 198-99 (4th Cir. 2006) (observing that we expanded COA to include freestanding actual innocence claim, though neither this Court nor Supreme Court has determined whether such claim can be proper basis for habeas corpus relief). We further conclude that jurists of reason would find it debatable whether the district court was correct in its procedural ruling that it lacked jurisdiction over the DNA claim because MacDonald failed to first obtain additional prefiling authorization from this Court. Accordingly, we expand the COA to include this issue.

As amended, our COA encompasses the following issues:

(1) Whether the district court erred in assessing the Britt claim by applying the standard of 28 U.S.C. § 2244(b)(2)(B)(ii), rather than § 2255(h)(1); by prohibiting expansion of the record to include evidence received after trial and after the filing of the 28 U.S.C. § 2255 motion; and by excluding, and thus ignoring, relevant evidence and drawing flawed conclusions from the evidence it did consider; and

(2) Whether the district court's procedural decision with respect to the freestanding DNA claim, requiring additional prefiling authorization from this Court, was erroneous in light of 28 U.S.C. § 2255(h).

In amending the COA, we are simply recognizing that MacDonald has made the showing required for a COA on the enumerated issues. We have not yet decided these issues, and we presently express no opinion on whether MacDonald is ultimately entitled to relief on either the Britt claim or the DNA claim. The parties are directed to file supplemental briefs on the issues identified in the amended

COA that were not addressed in their formal briefs, and to state therein any request for further oral argument. The Clerk shall establish an appropriate supplemental briefing schedule.

For the Court

/s/ Patricia S. Connor
Clerk