

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

No. 75-CR-26-3  
No. 5:06-CV-24-F

UNITED STATES OF AMERICA

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)

v.

**ORDER**

JEFFREY R. MacDONALD,  
Movant

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This matter is before the court for ruling on the following motions:

- Government's Motion for Publication and Modification of Order [DE-152];
- MacDonald's Motion for Certificate of Appealability [DE-155]; and
- Government's Motion for Leave to Exceed Page Limit [DE-159].

A. Motion for Publication and Modification of Order

(i) *Publication*

The Government's first motion requests that this court submit for publication in the Federal Supplement (Second) its order in this matter dated November 4, 2008 [DE-150]. The Government believes that the order "contains an important exposition of the law relating to successive habeas corpus petitions." Motion for Publication [DE-152] at 1. The undersigned disagrees. The November 4, 2008, order is entirely fact-specific and adds nothing of significance to federal habeas corpus jurisprudence. The Government's Motion for Publication is DENIED.

(ii) *Modification*

The Government next moves the court to make certain "modifications" in the November 4, 2008, order. Most urgent is the Government's request, post-judgment, that the court "modify" the order to include a recitation and analysis of "facts" known to the Government since 1979, the significance of which the Government has been aware since at least January 2006. Specifically, the Government now reveals that it has evidence, including affidavits and official

documents, that prove the falsity of Jim Britt's affidavit upon which the Fourth Circuit Court of Appeals' Pre-Filing Authorization primarily was based. The Government apparently withheld this evidence under the assumption that the MacDonald petition would survive the "thorough review" required for the district court's gatekeeping function, and that an evidentiary hearing would be ordered at which the Government at last would drop its bombshell. It did not work out that way.

To the extent the Government seeks an order "modifying" the November 4, 2008, order [DE-111] to include recitation and consideration of the Government's new evidence, such motion is DENIED, as is any request to supplement the record in this court to add it. Not only does the Government not suggest any legal basis upon which to so "modify" the order, but its request reveals a failure to recognize that the truth or falsity of Britt's affidavit or the allegations contained therein, is irrelevant to this court's rationale for denying MacDonald's request to file a successive § 2255 motion on the strength thereof.<sup>1</sup>

However, the Government's Motion for Modification is ALLOWED as to the following clerical, non-substantive matters:

1. At page 2, line 2 of the Order [DE-111], "Rule 32" is STRICKEN, and "Article 32" is substituted;
2. At page 2, line 10, of the Order [DE-111], "Brian Murtaugh" is STRICKEN and "Brian Murtagh" is substituted;
3. At page 26, line 17, of the Order [DE-111], "DUSM Holden" is STRICKEN and "Ms. Holden" is substituted; and
4. At page 41, line 21, continuing to page 42, line 1 of the Order [DE-11], the second instance of the phrase "to say before she was interviewed by the Government prior" is STRICKEN.

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<sup>1</sup> For the same reason, Jim Britt's death had no effect whatsoever on the analysis or the result of the order, which was in its final draft on the date he died.

MacDonald's requests to modify numbered 4 and 5 [DE-152] at 13-14, are DENIED.

B. MacDonald's Motion for Certificate of Appealability

The court finds that MacDonald has failed to make a substantial showing of the denial of a constitutional right, or to demonstrate that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that such jurists would find it debatable whether the district court was correct in its procedural rulings. MacDonald's Motion for Certificate of Appealability [DE-155] is DENIED

C. Government's Motion for Leave to Exceed Page Limit

In its discretion and for good cause shown, the court ALLOWS the Government's Motion for Leave to Exceed Page Limit [DE-159] in its Response [DE-160] to Motion for Certificate of Appealability.

D. Summary

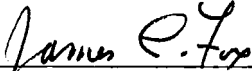
The Government's Motion for Publication and Modification of Order [DE-152] is DENIED, except that the requests for correction of specific clerical, non-substantive errors are ALLOWED as detailed herein at page 2, Section A (ii);

MacDonald's Motion for Certificate of Appealability [DE-155] is DENIED; and

The Government's Motion for Leave to Exceed Page Limit [DE-159] is ALLOWED.

SO ORDERED.

This the 1<sup>st</sup> day of January, 2009.

  
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JAMES C. FOX  
Senior United States District Judge