UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8525

UNITED STATES OF AMERICA, Appellee, v. JEFFREY R. MACDONALD, Appellant.	APPELLEE'S RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby opposes the *Motion For Leave To File Brief As Amici Curiae* filed on March 31, 2009, by the Innocence Project, the North Carolina Center On Actual Innocence, and the New England Innocence Project, on behalf of appellant Jeffrey R. MacDonald. As explained below, the motion should be denied for four reasons: (1) four of the attorneys who seek to appear as *amici* previously have appeared as advocates on behalf of MacDonald and played a substantial role in the DNA litigation; (2) MacDonald is adequately represented by counsel, who has filed a lengthy and comprehensive brief on his behalf; (3) the Court should not accept a merits brief from potential *amici* before deciding whether to grant a certificate of appealability; and (4) if the filing of a brief by *amici* is appropriate before a certificate of appealability is granted, the filing of the brief was untimely.

Discussion

Whether to permit the filing of an *amicus curiae* brief is "a matter of judicial grace." *National Organization for Women v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000). The Court should not permit the filing of the brief submitted in this case. The Seventh Circuit has adopted a policy of accepting an *amicus* brief "only when (1) a party is not adequately represented (usually, not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." Id. at 617. This policy provides a useful framework for considering a motion for leave to file an *amicus* curiae brief.

1. Prior Representation of a Party to the Litigation as Counsel Is Incompatible with Acting as *Amicus* at Later Stages of the Litigation.

The instant motion does not adequately disclose the movants' interest in the litigation. Specifically, the motion does not inform the court that Messrs. Harvey A. Silverglate, Phillip G. Cormier, Andrew Good, and Barry C. Scheck, who now seek to appear as *amici*, have all previously appeared as advocates on behalf of MacDonald, and played a direct and substantial role in the DNA litigation.

A jury convicted MacDonald on August 29, 1979 on three counts of murder, in violation of 18 U.S.C. § 1111.[1] In October 1990, MacDonald, through a new team of lawyers, including potential *amici* counsel Silverglate and Cormier of the firm of Silverglate and Good, filed a second motion under 28 U.S.C. § 2255. The district court denied relief on grounds of abuse of the writ and on the merits. *United States v. MacDonald*, 778 F. Supp. 1342 (E.D.N.C. 1991). This Court affirmed. *United States v. MacDonald*, 966 F.2d 854 (4th Cir. 1992).[2]

On April 22, 1997 potential *amici* counsel Silverglate, Cormier, and Good, without having obtained pre-filing authorization (PFA) from this Court pursuant to 28 U.S.C. § 2244, filed in the district court a third petition for habeas relief captioned *Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery.* Supporting MacDonald's motions were *Affidavit Of Philip G. Cormier No. 1*, and *Affidavit of Philip G. Cormier No.2 - Request For Access*

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[1]The jury convicted MacDonald of murder in the second degree for the bludgeoning and stabbing of his wife Colette and elder daughter Kimberly, and in the first degree for the murder by stabbing of his younger daughter Kristen, despite his testimony that the murders were committed by "hippie" intruders, and despite the presence of unidentified hairs, fibers, fingerprints, candle wax, which he claimed demonstrated the presence of intruders.

[2]This Court affirmed the denial of MacDonald's Section 2255 motion relying solely on the "abuse of the writ" doctrine. It observed that the alleged "newly-discovered" laboratory bench notes had, in fact, been received by MacDonald's preceding set of lawyers prior to the filing of his first habeas petition. Upon evaluation, those attorneys dismissed as inconsequential the "newly-discovered" evidence. *See MacDonald*, 966 F.2d at 858.

To Evidence To Conduct Laboratory Examinations – In Support of Jeffrey R. MacDonald's Motion To Reopen 28 U.S.C. § 2255 Proceedings And For Discovery.[3] The district court denied the motion insofar as it was based upon a "fraud on the court" claim. It transferred to this Court the motion for a new trial, based upon alleged newly-discovered evidence, for certification as a successive petition. *United States v. MacDonald,* 979 F. Supp. 1057 (E.D.N.C. 1997). On October 17, 1997, this Court entered an order granting MacDonald's motion insofar as it authorized DNA testing and remanded that matter to the district court. It denied the motion to file a successive habeas petition in all other respects. *In Re: Jeffrey R. MacDonald*, No. 97-713. MacDonald then appealed the district court's ruling on the fraud on the court claim. This Court affirmed *United States v. Jeffrey R. MacDonald*, No. 97-7297 (*per curiam*).

On September 10, 1998, potential *amici* counsel Silverglate, Goode, and Cormier filed in the district court a motion requesting that MacDonald's experts be given "access to the full universe of biological evidence gathered from the crime scene," in order to determine which of these items are candidates for DNA analysis. By Order entered December 11, 1998, the district court limited the testing to items specifically identified in an affidavit of

[3]Cormier Aff. No. 2 at ¶¶ 33-35 recounts the July 22, 1970, examination of vial No. 7 and the comparison of the hair by Janice Glisson which would later be designated 91A.

Cormier. [E.D.N.C. D.E. 86, p. 3]. On March 16, 1999 defense counsel Andrew Good filed a notice of appearance on behalf of MacDonald in the district court. [E.D.N.C. D.E. 94]. On March 19, 1999 Barry Scheck also filed an appearance on MacDonald's behalf. [E.D.N.C. D.E. 95]. Following a hearing on March 23, 1999 to resolve testing issues, at which potential *amici* counsel Good, Cormier, and Scheck appeared, and Cormier and Scheck argued on MacDonald's behalf, the district court entered an order on March 26, 1999 [E.D.N.C. D.E.99] which provided in pertinent part that the court would designate an independent laboratory from a prioritized list of candidates supplied by the parties to conduct the DNA testing. *Id.* On April 14, 1999 the district court issued an order directing the Government to employ the Armed Forces Institute of Pathology (AFIP) (MacDonald's first choice) to conduct the DNA testing and to file all financial documentation with the court. [E.D.N.C. D.E. 99]. On February 2, 2000 AFIP furnished the parties the resulting November 30, 1999 report.[4]

Although Messrs. Silverglate, Good, Cormier, and Scheck did not sign pleadings in the case after the October 27, 2004, notices of appearance were filed by Timothy D. Junkin and John C. Moffett,

[4]In pertinent part, the examiner described the hairs from both specimens 58A(1) and 91A as having "a root but no tissue", and does not describe either hair as having an "intact root". Specimen 75A he describes as being a "human hair with root and follicular tissue." The examiner did not describe any of the hairs [58A(1), 91A or 75A] as being in any way bloodstained or express any opinion that the hairs were pulled or otherwise forcibly removed.

they never withdrew as counsel of record for MacDonald. As recently as April 7, 2009, MacDonald's Website (www.themacdonaldcase.org) under the heading "Counsel" states: "Andy Good, Phil Cormier and Harvey Silverglate have been heavily involved in the appeals process and DNA issues of the case, and are committed to Jeff's criminal defense as well as student rights, civil liberties, and constitutional litigation."

Permitting lawyers who have represented MacDonald to appear in this case as *amici* would permit MacDonald an unwarranted second opportunity to make additional argument through partisan lawyers. Granting the motion would effectively permit the lawyers who represent him to divide into a "tag team" in order to gain an unfair tactical advantage.

If the party seeking to appear as *amicus curiae* is perceived to be an advocate of one of the parties to the litigation, leave to appear as *amicus* should be denied. *United States v. Gotti*, 755 F. Supp. 1157, 1158-59 (E.D.N.Y. 1991); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985); *Leigh v. Engle*, 535 F. Supp. 418, 422 (N.D.Ill. 1982). As the court stated in *Yip:* "Where a petitioner's attitude toward litigation is patently partisan, he should not be allowed to appear as *amicus curiae*." 606 F. Supp. at 1568. In *Gotti,* 755 F. Supp. at 1159, the court stated: "Rather than seeking to come as a 'friend of the court' . . . it is apparent that the NYCLU has come as an advocate for one side,

having only the facts of one side at the time. In doing so, it does the court, itself and fundamental notions of fairness a disservice."

2. MacDonald Is Adequately Represented, and Potential *Amici* Have No Special Expertise Relevant to the Legal Issues.

There is no need for assistance from *amici* in this case, because MacDonald is receiving adequate representation from his retained counsel. MacDonald's retained counsel has filed a 57-page informal brief on his behalf. In that brief, MacDonald's retained counsel has asserted the same claims of error asserted by potential *amici*. Moreover, unlike the brief submitted by potential *amici*, the informal brief filed on MacDonald's behalf contains substantial legal analysis. Under these circumstances, the Court would not benefit from accepting the brief submitted by potential *amici*.

Moreover, while potential *amici* counsel refer in their motion to The Innocence Project's "groundbreaking use of DNA technology to free innocent people," they have not shown that this case presents any particular legal issue about which they possess specialized expertise. The Government has never contested the DNA testing results provided by AFIP. The issue at this stage is not whether those results demonstrate MacDonald's innocence, which they do not. Instead, the issue is whether the district court erred when it determined that, in the absence of a pre-filing authorization (PFA) from this Court, it lacked jurisdiction to entertain the motion to

add the DNA predicate to the pending § 2255 application because of the requirements of 28 U.S.C. §§ 2244(b)(3)(A) and 2255(h).

The resolution of this issue essentially turns on whether this Court's order of October 17, 1997, entered in No. 97-713, granting MacDonald's motion for DNA testing, but in all other respects denying his application to file a successive § 2255 application, implicitly conferred jurisdiction on the district court to entertain the motion eventually filed in 2006 based upon the DNA testing results, which were unknown in 1997, and notwithstanding the provisions of §§ 2244 and 2255. This is a fact-bound situation involving this Court's interpretation of its own order, in light of the statutory scheme for resolving collateral attacks on convictions brought by federal prisoners under 28 U.S.C. § 2255, as amended. As the issue is purely jurisdictional, that the allegedly exculpatory evidence is based on DNA testing is of no consequence because § 2255 makes no distinction as to the type of newly discovered evidence.

Consequently, the extensive experience of the Innocence Project and its New England and North Carolina subsidiaries with the mechanics of DNA testing, and in obtaining the exoneration of unrepresented state prisoners through the use of DNA test results,

is irrelevant to this Court's resolution of the jurisdictional question.[5]

Because MacDonald is being adequately represented and because potential *amici* have failed to demonstrate that their participation will further aid in the consideration of the relevant legal issues, leave to appear should be denied. See *National Organization for Women v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000).

3. The Court Should Not Accept a Merits Brief from *Amici* Before Deciding Whether to Grant a Certificate of Appealability.

The acceptance of a merits brief from *amici* in an appeal of the denial of a § 2255 motion before a certificate of appealability (COA) has issued is inconsistent with the appellate gate keeping requirements of 28 U.S.C. § 2253. Under § 2253, no appeal can be taken from the denial of a § 2255 motion unless a COA has been issued. *See* § 2253(c). Section 2253 does not provide for the filing of *amicus* briefs when no COA has been issued, and neither does the language of FRAP 22 or Local Rule 22, which address the COA requirement. Moreover, FRAP 29 and Local Rule 29, which delineate when *amicus curiae* briefs may be filed, do not expressly

[5]Had the district court found jurisdiction and reached the merits of MacDonald's claims based on the DNA results, it surely would have granted no relief, because nothing in the testing results called into question the evidence used to convict MacDonald, or in any way demonstrated his innocence. If anything, the results added force to the case against MacDonald by identifying a hair found in his murdered wife's hand, which he had argued to the jury came from an intruder, to be Jeffrey MacDonald's own hair.

permit, or even appear to contemplate, the filing of an *amicus* brief in an appeal from the denial of a § 2255 motion prior to the grant of a COA. At this juncture, even the Government has not had an opportunity to file a brief. This Court therefore should deny the motion for leave to file the brief by *amici*.

4. The motion by potential *amici* was filed out of time.

Assuming that FRAP 29 permits the filing of a brief by *amici* at this stage, the motion is out of time, because it was filed more than seven days after the filing of MacDonald's informal brief. Rule 29(e) provides: "An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed." The motion by potential *amici* was filed 38 days after the corrected Informal Brief was filed on February 20, 2009. Moreover, the time for filing the Informal Brief was extended by the Court for 45 days beyond the original deadline of January 5, 2009, up to and including February 19, 2009. Thus, there was ample time for the movants, who also represented MacDonald and were thus fully familiar with the record, to file within the mandatory seven-day time period. Thus, the motion of potential *amici* to file the accompanying brief should be denied as out of time.

CONCLUSION

For all the reasons stated herein the Motion For Leave To File Brief as *Amici Curiae* should be denied.

GEORGE E.B. HOLDING
United States Attorney

/s/ Brian M. Murtagh
BRIAN M. MURTAGH
Special Assistant United States Attorney

/s/ John Stuart Bruce
JOHN STUART BRUCE
First Assistant United States Attorney
Eastern District of North Carolina
310 New Bern Avenue
Suite 800, Federal Building
Raleigh, North Carolina 27601-1461
Telephone: 919-856-4530

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

J. Hart Miles, Jr., Esq.
Hart Miles Attorney at Law, P.A.

Joseph E. Zeszotarski, Jr.
Poyner & Spruill

Andrew Good
Good & Cormier

I further certify that I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants, addressed as follows:

Barry Charles Scheck
Benjamin N. Cardozo
School of Law
Yeshiva University
Innocence Project
55 5th Avenue
New York, NY 10003-0000

Philip G. Cormier
Harvey A. Silverglate
Good & Cormier
83 Atlantic Avenue
Boston, MA 02110

Christine Mumma
North Carolina Center
on Actual Innocence
P.O. Box 52446
Shannon Plaza Station
Durham, NC 27717-2446

/s/John Stuart Bruce
JOHN STUART BRUCE
First Assistant United States Attorney
Eastern District of North Carolina