UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Crim. No. 75-26-CR-3
	)	
JEFFREY R. MacDONALD,	)	
	)	
Applicant/Defendant,	)	

PETITIONER'S REPLY TO RESPONSE OF THE UNITED STATES TO MOTION TO SUPPLEMENT STATEMENT OF ITEMIZED MATERIAL EVIDENCE

Comes now, the petitioner/defendant, Jeffrey R. MacDonald, through undersigned counsel, and respectfully sets forth this reply to the "Response of the United States to Motion to Supplement Statement of Itemized Material Evidence."

Jeffrey MacDonald, in his Motion to Vacate, filed pursuant to 28 U.S.C. Section 2255, 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 that occurred during the trial. Petitioner 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 applicant guilty of the underlying offense. In support of his Motion to Vacate, the petitioner has previously filed, pursuant to Rule 7 of the Federal Rules Governing Section 2255 Proceedings, a motion requesting that the record be expanded to include items of proof, some of which have surfaced post-trial. Because the

petitioner recently learned of additional evidence which is relevant to the question of the petitioner's innocence, (statements Helena Stoeckley made to her mother) he filed a Motion to Supplement his Statement of Itemized Material Evidence asking the Court to include consideration of this item of evidence when the Court reaches the stage of conducting its analysis of whether the new evidence which forms the predicate for the petitioner's Motion to Dismiss, when viewed in light of the "evidence as a whole," is sufficient to establish innocence.

The government opposes consideration by this Court of this new item of evidence. In so doing it takes a position here (and throughout its pleadings in this matter) regarding the application of post-conviction law that the petitioner submits is erroneous. The government takes the position that before any discreet item of evidence discovered post-trial can be considered by this Court in its analysis of innocence, that each such particular item of evidence must itself first have been the predicate for a new motion under 28 U.S.C. Section 2255, and must first have passed the gatekeeping requirements of that statute, i.e., been certified by a circuit court panel to (on a prima facie basis) comprise newly discovered evidence that if proven, and viewed in light of the evidence of the whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the defendant guilty of the offense.

The petitioner submits that this interpretation of the application of post-conviction law by the government is erroneous, illogical, and would lead to gross unfairness. Proof at trial is usually built by chains of evidence. One piece of evidence supports another, leads to another, fits into a pattern or puzzle that is eventually

convincing as proof. It is often the case that no one item of evidence is sufficient in and of itself to establish proof, but, rather, numerous items of evidence taken together are needed to establish such proof. A wrongly convicted person may over time, over many years, in fact, gather various pieces of evidence that only prove innocence when they are all placed together. The interpretation of the federal post-conviction process that the government seeks to impose herein, and its constant effort to limit the evidence that may be considered by this Court in its analysis of whether all the evidence establishes the innocence of the petitioner, overlooks this fundamental principle of criminal process and proof, and is inherently flawed. By illustration, take a wrongly convicted man, who each year over a successive twelve year period found one item of new evidence that supported his claim of innocence, where no one item of such evidence taken separately would establish clear and convincing proof, but where all twelve items taken together would, in fact, establish such clear and convincing proof of innocence. Under the government's interpretation of the application of federal post-conviction law, that wrongly convicted man would never have access to the courts. Under the government's interpretation, since the first item of new evidence was not sufficient to establish proof of innocence in and of itself, the man would not be able to successfully use it as a predicate for a motion to vacate under 28 U.S.C. Section 2255. Moreover, under the government's interpretation of the process, as the years passed and the man discovered additional items of evidence probative of his innocence, he could not be able to ask the court to even consider the earlier found items because they were not the predicates for prior post-conviction motions, and because they would be time-barred under the one year statute of limitations that applies to federal post-conviction motions based on newly discovered

evidence. This interpretation of the process that the government seeks to impose on this proceeding is not an accurate interpretation of federal post-conviction law. It is not the process that has been sanctioned by Congress or the by courts. Moreover, the government has offered no authority supporting the interpretation of the post-conviction process that it seeks to impose herein.

On the contrary, 28 U.S.C. Section 2255 is clear as to the process that is to unfold pursuant to a successive motion to vacate sentence based on newly discovered evidence, and it is a process that would, indeed, provide redress for the wrongly convicted man illustrated above. As 28 U.S.C. Section 2255 sets forth, if a defendant is possessed of newly discovered evidence, and that evidence (the predicate evidence) is proven, and if that evidence (the predicate evidence) when viewed in the light of the "evidence as a whole" establishes by clear and convincing evidence that no reasonable fact-finder would have found the defendant guilty, then the petitioner is entitled to relief. As part of the process, a successive applicant must first make out a prima facie case of these prerequisites before a panel of the circuit court, and obtain its permission to proceed at the trial court level. (This, of course, has been done in this proceeding.) Importantly, nowhere in the applicable federal post-conviction statutory regime is the term "evidence as a whole" limited, as the government would have it limited, to exclude consideration of discreet probative items of evidence developed piecemeal over time after the trial, when the Court is assessing the question of innocence viewed in the light of the evidence as a whole. Thus, the man illustrated above, upon discovering the last item of new evidence in the twelfth year, could petition the court for redress, claiming

that the new piece of evidence, when viewed along with *the evidence taken as a whole* (including that which was discovered over the prior eleven years) proved innocence.

The Supreme Court has opined that credible claims of constitutional error that have caused the conviction of an innocent person are rare, but that when they are substantiated by new evidence not presented at trial, that is, when the evidence taken as a whole demonstrates that it is more likely than not that no reasonable juror would have found guilt beyond a reasonable doubt, a petitioner should be granted relief from his conviction, even in the face of procedural impediments. *Schlup v. Delo*, 513 U.S. 298, (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Murray v. Carrier*, 477 U.S. 478 (1986). Such a determination requires a court to perform a complete review of the entire panoply of evidence, even that which was developed after the trial. As the Court stated in *Schlup, supra* at 867:

> [T]he *habeas* court must make its determination concerning the prisoner's innocence in light of all the evidence, including that … tenably claimed to have been wrongly excluded or to have become available only after trial.

The legal analysis of factual innocence under AEDPA likewise requires that all of the evidence be considered in a successive *habeas* claim. Pursuant to 28 U.S.C. Section 2255 an applicant for a successive petition must follow the dictates set forth in 28 U.S.C. Section 2244. And, as set forth in 28 U.S.C. Section 2244, any analysis of whether the predicate new evidence establishes innocence must occur when viewed in light of the *evidence as a whole*.

These principles were recently reaffirmed in *House v. Bell*, 126 S. Ct. 2064 (2006), where in a federal habeas attack on a state conviction, the Court emphasized that in the post-conviction proceeding, all of the evidence available should be considered,

including that developed post-trial, and went on to do so as part of its analysis and ruling. As that Court stated:

> First, although "[t]o be credible" a gateway claim requires "new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial," [citation omitted] the habeas court's analysis is not limited to such evidence…
>
> ... *Schlup* makes plain that the habeas court must consider " 'all the evidence,' " old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." [Citation omitted.]

Id.

The government's varied arguments in its Response that the new evidence should not be considered because it fails to pass muster under AEDPA, are contrary to law, are all based on the same faulty reasoning, and thus, are flawed and should be rejected.[1]

[1] Additionally the government argues that the contents of the submitted affidavit were somehow not the words of the affiant, and the government produced its own redacted version, which it claims better reflects the words of the affiant, but which, curiously was not sworn to by any affiant. The Petitioner stands by the affidavit submitted, and is confident that the affiant will stand by her words under oath at any hearing on this matter.

WHEREFORE, FOR THESE AND OTHER REASONS CONSIDERED BY THIS COURT, PETITIONER RESPECTFULLY REQUESTS THAT HIS MOTION TO SUPPLEMENT BE GRANTED.

Respectfully submitted this the 11th day of May, 2007.

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Certificate of Service

I hereby certify that a copy of this motion and accompanying brief were filed electronically May 11, 2007 through the CMF/ECF and therefore electronic notice will be sent to the following:

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