

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Duane O'Malley — PETITIONER  
(Your Name)

VS.

United States of America — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

District Court, 10-CR-20042; Seventh Circuit Court of Appeals under 14-2711

and 18-1617

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: \_\_\_\_\_  
Criminal Justice Act (See Orders), or

a copy of the order of appointment is appended. Under Volume No. One, Exhibits, "C", "S" and No. 7

  
(Signature)

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, )  
                                  )  
Plaintiff,                    )  
                                  )  
v.                             )                           Case No. 10-20042  
                                  )  
DUANE O'MALLEY,             )  
                                  )  
Defendant.                    )

**ORDER**

This matter is now before the Court on Defendant O'Malley's Motion [290] for Appointment of Counsel. For the reasons set forth below, Defendant's Motion [290] is GRANTED.

**BACKGROUND**

On September 26, 2011, a jury found Duane O'Malley guilty of five counts of knowingly removing, transporting, and dumping asbestos-containing insulation in violation of 42 U.S.C. § 7413(c)(1). Doc. 68. On July 21, 2012, O'Malley was sentenced to 120 months of imprisonment, three years of supervised release, a \$15,000 fine, and \$47,085.70 of restitution to the EPA. Doc. 121. On appeal, O'Malley argued that the Government was required to prove that the Defendant knew the material was *regulated* asbestos-containing material. On February 26, 2014, the Seventh Circuit issued a mandate and a copy of the opinion affirming the conviction and sentence, finding that the *mens rea* standard for a knowing violation of the Clean Air Act's federal asbestos regulations was satisfied where the Government proved that O'Malley knowingly worked with asbestos-containing material. *United States v. O'Malley*, 739 F.3d 1001 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 411 (2014).

While his direct appeal was pending, O'Malley filed a *pro se* motion for a new trial based on newly discovered evidence under Fed. R. Crim. P. 33. Doc. 172. His motion was based on three allegations: (1) the United States bribed codefendant Pinski by secretly agreeing that Pinski would not be liable for the \$47,000 restitution to the EPA superfund, in violation of 18 U.S.C. § 201(c)(2); (2) the United States withheld information regarding Pinski's testimony in a subsequent trial; and (3) the United States "underhandedly worked in collusion with O'Malley's retained appellate counsel Roger Heaton to prevent disclosure of the prosecutorial misconduct address in 'Claims One and Two.'" Doc. 172, at 10-15. On April 3, 2013, O'Malley supplemented his motion to add a fourth allegation that the United States failed to disclose Pinski's involvement in the state civil proceedings related to his federal criminal charges. Doc. 183. On April 8, 2013, O'Malley again supplemented his motion, raising a sixth claim, that the United States improperly rewarded Pinski for breaching his cooperation agreement. Doc. 186; see also Docs. 188, 190.

On June 17, 2013, O'Malley, with the assistance of counsel, filed a motion to stay the proceedings on his Rule 33 motion while counsel investigated whether new evidence existed that would warrant a new trial. Doc. 195. On June 19, 2013, the Court issued an opinion denying the motion to stay and advising O'Malley that his Rule 33 motion would be treated as a motion under 28 U.S.C. § 2255. Doc. 196. O'Malley withdrew that motion, but after his counsel withdrew from the case, he filed another *pro se* motion (Doc. 209) for new trial under Rule 33 on March 31, 2014, shortly after the Seventh Circuit issued the mandate in his direct appeal. See Doc. 207. In an opinion issued on May 28, 2014, the Court denied O'Malley's motion as it related to his third claim and construed his first and second claims as a motion under § 2255.

Doc. 216. O'Malley appealed that decision and the subsequent denial of his motion to reconsider on August 1, 2014. Doc. 224.

On September 22, 2016, the Seventh Circuit issued a mandate vacating the Court's ruling and allowing O'Malley to proceed under Rule 33. *United States v. O'Malley*, No. 14-2711 (7th Cir. 2016). On October 6, 2016, the Court reopened O'Malley's Rule 33 motion, allowed him to file a supplement to the motion, and scheduled a motion hearing. On October 20, 2016, O'Malley filed a "Supplemental Rule 33 Pleading Recognizing Structural Error, Per Se." Doc. 265. That pleading raised two more issues: the Court's June 19, 2013 order was "structural error" that warrants a new trial, and newly discovered evidence shows that Defendant is actually innocent. On October 21, 2016, the Court held a status conference where O'Malley indicated that he had one additional filing to supplement his Rule 33 pleading. The Court directed O'Malley to file his supplement to documents 172, 183, 185, 186, 190, and 265 within 21 days. After granting two prior extensions of time for O'Malley to file the supplement, the Court granted O'Malley a third extension of time on January 3, 2017. That order noted that O'Malley had filed 6 other motions seeking to compel, enjoin, requesting discovery, and requesting release, and informed O'Malley that it would not consider those motions until he submitted his supplemental filing and the Government responded.

On January 17, 2017, O'Malley filed his fourth motion for extension of time. Doc. 277. The Court denied O'Malley's request, noting that he had used the previous extensions of time to file various other motions. See Jan. 17, 2017 Text Order ("In sum, [Defendant] has had almost 90 days to file his Supplement, which was simply to consolidate all the addenda to his Rule 33 Motion into one document. Accordingly the Court finds that no future extensions are warranted and Orders the Government to Respond to Defendant's Rule 33 Motion [172] and supporting

Addenda [183] [185 [186] [188] [190] [265] within 21 days of this Order.”). On January 31, 2017, while the United States was preparing its response to the Rule 33 motion, O’Malley filed a “Motion for Leave to File Belated Consolidated Rule 33 Motion and Request to Extend Time to Add Necessary Documents,” “Defendant’s Supplement to his Pre-Appeal Ruling Rule 33(b)(1) Motion for New Trial Under # 172, 183, 185, 186, 188, 190, and 265,” and five “books.” Docs. 278-84. The Court directed the United States to respond to O’Malley’s motion for leave to file, and the response was docketed on February 7, 2017. Doc. 285. In its response, the United States opposed O’Malley’s request for leave to file. *Id.* (“The petitioner’s repeated filings failed to comply with this Court’s previously imposed time deadlines and many issues raised therein are far outside the scope of the remand to consider defendant’s previously filed motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure.”). The Court denied O’Malley’s motion and ordered the Government to file its response to the Rule 33 motion by February 15, 2017. On February 15, 2017, the Government filed its response (Doc. 287) and O’Malley filed a “Motion for Certification of Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a)(3).” Doc. 286. That motion was denied by this Court, and subsequently denied by the Seventh Circuit, on March 2, 2017.

On February 27, 2017, O’Malley filed the instant motion seeking appointment of counsel. Doc. 290. In his motion, O’Malley asserts that he has a constitutional right to assistance of counsel in his Rule 33 motion. Given the procedural history set forth above, and the amount of time spent on moving this matter to this point, it may seem obvious that the time for appointment of counsel has come and gone. However, for the reasons set forth below, the Court agrees with Mr. O’Malley as to the appointment of counsel and, in doing so, the Court believes that Mr. O’Malley’s constitutional rights are properly being preserved. As such, this Order follows.

## DISCUSSION

A defendant's right to counsel attaches "at or after the time that judicial proceedings have been initiated against him" and "continues to apply 'at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.'" *Kitchen v. United States*, 227 F.3d 1014, 1018 (7th Cir. 2000) (citing *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)). A defendant's right to counsel extends through his first appeal of right, *Evitts v. Lucey*, 469 U.S. 387, 396 (1985), but "once the direct appeal has been decided, the right to counsel no longer applies." *Kitchen*, 227 F.3d at 1018 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)). Thus, a defendant is entitled to the assistance of counsel in a motion for a new trial under Fed. R. Crim. P. 33 when that motion is made before the defendant's direct appeal is decided. See *Kitchen*, 227 F.3d at 1018-19.

Whether O'Malley is entitled to appointment of counsel to assist him in his Rule 33 motion depends on whether that motion was filed before his direct appeal was decided. The order from which O'Malley appealed was this Court's denial of his March 31, 2014 motion for new trial, (Doc. 209), which was filed shortly after his direct appeal was decided. Doc. 207. Thus, a strict technical reading of the docket suggests that O'Malley's Rule 33 motion came too late, and the right to counsel no longer applies. See *Kitchen*, 227 F.3d at 1018 ("[O]nce the direct appeal has been decided, the right to counsel no longer applies.").

However, O'Malley's prior Rule 33 motion, (Doc. 172), was filed almost a year before his direct appeal had been decided. That motion contained materially similar allegations to his post-appeal motion, (Doc. 209), and the Court denied both motions for the same reason—that 28 U.S.C. § 2255, rather than Fed. R. Crim. P. 33, was the correct vehicle for pursuing his claims. See Docs. 196, 216. Ultimately, the Seventh Circuit reversed and remanded, holding that this

Court improperly required O'Malley to bring pieces of his evidence in a separate action and he should have been allowed to proceed under Rule 33. (Doc. 260). In other words, while the motion that was the subject of the appeal was indeed filed after O'Malley's direct appeal was decided, that motion was precipitated because his prior motion was denied in error. See, e.g., *Kitchen*, 227 F.3d at 1019 ("[B]ecause Kitchen's motion for a new trial was decided before our decision in his direct appeal ... [he] had a right to counsel in prosecuting such a motion and in taking an appeal from its denial."). Thus, the Court finds that O'Malley is entitled to counsel to assist him in his Rule 33 motion, and appoints the Federal Defender's Office to represent him.

The Court also recognizes the complex history of this case and the volume of documents that will need to be reviewed in order to assist Mr. O'Malley with his Rule 33 motion.

Accordingly, after counsel is appointed, O'Malley's attorney will have 60 days to file a supplement to the motion for new trial, (Docs. 172, 209), and the supporting memoranda identified in this Court's January 3, 2017 text order and the Government's response (Doc. 287).

Thereafter, the Government will have 30 days to either renew or supplement its response.

Finally, the Court reminds O'Malley that all future filings in this case should be submitted by his appointed counsel.

### CONCLUSION

For the reasons stated above, Defendant's Motion [290] for Appointment of Counsel is GRANTED, and the Federal Defender's Office is appointed to represent O'Malley.

Signed on this 13th day of March, 2017.

s/ James E. Shadid  
James E. Shadid  
Chief United States District Judge

# UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## ORDER

June 29, 2018

*By the Court:*

No. 18-1617	UNITED STATES OF AMERICA, Plaintiff - Appellee  v.  DUANE L. O'MALLEY, Defendant - Appellant
<b>Originating Case Information:</b>	
District Court No: 2:10-cr-20042-JES-DGB-2 Central District of Illinois District Judge James E. Shadid	

The following is before the court:

1. MOTION FOR APPOINTMENT OF PRO BONO COUNSEL EXPERIENCED IN ENVIRONMENTAL LAW, filed on June 25, 2018, by the pro se appellant.
2. MOTION TO EXPEDITE NUNC PRO TUNC AMENDMENT TO CLEAR CONTROVERSIAL ORDERS, filed on June 25, 2018, by the pro se appellant.
3. MEMORANDUM OF PROCEDURAL EVENTS IN SUPPORT OF NUNC PRO TUNC AMENDMENT, filed on June 25, 2018, by the pro se appellant.
4. MOTION FOR LEAVE TO FILE EXCESS PAGE LIMITATION FOR GOOD CAUSE SHOWN WHERE THE DISTRICT "RECOGNIZED THE COMPLEX HISTORY AND VOLUMES OF DOCUMENTS" AND THAT "CHAOS ENSUED," filed on June 25, 2018, by the pro se appellant.

*Exhibit No. 7*

**IT IS ORDERED** that the motion for appointment of counsel is **GRANTED** to the extent that counsel will be appointed pursuant to the provisions of the Criminal Justice Act. Counsel will be named and a briefing schedule set by separate court order.

**IT IS FURTHER ORDERED** that appellant's "Motion to Expedite Nunc Pro Tunc Amendment to Clear Controversial Orders" is **DENIED**. Appellant submitted, along with this motion, an exhibit that appears to be his brief. In light of the order appointing counsel, this exhibit will be filed without further court action. The appeal will be briefed by counsel.

**IT IS FINALLY ORDERED** that the motion to exceed the page limitation is **DENIED** as moot.

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