

DLD-016

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 21-1571

UNITED STATES OF AMERICA

VS.

PAUL PAVULAK, Appellant

(D. Del. Civ. No. 1:09-cv-00043-001)

Present: KRAUSE, MATEY and PHIPPS, Circuit Judges

Submitted are:

- (1) Appellant's Motion to Proceed In Forma Pauperis for the Purpose of Applying for Appointment of Counsel; and
 - (2) Appellant's Application for a Certificate of Appealability
- in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied because jurists of reason would not debate the District Court's decision to reject Appellant's motions seeking relief under Federal Rules of Civil Procedure 60(b) and 60(d)(3). See 28 U.S.C. § 2253(c)(2); Bracey v. Superintendent Rockview SCI, 986 F.3d 274, 282-83 (3d Cir. 2021). Appellant's motions, which attacked his underlying conviction and sentence, constituted unauthorized second or successive motions under 28 U.S.C. § 2255. See Gonzalez v. Crosby, 545 U.S. 524, 530-32 (2005). To bring a second or successive § 2255 motion, a petitioner must obtain authorization from the court of appeals. See 28 U.S.C. § 2255(h). Because Appellant did not have that authorization, the District Court correctly rejected his motions. See Robinson v. Johnson, 313 F.3d 128, 139-40 (3d Cir. 2002). Even if Appellant's motions were construed as attacking defects in his habeas

proceedings, relief under Rule 60(b) would not be warranted because Appellant had an opportunity to raise his current arguments in his appeal from the denial of his § 2255 motion. See United States v. Fiorelli, 337 F.3d 282, 288 (3d Cir. 2003) (recognizing that a Rule 60(b) motion may not be used as a substitute for an appeal). To the extent that Appellant seeks appointment of counsel, and to proceed in forma pauperis for the purpose of seeking counsel appointment, his requests are denied.

By the Court,

s/ Peter J. Phipps
Circuit Judge

Dated: December 6, 2021
Lmr/cc: Whitney C. Cloud
Alexander P. Ibrahim
Paul E. Pavulak



A True Copy:

Patricia S. Dodszeweit

Patricia S. Dodszeweit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1571

UNITED STATES OF AMERICA

v.

PAUL E. PAVULAK,
Appellant

(D.C. No. 1-09-cr-00043-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, McKEE, JORDAN, HARDIMAN,
GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER,
MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Peter J. Phipps

Circuit Judge

Dated: April 27, 2022
Lmr/cc: Whitney C. Cloud
Alexander P. Ibrahim
Paul E. Pavulak