Appendix

"A"

- Brik's application for Certificate of Appealability denied by the Eighth Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1882

Vladimir Vladimirovic Brik

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:19-cv-01088-SRN)

JUDGMENT

Before LOKEN, COLLOTON, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. Appellant's pending motion to hold the case in abeyance is denied as moot. The appeal is dismissed.

May 27, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix

"B"

- District Court's dismissal of Brik's 60(b) as being "second or successive" and requiring pre-authorization from the Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, Plaintiff, v. Vladimir Vladimirovic Brik, Defendant.	Case No. 15-cr-78(03) (SRN/BRT) **ORDER**

Craig R. Baune, Jordan L. Sing and Katharine T. Buzicky, Office of the United States Attorney, 300 South Fourth Street, Suite 600, Minneapolis, Minnesota 55415, for Plaintiff United States of America

Vladimir Vladimirovic Brik, BOP Register No. 18466-041, FCI Elkton, Federal Correctional Institution, P.O. Box 10, Lisbon, Ohio 44432, Pro Se

SUSAN RICHARD NELSON, United States District Judge

Pending before the Court are the following pro se motions filed by Defendant Vladimir Vladimirovic Brik: (1) Motion Pursuant to Fed. R. Civ. P. 60(b) to Reopen § 2255 Motion [Doc. No. 746]; (2) Motion to Perpetuate Testimony Pursuant to Fed. R. Civ. P. 27(a) [Doc. No. 743]; (3) Motion to Withdraw the Motion to Perpetuate Testimony [Doc. No. 754]; (4) Motion to Supplement the Record [Doc. No. 748]; (5) Motion for Reconsideration [Doc. No. 761]; (6) Amended Motion for Reconsideration [Doc. No. 764]; (7) Motion to Strike Government's Response and Enter Government into Default [Doc. No. 765]; and (8) Motion to Correct Order on Motion for Reconsideration [Doc. No. 717].

Also pending before the Court is the Government's Motion to Dismiss Defendant's Motions Under Fed. R. Civ. P. 60(b) to Reopen his § 2255 Motion [Doc. No. 751].

I. BACKGROUND

In July 2016, Brik pleaded guilty to controlled substance analogue distribution and money laundering conspiracy charges. (*See* Plea Agmt. [Doc. No. 375] ¶ 1.) On June 27, 2017, the Court sentenced him to a term of imprisonment of 118 months. (Sentencing J. [Doc. No. 548]; Am. Sentencing J. [Doc. No. 554].)

A. Direct Appeal and Initial Motion to Vacate Under 28 U.S.C. § 2255

Brik filed a direct appeal with the Eighth Circuit Court of Appeals, arguing that the Government breached the parties' Plea Agreement by not opposing a two-point upward adjustment under the United States Sentencing Guidelines § 2D1.1(b)(15)(C). (*See* Appellant's Br. [Doc. No. 629-1] at 7].) The Eighth Circuit dismissed his appeal in light of Brik's waiver of appellate rights in the Plea Agreement. (8th Cir. J. [Doc. No. 596].)

In April 2019, Brik filed a Pro Se Motion to Vacate under 28 U.S.C. § 2255 [Doc. No. 624], raising claims of ineffective assistance of counsel. Specifically, he asserted that his trial counsel was ineffective for the following reasons: (1) providing him inaccurate advice regarding the mens rea requirement under the Analogue Act; (2) failing to oppose a two-point upward adjustment at sentencing; (3) failing to challenge the Court's ruling on Defendant's proposed jury instruction; and (4) failing to show him the entire Presentence Investigation Report ("PSR"). (Def.'s § 2255 Mot., Grounds 1–4.) The Court denied Brik's motion on the merits and denied his application for a certificate of appealability, *United States v. Brik*, No. 15-78 (SRN/BRT), 2019 WL 6037570 (D. Minn. Nov. 14, 2019); (Nov.

14, 2019 Order [Doc. No. 639].) Brik appealed, and after review, the Eighth Circuit denied his application for a certificate of appealability, dismissed his appeal, (8th Cir. § 2255 J. [Doc. No. 649]), and, in September 2020, issued its mandate. (8th Cir. Mandate [Doc. No. 708].)

B. Pending Motions

On March 23, 2021, Brik filed his Pro Se Motion to Perpetuate Testimony pursuant to Federal Rule of Civil Procedure 27(a) ("Motion for Testimony"). (Def.'s Mot. for Testimony [Doc. No. 743].) Brik claims that a recent discovery about the current status of trial counsel's law license warrants granting permission to depose her.

On May 3, 2021, Brik filed his Pro Se Motion Pursuant to Fed. R. Civ. P. 60(b) to Reopen his § 2255 Motion ("Motion to Reopen"). (Def.'s Mot. to Reopen [Doc. No. 746].) Brik raises two claims in his Motion to Reopen. (*Id.* at 1, 5–12.) He asserts that his guilty plea was not voluntary and informed because: (1) the prosecution withheld exculpatory evidence; and (2) his attorney was ineffective for not investigating or disclosing to him the value of such exculpatory evidence. (*Id.*)

On June 21, 2021, Brik filed his Pro Se Motion to Supplement the Record for Timeliness, arguing that his Motion to Reopen was timely filed. (Def.'s Mot. to Supplement [Doc. No. 748].)

On July 2, 2021, the Government responded to Brik's Motion to Reopen by moving to dismiss it. (Gov't.'s Mot. to Dismiss [Doc. No. 751].) It further requested a stay of any briefing schedules pending the resolution of the motion. (*Id.* at 5.)

On September 13, 2021, Brik filed a Pro Se Motion to Withdraw his Motion to Perpetuate Testimony [Doc. No. 754]. His Motion to Withdraw is granted, and the record shall reflect that his Pro Se Motion to Perpetuate Testimony is withdrawn.

On December 7, 2021, the Court directed the Government to respond to Brik's Motion to Reopen, noting that its previous response appeared to inadvertently address issues related to Brik's Motion to Perpetuate Testimony. (Dec. 7, 2021 Order [Doc. No. 756].)

On December 27, 2021, Brik filed a Pro Se Emergency Motion for Reconsideration, in which he moves the Court to reconsider its December 7, 2021 Order. (Mot. for Recons. [Doc. No. 761].) Brik argues that allowing the Government to file an untimely response to his Motion to Reopen would prejudice him, and he requests an entry of default judgement. (*Id.* at 1.)

The Government filed its response to Brik's Motion to Reopen on December 28, 2021, arguing that Brik's Motion should be denied because his motion, although stylized as a Rule 60(b) motion, is more properly classified as an unauthorized second or successive habeas petition. (Gov't's Resp. [Doc. No. 762] at 5–6.) As Brik has not received permission from the Eighth Circuit to file a successive § 2255 motion to vacate, the Government argues that this Court lacks jurisdiction to hear this motion. (*Id.* at 7.)

On January 3, 2022, Brik filed an Amended Emergency Motion for Reconsideration, in which he again moves the Court to reconsider its December 7, 2021 Order in which it directed the Government to respond to the instant motion. (Am. Mot. for

Recons. [Doc. No. 764]) In this Motion, he requests that the Court determine whether it abused its discretion in modifying the briefing schedule. (*Id.* at 4.)

On January 28, 2022, Brik filed a Pro Se Motion to Strike Government's Response and Enter Government into Default, in which he moves to strike the Government's response as untimely and requests that the Court enter default judgment in his favor. (Mot. to Strike [Doc. No. 765].)

Finally, unrelated to Brik's § 2255 claims, is his Pro Se Motion to Correct the Record. In this motion, Brik moves to correct alleged errors in the Court's October 19, 2020 Order [Doc. No. 715]), denying his motions for compassionate release. (Def.'s Mot. to Correct [Doc. No. 717].)

II. DISCUSSION

A. Motion to Reopen § 2255 Motion

As noted, in April 2019, Brik previously filed a § 2255 motion to vacate, which the Court denied. The Eighth Circuit subsequently denied his request for a certificate of appealability.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(b), amended § 2255, imposing strict restrictions on the filing of a second or successive § 2255 motion. *Abdullah v. Hedrick*, 392 F.3d 957, 960 (8th Cir. 2004). Under the AEDPA, a petitioner seeking to file a second or successive habeas petition must meet three requirements. *United States v. Lee*, 792 F.3d 1021, 1023 (8th Cir. 2015). First, any claims previously presented in a prior habeas petition must be dismissed. *Id.* (citing § 2244 (b)(1)). Second, if a claim was not previously adjudicated, it must be dismissed unless it

relies on "a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence." *Id.* (citing *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005)). Third, before filing a second or successive § 2255 petition in the district court, a petitioner must obtain an order from the court of appeals granting permission to file. *Id.* (citing 42 U.S.C. §2255(h)). This third requirement is "absolute" and may not be evaded "by simply filing a successive § 2255 motion in the district court." *Boykin v. United States*, 242 F.3d 373 (Table), No. 99-3369, 2000 WL 1610732 at *1 (8th Cir. 2000).

The Supreme Court has held that as a general matter, these § 2255 procedural requirements for second or successive motions also apply to prisoners' motions for relief from judgment filed under Rule 60(b). *Gonzalez*, 545 U.S. at 531 (explaining that a prisoner's Rule 60(b) motion often contains claims that, in substance, make it "a successive habeas petition" that "should be treated accordingly."). The sole exception to subjecting Rule 60(b) motions to § 2255 procedural requirements is "when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532.

Where, as here, the Rule 60(b) motion attacks the court's ruling in the previous habeas proceeding on the merits, or raises "new claims for relief," the motion is treated as a second or successive § 2255 motion. *Rouse v. United States*, No. 20-2007, 2021 WL 4202105, at *2 (8th Cir. Sept. 16, 2021) (citing *Gonzalez*, 545 U.S. at 531). As "a second or successive § 2255 motion may not be entertained by a district court unless the defendant has obtained approval from the Court of Appeals," Brik has failed to meet the stringent procedural requirements for filing a second or successive § 2255 motion. *United States v.*

Borrero, Nos. 03–281, 08–1160, 2010 WL 3927574, at *1 (D . Minn. Oct. 5, 2010) (citations omitted); *Rivera v. Smith*, No. 13-cv-2643 (SRN/FLN), 2013 WL 5874723, at *6 (D. Minn. Oct. 30, 2013) (dismissing a successive habeas petition in for failure to obtain an order from the court of appeals granting him permission to file it).

In light of Brik's failure to obtain the required preauthorization from the Eighth Circuit to file a second or successive § 2255 motion, Defendant's Motion to Reopen § 2255 Motion is denied.

III. ORDER

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's Motion Pursuant to Fed. R. Civ. P. 60(b) to Reopen § 2255 Motion [Doc. No. 746] is **DENIED** and **DISMISSED** as it is a second or successive habeas petition filed without the required precertification from the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3);
2. Defendant's Motion to Withdraw the Motion to Perpetuate Testimony [Doc. No. 754] is **GRANTED**;
3. Defendant's Motion to Perpetuate Testimony [Doc. No. 743] is **WITHDRAWN**;
4. Defendant's Motion to Supplement the Record [Doc. No. 748] is **DENIED AS MOOT**;
5. Defendant's Motion for Reconsideration [Doc. No. 761] is **DENIED**;
6. Defendant's Amended Motion for Reconsideration [Doc. No. 764] is **DENIED**;

7. Defendant's Motion to Strike Government's Response and Enter Government into Default [Doc. No. 765] is **DENIED**;

8. Defendant's Motion to Correct Order on Motion for Reconsideration [Doc. No. 717] is **DENIED AS MOOT**;

9. The Government's Motion to Dismiss Defendant's Motions Under Fed. R. Civ. P. 60(b) to Reopen his § 2255 Motion [Doc. No. 751] is **GRANTED**.

Dated: April 14, 2022

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

Appendix

"C"

- Eighth Circuit Court of Appeals denial for en banc rehearing and panel rehearing

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1882

Vladimir Vladimirovic Brik

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:19-cv-01088-SRN)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 08, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix

"D"

- Materiality of Dr. Berrier's evidence

APPENDIX "D"

MATERIALITY OF DR. ARTHUR BERRIER

1. Had Brik gone to trial, the Government would have been required to prove beyond a reasonable doubt that UR-144 and XLR-11 were substantially similar to the synthetic cannabinoid JWH-018, a Schedule 1 Controlled Substance. 21 U.S.C. §802(32)(A). See United States v. Washam, 312 F.3d 926, 930 n.2 (8th Cir. 2002). The Government also must prove beyond a reasonable doubt the Brik knew the substances listed in the indictment had a "substantially similar chemical structure" to a controlled substance. See McFadden v. United States, 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015); United States v. Makkar, 810 F.3d 1139 (10th Cir. 2015). Failure to satisfy either element would be fatal to the prosecution.

2. Several courts have accepted UR-144 and XLR-11 to be one in the same; see United States v. Ritchie, 732 Fed. Appx. 876, 2018 U.S. App. LEXIS 13895 (4th Cir. Va., May 25, 2018).

3. The Government intended to call Dr. Jordan Trecki, a DEA expert witness from the Office of Drug and Chemical Evaluation Section (DRE) to testify to the scientific element that the substances listed in the indictment meet the essential components of the statutory definition of a controlled substance analogue. Doc. No. 330 at Pg. 8. Brik Proposed to call Dr. Mark Erickson, a hired expert to rebuttal that UR-144 and XLR-11 were not substantially similar to JWH-018. Doc. No. 342-1 at ¶ 10 ("Compounds UR-144 and XLR-11 differ from their reference compound JWH-018 by 39% and 37% respectively. Using my own experience, I would consider these results to represent significant differences in structure, not substantial similarities to JWH-018.").

4. The government was under a constitutional and Court ordered obligation to disclose all Brady and Rule 16 material. However, on 3/29/21, Brik discovered for the first time that the Government withheld exculpatory information in their possession derived from Dr. Arthur Berrier, a DEA chemist.

5. Dr. Berrier was a Senior Research Chemist in the DEA's Office of Forensic Sciences (OFS) now known as (ODE), and would have challenged the scientific element of the Government's case - that XLR-11 and UR-144 are substantially similar to JWH-018.

6. As an OFS Senior Chemist for over ten years, Dr. Berrier routinely analyzed synthetic substances for the DRE (where Dr. Trecki worked) and gave his opinion on their substantial similarity to controlled substances. In the Spring of 2012, the DRE asked Dr. Berrier to compare UR-144 and JWH-018. His technical analysis concluded that they are not substantially similar in chemical structure, therefore, not illegal. However, the DRE ultimately did not follow their committee protocol of being in unanimous agreement before assisting in prosecutions, and nonetheless went on to testify that UR-144 and JWH-018 are substantially similar.

7. The fact that DRE did not follow "committee protocol" when giving testimony that UR-144 was an analogue, directly attacks the value of Dr. Trecki's testimony that Dr. Berrier could have shown the jury. Like Dr. trecki, Dr. Berrier's position at the DEA would have been relevant, and highly believable information.

8. Dr. Berrier, a DEA synthetic cannabinoid expert with a dissenting view-a view demonstrating that even highly trained Government employees disagreed about the substantial similarity of UR-144 and JWH-018 would have bolstered Brik's "lack of knowledge" defense theory. If DEA personnel disagreed with UR-144 and XLR-11 being analogues, it makes it more likely that Brik did not know that they were analogues.

9. Much to materiality may be persuasively extracted from United States v. Galecki, 932 F.3d 126; 2019 U.S. App. LEXIS 22417 (4th Cir. Va., July 29, 2019)(reversing due to the Sixth Amendment right to compulsory process was violated when the court declined to compel Dr. Berrier's testimony as to the dissimilarity of the analogue's chemistry to the controlled substance, because the

testimony was Exculpatory, Admissible, and Not Cumulative). Galecki's first trial resulted in a mistrial because the jury was hung on the issue of whether XLR-11 and UR-144 were analogues. Ecf. No. 875 at 8. In Galecki's second trial "the government questioned defendant's 'hired guns' about the compensation they received for testifying". Only after the jury indicated it was at an impasse on the issue of substantial similarity and the district court issued an Allen charge, did the jury decide not to believe his hired experts. The Circuit stated "[Dr. Berrier's testimony] was exculpatory because Defendants could have supported their case theory that the substantial similarity of XLR-11 and JWH-018 was a difficult question with evidence that even highly-trained DEA scientists disagreed about the answer... The jurors struggled to decide whether XLR-11 is substantially similar to JWH-018, and indicated by their note to the district court that they were 'basically hung on Count 1, substantially similar' J.A. 2048. That note prompted the court to issue an Allen charge, after which the jury convicted Defendants. Had Defendants presented testimony from someone who opined on that very issue in the court of his duties as the DEA, the jury could have entertained reasonable doubt that instead of relying on casting doubt about whether XLR-11 and JWH-018 are substantially similar in chemical structure." The Fourth Circuit reasoned that instead of relying on casting doubt on Dr. Trecki's testimony with a hired expert, "Dr. Berrier could have rebutted the testimony of Dr. Trecki, the Government's DEA expert, with his own knowledge of the DEA process and analysis. His expert testimony which diverged from Dr. Trecki's could have shown the jury that the DEA's own scientists could not agree on the substantial similarity of the chemicals at issue... In contrast to a hired chemist, Dr. Berrier was not paid outside the DEA employment to form his opinion about XLR-11 and UR-144's chemical similarity to JWH-018. He could not be impeached for pecuniary motive, nor would Galecki have paid him to testify at trial."

10. Dr. Berrier's testimony would have been "qualitatively different" and prevailed on raising a reasonable doubt to Brik's guilt, whereas Dr. Mark Erickson could not have produced that type of persuasive rebuttal testimony. This possibility is no hypothetical: See United States v. Adams, 2017 U.S. Dist. LEXIS 26351 (D. Kan. 2017)(Ordering the Motion to Compel Dr. Berrier and Mr. Comparin's testimony at trial, where the jury then acquitted Broombaugh and Adams on all charges).

11. In Brik's Joint Trial Brief, he disclosed his Defense before trial, "Defendants maintain their defense of not guilty. Defendants did not know that the substance at issue in the indictment, namely AM-2201, UR-144 and XLR-11 were controlled substance analogues"..."The defense expert will testify that there is no consensus in the scientific community that these products are chemical analogues to a controlled substance".

12. Brik denied the Government's plea offers to avoid them preparing for trial to the sentence of 66 months, then to 72 months with half of his forfeiture returned (roughly $75,000). After weighing the value in the eyes of the jury, of Dr. Mark Erickson's hired rebuttal testimony against Dr. Jordan Trecki's testimony, counsel determined Brik would not prevail on raising a reasonable doubt and advised him to plead (on the first day of trial) to a sentence of 138 months with no forfeiture returned.

13. The Government's misconduct lays directly in conflict with, and erodes the factual basis upon which the district court relied to accept Brik knowingly admitting that the Government would establish beyond a reasonable doubt at trial that AM-2201, UR-144 and XLR-11 are analogues to JWH-018, and that he knew they were analogues. See Fed.R.Crim.P. 11(b)(3). There is a reasonable probability that Brik would not have plead guilty in light of the evidence from Dr. Berrier, nor would competent counsel have recommended him to. The evidence as a whole bolstered Brik's defense and proved his actual innocence. Therefore his Due Process was violated by the wittheld Brady material rendering Brik's plea and plea waiver constitutionally infirm as unknowingly and involuntary under Brady v. United States.