22-6277

No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

PAUL E. PAVULAK, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition For A Writ Of Certiorari To The

United States Court of Appeals

For the Third Circuit

Paul E. Pavulak
Reg. No. 05577-015
Federal Medical Center
PO Box 1600
Butner, NC 27509

Pro Se

QUESTIONS PRESENTED

1. When a petitioner challenges a procedural bar in his 2255 which based on a fraud on the court, may a District Court Judge dismiss this motion as a Successive or Second 2255 without the adjudication on the merits involving the fraud under Rule 60(d) 3?

2. May a Circuit Court deny issuing a COA when a District Judge abuses his discretion by dismissing a Rule 60(d)(3) Fraud motion that challenges a procedural bar, without adjudication of the motion on its merits?

TABLE OF CONTENTS

TABLE OF APPENDICIES

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Paul Pavulak respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Third Circuit in this case. Mr. Pavulak further requests that should a writ be granted, he be appointed counsel to argue the merits of his case before the Court.

OPINIONS AND ORDERS BELOW

The judgement of the United States District Court for the District of Delaware 2021 U.S. DIST.LEXIS 41267. The Third Circuit's order denying Mr. Pavulak's Request for a certificate of appealability is reprinted at App. A. The order denying Rehearing of denial of the certificate of appealability is reprinted at App. 2a.

JURISDICTION

The Third Circuit entered its order denying a certificate of appealability on December 6, 2021. A petition for rehearing was denied on April 24, 2022. on July 11, 2022, Justice Alito granted application No. 22A11, extending the time within which to file a petition for certiorari to and including September 24, 2022. This Court has jurisdiction pursuant to 28 U.S.C. ss 1254 (1).

STATEMENT OF THE CASE

The Fraud perpetrated on the court by the egregious conduct of both the Public Defender, Mr. Ortiz, and Federal Prosecutor, AUSA McAndrew, was a primary determinant that unduly influenced the district court judge to procedurally bar the defendant's first three grounds of his 2255.

GROUND ONE

Mr. Pavulak's Sixth and Fourteenth Amendment rights were violated when the judge excluded him and the general public from attending the voir dire of prospective jurors.

GROUND TWO

Mr. Pavulak was excluded from the entire voir dire process, in violation of Fed. R. Crim. P. 43(a)(2).

GROUND THREE

Trial counsel failed to protect Mr. Pavulak's right to be present during the jury selection process.

The judge combined the petitioners first three grounds into a newly labeled, ground one.

The deceptive evidence, included in the Government's opposition brief (DI 177), was a fraudulent affidavit prepared by Mr. Ortiz (Ex A-Ortiz Affidavit) which became the basis of the narrative of footnote 1 in support of the procedural

bar. (Ex B Pg 9-11) 2255 Denial (DI 186).

Mr. Ortiz lied when he averred that Mr. Pavulak attended a Pre voir dire meeting at 9:20 a.m., September 20, 2010 and waived his right to attend the questioning of the jury pool; that Mr. Pavulak sat next to him at the defense table while the judge explained how she was going to interview each juror, in the jury room; and advised Mr. Pavulak not to accompany the lawyers into the jury selection process. The defendant never attended this meeting.

AUSA McAndrew exacerbated this false rendition of the meetings by introducing a fax from Sheriff Henderson (Ex. C fax) in which he affirmed that Mr. Pavulak was brought UP TO not INTO the court room at 9:20 a.m.

The trial transcript of the entire voir dire meeting (Ex D Pg 1-9, transcript) proves that Mr. Pavulak was absent from the meeting. The subject of closing the voir dire to Mr. Pavulak or the Public was never discussed and Mr. Oritz could not have advised the defendant since Mr. Pavulak was absent. The transcripts begins by stating Mr. Pavulak was not present, and there is no reference that he was brought into the meeting. The meeting concludes with the Judge announcing that she was taking a recess and left it up to the lawyer as to when they brought the defendant in. The transcript also confirms that the Judge never mentioned any reason for excluding the public, with an "on the record discussion" for the reasons to close are required by WALLER 467 U.S. 39, 46 (1984). Therefore up to this point in the proceedings, with no mention of closing,

Mr. Pavulak or his Attorney had nothing to object to. Once Judge Robinson ordered only the attorneys, to accompany her to the Jury room or the voir dire, it was clear to AUSA Kane that the Defendant was absent and the public was excluded. Ms. Kane was sent from the Attorney General office, Department of Justice, to assist with the prosecution.

Expressing her knowledge and experience in the jury selection process, AUSA Kane voiced an objection that Mr. Pavulak was absent. Knowing that the Fed. R. Crim P. 43 (a)(3) specifically states that the Defendant's presence is required at jury selection. She told the judge "that either the defendant should attend or waive his rights "on the record". If Mr. Ortiz had discussed, as he averred to in his false affidavit, that a waiver by Mr. Pavulak was already discussed and he would have at this time informed the court. Judge Robinson overruled this objection stating that in her court defendant's do not attend the jury selection. This is in complete disregard of the defendant's rights. (Ex E objection)

Judge Robinson, in denying Mr. Pavulak's 2255, procedurally barred his claim by ruling "Review of this case reveals that movant defaulted claim one because he did not raise it to this court during jury selection".

AUSA Kane was immediately aware of the looming structural error and constitutional violations about to take place and voiced an objection in a timely, concise fashion providing the Court with the opportunity to consider the consequences of proceeding with a closed voir dire. The Court did not request

an "on the record" waiver from Mr. Pavulak or conduct an on the record analysis of the Waller factors required to close a trial. In determining the sufficiency objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate stated interests, and therefore sufficient to preserve the claim for review. WRIGHT v.GEORGIA 373 U.S.248, 289-291; DAVIS v. WECHSLER 263 U.S.22, 24; LOVE v. GRIFFITH 266 U.S. 52, 33-34. No legitimate interest would have been served by requiring repetition of a patently futile objection. OSBOURNE v. OHIO 495 U.S. 103, 122-25 (1990)

Mr. Pavulak was twice prejudiced by the malfeasance of Luis Ortiz. First, Ortiz failed to protect the Petitioner's right to a public trial and to be present at voir dire. Then he lied about his failure. Ortiz abandoned his former client by becoming a willing witness for the prosecution, abandoned his role and duties as an attorney and prejudiced the judge in her ruling of Mr. Pavulak's 2255. American Bar Association Formal Opinion 10-456.

The Petitioner's 2255 motion also raised ineffective assistance of appellate counsel as a ground for relief and excuse for default.

The deficient performance of Mr. Pavulak's appellate attorney, Mr. Miller, is even clearer then that of Mr. Ortiz, and it is subject to the same two-prong Strickland analysis as the performance of trial counsel.

Appellate counsel failed to raise or argue the violation of Mr. Pavulak's voir dire

rights. When ignored issues are clearly stronger than those presented will counsel on appeal be found ineffective. Smith v. Robbins, 528 U.S. 259, 288 (2000). Mr. Pavulak's attorney devoted the first twelve pages of his main argument to a sentencing claim that would leave his then 68 year old client with a minimum 35year prison term. The success of that claim hinged on interpreting the relevant statute in a way so squarely foreclosed by precedent that the Third Circuit saw fit to remind appellate counsel of the basic principle of stare decisis. See Pavulak, 700F.3d at 674.

There can be no strategic reason for arguing a claim that is both weak and affords no meaningful relief while an obvious abuse of defendant's constitutional rights error, that would require reversal, goes unargued. Omission of a strong claim creates an inference that appellate counsel's performance fell below an objective standard of reasonableness. See United States v. Mannino, 212 F.3d 835, 840-44 (3rd CIR.2000); Withers, 638 F. 3d at 1065 (finding appellate counsel ineffective for failing to raise a public trial claim). The strength of the omitted claim relates also to the prejudice inquiry, which turns on whether The appeal may have been granted had the claim been brought. Mannino, 212 F. 3d at 847. A strong omitted claim may therefore establish both prongs of the Strickland inquiry. E.G., Eagle v. Linahan,

REASONS FOR GRANTING THE PETITION

This Rule 60 motion raises no new claims or evidence that would invalidate Mr. Pavulak's conviction. It does not challenge the proceedings that resulted in the Petitioner's imprisonment. Rather, it challenges the proceedings in which Mr. Pavulak's 2255 motion was ruled upon, using fraudulent information and evidence submitted by the Government not available on appeal. Such challenges are the core function of Rule 60 (d)(3). Indeed, when a judgement is shown to be obtained by fraud, Third Circuit precedent holds that Rule 60 relief is mandatory rather than discretionary. Such relief is especially called for when the perpetrator of fraud is an officer of the court.

Fraud on the court, can be characterized as a scheme to interfere with the Judicial machinery performing the task of impartial adjudication. 19 A.L.R.Fed. 761 (1974). A finding of fraud on the court is justified by the most egregious misconduct directed to the court itself, such as bribery of a judge or jury or fabrication of evidence by counsel, United States v. International Telephone & Telegraph Corp., 349 F. Supp. 22, 29 (D. Conn 1972), aff'd sub nom. Nader v. United States, 410 U.S. 919. Relief under Rule 60 (d)(3) is available upon a showing of: (1) intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that "in fact deceives the court". Gillespie v. Janey, 527 F. App'x 120, 122 (3rd CIR. 2013)

When a district court is presented with a Rule 60(d) motion after it has denied the petitioner's federal habeas application, the court must first determine

If the Rule 60 (d) motion constitutes a second or successive 2255 as articulated by the Third Circuit.

In those instances in which the factual predicate of a petitioner's Rule 60 (b) motion attacks the manner in which the earlier habeas judgement was Procured and not the underlying conviction, the Rule 60(b) motion may be Adjudicated on the merits. Pridgen v. Shnnon 380 R. 3d 721, 727 (3rd CIR 2004).

The District Court should have conducted an evidentiary hearing on this claim. Mr. Pavulak therefore urges more than an inadvertent mistake by the District Court, and instead argues that the District Court committed an error of law. In HAZEL-ATLAS, the Supreme Court held that a federal court possesses inherent power to vacate a judgement obtained by fraud on the court. See 322 U.S. at 248-49, 64 S. Ct. 997. The court thus "recognized what is now referred to as the 'fraud on the court' doctrine." ROBINSON v. AUDI AKTIENGESELLSCHAFT 56 F. 3d 1259, 1266 (10th CIR 1995). Rule 60(b) Sets forth grounds upon which a party may move the district court to grant relief from a final judgement. And rule 60(d)(3) confirms that Rule 60 "does not limit a court's power to..... set aside a judgement for fraud on the court." Moore's Federal Practice 60.81[1][a](3d ed. 2016). "There is no time limit on setting aside judgement" based upon a claim of fraud on the court under Rule 60(d)(3). Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and procedures 2870 (3d ed. 2012).

Second or Successive Habeas Peitions's vs. True Rule 60(b) Motions.

Under Gonzaelz, a 60(b) motion is a second or successive petition if in it substance or effect asserts or reasserts a federal basis for relief from the

petitioner's underlying conviction. See 125 S. Ct. At 2651. Conversely, it is a "true" 60 (b) motion if it either (1) challenges only a procedural ruling of the habeas court which precluded a Metis determination of the habeas application, id. At 2648 n.4; or (2) challenges a defect in the integrity of the federal habeas proceeding, provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition, Id. At 2648.

A 60(b) motion that challenges only the federal habeas court's ruling on procedural issues should be treated as a true 60(b) motion rather than a successive petition. See id. At 2648 & n.4. Thus, for example, a motion asserting that the federal district court incorrectly dismissed a petition for failure to exhaust, procedural bar, or because of the statute of limitations constitutes a true 60(b) motion. See id.

A Rule 60(b) motion asserting fraud or other defect in the integrity of the federal habeas proceeding may also constitute a true 60(b) motion, although this type of motion requires a more nuanced analysis. For example, whether a 60(b) motion alleges a defect in the integrity of the habeas proceeding, based upon a claim of fraud on the court relates solely to fraud perpetrated on the federal habeas court, then the motion will be considered a true 60(b) motion. See id. At 2648 n. 5.

The judge declined to issue a C.O.A. because the motion failed to make a "substantial showing" of the denial of a constitutional right.

The right of a defendant to be present at criminal proceedings is rooted in the confrontation clause of the Sixth Amendment, the due process clause of the Fourteenth Amendment, and a common law right of presence. United States v. Washington, 705 F. 2d 489, 496; 227 U.S. App. D.C. 184

Petitioner's constitutional rights were violated when the district judge closed the voir dire stating she doesn't permit defendants to attend the voir dire in her court. The Third Circuit Court of appeal denied petitioners request for a COA for three reasons: (1) Jurists of reason would not debate the district courts Decision to reject appellants motions seeking relief under Rule 60(d)(3). BRACEY v. SUPERINTENDENT 986 F. 3D 274, 282-3 (3RD CIR. 2021). In Pavulak's case his Rule 60 (d)(3) was dismissed. In Bracey "the court decides whether a petitioner is entitled to a certificate of appealability in two steps. First, the court asks whether his underlying claim is debatable on the merits. His burden on this point is a light one. He must show absence of frivolity or the existence of mere

good faith. Indeed, he need not even prove that some jurists would grant the petition, as a claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case has received full consideration, that the petitioner will not prevail. Second, the court asks whether jurists of reason would find it debatable whether the district court

was correct in its procedural ruling. On this second point, too, the petitioner's burden is light; he must merely make a credible showing that the districts court ruling was erroneous. On the merits, the appellate court performs a threshold inquiry regarding the underlying claim, without full consideration of the factual or legal bases adduced in support of that claim."

Appellant easily meets this burden. The fraud is proven by the trial transcripts.

(2) Appellant's Motions attacked his underlying conviction and sentence, which constituted an unauthorized second or successive motions under 28 U.S.C 2255. GONZALEZ v. US 545 U.S. 524, 530-32 (2005). This 60(d)(3) Fraud challenges the judge's procedural bar of the jury selection process by refusing to adjudicate a merit review of Pavulak's constitutional rights and his rights under Fed.R.Civ.P. 43(a)(2) right to attend jury selection. This is not a motion attacking a conviction or sentence.

(3) Relief under Rule 60(b) would not be warranted because applicant had an opportunity to raise his current arguments in his appeal from the denial of his 2255 motion. Rule 60(d)(3) provides that a court has the power to "set aside a judgement for fraud on the court." Fed. R. Civ. P. 60 (d)(3). The concept of "fraud upon the court should..... embrace only that species of fraud which does or attempt to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial take of adjudging cases that are presented for adjudication,

CONCLUSION

It is proven by the trial transcript that Mr. Pavulak's constitutional rights were violated when, through a coordinated fraud plot, it was utilized to deceive the court by two officers of the court. They showed their willingness to abandon their oath and lied to hide their actions at the expense of the defendants' rights under Fed. R. Crim. P 43(a)(2) and the Fifth, Sixth and Fourteenth Amendment of the Constitution. A Rule 60(d)(3) is the motion to attack and correct this obstruction in the court proceedings. The petitioner prays that this court will agree and order a merit adjudication of Petitioners 2255 claims of his constitutional rights to a public trial and his right to participate be upheld.