

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. Dodszeit

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

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE
3

4
5 UNITED STATES OF AMERICA, : CRIMINAL ACTION
6 Plaintiff, :
7 vs. :
8 PAUL E. PAVULAK, :
9 Defendant. : NO. 09-00043 (SLR)
10

11 Pet. Note: Transcript Wilmington, Delaware
12 shows that proceedings Monday, September 20, 2010
13 began at 9:19am ----> 9:19 o'clock, a.m.
14

15 BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J., and a jury
16

17 APPEARANCES:
18

19 EDWARD J. McANDREW, ESQ.,
20 Assistant United States Attorney
21

22 -and-
23

24 BONNIE L. KANE, ESQ.
25 U.S. Department of Justice - Criminal Division
(Washington, D.C.)

Counsel for Plaintiff

Valerie J. Gunning
Official Court Reporter

Ex D1

1 APPEARANCES (Continued):

2
3 LUIS A. ORTIZ, ESQ. and
4 BRIAN C. CROCKETT, ESQ.,
5 Assistant Federal Public Defenders

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7 Counsel for the Defendant
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PROCEEDINGS

(Proceedings commenced in the courtroom,
beginning at 9:19 a.m.)

THE COURT: Good morning, all.

MR. McANDREW: Good morning, your Honor. Ed
McAndrew for the United States. We're here for the trial in
the matter of United States of United States versus Paul
Pavulak, case number 09-43. Counsel are present. Mr.
Pavulak has not been brought in yet.

THE COURT: All right. I wanted to bring you in
because I made an executive decision at the end of the day

Ex D2

1 Friday. I don't know which of you has listed all the
2 custodians and potential witnesses.

3 MR. McANDREW: That would be me.

4 THE COURT: I eliminated all. I think I kept
5 the U.S Airways record custodian, but I'm not exactly sure
6 what we're looking for in terms of a conflict, because is it
7 a person, or do they use U.S Airways?

8 MR. McANDREW: Your Honor, we listed --

9 THE COURT: I wasn't sure that was a very
10 helpful way of picking, especially with all the other
11 incredibly difficult questions we had.

12 MR. McANDREW: Your Honor, we listed everyone in
13 an abundance of caution because we don't yet have the signed
14 stipulations, which I understand we'll have momentarily. So that
15 means that all of the custodians with the exception of the
16 custodian from Xoom Corporation and potentially US Air, but
17 I think that's going to fall off, too. All of those
18 custodians are going to be eliminated from the witness list.

19 THE COURT: Yes.

20 MR. McANDREW: In addition, if we have a
21 stipulation on his prior offenses, and the child
22 pornography, portions of the child pornography charge,
23 that's going to eliminate another four to six witnesses. So
24 this is an, in an abundance of caution, we listed everyone,
25 but this list is ultimately going to be much, much shorter.

Ex 83

Pet. Note: Discussion of voir dire procedure begins here.
There is no indication of prior off-the-record discussion. 4
In fact, the judge explicitly states that she is considering
the matter for the first time "off the top of [her] head."

1 THE COURT: Well, of course. This is going to
2 be an exhausting jury selection process. And the question
3 is, I mean, I would find it amazing if we had any juror who
4 did not answer any of these questions affirmatively.

5 MR. McANDREW: I concur.

6 THE COURT: And the question is, I mean, I'm
7 wondering, and I'm suggesting this. I'm thinking off the
8 top of my head.

9 In a case like this, would it be even -- would
10 it be just as quick to read all of the questions, but rather
11 than having people stand up and try to keep track of who
12 answered what, read the questions and basically just bring
13 everybody in, one at a time, one through however many we
14 have, and say, which of the questions did you think, you
15 know, you answered affirmatively, just the subject areas.
16 Was it a witness? Was it something about the nature of the
17 charge, rather than -- I mean, it's difficult enough in a
18 simple case to question three, jurors 1, 5 and 7 answered
19 yes. With as many as we have today, it's going to be

20 exhausting to try to do that. Note: The judge never states that
questioning will take place privately.
"just bring everybody in, one at a time"

21 MR. McANDREW: Sure. is ambiguous at best and could
refer to bringing them in from a

22 THE COURT: Does that work? waiting room or having
them approach the bench

23 MR. McANDREW: From the government's viewpoint,
24 that makes perfect sense. In fact, I'm not even sure if
25 your Honor needs to read the questions in the courtroom.

Ex D-9

1 THE COURT: Well, I think I do because I think
2 they need to have it. I don't want to read all of them.

3 MR. McANDREW: Yes.

4 THE COURT: So I think I do need to read them
5 once and just tell everybody, just keep in mind where your
6 concerns are and we'll follow up individually. And I don't
7 know. Perhaps at the end I'll say, is there anyone who
8 didn't answer any, but maybe we just bring them all in
9 anyway.

10 Pet. Note: Mr. Ortiz agrees. MR. McANDREW: I think so. I mean, I think --
11 There is no mention of private or MR. ORTIZ: That's our request. We, of course,
12 sensitive questioning. concur in that. It was going to end up this way, I believe,
13 anyway. I can't imagine -- I believe that all 90 will have
14 checked at least something, and therefore I concur in your
15 Honor's thoughts..

16 THE COURT: Okay. All right. Well, we will do
17 that and that will save me the embarrassment of not keeping
18 track of everybody. And that would take probably another
19 hour, just to do that initial step, so I would rather be
20 talking to the jurors than trying to do the administrative
21 stuff. All right. So we'll give it a shot, see how it
22 works. Obviously, if it works poorly, we won't ever do it

23 Pet. Note: The Court moves on to other matters. There was
24 again. no indication of the judge's intent to conduct voir dire
in private without Mr. Pavulak present.

25 All right. And so I guess we'll just deal with
the witness list, since we're not going to have to keep

Ex D5

1 track of who knows whom at this point. They've got a list
2 that I think does not include any of the records -- well, it
3 does not include any of the records custodians but the US
4 Air custodian. I don't know that I have it.

5 MR. McANDREW: We can provide the names of
6 those, the names of the two custodians.

7 THE COURT: Oh, that have names now?

8 MR. McANDREW: We now have the names of the
9 witnesses.

10 THE COURT: I want to be helpful. I need to
11 look them up, I think. I'm not sure I have them off the top
12 of my head. Actually, I do. All right.

13 MR. McANDREW: Donna Williams for US Air. And
14 it's George Garcia for Xoom.

15 THE COURT: All right.

16 MR. McANDREW: With regard to the other
17 witnesses, substantive witnesses, who may fall off the list,
18 there's some chance, depending on what happens in the trial,
19 they could potentially be called in rebuttal, even --

20 THE COURT: So we could keep them on.

21 MR. McANDREW: I would just leave them on.

22 THE COURT: They are listed there. If someone
23 knows them, they can decide what to do with it.

24 All right. There are an awful lot of people and
25 it's taking them some time, so unless you want to look at me

Ex D6

1 for the next ten minutes, I will leave the bench, and as
2 soon as they come up, I will come back in.

3 MR. ORTIZ: Your Honor, I added two names, too,
4 which I just gave your Honor. They're obvious witnesses
5 that the government point out they knew about. It's the
6 only other witnesses. My investigator only for rebuttal,
7 but I wanted to include that.

8 THE COURT: Sure.

9 MR. ORTIZ: And obviously, we have an expert,
10 Tami Loehrs, who is from Arizona. I don't imagine anyone
11 would know her, but out of an abundance of caution.

12 THE COURT: I think those have been added to the
13 written list, so I don't necessarily have to orally add
14 them. I would need to add the Donna Williams and the George
15 Garcia, but I will make sure of that.

16 MR. ORTIZ: Much appreciated, your Honor. Thank
17 you.

18 THE COURT: Anything else?

19 MR. McANDREW: One preliminary matter for
20 opening. In the opening statement, the government wanted to
21 refer, not by quotation, but to paraphrase some of the chats
22 and the e-mails that were the subject of our motion and
23 admit the digital evidence and some quotations, and I
24 understood the defense not to have an objection, but I
25 wanted to be clear about that. They filed an opposition and

Ex. D7

1 at the pretrial conference they expressed no objection. I
2 just wanted to be clear about that.

3 Obviously, during the trial, we'll have to lay a
4 foundation for them before they come in, but in terms of
5 relevance and everything else, we would just like to be
6 clear about it before we refer to them.

7 MR. ORTIZ: Your Honor, I don't know exactly.
8 From a factual matter, I would. I don't anticipate. I'm
9 assuming they're not presenting their case-in-chief in the
10 opening, so if that's not happening, we generally give a lot
11 of leeway as we usually get back.

12 THE COURT: Well, maybe you can have more of a
13 discussion.

14 MR. ORTIZ: Yes.

15 THE COURT: Because, generally, if there's a
16 dispute about what can be shown in opening, it does not get
17 shown, because in the list of everything I have to do, that
18 isn't a priority. So if you could talk.

19 MR. McANDREW: Your Honor, just to be clear,
20 we're not going to show anything.

21 THE COURT: It's just referring, describing, in
22 general?

23 MR. McANDREW: Yes.

24 THE COURT: Well, it wouldn't hurt to have a
25 short conversation.

Ex D-8

Pet. Note: The comment immediately below indicates that 9
Mr. Pavulak still was not present in court when the judge
called a recess.

1 Well, actually, I'm going to step out because I
2 don't think we have our jurors here, but in terms of when
3 you bring the defendant in, that's fine. All right.

4 MR. McANDREW: Thank you, your Honor.

5 THE COURT: Thank you, counsel. I will be back
6 momentarily. Pet. Note: Judge Robinson's parting comment suggests
she would be leaving the room directly.

7 (Short recess taken.)

8 Pet. Note: Per Mr. Pavulak's declaration, he entered court as soon as
it recessed and did not - - - see the judge present. Mr. Pavulak
declared he was present from this point forward, and that no discussion
9 with counsel (Proceedings resumed after the short recess.)
of in-private voir dire occurred, since the judge had not disclosed her
10 intent to hold THE COURT: All right. Let's bring our folks
voir dire in a back room.

11 in.

12 (The prospective jurors entered the courtroom.)

13 THE COURT: All right. Good morning, ladies and
14 gentlemen. I'm Judge Robinson, and I will be presiding over
15 the trial for which a jury is about to be drawn in the case
16 captioned United States versus Paul E. Pavulak.

17 Briefly stated, defendant is charged with: One,
18 failure register an updated registration as a section
19 offender. Two, possession of child pornography. Three,
20 attempted production of child pornography. And, four,
21 enticement and coercion of a minor.

22 Defendant Pavulak has pleaded not guilty to the
23 charges.

24 The trial in this case is expected to last up to
25 seven days. The government is represented by Edward J.

Ex D9

1 McAndrew, Assistant United States Attorney, and Bonnie L.
2 Kane, trial attorney for the Department of Justice.

3 Defendant Pavulak is represented by Luis A.
4 Ortiz, Esquire, and Brian C. Crockett, Esquire.

5 In light of this brief summary, I'm going to ask
6 you certain questions in order, first, to enable the Court
7 to determine whether or not any prospective juror should be
8 excused for cause. And, second, to enable counsel for the
9 parties to exercise their individual judgment with respect
10 to peremptory challenges. That is, challenges for which no
11 reason need be given by counsel.

12 Now, I'm doing this a little differently than I
13 usually do. I'm going to read all the questions, and what
14 I'd like each of you to do is keep track in your own mind
15 about which questions you would answer affirmatively,
16 because I suspect that each of you will answer at least one
17 answer affirmatively. I'm going to call you in one at a
18 time and we're going to talk to all of you, which is going
19 to take some time, but I think easier than trying to keep
20 track of which of you answered which questions. So listen
21 carefully to the questions, please. We're going to ask you
22 all to come back and we'll ask you about which questions you
23 answered affirmatively and what concerns you have about
24 Pet. Note: The judge still has not
serving as a juror in this case. stated that questioning will
occur in another room.

25 Ms. Fasano, would you please administer the oath

Ex - D10

Pet. Note: This is the beginning of private questioning in the back room. Transcripts of the proceedings were sealed.

(The following occurred in the jury room and is under seal, transcribed under separate cover.)

MR. McANDREW: Your Honor, before we bring the first juror in, my colleague wants to address an issue.

MS. KANE: I just wanted to raise a small issue. I'm aware of this because of another colleague of mine who handled a similar case where they did individual voir dire outside the courtroom where the defendant did not waive on the record his, I guess, his right to be participating or to be able to be present during this.

THE COURT: We've never, in this court, we've never had the defendants present.

MS. KANE: I just wanted to raise it.

THE COURT: All right. Let us bring Juror No. 1 in.

MR. CROCKETT: Your Honor, I assume we're just going in numerical order?

THE COURT: Yes.

Hi. How are you? If you could have a seat here, sir. And I believe you are Juror No. 1.

JUROR NO. 1: Yes.

THE COURT: And did you have any concerns about serving as a juror in this case based on the questions that I asked?

Ex. E