IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

Glen Alan Spicer,

petitioner,

-vs- Case No.1:08-CV-747

United States of America,

respondent.

* *

OBJECTIONS TO MAGISTRATE PEAKE'S REPORT AND RECOMENDATION

Glen Spicer objects to the magistrate's report generally, and thereby seeks de novo review by this court.

At the threshold, Mr. Spicer identifies a critical error in the factual findings where the magistrate contends: "[A]fter all of the evidence was presented, Petitioner's attorney stated that he did not wish to challenge Petitioner's guilty plea, but still sought to challenge the drug quantities...." (Doc.#229, p.4). The magistrate is simply wrong. The decision to withdraw the challenge to the guilty plea occurred prior to the presentation of the evidence. (Addendum "B"). The magistrate's chronology incorrectly infers that it was the evidence, and not Mr. Edward's misunderstanding of the law, that caused Mr. Spicer to withdraw the challenge. The magistrate's chronology is simply not possible, since the withdraw occurred prior to the testimony. **Id.**

Mr. Spicer does, however, agree with Magistrate Peake that Magistrate Dixon never reached the merits of Mr. Spicer's grounds, whether the grounds

were valid or invalid. (Doc.#229, p.5). That conclusion provides a key support necessary for Rule 60 relief. The Supreme Court's paradigmatic example of a proper Rule 60(b) motion is where a defect in the integrity of a habeas proceeding prevents the court from reaching the merits of a valid cognizable habeas ground. See **Gonzalez v. Crosby,** 545 U.S. 524 (2005); **United States v. Winestock,** 340 F.3d 200, 207 (4th Cir. 2003). Magistrate Peake's finding that the pivotal issue was never decided is undisputed.

Correspondingly, in order to adjudicate these objections, and decide this motion, the court need only decide whether any of three events Mr. Spicer has identified constitutes a defect in the integrity of the habeas proceedings. During the §2255 proceedings there were three significant events that destroy the reliability of the §2255 process:

1. The actual and constructive denial of (constitutionally and statutorily) required counsel.

2. The government failed to ensure the district court had accurate information, by neglecting to disclose that the indictment had been obtained through perjury suborned by a prosecutor masquerading as a licensed attorney.

3. The §2255 court lacked subject-matter jurisdiction to conduct the particular proceedings, because once the challenges to the guilty plea were withdrawn, there no longer existed a case and controversy.

1. The actual and constructive denial of constitutionally required counsel equates to a defect in the integrity of the habeas proceeding.

(A) When a §2255 involves an initial-review claim of constitutional trial error, the motion is the functional equivalent of a first appeal of right. The Constitution guarantees all criminal defendants the effective assistance of counsel during the first-appeal-of-right stage in the criminal proceeding.

The magistrate concludes that Mr. Spicer did not have a right to counsel during the §2255 proceedings. (Doc.#229, p.3). The magistrate's conclusion

relies on **Pennsylvania v. Finley**, 481 U.S. 551, 555 (1987)(Doc.#229, p.3). The magistrate's reliance is misplaced. Instead, **Finley** supports Mr. Spicer's proposition that he was entitled to effective assistance of counsel. As the magistrate states, **Finley** holds that "the right to appointed counsel extends to the first appeal of right, and no further." **Id.** Mr. Spicer contends that his §2255 actually was his first appeal of right.

Succinctly, Mr. Spicer had meritorious claims of government misconduct and ineffective assistance of trial counsel, none of which could not have been presented on direct appeal because the government suppressed the material facts (false testimony, suborned perjury, etc.). Stated otherwise, these claims, necessarily, could not ripen for review before the operative facts had been revealed. Thus, the §2255 proceeding constituted the first appeal of right for those constitutional trial error claims.

The Supreme Court has determined that traditional procedural default rules do not apply to constitutional-trial-error claims when those claims could not have been previously raised. See, e.g., **Trevino v. Thaler**, 133 S.Ct. 1911 (2013); **Martinez v. Ryan**, 132 S.Ct. 1309 (2012). The factual circumstance giving rise to the holdings in **Trevino** and **Martinez** were considerably less egregious than in Mr. Spicer's case. In those cases, the Court decided that even though the operative facts necessary for the claims had previously been known, the habeas proceeding still qualified as a first appeal of right. **Id.** Here, the government's deliberate actions prevented Mr. Spicer from timely learning the appropriate facts.[1/]

1/. The facts revealed at or after the hearing include that Agent Tony Sadler and his colleagues fabricated the testimony of Joshua Hall, Joe Tackett, and Richard Smith; that the prosecutor who obtained the indictment was not a prosecutor; etc. The effect of these and other misbevior has never been addressed by this court because of the §2255 proceedings flaws.

Accordingly, and contrary to the magistrate's premises, the Constitution guarantees Mr. Spicer the effective assistance of counsel during his §2255 because the motion contains first-appeal-of-right issues. Cf. **Williams v. Turpin**, 87 F.3d 1204 (11th Cir. 1996); **Id.**[2/] Instead, Mr. Spicer was actually denied counsel altogether with regard to formulating the claims, and he was constructively denied counsel as a result of Mark Edwards's generally deficient performance.

(B) Once a validly established §2255 claim is identified as warranting an evidentiary proceeding, defendants are statutorily entitled to counsel. Just as the Supreme Court has extended the concept of trial to include direct appeals, so too does its jurisprudence treat a §2255 as another step in the criminal proceedings. Consequently, even if counsel is not initially required for a proceeding, once one is required, that attorney must be competent to the task.

Mr. Spicer acknowledges that the general rule states that he is not entitled to appointed counsel in a collateral proceeding. See **United States v. Williamson**, 706 F.3d 405, 416 (4th Cir. 2013); **Reid v. Angelone**, 369 F.3d 363 (11th Cir. 2004). What does not follow from that premise is the conclusion that the court may appoint incompetent counsel.

It is absurd to postulate that because you are entitled to no help, I am authorized to actually harm you under the guise of voluntarily helping. Even if Magistrate Peake is correct that such a concept is nominally supported by Supreme Court dictum, (Doc.#229, p.3)(citing **Wainwright v. Torna**, 455 U.S. 586, 587-88 (1982))(although using a "see" signal), it is merely an example of why dicta has no stare decisis effect; sometimes applying, even well reasoned stray thoughts simply does not make any sense.

2/. At a minimum, Mr. Spicer needs counsel to advise him about the nature and consequences arising from the intentionally suppressed facts. That assistance of counsel, which he would have had if the government had not lied, transforms this proceeding into a first appeal of right.

Here, Mr. Spicer would have been better off without Mr. Edwards. Mr. Edwards's misunderstanding of a variety of relevant laws (e.g., the cognizability of a sentencing argument; jurisdictional effect of a mandatory minimum) cost Mr. Spicer his constitutionally guaranteed chance to the writ of habeas corpus.

Additionally, a better decisional analogy for determining whether Mr. Spicer is entitled to effective assistance of §2255 counsel is the line of authority arising from **Evitts v. Lucey**, 469 U.S. 387 (1985). In **Evitts**, the Supreme Court concluded that the Constitution's equal protection principles extended the right to counsel to the statutorily guaranteed direct appellate review. **Id.**; See 18 U.S.C. §3006A. Thus, even though historically the Sixth Amendment's meaning of trial did not include direct appeal, the practical realities of the adversary process, American concepts of fairness, and the Supreme Court decided it should. See **Ohio Adult Parole Authority v. Woodland**, 523 U.S. 272 (1998). There is not logical reason why that principle does not also apply to equally mandated appointment of §2255 counsel. See **Advisory Committee Notes to Rules Governing §2255 Proceeding**, R. 6(a)(2013). In the context of §2255, the logic for effective assistance is more pronounced.

First, unlike a direct appeal, the Constitution requires a person have access to habeas corpus. Thus, even though a direct appeal is not mandated, the Constitution still requires the court to appoint counsel for the direct appeal. The only reason the Supreme Court has not extended that right to habeas is because presumably the defendant had the assistance of counsel during the direct appeal. But where like here, that is not true, then the defendant should receive his one time opportunity with assistance with appellate review. In other words, there are two different review procedures,

one constitutionally created and the other only statutorily created. It is not rational that a person receives assistance of counsel for the statutory review, but not the constitutional review.

Second, in the habeas context the statutory obligation to appoint counsel occurs only after the court has reviewed the record and concluded that in the interest of justice an attorney is required, because the pro se litigant cannot properly prosecute a bona fide claim of constitutional error. Id; 18 U.S.C. §3006A (2010). Consequently, since the court has identified that the pro se litigant is inadequate to prosecute the claim, it would seem absurd to appoint an attorney also inadequate to prosecute the claim.

Once this court appointed Mr. Edwards to represent Mr. Spicer, the Constitution required Mr. Edwards's representation to be competent. Cf. e.g., **Sheperd v. United States,** 253 F.3d 585, 588 (11th Cir. 2001)(per curiam)(collecting cases)(If the statutory right to counsel under Rule 8(c) is abridged, then the error is presumed prejudicial).

(C) Court-appointed trial counsel fell well below the acceptable professional norms on at least three occasions.

(1) Since Mr. Edwards's advice was founded upon a profound miscomprehension of established law, Mr. Edwards's advice was per se unreasonable.

Mr. Edwards did not realize that in the absence of a challenge to the guilty plea, and its supporting stipulation, the §2255 court lacked authority to grant Mr. Spicer relief. (Addendum "A")(Even after Magistrate Dixon's report, Mr. Edwards letter indicates that he thought it possible to obtain a sentence below the mandatory minimum). A belief contrary to established law in this and ever circuit. See **Melendez v. United States,** 518 U.S. 120 (1996).

The Supreme Court recently reenforced its traditional position that a federal district court's authority to punish is established solely by a constitutionally-valid, congressional action; furthermore the conferred authority must be animated only by properly proven facts. See **Alleyne v. United States,** 133 S.Ct. 2151 (June 2013); **United States v. O'Brien,** 130 S.Ct. 2169 (2010); **Blakely v. Washington,** 542 U.S. 296 (2004). Mr. Edwards was wrong when he told Mr. Spicer that he could get a lower sentence even after withdrawing the challenge to the guilty plea and stipulation. That is, Mr. Edwards strategic decision was unreasonable because it relied on a misunderstanding of an established rule. **Hardwick v. Crosby,** 320 F.3d 1127 (11th Cir. 2003); **Lawhorn v. Allen,** 519 F.3d 1272 (11th Cir. 1008). That misadvice cost Mr. Spicer his only real opportunity for habeas corpus relief, i.e., prejudice. These facts represent a quintessential demonstration of ineffective counsel. See **Strickland v. Washington,** 466 U.S. 668 (1984).

(2) An attorney's failure to comply with a client's request to preserve a right to an appeal is per se ineffective.

Magistrate Dixon articulated in his report and recommendation stated that —contrary to counsel's guesswork, the court's ruminations, and the apparent purpose of the evidentiary hearing relief— this court could not grant relief due to the mandatory minimum. Only after reading the magistrate's findings did Mr. Spicer discover that his sentence could not have changed, even though the evidentiary hearing revealed all but 352 grams of methamphetamine used to convict him, had been nothing more than a law enforcement fabrication. What's more, most of the remaining drug weight is nothing more than Magistrate Dixon's extrapolation of Mr. Tisdale's (Mr. Spicer's trial attorney)

interpretation of what Michelle Watson might have meant during her trial testimony.

Moreover, even with the clairvoyantly attained Watson testimony, the magistrate had to resort to speculation to get the 500 grams needed to avoid addressing the merits of any claim. Specifically in terms of Mr. Haynes's contribution to the drug weight mirage, the magistrate speculates on when Mr. Hanynes was in Mr. Spicer's home, on what happened on those days, and how much of the hypothetical drugs were made. (Magistrate Dixon's R & R). Even an untrained layperson, like Mr. Spicer, could see the fallacy in the magistrate's reasoning.[3/] Mr. Spicer told Mr. Edwards to appeal. Mr. Edwards said he would, but then did not. (Attachment "1"; letter of Mark Edwards).

Whether a collateral proceeding or a first right of appeal, an attorney's affirmative misrepresentation or failure to follow a client's express direction to file an appeal constitutes egregious ineffectiveness that rises to the level of an exceptional circumstance to justify Rule 60(b)(c) relief. See **Roe v. Flores-Ortega**, 528 U.S. 470 (2000); **Smith v. Robbins**, 528 U.S. 259, 286 (2000).

(3) Mr. Edwards unfamiliarity with the relevant procedural rules permitted Mr. Tisdale to testify in violation of Mr. Spicer's attorney-client privilege.

Magistrate Dixon ultimately uses Mr. Tisdale's recollection of his impressions of Mrs. Watson's testimony to conclude that Mr. Spicer is not

3/. The magistrate's use of court created facts and speculative inferences alone should invalidate the §2255 judgment. Out of concern our argument not be misconstrued we emphasize, we are not challenging the drug weight findings; rather we are showing that the court's procedure was bad and that Mr. Edwards's was grossly negligent in not following Mr. Spicer's instructions to appeal.

entitled to sentencing relief. Even if the magistrate's decision to dismissing the motion was otherwise correct (i.e., the court lacked subject-matter jurisdiction to address the non-cognizable claim), the events still demonstrate that Mr. Edwards was stunningly ill-prepared for this proceeding.

The filing of §2255 motion constitutes a limited waiver of the attorney-client privilege. See generally **United States v. Nicholson,** 611 F.3d 3d (4th Cir. 2010). However, that waiver does not encompass Mr. Tisdale's testimony. Only in a narrow circumstance where an attorney must reveal a confidence to defend against an ineffectiveness claim is the attorney-client privilege waived. Mr. Edwards permitted Mr. Tisdale to violate that privilege repeatedly. (Addendum "C"). Magistrate Dixon used that breach to emasculate Mr. Spicer's chances of discovering the proceeding was futile.

In sum, Mr. Edwards's decisions were based on his misunderstandings of established law: a court's authority to impose a sentence below a mandatory minimum; the scope of the waiver of attorney-client privilege inherent in §2255 proceedings; etc. The misbegotten decisions foreclosed any merits decisions by this court and caused Mr. Spicer to lose his only chance at habeas corpus.

2. During the §2255 process the government failed to ensure the reliability of the evidence from which the district court's decision would be derived. By failing to disclose that Mr. Spicer's indictment had been obtained through perjury suborned by a prosecutor masquerading as a licensed attorney, the government ignored its duty to ensure a fair proceeding.

(A) At the time of the §2255 hearing, the government knew that the indictment had been obtained through the AUSA's use of perjury suborned from several witnesses; nonetheless, the government failed to disclose the extent of its deceptions.

At the time of the §2255, the government knew that AUSA Folmer, an unlicensed attorney, had used perjury suborned by Chief Agent Sadler in order

to obtain the indictment and induce the guilty plea. The government knew Agent Sadler had made up the testimony of at least Joshua Hall, Joseph Tackett, and Richard Smith. That government informant, Willie Haynes, was not present in Mr. Spicer's home at the time Mr. Haynes is alleged to have made methamphetamine. None of these facts were disclosed to Mr. Spicer or the court. (Cf. Addendum "B"). Consequently, neither Mr. Spicer nor the court could fulfill their roles in the adversarial process, rendering the §2255 proceedings unreliable.

(B) The government's silence constitutes fraud on Mr. Spicer, because if the information had been disclosed, Mr. Spicer would not only have refused to withdraw his challenge to the guilty plea, but also sought to amend his §2255 motion.

A party's fraud that prevents the other party from presenting a claim, or prosecuting a claim, violates Rule 60(b)(3). See **Zurich N. Am. v. Matrix Serv., Inc.**, 426 F.3d 1281, 1289 (10th Cir. 2005); **Hand v. United States**, 441 F.2d 529 (5th Cir. 1971). The government's failure to inform Mr. Spicer, that their prosecutor deceived the grand jury, the court, and Mr. Spicer's defense team, amounts to actionable fraud. **Zurich**, 426 at 1290 (fraud that interferes with the preparation of the pleading meets the Rule 60(b)(3) test). By pretending to be a licensed attorney, and all the credibility that imprimatur carries, Mr. Folmer lent validity to the fictional testimony that resulted in the indictment and conviction. The government failure to disclose in the §2255 proceedings a fraudulent attorney was able to present government-created testimony to get an indictment, plea, and sentence, is the gold standard justifying vacatur of the §2255 judgment. Fed. R. Civ. P. Rule 60(b)(3); (b)(6)(2013). Add to this the government's failure to disclose the extent that law enforcement not only permitted the perjury, but actually

created the perjury, and the unreliability of the §2255 decision without these facts being considered becomes poignant. See, e.g., **Dunlap v. Litscher** 301 F.3d 873, (7th Cir. 2002).

If those disclosures had been timely made, Mr. Spicer would not have withdrawn his challenge to the guilty plea. In fact it is more likely he would have amended his §2255 motion to include claims based on these new revelations.

(C) Since this court was obligated to examine its own jurisdiction, the government's non-disclosure also perpetrated a fraud upon the court.

If the government had timely disclosed the full breadth and scope of its fraud, the court would have recognized the outrageousness of the misconduct. Then, either sua sponte or by Mr. Spicer's informed motion, the court would likely have inquired into the validity of the criminal proceedings. Instead, the government's failure to admit it's role in the misconduct prevented the §2255 court from reaching that claim addressing the facts, both of which demonstrate classic circumstances justifying Rule 60(6) relief. See, e.g., **Dunlap**, 301 F.3d at 875-76.

Notably, the government's attorneys have remained silent throughout proceeding as well, even though this court ordered them to respond to the original motion. The most reasonable inference from this silence is that the current government attorneys are unwilling to enter the fray for fear of having to admit that their unlicensed colleague suborned perjury by the lead agent in order to prosecute the case, or having to lie.

This court should reopen the §2255 proceeding and inquire into the government's behavior. Otherwise, the court, by inaction, condones the government's misconduct at trial by allowing the government to compound the

original malfeasance through omission in the §2255 proceeding.

3. The §2255 court lacked subject-matter jurisdiction to conduct the particular proceedings, because once the challenges to the guilty plea were withdrawn, there no longer existed a case and controversy.

A federal court's subject-matter jurisdiction is limited to that affirmatively granted by Congress. **Ins. Co. of Ireland Ltd. v. Compagnie de Bauxite de Guinee,** 456 U.S. 694 (1982). Moreover, that grant must comport with the Constitution's requirements. **Id.** In the underlying case, two circumstances reveal the district court lacked any authority other than to summarily dismiss the action either for lack of subject-matter jurisdiction or lack of cognizable claim. Had the district court taken that course of action, it would have alerted Mr. Spicer that his opportunity for §2255 relief was being wasted. He would have learned then that by withdrawing his cognizable claims, the entire proceedings had been reduced to either a "moot court exercise" or a sham designed to cover up the government's deceptive conduct.

(A) A constitutional prerequisite to a federal court's subject-matter jurisdiction is an active controversy; otherwise the proceeding is moot and the court is left without authority or power to adjudicate the matter.

A federal Court's subject-matter jurisdiction is decided by Congress, but only within the limits of Article III. See **Bender v. Williamsport Area Sch. Dist.,** 475 U.S. 534, 541 (1986). One principle constitutional constraint is that there exist an actual case or controversy. **U.S. Const. Art. III;** See **Tanner Adv. Group v. Fayette County,** 451 F.3d 777 (11th Cir. 2006). In other words, if an issue is or becomes moot, then the federal court no longer has authority to decide the question, i.e., the court loses subject-matter

jurisdiction. **Sannan v. United States,** 631 F.2s 1247, 1250 (5th Cir. 1980). Significantly, subject-matter jurisdiction cannot be conferred by the parties, nor can a defect in subject-matter jurisdiction be waived. See **United States v. Cotton,** 535 U.S 625, 630 (2002). Accordingly, questions of subject-matter jurisdiction must be raised sua sponte by the court, whenever the facts appear that jurisdiction was or is lost. See **Bender,** 475, U.S. at 541.

In Mr. Spicer's circumstance, the moment Mr. Spicer withdrew the challenges to his guilty plea and the attendant stipulation, the §2255 proceeding became moot. That withdraw extinguished any possibility this court could grant relief. Mr. Spicer's plea stipulation required this court to impose a mandatory minimum sentence. Put differently, based on the stipulated facts (although known to be false) this court lacked the statutory authority and power (jurisdiction) to impose a lower sentence. **Melendez,** 518 U.S. at ; (holding that a district court lacks the authority to impose a sentence below a mandatory minimum). Consequently, the §2255 itself was moot. The court should have informed Mr. Spicer that in the light of the withdraw of a challenge to the stipulation, the motion would be dismissed for want of jurisdiction through mootness.

Magistrate Dixon's decision to continue the proceedings had practical prejudice well beyond wasted resources and offense to a Platonic concept of the separation-of-powers doctrine. The misbegotten hearing reinforced Mr. Spicer and Mr. Edwards mistaken belief that a remedy (lower sentence) could be obtained in the absence of a challenge to the guilty plea. (Addendum "A"). A result, which was a complete impossibility under the circumstance. Cf. **Greenlaw v. United States,** 554 U.S. 237 (2008). At that point in time, if the

magistrate had correctly assessed this court's jurisdiction and informed Mr. Edwards and Mr. Spicer that no relief would be available in the absence of a cancellation of the guilty plea, then Mr. Spicer would not have withdrawn the claims, and this court would have reached the merits of whether the guilty plea was valid.

The court's misapprehension of its duty to monitor its own jurisdiction validated Mr. Edwards's mistaken advice regarding the consequences of withdrawing the §2255 claims. See **Morrision v. Allstate Indemnity Co.**, 228 F.3d 1255, 1260-61 (11th Cir. 2000)(Once a court determines there has been no grant of power to cover a particular matter, then the court's sole remaining act is to dismiss the case for lack of jurisdiction). This court should correct the injustice caused by its own error, this court should vacate the §2255 judgment and inform Mr. Spicer if he persists in the withdraw of his challenges to the guilty plea and stipulation, then the court is obligated to summarily dismiss the motion. See, e.g., **Sanders v. United States**, 373 U.S. 1, 19 (1963)(prior to dismissal the better course of action is to advise the petitioner to amend); **United States v. Thomas**, 221 F.3d 430, 437-38 (3d Cir. 2000).

(B) The Rule Governing §2255 proceedings require the court to review the initial motion and dismiss the action if the motion fails to present a cognizable claim. In that instance, the court must, however, give the pro se litigant notice and an opportunity to correct any such technical deficiency.

This court has a statutory mandate to review a §2255 motion and dismiss the proceeding without further action, if the motion fails to state a cognizable ground for relief. Cf., e.g., **Blackledge v. Allison**, 431 U.S. 63, 76 (1977); **Baumann v. United States**, 692 F.2d 565, 572 (9th Cir. 1982). Yet,

Magistrate Dixon conducted a hearing to address sentencing errors which are not cognizable in §2255. See generally **United States v. Coley**, 2009 U.S. App. 15607 (11th Cir. 2009). Mr. Spicer acknowledges Magistrate Peake's conclusion that this court never decided the sentencing questions (Doc.#229, p. 5). Once more though, the court's decision to proceed has the effect of enhancing the misperception regarding the consequences of withdrawing the challenge to the guilty plea. This court should vacate the §2255 judgment.

CONCLUSION

Mr. Spicer's motion reveals numerous defects in the integrity of the habeas proceedings including ineffectiveness of required counsel, fraud upon the parties, fraud upon the court, and the absence of a "case and controversy," thus a court without jurisdiction. Indeed, the cumulative impact amounts to fraud upon the public and its interest in a fair and reliable judicial process. Contrary to the magistrates report, as a result of these defects, this court never reached the merits of Mr. Spicer's §2255 grounds of constitutional trial error, thus the Rule 60(b) motion is both proper and meritorious. This court should reject the magistrate's recommendations and either grant relief or proceed to an evidentiary hearing on the current motion's merits.

Prepared by Frank L. Amodeo and respectfully submitted this 11th day of December 2013 by:

Frank L. Amodeo, Writ Writer

Glen A. Spicer #
FCC - Low Unit B-3
P.O. Box 1031
Coleman, Fl 33521-1031

Verification

Under penalty of perjury as authorized in 28 U.S.C. §1746, I declare that the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.

Glen Alan Spicer

Certificate of Service

This motion was delivered in a pre-addressed, postage-prepaid envelope to prison authorities on the same day as signed. The United States of America is represented by counsel who is registered with the CM/ECF docketing system; thus the movant requests that notice of the filing and actual service of the motion on the United States be served through electronic notice.

Glen Alan Spicer

APPENDIX

7-F

Additional post-pleading seeking the appointment of counsel or guardian.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case No.: 6:08-cr-176-Orl-28GJK
(Forfeiture)

FRANK L. AMODEO,
Defendant.
_____/

Motion to Appoint Guardian Ad Litem

Comes now, Frank L. Amodeo, the above-styled defendant; hereinafter referred to as Amodeo and files this motion to appoint a Guardian Ad Litem, showing the Court as follows:

1. Amodeo was declared legally incompetent by the State of Florida on or about May 26, 2008.

2. The Plaintiff became aware of the incompetency on or before June 14, 2008, when the matter was brought to the Court's attention during a hearing be Assistant United States Attorney I. Randall Gold, Esquire.

3. This order of incompetency remains in full force and effect. As such Amodeo lacks the legal authority to contract or represent Amodeo's interests before this Court or in this action.

4. This Court has authority to appoint a guardian ad litem pursuant to Federal Rule of Procedure 17(c) or its bankruptcy equivalent.

5. The Eleventh Circuit Court of Appeals and the District Court for the Middle District of Florida have determined an incompetent is entitled to a guardian ad litem appointed by the Court in civil litigation. Burke v. Smith 252F.3d 1260 (11th Cir 2001); Greenworth Life Insurance Co. v. Sehorne 2008 U.S. Dist LEXIS 30369 (April 2008 M.D. of Fla.); Scannavino v. Fla. Dept. of Corrections 242 F.R.D.662, 2007 U.S. Dist LEXIS 41579 (M.D. of Fla. 2007).

6. The Supreme Court has determined that the prior determination of state courts are to be given preclusive effect in federal courts pursuant to the principle that federal courts are required by the full faith and credit provisions of federal law currently embodied in 28 USCS § 1738. This principle is long established, originally found in the Act of 1790; Mills v. Duryee (1813) 11 US 481; Thompson v. Williams (1874) 85 U.S. 457, 21 L.Ed 897; American Surety Co. v. Baldwin (1932) 287 US 156; 77 L.Ed 231, 53 S. Ct 98; Allen v. McMurry (1980) 449 US 90, 66 L. Ed 2d 308, 101 S.Ct 411; Kremer v. Chemical Construction Corp. (1982) 72 L. Ed 2d, 102 S.Ct 1883; Demosthenes v. Baal (1990) 495 U.S. 731, 109L.Ed 2d 762, 110 S.Ct. 2223.

7. Since Amodeo has substantial interests in the outcome of the bankruptcy

§1738. This principle is long established, priginally found in the Act of 1790; Mills v. Duryee(1813) 11 US 481; Thompson v. Williams (1874) 85 U.S. 457, 21 L.ED 897; American Surety Co. v. Baldwin(1832) 287 US 156; 77 L.Ed 231, 53 S,Ct 98; Allen v. McMurry(1980) 449 US 90, 66 L.Ed 2d 308, 101 S.Ct 411; kremer v. Chemical Construction Corp.(1982) 72 L.Ed 2d, 102 S.Ct 1883; Demosthenes v. Baal(1990) 495 U.S. 731, 109 L.Ed 2d 762, 110 S.Ct 2223.

7. Since Amodeo has substantial interests in the outcome of these proceedings, substantial duties to claiments in the case and has been declared incompetent, and since Amodeo lacks a general representative; Amodeo is entitled to appointmant of a guardian ad litem.

Wherefore, Amodeo respectfully requests the Court appoint a guardian ad litem and sunch other and further relief as the Court deems appropriat and fair.

Respectfully submitted this ____day of October 2009.

Frank L. Amodeo
F.C.C.-Low
P.O.Box 1031
Coleman, Florida 33521

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____day of October 2009, I served the Foregoing on all parties named below, by first class mail:

1. Martin R. Raskin
Jane Serene Raskin
RASKIN & RASKIN, P.A.
2601 South Bayshore Drive
Suite 725
Miami, Florida 33133
Attorneys for Edith Curry, Palaxar Group LLC, and Palaxar Holdings LLC.

2. Craig S. Warkol
BRACEWELL & GIULIAN LLP
1177 Avenue of the Americas
New York, N.Y. 10036

Attorneys for Frank Hailstone

3. Aaron C. Bates, Esq.
GOLDBERG BATES, PLLC
Florida Bar No. 011749
3660 Maguire Boulevard
Suite 102
Orlando, Florida 32803

4. J. Russell Campbell
BALCH & BINGHAM LLP
Florida Bar No. 901423
P.O. Box 306
Birmingham, Alabama 35201

Frank L. Amodeo

proceedings, substantial duties to claimants in the case and has been declared incompetent, and since Amodeo lacks a general representative; Amodeo is entitled to appointment of a guardian ad litem.

Wherefore, Amodeo respectfully requests the Court appoint a guardian ad litem and such other and further relief as the Court deems appropriate and fair.

Respectfully submitted this ____day of October 2009.

Frank L. Amodeo
F.C.C.-Low
P.O.Box 1031
Coleman, Florida 33521

CERTIFICATE OF SERVICE

The undersign certifies a true and correct copy of this motion has been served on the United States of America c/o I. Randall Gold, Esquire this ____day of October 2009.

Frank L. Amodeo

APPENDIX

7-G

Documents supporting Mr. Amodeo's diligence
in trying to comply with the
local rules of this court.

Dear Clerk

The Coleman-Low Library does not have a current version of the local rules, if you could send me a copy, I would greatly appreciate it. Further, I will make it available in the library for general use.

Sincerely

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

Middle District of Florida

Notice of Electronic Filing

The following transaction was entered on 7/18/2011 at 3:18 PM EDT and filed on 7/18/2011
Case Name: Amodeo v. United States of America
Case Number: 6:11-cv-01056-JA-GJK
Filer: Frank Louis Amodeo
Document Number: 4

Docket Text:
AMENDED MOTION to vacate, set aside or correct sentence (2255) Criminal Case No. 6:08cr176-orl-28GJK filed by Frank Louis Amodeo.(SR)

6:11-cv-01056-JA-GJK Notice has been electronically mailed to:

Robert Edward Bodnar, Jr robert.bodnar@usdoj.gov, beth.ragusa@usdoj.gov, orldocket.mailbox@usdoj.gov

6:11-cv-01056-JA-GJK Notice has been delivered by other means to:

Frank Louis Amodeo
#48883-019
FCC Low, Unit B-3
PO Box 1031
Coleman, FL 33521

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1069447731 [Date=7/18/2011] [FileNumber=8998845-0] [81ad4c934480488277d521bcd877e327991403b7a1fe40003996a5f88ab983435e6 7656ef0887388138e407ee919f0cc6afa0e979da362fb9efb397d3af98db6]]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
401 West Central Boulevard, Suite 1200
Orlando, FL 32801
407-835-4200

THE RESPONSE TO YOUR LETTER IS AS FOLLOWS:

_____ United States Circuit Judges, District Judges, and Magistrate Judges are strictly limited to their jurisdiction and do not have the authority to act or intercede in matters unless they pertain to a specific case pending before them. Since you do not have a case pending before this Court, no action or involvement by the Court is deemed appropriate.

_____ Although you have a case pending before this Court, it is improper for you to correspond directly with a United States Judge or Magistrate Judge. They will not, as a matter of policy, respond to personal correspondence when it pertains to a pending case. This policy is in keeping with their sworn duty to maintain complete impartiality in the exercise of their judicial duties. Accordingly, their decisions and opinions are, quite properly delivered in response to those legal instruments filed with the Clerk's Office in accordance with the governing rules of procedures. All pleadings and papers shall be filed with the Clerk Court and not with the judge thereof, except as provided by Local Rule 1.03(c) and Local Rule 3.01 (f).

_____ In accordance with 5 U.S.C. §551(1)(B), the records of the Federal Judiciary are exempted from the disclosure requirements of the Freedom of Information Act.

_____ Enclosed is a habeas corpus petition form. _____ Enclosed is a civil rights complaint form

_____ The Clerk's Office and the Court cannot give you legal advice. You may use any available law library, seek assistance of a trained legal assistant, or write the Prisoner's Research Project, Holland Law Center, University of Florida, Gainesville, FL 32611. Further, if you are incarcerated, you may write: Florida Institutional Legal Services, Inc., 1010 B NW 8th Avenue, Gainesville FL 32601 or call them at 352-375-2494.

_____ There is a fee of $45.00 for a record retrieval from archives. If you would like case number to be retrieved, please enclose $, made payable to: Clerk,U.S. District Court.

_____ Because you are not proceeding *in forma pauperis*, in this case, you are responsible for service of process upon the defendants in accordance with Rule 4(m) of the Federal Rules of Civil Procedure. State Court summons forms do not conform with the U.S. District Court requirements (Form A0440).

_____ *In forma pauperis* status does not entitle you to free photocopies of pleadings, orders, or docket sheets in any case file. The cost is .50 cents per page.

_____ Your case is now before the Court, and any pending motions are under consideration by this court. An order resolving the motion(s) will be entered as the Court's calendar permits. You may request a copy of the docket sheet to periodically keep updates of developments in the case. The cost is .50 cents per page.

✓ _____ Local Rules: A copy of the local rules, in either hard copy ~~or on disk in WordPerfect 6.1 format~~, may be obtained by forwarding a self-addressed envelope (9½"x12" or larger) with ~~$4.50~~ $3.08 postage affixed for the return of the rules to you. Local rules are also available on PACER. Call 1-800-676-6856 for additional information. Download a copy from our website at www.flmd.uscourts.gov/rules.htm

_____ There is a fee of .50 cents per page for copies of documents. If you would like those copies certified, that is an additional $9.00 per document.

_____

Sheryl L. Loesch, Clerk

_____

APPENDIX

7-H

Copy of the envelope from this court's clerk
showing that the January 9, 2012 order
did not arrive on time because
of government mistake.

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURTHOUSE
401 W. CENTRAL BLVD, SUITE 1200
ORLANDO, FLORIDA 32801-0120

OFFICIAL BUSINESS

B7

FRANK LOUIS AMODEO

COLEMAN LOW - FEDERAL CORRECTIONAL INSTITUTION

INMATE MAIL/PARCELS

P.O. BOX 1031

COLEMAN, FL 33521