

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	CRIMINAL ACTION
v.)	
)	No. 12-20099-01-KHV
MENDY READ-FORBES,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER

On April 23, 2015, the Court sentenced defendant to 240 months in prison. On November 21, 2019, the Court dismissed defendant’s Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. #354) filed September 3, 2019 as an unauthorized successive petition under Section 2255. See Memorandum And Order (Doc. #363). This matter is before the Court on defendant’s Motion For Appointment Of Attorney (Doc. #365) filed December 6, 2019, defendant’s Petition For Writ Of Audita Querela Or Other Appropriate Relief Pursuant To The All Writs Act (Doc. #366) filed December 6, 2019, and defendant’s Application To Proceed In District Court Without Prepaying Fees Or Costs (Doc. #369) filed January 6, 2020, which the Court construes as a motion to proceed in forma pauperis on appeal. For reasons stated below, the Court overrules defendant’s motions to appoint counsel and to proceed in forma pauperis on appeal, and defers consideration of defendant’s petition for a writ of audita querela.

I. Motion To Appoint Attorney On Appeal

Defendant asks the Court to appoint counsel to assist her on appeal. Counsel has already entered an appearance on behalf of defendant. See Tenth Circuit Order (Doc. #370) filed

January 8, 2020. Accordingly, the Court overrules as moot defendant's motion to appoint counsel.

II. Motion To Proceed In Forma Pauperis On Appeal

Under Rule 24(a)(1)(C), Fed. R. App. P., a defendant who seeks to proceed in forma pauperis must state the issues which she intends to present on appeal. Rule 24(a) requires such a statement because the district court will deny in forma pauperis status if it determines that the appeal is not taken in good faith. See Fed. R. App. P. 24(a)(3)(A). Good faith is an objective standard measured by whether the appeal is "frivolous" or lacks a "rational argument on the law or facts." See Coppedge v. United States, 369 U.S. 438, 448 (1962).

The Court finds that defendant's appeal is not made in good faith. In 2018, in the Tenth Circuit Court of Appeals, defendant sought leave to file a successive Section 2255 motion. Defendant asserted that her conviction should be vacated based on "newly discovered evidence that, while she was detained at the [Corrections Corporation of America detention facility in Leavenworth,] Kansas, her telephone conversations with her attorney and other privileged attorney-client communications appear to have been recorded and/or provided to the prosecution." Order (Doc. #345) filed July 27, 2018 at 2. The Tenth Circuit denied defendant's request for leave to file a successive Section 2255 motion. Id. As explained by the Tenth Circuit, defendant cannot overcome the procedural hurdle to receive authorization to file a second Section 2255 motion because she has not shown newly discovered evidence that "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that *no reasonable factfinder would have found [her] guilty of the offense.*" 28 U.S.C. § 2255(h)(2); Order (Doc. #345) at 2 (emphasis in original). While defendant may have a good faith belief in

the substantive merit of her claim, she has not shown any non-frivolous basis to raise the claim in a successive Section 2255 motion in light of the Tenth Circuit's ruling. Accordingly, the Court overrules defendant's motion to proceed in forma pauperis on appeal.

III. Petition For Writ Of Audita Querela

Based on the pending appeal of the order dismissing defendant's Section 2255 motion, which asserted essentially the same claim as the one in her petition for writ of audita querela, the Court defers consideration of defendant's petition for writ of audita querela until after the Tenth Circuit has resolved her appeal. In addition, because defendant has retained counsel on appeal and may decide to proceed with current counsel in the district court after the appeal is concluded, the Office of the Federal Public Defender need not enter an appearance in this matter as the Court previously directed. See Order (Doc. #373) filed February 4, 2020.

IT IS THEREFORE ORDERED that defendant's Motion For Appointment Of Attorney (Doc. #365) filed December 6, 2019 is **OVERRULED as moot**.

IT IS FURTHER ORDERED that the Court **STAYS** consideration of defendant's Petition For Writ Of Audita Querela Or Other Appropriate Relief Pursuant To The All Writs Act (Doc. #366) filed December 6, 2019 until after the Tenth Circuit has resolved defendant's appeal (Tenth Circuit No. 19-3268).

IT IS FURTHER ORDERED that defendant's Application To Proceed In District Court Without Prepaying Fees Or Costs (Doc. #369) filed January 6, 2020, which the Court construes as a motion to proceed in forma pauperis on appeal, is **OVERRULED**.

The Clerk is directed to forward a copy of this order to the Office of the Federal Public Defender.

Dated this 5th day of February, 2020 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge