

further asking the Court to appoint new counsel. DE-232 at 1-2. The reason stated for the request was that MacDonald and Ms. Berry "have insurmountable differences regarding the evidence and the law applicable in this case." Id. at 2.

DISCUSSION

4. "The Supreme Court of the United States has categorically rejected an argument that 'prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions.'" *Mackall v. Angelone*, 131 F.3d 442, 446-47 (4th Cir. 1997), citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.").

5. Whatever right MacDonald has to appointed counsel at this stage of the proceedings derives from statute. See Rule 8(c), Rules Governing Section 2255 Proceedings; *cf.* 18 U.S.C. § 3006A(a)(2)(B) ("Whenever . . . the court determines the interests of justice so require, representation may be provided for any financially eligible person who . . . is seeking relief under section . . . 2255 of title 28.") (emphasis added).

6. When a federal criminal case is pending trial or sentencing and an indigent defendant desires to substitute his appointed counsel with a newly-appointed one, he must demonstrate good cause. *Unites States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988), citing *United States v. Allen*, 789 F.2d 90, 92 (1st Cir. 1986). Whether to grant the motion is within the discretion of the

court. *Gallop*, 838 F.2d at 108. When the Fourth Circuit has reviewed cases in which district courts have denied defendant's motions for substitution of appointed counsel, the review has focused on three factors:

- (1) the timeliness of the motion;
- (2) the adequacy of the court's inquiry; and
- (3) whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense.

United States v. Smith, 640 F.3d 580, 588 (4th Cir. 2011), citing *Gallop*, 838 F.2d at 108.

7. The conclusory statement in MacDonald's motion to the effect that MacDonald and his appointed counsel "have insurmountable differences regarding the evidence and the law applicable in this case" does not establish that "the attorney/client conflict is so great that it [has] resulted in total lack of communication preventing an adequate defense." At the least, a more searching inquiry by the Court would be required.¹

8. However, the principles from the cases cited above emanate from a criminal defendant's Sixth Amendment right to counsel. "In short, the defendant's Sixth Amendment right to successor appointed counsel arises because the initial appointment

¹ One reason for trial courts to inquire into such claims of communication breakdown is that "[a] defendant, by unreasonable silence or intentional lack of cooperation, cannot thwart the law as to appointment of counsel." *Thomas v. Wainwright*, 767 F.2d 738, 742 (11th Cir. 1985), cited in *Smith*, 640 F.3d at 599 (Agee, J., concurring in part and concurring in the judgment).

has ceased to constitute Sixth Amendment assistance of counsel.” *Smith*, 640 F.3d at 588. In the instant case, the movant does not enjoy a Sixth Amendment right to counsel to pursue his successive collateral attacks on his conviction. Surely then, an even more powerful showing is required from the Movant to justify the Court’s granting of his motion to replace his current appointed counsel with another one. This is especially so when he continues to be assisted in his claims by competent pro bono counsel.²

9. Ms. Berry is an experienced practitioner of federal criminal law in this judicial district. There is no reason to believe that the Movant will be more satisfied with a successor appointed counsel.

10. The Government’s goal in this litigation is to achieve finality through an orderly disposition of the Movant’s claims. Otherwise, the Government has no stake in who is representing the Movant. The Government is concerned, however, that there may be no end to the Movant’s requests to change counsel in this matter.

CONCLUSION

Accordingly, the Government respectfully requests that the Court deny the Movant’s motion for substitution of appointed counsel, in the absence of a stronger showing of attorney/client

² MacDonald’s instant motion states that “[it] is the understanding of [appointed counsel] that [pro bono counsel] continues to represent [MacDonald]. DE-232 at 2. Indeed, while this motion for the withdrawal of appointed counsel has been pending, pro bono counsel has sought and obtained leave to file oversized replies to the Government’s responses to motions filed by Movant. See DE-233, DE-234.

communication breakdown not resulting from an intentional lack of cooperation from the Movant.

Respectfully submitted, this 15th day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing document upon the defendant in this action either electronically or by placing a copy of same in the United States mail, postage prepaid, and addressed to counsel for defendant as follows:

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This, the 15th day of February, 2012.

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