IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	NO. 90-296-18
WAYNE ANTHONY SMITH	:	(99-CV-6117)

O R D E R - M E M O R A N D U M

AND NOW, this 10th day of April, 2000, the motion to dismiss of the United States will be granted unless by May 10, 2000, defendant submits additional argument as to the applicability of the limitations period. 28 U.S.C. § 2255. Otherwise, if further argument is not made, this action will be dismissed on the basis of the present record.[1]

On September 14, 1998, defendant pleaded guilty to conspiracy to distribute cocaine base (Cr. No. 90-296-18) and illegal reentry after deportation (Cr. No. 98-423-01), and on November 5, 1998 was sentenced to 120 and 24 months imprisonment, respectively – to run concurrently. On November 16, 2000, the judgment of conviction was entered and became final on November 26,

[1] The "motion for transcript" is deferred.

1998, no appeal being taken within 10 days.[2] Fed. R. App. P. 4(b)(1)(A)(i). On December 2, 1999, defendant filed this § 2255 motion.

A motion under § 2255 must be filed within one-year from the latest of:

> (1) the date on which the judgment of conviction becomes final;
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> (2) the date on which the impediment to making a motion created by the governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making the motion by such governmental action;
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> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

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[2] In its motion, the United States notes that the judgments in Cr. No. 98-423-01 and Cr. No. 90-296-18 were docketed on November 10, 1998 and November 12, 1998 – and adopts November 12, 1998 as the effective date of judgment. However, while the judgment in Cr. 90-296-18 was signed on November 12, 1998, it was not entered until November 16, 1998.

In addition, the judgment in Cr. No. 98-423-01 was amended on December 22, 1998 to rectify a clerical mistake. However, even assuming the amendment altered the running of the limitations period, the lesser sentence was to run concurrently with the 120 months imposed in Cr. 90-296-18, and consequently, a favorable decision on the merits would have no effect on the sentence.

Here, defendant's conviction became final on November 26, 1998, and his petition was filed on December 2, 1999. A pro se prisoner's § 2255 motion is deemed filed at the moment of delivery to prison officials for mailing, Burns v. Morton, 134 F.3d 109 (3d Cir.). Here, there is no evidence as to when it was delivered. In addition, while the one-year limitation period is subject to equitable tolling, the motion alleges no facts to support such a finding. Defendant is given until May 10, 2999 within which to submit further argument on the belatedness of the filing.

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Edmund V. Ludwig, J.