

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

CARLOS LOPEZ :
 :
 v. : Civ. Act. No. 00-2176
 :
 UNITED STATES : Crim. Act. No. 94-184-01
 :

MEMORANDUM

Padova, J.

November , 2000

This matter arises on Petitioner Carlos Lopez's Pro Se Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. §2255. The government filed a response submitting that the Motion was untimely under the statutory limitations period, and Petitioner filed a reply addressing that defense. The Motion is fully briefed and ripe for decision. For the reasons that follow, the Court dismisses the Motion on the grounds that it is untimely.

I. BACKGROUND

On August 31, 1994, Petitioner Carlos Lopez pleaded guilty in the United States District Court for the Eastern District of Pennsylvania to 13 counts of an indictment related to possession, trafficking, and distribution of cocaine and heroin.¹ On December 13, 1994, Petitioner was sentenced to 322 months of incarceration, a fine, and a five-year period of supervised release. Count 15 of the conviction was for use of a firearm during a trafficking crime in violation of 18 U.S.C. § 924(c)(1). On December 11, 1996, the judgment and commitment order was amended to reflect February 16, 1994, as the date the offense was concluded. Petitioner filed no direct appeal of his sentence.

¹The Indictment contained 41 counts, 13 of them implicating Mr. Lopez.

In 1995, the Supreme Court announced a new rule in Bailey v. United States, 516 U.S. 137 (1995) that, to prove “use” of a firearm under 18 U.S.C. § 924(c)(1), the government must prove that the weapon was actively employed. On May 18, 1998, in Bousley v. United States, 523 U.S. 614 (1998), the Supreme Court clarified that this rule was available retroactively on collateral review.

On April 27, 2000, Mr. Lopez filed this motion, pursuant to 28 U.S.C. § 2255, to vacate his conviction on Count 15 under the new rule of law announced in Bousley in 1998. The Petition includes allegations of ineffective assistance of counsel, defects in the plea, and factual innocence on Count 15. Count 15 accounted for 60 months of the sentence.

II. DISCUSSION

Petitioner filed the current petition on April 27, 2000. It is governed by the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which went into effect on April 24, 1996. The statute established a one-year period of limitation to file motions under § 2255, from the latest of a series of possible dates. The statute provides, in pertinent part:²

The limitation period shall run from the latest of—

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (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. . . .

²The fourth date in the statute is “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(4). As Petitioner has not alleged the existence of new facts, this section of the statute is not relevant here.

28 U.S.C. § 2255 (Supp. 2000).

The Court will consider each of the relevant dates in turn.

Calculating the limitation period from the date of judgment of conviction, the Petition is untimely. Petitioner was sentenced on December 14, 1994, prior to the effective date of the AEDPA. He did not file a direct appeal.³ For prisoners whose convictions became final prior to the AEDPA's enactment, the limits period began to run on the effective date of the AEDPA, April 24, 1996. Brown v. Angelone, 150 F.3d 370, 372-73 (4th Cir. 1998). Thus, Petitioner was required to file his motion by April 24, 1997, and his failure to do so rendered the petition untimely.⁴

Calculating the limitation period from the new theory of law date, Petitioner's claim is still untimely. Petitioner bases his habeas claim on a new theory of law, announced by the United States Supreme Court on May 18, 1998, in Bousley v. United States. Using this date as the starting point for running the limitations period, Mr. Lopez's claim is untimely.⁵ The deadline for filing his §2255 petition would have been May 18, 1999.

Finally, Petitioner asserts that the Government's refusal to explain the reasons for amending the judgment of commitment constituted an impediment to making a motion under the second exception to the limitations period. (Reply at 5.) Specifically, he explains that the

³Mr. Lopez pleaded guilty to the Count 15 charge.

⁴Petitioner's judgment and commitment order was amended on December 11, 1996. Even if the Court were to construe this later date as the date of final judgment, the Petition would still be untimely.

⁵Bousley may be used as the starting point for running the limitations period, even though the "new rule" in question dealt with a change in statutory interpretation rather than a change in constitutional law. See United States v. Lloyd, 188 F.3d 184 (3d Cir. 1999).

Government's refusal to elaborate on the reasons for modifying the judgment and conviction prevented him from ascertaining whether he had any rights to a direct appeal. (Id.) He further elaborates that his attorney's failure to appeal constituted ineffective assistance of counsel.

Construing Petitioner's argument very liberally, the Court concludes that Petitioner has failed to demonstrate sufficiently the existence of an impediment to his filing of the habeas petition. See United States v. Rogers, Crim. No. 93-423-1, Civ. Action No. 99-5196, 2000 U.S. Dist. LEXIS 8819, at *4-5 (E.D. Pa. June 27, 2000). Petitioner's assertion of an impediment to filing a direct appeal does not explain his inability to file his habeas petition in a timely manner. Such a government impediment as alleged by Petitioner would not impair Petitioner's ability to file a timely habeas corpus petition, particularly one based on a new rule announced by the Supreme Court and bearing little or no relation to the supposed impediment. The instant Petition demonstrates the ability of Petitioner, absent the information he claims the Government refuses to give him, to file such a petition.

For the above reasons, the Court dismisses Petitioner's Motion on the ground that it is untimely. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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CARLOS LOPEZ	:	
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v.	:	
	:	Crim. Act. No. 94-184-01
UNITED STATES	:	

ORDER

AND NOW, this day of November, 2000, upon consideration of Petitioner Carlos Lopez's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 (Docket No. 496), the Government's Response (Docket No. 499), and Petitioner's Supplemental Reply (Docket No. 502), **IT IS HEREBY ORDERED** that said Motion is **DISMISSED** with prejudice.

BY THE COURT:

John R. Padova, J.