

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

CHARLES ZIMMERMAN :
 :
 : CIVIL ACTION
 : NO. 01-299
 v. : (Criminal No. 97-96-3)
 :
 UNITE STATES OF AMERICA :

MEMORANDUM ORDER

Petitioner was convicted of Hobbs Act - robbery and use of a firearm during a crime of violence. The victim, a Philadelphia jewelry store owner, was shot during the robbery and paralyzed below the chest as a result. Petitioner was sentenced on September 15, 1998 to 240 months of imprisonment. He challenged the sentence on appeal. It was affirmed on January 21, 2000.

Petitioner has now filed a "Motion Pursuant to 28 U.S.C. § 2255." The motion sets forth no cognizable basis collaterally to attack petitioner's sentence and no specific requested relief.¹

The essence of petitioner's assertions is that subsequent to the January 21, 2000 affirmance, he "has acquired new information" and "is currently garnering further information" about crimes committed by others "which would be helpful in a downward departure." He suggests that at the time of sentencing,

¹While this motion was presented by an attorney, the characterization of the pleading by the reviewing habeas clerk as "extremely sloppy and virtually illiterate" is not altogether unwarranted.

the court indicated that "the U.S. Attorney should contemplate a 35(b) Motion," should such information be provided.

In fact, the court determined that even if the prosecutor had made an oral post-conviction agreement to file a § 5K1.1 motion in return for substantial assistance, he reasonably concluded that petitioner had not provided substantial assistance. The court considered such assistance as was provided in imposing a sentence. The court noted that the prosecutor had agreed to consider a Rule 35(b) motion if any subsequent assistance provided by petitioner was truly substantial. As petitioner's counsel acknowledged, however, the prosecutor made clear that petitioner would bear "a very heavy burden" in securing such a motion given the heinousness of the offense and his extraordinary criminal record. Petitioner has 13 previous adult felony convictions for various offenses including bank robbery and armed assault.

Shortly after the instant motion was filed, petitioner wrote to the court asking that the court take no action on this motion but rather defer until "a proper § 2255 motion" can be prepared and filed. Petitioner suggests that the instant motion was filed to avert the one year limitation period in § 2255.²

²Contrary to petitioner's supposition, the court may not exclude from the applicable limitation period the time spent by petitioner in securing private counsel to present a claim for him.

It is one thing to seek leave to amend a properly filed petition and quite another to file a deficient petition as a tactic to evade or prolong the limitations period. To permit such a practice would effectively eviscerate the limitations period imposed by Congress in the AEDPA.

An inmate may not file an anticipatory claim. Insofar as petitioner claims entitlement to some relief based on "new information" or information he is "currently garnering," the § 2255 limitations period would run from the time the factual basis for his claim was first reasonably discoverable. Also, the one year limitation for motions pursuant to Fed. R. Civ. P. 35(b) does not apply to information unknown to a defendant until more than a year following imposition of sentence. See U.S. v. McDowell, 117 F.3d 974, 979 (7th Cir. 1997). This may arguably include information the value of which a defendant was unaware during the year following his sentencing. See U.S. v. Morales, 52 F.3d 7, 8 (1st Cir. 1995).

Insofar as petitioner predicates a claim on a purported "agreement" between his attorney, the prosecutor and the court at his sentencing, this is belied by the record. The court merely noted and the prosecutor confirmed that the government would evaluate any subsequent assistance provided by petitioner and would "consider" filing a Rule 35(b) motion if any such assistance was deemed substantial.

If petitioner has a current, viable, legally cognizable claim for relief under § 2255, the claim and the constitutional or legal basis therefor must be comprehensibly set forth. This should be done on the form obtainable from the Clerk for such purpose which is designed to facilitate the crafting and comprehension of § 2255 claims. If petitioner believes that he may eventually qualify for some relief, he should proceed if and when a claim becomes ripe.

ACCORDINGLY, this day of February, 2001, **IT IS HEREBY ORDERED** that this action is **DISMISSED** without prejudice to petitioner to file an amended petition on a proper form within thirty days setting forth comprehensibly any currently cognizable claim he wishes to assert and identifying the constitutional or legal basis for such claim, or to present any appropriate claim which may subsequently ripen or arise.

BY THE COURT:

JAY C. WALDMAN, J.