

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

UNITED STATES OF AMERICA : CRIMINAL NO. 94-402-1  
 : CIVIL ACTION 01-3943  
 :  
 v. :  
 :  
 :  
 LARRY McARTHUR a/k/a LARRY WILLIAMS :

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

March 18, 2003

Petitioner defendant Larry McArthur ("McArthur") filed a pro se Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. The petition for Writ of Habeas Corpus was referred to United States Magistrate Judge M. Faith Angell who issued a Report and Recommendation ("R&R") that the petition be denied as untimely. McArthur has filed various objections to the R&R, accorded de novo review by the court, and, through newly appointed counsel, a brief on the issue of equitable tolling.

**I. BACKGROUND AND PROCEDURAL HISTORY<sup>1</sup>**

On January 19, 1995, McArthur was convicted by a jury of one count of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1); he was sentenced to seventy seven months' imprisonment, followed by three years of supervised release. At

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<sup>1</sup>Adapted, in part, from Judge Angell's R&R.

trial, the government presented evidence to establish that on June 29, 1994, McArthur, a convicted felon, was observed with a gun by two officers, he fled with that gun, and a third officer saw McArthur toss the gun in his attempt to evade detection.

Philadelphia Housing Authority Officer Jake Bolden testified that while conducting a routine safety inspection of the Oxford Village Development in Northeast Philadelphia, he witnessed McArthur wrapping a sawed-off shotgun in a blue and white shirt. (1/18/95 R. at 107.) Upon observing McArthur, Officer Bolden gestured to his partner, Officer Creighton, who was standing nearby, (1/18/95 R. at 108); together Officers Bolden and Creighton approached McArthur, and identified themselves as police officers, id. Officer Bolden testified that when confronted, McArthur, still in possession of the shotgun, fled by bicycle. (1/18/95 R. at 108-111.) Officers Bolden and Creighton gave chase on foot; they were joined at some point by Officer Morales. (1/18/95 R. at 125).

Officer Bolden was the first officer to follow McArthur through the rear door of 1043 Comley Street, later discovered to be McArthur's residence. (1/18/95 R. at 111.) He testified that he saw McArthur run up the stairs to the unit's second floor, found him hiding in a closet, and discovered ten shotgun shells upon searching him incident to arrest. Id. At no time did Officer Bolden witness McArthur discard the gun or the shirt in

which it was said to have been wrapped (1/18/95 R. at 127); the shotgun was retrieved and secured by Officer Morales (1/18/95 R. at 131), but the shirt was never recovered (1/18/95 R. at 131-32).

In addition to Officer Bolden's testimony, the prosecution offered the testimony of Officers Creighton and Morales. On direct examination, Officer Creighton stated that, after being signaled by Officer Bolden, he too observed McArthur wrapping a shotgun in some sort of blue and white shirt. (1/18/95 R. at 134.) Though he took a different route in pursuit of McArthur, Officer Creighton testified that he entered 1043 Comley directly behind Officer Bolden and witnessed Bolden retrieve ten shotgun shells from McArthur's pockets. (1/18/95 R. at 136-37.)

Officer Morales, who saw McArthur for the first time on the bicycle, testified that as soon as McArthur had "made his way in" to the Comley residence, the officers "all entered together after him, Officer Bolden being first, Officer Creighton being second and myself being third." (1/19/95 R. at 9). Officer Morales stated that as the four men were entering the residence, he saw McArthur remove the shotgun from his waistband and toss it to the floor, the location from which the gun was subsequently recovered by Officer Morales. Id.

McArthur also took the stand to testify regarding the events preceding his June 29, 1994 arrest. He denied possessing a

shotgun, wrapping a shotgun in any sort of shirt or cloth, disposing of a shotgun, and hiding in a closet before being apprehended by police. (1/19/95 R. at 48-52.) To the contrary, McArthur testified, he came down the stairs voluntarily at which time he was laid on the floor and his residence was thoroughly searched by numerous officers. (1/19/95 R. at 53.) McArthur explained that he had only recently been released from a six-month stint in jail—charges against him had been dropped following an eyewitness statement absolving him of blame. Thereafter, he had fled in panic. (1/19/95 R. at 55-56.)

The jury returned a verdict of guilty on January 19, 1995, and McArthur was sentenced to seventy seven months imprisonment. McArthur, on direct appeal of his conviction, argued the propriety of the prosecutor's rebuttal to defense counsel's closing argument; but his conviction was affirmed. See United States v. McArthur, No. 95-1374, mem. op. at 2-7 (3d Cir. December 15, 1995). For purposes of 28 U.S.C. § 2255, McArthur's judgment of conviction became final on March 15, 1996. See Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999) (if defendant does not file a petition for certiorari to the United States Supreme Court, his conviction becomes final under § 2255 ninety days from the date the court of appeals affirms the judgment on direct appeal).

In a § 2255 motion signed and dated "July 27, 2001,"<sup>2</sup> McArthur raised the following claims: 1) ineffective assistance of counsel; 2) false reports and misleading facts; 3) perjured testimony; and, 4) newly discovered evidence. (Mot. to Vac. at 4-5.) Regarding ground one, McArthur claimed that attorney Marley, together with the prosecutor, had coerced him into signing three stipulations which were read in evidence at trial.<sup>3</sup> Grounds two and three alleged inconsistencies in the initial police reports made by the officers involved and the officers' testimony before the grand jury and at trial. Lastly, ground four raised the January 23, 2001 perjury conviction of Officer Bolden in an unrelated case.

The petition was referred to Magistrate Judge M. Faith Angell. On December 21, 2001, Judge Angell issued a Report & Recommendation that McArthur's's Writ of Habeas Corpus be

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<sup>2</sup>The motion was filed August 3, 2001.

<sup>3</sup>The stipulations were read at trial by the government:

MR. GRAY: The defendant and the Government agree that as of June 29, 1994, the defendant, Larry McArthur, had previously been convicted of a crime punishable by imprisonment for a term exceeding one year in the Commonwealth of Pennsylvania, Philadelphia Court of Common Pleas. ...

The second stipulation reads the firearm identified as Government Exhibit 2, a sawed-off Eastern Arms Company, Model 94-A 12-gauge one-shot shotgun, having no serial number, is a firearm within the definition of Title 18 United States Code, Section 921. And that prior to June 29, 1994, the firearm had been shipped in interstate commerce. ...

The third stipulation is that as of June 29, 1994, Government Exhibit 2, the Eastern Arms Model 94-A 12-gauge one-shot shotgun was an operable firearm, that is, it was capable of discharging a shot through the action of explosives. (1/18/95 R. at 24-25.)

dismissed as untimely under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") one-year statute of limitations for federal defendants to collaterally attack their conviction and/or sentence. The AEDPA took effect April 24, 1996; because prisoners whose convictions became final before the date of enactment enjoy a one-year grace period under the statute, McArthur had until April 23, 1997, to file his habeas motion. See Sweger v. Chesney, 294 F.3d 506, 513 (3d Cir. 2002). Thus, Judge Angell found that McArthur's § 2255 motion, filed August 3, 2001, was "plainly untimely." (R&R at 3.)

Citing 28 U.S.C. § 2255(4)<sup>4</sup>, Judge Angell acknowledged that newly discovered evidence would toll the one-year time period, but found that McArthur had failed to provide meaningful details in support of his claim and that "Officer Bolden's conviction in an unrelated case bears no relevance to his 1994 testimony [against McArthur.]" (R&R at 4). In addition to finding statutory tolling unwarranted, Judge Angell found nothing in the record to support equitable tolling of the statute of limitations. See Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (statute of limitations may be tolled if petitioner has been actively misled, kept from asserting his rights in some extraordinary way, or timely asserted his rights in the wrong

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<sup>4</sup>Under the AEDPA, the one-year statute of limitations begins to run from the latest "date on which the facts supporting the claim or claims presented could have been discovered through the exercise of reasonable diligence." See 28 U.S.C. § 2255(4).

forum).

Despite these findings, Judge Angell considered the merits of McArthur's additional claims. Regarding ineffective assistance of counsel, Judge Angell concluded that McArthur had not made the requisite showing under Strickland v. Washington, 466 U.S. 668, 687 (1984) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.") Id. at 686. "Mr. McArthur presents nothing to support his claims of coercion, other than the statement itself." (R&R at 6.) As to McArthur's claims regarding the government's closing argument, Judge Angell found that the issue had been litigated and rejected by the Court of Appeals; a § 2255 motion may not be used to relitigate matters decided adversely on appeal. See Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1075 (3d Cir. 1985).

Grounds two and three of McArthur's petition, claims concerning inconsistencies between testimony given by various officers and information memorialized in police reports, were not raised by McArthur on direct appeal. Finding no cause for that failure, Judge Angell concluded that McArthur was unable to present these grounds in his § 2255 petition. (R&R at 7); see Bousley v. United States, 523 U.S. 614 (1998) (a procedurally

defaulted claim in habeas may only be raised if petitioner shows cause and prejudice or that he is actually innocent); Sokolow v. United States, 1998 U.S. Dist. LEXIS 22605, at \*8 (E.D. Pa. Nov. 23, 1998) (the writ of habeas corpus will not be permitted to substitute for an appeal). Thus, Judge Angell found, even if McArthur's petition had been timely filed, his claims were without merit and relief was not warranted.

McArthur's objections to the R&R were filed of record as of January 15, 2002, nunc pro tunc. He objects on the following bases: 1) grounds two and three of his petition, regarding discrepancies in police reports and officers' testimony, can be raised for the first time in a habeas petition, because there was "cause" for McArthur's failure to raise these issues on direct appeal; 2) his petition not demonstrate ineffective assistance of counsel; and, 3) the news of Officer Bolden's perjury conviction constitutes newly discovered evidence sufficient to warrant tolling of the AEDPA statute of limitations. (Obj. R&R.)

Appointed counsel submitted a brief on the issue of equitable tolling. (Paper #67.) In the brief, McArthur argues he is entitled to equitable tolling based on the fact he was unaware of the opportunity to file a habeas petition, or statutory tolling under § 2255(4) based on newly discovered evidence. Id. With the brief, McArthur submitted an article detailing Bolden's conviction. (Paper # 67, Ex. A.) According to

the Philadelphia Daily News article:

Bolden, who attended the Police Academy in 1991, hated to see a drug dealer get away.

So when one fled after a search ... dropping cocaine, Bolden retrieved it. He then asked a woman accomplice, caught by his partner with marijuana, to name the escapee.

She refused.

Bolden was so angry, he took the woman in and charged her not only with possessing her small amount of pot, but also with having the cocaine, which could have cost her three to six years in jail ... .

After Bolden lied at the woman's preliminary hearing, other officers came forward and told the truth.

Bolden was arrested and later convicted of perjury, tampering with evidence and records and filing false reports.

(Paper # 67, Ex. A.) McArthur states that the court should conduct an evidentiary hearing pertaining to Officer Bolden's perjury conviction and McArthur's claim that his conviction was also based on perjured testimony. Id.

## II. DISCUSSION<sup>5</sup>

In ruling on a petition for a Writ of Habeas Corpus under 28 U.S.C. § 2255, a federal court may only consider claims that the petitioner is being held in custody in violation of the Constitution or laws of the United States. See 28 U.S.C. § 2255;

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<sup>5</sup>After careful consideration of McArthur's objections, we reject without discussion all but his claim the statute of limitations based was tolled because of newly discovered evidence, and adopt Judge Angell's R&R on grounds one through three of McArthur's petition.

see also Hill v. United States, 368 U.S. 424, 428 (1962).

Because the grounds upon which a final judgment may be attacked are thus limited, McArthur's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 is essentially a Federal Rule of Criminal Procedure 33 Motion for a New Trial. See Herrera v. Collins, 506 U.S. 390, 404 (1993) (a claim of new evidence alone is not cognizable in a § 2254 petition); United States v. Guinan, 6 F.3d 468, 470-71 (7<sup>th</sup> Cir. 1993) (extending the rationale of Herrera to § 2255 motions); cf. Sokolow v. United States, 1998 U.S. Dist. LEXIS 22605, at \*15 (E.D. Pa. Nov. 23, 1998) (citing Herrera and Guinan, and applying Rule 33 factors to § 2255 petition); but see Granero v. United States, 2000 U.S. Dist. LEXIS 2073, at \*4-5 (E.D. Pa. March 3, 2000) (applying Rule 33 test to § 2255 motion based on newly discovered evidence but not converting the motion).

The court has the discretion to treat McArthur's motion under § 2255 as a Rule 33 motion, see Ruiz v. United States, 221 F. Supp. 2d 66, 74 (D. Mass. 2002), and will do so because McArthur's petition, insofar as it is based on newly discovered evidence, presents no constitutional question for which § 2255 provides a remedy.<sup>6</sup>

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<sup>6</sup>As Judge Angell noted in her R&R, § 2255(4) does provide for statutory tolling of the AEDPA statute of limitations by directing that the statute begin to run from the latest "date on which the facts supporting the claim ... could have been discovered"; however, § 2255(4) refers to the discovery of new facts used to bolster an allegation of a constitutional violation, not a claim for relief based newly discovered evidence of alleged actual innocence. As

Rule 33 states, in relevant part, "Upon defendant's motion, the court may vacate any judgment and provide a new trial if the interest of justice so requires," Fed.R.Crim.P. 33(a), but, "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case," Fed.R.Crim.P. 33(b)(1).

The three-year time limitation imposed by the Rule is a relatively recent development. Under the pre-1998 version of Rule 33, defendants had only two years from the date of final judgment in which to bring forth new evidence. See Fed.R.Crim.P. 33, 1998 Amendments, Advisory Committee's Note. The rule now affords defendants three years from the verdict or finding of guilty. Fed.R.Crim.P. 33. Under either version of the rule, McArthur's motion is time-barred.<sup>7</sup> The § 2255 petition, converted here to a motion for new trial under Rule 33, was filed on August 3, 2001. Since the date of final judgment was March 15, 1996, and the date of the verdict was January 19, 1995, it is

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noted above, McArthur's claim based on new evidence is not cognizable under § 2255 and thus, § 2255(4) lends no support.

<sup>7</sup>The 1998 amendment to Rule 33 became effective December 1, 1998 and was meant to govern all proceedings commenced thereafter and proceedings then pending "insofar as just and practicable." Ruiz, 221 F. Supp. 2d at 75. Because McArthur's motion is untimely under both the pre and post-amendment versions of the rule, it is not necessary to decide which version is applicable.

clear that McArthur's petition cannot meet the time requirements set forth in the rule. Because the three-year time limit of Rule 33 is mandatory and strictly jurisdictional, see United States v. Smith, 331 U.S. 469 (1947); United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987), the court is without discretion, and McArthur's motion for a new trial will be denied as untimely.

Because McArthur's allegations are troubling, the court has considered the merits of the time-barred claim. McArthur claims then-Officer Bolden, convicted of perjury in January, 2001, also lied under oath about the events surrounding McArthur's June, 1994 arrest for possession of a firearm. "[T]his case come [sic] down to credibility ... . I told the jury I was set up ... . [T]he same thing that got [Bolden] mad in this other case got him mad in my case, the accomplice ran and I ran." (Obj. R&R.)

In Rutkin v. United States, 208 F.2d 647, 653 (3d Cir. 1953), the Third Circuit officially adopted the "Berry test," providing that the following requirements must be met to prevail under Rule 33 for newly discovered evidence:

(a) the evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

See Government of Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d

Cir. 1985) (origin of name is Berry v. Georgia, 10 Ga. 511, 527 (Ga. 1851)).<sup>8</sup> Bolden's conviction satisfies the first two factors required by Berry. The conviction was six years after the McArthur trial, and clearly unknown to McArthur or his counsel then; once McArthur became aware of the conviction, he displayed diligence in pursuing a claim based on the new evidence. The remaining Berry factors, however, are more difficult for McArthur to establish.

Perjury is a serious matter. Though the magistrate judge was of the opinion that Officer Bolden's 2001 perjury conviction bore no relevance to McArthur's case, it does. But the issue is how much relevance it bears. Berry requires that the conviction

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<sup>8</sup>Some courts, including the Third Circuit, have applied a more lenient standard, "the Larrison standard," when the newly discovered evidence is based on the discovery that a government witness allegedly perjured himself at trial. See United States v. Mangieri, 694 F.2d 1270, 1286 (D.C. Cir. 1982) (citing Larrison v. United States, 24 F.2d 82 (7<sup>th</sup> Cir. 1928)); United States v. Meyers, 484 F.2d 113, 166 (3d Cir. 1978). The Larrison test requires the following three-part proof by the defendant on a motion for a new trial: "1) The court is reasonably well satisfied that the testimony given by a material witness is false; 2) That without it a jury might have reached a different conclusion; and, 3) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial." Meyers, 484 F.2d at 116.

But the Third Circuit has never officially approved of Larrison as the proper test. See United States v. Massac, 867 F.2d 174, 178 (3d Cir. 1989) (observing that Larrison has not been formally adopted). Generally, judges of this court have declined to offer an opinion as to whether the Third Circuit should adopt Larrison by concluding that defendants' proffers of newly discovered evidence do not merit a new trial under either the Berry or Larrison test. See, e.g., United States v. Harris, 2000 U.S. Dist. LEXIS 3902, at \*18 (E.D. Pa. March 30, 2000).

Here, there is no need to analyze McArthur's new evidence under both Berry and Larrison, because McArthur cannot meet the threshold requirement of Larrison which requires him to offer new evidence that Bolden committed perjury in his case. See id. at \*19. There is no evidence of wrongdoing by Bolden in this earlier matter, regardless of how reprehensible Bolden's conduct was in the action that led to his conviction.

serve as more than a source of impeachment, that it be material to the issues involved and that, upon its consideration, the result of McArthur's trial would likely have been different. See Rutkin, 208 F.2d at 653.

First, the evidence of the perjury conviction is merely impeaching and therefore insufficient under Berry. McArthur has not demonstrated that Bolden's conviction rendered him beyond belief in this earlier trial, nor has Bolden's testimony been shown to be wholly incredible or without corroboration. Bolden was only one of three officers to testify against McArthur, and both of the other officers stated that, at some point, they had seen McArthur with the shotgun. Officer Creighton observed McArthur wrapping the weapon (1/18/95 R. at 134), and Officer Morales saw McArthur remove the gun from his waistband and throw it to the floor of the residence at 1043 Comley Street (1/19/95 R. at 9). In addition, Officer Morales testified that he was the one who actually recovered the weapon. Id. The accounts of the events of June 29, 1994, offered by the three officers were substantially similar. The new evidence offered by McArthur functions to impeach Bolden, but not to nullify his testimony.

Second, the evidence offered would probably not have resulted in an acquittal. See Rutkin, 208 F.2d at 653. Even without the testimony of Bolden, the aggregate testimony of Officers Creighton and Morales established McArthur's possession

of the gun, his flight from police, and his disposal of the weapon. There is adequate evidence in the record to support the jury's finding that McArthur possessed the shotgun. Applying the Berry test to the evidence in this action, McArthur has failed to demonstrate that the interests of justice require a new trial under Rule 33.

### **III. CONCLUSION**

Prisoner Larry McArthur's pro se Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, as supplemented with a brief on equitable tolling by court-appointed counsel, will be converted to a Motion for a New Trial under Rule 33 insofar as it concerns newly discovered evidence. Because McArthur did not meet the timeliness requirements for submission under Rule 33, the Motion for a New Trial will be denied. As to McArthur's remaining claims, properly brought under 28 U.S.C. § 2255, the court adopts the Report and Recommendation of Magistrate Judge M. Faith Angell. McArthur's Writ of Habeas Corpus, filed August 3, 2001, failed to comply with the one-year statute of limitations under the AEDPA, and there are no bases for either statutory or equitable tolling.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
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UNITED STATES OF AMERICA : CRIMINAL NO. 94-402-1  
 :  
 : CIVIL ACTION 01-3943  
 :  
 v. :  
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 :  
 LARRY McARTHUR a/k/a LARRY WILLIAMS :

ORDER

AND NOW, this 18th day of March, 2003, upon consideration of the Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, de novo review of the Report and Recommendation of United States Magistrate Judge M. Faith Angell, the objections

thereto, and the brief filed by court-appointed counsel regarding equitable tolling and newly discovered evidence, and for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Petition for Writ of Habeas Corpus as it pertains to newly discovered evidence shall be converted to a Motion for a New Trial under Federal Rule of Criminal Procedure 33, and that motion shall be **DENIED** with prejudice;
2. The Report and Recommendation is **APPROVED AND ADOPTED** as it concerns claims not based on newly discovered evidence and properly brought under 28 U.S.C. § 2255;
3. The Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 is **DENIED AND DISMISSED** with prejudice; and,
4. A certificate of appealability is **GRANTED**.

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S.J.