

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

EDWARD AARON LEE,	:	CIVIL ACTION
	:	NO. 02-1837
Petitioner,	:	
	:	CRIMINAL ACTION
v.	:	NO. 99-0356
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

MARCH 14, 2006

On August 16, 2005 the Court issued a Memorandum and Order denying in part petitioner Edward Aaron Lee's motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255 (doc. no. 58). For the following reasons, the remainder of petitioner's claims will now be denied.

I. BACKGROUND

On October 5, 1999 petitioner pled guilty to one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). On February 4, 2000 the Court sentenced petitioner to 188 months of incarceration, five years of supervised release following incarceration, a fine of \$1,000, and a special assessment of \$100. As a result of the Armed Career Criminal Act, 18 U.S.C. § 924(e), the Court enhanced petitioner's sentence based on three prior state convictions. The Court entered judgment on February 7, 2000.

On April 3, 2002 petitioner filed a habeas petition alleging that the sentence was improperly enhanced based on prior state convictions. Petitioner made three arguments: (1) that the prior state convictions were "un-counseled"; (2) that the prior state convictions were "invalid"; and (3) that his attorney for the federal sentencing was ineffective for failing to object to the use of these prior state convictions for enhancement purposes and for failing to appeal the sentence.

A. Memorandum and Order of August 16, 2005

On August 16, 2005 the Court issued a Memorandum and Order which had four directives. First, the Court dismissed petitioner's claims concerning "invalid" prior state convictions and ineffective assistance of counsel at federal sentencing. Those claims were time-barred under 28 U.S.C. § 2255's one-year statute of limitation and were not subject to equitable tolling.

Second, the Court held that it could not make a determination, on the record before it, as to whether petitioner's "un-counseled" prior state convictions claim were similarly time-barred.¹ Specifically, the Court raised the potential applicability of the "Gideon exception for equitable tolling" discussed in Daniels v. United States, 532 U.S. 374, 382

¹ Petitioner alleged that the state court failed to notify him of his right to counsel in appealing his state conviction, and thus, these "un-counseled" convictions are void and the Court should not have considered them in enhancing his federal sentence.

(2001). (Memorandum & Order 9-10.) The Court also pointed out, however, that petitioner may be "procedurally defaulted" from raising the Gideon exception if he did not raise the claim at his federal sentencing. (Id. at 9 n.3.) The Court indicated that this issue of procedural default may be decisive as to petitioner's remaining claims.

Third, the Court granted leave to the Government to take further discovery as to the "un-counseled" claims. All discovery was to be completed by November 14, 2005.

Fourth, the Court established a December 14, 2005 deadline, which permitted the parties to make additional submissions if they so wished. The Court specifically asked the parties to address the issue of procedural default if they chose to make additional submissions. (Id.)

B. Events Since the Memorandum and Order

Since the Memorandum and Order of August 16, 2005, the following three events have occurred. First, the Government apparently declined to take any additional discovery. The Court received a letter from petitioner dated November 21, 2005 objecting to the Government's failure to take his deposition. However, the Court notes that the Government was given leave to take petitioner's deposition; it was not ordered to do so.

Second, petitioner filed a timely supplemental memorandum of law (doc. no. 60). The majority of petitioner's

supplemental submission merely repeats the "invalid" prior state convictions and ineffective assistance of counsel arguments already made in his initial habeas petition and denied by the Court. The limited portion that addresses the Gideon exception to equitable tolling merely restates the law, but provides no evidence or argument as to whether he was advised of his right to counsel on appeal during his state proceedings. Petitioner's supplemental submission also fails to address the Court's concern as to whether the Gideon exception is procedurally defaulted because of the failure to raise the claim at the federal sentencing.

Third, the Government filed an untimely supplemental submission (doc. no. 61). The Government has decided to rely entirely on the arguments made in its initial response to the habeas petition. Like petitioner, the Government has chosen not to address the potential for procedural default.

The parties thus have been afforded an opportunity to be heard. The matter is ready for disposition.

II. DISCUSSION

Petitioner argues that under Daniels v. United States, 532 U.S. 374 (2001), because he was unaware of his right to counsel in appealing his state convictions, the one-year statute of limitations under The Antiterrorism and Effective Death

Penalty Act of 1996, 28 U.S.C. § 2255, should be equitably tolled. In Daniels, the Supreme Court determined that,

[i]f . . . a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse. The presumption of validity that attached to the prior conviction at the time of sentencing is conclusive, and the defendant may not collaterally attack his prior conviction through a motion under § 2255. **A defendant may challenge a prior conviction as the product of a Gideon [v. Wainwright], 372 U.S. 335 (1963), violation in a § 2255 motion, but generally only if he raised that claim at his federal sentencing proceeding.**

Id. at 382 (citations omitted) (emphasis added).

The Court finds that petitioner's claim that his prior state convictions were "un-counseled" are procedurally defaulted as he failed to raised the claim at his federal sentencing proceeding.

On October 5, 1999, at petitioner's change of plea hearing, he expressly acknowledged his right to litigate the applicability and legality of his prior state convictions (doc. no. 45). He acknowledged the same in his plea agreement (doc. no. 26).

Petitioner was provided the opportunity, both by pre-sentencing written submissions and orally at the sentencing hearing, to raise argument he now brings before the Court on

habeas review. Both petitioner himself and petitioner's counsel declined to do so.

Petitioner submitted a letter to the Court dated January 15, 2000 contending that two of the state convictions should be considered one offense. Petitioner, however, did not argue that his prior state convictions were "un-counseled." Similarly, petitioner's counsel submitted a sentencing memorandum dated February 1, 2000, which detailed defendant's background and argued that defendant's criminal history category over-represents the seriousness of his criminal history (doc. no. 38). Petitioner's counsel, however, did not argue that his prior state convictions were "un-counseled."

The Court has also carefully reviewed the transcript from petitioner's February 4, 2000 sentencing. Petitioner again failed to raise the argument that his prior state convictions were "un-counseled."

Accordingly, petitioner is now precluded on federal habeas review to argue that the prior state convictions were "un-counseled," i.e., petitioner is procedurally defaulted from raising the Gideon exception discussed in Daniels, 532 U.S. at 382. The Court further finds (and petitioner fails to argue) that there are any extraordinary circumstances that remove this case from the general rule. Thus, petitioner's remaining claims will be dismissed as untimely.

III. CONCLUSION

For the foregoing reasons, the petitioner's motion to vacate, set aside, or correct his sentence will be denied. An appropriate order follows.

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O R D E R

AND NOW, this **14th** day of **March, 2006**, it is hereby **ORDERED** that petitioner's motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255 (doc. nos. 46 and 49), is **DENIED** and **DISMISSED** as untimely.

IT IS FURTHER ORDERED that petitioner is not entitled to a certificate of appealability.²

AND IT IS SO ORDERED.

S/Eduardo C. Robreno

EDUARDO C. ROBRENO, J.

² A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). Id. "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." Id. at § 2253(c)(2). To make such a showing, petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Petitioner has not made the requisite showing in these circumstances.