

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

UNITED STATES OF AMERICA	:	
	:	No. 86-cr-263
	:	
v.	:	
	:	
	:	No. 04-cv-3958
ANGEL PEREZ	:	

MEMORANDUM AND ORDER

PRATTER, DISTRICT JUDGE

JULY 27, 2006

Presently before the Court is the *pro se* habeas corpus petition filed by Petitioner Angel Perez pursuant to 28 U.S.C. § 2255. Mr. Perez applies to the Court to vacate a sentence imposed upon him flowing from two counts of unlawful possession of a firearm by a convicted felon and two counts of possession with intent to distribute cocaine, a Schedule II narcotic controlled substance. For the following reasons, the Court finds that Mr. Perez is not entitled to habeas relief, and, accordingly, his petition is denied.

Mr. Perez also filed, in connection with his habeas petition, a series of motions, including his:

- Application for Writ of Habeas Corpus Ad Testificandum,
- Application and/or Motion to Enter Judgment as a Matter of Law,
- Application for an Order Reducing or Modifying Sentence Nunc Pro Tunc Pursuant to Rule 35(b) Federal Rules of Criminal Procedure,
- Petition for Certification of Question of Law,
- Application for an Evidentiary Hearing, and

- Application for Expedition of Evidentiary Hearing

For the following reasons, the Court finds these six motions also to be without merit, and, accordingly, they are denied.

I. BACKGROUND

On November 18, 1986, Mr. Perez was convicted on four counts in a superseding indictment, namely, two counts of being a felon in possession of firearms in violation of 18 U.S.C. App. § 1202(a)(1) (a predecessor to Section 922(g)) and two counts of possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1).¹ The sentencing court found Mr. Perez to be a dangerous special offender pursuant to 18 U.S.C. § 3575, and, on January 30, 1987, sentenced him to 60 years in prison for his crimes. Mr. Perez appealed his sentence to the Court of Appeals for the Third Circuit, which affirmed his conviction without an opinion. United States v. Perez, No. 87-1071, 831 F.2d 288 (3d Cir. Sept. 11, 1987). The United States Supreme Court denied Mr. Perez's petition for a writ of certiorari on February 29, 1988. Perez v. United States, No. 87-6006, 485 U.S. 907 (1988)

On August 20, 2004, Mr. Perez filed a *pro se* motion for habeas corpus pursuant to 28 U.S.C. § 2255, requesting relief from the sentences imposed for the gun and drug crimes of which he was convicted. Subsequently, Mr. Perez supplemented his original habeas petition with an extensive memorandum of law, to which the Government responded.² Mr. Perez has since

¹ Mr. Perez was acquitted on Count I of the superseding indictment, which also charged him with being a convicted felon in possession of a firearm.

² On November 12, 2004, Mr. Perez filed a Motion to File Supplemental Complaint in the Form of Corrected § 2255 Form Motion and Memorandum of Law in Support (Docket No. 106). That same day, Mr. Perez also filed a Memorandum of Law in Support of Motion to Vacate and Set Aside Conviction and Illegal Sentence Pursuant to 28 U.S.C. § 2255 (Docket No.

filed a reply to the Government's Response.³ In addition to his habeas petition and reply, Mr. Perez has also filed the motions and applications highlighted above.⁴ For the following reasons, the Court finds that Mr. Perez is not entitled to the relief requested because he cannot overcome the fact that his petition was untimely filed, and, accordingly, his petition for habeas corpus, as well as his other motions, are denied.

107). The Court granted Mr. Perez's Motion to File a Supplemental Complaint, and shall treat Mr. Perez's Supplemental Memorandum as having been filed on November 12, 2004.

³ On November 12, 2005, the Court received Mr. Perez's Application for Leave to File Reply Brief Exceeding 20 Page Limit and the attached Petitioner's Reply to Government's Response in Opposition to Defendant's Motion for Relief Under 28 U.S.C. § 2255. The Court subsequently granted Mr. Perez's request. The Court subsequently granted Mr. Perez's application and will treat his Reply as timely filed.

⁴ On October 3, 2005, the Court received copies of Mr. Perez's Application for Writ of Habeas Corpus Ad Testificandum, Application and/or Motion to Enter Judgment as a Matter of Law, Application for an Order Reducing or Modifying Sentence Nunc Pro Tunc Pursuant to Rule 35(b) Federal Rules of Criminal Procedure and will consider them in connection with Mr. Perez's habeas petition, as well as a letter requesting that the "enclosed Motions" be filed and time stamped. The Court subsequently granted Mr. Perez's request to file the above-mentioned "applications" and will consider them in connection with his habeas petition.

As an initial matter, Mr. Perez's Motion to reduce or modify his sentence pursuant to Federal Rule of Criminal Procedure 35(b) is barred as untimely and will be denied. Federal Rule of Civil Procedure 35(b) in effect at the time Mr. Perez committed his crimes provided that:

A motion to reduce a sentence may be made . . . within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. . . .

United States v. Idone, 38 F.3d 693, 696 (3d Cir. 1994). Mr. Perez's Rule 35(b) motion is untimely by over 17 years, and, accordingly, is denied.

II. STANDARD OF REVIEW FOR 28 U.S.C. § 2255

Section 2255 allows a prisoner in custody to attack his sentence if it was “imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255. Thus, a petitioner may only prevail on a section 2255 habeas claim by demonstrating that an error of law was constitutional, jurisdictional, “a fundamental defect which inherently results in a complete miscarriage of justice,” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962). The petitioner is entitled to an evidentiary hearing as to the merits of his claims unless the “files and records of the case conclusively show the petitioner is not entitled to relief.” 28 U.S.C. § 2255. The decision as to whether it is clear from the record that the prisoner is not entitled to relief is within the sound discretion of the district court. United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989) (citation omitted). Here, Mr. Perez is not entitled to an evidentiary hearing because it is clear from the record that his sentence should not be set aside, vacated, or corrected pursuant to Section 2255. Thus, Mr. Perez’s applications for an expedited evidentiary hearing and for a subpoena ad testificandum to secure his appearance at an evidentiary hearing are denied.

Mr. Perez raises a variety of arguments in support of the application of habeas relief here. His arguments can be generally summarized as asserting that habeas relief is proper because: (1) his sentence was illegally enhanced pursuant to the “Dangerous Special Offenders Act;” (2) there was prosecutorial misconduct; (3) the trial court made various errors with respect to evidence and the applicable law; and (4) appellate counsel provided him with ineffective assistance. The

Government asserts that Mr. Perez's petition is untimely and must be dismissed.

Prior to April 24, 1996, Section 2255 allowed federal prisoners to file a motion for relief "at any time," with very few restrictions. See United States v. Nadohil, 36 F.3d 323, 328 (3d Cir. 1994); United States v. McNair, 1999 U.S. Dist. LEXIS 6238, at *3 (E.D. Pa. May 3, 1993).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), effective April 24, 1996, amended 28 U.S.C. § 2255 to impose a one year limitations period on the filing of habeas motions. In pertinent part, Section 2255 provides that the one-year statute of limitations begins to 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; or
- (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. If a prisoner's conviction became final prior to the enactment of AEDPA, a court may not dismiss as untimely a Section 2255 Motion filed on or before April 24, 1997 (i.e., a motion filed one year after AEDPA's effective date). Burns v. Morton, 134 F.3d 109, 111-12 (3d Cir. 1998); McNair, 1999 U.S. Dist. LEXIS 6238, at *3; United States v. Menahem, No. 95-12, 2001 U.S. Dist. LEXIS 25585, at *4 (D. Del. Apr. 10, 2001). Although Mr. Perez argues that the Court should apply the pre-AEDPA standard of "at any time," the Third Circuit has held that Section 2255 motions filed after April 24, 1997 are subject to dismissal for failure to adhere to

AEDPA's one-year limitations period. United States v. Duffus, 174 F.3d 333, 335 (3d Cir. 1999) (“the effect of Burns v. Morton was to make . . . all other convictions in this circuit otherwise final before the effective date of the AEDPA, April 24, 1996, final on that day for purposes of calculating the limitations period under section 2255”). For the following reasons, the Court finds that Mr. Perez's petition for habeas corpus relief is untimely pursuant to the Section 2255 one-year statute of limitations and is not saved by equitable tolling. Accordingly, Mr. Perez's habeas petition is denied.

1. The Date When the Judgment of Conviction Became Final

As stated above, Mr. Perez was sentenced on January 30, 1987, and thereafter timely filed his direct appeal to the Third Circuit Court of Appeals. The Third Circuit affirmed Mr. Perez's conviction on September 11, 1987, and the Supreme Court denied certiorari on February 29, 1988. Mr. Perez acknowledges that his conviction became final in early 1988 and that he did not file a habeas petition until some 16 years later, but, as stated above, argues that the Court should apply the pre-AEDPA time limits allowing him to file a habeas petition “at any time.” Based on Duffus, however, Mr. Perez's conviction became “final” for AEDPA purposes on April 24, 1996, and, thus, Mr. Perez must have filed his habeas petition on or before April 24, 1997 for it to be considered timely pursuant to subsection (1) of Section 2255. Rather, Mr. Perez filed his habeas motion over eight years after the date for its timely filing.

2. The Date When an Unlawful Government Impediment to Filing was Removed

Mr. Perez argues that even if his petition is considered untimely under the one year statute of limitations with respect to the finality of his conviction, his motion meets the standard for

filing pursuant to subsections (2) - (4) of Section 2255. Specifically, with respect to an unlawful government impediment, Mr. Perez's only argument is that he has repeatedly challenged a state court conviction and has been denied relief because the Philadelphia District Attorney's Office repeatedly committed prosecutorial misconduct and misinformed the reviewing courts of the actual events in the state matter.⁵ Mr. Perez asserts that he entered into a conditional plea agreement with the Philadelphia District Attorney's Office with respect to state charges which were pending during the time he was in federal court for trial on the charges for which he was here convicted. Mr. Perez argues that he entered into the plea agreement with the understanding that the plea agreement would not affect his federal sentencing, which agreement the Government later used to enhance Mr. Perez's federal sentence. Mr. Perez does not, however, allege how this "government impediment" kept him from filing a timely habeas petition. To the contrary, Mr. Perez acknowledges that the Government's use of the plea agreement at his federal sentencing precipitated him withdrawing from the state plea agreement and proceeding to trial on those state charges, which would seem to indicate that there was no "impediment" at all. Thus, Mr. Perez makes no claim regarding an unlawful government impediment which extends his time for filing a timely habeas petition.

3. Intervening, Retroactive New Rule of Constitutional Law

Mr. Perez argues that the Supreme Court decisions in Blakely v. Washington, 542 U.S.

⁵ Mr. Perez also asserts that the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296 (2004) removed an "unlawful government impediment." Mr. Perez's argument with respect to Blakely and the later decision in United States v. Booker, 543 U.S. 220 (2005), is more appropriately discussed in reference to the third subsection of Section 2255, which allows extension of the time to file a habeas petition, namely, 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.

296 (2004) and United States v. Booker, 543 U.S. 220 (2005), which applied Blakely to the federal sentencing guidelines, provided a new rule of constitutional law pursuant to which his sentence can be challenged because the trial court erroneously found that he was a “Dangerous Special Offender” without having a jury decide the issue. See Lloyd v. United States, 407 F.3d 608, 611 (3d Cir. 2005) (Blakely challenges to the federal sentencing guidelines are governed by the intervening Booker decision). Mr. Perez’s arguments regarding the application of Blakely and Booker decisions to his convictions and sentence are unavailing, however, because those decisions only apply to cases on direct appeal and not to initial habeas motions. Lloyd, 407 F.3d at 615-616. Specifically, the Third Circuit Court of Appeals held that Booker does not apply retroactively to initial Section 2255 motions where the judgment was final before January 12, 2005, the day the Booker opinion was issued. Lloyd, 407 F.3d at 615-616. As stated above, Mr. Perez’s sentence was “final” on April 24, well before the issuance of Booker on January 12, 2005. Thus, Booker does not here apply.

4. Facts Supporting Claims Newly Discovered Through Due Diligence

Mr. Perez argues that his time for filing a habeas petition must be extended because he has presented newly discovered facts and claims.⁶ Specifically, Mr. Perez argues, *inter alia*, that he was erroneously classified as a Dangerous Special Offender, he was unfairly targeted by President Reagan’s “war on drugs,” the state plea agreement relied on by the sentencing court was fraudulently induced, the district court wrongfully relied on a suspended sentence to enhance

⁶ Mr. Perez presents both the Blakely and Booker decisions as supporting his claims for habeas relief under the newly discovered evidence subsection, as well as various grand jury, discovery, trial, sentencing, and prosecutorial misconduct and abuse issues. As discussed above, the Blakely and Booker decisions do not extend the date for Mr. Perez to file his Section 2255 habeas petition.

his sentence, the sentencing court exceeded the maximum allowable sentence pursuant to the Dangerous Special Offender Act, the evidence was insufficient to support a guilty verdict as to possession of particular pistols, perjured testimony regarding whether he stabbed Police Officer Cara was introduced to the jury, a witness refused to testify after being threatened with jail time on an outstanding warrant, the jury was racially biased, the jury was biased against witnesses with past criminal conduct, Hispanic citizens were under-represented on the grand jury and the trial jury, appellate counsel failed to litigate all issues with meritorious value, including the application of the Dangerous Special Offender Act and the elements of possession and interstate commerce, the prosecutor made inappropriate references to his trafficking guns for personal gain, and the special Assistant United States Attorney did not have proper authority to prosecute his case on behalf of the United States.

For purposes of determining the timeliness of his petition, Mr. Perez does not allege that any of the facts supporting new claims, or even new claims themselves, were unknown to him in the years between his final judgment of conviction in 1988, the date the applicable habeas statute of limitations expired in 1997, and the day Mr. Perez filed his habeas petition in 2004. To the contrary, Mr. Perez repeatedly argues that appellate counsel was ineffective for failing to raise the above-mentioned issues during his direct appeals, all of which took place in 1987 and 1988. Thus, Mr. Perez cannot utilize subsection (3) of Section 2255 to extend the time in which he had to file a habeas corpus petition, and his petition is here untimely.

5. Equitable Tolling

Here, as discussed above, Mr. Perez did not file his petition for habeas relief in a timely fashion. However, although the AEDPA generally requires habeas petitions to be filed within

one year of the final judgment, the “one-year filing requirement is a statute of limitations, not a jurisdictional rule, and thus a habeas petition should not be dismissed as untimely filed if the petitioner can establish an equitable basis for tolling the limitations period.” Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citing Miller v. N.J. State Dep’t of Corr., 145 F.3d 616, 618 (3d Cir. 1998)); United States v. Bendolph, 409 F.3d 155, 170 (3d Cir. 2005) (Nygaard, J., dissenting) (“AEDPA’s statute of limitations is subject to equitable tolling.”). Such equitable tolling is warranted when “the petitioner has in some extraordinary way been prevented from asserting his or her rights . . . [and] has exercised reasonable diligence in investigating and bringing the claims.” Miller, 145 F.3d at 618. Mere excusable neglect is not sufficient. Id. Our Court of Appeals has set forth three circumstances where equitable tolling can be appropriate: “(1) if the defendant has actively misled the plaintiff, (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights, but has mistakenly done so in the wrong forum.” Jones, 195 F.3d at 159 (citations omitted).

Here, Mr. Perez, in both his habeas petition and accompanying memoranda, makes extremely thorough arguments as to why the Court should not consider his habeas petition as untimely, including arguments regarding the application of pre-AEDPA Section 2255 time limits, the merits of his petition, and the application of Blakely and Booker to his case. Nowhere in his filings, however, does Mr. Perez argue that equitable tolling is proper or applicable. Likewise, he does not present evidence which would support a finding of equitable tolling. Although Mr. Perez argues that he was “misled” by the state to enter into a plea agreement which the federal government allegedly used to wrongfully enhance his sentence, Mr. Perez never argues that the Government somehow prevented him from filing a habeas petition between February 1988 and

April 1997, a period of more than nine years. Mr. Perez does not argue that he has been, in some extraordinary way, prevented from asserting his rights or that he has timely asserted his rights in the wrong forum. Rather, Mr. Perez repeatedly argues that the Court should apply the pre-AEDPA Section 2255 time limit which allowed a habeas filing “at any time” with little limitation. This, of course, as stated above, is not the law in this Circuit.

Mr. Perez argues that, despite repeated requests to do so, his counsel was ineffective because counsel did not perfect his appellate rights. The Court will read this to include his right to collateral review. Mr. Perez’s argument regarding a failure to perfect a direct review is contradicted by the facts, which indicate that he appealed directly to the Third Circuit Court of Appeals and was denied a writ of certiorari by the Supreme Court. To the extent that Mr. Perez is arguing that counsel failed to file a habeas petition despite his directions to do so, even taking these allegations as true, they do not rise to “extraordinary circumstances” that would justify equitable tolling. Attorney misconduct may be grounds for equitable tolling in narrow circumstances. See e.g., Nara v. Frank 264 F.3d 310, 320 (3d Cir. 2001) (habeas petitioner accused his counsel of leading him to believe that the attorney would file a habeas petition on his behalf and that there were no time constraints on habeas petitions). Mr. Perez does not make any allegations of such extraordinary circumstances, and he does not argue that counsel misled him into believing that counsel would file a petition. Moreover, even if Mr. Perez were somehow lulled into inaction during the time he felt counsel should have been filing a habeas petition on his behalf, Mr. Perez did not so file at any time over the nine year period between 1988 and 1997, during which lengthy period of time he certainly would have known that the counsel’s habeas petition was not forthcoming. Therefore, Mr. Perez has not made the requisite showing of

extraordinary circumstances necessary for the application of equitable tolling, and, accordingly, his habeas petition is denied as untimely.⁷

III. REQUEST FOR COUNSEL

In his Motion for a Judgment as a Matter of Law, Mr. Perez requests the Court to appoint counsel to represent him in order to litigate issues in this case. It is well-settled that there is no constitutional right to counsel in a federal habeas proceeding. Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991). Thus, the decision whether to appoint counsel rests within the sound discretion of the Court, which must first consider whether Mr. Perez has presented a non-frivolous claim and whether counsel would benefit Mr. Perez and the Court. Id. at 263-64. In making such a decision, a court must consider such factors as “the complexity of the factual and legal issues in the case, as well as the pro se petitioner’s ability to investigate the facts and present claims.” Id. A district court does not abuse its discretion, however, by declining to appoint counsel were the issues in the case are “straightforward and capable of resolution on the record” or the petitioner has a “good understanding of the issues and the ability to present forcefully and coherently his contentions.” Id. at 264 (citations omitted).

The Court finds that the issues in this case are neither factually or legally complex. The memoranda submitted by Mr. Perez in support of his petition for relief demonstrate his ability to investigate facts, understand the issues, respond directly to the assertions of the Government, and present his claims “forcefully and coherently.” Thus, the Court declines to appoint counsel for

⁷ Accordingly, Mr. Perez’s Application and/or Motion to Enter Judgment as a Matter of Law is also denied. Moreover, because the Court will not reach the merits of Mr. Perez’s habeas claims, his Petition for Certification of Question of Law regarding the issues in his habeas petition is also denied.

Mr. Perez.

IV. CONCLUSION

For the foregoing reasons, the Court denies Mr. Perez's Section 2255 motion requesting the Court to vacate, set aside, or correct his sentence for his 1986 convictions as well as the other pending motions and applications referred to above.

BY THE COURT:

GENE E.K. PRATTER
United States District Judge

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

UNITED STATES OF AMERICA	:	
	:	No. 86-cr-263
	:	
v.	:	
	:	
	:	No. 04-cv-3958
ANGEL PEREZ	:	

ORDER

AND NOW, this 27th day of July, 2006, upon consideration of Petitioner Angel Perez's Motion to Vacate, Set Aside, or Correct a Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 104) and Memorandum of Law in Support of Motion to Vacate and Set Aside Conviction and Illegal Sentence Pursuant to 28 U.S.C. § 2255 (Docket Nos. 106, 107), the Government's Response thereto (Docket No. 112), and Petitioner Perez's Reply (Docket No. 116) it is hereby ORDERED that the petition is DENIED.

IT IS FURTHER ORDERED that Petitioner Perez's:

1. Application for Writ of Habeas Corpus Ad Testificandum (Docket No. 113) is DENIED;
2. Application for an Order Reducing or Modifying Sentence Nunc Pro Tunc Pursuant to Rule 35(b) of the Federal Rules of Civil Procedure (Docket No. 113) is DENIED;
3. Application and/or Motion to Enter Judgment as a Matter of Law in the Above-Captioned Matter (Docket No. 113) is DENIED;
4. Petition for Certification of Question of Law (Docket No. 118) is DENIED;
5. Application for an Evidentiary Hearing (Docket No. 119) is DENIED; and

6. Application for Expedition of Evidentiary Hearing (Docket No. 120) is DENIED.

IT IS FURTHER ORDERED that no certificate of appealability will be issued on the ground that Petitioner Perez has not made a substantial showing of a denial of a constitutional right as required by 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

BY THE COURT:

GENE E.K. PRATTER
United States District Judge