



the previous convictions leading to the career criminal designation. The Government opposes the Motion.

For the reasons set out below the Court denies Mr. Ortiz's motion.

## **DISCUSSION**

### **I. Procedural Bar**

Mr. Ortiz is obliged to meet the terms of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2255(f) by which a one-year statute of limitations for the filing of a petition for seeking post-conviction relief. The latest of (1) the date a judgment becomes final, (2) the date on which an impediment to filing is removed, (3) the date (and, if appropriate, retroactive date) a right is first recognized; or (4) the date on which facts and circumstances amounting to newly discovered evidence was found triggers the running of the limitations period.

Mr. Ortiz is unable to excuse his failure to avoid the limitations bar. None of the statutory triggers excuses Mr. Ortiz's late filing. His primary effort in that regard is to inexplicably characterize his prior convictions as newly discovered evidence. However, each of them had been noticed pursuant to 21 U.S.C. § 851, were enumerated in the pre-sentence investigation report, were discussed at length during his sentencing hearing when defense counsel mounted a challenge to the Court's reference to those convictions for sentencing purposes, and were noted as part of the Court of Appeal's affirmance of his sentence. Thus, the litany of prior convictions cannot be treated for any purpose as newly discovered.

No other time-bar excuse is any more helpful to Mr. Ortiz. He makes no effort to claim that his conviction did not become final more than a year before he filed his petition. Likewise, he does not claim that the Government interfered with the filing of his petition. Mr. Ortiz does

not argue there has been a newly created, retroactive law applicable to his situation. And, finally, the attempted use of the “actual innocence” argument with the prior convictions and, accordingly, the career offender status, is no more availing - - not only does Mr. Ortiz ignore the intended tie between the “actual innocence” claim and the conviction for the crime at hand (as opposed to the collateral personal history that figures into the discretionary Sentencing Guidelines) but he cannot find any support for his inventive, but ultimately meritless, effort.

Therefore, Mr. Ortiz has not excused his late filing and his petition is time-barred.

## **II. The Petition Has No Substantive Merit**

Mr. Ortiz argues that his trial lawyer provided ineffective professional services because counsel failed to attack the career offender status assigned to him under the Sentencing Guidelines. In the context of this case, Mr. Ortiz can neither show the failure of his lawyer to meet his obligations or prejudice to Mr. Ortiz as a result - - and for the same reasons. Both elements would be required of Mr. Ortiz in order for him to succeed with his arguments.

Strickland v. Washington, 466 U.S. 668, 687, 694 (1984).

Logically and as a matter of law Mr. Ortiz’s lawyer cannot be considered ineffective if he did not raise a meritless, or futile claim. United States v. Martin, 262 Fed. Appx. 392, 395 (3d Cir. 2008) (unpublished opinion); Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996).

In the first instance, Mr. Ortiz’s fundamental flaw in his reasoning is that his life sentence was not the product of his career offender status under the Sentencing Guidelines, but was mandated by law as a result of his three prior felony drug convictions. Having received proper notice pursuant to 21 U.S.C. §851 of the three prior felony drug convictions - - each separate case arising from separate events and separate arrests, the sentencing for each all occurring on the same day before the same state court judge - - Mr. Ortiz fell within mandatory life sentencing

dictates for his conviction for conspiring to distribute 1,000 grams or more of heroin in violation of 21 U.S.C. §851. The consolidation for sentencing of the three prior felony drug convictions was of no moment. United States v. Velez, 427 Fed. Appx. 121, 124-25 (3d Cir. 2011). Thus by operation of law, Mr. Ortiz's trial counsel could not have saved Mr. Ortiz from the mandatory life sentence even if he failed to mount a successful challenge to the career offender status applied under the Guidelines.

Turning to the Guidelines at issue, Mr. Ortiz did, in fact, properly fall into Guidelines §4B1.1 career offender status. The three prior felony drug convictions were the products of three separate arrests (on December 5, 2001, February 14, 2002 and April 7, 2002), each in advance of the next commission of a crime, making the intervening arrests the key to treating the convictions as separate crimes as explained in Guideline § 4A1.2(a)(2). Hence, the career offender status was correctly applied to Mr. Ortiz.

Finally, within the Guideline regime, even without regard to the career offender status designation, Mr. Ortiz had earned for himself a Guideline sentencing range that called for life imprisonment, all as set forth in detail by the Probation Officer who prepared the Pre-Sentence Report. The advisory Guideline range for Mr. Ortiz matched the statutorily required life imprisonment sentence, making the career offender designation, and all alleged counsel error, immaterial.

**CONCLUSION**<sup>1</sup>

For the foregoing reasons, the Court denies Mr. Ortiz's petition. An appropriate Order follows.

BY THE COURT

S/Gene E.K. Pratter  
GENE E.K. PRATTER  
United States District Judge

---

<sup>1</sup> Mr. Ortiz has requested appointed counsel and a hearing on his petition. The Court declines to grant that request because the petition contains no colorable claim to consider. Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969), *overruled on other grounds by Stone v. Powell*, 428 U.S. 465 (1976); *Brown v. United States*, 556 F.2d 224, 227 (3d Cir. 1977).

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

**UNITED STATES OF AMERICA** : **NO. 2-05-CR-000044-10**  
**vs.** : **C.A. 13-2834**  
**ELVIS ORTIZ** :

**ORDER**

AND NOW, this 4th day of November, 2013, upon consideration of the Pro Se Motion To Vacate Sentence under 28 U.S.C. §2255 (Docket No. 996) and the Government's Response (Docket No. 1002), for the reasons set out in the accompanying Memorandum, IT IS HEREBY ORDERED that:

1. Mr. Ortiz's Motion (Docket No. 996) is **DENIED**.
2. no certificate of appealability will issue because reasonable jurists would not disagree with this denial of Mr. Ortiz's Motion; and
3. the Clerk of Court shall mark both above-captioned cases closed for all purposes, including statistics.

BY THE COURT:

S/Gene E.K. Pratter  
GENE E.K. PRATTER  
United States District Judge