

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

UNITED STATES : CRIMINAL ACTION  
 : NO. 09-733-02  
 v. :  
 : CIVIL ACTION  
 DAVID COBB : NO. 13-5736  
 :

**MEMORANDUM**

EDUARDO C. ROBRENO, J.

September 4, 2014

Petitioner David Cobb ("Petitioner") seeks habeas relief, pursuant to 28 U.S.C. § 2255, based on a claim that his trial counsel, Roland B. Jarvis, Esq., ("Counsel,") was unconstitutionally ineffective, in violation of Petitioner's Sixth Amendment right to representation by counsel. Respondent, the United States Government, asserts that (1) Petitioner's motion was untimely, and (2) Counsel was not ineffective under the standard outlined in Strickland v. Washington, 466 U.S. 668, 671 (1984).

**I. BACKGROUND & PROCEDURAL HISTORY**

Petitioner was charged, in an April 19, 2010 superseding indictment, with conspiracy to distribute 500 grams or more of cocaine under 21 U.S.C. § 846 (Count One), and possession with intent to distribute 500 grams or more of cocaine under 21

U.S.C. § 841(a)(1), (b)(1)(B), and aiding and abetting under 18 U.S.C. § 2 (Count Two).

Following a five-day trial, the jury convicted Petitioner and co-conspirator Jonathan Cobb on all counts.<sup>1</sup> Petitioner was sentenced to 288 months' imprisonment, 8 years supervised release, and a \$1,500 fine. District Court Judgment 1, ECF No. 179. On November 8, 2010, Petitioner filed a Notice of Appeal through Counsel. Pet.'s Notice of Appeal 1, ECF No. 182. Petitioner submitted a letter to the court on December 15, 2010, indicating that he no longer wished to be represented by Mr. Jarvis. Letter from David Cobb to the Court (Dec. 15, 2010) ECF No. 193. However, Mr. Jarvis did represent Petitioner on his appeal with the Third Circuit. On May 25, 2012, the Third Circuit affirmed the decision of the District Court as to both Petitioner and Jonathon Cobb. Third Circuit Judgment 2, ECF No. 215.

On September 24, 2013, Petitioner filed a pro se motion to vacate his sentence pursuant to 28 U.S.C. § 2255. See Motion to Vacate/Set Aside/Correct Sentence, ECF No. 221 [hereinafter "\$ 2255 Pet."]. Shortly thereafter, Petitioner filed a Memorandum of Law and Authorities in support of his § 2255 Petition. See Mem. L. & Authorities Supp. Pet.'r's Mot. Vacate, Set-Aside, or Correct Conviction or Sentence, ECF No. 223 [hereinafter "\$ 2255

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<sup>1</sup> A third co-defendant, Darren Macklin, was found not guilty on all charges. See Judgment of Acquittal as to Darren Macklin, ECF No. 157.

Mem.”]. Petitioner therein alleges that Counsel was ineffective for failing to: (1) to join co-conspirator Jonathan Cobb’s pre-trial motion to suppress the wiretap evidence; (2) explain the law of conspiracy; and (3) file a written Rule 29 motion after being requested to do so. § 2255 Mem. 5-8.

The Government submitted its response in opposition to the § 2255 petition on November 26, 2013. The Government asserts that the § 2255 petition should be denied on the following grounds: (1) Petitioner’s motion was untimely under the limitations provisions of 18 U.S.C. § 2255(f); and (2) Petitioner’s allegations that Counsel was ineffective in violation of the Sixth Amendment do not satisfy the mandatory two-part test set forth in Strickland. Gov’t’s Response in Opp’n, 4-6, ECF No. 226; see 466 U.S. at 687. In support of this second assertion, the Government analyzes and dismisses each of Petitioner’s three claims of ineffectiveness. Gov’t’s Response in Opp’n, 7-9.

## **II. ANALYSIS**

A criminal defendant may petition for relief under 28 U.S.C. § 2255 within one year of 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 (f).

A court of appeals judgment becomes final when the time expires to apply for a writ of certiorari for review of the judgment with the United States Supreme Court. See Clay v. United States, 537 U.S. 522, 525 (2003). The deadline for filing for a writ of certiorari is 90 days. See U.S. Sup. Ct. R. 13(1). Therefore, if a defendant has not filed for a writ of certiorari within 90 days of the date on which the court of appeals affirms the judgment of conviction, the judgment becomes final on the 91st day. See, e.g., Kapral v. United States, 166 F.3d 565, 570 (3d Cir. 1999).

In the present case, the Third Circuit issued its ruling on May 25, 2012. Petitioner did not file a petition for writ of certiorari. Therefore, the Third Circuit's judgment was finalized on August 23, 2012. The one year statute of limitations for Petitioner to file a § 2255 petition expired on August 23, 2012. Petitioner did not mail his motion until September 24, 2012, thereby exceeding the limitations period by

one month. § 2255 Pet. 14. The Court therefore finds that Plaintiff's § 2255 petition is untimely.

Petitioners may seek an exception from the timeframe provided under § 2255 (f) under the doctrine of equitable tolling. A court may grant equitable tolling of the one year statutory period for filing a § 2255 petition where a petitioner establishes (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. United States v. Thomas, 713 F.3d 165, 174 (3d Cir. 2013) (quoting Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549, 2562-63 (2010)).

Petitioner here has not requested equitable tolling, nor does the record show any reason why equitable tolling is applicable. See § 2255 Pet. 13; § 2255 Mem. 2-11.

Even if the pending § 2255 petition was not time-barred, it would be denied on the merits. Petitioner raises three claims of ineffective assistance of counsel, none of which satisfy the Strickland test. See 466 U.S. at 687.<sup>2</sup>

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<sup>2</sup> In Strickland, the Supreme Court established a two-prong test that a Petitioner must satisfy to sustain a claim of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be

### III. CONCLUSION

The Court will dismiss Petitioner's § 2255 Motion to Vacate, Set Aside or Correct Sentence. Petitioner's motion was filed outside of the one year statutory period provided for in § 2255 (f), and is therefore time-barred. Moreover, had Petitioner's motion been timely, it would still be denied on the merits.

An appropriate order follows.

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said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. To satisfy the first prong under Strickland, courts look to whether the attorney's performance was reasonable under prevailing professional norms. Id. at 688. Defendant's own statements or actions should also be considered to determine the reasonableness of counsel's actions. Id. at 691. To satisfy the second prong, the petitioner must show that there is a reasonable probability that the result of the proceeding would have been different but for counsel's erroneous conduct. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. at 694.

Judicial scrutiny of counsel's performance must be highly deferential to counsel. Id. at 689. To show ineffectiveness, the petitioner has the substantial burden of overcoming the presumption that counsel's actions might be considered sound trial strategy. Id.

Applying this standard, Petitioner has not presented any evidence that Counsel's performance was deficient, such that counsel acted unreasonably under prevailing professional norms. Further, Petitioner has not shown that he suffered prejudice at trial for any of the alleged errors.

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**O R D E R**

**AND NOW**, this **4th** day of **September, 2014**, for the reasons set forth in the accompanying memorandum, it is hereby **ORDERED** as follows:

- (1) Petitioner's pro se Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 221) is **DENIED with prejudice**;
- (2) A certificate of appealability shall not issue;<sup>3</sup> and
- (3) The Clerk shall mark this case **CLOSED**.

**AND IT IS SO ORDERED.**

/s/ Eduardo C. Robreno  
**EDUARDO C. ROBRENO, J.**

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<sup>3</sup> A court issuing a final order denying a § 2255 motion must also decide whether to issue a certificate of appealability. The Court may issue the certificate "...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Pabon v. Mahanoy, 654 F.3d 385, 393 (3d Cir. 2011) (quoting Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)). Here, Petitioner has not made such a showing, as each of the grounds he raised can be resolved without need of an evidentiary hearing. Therefore, the Court declines to issue a certificate of appealability.