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

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 97-4088
v.	:	
	:	CRIMINAL ACTION
WILFREDO MALDANADO	:	NO. 94-251-2

MEMORANDUM AND ORDER

Yohn, J. June 26, 1997

Wilfredo Maldanado pleaded guilty to violating the federal drug laws on January 9, 1995. At a sentencing hearing held on June 6, 1996, the defendant was sentenced to, inter alia, 110 months imprisonment. Judgment was entered on June 6, 1996. The defendant did not file a direct appeal.

On June 4, 1997, the defendant filed a pro se "motion for enlargement of time," seeking to be given until June 15, 1997 to file a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence. Apparently, Maldanado filed this motion in order to avoid the new one year limitations period found in § 2255 which was to expire on June 6, 1997--one year after the court's entry of judgment. On June 17, 1997, defendant's § 2255 motion was docketed with this court. That motion challenges this court's assessment of a two point enhancement pursuant to United States Sentencing Guideline § 2D1.1(b)(1). For the reasons set forth below, the court concludes that the defendant's motion is untimely. The court will, therefore, deny the defendant's motion to enlarge time and dismiss the petition for habeas corpus with

prejudice.

DISCUSSION

Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 provides, in part, as follows:

> A 1-year period of limitations shall apply to a motion under this section [§ 2255]. The limitations period shall run from the latest of--
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> (1) the date on which the judgment of conviction becomes final;
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> (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;
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> (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.

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220 (codified at 28 U.S.C. § 2255).

Maldanado admits in his Motion to Enlarge Time that his judgment of sentenced became final on June 6, 1996, see Mot. to Enlarge Time at 2, and the court has independently concluded that he is correct. Thus, the limitations period found in § 105 expired on June 6, 1997, unless the "facts supporting the claim" could not have been "discovered through the exercise of due diligence" until a date later than June 6, 1996, or the limitations period is subject to some form of equitable tolling.

Maldanado argues that the limitations period in § 105 should not be strictly applied in his case because he does not speak or read English well and he does not "know the precepts of the law or the constitution . . . ." Mot. to Enlarge Time at 2. Neither of these contentions, even if true, would entitle Maldanado to relief from the one year limitations period.

I. Maldanado's Claim Is Not Subject to the Discovery Rule Provision Found is § 105 of the AEDPA

Defendant's substantive claim is, essentially, that the district court erred in applying a two point sentence enhancement pursuant to U.S.S.G. § 2D1.1(b)(1).[1] Despite the court's clear findings to the contrary, see N.T. June 6, 1996 at 16-18,[2] defendant argues that he was not responsible for the possession of the weapon in question. But see United States v. Demes, 941 F.2d 220, 223 (3d Cir.) (so long as weapons are present at drug transaction site, and there is sufficient evidence to support an inference that the weapons were possessed in order to further the drug transaction, an enhancement under § 2D1.1(b)(1) is

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[1] "If a dangerous weapon (including a firearm) was possessed, increase by 2 levels." U.S.S.G. § 2D1.1(b)(1). Application note 3 to § 2D1.1 provides, in part: "The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1 app. n. 3.

[2] "[I]t is crystal clear to me that it is not clearly improbable that the weapon was connected to the offense." N.T. June 6, 1996 at 17.

appropriate), cert. denied, 502 U.S. 949 (1991); see also United States v. Goggins, 99 F.3d 116, 119 (3d Cir. 1996) (noting that § 2D1.1(b)(1) encompasses considerably more conduct that 18 U.S.C. § 924(c)), cert. denied, 117 S. Ct. 1347 (1997).

There is no doubt that "the facts supporting the claim . . . presented could have been discovered through the exercise of due diligence" at the time the defendant was sentenced on June 6, 1996. Indeed, defendant does not appear to claim that he did not know the factual basis of his claim at the time sentence was imposed, but rather claims that he was unable to discover the legal basis of his claim because he is not knowledgeable in the law and does not speak English well.

Under the explicit terms of the statute, as well as the federal common law version of the "discovery rule," a claim accrues when the defendant knows the facts underlying his claim, not the legal basis for any claim which may arise from those facts. See 28 U.S.C. § 2255 (limitation period begins when "facts supporting the claim" are discoverable (emphasis added)); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1125 (3d Cir. 1997) ("Under the discovery rule, a claim accrues upon awareness of actual injury, not upon awareness that the injury constitutes a legal wrong."). Because the defendant was clearly aware of the factual basis for his § 2255 claim at the time the court imposed sentence, the statutory version of the discovery rule found in § 105 of the AEDPA is of no aid to him.

Defendant's claim that he does not speak English is also of

no aid to him insofar as he claims that he could not have discovered the facts underlying his § 2255 claim. An interpreter was present at the sentencing hearing where the court explained the basis for sentencing the defendant to an enhancement under § 2D1.1. Once the interpreter interpreted the court's sentence and the reasons for imposing the § 2D1.1 enhancement, Maldanado, like any other prisoner, became responsible for investigating any legal claim which may have arisen from the facts as explained to him. The fact that the defendant does not speak English well, therefore, does not change the result in this case.

II. Defendant's § 2255 Claim is Not Subject to Equitable Tolling

Defendant also claims that he was simply unable to prepare his petition in a timely manner because of his lack of legal experience and his difficulty with the English language. The court assumes that the defendant is seeking to invoke some form of equitable tolling which would allow him to bring his § 2255 motion despite the lapse of the one year limitations period. The court will assume without deciding that the limitation period in § 105 of the AEDPA is subject to equitable tolling. See Calderon v. United States Dist. Ct., 112 F.3d 386 (9th Cir. 1997) (limitation period in AEDPA for state habeas corpus claims is

subject to equitable tolling).[3]

The Court of Appeals for the Third Circuit has indicated that equitable tolling may be appropriate in three circumstances:

> [E]quitable tolling may be appropriate "(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum."

Halliburton, 111 F.3d at 1125-26 (quoting Oshiver v. Levin, Fishbein & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994)); see also Calderon, 112 F.3d at 391 (noting that the limitation period in § 105 is tollable only in "extraordinary circumstances"). "To invoke equitable tolling, [defendant] must show that [he] exercised reasonable diligence in investigating his claim" Halliburton, 111 F.3d at 1126; see also Klehr v. A.O. Smith Corp., 117 S. Ct. ____, 1997 WL 331794 (U.S. June 19, 1997) (in

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[3] Calderon is the first, and as of this writing, the only court to address the question of whether the new habeas limitation period may be subject to equitable tolling. Two district court opinions have, in dicta, suggested that the period is probably not subject to tolling. See United States v. Clarke, Crim. No. 90-238, 1997 WL 186331 (E.D. Pa. Apr. 10, 1997) ("The court has no power to extend the statute of limitations . . . ."); United States v. Eubanks, Crim. No. 92-392, 1997 WL 115647 (S.D.N.Y. Mar. 14, 1997) ("The AEDPA provision appears to state a statute of limitations which cannot be waived or modified by the Court."). While the reasoning of Calderon is forceful, it appears to this court that a substantial question may exist as to whether the limitation period in § 2255 is jurisdictional or a statute of limitation subject to equitable tolling. Because it is likely that the issue will have to be resolved by the court of appeals or the Supreme Court, and because the petitioner in this case is not entitled to relief even if equitable tolling is applicable to the limitation period, the court will decline to address the difficult question.

order to invoke equitable tolling for "fraudulent concealment" under RICO, plaintiff must show that she exercised reasonable diligence in investigating her claim).

In this case, the defendant is apparently claiming that the limitation period in § 105 is subject to tolling because he has in some extraordinary way been prevented from asserting his rights. But the defendant does not provide any extraordinary reasons why the statute should be tolled in his case. That the defendant is not knowledgeable in the law is no excuse for failing to abide by the limitation period found in § 105. See School Dist. of the City of Allentown v. Marshall, 657 F.2d 16, 21 (3d Cir. 1981) ("[I]gnorance of the law is not enough to invoke equitable tolling."); see also Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1991) (lawyer's failure to file a claim is not reason for tolling the statute of limitations).

Nor is the defendant entitled to equitable tolling (under the facts of this case) merely because he does not speak English well, and had difficulty preparing his § 2255 petition. It may be true that the preparation of defendant's § 2255 motion took considerably more time due to his lack of familiarity with the English language. The fact remains, however, that the defendant knew of the factual basis for his claim on June 6, 1996. An examination of the defendant's § 2255 motion reveals that it is not extraordinarily complex--it certainly would not have taken a full year to prepare, even if the defendant had difficulty

understanding English. The court has no doubt that the defendant could have prepared his petition months ago, rather than waiting to the last minute and seeking an extension of time from the court. Given that even "excusable neglect" is an insufficient basis for tolling a statute of limitations, see Irwin, 498 U.S. at 96 ("[T]he principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect."); Halliburton, 111 F.3d at 1126 (accord), the court cannot say that the defendant in this case is entitled to relief from a limitation period Congress has manifestly intended to "accelerate the federal habeas process . . . ." Calderon, 112 F.3d at 391.

The court recognizes that the result of such a limitation period may have harsh consequences in some cases.[4] As the United States Supreme Court has stated, however:

> It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached. We should give them effect in accordance with what we can ascertain the legislative intent to be.

United States v. Kubrick, 444 U.S. 111, 125 (1979); see Marshall, 657 F.2d at 20 ("The tolling exception is not an open-ended invitation to the courts to disregard limitations periods simply because they bar what may be an otherwise meritorious cause.").

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[4] The consequences in this case are not particularly harsh, however, as a review of the petitioner's motion makes clear that it is without merit.

In our Constitutional system, it is the prerogative of Congress to decide issues of policy. See U.S. Const. art. I. Congress has determined that a one year limitation period should be applied to prisoners applying for a writ of habeas corpus. Whether or not the courts agree with this policy, it is their duty to apply the law as enacted by Congress. In this case, the law as enacted by Congress requires the court to dismiss the defendant's § 2255 motion as untimely.

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ORDER

AND NOW, this day of June, 1997, after consideration of the defendant's motion for enlargement of time, the government's response thereto, the defendant's reply, and after review of the defendant's motion pursuant to 28 U.S.C. § 2255, IT IS HEREBY ORDERED that:

1. Defendant's motion for enlargement of time is DENIED.

2. Defendant's motion pursuant to 28 U.S.C. § 2255 is DISMISSED WITH PREJUDICE as untimely.

3. Defendant's motion to proceed in forma pauperis is DENIED.

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William H. Yohn, Jr., Judge