

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

UNITED STATES OF AMERICA : CRIMINAL
 :
 v. :
 :
 RICHARD BLACK : NO. 92-538-1

MEMORANDUM and ORDER

Norma L. Shapiro, J.

November 7, 1997

Petitioner Richard Black ("Black") has filed a petition under the Criminal Code and Federal Rule of Criminal Procedure 60(b) to persuade the court to correct its Order of October 16, 1997, approving and adopting a Report and Recommendation of United States Magistrate M. Faith Angell to deny applicant's motion to set aside or correct a sentence pursuant to 28 U.S.C. § 2255. The court believes that petitioner intended to file under 28 U.S.C. 60(b), a proper procedure as habeas petitions are civil petitions under Title 28, United States Code. However, the petition can be deemed a timely motion to reconsider and will be entertained as such.

Black filed his petition on June 21, 1996, after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), April 24, 1996. Courts in this district have recognized a grace period of up to one year following the enactment of the AEDPA in which prisoners convicted before April 24, 1996 can file habeas petitions. See, e.g., United States v.

Santiago, 1997 WL 400028 (E.D. Pa. Jul. 10, 1997); United States v. Ortiz, 1997 WL 214934 (E.D. Pa. Apr. 28, 1997). Thus, the AEDPA statute of limitations did not bar Black's habeas petition as the Report and Recommendation stated.

However, the court also approved an alternative recommendation that Black's petition must be denied as a second habeas corpus petition filed without certification by the Court of Appeals pursuant to 28 U.S.C. § 2244, as is required for successive petitions by 28 U.S.C. § 2255. Therefore, any reliance on the AEDPA statute of limitations was harmless.

Plaintiff relies on Lindh v. Murphy, 117 S. Ct. 2059 (1997), as a "Contemporaneous Opinion by The United States Supreme Court, June 23, 1997, to which REVERSED The Application of Antiterrorism Effective Death Penalty ("AEDP") Act of April 24, 1996, That Court (6-23-97) stated not to be applied Retroactively to '(Non-capital crime cases,)' i.e., Habeas Corpus ? LINDH vs MURPHY, (1996) 96-6298 (April 12-June 23,1997) [sic]."

Lindh held that 28 U.S.C. § 2254(d), the new section of the statute dealing with state habeas corpus petitions, did not apply to non-capital cases already pending when the Act was passed. However, its consideration was limited to § 2254(d) state petitions pending when the Act was passed; this is a petition under 28 U.S.C. § 2255. This habeas application under 28 U.S.C. § 2255 was not filed until after the Act was passed and is not

affected by the Supreme Court's decision in Lindh v. Murphy.

Petitioner also cites Liriano v. United States, 95 F.3d 119 (2d Cir. 1996), "to which would inform the Court of Petitioner's intentions." Liriano makes a passing reference to the AEDPA's modification of § 2255 to limit certification by the Court of Appeals of successive habeas petitions to situations where there is newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral review. See id. at 121.

Black did not file the present petition until after the AEDPA went into effect; therefore the AEDPA applies. See United States v. Skandier, No. 97-3129, 1997 WL 581662 at *5 (3d Cir. Sept. 22, 1997) (not requiring certification by the Court of Appeals for habeas petitions filed before April 24, 1996). Certification by the Court of Appeals is necessary for a subsequent habeas petition, unless the first petition was not addressed on the merits. See Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997). This court did resolve Black's first petition on the merits. If Black seeks to file a successive habeas petition, he must seek certification from the Court of Appeals.¹

In certain limited circumstances, if a federal habeas petitioner's remedy under § 2255 is deemed "inadequate or

¹ The Court of Appeals for the Second Circuit has instructed district courts to transfer successive habeas petitions to the court of appeals under 28 U.S.C. § 1631, rather than dismissing them. See Liriano, 95 F.3d at 122-23. The Court of Appeals for the Third Circuit has not so provided.

ineffective," he may file a petition under 28 U.S.C. § 2241. But the § 2255 remedy is not inadequate "merely because the petitioner is unable to meet the stringent gatekeeping requirements." In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). Section 2241 is only available if the § 2255 remedy is procedurally barred and the court's failure to afford relief would amount to a "complete miscarriage of justice." Id. (allowing relief under § 2241 where the petitioner had been convicted of a crime that was subsequently made invalid). The narrow confines of § 2241 do not apply in this case.

Finally, Black raises the following question: "WHETHER OR NOT, THE UNITED STATES CONGRESS INTENDED TO PUNISH ACCUSED , WITHOUT PERMITTING A DOWNWARD DEPARTURE OF ADDITIONAL LEVELS UNDER CONSIDERATIONS TO "Drugs' " Purity Rate ? IF CONSIDERING, TOO THE AMOUNT OF HARMFUL SUBSTANCE, Under Title, 21 U.S.C., § 846 Violation ? United States v. Munoz-Realpe, 21 F 3d 376 [sic]."

United States v. Munoz-Realpe, 21 F.3d 375 (11th Cir. 1994) analyzed the November 1, 1993 amendments to the United States Sentencing Guidelines ("U.S.S.G."). Specifically, the court discussed the amendments' clarification of the term "cocaine base" under U.S.S.G. 2D1.1(c). Black was sentenced in April, 1993. Any subsequent modification of the U.S.S.G. has no bearing on his sentence.

Petitioner's motion for reconsideration is without merit and will be denied.

An appropriate Order follows.

