

MEMORANDUM

1. BACKGROUND. On February 25, 1993 two men entered and robbed the Continental Bank located at 125 West City Line Avenue in Bala Cynwyd, Pennsylvania. They fled the bank with approximately \$170,990 in cash.

Defendant and Michael McClenton were arrested on April 8, 1993, in connection with the bank robbery, and were subsequently indicted on four counts: conspiracy to commit bank robbery, in violation of 18 U.S.C. §§ 371 and 2113(a) (Count 1); bank robbery, in violation of 18 U.S.C. § 2113(a) (Count 2); armed bank robbery, in violation of 18 U.S.C. § 2113(d) (Count 3); and carrying and using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 4). They were jointly tried before a jury beginning on July 22, 1993. On August 5, 1993, the jury found both defendants guilty on Counts 1, 2, and 3 of the Indictment and not guilty on Count 4.

On August 11, 1993, defendant filed an Omnibus Post-Trial Motion for Judgment of Acquittal or, in the Alternative, for New Trial, and requested an extension of time to assign reasons in support of his Omnibus Motion. On December 13, 1993, defendant filed a Motion for New Trial raising four claims: (1) the Court erred in denying defendant's pretrial Motion to Compel Disclosure of Reverse 404(b) Evidence; (2) the Court erred in admitting documents pertaining to a maroon Cadillac that were seized from defendant's residence; (3) the Court erred in allowing the Government to admit the prior false statements of a witness to the FBI; and (4) the Court erred in allowing a bank teller, Cheryl Harp, to testify as to her degree of certainty in identifying defendant as one

of the bank robbers.

On February 4, 1994, defendant filed a pro se Motion for New Trial Due to Ineffective Assistance of Counsel. The Court appointed new counsel for defendant because of his ineffective assistance of counsel claims and permitted defendant to file supplemental memoranda of law in support of all of his motions. In connection with defendant's claims of ineffective assistance of counsel, the Court held an evidentiary hearing on April 7 and April 22, 1994. On October 14, 1994, the Court heard oral argument on all pending motions. By Memorandum and Order dated February 1, 1995, the Court denied the three post-trial motions filed by defendant on August 11 and December 13, 1993, and February 4, 1994.

On April 11, 1995, defendant filed a Motion for New Trial which the Court treated as two separate motions -- a Motion for New Trial on the basis of Newly Discovered Evidence and a Motion to Dismiss the Indictment or, in the alternative, for Return of Property. Defendant contended that the indictment of a third man for his participation in the same, "two man" bank robbery which led to defendant's conviction constituted newly discovered evidence which, if presented to the jury, would have resulted in an acquittal. Defendant also contended that, depending on which occurred later, either his conviction or the administrative forfeiture of his Mercedes was a violation of the Double Jeopardy clause. By Memorandum and Order dated May 11, 1995, the Court denied these motions. Also on May 11, defendant filed his First Amended Motion for New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure alleging

similar grounds as a basis for relief, which was denied on May 12, 1995 following oral argument earlier that day.

Defendant was sentenced on May 12, 1995 under the Sentencing Guidelines, inter alia, to concurrent terms of 120 months imprisonment. The applicable guideline for the counts of conviction is U.S.S.G. § 2B3.1. Based on a total offense level of 27 and a Criminal History Category of IV, the Guideline imprisonment range was 100 to 125 months.

On May 15, 1995, defendant filed a Notice of Appeal. On January 16, 1996, the Third Circuit affirmed the conviction and the sentence. On April 15, 1996, the Supreme Court of the United States denied defendant's Petition for a Writ of Certiorari.

On July 19, 1996, defendant filed a pro se Memorandum to Modifications of an Imposed Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(B) [sic], arguing that the Court improperly applied a three level enhancement under U.S.S.G. § 2B3.1(b)(2)(E) for brandishing, displaying, or possessing a dangerous weapon because both he and Mr. McClenton were acquitted on Count 4 of the Indictment. Defendant contended that because he was acquitted of Count 4 of the indictment for carrying and using a firearm during a crime of violence, the imposition of the sentencing enhancement was improper.

In a Memorandum and Order dated August 27, 1996, the Court denied defendant's Memorandum under 18 U.S.C. § 3582. The Court found that defendant's Memorandum, treated as a motion, was procedurally barred because the seven-day time

limit for granting relief under 18 U.S.C. § 3582, which had begun to run after the imposition of sentence, had long since lapsed. Then, applying the liberal standard for construing pro se motions set forth in Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court addressed the question whether defendant's motion stated a claim under 28 U.S.C. § 2255 and concluded that defendant's motion could not be properly construed as a collateral attack upon his conviction under that statute because of the failure to raise the sentencing guideline issue on appeal. Thus, the Court denied the relief sought under 18 U.S.C. § 3582 and 28 U.S.C. § 2255.

On September 20, 1996, defendant filed a "pro se Motion For Reduction Of Sentence Pursuant To 28 U.S.C. § 994(o); U.S.S.G. § 5G1.3(b), Amendment 465; 18 U.S.C. § 3582(c)(2)." [sic] Defendant contended in that motion that his sentence was improperly calculated because the Court failed to correctly apply U.S.S.G. § 5G1.3. Defendant argued that he should have been sentenced under the 1992 Guidelines, rather than the 1994 Guidelines which were in effect at the time of sentencing, and that due to the enhanced sentence for a probation violation triggered by his federal conviction under the latter guidelines, the Court had violated the Ex Post Facto clause of the Constitution. Defendant further argued that had the Court properly applied § 5G1.3, it would have reduced his criminal history category, increased his total offense level under the multi-count procedures of § 3D1.4, and concluded that the proper Guideline range was 87-108 months, less his state sentence, rather than 100 to 125 months without any reduction for his potential state sentence.

The Court concluded that it could not consider plaintiff's motion under § 3582(c)(2) because defendant was not sentenced to a term of imprisonment based on a sentencing range that was subsequently lowered by the Sentencing Commission as is required by that statute. Then, applying the liberal standard for construing pro se motions pursuant to Haines, the Court treated the filing as a motion under 28 U.S.C. § 2255, which was the only avenue for claiming the relief sought. In a Memorandum and Order dated October 22, 1996, the Court ruled that defendant's collateral attack on his sentence, treated as a motion under § 2255, was procedurally barred due to his failure to raise the issue on appeal, and that even were it not so barred, defendant's claim would fail on the merits.²

On October 25, 1996, defendant filed a pro se Motion For New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, which raised the following issues: (1) whether evidence concerning the existence and identity of a confidential source who supplied information to the Government is newly discovered, and if so, whether that evidence requires a new trial; (2) whether evidence concerning the identity of an alleged "third man" in the bank robbery for which the defendant was convicted is newly discovered, and if so, whether that evidence requires a new trial; (3) whether Cheryl Harp's identification of the defendant in a photo array was constitutional; and (4) whether the Government's conduct as it related to the suppression of the identity of the alleged third participant in the robbery and to Ms. Harp's identification was so outrageous as to

² United States v. Hawkins, 1996 WL 617430, *2-3 (E.D. Pa. Oct. 22, 1996).

offend due process. On November 4, 1996, the Court denied that motion for new trial, ruling that none of the grounds asserted in the motion met the legal criteria for granting a new trial. On September 9, 1997, the Third Circuit affirmed the November 4, 1996 Order denying defendant's motion. On December 1, 1997, the Supreme Court of the United States denied defendant's Petition for a Writ of Certiorari.

The current round of litigation was commenced by defendant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Doc. No. 265, filed May 13, 1998). On that same date defendant filed a Motion for Appointment of Counsel (Doc. No. 266, filed May 13, 1998). Thereafter, the Government submitted a letter to the Court (Doc. No. 268) and filed its Response to Defendant's Motion Under 28 U.S.C. § 2255 (Doc. No. 270, filed June 4, 1998); and defendant submitted a letter to the Court (Doc. No. 267) and filed a Rebuttal to Government's Response to Motion Pursuant to 28 U.S.C. § 2255 (Doc. No. 273, filed July 13, 1998).

2. DISCUSSION

A. Introduction. Defendant alleges in his 28 U.S.C. § 2255 motion filed May 13, 1998 that ineffective assistance of counsel at his trial and during appeal, coupled with a “pattern of misconduct” by the prosecutor and an erroneous jury instruction by the Court, served to deprive him of his “due process” rights to a fair trial. Many of these claims involve the participation of the “third man” in the robbery. Specifically, defendant contends, *inter alia*, that (1) his trial counsel was ineffective for declining the Court’s offer of a continuance in order to further investigate this third man; (2) his attorney in his first appeal was ineffective for not presenting evidence that the Government knew the third man’s identity before trial; and (3) the Government acted wrongfully in concealing its knowledge of this individual. As a preliminary matter, the Court will consider whether this motion is properly before this Court.

28 U.S.C. § 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (1994). The Government raises two procedural bars which it believes deprive this Court of jurisdiction to hear defendant’s motion. First, the Government asserts that defendant’s motion is time-barred under section 2255 because it was filed

more than a year after his conviction became final on April 15, 1996.³ Second, the Government contends that the instant motion is a “second or successive” motion under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), and must, therefore, be first presented to the Court of Appeals for certification before it may be considered by this Court.

The Court concludes that the instant § 2255 motion is a “second or successive” motion under the AEDPA, and thus the motion must be certified by the United States Court of Appeals for the Third Circuit pursuant to §§ 2244 and 2555 before it can be presented in this Court. In view of that determination the Court will not address the arguments advanced by the government and defendant regarding the AEDPA limitations period.

B. A “Second or Successive” Motion. Under the AEDPA, a defendant seeking to file a second or successive motion under 28 U.S.C. § 2255 to vacate, set aside, or

³ 28 U.S.C. § 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), provides in pertinent part:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall 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.A. § 2255, as amended Apr. 24, 1996. Pub.L. 104-132, Title I, § 105, 110 Stat. 1220.**

correct a sentence must as a preliminary step obtain an order from the appropriate court of appeals authorizing the district court to consider the motion. See 28 U.S.C.A. §§ 2244(b)(3)(A), 2255 (West 1994 & Supp.1997).⁴ “A three-judge panel has 30 days to determine whether ‘the application makes a prima facie showing that the application satisfies the requirements of’ § 106(b),” and its decision regarding authorization is not appealable. Felker v. Turpin, 518 U.S. 651, 657, 116 S.Ct. 2333, 2337 (1996) (quoting 28 U.S.C. § 2244(b)(3)(C); citing § 2244(b)(3)(B), (D), (E)). The requirement that a habeas petitioner “obtain leave from the court of appeals before filing a second habeas petition in the district court . . . simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court.” Id. at 664, 116 S.Ct. at 2340. The Supreme Court characterized “[t]he new restrictions on successive petitions” as “a modified res judicata rule, a restraint on what is called in habeas corpus practice ‘abuse of the writ.’” Id.⁵

⁴ **The AEDPA provides in pertinent part:**

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(b)(3)(A) as amended Apr. 24, 1996.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C.A. § 2255, as amended Apr. 24, 1996.

⁵ **In Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996), the court clarified the jurisdictional nature of the new AEDPA restrictions on successive petitions:**

Unlike the [pre-AEDPA] standard, under which a second petition could be pursued unless the government established that it was an abuse of the writ, see McCleskey v. Zant, 499 U.S. 467, 477, 494-95, 111 S.Ct. 1454, 1461, 1470-71, 113 L.Ed.2d 517 (1991), the new prior-approval device is self-executing. From the district court's perspective,

This Court, in the Memorandum and Order of August 27, 1996, denied defendant's pro se Memorandum to Modifications of an Imposed Term of Imprisonment under 18 U.S.C. § 3582(c)(1)(B) [sic], filed July 19, 1996, on the ground that defendant's "Memorandum" failed to state a claim either under 18 U.S.C. § 3582 or 28 U.S.C. § 2255. In denying that motion, the Court analyzed the issues presented under 18 U.S.C. § 3582 and 28 U.S.C. § 2255, but never explicitly considered the Memorandum to be a § 2255 motion. Given that this motion was never considered as a § 2255 motion, the Court concludes that such motion, standing alone, would not render the instant motion "second or successive" under § 2255. However, there is no such ambiguity in this Court's Memorandum and Order of October 22, 1996, which denied defendant's "pro se Motion For Reduction Of Sentence Pursuant To 28 U.S.C. § 994(o); U.S.S.G. § 5G1.3(b), Amendment 465; 18 U.S.C. § 3582(c)(2)" [sic], filed September 20, 1996. In applying the liberal standard for construing pro se motions enunciated in Haines, the Court deemed the filing a Motion under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence because, in order to state a claim under § 3582(c)(2), the Sentencing Commission would have had to have lowered the sentencing range under which defendant had been sentenced pursuant to 28 U.S.C. 994(o). Since no such change had occurred, it was clear that the only possible basis for claiming relief was under § 2255. In the October 22, 1996 Memorandum and Order, the Court treated the motion as if filed under § 2255 and ruled

it is an allocation of subject-matter jurisdiction to the court of appeals. A district court must dismiss a second or successive petition, without awaiting any response from the government, unless the court of appeals has given approval for its filing.
96 F.3d at 991.

that defendant's collateral attack on his sentence was procedurally barred due to his failure to raise this issue on appeal, and that even were it not so barred the defendant's claim would fail on the merits.⁶

The Court is mindful that judicial conversion of post-conviction motions poses special risks for defendants since the passage of the AEDPA. On that issue the Second Circuit recently noted:

Prior to the enactment of AEDPA, district courts routinely converted post-conviction motions of prisoners who unsuccessfully sought relief under some other provision of law into motions made under 28 U.S.C. § 2255 and proceeded to determine whether the prisoner was entitled to relief under that statute. This was done most frequently in the cases of pro se litigants who sought relief under a statute or rule that accorded no relief--often Fed.R.Crim.P. 35--in order to determine whether they might be entitled to relief under § 2255, without obligating them to replead their motions. . . . The enactment of AEDPA, however, brings into play new considerations. AEDPA places stringent limits on a prisoner's ability to bring a second or successive application for a writ of habeas corpus under either 28 U.S.C. § 2254 or § 2255. . . . If a district court receiving a motion under some other provision of law elects to treat it as a motion under § 2255 and then denies it, that may cause the movant's subsequent filing of a motion under § 2255 to be barred as a "second" § 2255. Adams v. United States, --- F.3d ---, 1998 WL 514679, at *1-2 (2nd Cir. 1998).

As Adams goes on to state, "a conversion, initially justified because it harmlessly assisted

⁶The October 22, 1996 Order reads as follows:

AND NOW, to wit, this 22nd day of October, 1996, upon consideration of the Motion of defendant, Michael Hawkins, For Reduction of Sentence Pursuant To 28 U.S.C. § 994(o); U.S.S.G. § 5G1.3(b), Amendment 465; 18 U.S.C. § 3582(c)(2), treated by the Court as Motion under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence (Document No. 242), and the September 24, 1996 letter from Assistant United States Attorney Robert A. Zauzmer in opposition to that Motion, for the reasons set forth in the accompanying Memorandum, IT IS ORDERED that the Motion of defendant, Michael Hawkins, For Reduction of Sentence Pursuant To 28 U.S.C. § 994(o); U.S.S.G. § 5G1.3(b), Amendment 465; 18 U.S.C. § 3582(c)(2), treated by the Court as Motion under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence, is DENIED. (footnotes omitted)

the prisoner-movant in dealing with legal technicalities, may result in a disastrous deprivation of a future opportunity to have a well-justified grievance adjudicated.” Id. at *2. However, because of the nature of the relief sought, defendant’s “pro se Motion For Reduction Of Sentence Pursuant To 28 U.S.C. § 994(o); U.S.S.G. § 5G1.3(b), Amendment 465; 18 U.S.C. § 3582(c)(2)” [sic], filed September 20, 1996, could only have been considered under § 2255, and it was so treated and given full consideration under that statute.

The question presented, then, is whether the October 22, 1996 denial of defendant’s “pro se Motion For Reduction Of Sentence Pursuant To 28 U.S.C. § 994(o); U.S.S.G. § 5G1.3(b), Amendment 465; 18 U.S.C. § 3582(c)(2)” [sic] on procedural grounds renders the instant motion “second or successive” under the strictures set forth in the AEDPA, that is, whether or not a dismissal of a prior § 2255 motion on procedural grounds alone renders subsequent § 2255 motions “second or successive.” Although the Third Circuit has not yet ruled on this question, the Court finds the recent per curiam decision of the Second Circuit in Carter v. United States, 150 F.3d 202 (2d Cir. 1998) persuasive:

We write to clarify that the denial of an initial § 2255 motion on grounds of procedural default (i.e., for failure to raise a claim on direct appeal, which failure is not excused by a showing of cause and prejudice) constitutes a disposition on the merits, such that any subsequent § 2255 motion will require authorization pursuant to § 2255 and 2244(b)(3)(A). Furthermore, the fact that a subsequent motion raises new grounds for relief has no bearing on this requirement. Id. at 203.

Accord Howard v. Lewis, 905 F.2d 1318, 1322-23 (9th Cir. 1990) (dismissal for

procedural default, unlike dismissal for failure to exhaust state remedies, is a disposition on the merits.)

Defendant's September 20, 1996, "pro se Motion For Reduction Of Sentence Pursuant To 28 U.S.C. § 994(o); U.S.S.G. § 5G1.3(b), Amendment 465; 18 U.S.C. § 3582(c)(2)" [sic] was treated as a § 2255 motion and denied on the ground of procedural default by Order dated October 22, 1996. This denial constitutes a disposition of a § 2255 motion on the merits for the purposes of the AEPDA, rendering the instant motion a "second or successive" motion under § 2255. Defendant has not been granted leave by the Court of Appeals to seek review of the instant "second or successive" Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255, as required by 28 U.S.C.A. § 2244(b)(3)(A). Because he has not obtained such an order, this Court may not consider the merits of his motion. Under these circumstances, this Court must either dismiss the unapproved second or successive motion, see Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996), or transfer the action to the appropriate court of appeals, see Benton v. Washington, 106 F.3d 162, 164 (7th Cir.1996). So as not to cause the defendant any unnecessary delay, the Court chooses the latter approach and therefore

orders that the action be transferred to the Court of Appeals.⁷

3. MOTION FOR APPOINTMENT OF COUNSEL. There is no federal constitutional right to counsel for collateral attacks on a conviction.⁸ See Pennsylvania v. Finley, 481 U.S. 551, 555 (1989). Appointing counsel for pro se petitioners in habeas corpus cases is a power commended to the discretion of the district court in all but the most extraordinary circumstances. Winsett v. Washington, 130 F.3d 269, 281 (7th Cir. 1997). Appointment of counsel is mandatory only “if, given the difficulty of the case and the litigant's ability, [the defendant] could not obtain justice without an attorney, [he] could not obtain a lawyer on [his] own, and [he] would have had a reasonable chance of winning with a lawyer at [his] side.” Forbes v. Edgar, 112 F.3d 262, 264 (7th Cir.1997). See also Stephen v. K.W. Prunty, 91 F.3d 155, 1996 WL 416297 at *2 (9th Cir. 1996) (stating that no appointment is needed if the issues are not of a kind that demand attorney representation in order to avoid a violation of due process and no evidentiary hearing was

⁷ **Transfers can be accomplished through 28 U.S.C. § 1631 (1994), which provides in pertinent part:**
Whenever a civil action is filed in a court ... or an appeal ... is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.
28 U.S.C. § 1631 (1994).

⁸ **18 U.S.C. § 3006A provides in pertinent part:**
[A]ny financially eligible person who . . . is seeking relief under section 2241, 2254, or 2255 of title 28 . . . may be furnished representation . . . whenever the United States magistrate or the Court determines that the interests of justice so require and such person is financially unable to obtain representation 18 U.S.C. § 3006A (1994).

required).

In view of the Court's disposition of this matter, there is no need for the Court to address the issues raised in defendant's Motion for Appointment of Counsel. Suffice it to say that defendant presented no issues involved in the Court's disposition of his motion which might have made it appropriate for the Court to appoint counsel.

4. CONCLUSION. For the foregoing reasons, the Court has denied both defendant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Doc. No. 265, filed May 13, 1998) for lack of jurisdiction, and defendant's Motion for Appointment of Counsel (Doc. No. 266, filed May 13, 1998). The Court has also transferred the case to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1631 (1994).

BY THE COURT:

JAN E. DUBOIS