

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

UNITED STATES OF AMERICA :
 : CIVIL ACTION
 v. : 98-2372
 :
 RUBEN CONCEPCION : CRIMINAL NO.
 : 95-624-01

MEMORANDUM

Broderick, J.

April 19, 1999

On May 7, 1996 Petitioner Ruben Concepcion pled guilty to one count of conspiracy to distribute crack cocaine and possess crack cocaine with intent to distribute, in violation of 21 U.S.C. § 846, one count of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1), and one count of criminal forfeiture under 21 U.S.C. § 853(a)(1)(2)and(p). On February 26, 1997, this Court sentenced Petitioner to ninety-five months imprisonment followed by five years supervised release. At the sentencing hearing, where Petitioner was represented by counsel, this Court inadvertently neglected to inform Petitioner of his right to file an appeal. Petitioner did not file an appeal.

On May 5, 1998 the Court received three motions filed by Petitioner: (1) a motion to proceed in forma pauperis; (2) a motion for documents without cost; and (3) a motion for relief under 28 U.S.C. § 2255. This Court granted the first two motions on May 19, 1998, and ordered the Clerk to furnish Petitioner with

copies of this Court's judgment and commitment order, Petitioner's presentence report, and a copy of the transcript of Petitioner's plea hearing and sentencing hearing.

In his section 2255 motion, filed on May 5, 1998, Petitioner claims generally that the sentence issued by this Court on February 26, 1997 violates three provisions of the sentencing guidelines, and claims generally that his counsel was ineffective. Petitioner, however, sets forth no specific facts to support the claims in his section 2255 motion.

On August 31, 1998 Petitioner supplemented his motion for relief under 28 U.S.C. § 2255. In his supplemental motion, Petitioner realleges one violation of the sentencing guidelines, asserts three new alleged violations of the sentencing guidelines, and realleges his ineffective assistance of counsel claim. In addition, Petitioner claims, for the first time, that the Court failed to advise him, at the time of sentencing, of his right to a direct appeal, in violation of Federal Rule of Criminal Procedure 32(c)(5).¹

On September 18, 1998, the Government filed a motion to dismiss Petitioner's motion as untimely. Petitioner opposed the Government's motion to dismiss, and filed a "motion to amend" his

¹ Petitioner erroneously cites Federal Rule of Criminal Procedure 32(a)(2) as the applicable rule. In 1994, the provisions of Rule 32(a)(2) were rewritten into current Rule 32(c)(5). Petitioner was sentenced in 1997, and thus Rule 32(c)(5) is the provision by which a district court must notify a defendant of his right to appeal his sentence.

section 2255 motion. For the reasons stated below, this Court will grant the Government's motion to dismiss, and deny Petitioner's section 2255 motion.

Petitioner's section 2255 motion is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132 ("AEDPA"). The AEDPA has imposed stringent requirements for seeking and obtaining collateral relief. Specifically, the AEDPA amended section 2255 to impose a one year time limit on filing section 2255 motions. The relevant text of 28 U.S.C. § 2255 provides that:

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 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 application 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.

Petitioner contends that his section 2255 motion is timely under subsection four, "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(4). Petitioner contends he received a copy of his sentencing transcript on June

16, 1998, and in reviewing the transcript, "discovered" the fact of the Rule 32 violation. According to Petitioner, June 16, 1998 should be the triggering date for the one year statute of limitations, and his motion filed on August 31, 1998 is therefore timely.

The Court notes that subsection four explicitly requires that the Petitioner show "due diligence" in discovering facts to support his claims. 28 U.S.C. § 2255(4). Petitioner has made no assertions of reasonable investigation of his claims. He did not file his motion for documents without cost until April 23, 1998, more than a year after his conviction. Therefore, Petitioner's motion is not governed by subsection four, and is thus governed by subsection one.

Moreover, Petitioner's contention that the date of his receipt of his free sentencing transcript should be the triggering event for the AEDPA's one year statute of limitations is simply untenable. "Transcripts . . . are not the sort of 'facts' contemplated by this subsection." United States v. Agubata, 1998 WL 404303, *3 fn. 1 (D. Md. July 9, 1998). Facts contained in Petitioner's transcript are not newly discovered facts sufficient to extend the time limitation for filing under the AEDPA. The facts supporting Petitioner's claims were discoverable at sentencing on February 26, 1997 and immediately thereafter.

Because Petitioner's 2255 motion is not governed by subsection four, it is therefore governed by subsection one, which is "the date on which judgment of conviction becomes final." 28 U.S.C. § 2255. Petitioner's judgment of conviction and sentencing was filed on February 27, 1997. He had 10 days to file a notice of appeal. Fed. R. Crim. P. 4(b). Petitioner did not file a direct appeal. Therefore, Petitioner's conviction became "final," for purposes of the AEDPA, on March 9, 1997. Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). Petitioner had until March 9, 1998 to file his section 2255 motion.

Petitioner's original section 2255 motion was filed by the Clerk of Court on May 5, 1998, almost two months after the prescribed limitations period. However, a pro se prisoner's section 2255 motion is deemed filed at the moment it is delivered to prison officials for mailing. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). While Petitioner has not submitted proof of the date he delivered his documents to prison officials, the cover letter accompanying Petitioner's original section 2255 motion is dated April 23, 1998. Accepting April 23, 1998 as the date of filing, Petitioner's motion is nevertheless filed nearly six weeks after the March 9, 1998 filing deadline. Therefore, the Court concludes that Petitioner's section 2255 motion is time barred by the AEDPA.

The Court has considered that the Third Circuit has held that the one-year limitations period for filing section 2255 petitions is a statute of limitations, not a jurisdictional bar. Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616 (3d Cir. 1998). The one year statute of limitations is therefore subject to equitable tolling. Id. at 618. However, federal courts invoke the doctrine of equitable tolling "only sparingly." United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998). Equitable tolling is only appropriate when the petitioner has been prevented from asserting his rights "in some extraordinary way." Miller, 145 F.3d at 618 citing Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994). Moreover, the petitioner must show that he exercised "reasonable diligence" in investigating and bringing his claims. Id. citing New Castle County v. Halliburton Nus Corp., 111 F.3d 1116, 1126 (3d Cir. 1997). Mere excusable neglect is not sufficient to toll the statute of limitations. Id.

Petitioner offers no evidence of reasonable diligence in investigating and filing his claims. All of the issues raised in Petitioner's section 2255 motion could have been raised at any time after sentencing. Petitioner had a full year to file a section 2255 motion and failed to do so. Petitioner's contentions do not present extraordinary circumstances sufficient to equitably toll the AEDPA's statute of limitations.

Having determined that Petitioner's section 2255 motion is untimely, this Court will grant the Government's motion to dismiss. Petitioner's section 2255 motion will be dismissed. Petitioner's motion to amend will be denied. Finally, there is no basis for issuing a certificate of appealability, as Petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

An appropriate Order follows.

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

UNITED STATES OF AMERICA	:	
	:	CIVIL ACTION
v.	:	98-2372
	:	
RUBEN CONCEPCION	:	CRIMINAL NO.
	:	95-624-01

O R D E R

AND NOW, this 19th day of April, 1999; upon consideration of the Government's motion to dismiss and Petitioner's response thereto; for the reasons stated in the Memorandum filed on this date;

IT IS ORDERED: The Government's motion to dismiss (docket # 149) is **GRANTED**;

IT IS FURTHER ORDERED: Petitioner Ruben Concepcion's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (docket # 133 and #148) is **DENIED**;

IT IS FURTHER ORDERED: Petitioner Ruben Concepcion's "motion

in opposition to government's motion and motion to amend" (docket # 150) is **DENIED**.

IT IS FURTHER ORDERED: There are no grounds for issuing a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

RAYMOND J. BRODERICK, J.