

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

UNITED STATES OF AMERICA	:	CRIMINAL No.
	:	98-00550-01
v.	:	
	:	CIVIL No.
KIN YAN TAM	:	03-0141
	:	

**Memorandum and Order**

Yohn, J.

December \_\_\_\_\_, 2004

Presently before this court is defendant Kin Yan Tam's motion to amend or supplement his prior motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. For the reasons stated herein, the motion will be denied.

**I. Background and Procedural History**

On January 11, 2000, defendant Kin Yan Tam pled guilty to four federal conspiracy counts involving a scheme to import and distribute heroin and to launder proceeds from the drug sales. He was sentenced to 240 months imprisonment on the first count, 120 months on the second count, and 252 months on the third and fourth counts, with the sentences to run concurrently.

Tam unsuccessfully appealed his conviction and his sentence. On January 13, 2003, represented by new counsel, he filed a motion under 28 U.S.C. § 2255 alleging ineffective assistance of counsel. Following a hearing, the court denied the motion. Tam appealed the denial, and by order dated December 15, 2003, the Third Circuit denied his application for a certificate

of appealability.

On August 9, 2004, Tam filed this motion to amend or supplement his § 2255 motion under Rule 15(d) of the Federal Rules of Civil Procedure, so that he could challenge his sentence under *Blakely v. Washington*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531 (2004). By his motion, Tam seeks to amend his original § 2255 motion to add the claim that the court’s sentencing findings regarding the quantity of drugs involved in the offense and his role in the offense violate the new constitutional rule announced in *Blakely*.

## II. Discussion

The Federal Rules of Civil Procedure apply to motions to amend § 2255 motions. *See U.S. v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999). Rule 15(a) provides for one amendment of right before a responsive pleading is served and for amendment by leave of the court, as justice requires, thereafter.<sup>1</sup> Fed. R. Civ. P. 15(a). Rule 15(d) governs supplemental pleadings, in which a party seeks to set forth transactions or occurrences that have occurred since the filing of the initial pleading. Fed. R. Civ. P. 15(d). Rule 15(d), like Rule 15(a), vests the court with discretion to determine when justice requires supplemental pleading. *Id.*

Although Rule 15 gives the court broad discretion to permit amendment and supplementation, “the liberality of the rule is no longer applicable once judgment has been entered.” *Ahmed v. Dragovich*, 297 F.3d 201, 207 (3d Cir. 2002). Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), which governs federal habeas motions, “a prisoner

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<sup>1</sup>Defendant, in his motion, cites only Rule 15(d), but he requests leave to “supplement and/or correct amend” his prior motion. *See* Motion to Amend and/or Motion to Supplement Motion to Vacate Sentence Filed under 2255 at ¶ 1 (emphasis added). Rule 15(a) is therefore also implicated.

receives one complete round of litigation, which as in other civil suits includes the opportunity to amend a pleading *before judgment*.” *Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999) (emphasis added); *see also United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000) (“A § 2255 petition provides a federal prisoner the opportunity to seek one full collateral review of his or her conviction and sentence.”).

Tam seeks to amend or supplement his § 2255 motion even though a final judgment on the merits of his initial motion has already been issued. This is not permissible. When the Third Circuit Court of Appeals denied Tam’s application for a certificate of appealability following the district court’s denial of his § 2255 motion, and he did not seek review by the Supreme Court, the “one complete round of litigation” to which he is entitled under the AEDPA came to a close. In light of such finality, Tam’s present motion is properly treated as a second or successive habeas motion and not as a Rule 15 motion to amend or supplement his initial habeas motion. *See Johnson*, 196 F.3d at 805 (“Just as a second filing may be treated as an initial motion when the first was not eligible for decision on the merits, so additional filings in the first collateral attack may be treated as ‘second or successive’ petitions when the first has reached a final decision.”).

Under the AEDPA, Tam may not file a second or successive § 2255 habeas motion without first moving in the court of appeals for an order authorizing the district court to consider the motion. 28 U.S.C. § 2244(b)(3); *see also Corrao v. United States*, 152 F.3d 188, 190 (2d Cir. 1998). A defendant may not circumvent the requirements of the AEDPA by presenting a second § 2255 habeas motion in the clothes of an amendment to the first. Because Tam has not sought an order in the court of appeals that would allow him to bring a successive habeas motion in district court, his motion to amend—for all intents and purposes a successive § 2255 motion—must

be denied.

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AND NOW on this \_\_\_\_\_ day of December 2004, upon consideration of the motion of defendant Kin Yan Tam to amend or supplement his previously filed motion for relief under 28 U.S.C. § 2255 and the government's response to the motion, it is hereby ORDERED that the motion is DENIED.

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William H. Yohn, Jr., Judge