

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

UNITED STATES OF AMERICA	:	CIVIL ACTION NO. 01-3302
	:	
v.	:	CRIMINAL ACTION NO. 99-004-1
	:	
MICHAEL GAITHER	:	

MEMORANDUM AND ORDER

Kauffman, J.

July 27, 2005

Petitioner brings this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255. Before the Court are Petitioner’s Motions for Leave to File Delayed Post-Conviction Motion, to Vacate/Set Aside/Correct Sentence under 28 U.S.C. § 2255 and for Appointment of Counsel. For the following reasons, the Motions will be denied.

I. The Motion for Leave to File Delayed Post-Conviction Motion

Petitioner moves to file a delayed habeas petition based on the Supreme Court ruling in Blakely v. Washington, 542 U.S. 296 (2004). However, Blakely applies only to state cases and as Petitioner’s case was federal and Petitioner was sentenced under the *federal* sentencing guidelines, we will construe Petitioner’s challenge as one based on United States v. Booker, 125 S.Ct. 735 (2005). In Booker, the Supreme Court ruled its holding in Blakely concerning sentencing in state cases was applicable to the federal sentencing guidelines, and that the Sixth Amendment requires that a jury, not a judge, find “a fact ... which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict.” Booker, 125 S.Ct. at 750. However, the rule announced by the Supreme Court in Blakely and extended to the federal sentencing guidelines under Booker do not apply retroactively on collateral review. See United States v. Aikens, 2005 WL 433440, at *8-9 (E.D.

Pa. Feb. 25, 2005) (holding that the new rule of law in Booker does not retroactively apply to collateral attacks to judgments that were final at the time that the rule was announced); United States v. Clausen, 2005 WL 846198, at *11 (E.D. Pa. Apr. 12, 2005). As Petitioner's case was final both at the time Booker and Blakely were announced, and these decisions are not to be applied retroactively, Petitioner's Motion for Leave to File Delayed Post-Conviction Motion will be denied.

II. The Habeas Petition

Petitioner was sentenced on April 23, 2004 and on July 21, 2004 he filed an untimely habeas petition brought pursuant to 28 U.S.C. § 2255. This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2255. The AEDPA places a one-year statute of limitations on the filing of § 2255 petitions to be calculated as follows:

The limitation shall run from the latest of

- (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (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 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. § 2255.

A federal prisoner's conviction becomes final when certiorari is denied or the time for filing a certiorari petition expires. See Griffin v. Kentucky, 479 U.S. 314, 321 n.6 (1987). If no timely appeal is taken, as in the present case, then the judgment is final ten days after the entry of judgment on the court's docket. See, e.g., United States v. Cabiness, 278 F. Supp. 2d 478, 483 (E.D. Pa. 2003); Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999) (for the purposes of limitations period governing motions to vacate, if a defendant does not pursue a timely direct appeal to the Court of Appeals, his or her conviction and sentence become final, and the statute of limitation begins to run, on the date on which the time for filing such an appeal expired). The Court lacks jurisdiction to hear the present motion because it is untimely and was filed three months after the expiration of the one year time period permitted by the AEDPA. Further, the Petition is based on Booker and Blakely which the Court has already noted are not applicable on collateral review. Thus, the habeas petition will be denied.

III. The Motion for Appointment of Counsel

“The Supreme Court has not recognized nor has the court of appeals found a constitutional right to counsel for civil litigants.” Parham v. Johnson, 126 F.3d 454, 456 (3d Cir. 1997). The Court may, however, “request an attorney to represent any person unable to afford counsel.” 28 U.S.C. § 1915(e)(1). “Such appointment is discretionary.” Parham, 126 F.3d at 456.¹

To guide the district courts in the exercise of this discretion, the Third Circuit Court of Appeals, in Tabron v. Grace, 6 F.3d 147 (3d Cir. 1993), delineated several factors relevant to the

¹ The Third Circuit Court of Appeals has emphasized that “volunteer lawyer time is extremely valuable. Hence, district courts should not request counsel . . . indiscriminately.” Tabron v. Grace, 6 F.3d 147, 157 (3d Cir. 1993).

determination of whether a litigant in a civil case should be appointed counsel. The Tabron court directed that as a threshold matter, the district court must consider the merits of the plaintiff's claim. “[B]efore the court is justified in exercising its discretion in favor of appointment, it must first appear that the claim has some merit in fact and law.” Id. at 155 (alteration in original) (quoting Maclin v. Freake, 650 F.2d 885, 887 (7th Cir.1981)). Under Tabron, if the district court concludes that “the claim has arguable merit in fact and law, the court should then consider a number of additional factors that bear on the need for appointed counsel.” Id. at 155.

Those factors include:

- (1) the plaintiff’s ability to present his or her own case;
- (2) the complexity of the legal issues;
- (3) the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue such investigation;
- (4) the amount a case is likely to turn on credibility determinations;
- (5) whether the case will require the testimony of expert witnesses; and
- (6) whether the plaintiff can attain and afford counsel on his own behalf.

Parham, 126 F.3d at 457-58 (citing Tabron, 6 F.3d. at 155-56, 157 n.5.) This list of factors is not exhaustive, but instead should serve as a guidepost for the district courts. Tabron, 6 F.3d at 157.

Because Petitioner’s claims are without merit for the reasons outlined above, and because the secondary Tabron factors do not weigh in Petitioner’s favor, the Court will not order the appointment of counsel in this case. Furthermore, even if Petitioner’s claims were meritorious, the secondary factors weigh against the appointment of counsel: Petitioner has adequately

presented his own the legal issues are not extraordinarily complex, and the case does not turn on factual investigation, credibility determinations, or expert witnesses.²

Accordingly, Petitioner's Motion for the Appointment of Counsel will be denied. An appropriate Order follows.

² Only Petitioner's inability to afford counsel weighs in favor of his request.

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ORDER

AND NOW, this 27th day of July, 2005, upon consideration of Petitioner's Motion to File Delayed Post-Conviction Motion (docket no. 39), Petitioner's Writ pursuant to 28 U.S.C. § 2255 (docket no. 40), and the Petitioner's Motion for Appointment of Counsel (docket no. 41), for the reasons stated in the accompanying memorandum, it is **ORDERED** that:

- (1) Petitioner's Motion to File Delayed Post-Conviction Motion (docket no. 39) is **DENIED**.
- (2) Petitioner's Writ pursuant to 28 U.S.C. § 2255 (docket no. 40) is **DENIED**.
- (3) Petitioner's Motion for Appointment of Counsel (docket no. 41) is **DENIED**.
- (4) The Clerk of the Court shall mark Civil Action No. 01-3302 **CLOSED**.
- (5) Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

BY THE COURT:

**S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.**