

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

MARISSA MARK,	:	
<i>Petitioner,</i>	:	CRIMINAL NO. 11-172
	:	
v.	:	CIVIL NO. 15-4108
	:	
UNITED STATES OF AMERICA,	:	
<i>Respondent.</i>	:	

PRATTER, J.

SEPTEMBER 23, 2015

MEMORANDUM

Marissa Mark has filed a Motion to Vacate, Set Aside or Correct a Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 54). Ms. Mark has also requested an evidentiary hearing. In response, the Government filed a Motion to Dismiss Petition Under 28 U.S.C. § 2255 (Docket No. 55). Because the Court finds that Ms. Mark failed to exercise the due diligence necessary to have met the one year statute of limitations for filing *habeas* petitions, her Motion is untimely and, therefore, denied. The Government’s Motion to Dismiss is granted.

I. BACKGROUND

Ms. Mark was arrested in March of 2011 for crimes which were committed in 2006. On September 9, 2011, Ms. Mark “pleaded guilty to conspiracy to use interstate commerce in the commission of a murder-for-hire, in violation of 18 U.S.C. § 1958(a); use of interstate commerce in the commission of a murder-for-hire, in violation of 18 U.S.C. § 1958(a); three counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1); and three counts of attempted access device fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1029(a)(2) and (b)(1) and (2).” Pet’r’s Mot. 15, Docket No. 54. She was sentenced on January 13, 2012, and the judgment of conviction was entered on January 17, 2012 (Docket No. 34).

No timely appeal was filed, but three and a half years later, on July 23, 2015, Ms. Mark filed the instant § 2255 Motion, much of which is premised on the opinions of Forensic Psychologist Norman Klein, Ph.D., as stated in a July 29, 2014 letter to Ms. Mark's counsel (Docket No. 54, Ex. I), that Ms. Mark could not have possessed the requisite *mens rea* at the time of the crimes.

II. DISCUSSION

Ms. Mark's § 2255 Petition is untimely. Section 2255, which allows defendants to collaterally attack their convictions and/or sentences while in prison, has a one year limitations period that only permits a filing within one year of the latest of:

- (1) the date on which judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by government action in violation of the Constitution or federal laws is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted by defendant was first recognized by the U.S. Supreme Court and made retroactively applicable; or
- (4) the date on which the facts supporting the claim could have been discovered through the exercise of reasonable diligence.

28 U.S.C. § 2255(f).¹

In this case, only the first option is even feasible to use to determine whether the Motion is timely.

As the Government correctly argues, Ms. Mark's Motion fails the assessment under paragraph one. The limitations period began to run from the date on which Ms. Mark's judgment of conviction became final. "A 'judgment of conviction becomes final' within the

¹ Thus, collateral review can ensure that courts conduct proceedings in a manner consistent with the state of the law extant. Its purpose is not to provide a mechanism for consistently re-examining final judgments on the strength of subsequent changes. *See Teague v. Lane*, 489 U.S. 288 (1989).

meaning of § 2255 on the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires."

Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). A petitioner has 90 days from the conclusion of his effort in the appellate court to file a petition for a writ of certiorari. *See Sup. Ct. R. 13.*

In this case, the judgment of conviction was entered on January 17, 2012, and no timely appeal was filed within ten days. Thus, Ms. Mark's conviction was final on January 27, 2012. The government argues that "even if one erred on the side of caution and counted an additional 90 days in which a petition for writ of certiorari to the United States Supreme Court could have been filed, defendant's conviction became final on April 16, 2012." Resp't Mot. 2 n.2, Docket No. 55. As a result, even with the use of this most indulgent date, Ms. Mark's Motion would have had to be filed by April 16, 2013. Therefore, Ms. Mark's Motion, which was filed more than two years later, on July 23, 2015, is denied as untimely in accordance with 28 U.S.C. § 2255(f)(1).

While Ms. Mark argues that her Motion was timely under paragraph four of § 2255(f) due to the "new facts" uncovered by Dr. Klein's examination and report, such an argument is flawed. Pursuant to paragraph four, the period of limitation begins to run on the date on which the facts "could have been discovered." 28 U.S.C. § 2255(f)(4). Therefore, an inquiry under paragraph four must begin with a determination of when the facts supporting the putative claim could have been discovered. *See Wims v. United States*, 225 F.3d 186, 189-90 (2d Cir. 2000). The test is an objective one. The Third Circuit Court of Appeals, citing *Wims* in a case involving a federal *habeas* petition by a state prisoner, has explained that "[d]ue diligence does not require

‘the maximum feasible diligence, but it does require reasonable diligence in the circumstances.’” *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004) (citing *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004) (quoting *Wims v. United States*, 225 F.3d at 190 n.4)).

In this case, Ms. Mark makes no arguments as to why the “new facts” relating to her mental state at the time of the commission of the crime could not have been discovered long before the examination and report of Dr. Klein. Had reasonable diligence been exercised, Ms. Mark would have been examined in 2011, prior to pleading guilty to her various crimes. Even if the contents of Dr. Klein’s report qualify as the types of “facts” alluded to in paragraph four, which is certainly wide open to dispute and doubt, those facts could and should have been discovered long before Dr. Klein’s letter of July 29, 2014. As a result, Ms. Mark’s Motion would not have been timely even under paragraph four.

Ms. Mark’s argument that her “actual innocence” tolls the one-year filing requirement is also without merit. While the Supreme Court has held that a showing of “actual innocence” can revive a time-barred claim, such a showing requires the petitioner to “show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Furthermore, “unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing.” *Id.* In *Hubbard v. Pinchak*, 378 F.3d 333 (3d Cir. 2004), the Third Circuit Court of Appeals held that, when considering a claim of actual innocence, evidence is not “new” if it was available at trial. *Id.* at 340.

In this case, the evidence, i.e., apparently Dr. Klein’s opinion, provided by Ms. Mark is not “new,” as it was available to her when she pled guilty to her crimes. Furthermore, it does not

come close to meeting the difficult burden of proving actual innocence, especially when one considers that the reliability of her evidence is hampered by the unexplained delay. While Dr. Klein’s opinion that Ms. Mark could not have formed the requisite *mens rea* could have potentially been helpful to her defense had she gone to trial, that opinion alone does not satisfy the standard of proving actual innocence, especially given the fact that Ms. Mark pled guilty, having the benefit of counsel, to her crimes. Ms. Mark has not provided new evidence making it more likely than not that no reasonable juror would have convicted her in light of the supposed “new evidence.” As a result, she has not made the showing of actual innocence necessary to revive her time-barred claim.

III. EVIDENTIARY HEARING

A district court is required to hold an evidentiary hearing on a motion to vacate sentence filed pursuant to 28 U.S.C. § 2255 unless the motions, files and records of the case show conclusively that the movant is not entitled to relief. 28 U.S.C. § 2255; *see also United States v. Booth*, 432 F.3d 542, 545-46 (3d Cir. 2005). Although the baseline the movant must meet to secure an evidentiary hearing is admittedly low, *Booth*, 432 F. 3d at 546, it is clear from the files and records of this case that Ms. Mark is entitled to none of the relief she seeks, and so she is not entitled to a hearing in this case.

IV. CERTIFICATE OF APPEALABILITY

When a district court issues a final order denying a § 2255 petition, the court must also make a determination about whether a certificate of appealability should issue or the clerk of the court of appeals shall remand the case to the district court for a prompt determination regarding whether a certificate should issue. Based upon the Motion and files and records of the case, and

for the reasons set forth herein, the Court finds that Ms. Mark has not demonstrated a substantial denial of a constitutional right. A certificate will therefore not issue.

V. CONCLUSION

For the reasons discussed above, the Court denies Ms. Mark's Motion to Vacate, Set Aside or Correct a Sentence Pursuant to 28 U.S.C. § 2255 and grants the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
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<i>Petitioner,</i>	:	CRIMINAL NO. 11-172
	:	
v.	:	CIVIL NO. 15-4108
	:	
UNITED STATES OF AMERICA,	:	
<i>Respondent.</i>	:	

ORDER

AND NOW, this 23rd day of September, 2015, upon consideration of Ms. Mark’s Motion to Vacate, Set Aside or Correct a Sentence Pursuant to 28 U.S.C. § 2255” (Doc. No. 54), the Government’s “Motion to Dismiss Petition Under 28 U.S.C. § 2255” (Doc. No. 55), Ms. Mark’s “Reply to Government’s Answer to Petitioner’s Motion” (Doc. No. 56), for the reasons discussed in the accompanying Memorandum, it is hereby ORDERED that:

1. Ms. Mark’s § 2255 Motion (Doc. No. 54) is DENIED;
2. The Government’s Motion to Dismiss the Petition (Doc. No. 55) is GRANTED;
3. An evidentiary hearing on the Motions is not warranted;
4. There is no probable cause to issue a certificate of appealability; and
5. The Clerk of Court shall mark this case CLOSED for statistical purposes.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge