

MEMORANDUM

1. Background. On May 6, 1992, defendant Ifedoo Noble Enigwe was indicted on four counts by a Grand Jury in the Eastern District of Pennsylvania for trafficking in heroin. On August 7, 1992, defendant was convicted by a jury on all four counts and, on August 13, 1993, was sentenced by this Court, inter alia, to 235 months in prison; the Court also imposed a criminal fine. The conviction and sentence were affirmed by the Third Circuit in an unpublished Memorandum on April 28, 1994.

On August 24, 1994, defendant filed a pro se Motion under 28 U.S.C. § 2255 seeking to vacate his sentence. After an evidentiary hearing, at which defendant also appeared pro se, his Motion was denied by Order dated September 11, 1995. See United States v. Enigwe, Crim. A. No. 92-00257, 1995 WL 549110 (E.D. Pa. Sep. 11, 1995). Defendant's Motion for Reconsideration was denied on March 1, 1996. See United States v. Enigwe, Crim. A. No. 92-00257, 1996 WL 92076 (E.D. Pa. Mar. 1, 1996). On appeal, by Order dated July 23, 1996, the Third Circuit vacated the denial of defendant's § 2255 Motion and remanded the case to this Court for appointment of counsel and further proceedings. On remand, the Court appointed counsel for defendant and conducted a second evidentiary hearing. Thereafter, defendant's § 2255 Motion was again denied and the Third Circuit affirmed that ruling. See United States v. Enigwe, Crim. A. No. 92-00257, 1997 WL 430993 (E.D. Pa. July 16, 1997), aff'd 141 F.3d 1155 (3rd Cir. Jan 16, 1998) (Table, No. 97-1632), cert. denied, 118 S.Ct. 1573, 140 L.Ed. 2d 806 (U.S. Apr. 27, 1998) (No. 97-8516).

On January 22, 1998, defendant filed a Letter/Motion to Vacate the "Judgment entered at my sentencing" under Federal Rule of Civil Procedure 60(b)(6) (Document No.

216, filed January 26, 1998). The Court treated this as a second or successive motion under 28 U.S.C. § 2255 and denied the Motion by Order dated February 13, 1998. The Court similarly denied, by Order dated February 25, 1998, defendant's Reply (Document No. 220, filed February 20, 1998) which was treated, at defendant's request, as a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). The Court subsequently denied defendant's motion for reconsideration of its Orders of February 13 and February 25, 1998. See United States v. Enigwe, Crim. A. No. 92-00257, 1998 WL 150974 (E.D. Pa. March 30, 1998). Lastly, in July of 1998, the Court denied two additional motions filed by Mr. Enigwe: defendant's Motion to Compel the United States Marshals to Return the Money Retained on a Writ of Execution, see United States v. Enigwe, Crim. A. No. 92-00257, 1998 WL 400095 (E.D. Pa. July 8, 1998), and defendant's Motion for Production of the Grand Jury Ministerial Records, see United States v. Enigwe, Crim. A. No. 92-00257, 1998 WL 400096 (E.D. Pa. July 8, 1998).

The current round of litigation was initiated by defendant's Second or Successive Petition for Vacation of Conviction Pursuant to § 2255 (Document No. 258, filed July 15, 1998), which has been supplemented by defendant's Additional Claims to Petitioner's Second § 2255 Motion Sub Judice (Document No. 261, filed August 26, 1998). The Government filed its Response to the Petition on July 30, 1998.

2. Discussion. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a defendant seeking to file a second or successive motion under 28 U.S.C. § 2255 to vacate, set aside, or 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).¹ “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.

Defendant once again contends that because he filed his initial section 2255 petition before the AEDPA was enacted, this Court need not employ the strict gatekeeping standards of 28 U.S.C. section 2255, as amended by the AEDPA, and that to apply those gatekeeping provisions would constitute an impermissibly retroactive limitation of his rights under the statute. For authority, defendant has cited In re Hanserd, 123 F.3d 922 (6th Cir. 1997).² This Court has previously discussed both the Hanserd

¹ The AEDPA provides in pertinent part:

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. Pub.L. 104-132, Title I, § 105, 110 Stat. 1220.

²Defendant contends that rather than applying the AEDPA’s gatekeeping provisions, the Court should apply the pre-AEDPA “abuse of the writ” standard defined in McCleskey v. Zant, 499 U.S. 467, 494-95 (1991). Under the “abuse of the writ” doctrine, a movant filing a second or successive § 2255 motion must establish cause for failure to raise his claim in an earlier proceeding and actual prejudice arising from the alleged

decision and the proper standard for deciding defendant's successive section 2255 motions, see United States v. Enigwe, 1998 WL 150974, at *3-6 (E.D. Pa. March 30, 1998). In that decision, the Court stated that because "there is no difference in outcome between pre- and post-AEDPA law applicable to this case, the Court concludes that the 'difference' does not 'matter' in this case . . . and the Court need not, therefore, determine whether the AEDPA may be applied retroactively." (citing In re Sonshine, 132 F.3d 1133, 1135 (6th Cir. 1997)). Id. at *6. The Court will not, however, address the pending Petition in the same way. Instead, the Court will determine whether the AEDPA should be applied to this Petition.

Petitioner's Second or Successive Petition for Vacation of Conviction Pursuant to § 2255 was filed July 15, 1998, well after the expiration of the one-year "grace period" following the enactment of the AEDPA on April 24, 1996. See Burns v. Morton, 134 F.3d 109, 111-12 (3rd Cir. 1998) (stating that prisoners whose convictions became final before the enactment of the AEDPA have a one year period after the statute's enactment to file their section 2255 motions). The AEDPA has repeatedly been held to apply to successive petitions such as the Petition at issue filed after this "grace period." See, e.g., United States v. Hatcher, 1997 WL 698488 (E.D.Pa.1997). As the First Circuit has stated:

[A]pplying a statute to a pleading that was filed after the statute's effective date is not really a 'retroactive' application in the classic sense. . . . we

error. See United States v. Essig, 10 F.3d 968, 979 (1994) (citing United States v. Frady, 456 U.S. 152 (1982)). To show cause, the petitioner must demonstrate either that "some objective factor external to the defense impeded counsel's efforts" to object during trial or on appeal, or that counsel was constitutionally ineffective. Essig, 10 F.3d at 979 (discussing an alleged misapplication of the Sentencing Guidelines (quoting McCleskey, 499 U.S. at 493 (1991))). Additionally, a movant must demonstrate that the alleged error worked to the prisoner's "actual and substantial prejudice," such that the integrity of the entire proceeding was infected. See Frady, 456 U.S. at 169-70.

know on the best of authority that Congress intended that AEDPA apply to all § 2255 petitions filed after its effective date (April 24, 1996). See Lindh v. Murphy, --- U.S. ---, ---, 117 S.Ct. 2059, 2063, 138 L.Ed.2d 481 (1997). We know, too, that the Supreme Court recently and uncritically applied AEDPA to a prisoner's second habeas petition even though the prisoner had filed his first petition prior to AEDPA's enactment. See Felker, 518 U.S. 651, 657, 116 S.Ct. 2333, 2336-37 (1996). Several courts of appeals have followed suit. See, e.g., In re Medina, 109 F.3d 1556, 1561-62 (11th Cir.1997); Roldan v. United States, 96 F.3d 1013, 1014 (7th Cir.1996); Hatch v. Oklahoma, 92 F.3d 1012, 1014 (10th Cir.1996). This approach is sound not only from a legal perspective but also from the standpoint of common sense. After all, if pre-AEDPA jurisprudence somehow attached to an entire course of post-conviction proceedings by virtue of a prisoner's having filed a pre-enactment petition at some point along the way, then the Court's opinion in Felker would be drained of all meaning.

Pratt v. United States, 129 F.3d 54, 58 (1st Cir. 1997).

Defendant urges the Court to disregard the AEDPA's gatekeeper provisions and instead enter into an examination of his Petition on its merits, in order to determine whether or not defendant's claims would meet the pre-AEDPA "cause and prejudice" standard. See United States v. Essig, 10 F.3d 968, 979 (1994). This is exactly the kind of examination which the AEDPA's gatekeeper provision assigns to the appropriate court of appeals. As the Second Circuit held in Corrao v. United States, --- F.3d ---, 1998 WL 461944 (2d Cir. 1998), when "a district court, rather than transferring a second or successive [§ 2255] petition, instead decides the petition on the merits . . . [the district court] impermissibly circumvents the AEDPA's gatekeeping provisions. As we stated in Liriano, it is important that courts in this Circuit follow 'a clear and comprehensive procedure' for handling second or successive § 2255 petitions." *Id.* at *3 (quoting Liriano v. United States, 95 F.3d 119 (2d Cir. 1996)(per curiam)). In Pratt, the First Circuit reached the same conclusion:

AEDPA's prior approval provision allocates subject-matter jurisdiction to the court of appeals by stripping the district court of jurisdiction over a second or successive habeas petition unless and until the court of appeals has decreed that it may go forward. See Nunez v. United States, 96 F.3d 990, 991 (7th Cir.1996). This statutory directive means that a district court, faced with an unapproved second or successive habeas petition, must either dismiss it, see id., or transfer it to the appropriate court of appeals, see Benton v. Washington, 106 F.3d 162, 164 (7th Cir.1996); Liriano v. United States, 95 F.3d 119, 122-23 (2d Cir.1996).

129 F.3d at 57 (footnotes omitted).

If this Court were to perform a "cause and prejudice" analysis in every second or successive petition under section 2255, the Court would be circumventing the clear intent of Congress as restated by the Supreme Court in Lindh. This the Court declines to do. As noted above, "[W]e know on the best of authority that Congress intended that AEDPA apply to all section 2255 petitions filed after its effective date (April 24, 1996). See Lindh v. Murphy, --- U.S. ---, ---, 117 S.Ct. 2059, 2063, 138 L.Ed.2d 481 (1997)" Pratt, 129 F.3d at 58. The merits of defendant's claims, as well as his argument that § 2255 as amended by the AEDPA constitutes an "impermissibly retroactive" application in his case, may be presented to the court of appeals. The Court will not undermine the clear proscription of the AEDPA by considering such claims and argument at this time.

Mr. Enigwe has not been granted leave by the Court of Appeals to seek review of his Second or Successive Petition for Vacation of Conviction Pursuant to § 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 Petition. As noted above, this Court must either dismiss this unapproved second or successive habeas Petition, see Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996), or transfer it 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 delays, the Court chooses the latter approach and therefore orders that defendant's Petition be transferred to the Court of Appeals.³

3. Conclusion. For the foregoing reasons, the Court has denied defendant's Second or Successive Petition for Vacation of Conviction Pursuant to § 2255, which has been supplemented by defendant's Additional Claims to Petitioner's Second § 2255 Motion Sub Judice, for lack of jurisdiction and hereby transfers the instant Petition to the United States Court of Appeals for the Third Circuit.

BY THE COURT:

JAN E. DUBOIS

³ 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).