

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALFRED W. TRENKLER

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

CIVIL ACTION NO. 99-10074-RWZ

**PETITIONER ALFRED W. TRENKLER'S
APPLICATION FOR CERTIFICATE OF APPEALABILITY**

Pursuant to 28 U.S.C. §2253(c) and F.R.A.P. Rule 22, the Petitioner Alfred W. Trenkler (hereinafter "the Petitioner") hereby applies for a certificate of appealability from the denial of his Motion pursuant to 28 U.S.C. §2255. The issues that were the subject of this Court's ruling are eminently debatable, and the questions thereby presented are adequate to deserve encouragement to proceed further. Therefore, it is respectfully suggested and urged that a certificate of appealability issue.

I. STATEMENT OF THE CASE.

A. Prior Proceedings.

The Petitioner was convicted in 1993 of violations of 18 U.S.C. §§844(d) and (i) and conspiracy in violation of 18 U.S.C. §371. The judgment of conviction was affirmed and mandate issued on September 5, 1995. On December 22, 1995, Petitioner filed a motion for a new trial based on new evidence, pursuant to Rule 33, Fed.R.Crim.P. The denial of that motion was affirmed on January 28, 1998. On January 7, 1999, Petitioner filed a petition under 28 U.S.C. §2255 seeking a vacation of the judgment of conviction

on the grounds of ineffective assistance of counsel. On April 18, 2000, this Court issued a Memorandum of Decision (attached hereto) denying Petitioner's Motion, ruling that the Motion was time barred. On May 16, 2000, the Petitioner filed a Notice of Appeal from the aforesaid Memorandum and Order.

B. The Memorandum of Decision.

In 1996, Congress enacted the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), which became effective April 24, 1996. Among other changes wrought, the statute amended Section 2255 to impose for the first time a limitations period of one year, from the date a conviction becomes final, for the filing of federal habeas petitions. For petitioners whose convictions became final before AEDPA's effective date, a one-year grace period was judicially imposed, allowing such petitioners until April 24, 1997, to file a Section 2255 petition. In its Memorandum of Decision, this Court ruled that the date that the First Circuit affirmed the denial of the motion for a new trial, January 28, 1998, was not the appropriate accrual date and the petition pursuant to Section 2255 was not timely. This Court also ruled that the AEDPA's one-year grace period was not tolled during the pendency of the Rule 33 motion. While the AEDPA provides for tolling in the context of exhaustion of state post-conviction review in state habeas corpus cases, this Court ruled, "Because no similar language exists in the federal habeas corpus section, I conclude that tolling is not allowed under Section 2255." Finally, this Court also ruled that "even if the limitations period is not jurisdictional and can therefore be equitably tolled, this case presents no grounds for equitable tolling."

II. A CERTIFICATE OF APPEALABILITY SHOULD BE GRANTED, AS THE ISSUES PRESENTED ARE DEBATABLE AND THE QUESTIONS PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER.

28 U.S.C. §2253(c)(2) states that a certificate of appealability may issue from a final order in a proceeding under §2255 only if the applicant has made “a substantial showing of the denial of a constitutional right.” In order to make a substantial showing, Petitioner need not show that he should prevail on the merits, but rather that the issue is debatable or that the questions presented are adequate to deserve encouragement to proceed further. Barefoot v. Estelle, 463 U.S. 880 (1983); Flieger v. Delo, 16 F.3rd 878 (8th Cir. 1994); United States v. Cota-Loaiza, 936 F.Supp. 756 (D.Colo. 1996); Rogers v. State of Wisconsin, 812 F.Supp. 905 (E.D. Wisc. 1993); Gordon v. Willis, 516 F.Supp. 911 (D.C. Ga. 1980).

For the following reasons, the issues that were the subject of this Court’s ruling (which prevented the Court from reaching the constitutional merits) are debatable and the questions presented are adequate to deserve encouragement to proceed further, and a certificate of appealability should be granted.

III. THE ONE-YEAR LIMITATIONS PERIOD SHOULD BE TOLLED DURING THE TIME OF THE PENDENCY OF THE MOTION FOR A NEW TRIAL.

While the language of §2255 does not contain the tolling language contained in §2254, it either should have or should now. “A §2255 motion is the federal equivalent of a state habeas petition filed pursuant to U.S.C. 28 §2254, and was intended to mirror §2254 in operative effect.” U.S.v. Vancol, 916 F. Supp. 372, 377, fn. 3 (D.Del. 1996), citing Reed v. Furley, 114 S.Ct. 2291, 2299-300 (1994), quoting Davis v. United States, 417 U.S. 333, 344 (1974); Wright, Federal Practice and Procedure, Vol. 3, § 591, 2000 Supplement, p. 192.

In Reed v. Farley, supra at 2300, the Supreme Court held, “We see no reason to afford habeas review to a state prisoner like Reed, who let a time clock run without alerting the trial court, yet deny collateral review to a federal prisoner similarly situated.” The Court then quoted Francis v. Henderson, 425 U.S. 536, 542 (1976), quoting Kaufman v. United States, 394 U.S. 217, 228 (1969) (omissions in original):

“Plainly the interest in finality is the same with regard to both federal and state prisoners... There is no reason to ... give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants.”

The same principles of judicial economy and due process that allow for tolling in §2254 cases should apply here.

IV. THE ONE-YEAR LIMITATION PERIOD MAY BE EQUITABLY TOLLED AND IN THIS CASE SHOULD BE SO TOLLED.

The limitations period in §2255 is not jurisdictional and may be equitably tolled Sandvik v. United States, 177 F. 3d 1269, 1271-72 (11th Cir. 1999), Miller v. New Jersey State Department of Corrections, 145 F. 3d 616, 619, n.1 (3rd Cir. 1998), just as it may be in §2254. Calderon v. United States District Court, 163 F. 3d 530, 541 (9th Cir. 1998) (en banc); Davis v. Johnson, 158 F. 3d 806, 810 (5th Cir. 1998); Miller v. New Jersey Department of Corrections, supra, Miller v. Marr, 141 F. 3d 976, 978 (10th Cir. 1998).

Sufficient equitable considerations are present in the instant case. Compelling reasons of personal as well as jurisdictional economy compelled the Petitioner to await a final determination on his Motion for a New Trial before filing his §2255 petition. It was not his fault, and it was beyond his control, that his Motion for New Trial, filed December 22, 1995, was not finally resolved until January 28, 1998. Therefore, even if not automatically tolled, the limitation period should here be equitably tolled, as a final

determination of the motion before April 24, 1997 might have allowed Petitioner to be within the judicially imposed one-year grace period.

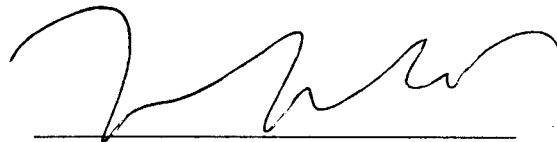
CONCLUSION

Therefore, for the forgoing reasons and authorities, the issues presented are important, debatable, and controlling legal authority in this circuit and deserve encouragement to proceed further, and the Application for the Certificate of Appealability should be granted.

Certificate of Compliance with Local Rule 7.1 (A)(2)

Upon the assumption that this Application may be deemed a Motion, the undersigned certifies that he has conferred with Assistant United States Attorney Kevin P. McGrath pursuant to Local Rule 7.1(A)(2) and we have been unable to resolve this issue.

Respectfully submitted,

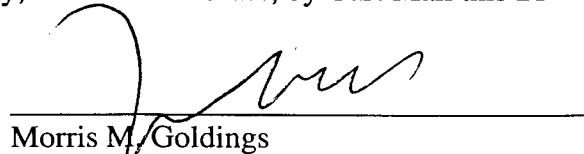


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Date: August 21, 2000

CERTIFICATE OF SERVICE

I, Morris M. Goldings, hereby certify that a true copy of the above document was served upon Assistant United States Attorney, Kevin P. McGrath, by U.S. Mail this 21st day of August, 2000



Morris M. Goldings

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