

No. 00-1657

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UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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ALFRED W. TRENKLER,  
Petitioner-Appellant

v.

UNITED STATES,  
Respondent-Appellee

---

ON APPEAL FROM AN ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

---

BRIEF FOR PETITIONER-APPELLANT  
ALFRED W. TRENKLER

---

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## JURISDICTIONAL STATEMENT

The basis for the jurisdiction of the district court was 28 U.S.C. §2255.

This basis for this Court's jurisdiction is 28 U.S.C. §2255, which provides, "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." This Court also has jurisdiction pursuant to 28 U.S.C. §1291, which provides that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

This appeal was timely filed. The district court's Memorandum of Decision was issued April 18, 2000. App. 50. The Notice of Appeal of that decision was May 16, 2000. App. 53.

This appeal is from a final order that disposes of the Petitioner's claims.

## STATEMENT OF THE ISSUES

1. Whether the one-year limitation period for the bringing of a petition pursuant to 28 U.S.C. §2255 did not begin to run until this Court's affirmance of the district court's denial of the Petitioner's motion for new trial.

2. Alternatively, whether the one-year limitation period of §2255 should be tolled for federal prisoners during the time of the pendency of the motion for a new trial, as it is under §2254 for state prisoners seeking federal relief.

3. Whether the one-year limitation period of §2255 may be equitably tolled for federal prisoners as it is under §2254 for state prisoners seeking federal relief, and whether in this case it should be so tolled.

**STATEMENT OF THE CASE AND FACTS**  
**RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW**

**1. STATEMENT OF PRIOR PROCEEDINGS.**

Alfred W. Trenkler (hereinafter "Petitioner") was convicted in 1993 of violations of 18 U.S.C. §§844(d) and (i) (receipt of explosive material and attempted malicious destruction of property with explosives), and conspiracy in violation of 18 U.S.C. §371. The judgment of conviction was affirmed and mandate of this Court issued on September 5, 1995. App. 117. On December 22, 1995, Petitioner filed a motion for a new trial based on new evidence, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. App. 117. That motion was denied on February 4, 1997 (Zobel, J.). App. 120. The denial of that motion was affirmed by this Court on January 28, 1998. App. 122.

On remand from this Court's decision in United States v. Shay, 57 F.3d 126 (1<sup>st</sup> Cir. 1995), on January 16, 1998, the district court ordered a new trial for co-conspirator Thomas A. Shay, holding that there was a reliable basis for the admission of the proffered testimony of a doctor as to Shay's suffering from a mental disorder which caused him to tell grandiose, self-incriminating lies and that the proffered testimony was relevant. App. 122. On April 1, 1998, this Court affirmed the January 16, 1998, Order of the district court and held that the prior error in the trial of excluding the

proffered testimony was not harmless. The case was remanded for a new trial. App. 122.

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, i.e., the failure of trial counsel to attempt to introduce in his trial the expert testimony of the doctor whose testimony had been improperly excluded in the Shay trial. Ibid.

On April 18, 2000, the district court (Zobel, J.) issued a Memorandum of Decision denying Petitioner's §2255 Motion, ruling that the §2255 Motion was time barred. (Addendum 1).

## **2. THE DISTRICT COURT'S MEMORANDUM OF DECISION OF APRIL 18, 2000.**

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As the district court ruled in its Memorandum of Decision, Add. 2-3, 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 28 U.S.C. §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. The amendment to 28 U.S.C. §2255 provides, "A 1-year period of limitation shall apply to a motion under this section." 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 §2255 petition.

In its Memorandum of Decision, the district 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 that the petition pursuant to §2255 was not timely. The district court also ruled that the AEDPA's one-year grace period was not tolled during the pendency of Petitioner's Rule 33 motion for a new trial.

While the AEDPA provides for tolling in the context of exhaustion of state post-conviction review in state habeas corpus cases, the district court ruled, "Because no similar language exists in the federal habeas corpus section, I conclude that tolling is not allowed under Section 2255." Add. 3. Finally, the district 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." Add. 3.

### **3. THE GRANTING OF THE CERTIFICATE OF APPEALABILITY.**

On May 16, 2000, Petitioner filed a Notice of Appeal from the district court's Memorandum and Order of April 18, 2000. App. 53. An Application for a Certificate of Appealability was granted on November 9, 2000. App. 55. In granting the Certificate of Appealability, the district court ruled,

“Although I adhere to my view that the Petitioner is time barred, Petitioner’s tolling arguments are not frivolous. Accordingly, the application is granted as to these issues.” App. 55.

An Order of Court of November 29, 2000, by this Court stated, “The district court granted appellant’s request for a Certificate of Appealability. Accordingly, pursuant to Grant–Chase v. Commissioner, 145 F.3d 431 (1<sup>st</sup> Circuit 1998), this appeal can go forward on the issues of whether the petition was time-barred.” App. 127.

This appeal follows.

## **SUMMARY OF THE ARGUMENT**

1. A judgment of conviction becomes final for purposes of a §2255 motion on the date that a petitioner can no longer pursue direct appeal. In this case, the one-year limitation period of §2255 did not begin to run until this Court's affirmance of the district court's denial of the Petitioner's motion for new trial.

2. 28 U.S.C. §2255 for federal prisoners was intended to mirror §2254 for state prisoners in operative effect. Alternatively, therefore, the language in 28 U.S.C. §2244(d)(2) allowing for tolling in §2254 cases should be read into §2255.

3. Equitable considerations allow for tolling in §2255 cases as in §2254 cases. Grounds for equitable tolling exist in this case.

## **STANDARDS FOR REVIEW**

The arguments present questions of statutory interpretation for which de novo review is appropriate.

## ARGUMENT

### **I. THE ONE-YEAR LIMITATION PERIOD FOR THE BRINGING OF A PETITION PURSUANT TO 28 U.S.C. §2255 DID NOT BEGIN TO RUN UNTIL THIS COURT'S AFFIRMANCE OF THE DISTRICT COURT'S DENIAL OF THE PETITIONER'S MOTION FOR NEW TRIAL.**

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The amendment to 28 U.S.C. §2255 provides, "A 1-year period of limitation shall apply to a motion under this section."

28 U.S.C. §2255 provides that the limitation period runs from the latest of:

(1) the date on which the judgment of conviction became final;

(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, if that right has been newly 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.

The limitation period of §2255 did not begin to run until this Court affirmed the district court's denial of Petitioner's motion for a new trial, on January 28, 1998. App. 122.

The opinion of the court in United States v. Dorsey, 988 F.Supp. 917, 919–920 (D.Md. 1998), is instructive. That court quoted the Advisory

Committee Note to Rule 5 of the Rules Governing Section 2255,

Proceedings for the United States District Courts (1997):

There is no requirement that the movant exhaust his remedies prior to seeking relief under §2255. However, the courts have held that such a motion is inappropriate if the movant is simultaneously appealing the decision.

The court cited United States v. Bazemore, 929 F.Supp 1567, 1569, n.4 (S.D.Ga. 1996) and Hon. Charles R. Richey, Prisoner Litigation in the United States Courts at 128–29 (1995) (“A petitioner must ordinarily complete a pending direct appeal prior to obtaining §2255 relief.”). The court then stated:

This requirement avoids redundancy of effort between direct appeal and collateral attack. It would therefore make little sense to require a petitioner to file the 2255 motion prior to the completion of any direct appeal.

U.S. v. Dorsey, *supra*  
at 919 (emphasis added)

The court then concluded that “a conviction is not ‘final’ for the purposes of the statute until a petitioner has completed the direct appeal”:

In the absence of any direct guidance from Congress, the consensus view has extended the prior case law on §2255, which held that a conviction is not “final” for the purposes of the statute until a petitioner has completed the direct appeal. The absence of specific language regarding “finality” in the amended §2255 suggests that Congress did not wish to disturb this line of authority, which essentially resolved a matter of judicial administration.

Accordingly, this Court concludes that a judgment of conviction becomes “final,” for purposes of a 2255 motion, on the date that a petitioner can no longer pursue direct appeal. Under the amended §2255, a petitioner has one year from that date to file a motion.

Ibid. (emphasis added)

The judgment of this Court denying petitioner’s motion for new trial was January 28, 1998. App. 122. Petitioner was therefore within the one-year limitation period when he filed his §2255 motion on January 9, 1999.

It may be that the one-year limitation period did not begin to run until after the time within which the Petitioner could petition the United States Supreme Court for certiorari, 90 days from January 28, 1998. In Kapral v. United States, 166 F.3d 565, 570–71 (3<sup>rd</sup> Cir. 1999), the Third Circuit reviewed the analysis of the Dorsey court and held:

[I]f a defendant does not file a certiorari petition, the judgment of conviction does not become “final” until the time for seeking certiorari review expires. A defendant has 90 days from the date on which the court of appeals affirms the judgment of conviction to file a petition for a writ of certiorari.

In Gendron v. United States, 154 F.3d 672 (7<sup>th</sup> Cir. 1998), the Seventh Circuit disagreed with the Third Circuit and held that under §2255, if a Petitioner does not seek review from the United States Supreme Court, his conviction becomes final at the time of the decision of the Court of Appeals. Either way—after the decision of this Court or after the time for a petition

for certiorari had lapsed—the Petitioner in this case was within the one-year time period.

**II. ALTERNATIVELY, THE ONE-YEAR LIMITATION PERIOD OF §2255 SHOULD BE TOLLED FOR FEDERAL PRISONERS DURING THE TIME OF THE PENDENCY OF A MOTION FOR A NEW TRIAL, AS IT IS UNDER §2254 FOR STATE PRISONERS SEEKING FEDERAL RELIEF.**

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The AEDPA expressly provides for tolling in the context of exhaustion of state post-conviction review in state habeas corpus cases. As noted in the district court Memorandum and Order of April 18, 2000, 28 U.S.C. §2244(d)(2) provides, “The time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.” Add. 3.

The district court concluded, “Because no similar language exists in the federal habeas corpus section, I conclude that tolling is not allowable under Section 2255.” Add. 3. Tolling should be allowable, however. “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. Farley, 114 S.Ct. 2291, 2299-2300 (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. While the language of §2255 does not contain the tolling language contained in §2254, it either should have or should now be so construed.

Additionally and significantly, it was not Petitioner’s fault, and it was beyond his control, that his Motion for a New Trial, filed December 22, 1995, was not finally resolved until January 28, 1998. A final determination of that motion by the district court before April 24, 1997, would have allowed Petitioner to have been within the judicially imposed one-year grace



period no matter how the statute is construed. This consideration has due process as well as equitable implications, and the one-year limitation either should not begin to run until after the appeal is completed or should be tolled during its pendency.

Also, as discussed in the following section, the fact of the timing of the district court's ruling on January 16, 1998, ordering a new trial in the related case of co-conspirator Shay with the admission of the previously excluded medical testimony, and this Court's affirmance of that Order on April 1, 1998, calls equitably if not legally for tolling.

**III. THE ONE-YEAR LIMITATION PERIOD OF §2255 MAY BE  
EQUITABLY TOLLED FOR FEDERAL PRISONERS AS IT IS  
UNDER §2254 FOR STATE PRISONERS SEEKING FEDERAL  
RELIEF, AND IN THIS CASE IT SHOULD BE SO TOLLED.**

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

Although the district court ruled that this case presents no grounds for equitable tolling, Add. 3, significant equitable considerations for tolling are present in the instant case. First, compelling reasons of personal as well as judicial economy compelled the Petitioner to await a final determination on his Motion for a New Trial before filing his §2255 petition.

Second, as stated in the preceding section, it was not Petitioner's 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. A final determination of that motion before April 24, 1997 would have allowed Petitioner to have been within the judicially imposed one-year grace period.

These circumstances certainly come within the ambit of “extraordinary circumstances beyond petitioner’s control that made it impossible to file the petition on time.” Add. 3.

A third equitable consideration, with perhaps legal and due process implications, is the timing of the district court’s Order and this Court’s affirmance thereof in the related case of co-conspirator Thomas A. Shay. On January 16, 1998, the district court ordered a new trial for Shay, with the required admission of the previously excluded testimony of a doctor as to Shay’s medical condition and credibility. App. 122. On April 1, 1998, this Court affirmed that Order. App. 122. Petitioner’s contention in his §2255 Motion is that the failure of his trial counsel to attempt to introduce the expert testimony of the doctor constituted ineffective assistance of counsel. He should not be time barred from making this claim, equitably if not legally, as it was appropriate and in the interest of judicial as well as personal economy to await a determination as to the admissibility of the doctor’s testimony. The §2255 motion on January 7, 1999, was presented within one year of the district court’s order of January 16, 1998, in the Shay case, and within one year of this Court’s affirmance of that order on April 1, 1998. This consideration also has legal and due process as well as equitable implications.

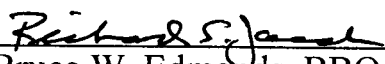
A fourth equitable consideration which this case starkly presents is the fact that Petitioner's sentence of confinement is for life.

Therefore, even if not automatically tolled, in the circumstances of this case the one-year limitation period of §2255 should be equitably tolled during the pendency of Petitioner's motion for new trial and direct appeal.

CONCLUSION

Therefore, for the forgoing reasons and authorities, the Order of the district court that the §2255 Petition was not timely filed should be reversed and the case should be remanded for further proceedings.

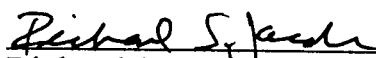
Respectfully submitted,

  
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Date: January 8, 2001

CERTIFICATE OF SERVICE

I, Richard S. Jacobs, 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 8th day of January, 2001.

  
Richard S. Jacobs

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-10074-RWZ

ALFRED TRENKLER

v.

UNITED STATES OF AMERICA

MEMORANDUM OF DECISION

April 18, 2000

ZOBEL, D.J.

Petitioner, Alfred Trenkler, 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, all in relation to the production, placement under a car and ultimate explosion of a bomb that killed one Boston police officer and maimed another. The judgment of conviction was affirmed, and mandate issued on September 5, 1995. Petitioner did not apply for a writ of certiorari to the Supreme Court, but on December 22, 1995, he filed a motion for a new trial pursuant to Rule 33, Fed. R. Crim. P. based on allegedly new evidence. The denial of that motion was affirmed on January 28, 1998. On January 7, 1999, Trenkler filed the instant petition under 28 U.S.C. § 2255 seeking vacation of the judgment of conviction on the grounds of ineffective assistance of counsel.

In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") which became effective on April 24, 1996. Among other changes wrought, the statute amended Section 2255 to impose for the first time a limitations period for the filing of federal habeas petitions, and the government argues that, as a result, this

petition is time barred. The amendment provides that "[a] 1-year period of limitation shall apply" and, insofar as relevant to this case, that it shall run from "the date on which the judgment of conviction becomes final. . . ." 28 U.S.C. § 2255. For petitioners whose convictions became final before the 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. See Rogers v. United States, 180 F.3d 349, 354 (1st Cir. 1999) (joining other circuits in allowing one-year grace period for filing Section 2255 petitions).

Whether the judgment of conviction is deemed to be final when the mandate issued from the Court of Appeals or when the time for filing a petition for certiorari expired is, in this case, immaterial as both precede the effective date of the AEDPA so the period of limitations is set by the one-year grace period. Two timing issues do emerge, however. First, petitioner asserts that the date the Court of Appeals affirmed denial of the motion for a new trial, January 28, 1998, is the appropriate accrual date and the petition is thus timely. The difficulty with the argument is that the statute, which explicitly describes four sets of circumstances triggering the limitations period, does not include the one posited by petitioner.<sup>1</sup> Moreover, none of the circumstances set forth

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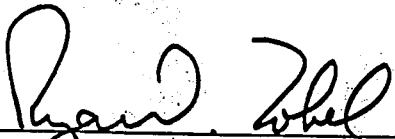
<sup>1</sup>According to 28 U.S.C. § 2255, the limitation period runs from the latest of:

- (1) the date on which the judgment of conviction became final;
- (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, if that right has been newly 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.

can be interpreted to encompass final resolution of a new trial motion postdating conviction and appellate review.

The second question is whether the AEDPA's one-year grace period is tolled during the pendency of the Rule 33 motion. The AEDPA expressly provides for tolling in the context of exhaustion of state postconviction review in state habeas corpus cases.<sup>2</sup> Because no similar language exists in the federal habeas corpus section, I conclude that tolling is not allowed under Section 2255. Finally, even if the limitations period is not jurisdictional and can therefore be equitably tolled, this case presents no grounds for equitable tolling. See Sandvik v. United States, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (holding that Section 2255 permits equitable tolling, relying on analysis of other circuits in cases construing Section 2254); cf. Libby v. Magnusson, 177 F.3d 43, 48 n.2 (1st Cir. 1999) (reserving judgment on whether equitable tolling might apply under Section 2254). Nothing in the papers suggests any wrongful government conduct that prevented petitioner from asserting his rights in a timely manner or any extraordinary circumstances beyond petitioner's control that made it impossible to file the petition on time. See, e.g., Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996) (discussing situations in which equitable tolling is appropriate).

Because the petition was filed too late, the petition is denied.

  
 RYA W. ZOBEL  
 UNITED STATES DISTRICT JUDGE

April 18, 2000

<sup>2</sup>28 U.S.C. § 2244 (d)(2) provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."



