

No. 00-1657

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALFRED W. TRENKLER,
Petitioner/Appellant

v.

UNITED STATES OF AMERICA,
Respondent/Appellee

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

REPLY BRIEF FOR
PETITIONER/APPELLANT ALFRED W. TRENKLER

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I. Nothing in Johnson v. United States Contravenes Trenkler's Argument that the Limitations Period of Section 2255 Should Be Tolloed While a Rule 33 New Trial Motion Is Being Litigated.

In its Brief, the Government cites Johnson v. United States, 246 F.3d 655 (6th Cir. 2001), in support of its argument that the Court should reject Trenkler's argument that the pendency of a Rule 33 motion tolls the period of limitations set forth in 28 U.S.C. § 2255. That decision, issued after Trenkler's Brief was filed in this Court, holds that a Rule 33 motion filed after the ten day period for seeking appellate review proved by Fed. R. App. P. 4(b) does not affect the finality of a habeas petitioner's conviction. Three observations about Johnson are pertinent to this case.

First, it does not appear that Johnson made the same argument that Trenkler makes here -- that the Court should read into Section 2255 a tolling provision analogous to that provided in 28 U.S.C. § 2244(d)(2). This difference saps the Sixth Circuit's decision of any persuasive force in this case. That Court was not required to grapple with the compelling arguments set

forth in Argument I of Trenkler's Brief that Congress' failure to include a tolling provision during the pendency of federal collateral proceedings was merely an oversight, rather than the result of some careful differentiation between how state and federal petitioners should be treated.

Second, the Johnson court observes that "the AEDPA does not expressly define when a conviction becomes 'final' . . ." 246 F.3d at 657. Thus, the court was required to give meaning to a term that could be interpreted in different ways; indeed, there is a circuit split, noted in Trenkler's Brief and the Government's Brief, over whether the period of limitations begins to run upon issuance of the mandate in the court of appeals, or upon expiration of the ninety days for seeking review via writ of certiorari. The point is that courts are frequently required to interpret all manner of statutes to fill the interstices left by inartful Congressional draftsmanship.

Third, the Johnson court's effort to distinguish between Rule 33 motions and when they are filed as to

whether they extend the period before "finality" attaches highlights the need for a judicial interpretation that is easy to apply. The law is better served, and public understanding of and respect for the criminal process is heightened, when matters are addressed on their merits. That is especially true when confronting claims under the Great Writ, where liberty, and even life, can be at stake.

Finally, in seeking to refute Trenkler's tolling argument, the Government relies upon the principle of statutory interpretation expressio unius exclusio alterius to argue that the inclusion of a tolling provision in section 2244(d)(2) and its absence in section 2255 suggests that Congress intended the differing results. As noted in Trenkler's Brief, however, the better reasoned appellate decisions have not followed that maxim in construing this statute because that principle assumes that the difference is the result of careful drafting. E.g. United States v. Burch, 202 F.3d 1274, 1277 (10th Cir. 2000). "All we can say is that in a world of silk purses and pigs' ears, the Act [AEDPA]

is not a silk purse of the art of statutory drafting.”
Lindh v. Murphy, 521 U.S. 320, 336 (1997).

**II. The Government's Argument That The Limitations
Period Is Jurisdictional Is Wrong; the Doctrine
Of Equitable Tolling Is Available And Should Be
Applied.**

Almost in passing, the Government argues that the period of limitations in section 2255 is jurisdictional. Gov't. Brief at 1, 19-20. Thus, the Government contends, "Congress intended to occupy the field with respect to the bases for tolling the limitations period, and that further judicially-made provisions for tolling would subvert the statutory scheme." Gov't. Brief at 19. Yet, it appears that every court that has addressed this issue has concluded that the limitations period is not jurisdictional, and thus, is subject to equitable tolling. The Government's bold contention to the contrary should be rejected.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Trenkler's Brief-in-Chief, the Court should reverse the lower court's judgment and remand so that a hearing on the merits of his section 2255 petition can take place.

Respectfully submitted
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I certify that this reply brief has been prepared using 14 point New Courier, monospaced font, WordPerfect 9.0. The reply brief contains six pages of text, and 782 words, exclusive of tables of contents and authorities.

Charles W. Rankin

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I certify that I have served the foregoing Reply Brief of Alfred Trenkler by mailing one paper copy and one computer disk via first class mail on August 2, 2001, to:

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