UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALFRED W. TRENKLER)
)
V.) CIVIL ACTION NO. 07-11823-RWZ
)
UNITED STATES OF AMERICA)

GOVERNMENT'S OPPOSITION TO PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. §2255

The government hereby opposes the motion filed by petitioner Alfred W. Trenkler ("Trenkler") in which he invokes 28 U.S.C. §2255 and asks this Court to vacate, set aside, or correct the sentence imposed on him by this Court over thirteen and one-half years ago, on March 8, 1994.[1] Among the many failings of his motion is a fundamental defect: relief under §2255 is not available to a petitioner, like Trenkler, who claims factual innocence based on newly discovered evidence, but without related claims of constitutional violations. Trenkler's motion, although captioned under §2255 is properly characterized as a motion for new trial based on allegedly newly discovered evidence under Fed. R. Crim. P. 33 ("Rule 33"), and is time-barred under that provision of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 33(b)(1). Moreover, even if considered under §2255, Trenkler has not established that he is entitled to a start date for the statute of

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[1]The government notifies the Court of the existence of victims, as defined by 18 U.S.C. §3771, in the underlying criminal prosecution that is the subject of Trenkler's §2255 motion.

limitations applicable to §2255 motions other than the date on which the judgment in his criminal case became final, on or about October 16, 1995. 28 U.S.C. §2255(1)-(4). Thus, even under §2255, Trenkler's motion is time-barred.

STATEMENT OF THE CASE

A. District Court Proceedings and Direct Appeals

On December 16, 1992, Alfred Trenkler and Thomas L. Shay were charged in a five-count indictment for their roles in an October 28, 1991 bombing that killed Boston Police Officer Jeremiah Hurley ("Hurley") and maimed his partner, Boston Police Officer Francis Foley ("Foley"). [Criminal No. 92-10369-RWZ, D. 1]. The indictment charged that: (1) in October 1991, the two received explosive materials in interstate commerce with the intent that the explosives would be used to kill, injure, and intimidate Shay's father, Thomas L. Shay ("Shay Sr.") and cause damage to a 1986 Buick and that this act actually caused the death of Officer Hurley, in violation of 18 U.S.C. §§844(d) and 2 (Count Two); (2) the two committed this same crime and actually caused serious personal injury to Officer Foley (Count Three); (3) on October 28, 1991, the two maliciously attempted to destroy Shay Sr.'s Buick by means of fire and explosive, and in fact caused the death of Officer Hurley, in violation of 18 U.S.C. §844(i) (Count Four); (4) the two committed this same offense and actually caused serious personal injury to Officer Foley (Count Five); and (5) the two

conspired to commit these crimes, in violation of 18 U.S.C. §371 (Count One).

On June 24, 1993, a federal grand jury issued a superseding indictment charging that, in September and October 1991, Trenkler and Shay: received explosive materials in interstate commerce with intent to kill, injure, and intimidate and cause destruction of property, which conduct had caused death and serious personal injury, in violation of 18 U.S.C. §844(d) (Count Two); knowingly attempted to maliciously damage and destroy property used in and affecting interstate commerce, by means of fire and explosives, which conduct had caused death and serious personal injury, in violation of 18 U.S.C. §844(i); and knowingly conspired to commit the foregoing acts, in violation of 18 U.S.C. §371 (Count One). [D. 205].

The co-defendants received separate trials. On July 27, 1993, Shay was found guilty on Counts One and Three of the Superseding Indictment. [D. 275]. He was sentenced by this Court on October 8, 1993 to 188 months imprisonment. His direct appeal resulted in a remand by the First Circuit, and Shay ultimately pled guilty before United States District Judge Edward F. Harrington to Counts One and Three of the Superseding Indictment, and was sentenced to 144 months imprisonment. [D. 631, 632].

On November 29, 1993, Trenkler was found guilty on all three counts of the Superseding Indictment. [D. 487]. He was

subsequently sentenced by this Court on March 8, 1994 to life imprisonment. [D. 552]. The judgment of this Court was affirmed by the First Circuit on July 18, 1995. [D. 561]. *See* United States v. Trenkler, 61 F.3d 45, 51-52 (1st Cir. 1995). Trenkler did not file a petition for a writ of certiorari, and his conviction therefore became final 90 days later, on or about October 16, 1995. Clay v. United States, 537 U.S. 522, 532 (2003).

B. Trenkler's Earlier Post-Judgment Proceedings

On December 22, 1995, Trenkler filed a Rule 33 motion for a new trial or, in the alternative, for an evidentiary hearing on the grounds of newly-discovered evidence. [D.566]. Earlier, in United States v. Shay, 57 F.3d 126, 133-34 (1st Cir. 1995), the First Circuit held that Shay should have been permitted to offer testimony (from a Dr. Phillips) that Shay suffered from a mental disorder that caused him to tell self-aggrandizing lies, making his incriminating statements unreliable. Trenkler argued in his Rule 33 motion that the Shay decision rendered Dr. Phillips's testimony "newly discovered evidence." Trenkler explained that he was aware of Dr. Phillips's testimony at the time of trial but did not know until the Shay decision on June 22, 1995 decision that the testimony was admissible. Trenkler also contended that the government had failed to disclose the existence of an alleged agreement with a witness for leniency in exchange for testimony. In February 1997, this Court denied Trenkler's motion for a new

trial. [D. 597]. Trenkler appealed this decision and this Court's separate denial of his motion for an inquiry into possible jury misconduct. On January 6, 1998, the First Circuit affirmed this Court's rejection of those claims. United States v. Trenkler, 134 F.3d 361, 1998 WL 10265 (1st Cir. 1998)(unpublished).

On January 7, 1999, Trenkler filed a motion with this Court pursuant to 28 U.S.C. §2255 claiming that his trial counsel was ineffective in not attempting to introduce Dr. Phillips's testimony. This Court concluded that Trenkler's §2255 motion was time-barred. On October 16, 2001, the First Circuit affirmed this Court's ruling. Trenkler v. United States, 268 F.3d 16, 26-27 (1st Cir. 2001).

On August 11, 2000, Trenkler filed another Rule 33 motion arguing, *inter alia*, that a document introduced into evidence was fraudulent and that Shay now claimed Trenkler was innocent. [D. 625]. This Court denied Trenkler's motion on December 28, 2000. [D.643]. On April 6, 2001, the First Circuit found Trenkler's notice of appeal untimely and dismissed the appeal for lack of jurisdiction. [Appeal No. 01-1323].

On October 3, 2002, Trenkler filed a petition for writ of habeas corpus in the Middle District of Pennsylvania, pursuant to 28 U.S.C. §2241. Trenkler claimed that the Supreme Court's decision in Jones v. United States, 529 U.S. 848 (2000), heightened the interstate commerce requirements of 18 U.S.C. §844(i) and

thereby removed the conduct for which he was convicted from the scope of both §§844(d) and (i).[2] The district court denied this petition. In an earlier decision, the Third Circuit had found that "a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate, exemplifies the uncommon situation in which §2255 is inadequate and ineffective and in which a §2241 petition is cognizable" under §2255's savings clause. In Re Dorsainvil, 119 F.3d 245, 251 (3rd Cir. 1997). The Third Circuit found that Trenkler's §2241 petition did not raise a viable savings clause claim and affirmed the district court's denial of his petition. Trenkler v. Pugh, 83 Fed.Appx. 468 (3rd Cir. 2003)(unpublished disposition).

On August 26, 2004, Trenkler filed a petition for a writ of mandamus in the First Circuit. [Appeal No. 04-2147]. Trenkler's petition presented for the first time the claim, later raised in a subsequent *coram nobis* petition before this Court, that §§844(d) and (i) and §34, as then written, did not permit this Court to impose a life sentence without the jury first having authorized such a sentence. On February 16, 2005, the First Circuit summarily

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[2]This was in essence Trenkler's second §2255 motion, as it attacked the legality of his criminal judgment. However, it was filed as a motion under 28 U.S.C. §2241, and purported to take advantage of the "savings clause" of 28 U.S.C. §2255 (§2241 motion to non-sentencing court attacking legality of sentence available only if "the remedy by [§2255] motion is inadequate or ineffective to test the legality of his detention").

dismissed the petition on the ground that it constituted an impermissible second or successive motion under 28 U.S.C. §2255:

> Petitioner seeks, through a petition for writ of mandamus, to vacate his two life sentences. We deny the petition for writ of mandamus because to allow it would be effectively to negate the stringent gatekeeping restrictions on second or successive §2255 petitions. 28 U.S.C. §§2255 ¶8, 2244(b)(2).

On June 22, 2005, the Supreme Court denied Trenkler's petition for a writ of certiorari. Trenkler v. United States District Court for the District of Massachusetts, 545 U.S. 1129 (2005).

In December 2005, Trenkler wrote a letter to this Court raising the issue presented in his mandamus petition. [D.668]. The court appointed counsel. On November 6, 2006, counsel presented the claim in a Petition and Motion for a Writ of *Coram Nobis* and/or *Audita Querela*. After extensive briefing, and upon reconsideration of an earlier ruling granting the *coram nobis* petition, this Court on April 4, 2007 granted the *coram nobis* petition and resentenced Trenkler to 37 years imprisonment. The cross-appeals of the government and Trenkler are currently before the First Circuit. [Appeal Nos. 07-1676, 1677, 1678, and 1679].

C. Leave to File This Second or Successive §2255 Motion

On July 20, 2007, Trenkler filed an application with the First Circuit for leave to file a second or successive §2255 motion, as required by law. 28 U.S.C. §2255. [Appeal No. 07-2122]. In a written judgment issued September 6, 2007, the First Circuit issued

the certification to permit Trenkler to file the instant §2255 motion in this Court. In issuing the certification, the First Circuit did so "without prejudice to summary resolution by the district court if further information required from Trenkler or tendered by the government so warrants." The Court also noted that although Trenkler's claims of new forensic evidence "could well be substantial . . . [l]ess clear are the bases for claims that the evidence is newly discovered or that its earlier unavailability reflects any constitutional violation."[3]

C. <u>Trenkler's Current §2255 Motion</u>

Upon certification from the First Circuit, Trenkler filed his §2255 motion in this Court on October 18, 2007. [Civil Action No. 07-11823-RWZ, D. 3]. On November 8, 2007, Trenkler filed his amended §2255 motion. [D. 5]. The government will describe each ground asserted in Trenkler's amended §2255 motion in some detail, as what Trenkler alleges and does not allege is important to the government's first argument that his §2255 motion is properly characterized as an untimely motion for new trial under Rule 33. The Supreme Court has held that newly discovered evidence claims (absent a constitutional claim such as ineffectiveness of counsel

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[3]By noting that Trenkler's application was not clear on whether any "earlier unavailability [of evidence] reflects any constitutional violation," the First Circuit anticipated the government's first argument to this Court: that allegations of newly discovered evidence, absent supportable allegations of a constitutional violation, are not cognizable under §2255, and must be presented, if timely, only under Rule 33.

or a Brady violation) are not cognizable under 28 U.S.C. §2254. Herrera v. Collins, 506 U.S. 390, 400 (1993). The Supreme Court's holding in Herrera, as explained in more detail below, has been extended by courts of appeals to §2255, the federal prisoner counterpart to §2254. *See e.g.*, Guinan v. United States, 6 F.3d 468, 470-471 (7th Cir. 1993); United States v. Conley, 323 F.3d 7, 13-14 (1st Cir. 2003). Even giving Trenkler the benefit of the doubt, and an overly generous view of what is "newly discovered evidence," his §2255 motion does not assert constitutional or jurisdictional errors, as required to invoke this Court's jurisdiction under §2255. Trenkler's self-styled §2255 motion is nothing more, at most, than a time-barred Rule 33 motion. Moreover, even considered as a §2255 motion, it is time-barred by his failure to allege newly discovered evidence, and/or his failure to establish that any newly discovered evidence could not have been discovered earlier through the exercise of due diligence.

1. Defense Bomb Expert Observed Fingerprint On Bomb Remains Collected And Held By The Bureau of Alcohol, Tobacco and Firearms

Trenkler alleges that in 1993, before trial, the defense bomb expert, Denny L. Kline ("Kline"), observed "traces of a fingerprint" on black electrical tape used to construct the bomb. The observation is alleged to have taken place at a meeting at ATF offices and it is alleged that Kline informed ATF agents of his observation. [App. at 1 (Affidavit of Morrison Bonpasse, recounting

conversation with Kline)].[4] Trenkler alleges that the fingerprint observed by Kline belongs to the builder of the bomb and would prove his actual, factual innocence. In explaining his delay in raising this argument, Trenkler alleges that Kline's observation was never reduced to writing or disclosed to Trenkler himself until July 2007, when Kline disclosed the fingerprint information to Morrison Bonpasse, an individual working on Trenkler's behalf.

Trenkler's first ground is at best a straightforward, newly discovered evidence claim, and nothing more.[5] Trenkler does not allege a constitutional violation. He does not allege that his trial counsel was ineffective in not pursuing the fingerprint observation by Kline. He does not allege in his first ground for relief that the fingerprint constituted withheld Brady material, in violation of the government's constitutional obligation to disclose exculpatory evidence.

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[4]Citations to the appendix to Trenkler's motion will be referenced herein by "[App. at __]."

[5]In actuality, information discovered by Trenkler's bomb expert before trial, and apparently communicated to defense counsel, can hardly be "newly discovered." The fact that the bomb expert who testified at trial, and diligent defense counsel, did not pursue the "discovery" strongly suggests that the "traces of a fingerprint" could not and did not produce a latent of value for comparison purposes.

2. The Government Possesses Exculpatory, Actual Innocence Evidence That Is Favorable To Defendant Trenkler

Trenkler alleges in the first part of his second ground for relief that the government is in possession of black electrical tape used in the construction of the bomb which the government was told contained "traces of a fingerprint." Trenkler alleges that the government withheld this favorable exculpatory evidence. Although he does not cite the case, Trenkler attempts to allege a Brady violation by the government. *See* Brady v. Maryland, 373 U.S. 83 (1963). But in fact, this part of Trenkler's second ground does not allege a constitutional Brady violation. The First Circuit has stated: "Brady applies to material that was known to the prosecution but unknown to the defense." United States v. Bender, 304 F.3d 161, 164 (1st Cir. 2002). As it was Trenkler's defense bomb expert who discovered traces of a fingerprint between layers of black electrical tape, the evidence, whether known to the government or not, cannot constitute a Brady violation.

Trenkler alleges in the second part of his second ground for §2255 relief that the government is in possession of five sets of fingerprints recovered from the undercarriage of the target vehicle owned by Shay Sr. He alleges that the fingerprints have never been disclosed or provided to Trenkler himself. Trenkler is careful in his allegation not to assert that neither he nor his defense team were unaware of the fingerprints. He merely alleges that the lifted fingerprints themselves were never given to him (it is not

clear whether he asserts that they were not given to his defense team). His own proffered support for this ground is fatal to his attempt to assert a Brady violation claim. Attached in the appendix to Trenkler's §2255 motion is the November 2, 1991 report from the Identification Section of the Boston Police Department disclosing that five lifts were taken of latent fingerprints from the undercarriage of the target vehicle. [App. at 3]. Thus, Trenkler was provided before trial with the results of the latent print examination of the undercarriage of the target vehicle, disclosing the existence of the latent fingerprint lifts. His further support in the appendix for this issue contains no suggestion that he specifically requested to inspect the lifted latents and that the government refused such a specific request. Thus, the fingerprint lifts from the undercarriage of the target vehicle were known to Trenkler's defense team before trial and cannot constitute a Brady violation.[6] Bender, 304 F.3d at 164

3. Bomb Switch Contacts Match Switches From Multiple Sources And Have Been Found To Be A Mismatch To Radio Shack Model Number 275-602 Toggle Switch

Trenkler alleges that trial evidence that connected bomb remains to a particular type and model toggle switch sold exclusively by Radio Shack was not accurate. He alleges that his

[6]Here again, Trenkler's counsel's failure to pursue the lifted fingerprints from the undercarriage of Shay Sr.'s vehicle is strongly suggestive that they were of no consequence. Not every lifted print produces a latent of value capable of being compared to known fingerprints.

defense bomb expert informed his trial counsel (prior to trial) that the bomb remains do not match the Radio Shack switch that the government contended at trial was part of the bomb. He also alleges that more recent investigative work (and allegedly newly discovered evidence) has identified a toggle switch matching the bomb remains that is not manufactured by or for Radio Shack. In support of his claim, Trenkler included in his appendix a copy of a March 17, 1993 letter from his counsel to Shay's counsel, stating that defense bomb expert Kline had informed him (Trenkler's counsel) that the switch that Shay was alleged to have purchased at Radio Shack did not match the remains of the bomb. [App. at 9].

Trenkler's third ground for relief is a straightforward, newly discovered evidence claim, if that, and certainly nothing more. Trenkler does not allege a constitutional violation. He does not allege that his trial counsel was ineffective in not pursuing the toggle switch information received from the defense bomb expert.[7] He does not allege that the toggle switch information constituted withheld Brady material, in violation of the government's obligation to disclose exculpatory evidence; nor could he, because it was information developed by his own bomb expert. *See* Bender, 304 F.3d at 164.

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[7]Trenkler's bomb expert testified at trial. To the degree that the toggle switch information in the letter from Trenkler's counsel was not fully explored at trial, it is most likely because it turned out to be of little or no consequence to Trenkler's defense.

4. Futaba Remote Control Receiver Could Not Operate After Being Armed For The Time Period Claimed By The Government

Trenkler alleges as his fourth ground for relief, based on technical specifications of the Futaba remote control receiver and the storage capacity of the Duracell battery used in the bomb, and given the government's trial evidence of when the bomb was attached to the target vehicle, that the bomb would not have had the battery power to trigger the device. It is unclear exactly what Trenkler alleges is newly discovered, and what was known by his trial team. It appears that some of the technical information on the remote control device might be newly discovered by him. However, he does attach as part of his appendix trial testimony of his bomb expert Kline that concerns the expert's experiment with the battery life of the bomb. [App. at 41].

Trenkler's fourth issue is at most a straightforward, newly discovered evidence claim, and nothing more. Trenkler does not allege a constitutional violation. Although he noted his trial counsel's failure to inquire with Futaba, he does not allege that his counsel was ineffective to do so. He merely uses that assertion to explain why he did not learn of the Futaba specifications earlier. Moreover, he can hardly argue ineffectiveness of counsel. Similar evidence was presented at trial by his bomb expert that purported to show that the batteries would have died before the explosion if the device was found by Shay Sr., as contended by the government, 24 hours before the

explosion.[8] In fact, Trenkler appears to allege nothing more, based on his new calculations, than that the batteries would have expired even earlier than testified to by his bomb expert. Trenkler also does not allege that the Futaba information constituted withheld Brady material, in violation of the government's obligation to disclose exculpatory evidence.

5. Co-defendant Shay States That Trenkler Is Innocent And That Others Are Responsible For Bomb

Trenkler alleges in his fifth ground for relief that in September of this year Shay proclaimed Trenkler's innocence in his (Shay's) own §2255 motion, in a letter to this Court [App. at 60-61], and in a letter to the United States Attorney's Office. [App. at 62-64]. Trenkler also relies on an August 7, 2006 published *Patriot Ledger* interview of Shay to the same effect. [App. at 54-56].

Trenkler's fifth ground for relief is at most a straightforward, newly discovered evidence claim, although Trenkler's earlier Rule 33 motion in 2000 relied in part on Shay's statements about Trenkler's innocence in this case. [D. 625]. But, more importantly, Trenkler does not allege a constitutional violation, either of the ineffectiveness of counsel variety or a Brady transgression by the government.

[8]The government never contended at trial that the receiver batteries were the cause or the only possible cause of the ignition of the explosive device. The explosion could have occurred with dead batteries.

6. A Witness In The Trenkler Trial Stated To Two Witnesses That Significant Portions Of His Testimony Are Untrue

Trenkler alleges in his sixth ground for relief that in 2001 a trial witness by the name of Michael Coady stated to Trenkler's step-father and his half-brother that substantial portions of his (Coady's) trial testimony were false. Trenkler's explanation of his delay in presenting this issue to the Court is based on Coady's desire for immunity from prosecution for his claimed perjury at trial.

Trenkler's sixth ground for relief is at most a straightforward, newly discovered evidence claim, although Trenkler himself admits that he had the information since 2001. But, more importantly, Trenkler does not allege a constitutional violation. He does not allege either ineffectiveness of counsel or a Brady violation by the government.

A further fatal flaw exists with respect to Trenkler's sixth ground for relief. His application to the First Circuit for leave to file this §2255 motion did not include this ground. As the permission Trenkler received to file this §2255 motion is limited to the issues included in his application, this Court is without jurisdiction to consider this ground.

ARGUMENT

A. Finality of Criminal Judgments

Trenkler asks this Court to vacate the criminal judgment

entered against him over 13 and one-half years ago, and grant him a new trial regarding events that occurred 16 years ago, in October 1991. Before addressing the procedural bars to Trenkler's §2255 motion, the government will briefly address the finality of judgment doctrine, and the important reasons for its application in this case.

The Supreme Court has long stressed the significance and importance of final judgments to our criminal justice system. In United States v. Frady, 456 U.S. 152 (1982), the Court refused to use the same standard of review for §2255 claims that is available for review of unpreserved errors on direct review (i.e., plain error). In requiring a stricter standard of review, the Court stated:

> By adopting the same standard of review for §2255 motions as would be applied on direct appeal, the Court of Appeals accorded no significance whatever to the existence of a final judgment perfected by appeal. Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, a final judgment commands respect.

Frady, 456 U.S. at 164-165.

In Teague v. Lane, 489 U.S. 288 (1989), the Court established a restrictive retroactivity doctrine for new rules of criminal procedure sought to be applied in federal post-conviction

proceedings. In rejecting the argument for prospective application of new Supreme Court decisions, the Court stated: "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague, 489 U.S. at 309. *See also* Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J. concurring) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.").[9]

Additionally, Congress has permissibly imposed restrictions on when and how many post-judgment attacks can be filed by state and federal prisoners, putting statutory gatekeeping requirements in place to protect final judgments from endless post-judgment attack. *See* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"); 28 U.S.C. §2254 and 2255. *See* Calderon v. Thompson, 523 U.S. 558 (1998) (The restrictions were "grounded in respect for

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[9]Trenkler is the poster-child for Justice Harlan's concerns of endless post-judgment litigation. As noted above, since his criminal judgment became final in October 1995, Trenkler has filed and pursued two Rule 33 motions, a §2255 motion, a §2241 motion under the savings clause of §2255, a petition for a writ of mandamus, a petition for a writ of *coram nobis*, the instant §2255 motion, and six related appeals.

the finality of criminal judgments."); David v. Hall, 318 F.3d 343, 346 (2003) ("One of AEDPA's main purposes was to compel habeas petitions to be filed promptly after conviction and direct review, to limit their number, and to permit delayed or second petitions only in fairly narrow and explicitly defined circumstances."). The Supreme Court, through its rule making power, has done the same for new trial motions, placing jurisdictional limits on motions based on newly discovered evidence. Fed. R. Crim. P. 33(b)(1) (within three years after the verdict or finding of guilty).

The First Circuit's decision in David is particularly noteworthy for Trenkler's §2255 motion for two reasons. First, in David, the petitioner claimed in his §2254 motion, as does Trenkler in his §2255 motion, that he was actually innocent. The First Circuit stated:

> Nothing is changed here by David's claim of actual innocence . . . [i]n general, defendants who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming: pre-trial motions must be filed on time, timely appeals must be lodged, and habeas petitions must conform to AEDPA. In particular, the statutory one-year limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence even though Congress clearly knew how to provide such an escape hatch.

David, 318 F.3d at 347.

Second, the First Circuit accurately expressed one of the practical reasons for rigorously enforcing the gatekeeping requirements of post-conviction proceedings:

> There is a strong public interest in the prompt assertion of habeas claims. Normally, the grant of habeas relief leaves the state free to retry the petitioner, but this becomes increasingly hard to do as memories fade, evidence disperses and witnesses disappear. A defendant who could not have filed his petition earlier is at least a sympathetic figure; one who has a known claim, defers presenting it, and then asks to be excused for the delay is unlikely to get cut much slack. A couple of cases have conjectured that actual innocence might override the one-year limit, *e.g.*, Wyzykowski v. Dept. of Corrections, 226 F.3d 1213, 11218-19 911th Cir. 2000); but to us these dicta are in tension with the statute and are not persuasive.

David, 318 F.3d at 347.

Here, the difficulties of retrying Trenkler have passed with the 14 years since the verdict from the difficult to the impossible. Boston Police Officer Denise Craft, the first police responder to Shay Sr.'s house on October 28, 1991, and the government's first witness at trial, died within the past year. ATF Special Agent Marty Marciniac, the head of the ATF National Response Team which performed the crime scene investigation in the criminal case, and who testified at trial, is also deceased. Several of the government's witnesses 16 years ago were incarcerated at the time, and their current availability is certainly questionable. More importantly, in October 2005, with no collateral attack on Trenkler's judgment pending or reasonably anticipated by the government, and ten years after judgment became final with the affirmance of Trenkler's judgment on direct appeal, and the new trial filing period having long before expired, the United States Attorney's Office authorized ATF to destroy the

evidence in this case. The evidence was destroyed in October 2005 and February 2006.

The inability of the government to retry this case may or may not be an independent reason to deny Trenkler's §2255 motion. But, it is certainly the reason why courts have historically recognized the importance of criminal judgments being recognized as final, and why the final judgment in this case should not be disturbed.

For the reasons discussed in detail below, Trenkler has not come close to establishing a right to the extraordinary relief available under §2255.

B. Trenkler's Motion Is Not Cognizable Under §2255

Section 2255 states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. §2255.

In essence, and by its very terms §2255, provides redress for jurisdictional or harmful constitutional errors. It only applies to such non-jurisdictional and non-constitutional errors of federal law that involve a "fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); *see also*, Reed v. Farley, 512 U.S. 339,

353-354 (1994); United States v. Tamreck, 441 U.S. 780, 784 (1979). Thus, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." Addonizio, 442 U.S. at 184. See Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (the "principle that collateral review is different from direct review resounds throughout our habeas jurisprudence"); Singleton v. United States, 26 F.3d 233, 236 (1st Cir. 1994) (a presumption of finality attaches to criminal convictions once all direct appeals have been exhausted; post-conviction relief on collateral review "is an extraordinary remedy, available only on a sufficient showing of fundamental unfairness").

Although Trenkler has labeled his motion as one under §2255, it is for this Court to determine the substance of his motion and treat it accordingly. Gonzalez v. Crosby, 545 U.S. 524, 531 (2005). *See also* United States v. Evans, 224 F.3d 670, 672 (7th Cir. 2000) (in determining whether post-conviction motion is second §2255 motion "the caption that a defendant puts on the motion is irrelevant"). If Trenkler's motion does not fall within the permissible scope of §2255, this Court lacks jurisdiction to consider his challenge to his criminal judgment. Addonizio, 442 U.S. at 184.

As discussed above in the description of the grounds advanced in his §2255 motion, Trenkler at most presents a newly discovered evidence claim seeking a new trial, or alternatively, an

evidentiary hearing with the hope of obtaining a new trial.[10] He does not allege a constitutional violation in the form of allegations of ineffectiveness of counsel or Brady violations. His claim is simply that his newly discovered evidence would establish his innocence or otherwise undermine the evidence found sufficient by the jury to establish his guilt.

In its judgment permitting the filing of Trenkler's §2255 motion, the First Circuit expressed scepticism that the alleged earlier unavailability of the claimed newly discovered evidence reflects any constitutional violations. In so stating, the First Circuit recognized the jurisdictional limitations of §2255, and the requirement, even within a claim of actual innocence, to allege a valid constitutional violation.

The inadequacy of a claim of actual innocence based on newly discovered evidence, divorced from a constitutional violation, in a post-conviction habeas proceeding was established by the Supreme Court in Herrera v. Collins, 506 U.S. 398 (1993).[11] In Herrera, the

[10]By so stating, the government is not conceding that the evidence addressed in Trenkler's motion is newly discovered. Even if newly discovered, the government does not concede that it could not, in the exercise of due diligence, have been discovered earlier. However, for the limited purpose of this initial argument that his §2255 motion is actually a time-barred Rule 33 motion, the government will assume that Trenkler is basing his arguments on actual newly discovered evidence.

[11]Herrera involved a claim of actual innocence by a state prisoner, attacking his state court judgment under 28 U.S.C. §2254. As discussed below, courts, including the First Circuit, have found Herrera equally applicable to §2255, its federal prisoner

petitioner claimed he was innocent of the double murder for which he had been convicted in state court. In support of his §2254 motion, the petitioner submitted several affidavits contending that the petitioner's deceased brother had committed the killings. The district court ruled that the petitioner could present his actual innocence claim in state court, but the court of appeals reversed, holding that: "petitioner's claim of actual innocence was not cognizable [under §2254] because . . . 'the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.'" Herrera v. Collins, 954 F.3d 1029, 1034 (5th Cir. 1992) (*quoting* Townsend v. Sain, 372 U.S. 293, 317 (1963)).

The Supreme Court affirmed, noting that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Herrera, 506 U.S. at 400. The Court further explained that "the [above] rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact." Herrera, 506 U.S. at 400. *See also* Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the

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counterpart.

question whether their constitutional rights have been preserved.").

The Supreme Court went on to reject the petitioner's claim that his conviction, in light of his actual innocence, brought him within the fundamental miscarriage of justice exception for habeas relief. The Court explained: "The fundamental miscarriage of justice exception is available 'only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence.' Kuhlman v. Wilson, 477 U.S. 436, 454 (1986). We have never held that it extends to freestanding claims of actual innocence." Herrera, 506 U.S. at 404-405 (emphasis in original). The bottom line in Herrera was best said by the Court itself: "[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera, 506 U.S. at 404.

The Seventh Circuit was the first court of appeals to apply Herrera to a §2255 proceeding. United States v. Guinan, 6 F.3d 468 (7th Cir. 1993). The petitioner in Guinan made two claims in his §2255 motion: (1) newly discovered evidence showed that he was innocent; and (2) his trial counsel had been ineffective. Guinan, 6 F.3d at 470. The Seventh Circuit started its discussion of the actual innocence claim by noting that new trial motions under Rule 33 based on newly discovered evidence had to be filed (at that

time) within two years of the final judgment, a term exceeded by Guinan. The court concluded that §2255 could not be used to circumvent the time limitation of Rule 33. Guinan, 6 F.3d at 470.

In finding Herrera controlling in a §2255 proceeding, the Seventh Circuit stated: "Section 2255 is a substitute for habeas corpus and like it is confined to correcting errors that vitiate the sentencing court's jurisdiction or are otherwise of constitutional magnitude." Guinan, 6 F.3d at 470. The court noted that a claim of actual innocence is fundamentally different from a claim of legal error, and went on to say:

> The purpose of granting a new trial on the basis of newly discovered evidence is not to correct a legal error, but to rectify an injustice, and the office of section 2255 is the former, not the later. Richardson v. Gramley, 998 F.2d 463, 464 (7th Cir. 1993). The conviction of an innocent person is an injustice, but it is only when such a conviction results from a legal error that the courts speak of a 'miscarriage of justice' that warrants a new trial. Johnson v. United States, 805 F.3d 1284, 1289-90 (7th Cir. 1986). Even then, unless the error is of constitutional magnitude, a federal court does not have the power to correct it in a proceeding brought under the habeas corpus statute (section 2254) or, we add today, its federal-prisoner substitute (section 2255).

Guinan, 6 F.3d at 470-471; *see also* Evans, 224 F.3d at 673-674 (citing Herrera in §2255 case to effect that "a conviction does not violate the Constitution(or become other wise subject to collateral attack) just because newly discovered evidence implies that the defendant is innocent").

The First Circuit followed Guinan and also applied Herrera to a §2255 proceeding. United States v. Conley, 323 F.3d 7 (1st Cir.

2003). The court first distinguished between newly discovered evidence claims that do not assert a Brady violation, which in this Circuit are controlled by United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980), and newly discovered evidence claims that assert a constitutional Brady claim, which require a lesser showing to warrant relief.[12] Conley, 323 F.3d at 10. The district court in Conley granted a new trial in Conley's §2255 proceeding under Wright, and did not reach the Brady claim. The First Circuit disagreed with the district court's use of §2255 to grant a new trial based on a Wright claim.

> The problem is that new evidence claims under Wright are cognizable grounds of relief only in post-trial motions for a new trial and not under habeas or its section 2255 surrogate. Powerful new evidence of innocence can satisfy one of the new "gatekeeper" requirements for bringing a "second or successive" section 2255 motion, *see* 28 U.S.C. §2255; but a traditional habeas ground is required once one gets through the gate. Merely to claim that new evidence casts doubt, even grave doubt, on the correctness of a conviction is not a ground for relief on collateral attack. *See* Herrera v. Collins, 506 U.S. 390, 400 (1993); United States v. Evans, 224 F.3d 670, 673-74 (7th Cir. 2000).

Conley, 323 F.3d at 13-14. *See also* United States v. Ruiz, 221 F.Supp. 2d 66, 72 (D. Mass. 2002) (Wolf, J.) ("Where a claim or relief based on newly discovered evidence is based on actual

[12]Conley, like Guinan, held that newly discovered evidence claims tied to alleged constitutional violations could be adjudicated under §2255. Conley, 323 F.3d at 14 ("Conley's claim under Brady [is] a settled basis for collateral attack"); Guinan, 6 F.3d at 471 (Guinan's claim of ineffective assistance of counsel "is a claim of constitutional error and can therefore be raised in a motion under section 2255").

innocence, rather than new evidence of a constitutional violation, the claim is not cognizable under §2255 and, properly construed, is a Rule 33 motion.”).

Here, Trenkler has alleged neither an ineffectiveness claim, nor a genuine Brady claim. His §2255 motion requests a new trial based on allegedly newly discovered evidence that he claims would establish his actual innocence, or at least result in a different verdict upon retrial. Under Conley, this Court lacks jurisdiction to consider his stand-alone newly discovered evidence claim under §2255. His motion should be denied without a hearing and his petition dismissed.

C. Under Rule 33, Trenkler’s Motion Is Time-Barred

Under Rule 33, this Court may “vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a). However, strict time limitations are incorporated into Rule 33. With respect to new trial motions based on newly discovered evidence, the motion “must be filed within 3 years after the verdict or finding of guilty.” Fed. R. Crim. P. 33(b)(1). The First Circuit, as well as other appellate courts, have held that Rule 33 is jurisdictional, “and the district court is without discretion to grant a motion for new trial that is not timely filed.” United States v. DiSanto, 86 F.3d 1238, 1250 (1st Cir. 1996); United States v. Lema, 909 F.2d 561, 565 (1st Cir. 1990); see also United States v. Bowler, 252 F.3d 741, 743 (5th Cir. 2001);

United States v. Lussier, 219 F.3d 217, 221 (2d Cir. 2000). Trenkler was found guilty by the jury on November 29, 1993. His three-year period to seek a new trial based on newly discovered evidence expired almost eleven years ago, on November 29, 1996.

Trenkler fares no better if this Court calculates his new trial motion period under the version of Rule 33 which applied prior to December 1, 1998.[13] Under the earlier version: "A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment." Fed. R. Crim. P. 33 (1998). Calculating Trenkler's final judgment to have become effective 90 days after his direct appeal was affirmed, his two-year period to file a newly discovered evidence claim under the old version of Rule 33 expired more than ten years ago, on October 16, 1997. As Trenkler's right to file a Rule 33 new trial motion based on newly discovered evidence long-ago expired under either version of Rule 33, it is unnecessary for this Court to decide which version is applicable in this case. *See* Ruiz, 221 F.Supp. 2d at 75. Accordingly, Trenkler's §2255 motion, properly considered as a Rule 33 motion, is time-barred.

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[13]The 1998 Amendment to Rule 33 became effective December 1, 1998, and according to its enabling order, "shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending." Order of April 24, 1998 of the Supreme Court of the United States. *See also* Bowler, 252 F.3d at 744; Ruiz, 221 F.Supp. 2d at 75.

D. Even As A §2255 Motion, The Motion Is Time-Barred

Even if this Court were to consider Trenkler's motion under §2255, it is time-barred, as the evidence he asserts in his various grounds for relief is either not newly discovered, or could have been discovered much earlier through the exercise of due diligence.

Section 2255 provides for a one-year limitations period that runs from the latest of:

> (1) the date on which the judgment of conviction becomes 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.

28 U.S.C. §2255. It is the petitioner's burden in a §2255 proceeding to show entitlement to relief. David v. United States, 134 F.3d 470, 474 (1st Cir. 1998).

The first three starting possible dates for the §2255 statute of limitations do not help Trenkler. Subsection 1 is not helpful because conviction became final in October 1995. Subsection 2 is unavailable as he has not asserted a valid Brady claim. His only claims of withheld evidence involve evidence known to his defense

team prior to trial. Subsection 3 is inapplicable, as Trenkler does not rely on any newly recognized constitutional right. Thus, it is only Subsection 4 that Trenkler has attempted to put into play in an effort to have this Court consider his §2255 motion 12 years after his criminal judgment became final.

In Johnson v. United States, 544 U.S. 295 (2005), the Supreme Court dealt with Subsection 4 of §2255 in the context of a federal prisoner who, post-judgment, successfully attacked in state court a career offender predicate, and thereafter sought to be resentenced in his federal case under §2255 with the benefit of the vacated state court conviction. The Court held that the one-year statute of limitations for §2255 motions did not begin to run until the prisoner obtained notice of the state court action vacating his career offender predicate. But, the Court imposed on the petitioner an obligation to act with due diligence in seeking to collaterally attack his prior conviction and dealt with the argument that the petitioner, serving a lengthy federal sentence, should not be penalized for delay in seeking to vacate his state court sentence because the enhancement period caused by the career offender predicate was years away from beginning. The Court stated that during any such delay "the predicate conviction grows increasingly stale and the federal outcome is subject to question," and such delay is "at odds with the provision in paragraph four [of §2255] that the one year starts running when the operative facts

'could have been discovered through the exercise of due diligence.'" Johnson, 544 U.S. at 307. In Johnson, the Supreme Court implemented the statutory mandate of due diligence by requiring that it be shown "by prompt action on the part of the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior conviction with its potential to enhance the later [federal] sentence." Johnson, 544 U.S. at 308.

Thus, Johnson makes clear that due diligence is not limited to the time period after the discovery of "new facts," but also to the period of time between when a prisoner has an interest in finding or bringing about the new facts, and actually learning of the new facts. Here, Trenkler, had an interest in learning new facts about his case as soon as his direct appeal concluded and his judgment became final on October 16, 1995 and the then two-year period for Rule 33 motions began to run.[14] Thus, any explanations Trenkler proffers for the delay in presently his current claims of newly discovered evidence must account for, at a minimum, the period of time from October 16, 1995 until he filed on July 20, 2007 his application with the First Circuit for leave to file this

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[14]The one-year statute of limitations for §2255 motions did not become effective until on April 24, 1996, after Trenkler's judgment became final on October 16, 1995. Every court of appeals to address the issue concluded that prisoners such as Trenkler, whose judgments became final before the enactment of AEDPA, had, under Subsection 1 of the §2255 limitations provision, until April 24, 1997 to file a §2255 motion. *See* Duncan v. Walker, 533 U.S. 167, 183, n.1 (2001) (Stevens, J. concurring); Gaskins v. Duval, 183 F.3d 8, 9 (1st Cir. 1999).

successive §2255 motion.[15]

Even a cursory review of Trenkler's proffered support for his motion shows that some of the facts on which he relies where known to him and his defense team before trial, and the remaining facts could have been discovered through the exercise of due diligence well more than one year before his application for leave to file this motion was filed with the First Circuit on July 20, 2007.

Ground 1 in support of his request for §2255 relief involves "traces of a fingerprint" discovered by his bomb expert before trial. To the degree that personal knowledge of Trenkler is required (which it is not), he does not explain why he did not inquire of his bomb expert in the more than 13 years between the end of his trial and July 2007, when he claims to have learned personally about the "traces of a fingerprint."

Ground 2 in support of his request for relief relies on the same "traces of a fingerprint," as well as five lifts of latent fingerprints from the undercarriage of Shay Sr.'s vehicle, which were reported in a 1991 Boston police report that was produced to

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[15]It is true that the due diligence inquiry is an individualized one and must take into account the conditions of confinement and the reality of the prison system. Aron v. United States, 291 F.3d 708, 712 (11th Cir. 2002); Montenegro v. United States, 248 F.3d 585, 592 (7th Cir. 2001). However, here, the record establishes that Trenkler's incarceration did not inhibit his post-judgment filings, which included fact-based, as well as legal, claims. Moreover, the record establishes that Trenkler had committed assistance from non-incarcerated individuals working on his behalf, such as his step-father and others.

his defense team before trial. Again, even if personal knowledge of Trenkler is required (which it is not), he does not even allege that he was unaware of the report until recently. Rather, he merely asserts that the fingerprint report took on a new importance since the fingerprint trace information was learned in July 2007. The failure to diligently uncover the fingerprint trace information from his own defense expert does not justify or explain the delay in pursuing the Boston police fingerprint report of lifts from the undercarriage of Shay Sr.'s vehicle.

Ground 3 in support of his request for relief (toggle switch comparison) is not newly discovered evidence. It is based on information known to his bomb expert and his trial counsel well in advance of trial. Trenkler's own counsel wrote a letter to Shay's counsel informing Shay's counsel of the bomb expert's discovery when the expert disassembled toggle switches from Radio Shack and compared them to the bomb remains from the crime scene. Again, even if personal knowledge of Trenkler is required (which it is not), he does not explain why he only learned of the toggle switch information recently. Merely claiming that the letter was found during the search of 40 boxes of legal documents does not explain why the search did not occur years earlier.

Ground 4 in support of his request for relief (battery life of remote controlled receiver) suffers from the same defects as his toggle switch allegations. At trial, his defense expert testified

to an experiment with the battery life of the receiver, and stated that his experiment showed that the batteries would have been exhausted 22 hours after the device was placed and armed, while the government's evidence showed that the bomb had been in place and armed for at least 24 hours. Thus, the basics of his claim were known before trial. It is only new calculations that he claims would show an even shorter battery life that are even arguably new. He claims that it was only during the recent search of the 40 boxes of legal documents that information was learned that led to the new calculations. Again, he offers no explanation why the boxes of legal documents were not diligently reviewed years ago.

Ground 5 in support of his request for relief (Shay's proclamations of Trenkler's innocence) are hardly new. Trenkler's first §2255 motion contained similar allegations.

Ground 6 in support of his request for relief (recantation by trial witness Michael Coady), besides not being properly before this Court, is not based on newly discovered evidence. The affidavits proffered in support of Ground 6 rely on conversations Trenkler's step-father and half-brother allege they had with Coady in 2001. It is worth noting that in 2001, a §2255 motion relying on the hearsay statements of Coady's recantations would have been time-barred by over five years. Trenkler has not even tried to explain why it took him until 2001 to obtain statements from Coady. His explanation of the delay since 2001 is hardly better than no

explanation at all.

E. Conclusion

For the above stated reasons, this Court should deny, without a hearing, Trenkler's motion, filed by him under 28 U.S.C. §2255.

Respectfully submitted,

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December 14, 2007

CERTIFICATE OF SERVICE

This is to certify that I have this 14th day of December 2007 served upon petitioner, Alfred W. Trenkler, Reg. No. 19377-038, U.S.P. Allenwood, P.O. Box 3000, White Deer, PA 17887, a copy of the foregoing document by first class mail.

/s/ Timothy Q. Feeley
TIMOTHY Q. FEELEY
Assistant U.S. Attorney