No. 00-1657

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALFRED W. TRENKLER,
Petitioner-Appellant

v.

UNITED STATES OF AMERICA,
Appellee

On Appeal From A Judgment Entered In The
United States District Court
for the District of Massachusetts
Denying a 28 U.S.C. §2255 Petition

Brief for the Appellee

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

MISCELLANEOUS

I. JURISDICTIONAL STATEMENT

The District Court's dismissal of the 28 U.S.C. §2255 petition filed by Alfred W. Trenkler ("Trenkler") was entered on the docket on April 18, 2000, Appendix ("App.") 2, and Trenkler filed a timely notice of appeal on May 16, 2000. App. 3. This Court has jurisdiction pursuant to 28 U.S.C. §2255 and 28 U.S.C. §1291.

The District Court, however, lacked jurisdiction over this matter because Trenkler filed this petition to set aside his conviction beyond the one-year limitations period permitted under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. §2255, and the limitations period is jurisdictional. See infra, pp. 18-19. Specifically, Trenkler had one year from April 24, 1996 to file his petition, see Rogers v. United States, 180 F.3d 349, 354 (1st Cir. 1999), cert. denied, 120 S.Ct. 958 (2000), but he failed to file the petition until January 7, 1999. App. 2, 5.

II. STATEMENT OF THE ISSUES

1. Whether Trenkler's conviction became "final" within the meaning of the AEDPA either when this Court issued its mandate on Trenkler's direct appeal or when the time for filing a petition for certiorari expired, and not when this Court affirmed, more than two years later, the denial of Trenkler's motion for a new trial?

2. Whether the District Court correctly concluded that the one-year limitations period in the AEDPA was not tolled during the

pendency of Trenkler's motion for a new trial under Fed. R. Crim. P. 33?

3. Whether the District Court abused its discretion when it concluded that the doctrine of "equitable tolling" was not available to Trenkler to revive his time-barred petition?

III. STATEMENT OF THE CASE AND OF RELEVANT FACTS

This is an appeal from the dismissal of Trenkler's 28 U.S.C. §2255 petition to set aside his conviction.

On June 24, 1993, a federal grand jury returned a three-count superseding indictment against Trenkler and Thomas A. Shay ("Shay") charging them for their respective roles in the bombing death of Boston Police Bomb Squad Officer Jeremiah Hurley and the maiming of Hurley's partner, Bomb Squad Officer Francis Foley. App. 81; see generally United States v. Trenkler, 61 F.3d 45, 47-51 n.1 (1st Cir. 1995) ("Trenkler I"). The cases were severed on Trenkler's motion, and Shay was tried first. App. 73; see Trenkler I, 61 F.3d at 48.

Shay sought to admit at his trial the testimony of Dr. Robert Phillips, a psychiatrist. See generally United States v. Shay, 57 F.3d 126, 129-130 (1st Cir. 1995). Dr. Phillips was apparently prepared to testify that Shay suffered from a mental disorder known as "pseudologia fantastica," id. at 129, which purportedly caused Shay to tell self-aggrandizing lies, and which may have, in Dr. Phillips's view, explained the various incriminating statements made by Shay. The District Court (the Honorable Rya W. Zobel)

excluded that evidence, see Shay, 57 F.3d at 130 n.2, and on July 27, 1993, the jury found Shay guilty of conspiracy and malicious destruction of property. App. 88. Shay appealed, and on June 22, 1995, this Court concluded that exclusion of Dr. Phillips's testimony was error, Shay, 57 F.3d at 133-134, and remanded to the District Court. Shay ultimately pled guilty, and was sentenced to 12 years' imprisonment. App. 124.

Meanwhile, Trenkler's trial followed Shay's, and Trenkler declined even to offer the testimony of Dr. Phillips. February 4, 1997 Memorandum of Decision, attached to Trenkler Brief at Addendum ("Add.") 4-5. The jury convicted Trenkler on all counts of the superseding indictment, App. 111, and on March 8, 1994, he was sentenced to life imprisonment. App. 115; Trenkler I, 61 F.3d at 51. This Court affirmed Trenkler's conviction on July 18, 1995, Trenkler I, 61 F.3d at 62, and issued its mandate on September 5, 1995. App. 117. Trenkler did not file a petition for a writ of certiorari.

On December 22, 1995, Trenkler filed a motion under Fed. R. Crim. P. 33 for a new trial. See Add. at 4. Among the grounds for the motion were that Dr. Phillips's testimony constituted "newly discovered evidence." Id. On February 4, 1997, the District Court (Zobel, J.) denied the motion. Id. at 6. It reasoned that "[t]he Phillips' evidence was not unknown or unavailable at the time of [Trenkler's] trial. In fact, [Trenkler's] attorney concedes that

prior to trial he considered offering the Phillips evidence but did not, figuring that it would be 'futile' in light of [the District Court's] ruling in the Shay, Jr. trial." Id. at 5. The District Court also noted, "[n]or does the First Circuit's opinion in Shay, Jr. constitute 'new evidence.' Defendant never offered or attempted to offer the Phillips evidence into evidence at trial and is therefore foreclosed from relying on the First Circuit's opinion in Shay, Jr. as grounds for a new trial." Id. at 5 n.2.

Trenkler appealed, again, this time from the denial of his motion for a new trial, and on January 6, 1998, this Court affirmed. United States v. Trenkler, 134 F.3d 361 (1st Cir. 1998)(Table, text in WESTLAW, No. 97-1239)("Trenkler II"). With respect to Dr. Phillips's testimony, this Court reasoned that,

> [u]nder no interpretation of the [newly discovered evidence] standard was Dr. Phillips's testimony unknown or unavailable at the time of defendant's trial. That the district court excluded the testimony in Shay Jr.'s trial and that [Trenkler's] trial counsel believed it would be futile to offer it in light of the prior trial do not excuse him from making the offer.

Id. *4. This Court also noted that:

> The decision of [Trenkler] trial counsel in this case not to offer the testimony may have been part of [counsel's] reasonable trial strategy: although some of Shay Jr.'s statements were not favorable to Trenkler, some of his admissions supported Trenkler's defense. Thus, trial counsel may have determined that it would be unwise to risk discrediting Shay Jr.'s admissions, even for the sake of discrediting his statements about

> the existence of a co-conspiracy between Shay Jr. and defendant.

Id.

Trenkler filed the petition at issue in this appeal on January 7, 1999, App. 2, 5, more than one year after this Court had affirmed the denial of his motion for a new trial, and more than three years after this Court issued the mandate on his direct appeal. Trenkler asserted that he had been denied effective assistance of counsel for counsel's failure at trial to seek to admit Dr. Phillips's testimony. App. 13-16.

On April 20, 1999, the government filed its opposition. App. 17. The government argued that Trenkler's petition was barred by the one-year limitations period in the AEDPA. Specifically, the government asserted, because Trenkler's conviction was final at the time of the passage of the AEDPA, Trenkler had one year from the statute's effective date (April 24, 1996) to file his petition. See Rogers v. United States, 180 F.3d 349, 354 (1st Cir. 1999), cert. denied, 120 S.Ct. 958 (2000).[1] Because he did not file his petition until January 5, 1999, approximately 21 months after expiration of the limitations period, the government argued that

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[1]This one-year "grace period" from the AEDPA's effective date provided to petitioners like Trenkler, whose convictions were final before the passage of AEDPA is hereafter referred to as the AEDPA limitations period, though it is a judicially crafted component of the limitations period set forth in the statute.

Trenkler's petition was time-barred.[2] On April 18, 2000, the District Court (Zobel, J.) issued its Memorandum of Decision denying Trenkler's petition. App. 2, 50. In particular, the District Court concluded that Trenkler's petition was time-barred by the AEDPA's one-year limitations period. App. 52. In so doing, the District Court rejected Trenkler's argument that his conviction did not become "final" until this Court affirmed the denial of his motion for a new trial on January 6, 1998, App. 51; rejected Trenkler's argument that the AEDPA's limitations period was somehow tolled during the pendency of the motion for a new trial, App. 52; and rejected Trenkler's argument that his late-filed petition was saved by the doctrine of equitable tolling. App. 52. On this final point, the District Court concluded that, even if equitable tolling were available under certain circumstances, "[n]othing 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." App. 52.

Trenkler filed his Notice of Appeal on May 16, 2000, App. 3,

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[2]The government also argued, on the merits, that trial counsel's decision not to offer the evidence was, rather than ineffective assistance of counsel, part of counsel's strategy to concede Shay's involvement in the bomb plot but deny that Trenkler was involved in the crime. App. 42. The government also argued that the testimony would have been irrelevant to the outcome of the case given the overwhelming evidence of Trenkler's guilt. App. 45-48. This evidence is recited by this Court at length in Trenkler I, 61 F.3d at 60-61.

53, and an Application for a Certificate of Appealability on August 21, 2000. App. 55. The District Court granted the application on November 9, 2000, reasoning that: "Although I adhere to my view that the petition is time-barred, petitioner's tolling arguments are not frivolous. Accordingly, the application is granted as to these issues." App. 55.

IV. STANDARD OF REVIEW

The District Court's conclusions with respect to when the judgment of conviction became final for the purpose of the AEDPA, and whether the pendency of a Rule 33 motion tolls the limitations period of the AEDPA, involve questions of law and are reviewed de novo. Barrett v. Lombardi, 239 F.3d 23, 27 (1st Cir. 2001). The standard of review of the District Court's conclusions with respect to the applicability of equitable tolling is abuse of discretion. United States v. Patterson, 211 F.3d 927, 931 (5th Cir. 2000).

V. SUMMARY OF ARGUMENT

1. Trenkler's conviction became "final" for the purpose of triggering the one-year limitations period in the AEDPA, 28 U.S.C. §2255, either when this Court issued its mandate on Trenkler's direct appeal, see Gendron v. United States, 154 F.3d 672, 674 (7th Cir. 1998), cert. denied, 526 U.S. 1113 (1999), or when Trenkler's time for filing a petition for certiorari from that decision expired. See Kapral v. United States, 166 F.3d 565, 577 (3rd Cir. 1999). Under the Gendron test, Trenkler's conviction became final

on September 5, 1995, when mandate issued in connection with his direct appeal. App. 117. Under the Kapral test, Trenkler's conviction became final when the 90-day period for filing a petition for certiorari expired, on December 5, 1995. Because in either case Trenkler's conviction became final before the passage of the AEDPA, he had one year from the AEDPA's effective date, or until April 24, 1997, to file his petition. Rogers v. United States, 180 F.3d 349, 356 (1st Cir. 1999). Because Trenkler waited until January 7, 1999 to file his petition, App. 2, 5, the District Court correctly concluded that the petition was time-barred. App. 52.

Trenkler's argument that his conviction did not become "final" until nearly two and one half years after conclusion of his direct appeal, when this Court affirmed the denial of his motion for a new trial, is meritless. As the District Court here concluded, not one of the four circumstances set forth in 28 U.S.C. §2255 which trigger the one-year period "can be interpreted to encompass final resolution of a new trial motion postdating conviction and appellate review." App. 51-52. See, e.g., Johnson v. United States, 246 F.3d 655, 2001 WL 369844 *2 (6th Cir. 2001)(for purposes of AEDPA's limitations period, "conviction becomes final at the conclusion of direct review"); United States v. Torres, 211 F.3d 836, 837 (4th Cir. 2000) (disposition of "direct appeal" triggers limitations period.)

2. The District Court correctly concluded that the one-year limitations period in the AEDPA was not tolled during the pendency of Trenkler's motion for a new trial under Fed. R. Crim. P. 33. There is no statutory basis for Trenkler's argument, and it has been rejected by the courts of appeals which have considered it. E.g., United States v. Prescott, 221 F.3d 686, 689 (4th Cir. 2000). Any other result would permit petitioners to extend for three years (the time limit for a Rule 33 motion), plus whatever period was required to litigate and appeal the Rule 33 motion, the §2255 limitations period by filing a motion for a new trial after the direct appeal was concluded. See Johnson, 2001 WL 369844 *3.

3. The District Court did not abuse its discretion when it concluded that, even if equitable tolling were permitted under 28 U.S.C. §2255, nonetheless there were no grounds for equitable tolling present here. Trenkler has failed to show any misconduct by the government which caused his late filing, see Torres v. Superintendent of Police, 893 F.2d 404, 407 (1st Cir. 1990), but instead simply appears to have failed to "exercise reasonable diligence." Benitez-Pons v. Commonwealth of Puerto Rico, 136 F.3d 54, 61 (1st Cir. 1998). Trenkler's failure to exercise reasonable diligence does not provide a basis for equitable tolling. Id.

VI. ARGUMENT

A. Trenkler's Conviction Became Final, At The Very Latest, When The Period Expired For Filing A Petition For Certiorari From This Court's Affirmance Of His Conviction

Congress passed the AEDPA on April 24, 1996. The AEDPA amended 28 U.S.C. §2255 to include a one-year time limit for collateral attacks under that section. The time limit is triggered by one of four events:

> (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.

Trenkler does not advance any claim that would warrant using any of the dates set forth in subsections (2), (3), or (4) to commence the one-year period. Moreover, his petition is time-barred pursuant to subsection (1), because he did not file his §2255 petition within one year of "the date on which the judgment of conviction becomes final," or within the one-year grace period

provided for those petitioners like Trenkler whose convictions became final before the effective date of the AEDPA. See, e.g., Rogers, 180 F.3d at 354. Although there is a split between the circuits as to when a conviction becomes final for purposes of commencing the limitations period, the District Court correctly recognized that Trenkler's petition is time-barred under either test.

In Gendron v. United States, 154 F.3d 672, 674 (7th Cir. 1998), the Seventh Circuit held that where a defendant did not file a petition for certiorari, his conviction became final, for purposes of the AEDPA, on the date the court of appeals issued its mandate in the direct criminal appeal. In contrast, in Kapral v. United States, 166 F.3d 565, 577 (3rd Cir. 1999), the Third Circuit held that a defendant's conviction did not become final until: "the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires." This Court does not appear to have addressed this question.[3]

Under the Gendron test, Trenkler's conviction became final on September 5, 1995, when this Court issued its mandate in connection

[3]The Solicitor General has specifically endorsed the approach taken in Kapral, 166 F.3d at 577.

with Trenkler's direct appeal. App. 117. Under the Kapral test, Trenkler's conviction became final when the period for filing a petition for certiorari expired, namely 90 days from the date mandate issued, or on December 5, 1995. U.S. Sup. Ct. Rule 13. Under either of these tests, Trenkler's conviction became final no later than December 5, 1995.

Given that Trenkler's conviction was final at the time of passage of the AEDPA on April 24, 1996, he had one year from the AEDPA's effective date, until April 24, 1997, to file any collateral claims under 28 U.S.C. §2255. See, e.g., Rogers, 180 F.3d at 354; Flanagan v. Johnson, 154 F.3d 196, 200 (5th Cir. 1998); Goodman v. United States, 151 F.3d 1335, 1337 (11th Cir. 1998); Brown v. Angelone, 150 F.3d 370, 375 (4th Cir. 1998); Mickens v. United States, 148 F.3d 145, 146 (2nd Cir. 1998); Burns v. Morton, 134 F.3d 109, 111 (3rd Cir. 1997); Calderon v. United States District Court for the Central District of California, 128 F.3d 1283, 1288 (9th Cir. 1997). Trenkler filed his §2255 petition on January 7, 1999, App. 2, 5, approximately 21 months after the expiration of this grace period. Accordingly, Trenkler's petition is time-barred.

Trenkler's argument that his conviction did not become "final" until the disposition of his motion for a new trial has no basis in the statute, the cases interpreting the statute, or the policy behind the statute. The District Court correctly recognized that

the AEDPA nowhere suggests, in its recitation of the circumstances which trigger the limitations period, that "finality" only occurs upon the affirmance of a denial of a motion for a new trial years after disposition of a direct appeal. App. 51-52. Indeed, the reported cases unanimously refer to the disposition of the "direct appeal" as the triggering event. Johnson, 2001 WL 369844 *3; United States v. Prescott, 221 F.3d 686, 687 (4th Cir. 2000); United States v. Torres, 211 F.3d 836, 839 (4th Cir. 2000); United States v. Willis, 202 F.3d 1279, 1280 (10th Cir. 2000); Kapral, 166 F.3d at 575.

The precise argument made by Trenkler here was advanced, and rejected by the Sixth Circuit, in Johnson. There, the petitioner argued that his conviction was not "final" for the purposes of the AEDPA until the disposition of his motion for a new trial. Like Trenkler, Johnson had filed the Rule 33 motion months after disposition of his direct appeal, id. *1, and it was not resolved finally until nearly three years after disposition of his direct appeal. Id. The Sixth Circuit concluded that a motion for a new trial filed more than ten days after the entry of the judgment of conviction "is a collateral challenge separate from the direct appeal." Id. *2.[4] Any other result, it noted, would in effect

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[4]The Sixth Circuit carefully distinguished the situation where the Rule 33 motion was filed within ten days of the judgment, thereby tolling the period for appeal until "'10 days after the entry of the order disposing of the [Rule 33] motion, or within 10 (continued...)

extend the AEDPA limitations period for at least the three years permitted for the filing of certain Rule 33 motions. Id. *3; see Fed. R. Crim. P. 33.

> The potential for abuse of [the rule urged by the petitioner] is evident: every defendant seeking to file an untimely §2255 motion could do an end-run around the AEDPA limitations period by filing a timely, but ultimately meritless, Rule 33 motion.

2001 WL 369844, *3.[5]

Moreover, the Sixth Circuit also noted that its holding:

> furthers the AEDPA's strong preference for swift and final adjudication of §2255 motions, as expressed through its strict limitations period and constraints on successive petitions. Petitioner's reading of Rule 33 would severely undercut Congress' intent in enacting the AEDPA by greatly extending the time in which a petitioner may properly bring a §2255 challenge.

Id. See Calderon, 128 F.3d at 1289 (limitations period in AEDPA reflects Congressional intent "to accelerate the federal habeas

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[4](...continued)
days after the entry of the judgment of conviction, whichever period ends later.' Fed. R. App. P. 4(b)(3)(A)." Johnson, 2001 WL 369844 *2. Under that scenario, the disposition of the Rule 33 motion would become part of the direct appeal. If the Rule 33 motion were filed outside the ten day window, it would necessitate a second notice of appeal, separate from the initial direct appeal. Id.

[5]In fact, that is precisely what has happened here. Trenkler filed a Rule 33 motion which failed to meet the well-established standards for motions based on newly-discovered evidence. The rule now urged by Trenkler would reward his filing of a meritless motion by extending for years the strict limitations period set forth in the AEDPA.

process."); see id. ("I agree with my Republican colleagues . . . that we ought to have a strict statute of limitations") (remarks of Senator Biden) (quoting 141 Cong. Rec. S7840).

The principal case cited by Trenkler, United States v. Dorsey, 988 F. Supp. 917 (D. Md. 1998), in fact stands for the proposition that the conviction is "'final', for purposes of a 2255 motion, on the date that a petitioner can no longer pursue direct appeal." 988 F.Supp. at 919. Dorsey does not, in any way, suggest that a motion for a new trial under Rule 33, with its expanded time limitations relative to 28 U.S.C. §2255, could be used to extend for three years (the period for Rule 33 motions), plus whatever period was required for litigation and appeal of the motion, the one-year limitations provision in that statute.

B. The District Court Correctly Concluded That The One-Year Limitations Period In The AEDPA Was Not Tolled During The Pendency of Trenkler's Motion For A New Trial Under Fed. R. Crim. P. 33

The District Court correctly rejected Trenkler's argument that, even if the conviction was final upon conclusion of his direct appeal, nonetheless the AEDPA's one-year limitations period is somehow tolled during the pendency of his motion for a new trial. App. 52. The statute does not provide for such tolling in the context of §2255 review, and none of the cases which have addressed the issue have concluded that tolling is appropriate during the pendency of a Rule 33 motion.

First, the statute itself lists four different dates, and provides that the limitations period shall run from the latest such date applicable. 28 U.S.C. §2255. This effectively provides for tolling in several different circumstances (e.g., for an "impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States"), but contains no mention of tolling in the circumstance presented here - i.e., during the pendency of a Rule 33 motion. Fundamental principles of statutory construction, and in particular the principle of "expressio unius exclusio alterius," prohibit the construction of the statute sought by Trenkler. See, e.g., Sunshine Development Inc. v. F.D.I.C., 33 F.3d 106, 116 (1st Cir. 1994).

Indeed, the statute governing the availability of habeas relief for a person in state custody, 28 U.S.C. §2244(d)(2), specifically contains a provision tolling the limitations period during the pendency of such post-trial motions. According to that provision:

> 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 or limitation under this subsection.

Trenkler has argued that this provision ought be incorporated into §2255, on the grounds "that there is no reason to treat federal prisoners differently from state prisoners in this regard."

Trenkler Brief at 26.[6] To the contrary, the inclusion of this tolling provision for habeas petitioners for prisoners in state custody, and the absence of any similar provision for prisoners in federal custody, strongly reflects that Congress made a deliberate choice not to make such tolling available for prisoners in federal custody. See Goncalves v. Reno, 144 F.3d 110, 129 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999)("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (quoting I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987)).

In Prescott, 221 F.3d at 688, the Fourth Circuit addressed this identical question, and concluded that the pendency of a Rule 33 motion does not toll the limitations period for filing an action under 28 U.S.C. §2255. That court specifically rejected the

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[6]Trenkler argues that at least two courts of appeal have concluded that "we . . . see no principled reason to treat state and federal habeas petitioners differently." Kapral, 166 F.3d at 573; United States v. Burch, 202 F.3d 1274 (10th Cir. 2000). This may be true with respect to whether the limitations period is triggered by the mandate or by the expiration of the time for filing a petition for certiorari, which was the issue addressed in the cases cited by Trenkler. It is simply not the case with respect to whether the limitations period for a §2255 petition is tolled by a Rule 33 motion. On that question, the "principled reason" to treat state and federal prisoners differently is the significant difference in statutory language between §2244(d)(2) and §2255, and the principles of comity which underlie that difference. See infra p. 17.

argument that the tolling provision for state prisoners under §2244(d)(2) ought be transported to the limitations period for federal prisoners under §2255. It reasoned that

> [t]olling with regard to state proceedings 'upholds the principle of comity that underlies the exhaustion doctrine. . . .' Section 2255 applies only to 'prisoner[s] in custody under sentence of a court established by Act of Congress,' and therefore principles of comity underlying the exhaustion doctrine are inapplicable.

221 F.3d at 689. See also Adelson v. DiPaola, 131 F.3d 259, 262 (1st Cir. 1997)(exhaustion is sentry that patrols the pathways of comity between the federal and state sovereigns); Mele v. Fitchburg Dist. Court, 850 F.2d 817, 819 (1st Cir. 1988)(the exhaustion principle ensures that state courts have the first opportunity to correct their own constitutional errors).

With regard to the argument that, principles of comity notwithstanding, §2244(d)(2) ought to be mechanically transported to §2255, the Fourth Circuit concluded that:

> [Section] 2244(d) indicates Congress was aware of tolling issues regarding post-conviction relief proceedings, yet chose not to add an exhaustion requirement for post-trial motions to §2255. In light of the unambiguous language of the statute and Congress' knowing rejection of an exhaustion requirement for §2255, we would be guilty of judicial legislation were we to [toll the §2255 limitations period during the pendency of petitioner's motion for a new trial.]

Prescott, 221 F.3d at 689. See O'Connor v. United States, 133 F.3d 548, 550 (7th Cir. 1998)("post-judgment motions (such as those

under Rule 32, 33 and 35) do not suspend" the one-year limitations period under the AEDPA); United States v. Chambers, 126 F.Supp. 2d 1052, 1054 (E.D. Mich. 2000)(pendency of motion for new trial will not toll AEDPA limitations period).

C. The District Court Did Not Abuse Its Discretion When It Concluded That Equitable Tolling, Even If Available Under 28 U.S.C. §2255, Was Inapplicable To Trenkler's Appeal

Trenkler is left only with the argument that the doctrine of equitable tolling will somehow save his petition. Several circuits to consider the issue have held that equitable tolling is available under 28 U.S.C. §2255. See Kapral, 166 F.3d at 567 ; Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998), cert. denied, 526 U.S. 1074 (1999). Nonetheless, the structure of §2255 strongly suggests that it is inappropriate to import an equitable tolling doctrine into the AEDPA, and that the time limits set forth therein are jurisdictional. Congress set forth in §2255 four separate dates which begin the running of the one-year limitations period. Those dates involve newly-discovered evidence and government misconduct that impeded the filing of the petition -- both typically cases for equitable tolling in other contexts. See, e.g., Torres v. Superintendent of Police, 893 F.2d 404, 407 (1st Cir. 1990). That suggests that 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. Cf. Libby v. Magnuson, 177 F.3d 43,

48-49 n.2 (1st Cir. 1999)(reserving question whether equitable tolling applies to §2244(d)(2)); Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999) ("section 2244(d)(1) already contains an equitable tolling provision .... Given this and other express tolling provisions, it is unclear what room remains for importing the judge-made doctrine of equitable tolling"). Nonetheless, even if the doctrine of equitable tolling were applicable, there is nothing remotely inequitable about applying the AEDPA's one-year limitations period in this case.

This Court has held that, in order to obtain the benefit of equitable tolling, a party must show "excusable ignorance of the statute of limitations caused by some misconduct of the defendant." Torres v. Superintendent of Police, 893 F.2d at 407. "Equitable tolling is unavailable where a party fails to exercise reasonable diligence." Benitez-Pons v. Commonwealth of Puerto Rico, 136 F.3d 54, 61 (1st Cir. 1998).

> Federal courts invoke the doctrine of equitable tolling 'only sparingly,' and will not toll a statute because of 'what is at best a garden variety claim of excusable neglect' on the part of the defendant. . . . Absent a showing of intentional inducement or trickery by the [government], a statute of limitations should be tolled only in the 'rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.'

United States v. Midgley, 142 F.3d 174, 179 (3rd Cir. 1998). Trenkler cannot begin to present the "rare situation" appropriate

for application of the doctrine.

Trenkler argues that he mistakenly believed that he could not file the §2255 petition while his appeal from the denial of a motion for a new trial was pending. Trenkler Brief at 31. That was not a reasonable belief, given the clarity of the AEDPA limitations provision, and given that this Court has held that consideration of a §2255 petition is premature only while a "direct appeal" is pending. United States v. Gordon, 634 F.2d 638, 639 & n.3 (1st Cir. 1980). This petition was filed more than three years after disposition of Trenkler's appeal.

The AEDPA limitations period may well cause petitioners, on occasion, to file §2255 petitions while Rule 33 motions are pending. Nonetheless, as one court noted in facing this precise issue: "[c]onsolidation of motions under Rule 33 and §2255 is an option, and district courts are well equipped to resolve those motions in a timely and expeditious manner." Prescott, 221 F.3d at 689. See also O'Connor, 133 F.3d at 551 (AEDPA limitations period not tolled by pending Rule 33 motion, so consolidation of habeas petition and Rule 33 motion would be appropriate course).

Here, nothing prevented Trenkler from filing his §2255 petition while his Rule 33 motion was pending. This Court concluded on June 22, 1995, that "it was a clear error in judgment for the district court to exclude Dr. Phillips' testimony under any plausible interpretation of Rule 702." Shay, 57 F.3d at 133. This

Court remanded to the District Court to determine whether a new trial was necessary on those grounds. 57 F.3d at 137. Nonetheless, despite the extended district court and appellate proceedings regarding the very basis of the instant petition, Trenkler failed to file that petition until January 7, 1999. That is fully three and one-half years after this Court had already concluded that exclusion of the testimony was error. Trenkler has failed to exercise reasonable diligence, pure and simple, and that failure does not give rise to a claim for equitable tolling. See Benitez-Pons v. Commonwealth of Puerto Rico, 136 F.3d at 54.

Trenkler also argues that equitable tolling is appropriate because "this Court has not yet addressed any of these complex issues." Trenkler Brief at 32. These issues are not complex, and the AEDPA's limitations period is not "a trap for the unwary."[7] Section 2255 provides for a one-year limitations period from "the date on which the judgment of conviction becomes final," or from the AEDPA's effective date for petitioners like Trenkler who qualify for the "grace period." See Rogers, 180 F.3d at 354. The cases unanimously reflect that Trenkler's conviction became "final"

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[7]For this reason as well -- i.e., that there is nothing confusing about the AEDPA's limitations period -- this Court should decline to adopt, as Trenkler suggests (Trenkler Brief at 25), a rule that would require a district court in receipt of a Rule 33 motion to advise the movant of the AEDPA's limitations period. Such a rule is unnecessary in this area and will unnecessarily "burden the district courts with a new protocol." Raineri v. United States, 233 F.3d 96, 100 (1st Cir. 2000).

at the conclusion of his direct appeal. See p. 13, Supra. In short, neither the statute nor the cases reflect the complexity imagined by Trenkler.

Finally, Trenkler urges the unfairness of his conviction, and in particular that "Shay's statements were critically important to Trenkler's conviction," Trenkler Brief at 33, that his direct appeal resulted in a dissenting opinion, id., and that Shay's conviction was reversed while Trenkler is serving a life sentence. Id.

Not one of these arguments relates to the prerequisites for equitable tolling, i.e., "excusable ignorance of the statute of limitations caused by some misconduct of the defendant." Torres, 893 F.2d at 407.

Moreover, this Court has already recognized that there was abundant evidence supporting the conviction independent of Shay's statements, Trenkler I, 61 F.3d at 60-61, and that, in fact, "some of [Shay's] admissions supported Trenkler's defense." Trenkler II, 1998 WL 10265 *4. Second, the mere fact that one judge dissented from the affirmance of Trenkler's conviction, on grounds distinct from the arguments offered now, Trenkler I, 61 F.3d at 62, is irrelevant to whether it is equitable to permit Trenkler to proceed out of time. Finally, the fact that Trenkler's crimes were severe enough to warrant a life sentence, while his co-defendant pled guilty and received a lesser sentence, cannot justify ignoring the

clear Congressional directive regarding the AEDPA limitations period.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's April 18, 2000 Memorandum of Decision dismissing Trenkler's petition on the grounds that it was time-barred.

Respectfully submitted,

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May 10, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

Appeals No. 00-1657

UNITED STATES OF AMERICA
Appellee

v.

ALFRED W. TRENKLER,
Defendant-Appellant

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