

On June 24, 1993, a superseding indictment was returned charging that, in September and October 1991, Shay and Trenkler 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) (Count Three); and knowingly conspired to commit the foregoing acts, in violation of 18 U.S.C. §371 (Count One). [D. 205].

This Court severed the defendants, and Shay went to trial first. On July 27, 1993, after 21 days of trial, the jury convicted Shay on Counts One and Three, and found him not guilty on Count Two. [D. 275]. On October 8, 1993, Shay was sentenced to 188 months imprisonment, to be followed by five years of supervised release. [D. 351]. A timely appeal followed. [D. 353]. On April 1, 1998, after a remand from the First Circuit, hearings before this Court, and the government's appeal, the First Circuit remanded this case a second time for a new trial. [D. 618].

Upon remand for a new trial, this case was reassigned to United States District Judge Edward F. Harrington. [D. 4/23/98]. On October 29, 1998, Shay pled guilty to Counts One and Three of

the Superseding Indictment. [D. 631]. He was sentenced that same date to 144 months imprisonment and five years of supervised release. [D. 632]. Judgment entered November 9, 1998, and no appeal was noticed by Shay within the applicable ten day period. Fed. R. App. P. 4(b)(1)(A). [D. 632].

The applicable ten-day appeal period expired on or about November 23, 1998. See Fed. R. App. P. 26(a) (do not count weekend days and holidays in computing time period of less than 11 days). See also Clay v. United States, 537 U.S. 522, 532 (2003) (for purpose of starting clock on §2255's one year limitations period, a judgment becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmance of conviction).

No motion under 28 U.S.C. §2255 was filed by Shay until the current motion was received by this Court on September 19, 2007. [D.1]. In his motion, Shay seeks to set aside his 1998 conviction under 28 U.S.C. §2255 on the claimed basis that his guilty plea was entered due to ineffectiveness of counsel and improper coercion by those same attorneys, and was therefore involuntary. Additionally, and reading the caption of Shay's motion in the most liberal way possible, it appears that he may also be contending that this Court should issue a writ of habeas corpus under 28 U.S.C. §2241 based on the so-called "savings clause" of §2255.

Issues Presented

1. Whether Shay's §2255 motion to set aside his 1998 conviction is time-barred by the one-year statute of limitations applicable to motions under 28 U.S.C. §2255.

2. Whether Shay's time-barred §2255 motion is nevertheless cognizable under 28 U.S.C. §2241 because his §2255 motion to set aside the judgment in his criminal case is inadequate or ineffective to test the legality of his detention.

Discussion

I. Shay's §2255 Motion To Set Aside His 1998 Conviction Is Time-Barred By The One-Year Statute Of Limitations Applicable To Motions Under 28 U.S.C. §2255

Pursuant to amendments enacted as part of the Anti-Terrorism and Effective Death Penalty Act ("ADEPA") which became effective on April 24, 1997, 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.

The judgment of conviction in Shay's criminal case became final on November 23, 1998, nearly nine years before he filed the current §2255 motion. Thus, Shay's attack on his conviction is time-barred unless the one-year statute of limitations began to run, not when his conviction became final, but on another later date under subsections (2), (3), or (4) of §2255. However, Shay is not eligible for the benefit of a later starting date for the one-year limitations period.

Shay has alleged that after the first remand from the First Circuit his counsel were ineffective and improperly coerced him into making an involuntary plea of guilty to Counts One and Three of the Superseding Indictment. He makes no allegation that he was impeded or prevented by government action from filing his §2255 motion at an earlier time. He makes no allegation that he bases his motion on a right newly recognized by the Supreme Court. Finally, he makes no allegation that the facts supporting his claim could not have been discovered earlier through the exercise of due diligence. Accordingly, Shay's criminal conviction became final on November 23, 1998, and any §2255 motion had to be filed, in order to be timely, on or before November 23, 1999. As Shay did not file his current §2255 motion until September 19, 2007, it is time-barred and must be dismissed.

II. Shay's Time-Barred §2255 Motion Is Not Cognizable Under 28 U.S.C. §2241 Because His §2255 Motion To Set Aside The Judgment In His Criminal Case Is Not "Inadequate Or Ineffective" To Test The Legality Of His Detention

AEDPA's strict time and gatekeeping provisions have spurred attempts by prisoners to obtain relief via the so-called "savings clause" of §2255. The savings clause language permits a federal prisoner to seek a writ of habeas corpus under 28 U.S.C. §2241 where it "appears that the remedy by motion [under §2255] is inadequate or ineffective to test the legality of his detention." See United States v. Barrett, 178 F.3d 34, 49-50 (1st Cir. 1999). Courts responding to these attempts have uniformly held that §2255 does not become "inadequate or ineffective" - and thus, §2241 does not become available - simply because a defendant cannot meet AEDPA's time and successive motion gatekeeping requirements. See e.g., Barrett, 178 F.3d at 50 ("A petition under §2255 cannot become 'inadequate or ineffective,' thus permitting use of §2241, merely because petitioner cannot meet the AEDPA second or successive requirements."); see also Jiminian v. Nash, 245 F.3d 144, 147-48 (2nd Cir. 2001) ("We now hold that §2255 is not inadequate or ineffective, such that a federal prisoner may file a [savings clause] petition, simply because a prisoner cannot meet the AEDPA's gate-keeping requirements, provided that the claim the prisoner seeks to raise was previously available on direct appeal or in a prior §2255 motion.")(citing additional cases); In Re

Dorsainvil, 119 F.3d 245, at 251 (3rd Cir. 1997) (“We do not suggest that §2251 would be ‘inadequate or ineffective so as to enable a second petitioner to invoke §2241 merely because the petitioner is unable to meet the strict gatekeeping requirements of the amended §2255.”). “Such a result would make Congress’s AEDPA amendment of §2255 a meaningless gesture,” by permitting review under §2241 in precisely those circumstances where Congress intended that review be barred. Barrett, 178 F.3d at 50; In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998)(construing the savings clause as available for AEDPA-barred claims would “nullify the [AEDPA] limitations”); see also Jamison v. United States, 244 F.3d 44, 47 (1st Cir. 2001)(“It is implicit in [AEDPA’s] scheme that collateral attack claims not within the two [statutory] categories are meant to be barred.”)(emphasis in original).

Instead, appellate courts have held the savings clause to authorize relief only in extraordinarily rare circumstances, such as those presented by the Supreme Court’s decision in Bailey v. United States, 516 U.S. 137 (1995). In Bailey, the Supreme Court adopted a construction of 18 U.S.C. §924(c)(1), which criminalizes use of a firearm when committing a federal crime, that was narrower than had been applied by appeals courts. See Bailey, 516 U.S. at 150; Sustache-Rivera v. United States, 221 F.3d 8, 14 n. 9, 16 n. 13 (1st Cir. 2000). The Bailey decision had the effect of negating the criminality of some individuals whose convictions had already

become final. However, §2255's successive gatekeeping requirements provided no avenue for relief because Bailey was not a constitutional decision. Sustache-Rivera, 221 F.3d at 16. Under these circumstances, several courts of appeals held that resort to §2241 was permissible to allow a prisoner to raise an otherwise-barred claim that his §924(c) conviction was based on conduct that Bailey made non-criminal. See Reyes-Requena v. United States, 243 F.3d 893, 906 (5th Cir. 2001); In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000); In re Davenport, 147 F.3d 605; Triestman v. United States, 124 F.3d 361, 373-80 (2nd Cir. 1997)); Dorsainvil, 119 F.3d at 252. The courts made clear, however, that their decisions turned on the unique circumstances of Bailey, including the impossibility of obtaining timely review and the fact that defendants could prove their conduct had been rendered wholly non-criminal by Bailey. See, e.g., Reyes-Requena, 243 F.3d at 904 (holding that "the savings clause of §2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first §2255 motion"); Jones, 226 F.3d at 333-34 (similar); Davenport, 147 F.3d at 611 ("A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental

defect in his conviction or sentence because the law changed after his first 2255 motion.”).

The First Circuit has not defined the exact parameters of the savings clause, but has indicated that its reach should be no broader than established by courts in the Bailey context. The Court has stated that the savings clause “has most often been used . . . to present an argument that, under a Supreme Court decision overruling circuit courts as to the meaning of a statute, a prisoner is not guilty within the new meaning attributed to the statute,” Sustache-Rivera, 221 F.3d at 16, and has suggested but not decided that it may also extend to situations in which application of AEDPA would constitute a “complete miscarriage of justice” and raise “serious constitutional concerns.” Barrett, 178 F.3d at 51-52.

This narrow application of the savings clause comports with Congress’s purpose in enacting AEDPA to ensure the finality of judgments by compelling motions under 28 U.S.C. §2255 to be filed promptly after conviction and direct review. See Williams v. Taylor, 529 U.S. 420, 436 (2000); Duncan v. Walker, 533 U.S. 167, 179 (2001); Barrett, 178 F.3d at 38. AEDPA’s limitations mean that some claims that may have proved fruitful had they been timely made cannot be remedied. See, e.g., Dodd v. United States, 545 U.S. 353, 359 (2005); Schriro v. Summerlin, 542 U.S. 348 (2004). The limitations, however, are constitutional. Cf. Delaney v. Matesanz,

264 F.3d 7, 12 (1st Cir. 2001). Moreover, they serve important societal interests. Cf. Adams v. Woods, U.S. (2 Cranch) 336, 342 (1805)(permitting a claim to be "brought at any distance of time" is "utterly repugnant to the genius of our laws"); Engle v. Isaac, 456 U.S. 107, 127 (1982)(finality is important to collateral review because such review "extends the ordeal . . . for both society and the accused," frustrating deterrence and rehabilitation).

Accordingly, Shay can not avail himself of the savings clause of §2255. All or almost all of the allegations made in his §2255 motion are based on facts known to him at the time he could have pursued a direct appeal or have filed a timely motion under §2255. He cannot now use the savings clause to bring a run-of-the-mill ineffectiveness attack on a guilty plea he entered nearly nine years ago. No event comparable to the Supreme Court's decision in Bailey, overturing established circuit court law criminalizing certain conduct and leaving defendants convicted of conduct which was declared not to violate a criminal statute without legal recourse, has occurred in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have the 12th day of October 2007 served upon petitioner, Thomas A. Shay, Reg. No. 19193-038, Donald W. Wyatt Detention Center, Pod D, 950 High Street, Central Falls, RI 02863, a copy of the foregoing document by first class mail.

/s/ Timothy Q. Feeley
TIMOTHY Q. FEELEY
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