IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:CIVIL NO. 00-2454**
	:
v.	**:**
	:
KEVIN DONAHUE	**:CRIMINAL NO. 92-123-1**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **May 1, 2001**

Kevin Donahue ("Donahue" or "Petitioner") filed a petition for habeas corpus under to 28 U.S.C. § 2255, or in the alternative under 28 U.S.C. § 2241, and the government responded. Magistrate Judge Faith Angell filed a Report and Recommendation ("R & R") on January 4, 2001, advising the court to deny and dismiss the petition and find no probable cause to issue a certificate of appealability. Petitioner objected to the Recommendation, but rested on the grounds set forth in the petition. After de novo consideration, the petition for writ of habeas corpus will be denied and dismissed without an evidentiary hearing.

BACKGROUND

On September 10, 1992, Kevin Donahue was found guilty of manufacturing P2P, manufacturing methamphetamine, conspiracy and aiding and abetting. He was sentenced within the sentencing guideline range on May 11, 1993 to one hundred sixty months[1]

[1] The court calculated Donahue's base offense level at 32, and criminal history level at III. His sentencing guideline range was 151-188 months.

imprisonment, followed by six years supervised release.

Donahue filed the present petition for a writ of habeas corpus on May 12, 2000. In his petition, Donahue alleges: (1) he was denied effective assistance of counsel because counsel did not move the court to reduce his sentence because of his ill-health; and (2) the court erred by failing to decrease his base offense level because of his ill-health.

DISCUSSION

B. Timeliness of the Petition Under § 2255

Under § 2255, as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a prisoner has one year to file a petition for habeas corpus. 28 U.S.C. § 2255. The one year statute of limitations runs "from the latest of - (1) the date on which the judgment of conviction becomes final; . . . or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Id.

Donahue's conviction became final before the ADEPA went into effect on April 24, 1996. Prisoners in that situation are allowed one year from the AEDPA effective date to file a habeas petition. See Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). This petition was filed May 12, 2000, more than two years after the date the petition would have been timely under the AEDPA. The petition is untimely under § 2255(1).

Because petitioner's substantive claim is based on an illness, he could argue that § 2255(4) applies. The petition would be timely if it were submitted within one year of the discovery of the facts supporting his claim, or April 24, 1997, whichever is later. According to his medical records, plaintiff was diagnosed with chronic lymphocytic leukemia in March, 1996.[2] One-year after the date of discovery would be March, 1997. Were plaintiff filing his petition under § 2255(4), the grace period established by Burns would permit him until April 24, 1997 to file his petition. The petition is also untimely under § 2255(4).

B. The Propriety of Addressing this Petition under § 2241

A motion under § 2241 generally challenges the execution of the federal prisoner's sentence, including such matters as the computation of the sentence, prison disciplinary actions, transfers, and imprisonment conditions. See Chambers v. United States, 106 F.3d 472, 474-75 (2d Cir. 1997); Donald E. Wilkes, Jr., Wilkes Federal Postconviction Remedies and Relief §

[2] A medical transfer summary by Dr. Trung M. Tran, M.D. from the Federal Medical Center in Rochester, Minnesota reviews Donahue's medical history. It states Donahue was diagnosed with leukemia in March, 1996, after a doctor investigated Donahue's complaint of a burning sensation in his feet. The date of diagnosis is confirmed by a noted dated 8/13/99, by Dr. Angela Dispenzieri, M.D. that states Donahue "initially developed symptoms of paresthesias and skin changes in 1995 and by 1996 was diagnosed with CLL [chronic lymphocytic leukemia] and mixed cyroglobulinemia."

5-5 (1998). In contrast, a petition under § 2255 is generally the proper vehicle for a federal prisoner to challenge his conviction and sentence. In this petition, Donahue challenges the validity of his underlying sentence, he contends errors of his counsel and the court resulted in the imposition of too long a sentence. He does not allege that conditions or terms of confinement somehow conflict with the sentence imposed by this court. So it appears the petition would properly be addressed under § 2255, but, as the court has already noted, under § 2255 this petition is untimely.

Section 2241 is also invoked where § 2255 cannot provide adequate relief. Petitioner could claim that the § 2255 remedy is ineffective in his case because of the time bar. Generally, procedural barriers, without more, do not establish inadequacy or inefficacy. See, e.g., Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997). The Third Circuit has stated that "§ 2255 would not be 'inadequate or ineffective' so an to enable a . . . petitioner to invoke § 2241 merely because that petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255. Such a holding would effectively eviscerate Congress's intent in amending § 2255." In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997).

To proceed under § 2241 because of the insufficiency of § 2255, a petitioner must show he or she "does not have and,

because of the circumstance[s], never had an opportunity to challenge his [or her[conviction" on the grounds now raised. Id. The court then has to find that to bar the petition would result in a miscarriage of justice. See id. at 251.

Petitioner's medical records demonstrate that he had the opportunity to file a timely habeas corpus petition after his diagnosis, so he cannot pursue a writ of habeas corpus under § 2241.

C. Ineffective Assistance of Counsel and the Error of the Court

Assuming arguendo, the petition was not procedurally barred, the court still could not grant this petition under either § 2255 or § 2241. Donahue asserts that his counsel was ineffective at sentencing because he never requested, and petitioner never received, a sentence reduction under Sentencing Guideline § 5H1.4 because of his frail health. Although petitioner was arguably suffering from chronic lymphocytic leukemia at his sentencing in May, 1993, he was not diagnosed with the condition until March, 1996. See supra, n. 2. Neither counsel nor the court could have known of his illness, so their failure to raise or consider the issue at sentencing was not error.

This court has no jurisdiction to reduce petitioner's sentence at his request because of his subsequently diagnosed

illness.[3] See U.S. v. Graziano, No. 92-426-01, 1995 WL 753855 (E.D. Pa. Dec. 13, 1995)(Gawthrop, J.)(No federal statute, rule of criminal procedure or federal sentencing guideline authorizes a judge to reduce a sentence for a illness diagnosed well after the sentence has become final). Under 18 U.S.C. § 3582(c)(1)(A), the court may consider reducing the petitioner's term of imprisonment "upon motion of the Director of the Bureau of Prisons." Nothing in this opinion precludes the Director of the Bureau of Prisons from moving the court to reduce the petitioner's sentence, and petitioner may pursue relief on account of his medical condition from the Bureau.

CONCLUSION

The petition is untimely and fails to state a ground for relief under either 28 U.S.C. § 2255 or 28 U.S. C. § 2241. It will be denied without an evidentiary hearing.

[3] Petitioner, contending that the "courts can reduce a already sentenced defendant in the event the court finds sufficient medical evidence to warrant such a reduction and correction in sentence," cites United States v. Charles Edgar Thayer, 857 F.2d 1358 (9th Cir. 1988). In Thayer, the court received a petition under Federal Rule of Criminal Procedure 35(b), which provides in relevant part: "A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed." This court cannot reduce petitioner's sentence under Rule 35(b) because petitioner was sentenced in May, 1993, more than 120 days before the petition was submitted.

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ORDER

AND NOW this 1st day of May, 2001, after careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2255, or in the alternative 28 U.S.C. § 2241, in consideration of the Report and Recommendation of Magistrate Judge Faith Angell and petitioner's objection thereto, it is **ORDERED** that:

1. The petition filed pursuant to 28 U.S.C. § 2255, or in the alternative 28 U.S.C. § 2241, is **DENIED WITHOUT AN EVIDENTIARY HEARING**.

2. There is no basis for the issuance of a certificate of appealability.

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Norma L. Shapiro, S.J.