UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JEREMY BENDER	)	
	)	
Movant	)	
	)	
v.	)	Civil No. 04-13-P-H
	)	Criminal No. 99-27-P-H
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

On January 1, 2004, Jeremy Bender filed a motion pursuant to 28 U.S.C. § 2255 challenging his federal conviction and 293-month sentence on four grounds, one of which claimed ineffective assistance of counsel as to two missed opportunities to contest evidence at trial. (Docket No. 1.) After I ordered it to answer, the United States filed a response seeking summary dismissal of all four grounds of Bender's motion. (Docket No. 7.) Bender then filed a letter motion seeking leave to supplement his § 2255 motion (Docket No.8) which I allowed.[1] On June 7, 2004, well after the one-year statute of limitation of 28 U.S.C. § 2255 ¶ 6(1) had run, Bender filed a supplemental memorandum raising an entirely new claim of ineffective assistance of counsel pertaining to an allegedly foresaken plea opportunity. (Docket No. 16.) The United States responded by objecting to this supplementation on the ground that it was an entirely new claim and not a supplementation of those in Bender's § 2255 motion and that it was, therefore, untimely. (Docket No.19.) As discussed below, I agree with the United States and

[1] The motion to supplement filed by Bender clearly requested leave to supplement the petition already filed and made no mention of supplementing that petition with new grounds.

conclude that this supplemental claim is untimely. I also agree with the United States that Bender's initial four grounds are too conclusory to allow for review and, as Bender has not provided any further factual or legal explanation of these claims in his supplemental memorandum, I recommend that the Court **DENY** Bender's § 2255 motion.

Procedural Background

After being convicted by the jury, Bender took an unsuccessful direct appeal of his conviction. The mandate of the First Circuit Court of Appeals entered on that court's docket on October 21, 2002. The United States Supreme Court denied Bender's petition for writ of certiorari on January 21, 2003. Thus, Bender had, under 28 U.S.C. § 2255 ¶ 6(1), one year from that date to file a timely § 2255 motion. Bender filed his form petition on January 13, 2004, and the United States concedes that the grounds raised in that motion are timely.

In his original motion Bender alleged four grounds. One, he claims Smokey Heath, a government witness, perjured himself and the United States Attorney allowed Heath to perjure himself and thereby taint the jury. Two, Bender asserts that his attorney was ineffective because during the trial he did not take a delay the judge offered to exam (unspecified) records even though Bender wanted his attorney to avail himself of the delay. Bender also faults his attorney for not contesting Heath's "lies and competence." Three, Bender "feels" he should not have been sentenced in a federal court because of a "jurisdictional issue" and states his belief that he was sentenced as an Armed Career Criminal illegally. He entitles this claim as an incorrect sentence claim. And, four, Bender complains that he "was indicted and convicted in federal court although [Bender]

feels only the state of Maine has jurisdiction over his case." This, Bender describes as a jurisdictional claim.

After being ordered to answer, the United States responded promptly to Bender's motion, arguing, principally, that the four grounds raised by Bender were so conclusory as to not warrant response by it or analysis by the court. In turn, Bender requested leave to file a supplemental petition therein indicating that he had tried to put forth his supporting facts briefly without citing cases or law as instructed on the § 2255 form. He stated he had a brief in support of his motion presenting the case law on which he desired to rely. I granted that request, ordered that Bender could "file a meaningful supplemental motion," and reminded Bender "that pursuant to Rule 2(b), Rules Governing Section 2255 Proceedings, any motion to vacate (or meaningful supplement thereto) shall be signed under penalty of perjury." (Docket No. 10.)[2]

In his supplemental brief Bender states that the issue he presents therein is that his conviction was obtained and his sentence was imposed in violation of his constitutional right to effective assistance of counsel. (Pet.'s Suppl. Br. at 1, Docket No. 16.) Bender explains: "PETITIONER'S COUNSEL REJECTED THE 15 YEAR PLEA OFFER AND EXPOSED PETITIONER TO TRIAL AND MORE HARSHER SENTENCE NOTWITHSTANDING THE OCEAN OF EVIDENCE COMPILED AGAINST PETITIONER BY THE GOVERNMENT." (Id.) The accompanying legal analysis argues, first, that (for statute of limitations purposes) the issue raised in his supplemental brief relates back, under Federal Rule of Civil Procedure 15(c), to his initial motion's "conclusive ineffective assistance of counsel claim." Bender sets forth the standard for

[2] Bender was also granted an extension of time to submit his supplemental motion. (Docket No. 15.)

ineffective assistance of counsel claims in very general terms and then focuses in on "counsel's maladroit performance in rejecting the 15 year plea offer notwithstanding Petitioner's unambiguous instruction to accept the plea offer" which conduct worked a significant detriment to Bender. Bender goes on to explore the ineffective assistance standard as it applies to plea offers, advice, and negotiations.

Finally, as part of this supplemental memorandum -- in what Bender describes as his affidavit -- (as relevant) Bender 'swears' under penalty of perjury that:

> On December 4, 2004, before Petitioner's arraignment on the superseding indictment, Petitioner's Counsel, Mr. James R. Bushell informed counsel that the Government offered Petitioner a 188 months sentence plea agreement. Petitioner told counsel to do whatever he thinks is best for Petitioner, Counsel told Petitioner to go ahead and enter a not guilty plea until counsel review[ed] all the evidence. Relying on counsel's advi[c]e, Petitioner entered a not guilty plea at his December 4, 2000 arraignment.
>
> [I]t took approximately one year from the denial of Petitioner's suppression motion[3] to the commencement of Petitioner's trial. However, approximately four months before trial, Counsel approached Petitioner with the same 188 months plea agreement from the government. Because at this second go around, Petitioner ha[d] been able to review his discovery materials, Petitioner informed counsel to accept the 188 months plea agreement.
>
> [O]n January 2001, ignoring Petitioner's unambiguous request to accept 188 months plea, counsel proceeded to trial, blew trial and exposed Petitioner to a hars[h]er sentence of 293 months in prison. Prejudice is quantifiable.

(Id. at 7-8.)

Discussion

With respect to Bender's initial three non-ineffective assistance of counsel claims Bender has not provided any additional factual or legal support in his supplemental

[3] In actuality, Counsel was successful in pressing his motion to suppress, a motion the District Court granted and the First Circuit Court of Appeals affirmed on the United States' interlocutory appeal. United States v. Bender, 221 F.3d 265 (1st Cir. 2000). The docket entry for the District Court's oral order does misstate that determination as a denial of Bender's motion to suppress. (See Oct. 22, 1999, docket entry.)

memorandum in response to the United States' assertion that they are too conclusory to allow for § 2255 review. United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993) ("When a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing. In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets.")(citations omitted). Bender does not specify how Heath allegedly perjured himself and there are no facts on which to base an analysis of whether the prosecution's conduct was somehow unconstitutional on this score. With regards to his attacks on his sentence and the court's jurisdiction based on his feeling that this court did not have jurisdiction over him, I agree with the United States that a § 2255 movant's feelings on this score do not generate a justiciable constitutional claim..

Vis-à-vis Bender's initial ineffective assistance of counsel claims (to which Bender attempts to tether his ineffective assistance claim in his supplemental brief) Bender utterly fails to explain at what point and on what ground his attorney should have pursued a delay in the trial to examine records, nor does he indicate what those records might have been. And, as with his related claim concerning the prosecution and Heath's testimony, Bender, who faults his attorney for not contesting Heath's "lies and competence," does not identify Heath's alleged lies nor explain why there was a question about his competence. Based on the grounds raised on Bender's direct appeal one might speculate as to some of the content of Bender's discontent, see United States v. Bender, 304 F.3d 162 (1st Cir. 2002), but I decline to do this, especially as Bender was given an

opportunity to supplement his petition after the United States argued that his grounds failed due to their conclusory nature.

The 28 U.S.C. § 2255 ¶ 6(1) Statute of Limitations and the Federal Rule of Civil Procedure 15(c) Relation-Back Inquiry

This leaves, then, the question of whether the ineffective assistance of counsel claim raised in Bender's supplemental memorandum "relates back" to the claims raised by Bender in his timely form § 2255 petition so that this claim, too, is timely under 28 U.S.C. § 2255 ¶ 6(1). Bender contends that the supplemental ground should relate back due to Federal Rule of Civil Procedure 15(c), which provides as relevant: "An amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

With respect to applicability of the Federal Rules of Civil Procedure to § 2255 motions, the current version of Rule 12 of the Rules Governing Section 2255 Cases provides:

> If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

R. Gov. Sec. 2255 Proceedings 12 (emphasis added).[4] And 28 U.S.C. § 2242 provides that an application for writ of habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

[4] Effective December 1, 2004, Rule 12 will read: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." R. Gov. Sec. 2255 Proceedings 12 (effective Dec. 1, 2004, absent contrary

First I note that Rule 2 of the Rules Governing Section 2255 Proceedings provides that the § 2255 motion: "shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested." R. Gov. Sec. 2255 Proceedings 2(b).[5] Clearly Bender had knowledge of the forsaken plea offer by the time he filed his initial § 2255 motion in January 2004 and he offers no reason why he could not have set forth at that time the facts that he now includes in his "affidavit."

Rule 2's comprehensive pleading expectations are not the end of this matter, however. Resolution of the current quandary really turns on how the court applies Federal Rule of Civil Procedure 15(c)(2) in cases implicating the § 2255 ¶ 6(1) limitation period. And Rule 15(c)(2) has been applied by panels in two Circuit Courts of Appeals to allow an amendment to a § 2255 petition to relate back when the amendment adds a claim or claims that only relate to the timely claims because they pertain to the same criminal judgment. See Felix v. Mayle, 379 F.3d 612, 2004 WL 1770109, *2 (9th Cir. Aug. 9, 2004) ("In other civil litigation, we have required relation-back of new claims arising from the same "conduct, transaction, or occurrence" as the claim in the original complaint, even when the new claims are based on a different legal theory of which there was no warning in the original pleading. We fail to see why this literal application of Rule 15(c) should not apply to habeas corpus proceedings.") (citation omitted); Ellzey v.

Congressional action). The applicable advisory committee notes explain that: "The language of Rule 12 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended." Id. (advisory committee notes to 2004 amendments).

[5] The pending amendment to this rule breaks these requirements down into three of five prongs setting forth the requirements of a § 2255 motion: "The motion must: **(1)** specify all the grounds for relief available to the moving party; **(2)** state the facts supporting each ground; **(3)** state the relief requested." R. Gov. Sec. 2255 Proceedings (b) (effective Dec. 1, 2004, absent contrary Congressional action).

United States, 324 F.3d 521, 526 (7th Cir. 2003) ("A prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2).").

As Judge Woodlock of the District of Massachusetts stated in Bradshaw v. United States, the First Circuit has not yet reached the issue of what constitutes the same "conduct, transaction, or occurrence" in the context of a § 2255 motion. Nos. Civ.A.03-12272-DPW, Civ.A.03-12324-DPW, 2004 WL 1618848, *2 n.1 (D.Mass. July 16, 2004). In Branshaw Judge Woodlock was "persuaded by the force of the analysis in Ellzey," although he recognized, as I now discuss, that "the majority of the Courts of Appeals have held that a § 2255 petitioner may not evade the one-year limitation period by attempting to introduce new claims or theories by amendment." Id.

I have identified seven cases from different circuits that have concluded that in the 28 U.S.C. § 2255 context the Rule 15(c) relation back determination requires an analysis beyond whether the claims relate to the same criminal judgment and that have recognized that this determination involves an exercise of the District Court's discretion as to whether or not the supplemental claim relates to a claim raised in the timely § 2255 motion. These decisions are: Rodriguez v. United States, 286 F.3d 972 (7th Cir. 2002); [6]

[6] As I read Rodriguez in comparison with Ellzey it appears that there is an intra-circuit split on this question. Ellzey distinguishes Rodriguez by stating that in Rodriguez the motion to amend came after a final decision, Ellzey, 324 F.3d at 527, a temporal fact that the Rodriguez panel did not emphasize in its relation back discussion, choosing instead to address the futility aspect of the motion to amend based upon the fact that it was filed more than thirty months after the expiration of § 2255 ¶ 6(1) deadline and raised an entirely new issue.

The First Circuit Court of Appeals has cited Rodriguez in an unpublished decision, for the proposition that "a motion to amend habeas petition is untimely unless it is filed within one year statute of limitations, or relates back to the original filing." See United States v. Valdes, No. 01-1938, 2002 WL 31193494, *2 (1st Cir. June 19, 2002). As each § 2255 motion can address only one judgment, R. Gov.

United States v. Hicks, 283 F.3d 380, 388-89 (D.C. Cir. 2002); United States v. Espinoza-Saenz, 235 F.3d 501, 505 (10th Cir. 2000); Davenport v. United States, 217 F.3d 1341, 1344-46 (11th Cir. 2000); United States v. Pittman, 209 F.3d 314, 318 (4th Cir. 2000); United States v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999); and United States v. Craycraft, 167 F.3d 451, 457 (8th Cir. 2000). See also Dean v. United States, 278 F.3d 1218, 1221 (11th Cir.2002); United States v. Thomas, 221 F.3d 430, 436 (3rd Cir. 2000).

In these decisions there is a recurring recognition of the need to read the Rule 15(c) relation back allowance in the context of the congressional concern for finality of these criminal judgments reflected in the 28 U.S.C. § 2255 ¶ 6 statute of limitation enacted by Congress in 1996 as part of the Antiterrorism and Effective Death Penalty Act (AEDPA). See, e.g., Espinoza-Saenz, 235 F.3d at 505 ("[B]ecause a majority of amendments to § 2255 motions raise issues which relate to a defendant's trial and sentencing, to allow amendment under that broad umbrella would be tantamount to judicial rescission of AEDPA's statute of limitations period."). There is also a realization that the ¶ 8 limitation on second and successive § 2255 filings is impacted by efforts to relate-back untimely claims. See, e.g., Rodriguez, 286 F.3d at 981& n.6 ("[W]e have noted the special considerations for post-finality motions that we must consider in light of AEDPA's limitations on multiple efforts to obtain collateral review.").

Vis-à-vis the § 2255 ¶ 6 statute of limitation and the defendant Pittman's efforts to relate claims back, the Fourth Circuit Court of Appeals reasoned:

> Pittman argues that his motion to amend should relate back to the original § 2255 motion because the "occurrence" for purposes of Rule 15(c) should be the entire trial and sentencing proceeding. For this proposition Pittman relies on a single district court case that held without analysis that an

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Sec. 2255 Proceedings 2(c), the Valdes Panel seems to be of the view that there must be some relation beyond the mere fact that the amendment relates to the same criminal judgment.

> untimely amendment related back because "both petitions allege constitutional defects surrounding the same 'occurrence'--petitioner's trial and penalty phases." Williams v. Vaughn, 3 F.Supp.2d 567, 570 (E.D.Pa.1998). Yet this holding views "occurrence" at too high a level of generality. The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c). If we were to craft such a rule it would mean that amendments to a § 2255 motion would almost invariably be allowed even after the statute of limitations had expired, because most 2255 claims arise from a criminal defendant's underlying conviction and sentence. Such a broad view of "relation back" would undermine the limitations period set by Congress in the AEDPA.

209 F.3d at 318.

> Now, with respect to this concern Judge Easterbrook stated in Elzzey:
>
> Elements of civil practice sometimes must be modified to match special features of collateral-attack practice, but statutes of limitations are ubiquitous in ordinary civil litigation over torts and contracts. Nothing in the nature of the limitations rules enacted as part of the AEDPA requires courts to depart from the way Rule 15(c) handles relation back for other periods of limitations.

324 F.3d at 525. However, if you follow the lead of Ellzey and Felix, the § 2255 ¶ 6(1) limitation period is all bark with no bite, at least until issues are joined definitively with the United States or, maybe even until, the District Court makes a final determination. A § 2255 motion can be directed to one judgment only, R. Gov. Sec. 2255 Mot. 2(c), and all attacks on that judgment would relate back to the most bare-minimum § 2255 motion. Relying on Pittman, Duffus, and Craycraft, the Eleventh Circuit stated in Dean that "the untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial and sentencing proceedings." 278 F 3d at 1222. As Hicks observed:

> Although Rule 15(c) could be read to mean that the relevant "occurrence" is the claimant's trial and sentencing, this interpretation has been resisted, and with good reason. In most cases, a prisoner's claims for collateral relief will arise out of the same criminal conviction; therefore, if the

> defendant's trial and sentencing are construed to be the "occurrence," virtually any purported amendment will relate back. Such a result would be difficult to square with Congress' decision to expedite collateral attacks by placing stringent time restrictions on § 2255 motions.

283 F.3d at 388 (citing Espinoza-Saenz, Davenport, and Pittman). Applying Federal Rule of Civil Procedure 15(c) with the § 2255 ¶ 6 and ¶ 8 statutory provisions in mind, as the majority of circuits have done, is what Rule Governing Section 2255 Procedures 12 reminds the Court to do.

Making the relation-back determination in a 28 U.S.C. § 2255 case using the majority approach

The cases discussed above offer some guidance as to how to go about the relation-back analysis when approaching an untimely supplement from the vantage point of a 28 U.S.C. § 2255 tailored Rule 15(c) determination. The Dean Court explained:

> The key consideration is that the amended claim arises from the same conduct and occurrences upon which the original claim was based. This may be the case even if one or both claims do not explicitly state supporting facts. When the nature of the amended claim supports specifically the original claim, the facts there alleged implicate the original claim, even if the original claim contained insufficient facts to support it. One purpose of an amended claim is to fill in facts missing from the original claim. Applying this rule to the instant case, we hold that three of Dean's amended claims on appeal expand the facts, and serve to further specify his original claims. This is precisely the sort of amendment contemplated by Rule 15(c).

278 F 3d at 1222. The Hicks Panel adopted a similar analysis:

> Thus, while an amendment offered for the purpose of adding to or amplifying the facts already alleged in support of a particular claim may relate back, see Thomas, 221 F.3d at 436 (observing that an amendment seeking "to correct a pleading deficiency by expanding the facts but not the claims alleged in the petition" would clearly fall within Rule 15(c)), one that attempts to introduce a new legal theory based on facts different from those underlying the timely claims may not, see Dean, 278 F.3d at 1221 ("Congress did not intend Rule 15(c) to be so broad as to allow an amended pleading to add an entirely new claim based on a different set of facts."). These principles are faithful both to the underlying purposes of

> Rule 15(c) and to the concerns about drawn-out and unlimited collateral attacks on federal criminal judgments evinced by the passage of AEDPA. They ensure that relation back will be allowed only where the original motion provides adequate notice of the prisoner's claims and the proposed amendment would neither change the fundamental nature of those claims nor prejudice the Government's defense by requiring it to prepare its case anew. See 6A Wright & Miller § 1497, at 84-85.

283 F.3d at 388-89 (emphasis added).

Seen through such a prism I conclude that Bender is not entitled to have the ineffective assistance of counsel claim proposed in his supplemental memorandum relate back for § 2255 ¶ 6 purposes to his timely § 2255 motion. It should be clear from the above discussion that the mere fact that Bender had included two complaints of "ineffective assistance of counsel" does not open the floodgates for any ineffective assistance claim based on any conduct of counsel at any point in his criminal proceedings. See Espinoza-Saenz, 235 F.3d at 505 (defendant's supplemental motion raising completely new claims of ineffective assistance of counsel was not a clarification of the original ground "but instead sought to assert claims totally separate and distinct, 'in both time and type' from those raised in his original motion"). While Bender's supplement includes a lot of new facts, Bender is not adding to or amplifying the facts in his § 2255 motion; these new facts about alleged plea offers come entirely out of the blue. Indeed, Bender's timely § 2255 motion makes absolutely no mention of facts or claims relating to anything occurring during the pre-trial stage of his prosecution (during which the plea negotiations would have occurred). Also weighing in my analysis is, one, the obvious fact that the new claim and the supporting facts were entirely within Bender's ken at the time that he filed his § 2255 motion (indeed by the time that he went to trial), see Pittman, 209 F.3d at 318 (noting that the § 2255 movant "was aware of the

deficiencies alleged in his motion to amend even at the time of his initial motion and "he could have easily included them in his original § 2255 motion"),[7] and, two, the fact that, although Bender's motion has not been pending for very long, the United States has already filed a responsive pleading seeking a disposition on its merits.[8]

My conclusion that Bender is not entitled to have his supplemental claim relate back is consistent with the determination made by Circuit Court of Appeals cases discussed above. See Hicks 283 F.3d at 389("[W]e have little trouble concluding that Hicks' Apprendi motion cannot be allowed to relate back. The claim raised by this amendment is completely different from that asserted in the original § 2255 motion. The amendment advances an entirely new legal theory that arises from an entirely different set of facts and type of conduct - the Government's failure to prove the quantity of drugs at trial - than did the timely motion, which was based on the Government's willingness to grant leniency in exchange for testimony. Therefore, Rule 15(c) does not permit Hicks' amendment to take shelter in the filing date of his initial application for collateral relief. And because that subsequent motion was made more than a year after the prisoner's conviction became final, it is time-barred."); Duffus,174 F.3d at 337 ("Here, however,

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[7] For the benefit of the United States in answering future motions, I stress that it is clear from all these cases that the determination as to whether to allow a Federal Rule of Civil Procedure 15(c) relation-back amendment must be made on a case-by-case basis so that the § 2255 ¶ 6(1) statute of limitation is applied fairly with respect to both the movant and the United States. See Thomas, 221 F.3d at 436 ("A § 2255 petition provides a federal prisoner the opportunity to seek one full collateral review of his or her conviction and sentence. While we certainly do not suggest that a prisoner can willy nilly file papers at his or her whim, to eliminate or to compromise what will likely be a prisoner's only opportunity to collaterally challenge a sentence by refusing to even consider whether a proposed amendment relates back to his or her petition would be to elevate procedural rules over substance. Thus, we hold that Rule 15(c)(2) applies to § 2255 petitions insofar as a District Court may, in its discretion, permit an amendment to a petition to provide factual clarification or amplification after the expiration of the one-year period of limitations, as long as the petition itself was timely filed and the petitioner does not seek to add an entirely new claim or new theory of relief.").

[8] To put weight on the length of time that has passed since the § 2255 ¶ 6(1) year has expired would be contradictory to the rather well settled application of the one-year period that views a § 2255 motion as untimely whether it be ten years or one day late.

while [the § 2255 movant] asserted in his initial motion that his attorney had been ineffective, the particular claim with respect to failing to move to suppress evidence was completely new. Thus, the amendment could not be deemed timely under the "relation back" provisions of Fed.R.Civ.P. 15(c)."); Craycraft, 167 F.3d at 457 ("[The § 2255 movant's] original complaint alleged deficiencies of representation distinctly separate from the deficiency alleged in his amendments. Failing to file an appeal is a separate occurrence in both time and type from a failure to pursue a downward departure or failure to object to the type of drugs at issue. We cannot say that his original petition would provide notice of such a different sort of theory. Therefore, the amendment cannot relate back under Rule 15(c) and it must be time barred."); Rodriguez, 286 F.3d at 981 ("[Section 2255 movant's] original § 2255 application made no mention of the appropriate standard of review for sentencing factors that increase the maximum available sentence. Instead it focused on ineffective assistance of counsel issues. The issues and facts underlying his Apprendi claim are unrelated to his ineffective assistance of counsel claims. Because there is no claim in [the] original petition that his amended claim could relate back to, it violates AEDPA's one-year statute of limitations.").

Because I conclude that Bender is not entitled to supplement his § 2255 motion with this plea related ineffective assistance claim, I need not address the dueling sworn statements of Bender, on the one hand, and, on the other hand, those of Bender's trial counsel and the prosecutor who both attest to the fact that there was never a 188-month plea proposal on the radar screen.

Conclusion

For these reasons, I now recommend that the Court **DENY** Bender 28 U.S.C. § 2255 relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

September 9, 2004.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

BENDER v. USA
Assigned to: JUDGE D. BROCK HORNBY
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $
Lead Docket: None
Related Cases: 2:99-cr-00027-DBH
Case in other court: None
Cause: 28:2255 Motion to Vacate / Correct Illegal Sentenc

Date Filed: 01/13/04
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

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