IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LUIS MONTES DEOCA,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. A. No. 01-447-KAJ
	)	Cr. A. No. 97-79-KAJ
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Luis Montes DeOca, *pro se* Petitioner.

Edmond Falgowski, Assistant United States Attorney, United States Department of Justice, Wilmington, Delaware. Attorney for Respondent.

MEMORANDUM OPINION

January 16, 2004
Wilmington, Delaware

Jordan, District Judge

I. INTRODUCTION

Petitioner Luis Montes DeOca has filed with the Court the current motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (D.I. 29.) At the time of filing, DeOca was serving his sentence at FCI Allenwood in White Deer, Pennsylvania.[1] As explained below, the Court will dismiss DeOca's motion as time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2255.

II. PROCEDURAL AND FACTUAL BACKGROUND

On September 30, 1997, DeOca pled guilty to possession of more than 500 grams of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(ii)(II), punishable by a maximum penalty of forty years (480 months) incarceration. (D.I.s 8, 16.) In his plea agreement, DeOca agreed not to oppose deportation after he completed his sentence. (*Id.*)

Prior to sentencing, DeOca moved for a downward departure in sentencing, pursuant to U.S.S.G. § 5K2.0. He argued that his agreement to be deported upon completion of his sentence justified a one or two level downward departure. (D.I. 19.) On

[1]The last piece of mail sent to DeOca was returned to the Clerk as undeliverable, with no forwarding address.

January 14, 1998, the Court[2] concluded that DeOca was not eligible for a downward departure and sentenced him to 97 months (8 years 1 month) incarceration, to be followed by five years supervised release. (D.I.s 22, 26.)

DeOca appealed his sentence, arguing that his willingness not to oppose deportation justified a downward departure. (D.I. 28.) The United States Court of Appeals for the Third Circuit affirmed his conviction and sentence. (*Id.*) DeOca did not file a petition for writ of certiorari.

On June 29, 2001, DeOca filed with this Court his original § 2255 motion, dated June 25, 2001. (D.I. 29.) His original § 2255 motion asserts two *Apprendi* claims: 1) he pled guilty to an indictment alleging possession with intent to distribute 500 or more grams of cocaine, but he was sentenced to possession of 4 kilograms; and 2) he was sentenced to 5 years supervised release but it should have been 3 years supervised release. (D.I. 29.) DeOca subsequently amended his motion to include a third claim that the United States government violated Article 36 of the Vienna Convention by failing to inform him of his constitutional right to inform the Dominican Republic's counsel of his arrest. (D.I. 34.)

The Government's answer asks the Court to dismiss the entire

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[2]This matter was originally decided by the Honorable Roderick R. McKelvie, but was reassigned to the undersigned on January 6, 2003.

§ 2255 motion as time-barred, and, alternatively, as meritless. (D.I. 36.) DeOca filed a response to the Government's time-bar argument, asserting that the one-year statute of limitations should be equitably or statutorily tolled. (D.I. 37.) DeOca's § 2255 motion is now ripe for review.

III. STANDARD OF REVIEW

After conviction and exhaustion, or waiver, of any right to appeal, courts and the public can presume that a defendant stands fairly and finally convicted. *See United States v. Frady*, 456 U.S. 152, 164 (1982). However, prisoners in federal custody may attack the validity of their sentences pursuant to 28 U.S.C. § 2255. Section 2255 cures jurisdictional errors, constitutional violations, proceedings that resulted in a "complete miscarriage of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 784 (1979).

A federal district court must hold an evidentiary hearing on a § 2255 motion only when the petitioner raises an issue of material fact and the court therefore needs to determine the truth of the allegations. *See United States v. Essig,* 10 F.3d 968, 976 (3d Cir. 1993). However, a petitioner is not entitled to a hearing if his allegations are conclusively contradicted by the record, or if they are patently frivolous. *Solis v. United States*, 252 F.3d 289, 295 (3d Cir. 2001); *see Gov't of the Virgin*

Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). Thus, if the motions, files, and records "show conclusively that the movant is not entitled to relief," then a district court may summarily dismiss a § 2255 motion. *United States v. Nahodil,* 36 F.3d 323, 326 (3d Cir. 1994) (quoting *United States v. Day,* 969 F.2d 39, 41-42 (3d Cir. 1992)).

As explained below, the Court finds that the evidence of record conclusively demonstrates that DeOca is not entitled to the relief sought and that an evidentiary hearing is not required.

IV. DISCUSSION

A. One Year Filing Period

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year period of limitation on the filing of a § 2255 motion by federal prisoners. *See* 28 U.S.C. § 2255; *Miller v. New Jersey State Dep't of Corrs.,* 145 F.3d 616, 619 n.1 (3d Cir. 1998) (holding that one-year limitations period set forth in § 2255 is not a jurisdictional bar and is thus subject to equitable tolling). The one-year limitations period begins to run 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.

DeOca did not file his § 2255 motion within one year of any of the four triggering events in the AEDPA. First, DeOca did not file his petition within one year of his conviction becoming final. When a federal prisoner appeals his sentence or conviction to the appropriate court of appeals but does not file for certiorari review, the judgment of conviction becomes final, and the one-year period begins to run, upon the expiration of the ninety-day (90) time period allowed for seeking certiorari review. *Kapral v. United States,* 166 F.3d 565, 570-71 (3d Cir. 1999). Here, DeOca appealed his conviction and sentence but did not file for a writ of certiorari. Consequently, his conviction became final on November 19, 1998, the day on which the ninety day certiorari filing period expired. *See Kapral,* 166 F.3d at 567. Accordingly, DeOca had to file his § 2255 motion by November 19, 1999 in order to comply with the one-year statute of limitations under § 2255(1).

DeOca's § 2255 motion was filed on June 29, 2001, but his

certificate of service is dated June 25, 2001. (D.I. 29.) Because a *pro se* petitioner's habeas petition is considered filed on the date he delivers it to prison officials for mailing to the district court, the Court adopts June 25, 2001 as the filing date. *See Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Nonetheless, even using June 25, 2001 as the filing date, DeOca filed his § 2255 motion approximately one and a half (1 ½) years too late.

Second, DeOca does not allege that any unconstitutional action prevented him from making the present motion earlier, nor does he allege any new facts that have come to light in the intervening time period that could not have been discovered earlier. *See* 28 U.S.C. § 2253(2),(4). Thus, neither of the time extensions contained in § 2255(2) or (4) are triggered.

However, DeOca does attempt to argue that the filing period should be extended pursuant to § 2255(3) because of a newly recognized legal right. Instead, in his response to the Government's answer, DeOca states that his § 2255 motion is timely because he filed it within one year of the United State Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (D.I. 37 at 4.)

DeOca correctly asserts that *Apprendi* provides a new procedural rule requiring "any fact [increasing] the penalty for a crime beyond the prescribed statutory maximum [to] be submitted

to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Moreover, because the Court adopts June 25, 2001 as the date of filing, DeOca correctly asserts that he filed his federal habeas motion within one year after the *Apprendi* decision.[3] However, the Third Circuit has specifically held that *Apprendi* does not retroactively apply on collateral review. *United States v. Swinton*, 333 F.3d 481 (3d Cir. 2003). As such, *Apprendi* does not extend the one-year period in this matter.

In short, DeOca's § 2255 motion is time-barred. However, DeOca also argues that the filing period should be equitably tolled. Accordingly, the Court will now consider DeOca's equitable tolling argument.

B. Equitable Tolling

DeOca contends that the one-year filing period should be equitably tolled because he was unaware of the one-year filing restriction. He asserts that his court-appointed counsel did not inform him of the filing period, and he cites *Baskin v. United States*, 998 F.Supp. 188 (D. Conn. 1998) to support his argument. (D.I 37.)

A court may, in its discretion, equitably toll the one-year filing period when "the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights." *Miller v. New Jersey State Dep't of Corrs.*, 145 F.3d 616, 618 (3d Cir.

[3]*Apprendi* was decided on June 26, 2000.

1998)(internal citations omitted). In general, federal courts invoke the doctrine of equitable tolling "only sparingly." *See United States v. Midgley,* 142 F.3d 174, 179 (3d Cir. 1998). The Third Circuit permits equitable tolling for habeas petitions in only four narrow circumstances:

> (1) where the defendant actively misled the plaintiff;
> (2) where the plaintiff was in some extraordinary way prevented from asserting his rights;
> (3) where the plaintiff timely asserted his rights mistakenly in the wrong forum; or
> (4) where [in a Title VII action]the claimant received inadequate notice of his right to file suit, a motion for appointment of counsel is pending, or the court misled the plaintiff into believing that he had done everything required of him.

Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). Generally, in non-capital cases, inadequate research, attorney error, miscalculation, or other mistakes do not qualify as "extraordinary circumstances" sufficient to trigger equitable tolling. *Fahy v. Horn,* 240 F.3d 239, 244 (3d Cir. 2001).

In order to warrant equitable tolling, the petitioner must demonstrate that he "exercised reasonable diligence in investigating and bringing [the] claims;" mere excusable neglect is insufficient. *Miller,* 145 F.3d at 618-619 (citations omitted). In short, "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." *Jones,* 195 F.3d at 159 (quoting *United States v. Midgley,* 142 F.3d 174, 179 (3d

Cir. 1998).

Here, DeOca has failed to demonstrate extraordinary circumstances sufficient to equitably toll the statute of limitations. When a district court appoints counsel, the appointment "extend[s] throughout any proceedings in the Supreme Court." 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 39.3b (4th ed. 2001); *see also* 18 U.S.C. §§ 3006A(a)(2)(B), 3006A(c)(once a federal district court or court of appeals appoints counsel, the appointment extends "through appeal, including ancillary matters appropriate to the proceedings"). The appointment of counsel does not automatically extend through federal habeas proceedings because a habeas petitioner does not have a constitutional right to counsel. *See Coleman v. Thompson*, 501 U.S. 722, 725 (1991)(§ 2254); *Pennsylvania v. Finley*, 481 U.S. 551, 557-58 (1987); *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). Thus, contrary to DeOca's contention, his court-appointed attorney was not required to inform him of the availability of post-conviction relief pursuant to 28 U.S.C. § 2255.

Second, the Court rejects DeOca's implication that equitable tolling is warranted because his attorney's statement that, "the remaining right we have is to file a petition with the United States Supreme Court," constituted ineffective assistance of counsel. (D.I. 37 at 3.) DeOca contends that this statement

misled him into believing that a writ of certiorari was the only remedy available to him. He cites *Baskin v. United States*, 998 F.Supp. 188 (D. Conn. 1998) as an example of equitably tolling the filing period because of ineffective assistance of counsel.

Baskin, however, is completely inapposite. In *Baskin*, the petitioner's § 2255 motion alleged several instances of ineffective assistance of counsel, including the attorney's failure to inform the petitioner of the denial of *certiorari* until 13 months after such denial. Consequently, the petitioner could not file his § 2255 motion within the one-year filing period. As such, the *Baskin* court held that the statute of limitations should be equitably tolled because "it would be grossly inequitable to bar petitioner's ineffective assistance of counsel claim on the basis that counsel's error permitted the statute of limitations to run." *Baskin*, 998 F. Supp. at 190.

Here, the statement by DeOca's court-appointed counsel referred only to the remedies available during his representation of DeOca. As such, it was a correct statement of law and cannot constitute ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984)(to satisfy first prong of *Strickland* test, petitioner must demonstrate that counsel's performance was deficient). While DeOca's misinterpretation of his attorney's statement is unfortunate, his neglect in failing to independently investigate the availability of further remedies

does not warrant equitably tolling the one-year period. *See Miller*, 145 F.3d at 618-19; *see also United States v. Bruce*, 2002 WL 31757938, at *1 (D. Del. Nov. 26, 2002)(an unrepresented petitioner's mistakes or miscalculations do not warrant equitable tolling of the statute of limitation in § 2255 cases); *Simpson v. Snyder*, 2002 WL 1000094, at *3 (D. Del. May 14, 2002)(collecting cases for both § 2254 and § 2255).

C. Alternatively, DeOca's § 2255 motion is without merit

Even if, arguendo, the one-year time period could be equitably tolled, DeOca has failed to provide any grounds for relief under 28 U.S.C. § 2255. As explained below, the record clearly refutes DeOca's two *Apprendi* claims. Moreover, *Apprendi* does not apply in this situation, and DeOca has failed to state a claim regarding the alleged violation of the Vienna Convention.

DeOca's first claim is that his sentence violated *Apprendi* because it was based on a determination that he possessed four (4) kilograms of cocaine, but he pled guilty to an indictment alleging possession with intent to distribute five hundred (500) or more grams of cocaine. (D.I. 29.) However, after the indictment, DeOca freely admitted that he previously transported two (2) kilograms of cocaine. This stipulation was explicitly included in his plea agreement as "relevant conduct." (D.I. 13 at ¶ 6.)

Moreover, the transcript of DeOca's plea colloquy reveals

that DeOca knowingly pled guilty to possession of a total of 4 kilograms of cocaine. In describing the facts of the Government's case, the Assistant United States Attorney twice stated that "the agreement provides for a total of four kilos." (D.I. 16, at 3, 13.) When questioned by the Court after these statements, DeOca admitted that the facts were true. (*Id*. at 13.) DeOca also explicitly stated that he reviewed the plea agreement with his attorney, he willingly entered into the agreement, and he understood that the maximum potential penalty was 40 years in prison. (D.I. 16 at 6, 7.) As such, the Court defers to DeOca's admissions made under oath and finds his current contrary allegations are "wholly incredible." *See Blackledge v. Allison*, 431 U.S. 63, 73-4(1977).

In his second claim, DeOca contends that his sentence of 5 years supervised release violates *Apprendi* because he should have been sentenced to only 3 years of supervised release. (D.I. 29.) Once again, this unsupported allegation is refuted by the record. The plea agreement explicitly states that count one of the indictment "carries a maximum penalty of not less than 5 years and not more than 40 years incarceration . . . and not more than five years supervised release." (D.I. 13 at ¶ 1) The supervised release terms contained in the plea agreement are entirely consistent with 21 U.S.c. § 841(b)(1)(B)(ii)(II)'s requirement that "any sentence imposed under this subparagraph shall, in the

absence of such a prior conviction, include a term of supervised release of at least 4 years." Consequently, claim two is without merit.

Additionally, *Apprendi*'s substantive holding does not apply to claims one and two. DeOca was sentenced to 97 months (8 years 1 month) incarceration, but the maximum possible penalty was 40 years imprisonment. The *Apprendi* rule only applies when the sentence imposed exceeds the maximum statutory penalty. *Apprendi*, 530 U.S. at 490; *United States v. Sau Hung Yeung*, 241 F.3d 321, 327 n.3 (3d Cir. 2000). Thus, because the sentence actually imposed was substantially less than the possible maximum penalty, *Apprendi* does not provide a basis for granting the requested relief.

Finally, DeOca's third claim alleges that the Government failed to inform him that "he has a constitutional right to inform the Dominican Republic's Counsel here in the U.S. [thereby violating] article 36 of the Vienna Convention." (D.I. 34.) A violation of the Vienna Convention only constitutes a ground for federal habeas relief if the petitioner shows that "the violation had an effect on the trial." *Breard v. Greene,* 523 U.S. 371, 377 (1998). DeOca has failed to demonstrate how this alleged violation affected his plea agreement. Thus, ground three does not provide a basis for federal habeas relief.

V. CERTIFICATE OF APPEALABILITY

The Court must determine whether a certificate of appealability should issue. *See* Third Circuit Local Appellate Rule 22.2. A certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

When a court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the petitioner must demonstrate that reasonable jurists would find it debatable: (1) wether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in is procedural rule. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). If the district court correctly invokes a plain procedural bar to dispose of a case, "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.*

In the present case, DeOca's § 2255 motion is time-barred by the one-year period of limitations. The Court concludes that the time period cannot be equitably tolled to render the petition timely. The Court is convinced that reasonable jurists would not find its assessments debatable. Therefore, DeOca has failed to

make a substantial showing of the denial of a constitutional right, and the Court will not issue a certificate of appealability.

VI. CONCLUSION

For the reasons stated, the Court concludes that DeOca's § 2255 motion was filed after the one-year period of limitations expired and that the application for equitable tolling is without merit. Accordingly, DeOca's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence is dismissed as untimely. An appropriate order will issue.

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v.	)	Civ. A. No. 01-447-KAJ
	)	Cr. A. No. 97-79-KAJ
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

O R D E R

At Wilmington, this 16th day of January, 2004, consistent with the memorandum opinion filed in this matter today;

IT IS HEREBY ORDERED that:

1. Petitioner Luis Montes DeOca's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is DISMISSED, and the relief requested therein is DENIED.

2. The Court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Kent A. Jordan
UNITED STATES DISTRICT JUDGE