UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States of America	:	
	:	
v.	:	**Docket No. 3:95cr81(JBA)**
	:	**3:99cv2272(JBA)**
Heriberto Baldayaque,	:	
	:	
Defendant.	:	

Ruling on § 2255 Motion [Doc. #508 & #523][1]

Heriberto Baldayaque, a prisoner in federal custody pursuant to a judgment of conviction of this Court, has filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. Baldayaque filed the motion pro se, arguing that his guilty plea and conviction should be vacated because, inter alia, he received ineffective assistance of counsel and his plea was not knowing and voluntary.

After review of the motion and the Government's response, the Court appointed counsel, held an evidentiary hearing, and received supplemental briefing. For the reasons that follow, the Court concludes that the motion is time-barred as a matter of current Second Circuit law, and therefore must be denied.

[1]Doc. #523 is a supplement to Baldayaque's pro se motion, prepared by appointed counsel, that amplifies certain arguments made in Baldayaque's original petition.

I. Factual Background[2]

On November 8, 1995, Baldayaque entered a plea of guilty to a charge of conspiracy to possess with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. § 846. Following several days of sentencing hearings, the Court sentenced Baldayaque on February 7, 1996 to 168 months in prison. On February 14, 1997, the U.S. Court of Appeals for the Second Circuit summarily affirmed the conviction and sentence. Baldayaque did not seek review by petition for certiorari, and the time to do so expired on May 14, 1997.

In February 1997 Baldayaque directed his wife, Christina Rivera, to retain counsel to file a motion under 28 U.S.C. § 2255. While no specific grounds for relief were mentioned to her, he conveyed to her his understanding that there was a specific time limit for filing the motion. With the help of Rev. Brixeida Marquez, a prison chaplain, Rivera located new counsel. Because Rivera, like Baldayaque, speaks only Spanish, Marquez accompanied her to the new attorney's office, and with Marquez translating, Rivera requested that the new attorney file a § 2255 motion, which may also have been referred to by Rivera and

[2]After a hearing on a § 2255 motion, the Court is required to "determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255. In this rendition of the facts, the Court takes the procedural details of, for example, when motions were filed, from official entries on the Court's docket. Other renditions of fact are those found by a preponderance of the evidence after a hearing on the matter.

Marquez as a motion for a reduction of sentence.

The new attorney instructed Rivera and Marquez to obtain copies of the sentencing transcript. At a subsequent appointment, after the sentencing transcripts had been delivered, the new attorney told them that it was too late to file a motion under § 2255. They were told, however, that he had "a better motion" available that would allow for Baldayaque's immediate deportation to the Dominican Republic, his country of citizenship.

The new attorney indicated that his fee for preparing such a motion was $10,000, but because Marquez was a woman of the cloth and he wanted to help, he would accept a reduced fee of $5,000. After the meeting, Rivera told Marquez that neither she nor Baldayaque's family had funds for such a fee. Marquez and Rivera prayed, and after soliciting among friends and family, they raised $3,000. To raise the remaining $2,000, Marquez asked various churches in the community for support, and she and Rivera held a bake sale. They finally collected, and Marquez delivered, $5,000 to the new attorney on March 25, 1997.

On November 13, 1997, eight months after receiving his fee, the new attorney filed a three-page motion entitled "Defendant's Petition for Modification of Sentence to Permit Deportation." [Doc. #485]. The motion quoted a portion of the sentencing transcript in which the Court noted that Baldayaque's sentence was a harsh one, and "[i]f the government should at some time

choose to deport Mr. Baldayaque at a point prior to the expiration of his sentence, the Court would have no objection and would not deem that to be an inappropriate action to take with regard to Mr. Baldayaque." The motion represented that Baldayaque had been diagnosed with tuberculosis, and referenced an agreement between the Attorney General of Connecticut and the Immigration and Naturalization Service to permit deportations of persons in state custody prior to the completion of their sentences.

The Court denied this motion on June 9, 1998, noting that "Congress . . . has spoken on this precise issue" in 8 U.S.C. § 1231(a)(4)(B)(i), which grants only the Attorney General such discretion – not the sentencing court. The Court also cited Thye v. United States, 109 F.3d 127 (2d Cir. 1997), which held that the statute "provide[s] the Attorney General with the sole and unfettered discretion to deport criminal aliens prior to the completion of their sentence of imprisonment." Id. at 128 (citations and quotations omitted).[3]

When the new attorney told Marquez that the motion had been denied, he stated that there was nothing else that could be done to secure Baldayaque's release. Marquez told Rivera, who was "devastated," and Rivera told Baldayaque. No further filings in the case were made for the twenty months following the Court's

[3]The section of the U.S. Code cited in Thye, 8 U.S.C. § 1252(h)(2)(A), was re-codified at 8 U.S.C. § 1231(a)(4)(B).

ruling denying the new attorney's motion.

On February 11, 2000, Baldayaque filed a pro se motion to correct his sentence pursuant to Fed. R. Crim. P. 35, alleging many of the grounds subsequently raised in the instant habeas petition. The Court denied the motion on August 23, 2000, and forwarded to Baldayaque the forms to file a § 2255 motion.[4] Baldayaque filed the instant motion on November 28, 2000.

II. Analysis

Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), contains a one year statute of limitations for § 2255 claims filed after April 24, 1996. Here, the parties agree that Baldayaque's conviction became final on May 14, 1997, ninety days after the Second Circuit summarily affirmed his conviction, during which time Baldayaque could have petitioned the U.S.

[4]The Court, noting the stringent limitations on second or successive § 2255 petitions, declined to recharacterize the motion as one brought under § 2255, and instead forwarded the proper forms to file a § 2255, if he so desired. See Adams v. Untied States, 155 F.3d 582, 584 (2d Cir. 1998) ("If a district court receiving a motion under some other provision of law elects to treat it as a motion under § 2255 and then denies it, that may cause the movant's subsequent filing of a motion under § 2255 to be barred as a "second" § 2255. Thus a conversion, initially justified because it harmlessly assisted the prisoner-movant in dealing with legal technicalities, may result in a disastrous deprivation of a future opportunity to have a well-justified grievance adjudicated.").

Supreme Court for a writ of certiorari.[5] Absent tolling, any § 2255 motion filed by Baldayaque after May 14, 1998 would be time-barred under AEDPA.

This limitations period may be equitably tolled if extraordinary circumstances prevented a defendant from filing his petition on time and the defendant acted with reasonable diligence throughout the period he seeks to toll. Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000) (recognizing existence of equitable tolling for analogous limitations period under 28 U.S.C. § 2244); Green v. United States, 260 F.3d 78, 82 (2d Cir. 2001) (applying Smith to § 2255 petitions). Baldayaque argues that equitable tolling applies because: (1) immediately following loss of his appeal, he directed his family to retain an attorney specifically to file a § 2255 motion; (2) after extraordinary

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[5]There is currently a split in the circuits as to whether this ninety-day time period is included in the one year statute of limitations for § 2255 claims. Compare United States v. Gamble, 208 F.3d 536 (5th Cir. 2000) (even where a defendant does not file a petition for certiorari, one-year limitation period runs from expiration of 90-day period during which he was entitled to seek certiorari), United States v. Garcia, 210 F.3d 1058, 1060 (9th Cir. 2000), United States v. Burch, 202 F.3d 1274 (10th Cir. 2000), Kapral v. United States, 166 F.3d 565, 570 (3d Cir. 1999), Kaufmann v. United States, 282 F.3d 1336 (11th Cir. 2002) and Derman v. United States, No. 01-2545, ___ F.3d ___, 2002 WL 1610566 (1st Cir. Jul 25, 2002) with Gendron v. United States, 154 F.3d 672 (7th Cir. 1998) and United States v. Torres, 211 F.3d 836 (4th Cir. 2000). The Supreme Court has agreed to resolve this dispute. See Clay v. United States, 122 S.Ct. 2658 (June 28, 2002) (granting petition for writ of certiorari on this issue). While the Second Circuit has not decided the issue, the Government concedes that the statute of limitations does not begin to run during this ninety day period. Govt's Resp. [Doc. #526] at 4.

effort, the required retainer was paid to an attorney with express instructions to file a § 2255 motion; (3) the retained attorney incorrectly advised Rivera and Marquez that a § 2255 petition was time-barred; (4) the attorney instead filed his "better motion," which was clearly meritless and was denied by the Court; and (5) Marquez and Rivera were told that it was too late to file any other motions, and that nothing further could be done to secure Baldayaque's release or reduce his sentence.

The Government argues that nothing "prevented" Baldayaque from filing a § 2255 motion prior to the expiration of the limitations period: Baldayaque knew that no § 2255 motion had been filed on his behalf, and he made no effort to file such a motion pro se. The Government further argues that Second Circuit case law excludes attorney negligence or error as a basis for equitable tolling. The Government additionally argues absence of petitioner's diligence after the "better motion" was denied by the Court in June of 1998, as no motions were then pending in his case, and Baldayaque filed nothing further for approximately twenty months.

A. Extraordinary Ends / Diligence

It is clear to the Court that Baldayaque and his family went to extraordinary ends to specifically file what they knew to be a "2255" motion, and that they took such action well within the

limitations period. While they may not have been aware of specific grounds for relief, they were well aware of both the lengthy sentence Baldayaque received and the fact that any challenges to that sentence had to be made within a specified time period, and they retained counsel to investigate and develop a § 2255 motion appropriate to his circumstances, with the objective of sentence reduction.[6]

The Court further concludes that as a factual matter Baldayaque was effectively "prevented" from filing a § 2255 motion by the new attorney's erroneous advice in early 1997 that the time limit for filing such a motion had passed. "Prevent" means "to deprive of power or hope of acting, operating, or succeeding in a purpose"; "to keep from happening or existing esp[ecially] by precautionary measures"; and "make impossible through advance provisions." Webster's Third New International Dictionary (1993) at 1798. Baldayaque has a third-grade education, speaks only Spanish, and cannot read or write. When the new attorney, an experienced lawyer, accepted the $5000 retainer and represented (obviously with no research whatsoever) that the filing period had expired when in fact the time period had only just begun to run, Baldayaque was effectively deprived

[6] Cf., e.g., ABA Standards for Criminal Justice (3d ed. 1993), Standards 4-8.5 ("the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases") and 4-4.1 (discussing lawyer's extensive duty to investigate in criminal cases).

of the power of acting. He was "prevented" from filing a § 2255 motion just as surely as he would have been had, for example, a prison guard confiscated legal papers that he was preparing to mail to the court. Cf. Valverde v. Stinson, 224 F.3d 129 (2d Cir. 2000) (confiscation of prisoner's legal papers shortly before filing deadline was sufficient basis for equitable tolling of limitations period).

The logic of the Government's argument that Baldayaque was nevertheless either not "prevented" from filing a pro se motion or was not reasonably diligent because he failed to do so produces absurd results: prisoners would be required to disregard their attorneys' advice and file their pro se motions to hedge the possibility that the advice might be erroneous.

The Second Circuit's recent opinion in Garcia v. United States, 278 F.3d 134 (2d Cir. 2002), while not directly analogous, is instructive in this regard. In Garcia, the defendant's plea agreement provided that he waived his right to appeal or collaterally attack any sentence below forty-six months. The district court sentenced him to sixty months, and his right to appeal remained intact. Nonetheless, at sentencing,

> Garcia's trial counsel said: "I want to place on the record that according to the sentence that your Honor's imposed, there is an appellate waiver in the plea agreement that is applicable in the case." The district judge responded: "All right. You can still claim ineffective assistance of counsel on appeal, the only issue left open. I am not suggesting for a moment that there are any grounds for it." Garcia did not file an appeal.

Id. at 136. Garcia thereafter collaterally attacked his sentence under § 2255, but the district court found the claims procedurally defaulted because they were not raised on direct appeal. The Second Circuit vacated and remanded, reasoning as follows:

> Garcia's attorney advised him on the record that no appeal could be filed and the district court confirmed that incorrect advice . . . . When a defendant has been incorrectly advised by counsel that no appeal is possible, we do not require that the defendant have gone through the futile exercise of requesting counsel to file an appeal to demonstrate that his counsel's ineffective assistance deprived him of an appeal that would have otherwise been filed. Instead, as when a court mistakenly informs a defendant that he has no right to appeal, relief is appropriate unless the Government can show by clear and convincing evidence that the defendant actually appealed or had independent knowledge of his right to appeal and elected not to do so.

Id. at 137 (citing Soto v. United States, 185 F.3d 48, 54-55 (2d Cir. 1999) (emphasis added)).

While Garcia concerned the right of direct appeal, the reasoning that Garcia was not required to disregard his attorney's advice and nonetheless file an appeal solely for the purpose of demonstrating that he desired to appeal is particularly instructive here, because the Government argues that Baldayaque should have gone through what he reasonably believed was the unnecessary effort of filing a pro se § 2255 motion just to demonstrate his diligence, when in fact, like Garcia, he had no reason to disbelieve his counsel's flawed advice.

B. Attorney Negligence

Despite the Court's conclusion that Baldayaque and his family went to extraordinary ends to file a timely § 2255 motion and that Baldayaque was in essence "prevented" from filing such a motion by the new attorney's erroneous advice, the Court nonetheless concludes that under controlling Second Circuit case law, the doctrine of equitable tolling cannot be applied in this case. The root of Baldayaque's failure to achieve the objective he, through his wife, so vigorously sought – filing a § 2255 motion – was the new attorney's negligence, which consisted of his incorrect advice in early 1997 that the time period for filing a § 2255 motion had passed and his frivolous alternative motion to permit deportation.[7] As set out below, controlling Second Circuit case law makes clear that attorney error resulting in late filing cannot be deemed "extraordinary circumstances."

In Smaldone v. Senkowski, 273 F.3d 133 (2nd Cir. 2001), the Second Circuit rejected the petitioner's argument that AEDPA's

[7]By the time the Court denied the motion to permit deportation, the time period had, in fact, passed, so the new attorney was not incorrect in his advice that nothing further could be done at that point. However, while the Government points to the twenty month period between June 1998 (when the motion was denied) and February 2000 (when Baldayaque filed the instant § 2255 petition) as evidence of Baldayaque's alleged lack of diligence, the Court concludes that Baldayaque's inaction, against reliance on his attorney's advice that nothing further could be done, does not evidence a lack of diligence. This conclusion is buttressed by the fact that Baldayaque filed the instant § 2255 motion shortly after receiving the proper forms from the Court upon denial of his motion under Fed. R. Crim. P. 35.

one year statute of limitations should be tolled because of his attorney's mistaken advice that the period is "reset" rather than merely tolled during the pendency of state post-conviction proceedings. The Smaldone court held that "[t]his Circuit, like her sisters, has found attorney error inadequate to create the 'extraordinary' circumstances equitable tolling requires." Id. at 138 (citing Geraci v. Senkowski, 211 F.3d 6, 9 (2d Cir. 2000); Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999); and Sandvik v. United States, 177 F.3d 1269, 1270 (11th Cir. 1999)).

The cases from other circuits cited in Smaldone provide, to varying degrees, guidance. In Sandvik, the § 2255 motion was due on April 24, 1997 (one year after the effective date of AEDPA), but it did not arrive in the clerk's office until April 25, 1997. The motion had been mailed by counsel on April 18, 1997. The Eleventh Circuit held that equitable tolling was not allowed:

> Sandvik's motion was late because his lawyer sent it by ordinary mail from Atlanta less than a week before it was due in Miami. While the inefficiencies of the United States Postal Service may be a circumstance beyond Sandvik's control, the problem was one that Sandvik's counsel could have avoided by mailing the motion earlier or by using a private delivery service or even a private courier. There is not, therefore, ground for equitable tolling here.

177 F.3d at 1272.

The lawyer's mistake in Taliani is never specified beyond a the summary that "[petitioner] missed the deadline by a little more than a month and argues that this was due to his lawyer's

having miscalculated that limitations period because of inadequate research." 189 F.3d at 597. The Seventh Circuit noted that "[n]ormally, a lawyer's mistake is not a valid basis for equitable tolling, and nothing in the present case justifies relaxing this rule: forcing the defendant to defend against the plaintiff's stale claim is not a proper remedy for negligence by the plaintiff's lawyer." Id. at 598 (internal citation omitted).

In Fahy, a death penalty case, petitioner's counsel mistakenly believed that a fourth petition for collateral relief had to be filed in state court before filing a federal habeas petition. This belief was incorrect, however, and as a result of this mistaken pursuit of the state relief, the deadline passed for seeking federal habeas relief. The Third Circuit noted that "[i]n non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." 240 F.3d at 244 (citations omitted). However, the Court reasoned that "death is different," and nonetheless allowed petitioner to pursue his otherwise untimely petition.

In Geraci, the court set out an exhaustive time line that showed the petition was time-barred, and then briefly mentioned attorney error:

> [T]he record contains no evidence of extraordinary or unusual circumstances that would justify equitable tolling of the AEDPA's one- year limitation period. The district court rejected as implausible Geraci's claim that his counsel filed several days late as a

> result of "miscalculation." There is no indication that Geraci's counsel was concerned about dates and limitations until it was too late to matter.

211 F.3d at 9 (internal citations omitted).

Baldayaque's retained attorney's flawed legal advice to Baldayaque's family cannot be distinguished from Smaldone and the cases cited therein. While it may be different in degree, it is nonetheless attorney negligence of the same kind as advising a client that the time period had been "reset" when it had in fact only been tolled, or arithmetically miscalculating the proper date upon which a motion is due. Because Baldayaque did everything that could have been expected of him and because he went to extraordinary ends to have a § 2255 motion filed on his behalf, the Court would, but for the Smaldone line of cases, equitably toll the limitations period in accordance with Smith. However, Smaldone is controlling, and Baldayaque's motion must be denied as untimely.

III. Conclusion

For the reasons set out above, Baldayaque's motion under 28 U.S.C. § 2255 [Doc. #508 & Doc. #523] is DENIED. Inasmuch as the Court's reading of Smaldone has insulated a constitutional claim of arguable merit, the Court concludes that this is an appropriate case for the issuance of a Certificate of

Appealability as provided by 28 U.S.C. § 2253(c),[8] limited to the question of whether, under the circumstances of this case, the one year limitations period of 28 U.S.C. § 2255 can be equitably tolled.

IT IS SO ORDERED.

/s/

Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut, this 6th day of September, 2002.

[8]See, e.g., Nichols v. Bowersox, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999) (en banc) (review of preliminary procedural issues antecedent to the merits of an appeal may be certified under § 2253(c)).