

2005 WL 323731 (N.D.Tex.)

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United States District Court,
N.D. Texas, Dallas Division.
UNITED STATES OF AMERICA

v.

Shannon H. PALMER, # 27801-177, Defendant/Movant.

No. 3-01-CR-312-R, 3-04-CV-2092-R.

Feb. 9, 2005.

Shannon Hemstock Palmer, Fort Worth, TX, pro se.

[John E. Castaneda](#), Law Office of John E. Castaneda, Dallas, TX, for Defendant.

[Michael R. Snipes](#), Law Office of Michael R. Snipes, Dallas, TX, for Plaintiff.

ORDER

[BUCHMEYER](#), J.

*1 After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the findings, conclusions and recommendation of the United States Magistrate Judge are adopted.

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

[SANDERSON](#), Magistrate J.

Pursuant to the provisions of [28 U.S.C. § 636\(b\)](#), and an order of the court in implementation thereof, this case has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type of Case: This is a motion to vacate, set aside, or correct sentence brought by a federal prisoner pursuant to [28 U.S.C. § 2255](#).

Parties: Movant, Shannon Hemstock Palmer, is presently confined at FMC Carswell in Fort Worth, Texas.

Statement of the Case: Movant was charged by indictment with conspiracy to receive stolen money by mail in violation of [18 U.S.C. § 371](#) to which she pled guilty. On August 14, 2002, the District Court filed a judgment sentencing Movant to forty-six months imprisonment, a three-year term of supervised release, and restitution in the amount of \$76,104.03 to be paid jointly and severally with all co-defendants. Movant did not appeal.

On September 27, 2004, Movant filed this [§ 2255](#) motion challenging the judgment of conviction. In one ground for relief, she contends her sentence was increased in violation of her Sixth Amendment right to a trial by jury as set out in the Supreme Court's ruling in [Blakely v. Washington, --- U.S. ---, 124 S.Ct. 2531, 159 L.Ed.2d 403 \(2004\)](#). [FN1]

[FN1](#). In *Blakely*, a majority of the Supreme Court held that an enhanced sentence imposed by a judge under the Washington Sentencing Reform Act, which was based on fact neither admitted by the defendant nor found by a jury, violated the Sixth Amendment to the United States Constitution. [Blakely, --- U.S. at ---, 124 S.Ct. at 2538](#). The Supreme Court recently extended *Blakely* to the federal sentencing guidelines. [United States v. Booker, --- U.S. ---, 125 S.Ct. 738, --- L.Ed.2d ---, 2005 WL 50108 \(2005\)](#). That holding, however, has thus far only been made applicable to cases on direct review. *Id.* at *23.

Findings and Conclusions: The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), establishes a one-year statute of limitations for federal inmates seeking relief under [§ 2255](#). See [28](#)

[U.S.C. §§ 2255](#). The district court may raise the affirmative defense of the statute of limitations *sua sponte*. See [Kiser v. Johnson, 163 F.3d 326 \(5th Cir.1999\)](#).

The one-year period is calculated from the latest of either (A) the date on which the judgment of conviction became final; (B) the date on which an impediment to filing a [§ 2255](#) motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from filing by such governmental action; (C) the date on which the Supreme Court initially recognizes a new constitutional right and makes the right retroactively applicable to cases on collateral review; or (D) the date on which the facts supporting the claim became known or could have become known through the exercise of due diligence. See [id. § 2255](#).

***2** Movant has alleged no government-created impediment under subparagraph (B) that prevented the filing of this [§ 2255](#) motion. Moreover, the court determines that the facts supporting the claims raised in the instant [§ 2255](#) motion became known or could have become known prior to the date Movant's judgment of conviction became final.

Subparagraph C provides that the one-year period commences from the date on which the Supreme Court initially recognizes a new constitutional right and makes the right retroactively applicable to cases on collateral review. See Subparagraph (C) of [§ 2255](#). Movant relies on [Blakely v. Washington](#), and argues that she could not have "previously presented" her [§ 2255](#) motion because she "could not have foreseen the Supreme Court's recent decision regarding a defendant's rights under the Sixth Amendment [with respect to] sentencing factors...." (See ¶ 2255 Mot. ¶ 13, and Memorandum in Support at 2- 4). While the Supreme Court recently extended [Blakely](#) to the U.S. Sentencing Guidelines, it has not yet addressed whether it should be made retroactively applicable to cases on collateral review. See [United States v. Booker, --- U.S. ----, 125 S.Ct. 738, --- L.Ed.2d----, 2005 WL 50108, at *23 \(2005\)](#) (extending holding in [Booker](#) to cases on direct review). Therefore, subparagraph C is presently inapplicable to this case and the court will calculate the one-year statute of limitations from the date Petitioner's conviction became final at the conclusion of direct review or upon the expiration of the time for seeking such review. See [28 U.S.C. § 2244\(d\)\(1\)\(A\)](#).

Movant's conviction became final on October 7, 2002, the last day on which she could have appealed to the Fifth Circuit Court of Appeals the amended judgment of conviction entered on September 23, 2002. See [Fed. R.App. 4\(b\)\(1\)\(A\)](#) ("In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal."). The one-year period began to run on October 8, 2002, the day after the conviction became final, see [Flanagan v. Johnson, 154 F.3d 196, 202 \(5th Cir.1998\)](#), and expired on October 7, 2003. Movant did not file this [§ 2255](#) motion until September 16, 2004, eleven months after the expiration of the one-year period. [\[FN2\]](#) Therefore, Movant's [§ 2255](#) motion is clearly untimely.

[FN2](#). For purposes of this recommendation, the [§ 2255](#) is deemed filed on September 16, 2004, the date Movant signed the same and presumably placed it in the prison mail. See [United States v. Patterson, 211 F.3d 927, 930 \(5th Cir.2000\)](#) (citing [Spotville v. Cain, 149 F.3d 374, 377 \(5th Cir.1998\)](#) (holding that a federal petition is deemed filed for determining application of the AEDPA when the prisoner tenders it to prison officials for mailing)).

Insofar as Movant requests equitable tolling of the limitation period, her request should be denied. Neither the [§ 2255](#) motion nor the memorandum in support presents "rare and exceptional circumstances" warranting equitable tolling, [United States v. Riggs, 314 F.3d 796, 799 \(5th Cir.2002\)](#), cert. denied, [539 U.S. 952, 123 S.Ct. 2630, 156 L.Ed.2d 645 \(2003\)](#), and that Movant diligently pursued her rights, [United States v. Patterson, 211 F.3d 927, 930 \(5th Cir.2000\)](#). To the extent Movant relies on her *pro se* status, her claim is meritless. "[N]either a plaintiff's unfamiliarity with the legal process nor [her] lack of representation during the applicable filing period merits equitable tolling." [Turner v. Johnson, 177 F.3d 390, 392 \(5th Cir.1999\)](#).

RECOMMENDATION:

***3** For the foregoing reasons it is recommended that the District Court dismiss with prejudice the motion under [28 U.S.C. § 2255](#) as barred by the one-year statute of limitations.

A copy of this recommendation will be mailed to Movant Shannon Hemstock Palmer, # 27801-177,

FMC Carswell, P.O. Box 27137, Fort Worth, Texas 76127.
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