

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
<i>v.</i>)	<i>Criminal No. 95-59-P-H</i>
)	<i>(Civil No. 99-144-P-H)</i>
PAUL J. CAVALLERO,)	
)	
<i>Defendant</i>)	

***RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255***

The defendant moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 262 months was imposed after he was convicted by a jury on charges of conspiracy to possess with intent to distribute five grams or more of cocaine base and distribution and possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 2, 841(a)(1) and 846. Judgment (Docket No. 58) at 1-2. The defendant now contends that his sentence should be vacated and he should be resentenced due to the vacation of two Massachusetts convictions that provided the basis for the initial calculation of his sentence based on career offender status under the United States Sentencing Commission Guidelines (“U.S.S.G.”). Motion Under 28 U.S.C. § 2555 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“Petition”) (Docket No. 68) at 5 and Memorandum of Paul J. Cavallero in Support of His Motion to Vacate and Correct His Sentence Pursuant to 28 U.S.C. §2255 (“Defendant’s Memorandum”), attached to Petition, at [1].

A section 2255 motion may be dismissed without an evidentiary hearing if “(1) the motion

is inadequate on its face, or (2) the movant's allegations, even if true, do not entitle him to relief, or (3) the movant's allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible." *David v. United States*, 134 F.3d 470, 477 (1st Cir. 1998) (internal quotation marks and citation omitted). In this instance, certain of the defendant's allegations meet one or more of these criteria and I accordingly recommend that the motion be denied without an evidentiary hearing as to those assertions, as set forth in detail below. An evidentiary hearing was held before me on November 3, 1999 with respect to two of the issues raised by the defendant's motion and the government's objection to it. As to those issues, I recommend that the court deny the defendant's motion.

I. Background

The defendant was sentenced in June 1997 as a career offender pursuant to U.S.S.G. § 4B1.1 (1995), which at the time of sentencing provided:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

(Table omitted). The prior felony convictions in this case were obtained in 1991 on guilty pleas in the Massachusetts district court in Fitchburg, Massachusetts, on charges of possession of cocaine with intent to distribute it. Second Revised Presentence Investigation Report (Government Exhibit 9) at 6-7 & Docket Sheets (Defendant's Exhibits 12 & 13) at [1].

On March 9, 1999 the defendant's motion for new trials on the two Massachusetts convictions was granted. Docket Sheets at [2].

At the time of sentencing on the conviction in this court, on June 2, 1997, Judgment at 1, the government and the defendant entered into a written agreement that provides, in pertinent part:

Defendant waives any right to appeal the conviction and sentence and to file for a Writ of Habeas Corpus, 28 U.S.C. § 2241 *et seq.*, seeking post-conviction relief, except that if either of Defendant's 1991 Massachusetts felony drug convictions is vacated, Defendant may file for a Writ of Habeas Corpus on that basis alone, consistent with the applicable provisions of 28 U.S.C. § 2255.

Agreement (Docket No. 57) ¶ 5. On June 2, 1998 the defendant filed a motion to enlarge the time in which he could file his section 2255 motion to "30 days from the time [he] receives information which is finally determinative of the validity of his underlying conviction." Motion for Enlargement of Time to File Motion Under Title 28 United States Code, Section 2255 (Docket No. 66) at [1]-[2]. The government did not respond to this motion, and it was granted on that basis on June 23, 1998. Endorsement, *id.* at [2]. Notification of the granting of the motion was sent to the government's attorney by the clerk's office by letter dated June 25, 1998.

The motion for section 2255 relief was filed on May 4, 1999. Docket. After reviewing the parties' filings and meeting with counsel, I issued a procedural order limiting an evidentiary hearing in this matter to the following issues: (i) whether the defendant's Massachusetts convictions at issue had been vacated and (ii) whether there exists the factual predicate required for an equitable tolling of section 2255's one-year period of limitation. Procedural Order (Docket No. 78).

II. Findings of Fact

I make the following recommended findings of fact from the evidence presented at the hearing on November 2, 1999:

1. The defendant and his attorney learned for the first time that the Massachusetts convictions would be used to sentence him as a career offender from the first revised presentence investigation report, dated July 5, 1996. Government Exhibit 8 at 6-7.
2. By motion dated July 23, 1996 the defendant sought and was granted a continuance of sentencing in order to obtain documentary evidence that he hoped would convince the court that the two Massachusetts convictions should be treated as one under the sentencing guidelines, thereby excluding him from career offender status. Docket No. 46.
3. A sentencing hearing scheduled for October 17, 1996, Docket No. 48, was not held. By motion dated December 11, 1996 the defendant sought and was granted a further continuance of sentencing for the same reason for which the first continuance was sought and also to obtain expert review of the laboratory findings concerning the cocaine base that was the basis of the charges and to allow counsel time to prepare a written memorandum in support of a downward departure. Docket No. 53.
4. By motions dated February 19 and March 13, 1997 the defendant sought and was granted continuances of sentencing to allow a new lawyer, Jerry Whittington,¹ to become the defendant's lead counsel for sentencing purposes and to argue that "errors have been made in the sentencing, specifically in the Criminal [sic] computation relating to the Commonwealth of Massachusetts

¹ Although referenced in the February 19, 1997 motion as "Jerry Whitting," it was disclosed at the hearing that the individual's correct name is "Jerry Whittington."

conviction record.” Motion to Continue Sentencing Hearing (Docket No. 55) at [1] & Motion to Continue Sentencing Hearing (Docket No. 54).

5. Jerry Whittington represented himself to the defendant, members of the defendant’s family, and his counsel to be a lawyer with an office in Louisiana who specialized in career offender sentencing. He was paid over \$8,700 to represent the defendant at sentencing. He failed to appear in Maine and it was discovered at some time after March 14, 1997 and before June 2, 1997 that he is not a lawyer and had not provided, nor could he provide, the promised services to the defendant. The delay due to Whittington’s involvement was no more than four months.

6. By letter dated June 8, 1997 and postmarked June 9, 1997 the defendant wrote to Leonard J. Staples, the Massachusetts attorney who had represented him in connection with the 1991 convictions, asking him to check into the possibility of vacating one or both of the convictions. Defendant’s Exhibit 9. He wrote to Staples again in connection with this request on or about July 3 and July 17, 1997. Defendant’s Exhibits 5 & 10.

7. Staples did not agree to represent the defendant in this regard until a date after November 10, 1997, when he received a retainer of \$2,500 from the defendant’s mother. Defendant’s Exhibit 6. Neither the defendant nor his mother was able to raise the necessary funds to retain Staples until that time, due at least in part to the fact that the payments made to Whittington had used all of their available financial resources.

8. After accepting the defendant’s case, Staples asked to review the files on the cases in the Fitchburg district court. One of the case files was made available to him immediately, but the other file was not made available to him for a period of weeks. Staples also reviewed his own files and notes and the police reports concerning the charges. He noticed that he had no drug analysis on one

of the cases, so he requested a copy of that document from the district attorney's office, which also had no copy, and from the police, who could not locate it. He eventually received a copy of the drug analysis, but he does not recall when. Staples also asked for the tape recording of the plea hearing, but it had been destroyed because of the passage of time in accordance with the practice of the Massachusetts district courts.

9. Staples drafted a motion for new trial in the two cases based on the lack of a drug analysis certification, which he felt was the strongest basis for a due process challenge, as well as due process claims based on the lack of an informed waiver of the right to a "first instance" jury trial in one of the two cases, the failure of the court to explain to the defendant the elements of the crimes with which he was charged, and the failure of the court to assure that the factual basis of the charges was read to the defendant and that he agreed to that recitation. Staples testified that this draft was dated May 29, 1998. Staples did not file this draft because he received a copy of the drug certification after writing the draft.

10. Staples testified that on May 26, 1998 he sent the defendant a copy of the motion for new trials that he planned to file in the Massachusetts cases along with an affidavit for the defendant's signature. These items were sent to the wrong address. When informed of the defendant's new address, Staples sent the same items to him on May 30, 1998. The defendant promptly executed and returned the affidavit. Staples filed the motion on June 9, 1998 immediately upon receiving the defendant's executed affidavit.

11. After filing the motion, Staples checked frequently with the clerk's office in Fitchburg concerning its status. The Massachusetts judge who had accepted the defendant's pleas on the two convictions at issue denied his motion for new trials on January 14, 1999. Staples filed a motion for

reconsideration on February 1, 1999 and, after a chambers conference, the judge granted the motion for a new trial in each case on March 9, 1999. Staples did not receive written confirmation of the granting of the motion until April 9, 1999.

12. As conceded by the government at the evidentiary hearing, the evidence before the court establishes that the defendant's 1991 Massachusetts convictions were vacated by the granting of the motion for new trials.

III. Analysis

The government makes several arguments in opposition to the defendant's motion. It contends that the defendant's motion violates the sentencing agreement, that the motion is untimely, that the court lacked jurisdiction to grant the defendant's motion for an extension of time in which to file the motion, that the claim raised by the motion is not cognizable under section 2255, that an invalid conviction may nonetheless serve as a predicate offense for the purpose of enhancing a sentence imposed on conviction of a federal crime, and that the doctrine of equitable tolling is not available to the defendant under the circumstances of this case. Government's Response to Motion to Vacate, Set Aside or Correct Sentence Filed Pursuant to Title 28, U.S.C., Section 2255 ("Government's Response") (Docket No. 75) at 2-4. The defendant responds that the sentencing agreement does not limit his rights under section 2255, which include the right to bring this motion at this time; that the motion is not untimely given the court's granting of his motion for an extension of time in which to file it; that the government has waived any argument that the court lacked jurisdiction to grant the motion for an extension by failing to oppose it when it was filed or when the government was notified that it had been granted; that this waiver extends to the government's

ability to argue that the doctrine of equitable tolling should not be applied under the circumstances of this case; that the relief he seeks is available under section 2255; and that he is entitled to relief under 28 U.S.C. § 2255(4), independent of the doctrine of equitable tolling, because he filed this motion within one year after he discovered or could have discovered the facts supporting his claim.² Reply of Paul Cavallero (“Defendant’s Reply”) (Docket No. 77) at 1-7.

A. Breach of the Settlement Agreement

The government argues that the defendant’s motion was not filed “consistent with the applicable provisions of 28 U.S.C. § 2255,” as required by the sentencing agreement, because the motion was filed more than one year after the sentencing judgment was entered on June 2, 1997.³ This argument reads too much into the sentencing agreement. If equitable tolling of section 2255’s statute of limitations is available, as I conclude below, the mere fact that the defendant filed this motion more than one year after he was sentenced does not and cannot breach the term of the

² The latter argument was first raised at the evidentiary hearing and is not included in the defendant’s written submissions. At the hearing, counsel for the government agreed that this is merely an amplification of the legal arguments made by the defendant in support of his motion and accordingly appropriate for consideration by the court.

³ The statute provides, in pertinent part:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall 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.

sentencing agreement upon which the government relies. In addition, the defendant's argument under subsection 4 of section 2255 is not inconsistent with the terms of that statute. The filing of this motion is not inconsistent with the applicable provisions of section 2255.

B. Timeliness

The government correctly observes that this motion was filed more than one year after the defendant's judgment of conviction became final. To the extent that the defendant is now basing the motion on an argument that he filed this motion within a year after he could have discovered the facts underlying his claim in the exercise of due diligence, the fact that more than a year has passed since the sentencing does not make the motion untimely. To the extent that the motion is based on any other argument, as appears from the language of the motion itself, the one-year statute of limitations may be equitably tolled. *E.g.*, *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Calderon v. United States District Court*, 128 F.3d 1283, 1289 (9th Cir. 1997), *vacated on other grounds* 163 F.3d 530 (9th Cir. 1998). The First Circuit has reserved this question, but seems to cite *Miller* with approval. *Libby v. Magnusson*, 177 F.3d 43, 48 n.2 (1st Cir. 1999). I conclude that equitable tolling is available to the defendant here, if he can establish his entitlement to its application. Accordingly, the motion is not necessarily untimely.

C. The Extension of Time

The defendant understandably relies on this court's granting of his motion for an extension of time in which to file his section 2255 motion "until 30 days from the time he receives information which is finally determinative of the validity of his underlying conviction," Motion for Enlargement

of Time to File Motion Under Title 28 United States Code, Section 2255 (Docket No. 66) at [1]-[2], to argue that he filed this motion in a timely manner. However, I agree with the government that the court lacks jurisdiction to extend the limitations period imposed by section 2255 before any claim for relief has actually been filed.

In this circuit, a criminal statute of limitations is generally waivable. *E.g.*, *United States v. Spector*, 55 F.3d 22, 24 (1st Cir. 1995) (waiver by defendant); *Acevedo-Ramos v. United States*, 961 F.2d 305, 307 (1st Cir. 1992) (same). The majority of courts that have addressed the specific issue have held that the one-year limitation added to section 2255 by the Anti-Terrorism and Effective Death Penalty Act of 1996 is a statute of limitations and not jurisdictional, *e.g.*, *Kapral v. United States*, 166 F.3d 565, 567 (3d Cir. 1999); as a result, the limitation may be waived by the government. *E.g.*, *Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir. 1999); *Fadayiro v. United States*, 30 F.Supp.2d 772, 779 (D.N.J. 1998); *but see Giles v. United States*, 6 F.Supp.2d 648, 649-50 (E.D.Mich. 1998). The fact that the statute of limitations may be waived, however, does not mean that the courts have the power to extend the period upon motion of a defendant.

All of the courts that have addressed the question in reported decisions have held that the courts lack jurisdiction over motions to extend the time in which to bring section 2255 motions. *Echeverri v. United States*, 1998 WL 456418 (E.D.N.Y. Jun. 15, 1998), at *2; *United States v. Clarke*, 1998 WL 91069 (D.Conn. Feb. 24, 1998), at *1; *In re Wattanasiri*, 982 F. Supp. 955, 957-58 (S.D.N.Y. 1997); *United States v. Agnes*, 1997 WL 763025 (E.D.Pa. Dec. 9, 1997), at *1. These courts uniformly suggest that a prisoner who finds himself in the situation presented here by the defendant can only bring his section 2255 motion when the underlying convictions have in fact been vacated, seeking to show that the statute of limitations should be equitably tolled. I find the

reasoning of these courts — that no case or controversy is presented until a section 2255 motion is filed, *Wattanasiri*, 982 F. Supp. at 957-58 — to be persuasive. This court was without jurisdiction to grant the defendant’s motion for an extension of time in which to file the instant motion.

The defendant contends that he is nonetheless protected by the court’s granting of his motion for an extension of time because the government has waived the jurisdictional argument by failing to object to the motion when it was made or when the government was notified that the motion had been granted. However, the court lacked jurisdiction over the subject matter of the motion for an extension of time, a jurisdictional defect that cannot be waived. Fed. R. Civ. P. 12(h)(3) & Fed. R. Crim. P. 12(b)(2) (both made applicable here by Rule 12 of the Rules Governing Section 2255 Proceedings for the United States District Courts); *Choeum v. INS*, 129 F.3d 29, 32 (1st Cir. 1997); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 676 n. 3 (1st Cir. 1992) (“subject matter jurisdiction cannot be conferred by waiver”). The defendant’s motion accordingly cannot be rendered timely by the granting of a motion for extension that this court lacked jurisdiction to grant, regardless of the government’s failure to oppose the motion.

The defendant also argues that the government’s “waiver” extends to its ability to argue that the doctrine of equitable tolling is not applicable to this case. He cites no authority in support of this position. There is no sense in which the defendant’s motion for an extension of time could be considered to invoke equitable tolling. Indeed, the doctrine is only available, if at all, because the granting of the defendant’s motion for an extension of time was not effective under the circumstances. An extension of time to file a motion is not the same thing as application of equitable tolling of a statute of limitations. The government did not waive its opposition to the application of the doctrine of equitable tolling to the motion now before the court by failing to object to the motion

for an extension of time.

D. Availability of Relief

The government's argument that the defendant's motion seeks relief that is not available under section 2255 is not supported by existing case law. In *Custis v. United States*, 511 U.S. 485 (1994), the Supreme Court specifically held that a prisoner in federal custody could attack state convictions that led to an enhanced sentence in state court or through federal habeas review, and, "[i]f [he] is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences." *Id.* at 497. The First Circuit held in *United States v. Pettiford*, 101 F.3d 199, 201 (1st Cir. 1996), that a federal prisoner could use section 2255 to obtain resentencing when the state-court convictions that had led to enhancement of his federal sentence were subsequently vacated.⁴ This holding is consistent with those of all of the circuits that have addressed the issue. *United States v. LaValle*, 175 F.3d 1106, 1108 (9th Cir. 1999) (listing cases from the Fourth, Fifth and Tenth Circuits). *See also United States v. Moretto*, 116 F.3d 464 (table), 1997 WL 313972 (1st Cir. Jun. 11, 1997) (unreported decision in which First Circuit upheld state court's resentencing pursuant to a § 2255 motion due to the setting aside of two prior state

⁴The government contends that *Pettiford* has been "roundly criticized," citing *United States v. Kahoe*, 134 F.3d 1230, 1234 (4th Cir. 1998). Government's Response at 32. Nonetheless, *Pettiford* remains binding upon this court. The government also argues that *Pettiford* is distinguishable from the case at hand because it involved "the statutory language of the Armed Career Criminal Act," *id.* at 30, while this case involves career offender status under the sentencing guidelines. I do not agree that the distinction is significant, a conclusion that is bolstered both by the case law cited in the text that follows in which the career offender guideline was at issue and by the First Circuit's discussion of *Custis* in *Pettiford*, 101 F.3d at 200-01, which is too broad in scope to support the government's position.

convictions used to establish career offender status).⁵

The relief sought by the defendant in the instant motion is available under section 2255.

E. Relief Under Section 2255(4)

This argument, first raised by the defendant at the evidentiary hearing, is based on a contention that the defendant first learned that his Massachusetts convictions were infirm in late May 1998, making his filing of this motion on May 4, 1999 timely because it was within the one-year statutory limitation. However, the defendant produced no evidence at the hearing to support a conclusion that he or Attorney Staples could not have discovered the infirmity in those convictions through the exercise of due diligence before late May 1998, which is the appropriate statutory test. Indeed, all three of the grounds for a new trial presented by the defendant to the Massachusetts court could have been discovered long before May 1998, and at any time after the defendant became aware in July 1996 that those convictions would be used to sentence him in this court as a career offender. The fact that Staples waited until late May 1998 to obtain proof that an argument he considered to be stronger could not be presented to the Massachusetts court does not make the evidence of the infirmity that he did present to the court through his own and Staples' affidavits any less discoverable at an earlier date. The information that the defendant used to obtain the new trials was known to him and to Staples since the pleas were entered in 1991. Even if it could be contended that the defendant and Staples needed the docket sheets from those cases to confirm the information that

⁵ This case law also makes irrelevant the government's contention that *Custis* and *Lewis v. United States*, 445 U.S. 55 (1980), hold that a sentence based in part on a potentially invalid prior conviction is nonetheless valid. Neither Supreme Court opinion is necessarily inconsistent with the relief sought here by the defendant, which several circuits have found to be available after *Custis* was decided.

provided the basis of one of the grounds presented to the Massachusetts court,⁶ and that discovery of necessary information on one of the three grounds presented to the court is effective as to all three grounds with respect to the issue of due diligence, by Staples' own testimony he had seen the docket sheets from both cases well before late May 1998.

The defendant is not entitled to relief on this basis.

F. Equitable Tolling

The sole remaining issue is the question whether the defendant has established his entitlement to application of the doctrine of equitable tolling in this case to excuse his failure to bring this motion within one year following the entry of judgment on his conviction. Equitable tolling of the section 2255 statute of limitations is available only in extraordinary or "rare and exceptional" circumstances. *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). The defendant must demonstrate his "reasonable diligence in investigating and bringing" the claim. *Miller*, 145 F.3d at 618-19. "Because the relevant limitation period originates in a federal statute, federal law supplies the rule of decision in respect to the equitable tolling issue." *Bonilla v. Muebles J.J. Alvarez, Inc.*, ___ F.3d ___, 1999 WL 959534 (1st Cir. Oct. 26, 1999), at *3. "Generally speaking . . . equitable tolling is not appropriate unless a claimant misses a filing deadline because of circumstances effectively beyond her control." *Id.*

Here, the defendant contends that he was entitled to rely on the presumptively valid granting of his motion for an extension of time in which to file his section 2255 motion. However, that motion was granted after he had filed his motion for a new trial in the Massachusetts court. The time

⁶ It is impossible to discern from the Massachusetts court's orders granting the new trial motion whether the basis for that decision was all three of the grounds presented by the defendant or any one or two of those grounds.

taken by that court to resolve the motion was beyond the control of the defendant and could not in any event be considered evidence of his diligence or lack thereof in bringing his section 2255 motion, which he could only do when and if the Massachusetts convictions were vacated. It is the time between July 1996, when he first learned that the Massachusetts convictions would be used to give him career offender status under the sentencing guidelines, which status is the subject of the pending motion, and June 9, 1998 when Staples filed the motion for new trials in the Massachusetts court that is the period during which the defendant must demonstrate his diligence and the existence of extraordinary and exceptional circumstances beyond his control.⁷

Here, the only evidence concerning the delay caused by the involvement of Whittington is attorney Emerson's testimony that it amounted to no more than four months. There is no evidence of any attempt by the defendant to attack the Massachusetts convictions in any way until his family retained Whittington, who was out of the picture sometime before June 2, 1997. The defendant argues that Whittington was also responsible for the lack of action on the Massachusetts convictions until late November 1997, when Staples received a retainer, because Whittington had been paid all of the money that was available to him to retain a lawyer for this purpose and his mother was not able to raise the necessary funds until that time. Inability to pay a lawyer is not likely in itself to constitute the extraordinary circumstances necessary to invoke equitable tolling of section 2255's statute of limitations; any criminal defendant who qualifies for *in forma pauperis* status might

⁷ It is for this reason that *Hollins v. Department of Corrections*, ___ F.3d ___, 1999 WL 791444 (11th Cir. 1999), to which the defendant's counsel referred the court during the evidentiary hearing, provides little assistance to the court. In that case, the Eleventh Circuit applied what it called the "unique circumstances" doctrine to excuse the late filing of an appeal when the appellant had relied on the court's electronic docket sheet for the case, which failed to show the entry of the final order from which the appellant sought to appeal. 1999 WL 791444 at *2-*3.

advance such an argument, and, if successful, toll the application of the statute indefinitely. *See generally Hannahs v. United States*, 75 A.T.F.R.2d 95-1150, 1995 WL 230461 (W.D.Tenn. Jan. 30., 1995), at *3 (“Financial hardship . . . is not sufficient to warrant equitable tolling of the limitations period.”)

The defendant’s inability to pay in this case is even less of a factor given prevailing Massachusetts practice. Although there is no constitutional right to counsel in a proceeding brought pursuant to Mass. R. Crim. P. 30(b), *Commonwealth v. Davis*, 574 N.E.2d 1007, 1010 n.7 (Mass. 1991), the trial courts apparently do appoint counsel for that purpose. *E.g.*, *Commonwealth v. White*, 707 N.E.2d 823, 824 (Mass. 1999); *Commonwealth v. Smith*, 692 N.E.2d 65, 67 (Mass. 1998). The defendant has not suggested that he attempted to obtain appointed counsel to assist him in seeking new trials on the Massachusetts convictions.

The Massachusetts rule requires a defendant moving for a new trial or correction of sentence to include all grounds for the claimed relief “in his original or amended motion,” deeming any grounds not so included to be waived unless the court permits them to be raised in a subsequent motion or the grounds at issue “could not reasonably have been raised in the original or amended motion.” Mass. R. Crim. P. 30 (c)(2). However, this “one bite at the apple” approach does not excuse Staples’ delay in filing the motion for new trials until June 9, 1998. His only explanation for the delay was that he was waiting to see whether the police would produce a drug analysis certification for one of the two convictions and that, when they did, he filed the motion without relying on the absence of that certification as a ground for relief. It makes no sense to delay filing the motion under the circumstances of this case until Staples was sure that the ground for relief that he felt was strongest could not be asserted at all. At most, delay for this reason saved Staples from

potential embarrassment. It had nothing to do with diligent pursuit of the possible vacation of the convictions.

Staples also testified that he based the motion for new trials on the claim that the trial judge failed during the plea colloquy to determine that the defendant had knowledge of the elements of the charges against him rather than the trial judge's failure to inform the defendant of his "intra-trial" rights such as the privilege against self-incrimination and the right to cross-examine witnesses. The former claim does not require any further showing in order to establish a constitutional violation, while the latter would require the defendant to show that the proper colloquy would have affected his decisions to plead guilty. Staples did not testify to any reason why the choice to proceed in the manner requiring a lesser evidentiary showing caused any delay in bringing the motion. The defendant has not suggested that he did not know in November 1997 or at any other time before he signed the affidavit submitted with the motion in June 1998 that he had not been informed in 1991 of the elements of the charges against him. No investigation was necessary to uncover that information, which by the testimony of Staples was known only to the defendant, who must have known it, although not necessarily its significance, since 1991. Given the importance of the 1991 convictions to the defendant, as he clearly informed Staples, one of Staples' first questions to the defendant in November 1997, if not before, should have been directed to his memory concerning the explanation he received of the elements of the charges at the 1991 plea colloquy. Staples appears to have limited his questions to the defendant at this time, at least in writing, to the "intra-trial" rights. Defendant's Exhibit 11. Staples' apparent failure to consider the ground upon which he ultimately brought the successful motion until several months later does not constitute the rare and extraordinary circumstances that permit a statute of limitations to be equitably tolled.

The defendant did contact Staples immediately after he was sentenced, eleven months after he first became aware that the Massachusetts convictions would have the effect on his federal sentence that he now seeks to reverse. That is the only evidence in this record of diligence on his part in seeking to vacate these convictions. Staples' approach after he was retained can best be described as leisurely.⁸ The Whittington incident, while apparently financially devastating to the defendant and certainly reprehensible, cannot excuse more than four months of the defendant's delay in attacking the Massachusetts convictions.

The defendant has not established on the record before the court that he exercised due diligence in seeking to vacate the Massachusetts convictions sufficient to invoke equitable tolling of the section 2255 statute of limitations.

IV. Conclusion

Equitable tolling of the section 2255 statute of limitations is available only in extraordinary or rare and exceptional circumstances. Here, a full seven months passed after the defendant became aware that his Massachusetts convictions would be used to give him career offender status for sentencing purposes before he made any effort to contact an attorney to address the question whether those convictions could be vacated or took any other steps toward that end. This court must hold the defendant to a standard of reasonable diligence from that date in filing a motion in the Massachusetts court to begin the process of the possible vacating of those convictions. Additional

⁸ Staples' professed misunderstanding that all that was required to satisfy the applicable statute of limitations was the filing of the motion for a new trial in Massachusetts within a year of the entry of the judgment against the defendant in this court is not evidence of extraordinary circumstances to be considered as justification for equitable tolling. Staples, a lawyer, could have reviewed the statute himself and easily discovered his mistake.

months passed after the defendant contacted Staples, and even after he paid Staples a retainer, before the motion was filed. Reasonable diligence requires the filing of such a motion expeditiously. Even allowing for the time passing during the defendant's unfortunate reliance on Whittington, the evidence provided by the defendant does not establish reasonable diligence on his part. Regrettably, I must conclude that extraordinary circumstances justifying equitable tolling are not present here.

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED**.

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 after 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.

Dated this 17th day of November, 1999.

*David M. Cohen
United States Magistrate Judge*