

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

ERIC MURDOCK,	)	
	)	
Petitioner,	)	
	)	
v.	)	2:11-cr-00008-DBH
	)	2:14-cv-00205-DBH
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

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

In this action, Petitioner Eric Murdock moves, pursuant to 28 U.S.C. § 2255, to vacate, set aside or correct his sentence on numerous grounds. (Motion, ECF No. 135.) The Government requests a summary dismissal on the sole basis that the petition was not filed timely under 28 U.S.C. §2255(f).<sup>1</sup> (Response, ECF No. 144.)

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<sup>1</sup> Title 28 U.S.C. § 2255(f) states:

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.

After a review of Petitioner's motion, the Government's request for dismissal, and the additional filings by the parties, the recommendation is that the Court deny the Government's request for dismissal at this stage of the proceedings.

### **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Petitioner was convicted, following a jury trial, of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1), subject to the penalties of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). (Judgment, ECF No. 110 at 1.) The Court sentenced Petitioner to a term of 216 months of imprisonment, followed by three years of supervised release. (*Id.* at 2-3.) The First Circuit affirmed the conviction and the sentence on November 20, 2012. *United States v. Murdock*, 699 F.3d 665 (1st Cir. 2012). Petitioner did not seek a writ of certiorari.

Petitioner alleges that he signed and dated his standard form section 2255 motion on February 4, 2014. The preprinted form motion states on the next-to-last page: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on (month, date, year). . . . Executed (signed) on \_\_\_\_\_ (date)." The handwritten date of February 4, 2014, was inserted in the blank space, followed by Petitioner's signature and the stamp, printed name, title, and signature of a prison official authorized to administer oaths, pursuant to 18 U.S.C. § 4004. (Motion at 78.) On the last page of the form motion, in response to a section regarding the timeliness of the motion, Petitioner alleges: "This motion is timely filed as it is within one year on which the judgment of conviction [became] final on February 18, 2014."<sup>2</sup> Petitioner's section 2255 motion was filed with the Court on May 15, 2014. (Motion at 1.)

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<sup>2</sup> The parties do not dispute that the conviction became final on February 19, 2014, because February 18, 2014, was a holiday. (Response at 6 n.3; Reply, ECF No. 147 at 2.)

The Government argues that the petition is untimely under all of the provisions of 28 U.S.C. § 2255(f). (Response at 1.) The Government does not address the “prison mailbox rule,” but rather simply focuses on the May 15, 2014, date on which Petitioner’s section 2255 motion was filed with the Court.<sup>3</sup> (Response at 7.) The Government contends that because the filing of the section 2255 motion occurred after the expiration of the one year period of limitation set forth in 28 U.S.C. §2255(f)(1), the petition was not filed timely. (*Id.*) The Government also maintains that the petition was not filed timely under section 2255(f)(2), (f)(3), or (f)(4). (*Id.*)

Petitioner filed a reply (ECF No. 147) and an affidavit (ECF No. 147-1), in which filings he addressed the timeliness of his petition under sections 2255(f)(1), (f)(2), and (f)(3). Petitioner argues that he filed timely, pursuant to section 2255(f)(1), based on the prison mailbox rule. Petitioner alleges that he placed his section 2255 motion in the prison mailing system on February 4, 2014. In particular, Petitioner asserts that he placed the following into a secure prison mail dropbox: the motion, two copies of the motion, and a cover letter in an envelope addressed to the clerk’s office, with first class postage attached. (Reply at 2; Affidavit at 2.)<sup>4</sup> He alleges that after waiting approximately two months without receiving any acknowledgement from the Court, he asked the clerk’s office about the status of the motion and was told that no such motion had been filed. (Reply at 2; Affidavit at 3.) Petitioner alleges that he then filed an additional copy of the motion. (Reply at 2; Affidavit at 3.)

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<sup>3</sup> The “prison mailbox rule” is set forth in Rule 3(d) of the Rules Governing Section 2255 Proceedings, which states:

A paper filed by an inmate confined in an institution is timely if deposited in the institution’s internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. §1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

<sup>4</sup> Petitioner also alleges that in January 2014, *i.e.*, before he placed his section 2255 motion in the prison mailing system, he requested a withdrawal of funds in anticipation of paying a \$5.00 filing fee. (Reply at 2; Attachment, ECF No. 135-1.) Petitioner was mistaken in that there is no filing fee for a section 2255 motion, but he apparently attaches the request form as evidence that he was preparing to submit the section 2255 motion. (Reply at 2.)

Petitioner also argues that his section 2255 motion is timely under section 2255(f)(2) based on three ongoing governmentally-imposed impediments to his filing a section 2255 motion. First, he contends that the Court never ruled on certain points made in his supplemental sentencing memorandum. (Reply at 9-10; Supplemental Memorandum and Statement, ECF No. 107.) Second, Petitioner maintains that the Government failed to provide him with information regarding the predicate convictions for purposes of his sentencing as a career criminal. (*Id.* at 11.) Third, Petitioner asserts that he has not received discovery material and recordings that were admitted at trial and in a suppression hearing. (*Id.* at 12.) Finally, Petitioner argues that his petition is timely under section 2255(f)(3), based on *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013). (Affidavit, ECF No. 147-1 at 6.)

The Court granted the Government and Petitioner permission to file surreply memoranda. (Orders, ECF Nos. 151, 154.) In its filing, the Government argues that Petitioner’s section 2255 motion is untimely under section 2255(f)(1) for three reasons. (Government’s Surreply, ECF No. 152 at 2-3.) First, the Government argues that because Petitioner omitted the phrase “under penalty of perjury,” in his reply brief or in the affidavit in support of his reply brief, Petitioner’s allegation that he mailed his motion on February 4, 2014, fails to comply with 28 U.S.C. §1746.<sup>5</sup> (*Id.* at 3.)

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<sup>5</sup> Title 28 U.S.C. § 1746 states in relevant part:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

...

(2) If executed within the United States . . . : “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

Second, the Government argues that the prison mailbox rule does not render the motion timely because Petitioner omitted the mailing date from his section 2255 motion. (*Id.*) Third, the Government appears to argue that the prison mailbox rule does not apply because Petitioner did not diligently follow up when, over the course of two months, Petitioner did not receive any acknowledgement from the Court that his motion had been docketed. (*Id.* at 2.)

## II. DISCUSSION

The timeliness of a section 2255 motion is governed by 28 U.S.C. § 2255(f), which provides a one-year period of limitation running from the latest of several dates.

### A. 28 U.S.C. §2255(f)(1)

Under section 2255(f)(1), the period of limitation begins to run from “the date on which the judgment of conviction becomes final.” “Where, as here, Supreme Court review is not sought, ‘a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court’s affirmation of the conviction.’” *Ramos-Martínez v. United States*, 638 F.3d 315, 320-21 (1st Cir. 2011) (quoting *Clay v. United States*, 537 U.S. 522, 525 (2003)). Rule 13 of the Rules of the Supreme Court provides that a petition for a writ of certiorari must be filed within 90 days after the entry of judgment. In this case, because the First Circuit decision was dated November 20, 2012, and the 90th day after the judgment, February 18, 2013, was a holiday, the period of limitation under section 2255(f)(1) began to run on February 19, 2013, and expired on February 19, 2014.

Whether the petition was filed timely turns on the application of the prison mailbox rule. In 1999, the First Circuit held that the prison mailbox rule applies to motions under 28 U.S.C. §§ 2254, 2255. *Morales-Rivera v. United States*, 184 F.3d 109, 109-10 (1st Cir. 1999) (per curiam) (citing *Houston v. Lack*, 487 U.S. 266 (1988) (applying the prison mailbox rule to the filing of a

notice of appeal from the dismissal of a habeas petition)). The prison mailbox rule was subsequently incorporated into the rules governing section 2255 proceedings. See Rules Governing Section 2255 Proceedings 3(d) advisory committee's note, 2004 amendments ("Rule 3(d) is new and provides guidance on determining whether a motion from an inmate is considered to have been filed in a timely fashion").<sup>6</sup>

The First Circuit has not yet addressed the respective burden on the petitioner to demonstrate compliance with the prison mailbox rule, and on the Government to demonstrate noncompliance, when the Government seeks a dismissal based on the timeliness of the motion. The Eleventh Circuit, however, has held:

Absent evidence to the contrary, we assume that a prisoner delivered a filing to prison authorities on the date that he signed it. We have identified prison logs or other records as evidence that could contradict the signing date. The burden is on the Government to prove the motion was delivered to prison authorities on a date other than the date the prisoner signed it.

*Jeffries v. United States*, 748 F.3d 1310, 1314 (11th Cir. 2014) (citations and quotation marks omitted). The Eleventh Circuit thus employs a burden-shifting approach pursuant to which the petitioner has the initial burden to demonstrate that he delivered the petition to prison authorities on the date that he signed petition, and thereafter the burden shifts to the Government to demonstrate that the prisoner delivered the filing on a different date. See *id.* In *United States v. McNeill*, 523 F. App'x 979, 982-83 (4th Cir. 2013) (unpublished), the court found that the petitioner had "satisfied his initial burden of proof," by submitting a declaration under 28 U.S.C. §1976. *Id.* at 983. That submission rendered him eligible for the prison mailbox rule, and the burden then shifted to the Government "to establish that the statute of limitations has run and that the prison mailbox rule does not apply." *Id.* See also *Powell v. Gelb*, 2014 WL 1056982, at \*3,

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<sup>6</sup> The same rule is applicable to state prisoners and is set forth in Rule 3(d) of the Rules Governing Section 2254 Cases. The prison mailbox rule also applies to federal appeals. See Fed. R. App. P. 4(c), 25(a)(2)(C).

2014 U.S. Dist. Lexis 33645, at \*6-7 (D. Mass. Mar. 13, 2014) (denying without prejudice the respondent's motion to dismiss for lack of timeliness after concluding that the petitioner had met his initial burden of compliance with the prison mailbox rule, but the respondent had failed to rebut Petitioner's timeliness claim).

In this case, Petitioner has made a *prima facie* showing that he filed his motion on February 4, 2014, by complying with the prison mailbox rule. Petitioner completed the standard form declaration at the end of the motion with the date of February 4, 2014, the signature of a prison official, and his own signature. The standard form declaration contains all the necessary elements, including the statement that Petitioner signed "under penalty of perjury." (Motion at 78.)<sup>7</sup>

The Government nevertheless challenges the timeliness of the filing. In support of its argument, the Government notes that Petitioner failed to state the date on which he placed the motion in the prison mailing system. The Government's contention that Petitioner did not satisfy his initial burden fails.

The form declaration contains an underlined blank space in which a petitioner is expected to insert the date on which he or she signed the motion, but the declaration does not contain a separate underlined blank space to indicate that a petitioner is expected to insert the date on which he or she placed the motion in the prison mailing system. (*Id.*) Consequently, when a petitioner, as here, inserts the date on which he or she signed the petition, the date may or may not be the date on which the prisoner placed the motion in the prison mailbox system. As the Eleventh Circuit suggested in *Jeffries*, the Government has the burden to present evidence to overcome the presumption that the signature date is also the delivery date. *Jeffries*, 748 F.3d at 1314. The

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<sup>7</sup> Because the declaration includes the necessary elements, the Government's challenge to Petitioner's reply memorandum is of no consequence.

signature date thus is sufficient to satisfy the Petitioner's initial burden to demonstrate compliance with the prison mailbox rule.

The Government's next argument, that the prison mailbox rule does not apply in this case because Petitioner did not diligently follow up when he did not receive an acknowledgement from the Court that his motion had been docketed, has not been addressed by the First Circuit. In *Huizar v. Carey*, 273 F.3d 1220, 1223 (9th Cir. 2001), the Ninth Circuit held: "A prisoner who delivers a document to prison authorities gets the benefit of the prison mailbox rule, so long as he diligently follows up once he has failed to receive a disposition from the court after a reasonable period of time." In *Huizar*, the petitioner submitted his petition, waited two months without a response, wrote to the court, waited another 21 months, sent another copy of the petition, waited another five months, and wrote another letter to the court. *Id.* at 1224. The Ninth Circuit concluded that the petitioner's "steady stream of correspondence, if proven, would show reasonable diligence on his part." *Id.*

In contrast, in *Allen v. Culliver*, 471 F.3d 1196, 1198 (11th Cir. 2006) (per curiam), the Eleventh Circuit held that "[o]nce there has been a finding of fact that a timely notice of appeal was in fact delivered to the proper prison authorities (proper postage prepaid) for mailing to the district court, there is no room, either in *Houston* or in Fed. R. App. P. 4(c), for the operation of a diligence requirement." The Court reversed and remanded the case because the district court assumed that the petitioner had delivered a notice of appeal to prison authorities, but it had not made a factual finding to that effect. *Id.* The Court concluded that on remand, the district court was permitted to consider any lack of diligence in the petitioner's follow-up, but only in order to determine whether the petitioner delivered the notice of appeal to prison authorities. *Id.*

Similarly, the Seventh Circuit has rejected the Ninth Circuit's diligence requirement. *See Ray v. Clements*, 700 F.3d 993, 1012 (7th Cir. 2012). In *Ray*, the petitioner had previously won an appeal from the district court's denial of his section 2254 petition. *See Ray v. Boatwright*, 592 F.3d 793, 798 (7th Cir. 2010) (holding that the petitioner's confrontation clause rights were violated when the state introduced out-of-court statements made by individuals who did not testify at trial, and the error was not harmless). In the prior appeal, the Seventh Circuit remanded the section 2254 matter to permit the Government to develop its timeliness defense. *Id.* at 799. The district court held an evidentiary hearing in which it placed the burden on the petitioner to prove timeliness, found that the petitioner did not timely submit his state post-conviction petition to a prison official for mailing, and dismissed the petition. *Ray*, 700 F.3d at 995. The Seventh Circuit reversed, holding that (1) the federal prison mailbox rule applies under Wisconsin procedural law to state post-conviction petitions delivered for mailing to state court, *id.* at 1004-06; (2) the petitioner has the initial burden to demonstrate compliance with the prison mailbox rule but then the burden shifts to the state, *id.* at 1008, 1011-12; and (3) the district court's finding of untimeliness was clearly erroneous, *id.* at 995.

Regarding the applicability of the prison mailbox rule when the petition was not received by the Court, the Seventh Circuit elaborated:

We recognize the need to identify some limiting principle. Otherwise, as the state correctly points out, a prisoner's purported filing might be "properly filed" or "pending" for years without anyone knowing. To avoid this, we think the petitioner's requisite evidentiary showing should be exacting. The prisoner's sworn declaration should identify the who, what, when, where, how, and why of his alleged delivery to a prison official. And in cases where the purported filing is not received by the court, the petitioner must supply a sworn declaration attesting to these facts *plus* some other corroborating evidence. This "other evidence" can be documentary (for example, copies of the filing, postmarked envelope, or other correspondences). Or, it may be testimonial. But once the pro se prison litigant adduces such evidence, he has done all that is required. The burden then shifts to the state to show untimeliness.

*Id.* at 1011-12.<sup>8</sup>

Here, based on his compliance with the mailbox rule, Petitioner has demonstrated a *prima facie* case that he filed the Petition within the limitation period. That is, the record reflects that Petitioner and a prison official signed the standard 2255 form on February 4, 2014, which was before the limitation period expired on February 19. Even if the Circuit were to adopt a diligence requirement, one cannot and should not determine on this record whether the Petition was filed timely. Instead, because Petitioner has established that he is entitled to the benefit of the mailbox rule, and because the record lacks evidence from which the Court could conclude definitively that Petitioner did not file timely the Petition, the Court should not summarily dismiss the Petition as urged by the Government.

**B. 28 U.S.C. §2255(f)(2), (f)(3)**

Under section 2255(f)(2), the one-year limitation period may run from “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.” Petitioner alleges that three continuing governmentally-imposed impediments to his filing a section 2255 motion exist. First, he argues that the Court never ruled on certain points made in his supplemental sentencing memorandum. (Reply at 9-10;

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<sup>8</sup> See also *In re Williams*, 759 F.3d 66, 69 (D.C. Cir. 2014) (leaving undecided whether the Court agreed with the Ninth Circuit’s recognition of a diligence requirement because the Government conceded that the petitioner had made a *prima facie* showing of timeliness); *Jones v. Heimgartner*, --- F. App’x ---, 2015 WL 873057, 2015 U.S. App. Lexis 3420 (10th Cir. Mar. 3, 2015) (unpublished) (reversing the district court’s dismissal of a section 2254 petition because the district court erroneously required evidence that an earlier section 2254 petition had been filed in court, in addition to compliance with the prison mailbox rule, and remanding for the taking of evidence on the petitioner’s compliance with the prison mailbox rule with respect to the earlier section 2254 petition); *Joseph v. Conway*, 567 F. App’x 56, 59 (2d Cir. 2014) (unpublished) (vacating the district court’s dismissal of a 2254 petition and remanding for the taking of evidence on the petitioner’s compliance with the prison mailbox rule with respect to an earlier *coram nobis* petition, noting that “whether the prison mailbox rule is available when the state court never receives an alleged filing is unanswered in this Circuit”).

Supplemental Memorandum and Statement, ECF No. 107.) Contrary to Petitioner's argument, the Court does not rule specifically on a defendant's sentencing memorandum; rather, the Court takes into account the defendant's statements in determining an appropriate sentence. *See* 18 U.S.C. § 3553(a); Fed. R. Crim. P. 32. The sentencing hearing was held on two days: December 21, 2011, and January 30, 2012. (Sentencing Tr., I, II, ECF Nos. 117, 118.) Petitioner filed his supplemental memorandum on January 27, 2012, and the Court addressed it on the second sentencing hearing date, stating explicitly that the Court had read that document and another submitted by Petitioner on the same date. (Sentencing Tr. II, ECF No. 118 at 2, 26.) The Court took those documents into account in its sentencing of Petitioner and, therefore, the lack of a specific ruling on Petitioner's sentencing memorandum was not an impediment under section 2255(f)(2).

Petitioner's second alleged impediment, for purposes of section 2255(f)(2), is that the Government failed to provide him with information regarding the convictions that served as predicates to his sentencing as a career criminal. (Reply at 11.) The issue of Petitioner's sentencing as a career criminal was addressed and decided in his direct appeal. Petitioner challenged "the sufficiency of the materials submitted to support predicate convictions in Virginia and Florida." *Murdock*, 699 F.3d at 671. The First Circuit did "not find clear error in the district court's determination that the Mr. Murdock before it was the same individual convicted of robbery in Virginia and aggravated assault in Florida." *Id.* at 672. To the extent that Petitioner attempts to challenge a prior conviction in Massachusetts as well, that claim fails for the same reason, to the extent Petitioner is not procedurally defaulted. *See id.* at 671 n.1. *See Barrett v. United States*, 965 F.2d 1184, 1190 n.11 (1st Cir. 1992); *United States v. Figueroa*, 25 F.3d 1037 (1st Cir. 1994) (unpublished) (noting that "issues decided on direct appeal will not be reviewed again by way of § 2255 motion").

Petitioner's third alleged impediment is related to a *Brady* claim that the Government failed to disclose discovery material and recordings that were the subject of testimony at trial and in a suppression hearing.<sup>9</sup> (*Id.* at 12.) Specifically, Petitioner points to an alleged audio recording of an officer's account of a conversation that he had with Petitioner. (Affidavit, ECF No. 147-1 at 5.) Petitioner notes a discrepancy between the transcript of the officer's recorded account and the Petitioner's memory of the conversation, and maintains that Petitioner requested, but did not receive, the audio recording. (*Id.* at 5-6.) Petitioner alleges that unspecified discrepancies between the audio recording and the trial and suppression testimony would have provided grounds for impeachment. (*Id.* at 6.)

“To progress to an evidentiary hearing, a habeas petitioner must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings.” *David v. United States*, 134 F.3d 470, 478 (1st Cir. 1998). Petitioner's claim fails, in part because he fails to specify the nature of the discrepancies and how, if counsel had known about them, the discrepancies would have led to a different result. *See United States v. Alverio-Meléndez*, 640 F.3d 412, 424 (1st Cir. 2011) (holding that to establish a *Brady* violation, a defendant must show prejudice). Furthermore, and more fundamentally, the Court's suppression ruling was one of the issues raised and decided on appeal. *Murdock*, 699 F.3d at 667-70. Counsel argued before this Court that the Government failed to reveal certain details about a conversation between officers and Petitioner. (Reply in Support of Motion to Suppress, ECF No. 35 at 1.) Counsel also cross-

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<sup>9</sup> The Supreme Court held in *Brady v. Maryland*, 373 U.S. 83 (1963), that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. The First Circuit has held that “[t]o establish a *Brady* violation, ‘a defendant must make three showings. The evidence at issue (whether exculpatory or impeaching) must be favorable to the accused; that evidence must have been either willfully or inadvertently suppressed by the government; and prejudice must have ensued.’” *United States v. Alverio-Meléndez*, 640 F.3d 412, 424 (1st Cir. 2011) (quoting *United States v. Mathur*, 624 F.3d 498, 503 (1st Cir. 2010)) (quotation marks omitted).

examined the officer to which Petitioner refers in Petitioner's affidavit. Significantly, the First Circuit relied in part on the testimony at the suppression hearing in determining that the district court did not err. (Suppression Hearing Tr., ECF No. 46 at 48, 75.) *Murdock*, 699 F.3d at 668-69. Petitioner is not permitted to revisit issues that were decided in the direct appeal. *See Barrett*, 965 F.2d at 1190; *Figueroa*, 25 F.3d 1037.

Finally, Petitioner argues that his petition is timely under section 2255(f)(3), based on *Descamps* and *Alleyne*. (Affidavit, ECF No. 147-1 at 6.) Neither case is applicable to Petitioner's section 2255 motion. At Petitioner's sentencing, the Court found, based on certified records, that the robbery conviction in Virginia, the conviction of assault and battery with a dangerous weapon in Massachusetts, and the conviction of aggravated assault in Florida, all qualified categorically as "violent felonies" for purposes of sentencing enhancement under the Armed Career Criminal Act (ACCA). (Sentencing Tr. I, ECF No. 117 at 49-51.) "Under the categorical approach, an offense constitutes a crime of violence 'only if its elements are such that we can conclude that a person convicted of the offense has necessarily been found guilty of conduct that meets the [§4B1.2(a)] definition.'" *United States v. Ramos-González*, 775 F.3d 483, 504 (1st Cir. 2015) (quoting *United States v. Martinez*, 762 F.3d 127, 133 (1st Cir. 2014)) (quotation marks omitted). Because Petitioner's predicate felonies qualified under the "categorical approach," *Descamps*, by its terms, does not apply. *Descamps*, 133 S.Ct. at 2281.<sup>10</sup> In addition, although the First Circuit has not yet

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<sup>10</sup> In *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013), the Supreme Court noted that under the "categorical approach," courts "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood. The prior conviction qualifies as an [Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)] predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." The Supreme Court also identified a "modified categorical approach" that applies in determining whether a "divisible" statute, *i.e.*, a statute that "sets out one or more elements of the offense in the alternative," where one alternative matches an element in the generic offense at issue, but the other alternative does not. 133 S. Ct. at 2281. Under the modified categorical approach, the sentencing court may consult a limited number of additional documents, "such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Id.* In *Descamps*, the Supreme Court held "that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements" and the statute at issue "criminalizes a broader swath of conduct than the relevant generic offense." *Id.*

ruled on whether the Supreme Court, in *Descamps*, had newly recognized a constitutional right, as required for the application of 28 U.S.C. § 2255(f)(3), other circuits have held that the Supreme Court had not done so.<sup>11</sup>

In *Allyene*, the Supreme Court held that “facts that increase mandatory minimum sentences must be submitted to the jury.” 133 S. Ct. at 2163. However, as the First Circuit has noted, in *Alleyne*, the Supreme Court recognized that “a defendant’s prior convictions need not be submitted to the jury even where those convictions form the basis for an increased sentence.” *United States v. Paladin*, 748 F.3d 438, 451 (1st Cir. 2014) (citing *Alleyne*, 133 S. Ct. at 2160 n.1). Thus, *Alleyne* is not applicable to Petitioner’s case and does not render his motion timely under 28 U.S.C. section 2255(f)(3). Petitioner’s argument also fails because the First Circuit has held that “the rule announced in *Alleyne* is not retroactively applicable to sentences on collateral review on an initial habeas petition.” *Butterworth v. United States*, 775 F.3d 459, 468 (1st Cir. 2015).

### III. CONCLUSION

Based on the foregoing analysis, the recommendation is that the Court conclude that Petitioner’s motion was not filed timely under 28 U.S.C. § 2255(f)(2), (f)(3), and (f)(4), but that Petitioner has established a *prima facie* case that he timely filed the motion in accordance with

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at 2281-82. Because the Court determined that Petitioner’s predicate crimes qualified as violent felonies using a categorical approach, *Descamps* is not applicable.

<sup>11</sup> See *United States v. Hopson*, 589 F. App’x 417 (10th Cir. 2015) (unpublished) (holding that *Descamps* “did not recognize a new right, but rather applied existing doctrine,” for purposes of applying 28 U.S.C. § 2255(f)(3)); see also *Ezell v. United States*, 778 F.3d 762, 766 (9th Cir. 2015) (holding that *Descamps* did not announce a new rule of constitutional law, but rather involved statutory interpretation, for purposes of 28 U.S.C. §2255(h)(2)); *In re Jackson*, 776 F.3d 292, 296 (5th Cir. 2015) (per curiam) (“Nothing in *Descamps* indicates that its holding announced a new rule that was constitutionally based, and *Descamps* did not announce that its holding applied retroactively to cases on collateral review,” for purposes of section 2255(h)(2)). Title 28 U.S.C. § 2255(h)(2) provides that a petitioner may not pursue a second or successive section 2255 motion based on new law unless the appropriate court of appeals first certifies that the motion is based on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”

section 2255(f)(1). The recommendation, therefore, is that the Court deny the Government's request for dismissal.<sup>12</sup>

### 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 fourteen (14) days of being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) 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.

/s/ John C. Nivison  
U.S. Magistrate Judge

Dated this 6<sup>th</sup> day of May, 2015.

Case title: USA v. MURDOCK

Related Case: [2:14-cv-00205-DBH](#)

Magistrate judge case number: 2:10-mj-00200-JHR

Date Filed: 02/01/2011

Date Terminated: 01/30/2012

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Assigned to: JUDGE D. BROCK  
HORNBY

#### **Defendant (1)**

**ERIC MURDOCK**

*TERMINATED: 01/30/2012*

represented by **ERIC MURDOCK**

#93684-038

FCI ALLENWOOD MEDIUM

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<sup>12</sup> If the Court adopts the recommendation, the Court could schedule an evidentiary hearing in an effort to resolve the timeliness issue. In the interests of judicial economy, however, I recommend that the Court first determine whether the Government intends to seek summary dismissal based on the merits of Petitioner's claims. The Government did not address the merits of the motion in its response. In its filing, the Government wrote: "As a result of the timeliness bar, the Government will not address the substantive issues the petition raises unless the Court directs it to do so." (Response, ECF No. 144 at 1. I recommend that the Court establish a deadline by which the Government must file a request for summary dismissal if it intends to seek summary dismissal. If the Government files a request for summary dismissal, and if the Court determines that an evidentiary hearing on the merits is not warranted, the timeliness issue would undoubtedly be moot. If the Government does not seek summary dismissal on the merits, or if the Court otherwise concludes that an evidentiary hearing on the merits is warranted, the Court could conduct a consolidated evidentiary hearing on the merits and the timeliness issue.

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