

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	<b>Criminal No. 94-63-P-H</b>
	)	<b>(Civil No. 97-106-P-H)</b>
<b>ALLEN J. ADAMS,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO REINSTATE**

The defendant, who was convicted on a guilty plea of conspiracy to hinder others in the free exercise of federally secured rights, a violation of 18 U.S.C. § 241, and two counts of racially motivated interference with the use of a public accommodation, in violation of 18 U.S.C. § 245, moves to reinstate proceedings initiated on April 1, 1997 by his filing of a petition pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence (Docket No. 39). He avers that the government’s opposition to that petition, which was filed in this court on April 29, 1997 (Docket No. 41), and my recommended decision on that petition, issued on May 15, 1997 (Docket No. 42), were “never served” on him. Petitioner’s Motion to Reinstate Proceedings (“Motion”) (Docket No. 45) at [1]. The instant motion was filed on September 13, 2000.

In his unsworn motion, the defendant admits that he received a copy of the court’s order dated June 4, 1997 adopting the recommended decision and denying his section 2255 motion (Docket No. 43), but states that “no appeal was taken inasmuch as there was no opinion from which petitioner could formulate a meaningful appeal.” Motion at [1]. He contends that these allegations demonstrate

“good cause” to allow reinstatement of the section 2255 proceedings at this time. *Id.* at 3 [sic]. I disagree, and recommend that the court deny the motion.

The government suggests that this motion should be treated as one brought pursuant to Fed. R. Civ. P. 60(b), citing *United States v. Johnson*, 934 F. Supp. 383, 384-85 (D.Kan. 1996). Rule 60(b) provides:

On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

The Rules Governing Section 2255 Proceedings for the United States District Courts do not provide any guidance for the situation presented by the defendant’s motion. However, Rule 12 of those rules allows this court to apply the Federal Rules of Civil Procedure to motions filed in section 2255 cases, where appropriate. For the reasons set forth by the *Johnson* court, I find Fed. R. Civ. P. 60(b) to be appropriate here. 934 F.Supp. at 384-85. *See also Rogers v. United States*, 180 F.3d 349, 352 n.3 (1st Cir. 1999) (observing, but not deciding, that Rule 60 may apply to section 2255 proceedings).

The defendant’s brief motion cannot be read to invoke any of the first five alternatives set forth in Rule 60(b) and in any event is brought more than a year after the entry of judgment on his section 2255 application, making the first three alternatives unavailable. In addition, since records available to the court show that copies of the government’s opposition was mailed to the defendant, no misconduct is at issue.

The defendant offers no explanation for the three-year lapse between the entry of judgment on his application and the filing of the instant motion. Under the circumstances, I conclude that the motion was not made within a reasonable time and should be denied for that reason alone. *See* 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2866 at 382-83 & n.7 (2d ed. 1995).

It is clear that the defendant, having received notice of the entry of judgment against him (and, for all that appears, that he received such notice promptly after the entry), may not now proceed with an appeal. *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000) (disallowing notice of appeal filed by prisoner two weeks after first receiving notice of dismissal of his *pro se* action seven months after entry of judgment, due to transfer to another prison facility). Indeed, the defendant's suggestion that he could not file a notice of appeal after receiving notice of the entry of judgment on his section 2255 application because he could not formulate a meaningful appeal in the absence of the recommended decision rings decidedly hollow, even without consideration of the intervening three years. The appropriate action for him to have taken at that time was the filing of a notice of appeal along with a request for the missing documents and an affidavit setting forth the alleged lack of service. That course of action was certainly available to the defendant at the time. He cannot sleep on his rights for three years and then seek reinstatement of his claim on the mere conclusory assertion that his failure to receive the government's opposition and the recommended decision, neither of which triggered the entry of judgment, constitutes good cause for such relief.

Even if the defendant's motion had been timely, "as a precondition to relief under Rule 60(b), [the moving party] must give the trial court reason to believe that vacating the judgment will not be an empty exercise." *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Trans. Co.*, 953 F.2d 17, 20 (1st Cir. 1992). The defendant's motion makes no attempt to argue that the recommended decision issued May 15, 1997 was in error or that the outcome, if this

motion were granted, would be any different on the merits. Having reviewed the original application and my recommended decision, I am convinced that the outcome would be the same. Accordingly, I conclude that this matter should not be reopened.

For the foregoing reasons, I recommend that the defendant's motion to reinstate 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.*

Date this 27th day of November, 2000.

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David M. Cohen  
United States Magistrate Judge

