

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<i>v.</i>	)	<b>Criminal No. 89-66-P-C</b>
	)	<b>(Civil No. 98-247-P-C)</b>
<b>DARRELL S. PALMER,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR  
COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255 AND  
APPLICATION FOR LEAVE TO FILE LATE NOTICE OF APPEAL**

The defendant has filed a Petition Under 28 USC § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (“Petition”) (Docket No. 37) and an Application for Leave to File a Motion Pursuant to § 2255 (“Application”) (Docket No. 38), which essentially seeks leave to file an untimely notice of appeal of his sentence. Application at 5. I recommend that the court deny both motions.

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) (citation and internal quotation marks omitted). In this instance, I find that the allegations, accepted as true, would not entitle the defendant to relief and accordingly recommend that the motion be denied without an evidentiary hearing. Finding that the court is without

jurisdiction to grant the relief sought in the application outside the process established by section 2255, I also recommend that the application be denied.

### **I. Factual and Procedural Background**

On April 30, 1990 the defendant pleaded guilty to charges of conspiracy to distribute and possess with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) and 846, and making and subscribing to a false United States individual income tax return for calendar year 1985, in violation of 26 U.S.C. § 7206(1). Docket at [1]; Master Docket at [3]. On November 19, 1990 he was sentenced to a term of 168 months imprisonment on the first charge and three years on the second charge, to be served concurrently. Docket at [2]. No notice of appeal from the sentence was filed.

The defendant acknowledges that the court explained to him during sentencing that he had a right to appeal his sentence. Application at 2. He swears that he requested his trial counsel to file an appeal and that his counsel refused to do so. Petition at 6. He requests in his unsworn application that he be allowed to file a notice of appeal, some seven and one-half years after sentence was imposed, due to his attorney's failure to file the requested notice of appeal, of which he was informed on December 7, 1990, Application at 2, and due to his intervening mental illness, *id.* at 3; Petition at 6(a). He asserts that he is entitled to "a degree of latitude" as a pro se litigant, Application at 1, citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

### **II. Discussion**

In the First Circuit, a criminal defendant deprived of his right to appeal as the result of his

counsel's dereliction is entitled to have his appellate rights restored without making any showing as to the merits of the issues he would appeal. *Bonneau v. United States*, 961 F.2d 17, 23 (1st Cir. 1992); *see also Scarpa v. Dubois*, 38 F.3d 1, 13 n.7 (1st Cir. 1994). However, that relief is available pursuant to section 2255. *Bonneau*, 961 F.2d at 23; *Rodriquez v. United States*, 395 U.S. 327, 328-29 (1969). The First Circuit decided *Bonneau* and *Scarpa* before the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") took effect. Among other things, the AEDPA added a one-year statute of limitations to section 2255. The relevant section of section 2255 now provides:

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.

Here, the defendant's judgment of conviction became final on November 29, 1990, when the ten days provided by Fed. R. App. P. 4(b) for filing an appeal after entry of judgment expired. Docket at [5]; *Robinson v. United States*, 345 F.2d 1006, 1007 (10th Cir. 1965). He makes no factual assertion that would invoke subsections 2 and 3 of the relevant section of section 2255. The fact that

an appeal had not been filed was apparent to him within a few days after the 10-day deadline for an appeal of his sentence had passed. Therefore, he cannot invoke subsection 4. Any claims raised in the defendant's petition pursuant to section 2255 are thus time-barred, and the motion must be denied.

The defendant has apparently brought the separate motion for leave to file a late notice of appeal in hopes of avoiding the statute of limitations bar under section 2255. However, the courts cannot provide the relief sought by the defendant through means other than section 2255. *See, e.g., Martin v. United States*, 81 F.3d 1083, 1084 (11th Cir. 1996) (after dismissal of untimely appeal, defendant requested permission to file untimely appeal pursuant to § 2255); *United States v. Nagib*, 56 F.3d 798, 800 (7th Cir. 1995) (after untimely appeal dismissed on jurisdictional grounds, defendant allowed to file appeal through section 2255 motion). *See also United States v. Robinson*, 361 U.S. 220, 224 (1960) (court may not enlarge period for taking appeal provided by criminal rules); *United States v. Zuleta-Molina*, 840 F.2d 157, 158 (1st Cir. 1988) (requirement of timely filing of appeal of sentence is jurisdictional).<sup>1</sup>

### III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without a hearing and that his application for leave to file an untimely notice of appeal (identified by the defendant as an application for leave to file a motion pursuant to 28 U.S.C. § 2255) also be **DENIED**.

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<sup>1</sup> The defendant's request that the court hold him to "less stringent standards" because he appears pro se, citing *Haines*, 404 U.S. at 520, does not affect the outcome here because it is "beyond doubt that [he] can prove no set of facts in support of his claim which would entitle him to relief," *id.* at 521, in view of the section 2255 statute of limitations and the jurisdictional effect of his failure to file a timely notice of appeal.

**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 18th day of September, 1998.*

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*David M. Cohen  
United States Magistrate Judge*