

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,           :  
  :  
                  Plaintiff,            :  
  :  
  :  
                  v.                     :  
  :  
  :  
  :  
AMIT MENAHEM,                       :  
  :  
  :  
                  Defendant.           :  
  :

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Amit Menahem, Pro Se Defendant.

Edmond Falgowski, Esquire, Assistant United States Attorney, of  
THE OFFICE OF THE UNITED STATES ATTORNEY, Wilmington, Delaware.  
Attorney for Plaintiff.

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**MEMORANDUM OPINION**

April 10, 2001

Wilmington, Delaware

**Farnan, District Judge.**

Pending before the Court is a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (D.I. 63) filed by Defendant, Amit Menahem, and a Motion To Dismiss (D.I. 68) filed by Plaintiff, the United States of America (the "Government"). For the reasons set forth below, Defendant's Section 2255 Motion will be denied, and the Government's Motion To Dismiss will be granted.

**BACKGROUND**

On April 28, 1995, Defendant pled guilty to Count I of a federal indictment, charging conspiracy to possess and utter counterfeit American Express Travelers Checks. The Court sentenced Defendant on September 7, 1995, to three years probation, restitution in the amount of \$2,209.50, and a special assessment of \$50. In March 1998, Defendant filed the instant Motion To Vacate, Set Aside Or Correct Sentence Under 28 U.S.C. § 2255.

By his Motion, Defendant contends that his guilty plea was not voluntary and his counsel was ineffective because he coerced him into pleading guilty without raising evidence of his innocence. In response to the Motion, the Government filed a Motion To Dismiss based upon the AEDPA's statute of limitations. To date, Defendant has failed to file any response to the Government's Motion. Accordingly, the Court will proceed to the

merits of the pending Motions.

#### DISCUSSION

By its Motion To Dismiss, the Government contends that Defendant's Section 2255 Motion is time barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Effective April 24, 1996, the AEDPA amended 28 U.S.C. § 2255 to impose a one year limitations period on the filing of Section 2255 motions. In pertinent part, Section 2255 provides that the statute of limitations begins to run from the latest of:

- (1) the date on which the judgment 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;
- (3) the date on which the right asserted was initially 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.

Applying the Section 2255 limitations period, the Court of Appeals for the Third Circuit concluded that, if a prisoner's conviction became final prior to the enactment of the AEDPA, a court may not dismiss as untimely a Section 2255 Motion filed on or before April 24, 1997. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). Essentially, this rule gave prisoners whose convictions became final prior to the enactment of the AEDPA,

"one full year with notice" to file their Section 2255 motions. Id. at 112. Motions filed after the one-year grace period; however, are subject to dismissal for failure to adhere to the new timing limitations imposed by the AEDPA. United States v. McNair, 1999 WL 281308, \*1 (E.D. Pa. May 3, 1999). As the Third Circuit recognized in United States v. Duffus, "the effect of [the rule enunciated in] Burns v. Morton was to make . . . all other convictions in this circuit otherwise final before the effective date of the AEDPA, April 24, 1996, final on that day for purposes of calculating the one year limitations period." 174 F.3d 333, 335 (3d Cir. 1999).

In this case, Defendant pled guilty on April 28, 1995 and was sentenced on September 7, 1995. Defendant's judgment of conviction and sentencing was filed on September 8, 1995. Pursuant to Federal Rule of Appellate Procedure 4(b), Defendant had 10 days from the judgment of conviction and sentencing to file a direct appeal to the Court of Appeals for the Third Circuit. See McNair, 1999 WL 281308 at \*2; United States v. Concepcion, 1999 WL 225865 (E.D. Pa. Apr. 19, 1999) (applying Rule 4(b) from date judgment of conviction and sentence was entered). Thus, Defendant was required to file his direct appeal by September 18, 1995. Because Defendant failed to file a timely notice of appeal, his judgment of conviction became final on September 18, 1995. Id. (citing Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999)). Because Defendant's conviction

became final before the effective date of the AEDPA, Defendant had until April 24, 1997 to file a Section 2255 motion. Burns, 134 F.3d at 112.

With regard to pro se prisoner filings, this Court has treated the date on the motion or petition as the date of filing. See e.g. Fennell v. Snyder, Civ. Act. No. 99-289-SLR, order at 4(D. Del. Feb. 8, 2000) (citing Murphy v. Snyder, Civ. Act. No. 98-415-JJF at 4 (D. Del. Mar. 8, 1999)). In this case, Defendant's Motion is dated March 26, 1998. Because the Motion is deemed filed approximately eleven months after the April 24, 1997 filing deadline, the Court concludes that Defendant's Motion is time barred, unless the statute of limitations has been tolled. See Aristy v. United States, 2000 WL 988061, \*2 (recognizing that statute of limitations may be equitably tolled); Concepcion, 1999 WL 225865 at \*3 (same).

In this case, Defendant has not offered any evidence suggesting that the statute of limitations should be tolled. Accordingly, the Court concludes that Defendant's Motion is time barred under the AEDPA, and therefore, Defendant's Section 2255 Motion will be denied and the Government's Motion To Dismiss will be granted.

#### **CONCLUSION**

For the reasons discussed, the Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In

Federal Custody filed by Defendant, Amit Menahem, will be denied, and the Motion To Dismiss filed by Plaintiff, the United States of America, will be granted.

An appropriate Order will be entered.