

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. : Criminal Action No. 99-014-4-JJF
 :
 : Civil Action No. 01-239-JJF
 LEROY TURNER, JR., :
 :
 Defendant. :

Colm F. Connolly, Esquire, United States Attorney, Beth Moskow Schnoll, Esquire, Assistant United States Attorney of the UNITED STATES DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for Plaintiff.

Leroy Turner, Jr., Pro Se Defendant.

MEMORANDUM OPINION

November 13, 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. 105) filed by Defendant, Leroy Turner, Jr. For the reasons set forth below, Defendant's Section 2255 Motion will be denied.

BACKGROUND

On July 7, 1999, Defendant pled guilty to conspiracy to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846. The Court sentenced Defendant to 188 months imprisonment. The Judgment Of Conviction against Defendant was entered on the Court's docket on July 8, 1999.

On July 20, 1999, Defendant filed a notice of appeal. By Order dated May 30, 2000, the Court of Appeals dismissed Defendant's appeal as untimely, because Defendant did not file his notice of appeal within ten days as required by Federal Rule of Appellate Procedure 4(b).

Thereafter, Defendant filed the instant Section 2255 Motion. By his Motion, Defendant raises three claims. Specifically, Defendant contends that (1) his counsel was ineffective; (2) the indictment against him was unconstitutional; and (3) he is entitled to an evidentiary hearing. (D.I. 105 at 5).

The Government has filed a response to Defendant's Section 2255 Motion alleging that the Motion is time-barred under the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2255. Accordingly, the instant Section 2255 Motion is ripe for the Court's review.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), effective April 24, 1996, 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.

In this case, Defendant was sentenced on July 7, 1999, and the Judgement Of Conviction against Defendant was entered

on the Court's docket on July 8, 1999. Pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A)(i), Defendant was required to file a notice of appeal within ten (10) days after entry of the Court's judgment on the docket. See Fed. R. App. P. 4(b)(6) ("A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket."). In this case, however, Defendant's appeal was not timely filed.

"If a defendant does not pursue a timely direct appeal to the court of appeals, his or her conviction and sentence become final, and the statute of limitations begins to run, on the date on which the time for filing such an appeal expired." Kapral v. United States, 166 F.2d 565, 577 (3d Cir. 1999) (emphasis added). Thus, in this case, Defendant's conviction became final on July 18, 1999. See Fed. R. App. P. 26(a)(2) (excluding intermediate Saturdays, Sundays, and legal holidays when computing time periods less than 7 days).

Applying the one year statute of limitations, Defendant was required to file his Section 2255 Motion no later than July 17, 2000. However, in this case, Defendant's Motion is deemed filed on April 4, 2001, more than eight months after

the expiration of the statute of limitations.¹ Further, 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. See United States v. Foreman, 2001 WL 652239. *1 (D. Del. Feb. 15, 2001) (Robinson, J.) (dismissing a § 2255 motion filed by a defendant, who had filed an untimely direct appeal of his conviction and who had filed his § 2255 motion more than one year after his conviction became final).

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, Leroy Turner, Jr., will be denied.

An appropriate Order will be entered.

¹ Absent proof of mailing, the date on Defendant's motion is deemed the filing date. Johnson v. Brewington-Carr, Civ. Act. No. 99-181- JJJ, mem. op. at 4 (D.Del. Feb. 22, 2000).

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 LEROY TURNER, JR., :
 :
 Defendant. :

O R D E R

At Wilmington, this 13 day of November 2001, for the
reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that:

1. Defendant's Motion Under 28 U.S.C. § 2255 To Vacate,
Set Aside, Or Correct Sentence By A Person In Federal Custody
(D.I. 105) is DENIED.

2. Because the Court finds that Defendant has failed to
make "a substantial showing of the denial of a constitutional
right" under 28 U.S.C. § 2253(c)(2), a certificate of
appealability is DENIED.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE