

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHRISTOPHER W. CLEMONS,)
aka DOEBOY,)
)
Petitioner,)
)
v.) Civil Action No. 03-319-KAJ
) Crim. Action No. 99-82-KAJ
)
UNITED STATES OF)
AMERICA,)
)
Respondent.)

M E M O R A N D U M O R D E R

I. INTRODUCTION

Petitioner Clemons is presently incarcerated at FCI Allenwood in White Deer, Pennsylvania. He has filed with the Court a Motion to Vacate, Set Aside or Vacate his sentence pursuant to 28 U.S.C. § 2255. (D.I. 65.) The Government timely filed an Answer, (D.I. 63.), and Clemons filed a "Traverse"¹. (D.I. 65.) Presently before the Court is the Government's Motion

¹"Traverse" is the common-law pleading name for a formal denial of the factual allegations in an opposing parties' pleading. (Black's Law Dict., 7th ed. at 1506.) In habeas corpus pleadings, the terminology of "petition," "return," and "traverse," has historically been used to designate, respectively, the petitioners opening submission seeking relief, the government's answer, and the petitioner's reply. Cf. 28 U.S.C. § 2248 ("The allegations of a return to the writ..., if not traversed, shall be accepted as true...") That terminology regularly finds it way into 2255 cases as well. A change in terminology is imminent with an expected effective date of December 1, 2004 for new Rule 5 of the Rules Governing Section 2254 cases.

for Leave to file an Amended Answer in response to Clemons' Traverse, (D.I. 66.), the Government's Motion to Expand the Record Under Rule 7 of the Rules Governing Section 2255 Motions, (D.I. 70.), and Clemons' Response and Memorandum in Opposition to the Governments' Motions. (D.I. 71; D.I. 72.)

II. DISCUSSION

A. Government's Motion for Leave to File an Amended Answer

It is well-settled that Federal Rule of Civil Procedure 15(a) applies to amendments of § 2255 motions. *Riley v. Taylor*, 62 F.3d 86, 89-90 (3d Cir. 1995); *U.S. v. Duffus*, 174 F.3d 333, 336-37 (3d Cir. 1999). Rule 15(a) permits a court to grant a party leave to amend his or her answer when justice so requires. Fed. R. Civ. P. 15(a). A court may deny a motion to amend an answer if it finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowing the amendment or futility of amendment." *Duffus*, 174 F.3d at 337 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Here, Clemons filed his § 2255 motion on March 24, 2003, (D.I. 55.), and the Government timely filed its Answer on May 16, 2003. (D.I. 63.) However, on June 19, 2003, Clemons then filed his Traverse, which served, at least in part, as an amendment to his petition and raised a new allegation that the

"prosecution was vindictive in filing the second indictment which exposed the defendant to harsher penalties." (D.I. 65 at 13.)

The Government requests leave to amend its Answer to address this allegation. Clemons does not oppose this amendment, provided he is given an opportunity to file an amended response to the Government's Amended Answer. (D.I. 71 at 2.)

Although I will not grant Clemons' leave to file an amended response to the Government's amended Answer, (See *infra* at ¶ C.), I will grant the Government's Motion to Amend. Clemons added a new claim in his amended pleading and the Government's Amended Answer merely responds to that new claim. Consequently, I find no evidence of bad faith from the Government, and granting leave to amend will not prejudice Clemons.

Further, included in the Government's Amended Answer is a response to a claim originally raised by Clemons in his § 2255 motion, namely, that his counsel was ineffective for failing to have the indictment dismissed under the speedy indictment requirement contained in the Speedy Trial Act. (D.I. 69 at 19; D.I. 65 at 13.) In its original Answer, the Government responded to this claim on statute of limitations grounds under 18 U.S.C. § 3288, not on the speedy indictment grounds. The Government's Motion to Amend does not address its failure to discuss the 30-day speedy indictment requirement in its original Answer. Clemons regards the Government's new speedy indictment argument

as an affirmative defense, and asks the Court to deny this defense as waived. (D.I. 71 at 2,3; D.I. 72.) Specifically, Clemons argues that any affirmative defenses not raised in the respondent's answer are waived. *Id.*, citing *Lutz v. Brennan*, 67 Fed. Appx. 151 (3d Cir. June 16, 2000) (non-precedential).

As an initial matter, the speedy indictment rule is not an affirmative defense for the Government. Nevertheless, even if it were, Clemons misconstrues the waiver doctrine contained in *Lutz*. Pursuant to *Lutz*, any affirmative defenses not raised in the answer must be "raised at the earliest practicable moment thereafter." *Id.* at **3 (citing *Robinson v. Johnson*, 313 F.3d 128, 137 (3d Cir. 2002)). Here, because the Government raised its speedy indictment argument at the same time it responded to Clemons' new claim, I find that the Government did raise it at the earliest practicable moment. Moreover, there is no indication of bad faith on the part of the Government, or prejudice to Clemons. Thus, I will also grant the amendment with respect to this argument.

B. Government's Motion to Expand the Record

The Government has filed a Motion to Expand the Record Pursuant to Rule 7 of the Rules Governing Section 2255 Proceedings, 28 U.S.C. foll. § 2255. Specifically, the Government seeks to expand the record with a copy of Clemons' "Motion to Withdraw Waiver of Indictment and Guilty Pleas" for a

related criminal proceeding, *U.S. v. Doe Boy*, Cr. A. No. 980109-RRM, as well as a copy of this Court's Order with respect to that Motion. (D.I.70, Exh. 1.)

Pursuant to Rule 7 of the Rules Governing Section 2255, a court may direct the record to be expanded to include additional materials relevant to the determination of the § 2255 motion. The materials that may be added included documents and exhibits, provided that these materials are submitted to the opposing party. *Id.* Here, I find that both the Motion and the Order are relevant for determining the merits of Clemons' claim that his counsel provided ineffective assistance by not moving to dismiss the indictment on speedy indictment or limitation grounds. Moreover, these exhibits directly relate to the Government's Amended Answer. Thus, I will grant the Government's Motion to Expand the Record with these documents. (D.I. 70.)

C. Clemons' "Motion in Response to the Government's Motion" and his "Memorandum in Support [of his Motion]"

Clemons has filed a document titled "Defendant's Motion in Response to the Government's Motion to Expand the Record Under Rule 7 of the Rules Governing Section 2255" whereby he asks the Court to grant the motion in part and deny it in part.² (D.I. 71.) Specifically, he states: (1) he does not oppose the Government's Motion to Amend its Answer with respect to the

²Because the document is titled as a "motion," I will treat it as such, despite the fact that is docketed as a "response."

vindictive prosecution claim, provided that he can file an amended traverse in response; (2) he asks the Court to deny the motion to amend the answer with respect to the Government's argument regarding the speedy indictment on the basis of waiver; and (3) he asks the Court to deny the motion to expand the record with the two exhibits "in the interest of fairness." (D.I. 71.) He has also filed a Memorandum supporting his argument for denying the Government's motion to amend with respect to the speedy indictment claim. (D.I. 72.) As explained above, I have decided to grant the Government's motion to amend and its motion to expand the record. I therefore will not discuss these matters further.

However, I will briefly address Clemons' request to file an amended traverse in response to the Government's Amended Answer. (D.I. 71.) Section 2255 and the Rules Governing Section 2255 Proceedings do not contemplate the filing of a traverse by the movant in response to the Government's answer, except in special circumstances. In this case, I find that the numerous filings by both parties clearly present the issues and the issues are capable of resolution on the record currently before me. As such, I conclude that an amended traverse by Clemons is not warranted. *See, e.g., United States V. Sanchez*, 2002 WL 465297 (E.D. Pa. Mar. 21, 2002) (denying petitioner's request for leave to file a traverse where issues were straightforward and capable

of being resolved on the record before the court). Thus, I deny Clemons' Motion to File an Amended Traverse. (D.I. 71.)

Included within Clemons' Memorandum to support his waiver argument is his request that the Court consider the case *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) when reviewing his 2255 motion. (D.I. 72.) I will grant this request.

In short, I will consider the Government's Appendix, (D.I. 67.), the Government's Amended Answer, (D.I. 68.), the Government's Red-Lined version of the Amended Answer, (D.I. 69.), and the case *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) when I review Petitioner Clemons' § 2255 Motion to Vacate, Set Aside, or Correct the Sentence.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. The Government's Motion to for Leave to File Amended Answer is GRANTED. (D.I. 66.) The Government's Amended Answer (D.I. 68.), its Appendix, (D.I. 67.), and the red-lined version of the Government's Amended Answer, (D.I. 69.), are considered filed with the Court.

2. The Government's Motion to Expand the Record Under Rule 7 of the Rules Governing Section 2255 Proceedings is GRANTED. (D.I. 70.) The record now includes Clemons' "Motion to Withdraw Waiver of Indictment and Guilty Pleas," and this Court's "Order"

dated January 4, 2000, which are included as Exhibit 1 to Docket Item 70.

3. Clemons' Motion to Deny in Part and Grant in Part the Government's Motions is DENIED. (D.I. 71.)

4. Clemons' request that the Court consider *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) when it reviews his § 2255 motion is GRANTED.

Dated: September 10, 2004

Kent A. Jordan
UNITED STATES DISTRICT JUDGE