

UNITED STATE DISTRICT COURT

DISTRICT OF CONNECTICUT

DARYL HENRY :  
 :  
v. : CIV. NO. 3:00CV666(AHN)  
 : CRIM. NO. 3:94cr215(AHN)  
UNITED STATES OF AMERICA :

RULING ON PETITIONER'S MOTION TO VACATE, SET ASIDE OR CORRECT  
SENTENCE

The petitioner, Daryl Henry ("Petitioner"), has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The Petitioner has also filed a motion for leave to amend his § 2255 motion. For the following reasons, both of the Petitioner's motions [docs. # 43 and # 47] are DENIED.

BACKGROUND

On the morning of June 1, 1994, the Petitioner entered the Connecticut Branch of the New Haven Savings Bank in New Haven, Connecticut. He vaulted over the teller's counter and ordered the tellers to move back. The Petitioner collected \$1,434 in cash and fled the bank. He wore a bandana over his face but did not display a weapon or specifically threaten to harm the customers or the tellers in the bank. On February 5, 1995, the Petitioner pled guilty to bank robbery by means of force and violence and by intimidation in violation of 18 U.S.C. § 2113(a). On April 28, 1995, the Petitioner was sentenced to 151-month term of imprisonment.

On June 13, 1998, Petitioner filed a Motion for Reconsideration of Sentencing in which he sought to have his

conviction reduced from bank robbery under 18 U.S.C. § 2113(a) to the lesser included offense of bank larceny as defined by 18 U.S.C. § 2113(b). On February 26, 1999, this Court entered an order construing the motion as a motion pursuant to 28 U.S.C. § 2255 and the Petitioner was offered the option of withdrawing the motion. On March 25, 1999, the Petitioner withdrew the motion and filed a petition for a Writ of Error Coram Nobis pursuant to the All Writs Act, 28 U.S.C. § 1651(a), raising several claims including that the indictment had not been properly signed. This Court denied the motion on the grounds that the relief the Petitioner sought was pursuant to 28 U.S.C. § 2255. In addition, this Court concluded that the indictment against the Petitioner was properly signed by the foreperson of the grand jury. On appeal the United States Court of Appeals for the Second Circuit affirmed the ruling. The petitioner did not appeal his sentence. On April 3, 2000, he filed the instant motion pursuant to 28 U.S.C. § 2255.

#### DISCUSSION

The Petitioner maintains that he is innocent of the crime of bank robbery as defined by 18 U.S.C. § 2113(a). He asserts his conduct more closely resembled bank larceny under 18 U.S.C. § 2113(b). In his motion for leave to amend, the Petitioner seeks permission to add a claim that his Sixth Amendment right to effective assistance of counsel was violated. Specifically, he

asserts that his counsel, Richard A. Reeves, improperly advised him to plead guilty to the charge of bank robbery. In addition, the Petitioner maintains that his conviction should be vacated due to a defective indictment.

The grounds for which a prisoner may gain relief under § 2255 include constitutional errors, jurisdictional errors and errors of law that constitute "a fundamental defect, which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979).

I. Failure To File Direct Appeal

The government contends that the Petitioner is procedurally barred from bringing his present § 2255 motion because he failed to file a direct appeal challenging his conviction. The court agrees.

A party is procedurally barred from obtaining relief under 28 U.S.C. § 2255 when the claim is not raised on direct appeal. See Campino v. United States, 968 F.2d 187 (2d Cir. 1992). "A motion under § 2255 is not a substitute for an appeal." United States v. Munoz, 143 F.3d 632, 637 (2d Cir. 1998). The exception to the rule occurs when the individual can demonstrate either (1) cause for the failure to raise the issue on appeal and actual prejudice or (2) actual innocence. See Bousley v. United States, 523 U.S. 614, 622 (1998); see United States v. Rosario, 164 F.3d 729, 732 (2d Cir. 1998). To establish actual innocence the

Petitioner must demonstrate that "it is more likely than not that no reasonable juror would have convicted him." Schlup v. Delo, 513 U.S. 298, 327-28 (1995).

Here, the Petitioner claims that he is innocent of bank robbery because his actions during the course of the robbery were not intimidating. This claim is without merit.

To support a conviction of bank robbery in violation of 18 U.S.C. § 2113(a) the evidence must indicate that an ordinary, reasonable teller could infer a threat of serious bodily injury from the defendant's acts. See United States v. Wagstaff, 865 F.2d 626, 627-28 (4<sup>th</sup> Cir. 1989). Numerous courts have held that a teller could reasonably infer a threat of bodily harm where the defendant vaulted over the counter in the course of a bank robbery. See United States v. Woodrup, 86 F.3d 359, 364 (4<sup>th</sup> Cir. 1996); see Unites States v. Lucas, 619 F.2d 870, 871 (10<sup>th</sup> Cir. 1980). Consequently, a jury could reasonably find that the Petitioner's actions during the course of the bank robbery, including his vault over the counter, constituted intimidation. Accordingly, the Petitioner has failed to establish actual innocence.

## II. Petitioner's Claims are Time-Barred

The government also asserts that the Petitioner's claims are time-barred. The court agrees.

The Petitioner entered a plea agreement in February 1995

prior to the adoption of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), on April 24, 1996. Here, because the Petitioner's conviction became final prior to the effective date of AEDPA, he had until April 24, 1997, i.e., one year after the effective date of AEDPA, to file a motion under § 2255. See Warren v. Garvin, 219 F.3d 111 (2d Cir. 2000); McHale v. United States, 175 F.3d 115, 120 (2d Cir. 1999). However, the Petitioner filed his § 2255 motion on April 3, 2000, more than sixty-one (61) months after he pleaded guilty on February 7, 1995. Because the claims raised by the petitioner related to issues arising out of the plea agreement, they could have been raised prior to April 24, 1997. Consequently, his § 2255 motion is untimely.

### III. Unsigned Indictment

The petitioner alleges that the indictment returned against him is invalid because it was not properly signed. There is no merit to this claim.

On June 15, 1999, this Court ruled that the indictment was in fact signed by the foreperson of the grand jury. On February 8, 2000, the Court's ruling was affirmed on appeal to the United States Court of Appeals for the Second Circuit. See United States v. Henry, No. 99-1406, 2000 WL 232070 (2d Cir. Feb. 8, 2000). The Petitioner "may not re-litigate questions which were raised and considered on direct appeal" in a § 2255 motion. See

Riascos-Prado v. United States, 66 F.3d 30, 33 (2d Cir. 1995).

Consequently, because the Petitioners claim was resolved on appeal, he is barred from re-litigating them in a § 2255 motion.

#### IV. Leave to Amend

On July 27, 2000, Petitioner moved to amend his original § 2255 motion to add a claim of ineffective assistance of counsel.

Amendments and supplements to habeas petitions are to be governed by the procedural rules applicable to civil actions. See 28 U.S.C. § 2242 (1994). According to the Federal Rules of Civil Procedure, Petitioner may amend his motion by leave of the court, "and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). See also Masotto v. United States, 2000 WL 19096 Case No. 97-2894 (2d Cir. 2000)

(maintaining "that a district court should normally permit amendment absent futility, undue delay, bad faith or dilatory motive, or undue prejudice"); Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993) (explaining that amendments to an initial petition for habeas relief should be liberally permitted in order to ensure a single comprehensive petition rather than successive petitions). However, leave to amend may be denied when the amendment would be futile. See John Hancock Mut. Life Ins. Co. v. Amerford Int'l Corp., 22 F.3d 458, 462 (2d Cir. 1994). An amendment may be futile when the statute of limitation bars the cause of action. Keller v. Prince Georges County, 923 F.2d 30,

33 (4<sup>th</sup> Cir. 1991).

Here, leave to amend would be futile because the Petitioner's motion pursuant to § 2255 is procedurally and time barred. Consequently, the Petitioner's leave to amend is denied.

CONCLUSION

For the foregoing reasons, the Petitioner's motion to vacate, set aside or correct sentence [doc. # 43] is DENIED. The Petitioner's motion for leave to amend [doc. # 47] is also DENIED. The clerk is directed to CLOSE this case.

SO ORDERED this            day of November, 2000 at Bridgeport,  
Connecticut.

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Alan H. Nevas  
United States District Judge