

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

LESLIE R. BARTH :  
v. : Civ. No. 3:01CV1704(AHN)  
Crim. No. 3:90CR5  
UNITED STATES OF AMERICA :

RULING ON PETITION TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE PURSUANT TO 28 U.S.C. § 2255; MOTION TO  
RECUSE THE COURT FROM CONSIDERING THAT PETITION;  
MOTION TO CORRECT THE RECORD AND FOR A STAY; AND  
MOTION TO COMPEL THE RETURN OF HIS EXPIRED PASSPORT

On July 9, 1993, a jury found Leslie R. Barth guilty of one count of wire fraud and twelve counts of mail fraud in violation of 18 U.S.C. §§ 1343 and 1341, respectively. The court sentenced him to fifteen years imprisonment. On August 25, 1995, the Second Circuit Court of Appeals affirmed his conviction. Barth filed a writ of certiorari, which was denied on October 7, 1996.

On September 4, 2001, nearly five years later, Barth filed a petition pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence [doc. # 1]. He also has moved (1) to recuse the court from considering his § 2255 petition [doc. # 10]; (2) to correct an allegedly inaccurate record and to stay consideration of the recusal motion [doc. # 35]; and (3) to compel the return of his expired passport from the

Office of the Clerk of the District Court in Bridgeport,  
Connecticut [doc. # 43].

For the reasons discussed below, Barth's motions and  
petition are hereby denied.<sup>1</sup>

**I. Motion to Correct the Record and to Stay Consideration of  
the Motion for Recusal Pending Submission of Barth's  
Corrected Version of the Record by October 18, 2002**

Barth has moved to recuse the court from ruling on his §  
2255 petition because, among other reasons, he alleges that  
the court violated Federal Criminal Rule 11(e)(1)(c) by  
participating in plea discussions during a January 1991  
meeting between the court, Barth, Barth's counsel (F. Mac  
Buckley), and the government. To provide factual support for  
that allegation, Barth has moved pursuant to Federal Appellate  
Rule 10(e) that the court give him until October 18, 2002, to  
conduct an investigation and submit an updated factual account  
of that meeting. He also asks that the court stay  
consideration of the recusal motion pending its ruling on the  
"correction" motion.

Barth's motions to correct the record and for a stay are  
without merit. Although Federal Appellate Rule 10(e) governs  
the record on appeal, Barth does not have an appeal pending.

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<sup>1</sup> The court shall evaluate Barth's motions before turning  
to the merits of his § 2255 petition.

Thus, Federal Appellate Rule 10(e) has no bearing on his § 2255 motion. Furthermore, both motions are moot because Barth never submitted any supplementary materials about the January 1991 meeting - either before or after October 18, 2002.

Thus, Barth's motions to correct the record and for a stay are denied.

## **II. Motion to Recuse the Court from Considering His § 2255 Petition**

Next, Barth asserts four different grounds to recuse the court from considering his § 2255 petition: (1) 28 U.S.C. § 455(a) and (b)(3); (2) United States v. Robin, 553 F.2d 8 (2d Cir. 1977) (denying rehearing en banc); (3) the Advisory Committee's Notes to Rule 4 of the Rules Governing Section 2255 Proceedings for United States District Courts; and (4) his allegation that the court improperly participated in plea discussions in contravention of Federal Criminal Rule 11(e)(1)(c). None of these purported bases for recusal has any merit.

First, Barth argued in his direct appeal that 28 U.S.C. § 455(a) and (b)(3) required the court to recuse itself. On August 25, 1995, the Second Circuit Court of Appeals ("Second Circuit") rejected this argument in an unpublished opinion. Barth's motion provides this court with no principled reason for re-visiting the appellate court's ruling on this issue.

Second, the Second Circuit's decision denying rehearing en banc in United States v. Robin similarly provides no support for his recusal motion. Rather, Robin merely makes a passing reference to Halliday v. United States, 380 F.2d 270, 272-74 (1<sup>st</sup> Cir. 1967), in which the First Circuit Court of Appeals found that a sentencing court generally should not conduct a hearing on a § 2255 petition when a petitioner challenges the court's prior determination that a guilty plea is voluntary. In this case, Barth was convicted after a jury trial, so neither Robin nor Halliday are apposite to Barth's recusal motion.

Third, the citation of the Advisory Committee's Notes to Rule 4 of the Rules Governing Section 2255 Proceedings is equally unavailing. Rule 4(a) plainly provides that "[t]he original [§ 2255] motion shall be presented promptly to the judge of the district court who presided at the movant's trial." Fed. R. Gov. § 2255 Proc. 4. Moreover, although the Notes state that "[c]ommentators have been critical of having the motion decided by the trial judge," the Notes also recognize that "the long-standing majority practice in assigning motions made pursuant to § 2255 has been for the trial judge to determine the merits of the motion." Fed. R. Gov. § 2255 Proc. 4 Advisory Committee's note.

Finally, Barth has failed to substantiate his claim that the court violated Federal Criminal Rule 11(e)(1)(c) by allegedly participating in his plea discussions in January 1991. According to the government's brief, the court met with Barth, Buckley, and government counsel at that time in anticipation of Barth entering a guilty plea. However, there were no plea discussions at that time. Moreover, neither the court nor the government recall that the court participated in any plea discussions or ever informed Barth about the merits of any plea agreement. Unsurprisingly, Barth has not submitted any evidence that would cause the court to question the government's account of that meeting.

Thus, for the reasons set forth above, Barth's motion for recusal is denied.

### **III. Motion for Release of Passport**

Next, Barth has requested the return of his expired passport, which is in the custody of the Office of the Clerk of the District Court in Bridgeport, Connecticut. He claims that he has no other valid picture identification in his possession, and that he needs this document "for many purposes, including the necessity of obtaining a birth certificate for purposes of making a retirement claim under the Social Security Act." Barth has not had this expired

passport in his possession for more than thirteen years.

This claim is wholly devoid of merit. First, it strains credulity to believe that a thirteen-year-old expired passport is Barth's sole form of picture identification, particularly because he had ample opportunity to obtain another form of identification when he was not in custody from 1991 to 1995. Second and more importantly, federal court and State Department policy precludes the release of expired passports to defendants such as Barth. According to a February 23, 1996, memorandum from the Administrative Office of the United States Courts entitled "Disposition of Passports Surrendered by Defendants," "a passport [surrendered by a defendant] remains the property of the United States and should be returned to the Department of State when it has no practical use."<sup>2</sup> Thus, Barth's motion to compel the release of his expired passport is denied.

#### **IV. Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence**

Finally, Barth's § 2255 petition, which was filed on

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<sup>2</sup> The Clerk of Court for this District follows this policy, but did not return Barth's passport to the United States Department of State when it expired. In a separate order, the court shall order the Clerk of Court to return Barth's passport to the Office of Passport Policy and Advisory Services, United States Department of State, 1111 9<sup>th</sup> Street, N.W., Room 260, Washington, D.C. 20522-1705.

September 4, 2001, fails as a matter of law because it is untimely. The statute of limitations of one year under § 2255 states that the time to petition to vacate a sentence "shall run from the latest of:(1) the date on which the judgment of conviction becomes final . . . [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. Since Barth's conviction became final on October 7, 1996, his petition was filed nearly four years late under § 2255(1).

Similarly, under § 2255(4), Barth's petition is untimely by more than ten years. His petition includes copies of several published articles that chronicle the misdeeds of his first attorney, F. Mac Buckley, whom Barth discharged before trial. Barth apparently contends that these new articles somehow constitute newly discovered evidence within the meaning of § 2255(4) that would support an ineffective assistance claim. Barth, however, does not dispute that he discharged Buckley on February 4, 1991. Thus, even if we indulge the dubious notion that these articles somehow constitute newly discovered evidence, Barth's decision to terminate the attorney-client relationship with Buckley demonstrates that he was cognizant of his allegedly deficient

representation at that time. Accordingly, Barth's § 2255 motion is denied.

SO ORDERED this \_\_\_\_\_ day of December, 2002, at Bridgeport, Connecticut.

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Alan H. Nevas  
United States District Judge