

No. 00-1657

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**ALFRED W. TRENKLER,
Petitioner/Appellant**

v.

**UNITED STATES OF AMERICA,
Respondent/Appellee**

**ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**BRIEF FOR
PETITIONER/APPELLANT ALFRED W. TRENKLER**

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JURISDICTIONAL STATEMENT

The basis for the jurisdiction of the district court was 28 U.S.C. § 2255. That statute, in conjunction with 28 U.S.C. § 1291, provides the basis for this Court's jurisdiction.

This appeal was timely filed. The district court's memorandum of decision was dated April 18, 2000. *App.* 50. The notice of appeal was filed on May 16, 2000. *App.* 53. The District Court granted a Certificate of Appealability as to specified issues on November 9, 2000. *App.* 55. This appeal is from a final order denying Trenkler's petition for relief under 28 U.S.C. § 2255.

STATEMENT OF THE ISSUES

- I. Should the Court read a tolling provision into 28 U.S.C. § 2255 comparable to that applicable to state prisoners seeking relief under 28 U.S.C. § 2254?

- II. Where: (1) prior caselaw reasonably led the defendant to believe he could not litigate a § 2255 petition during the pendency of an appeal; (2) the procedural requirements for litigating simultaneous post-conviction motions have not been articulated by the Court of Appeals for the First Circuit; and (3) the defendant is serving a life sentence and claims actual innocence, should he be permitted to litigate the merits of his § 2255 petition under the doctrine of equitable tolling?

STATEMENT OF THE CASE AND RELEVANT FACTS

Following a jury trial, Alfred W. Trenkler was convicted on November 29, 1993 of substantive violations of 18 U.S.C. §§ 844(d) and (i) (receipt of explosive material and attempted malicious destruction of property with explosives) and conspiracy to commit said offenses in violation of 18 U.S.C. § 371. These charges all related to the detonation of an explosive device that killed one Boston Police officer and injured another on October 28, 1991. Trenkler was tried separately from his co-defendant, Thomas A. Shay. Trenkler was sentenced to life imprisonment on these convictions.

On July 18, 1995, this Court affirmed Trenkler's convictions on direct appeal. *United States v. Trenkler*, 61 F.3d 45 (1st Cir. 1995). The Court held, *inter alia*, that the district court abused its discretion in admitting hearsay concerning information retrieved from an ATF computer database of explosives and arson incidents. *Id.* at 58. The Court concluded, however, that the error was harmless beyond a reasonable doubt. *Id.* at 60. Chief Judge Torruella dissented from the majority opinion, characterizing the rest of the government's case against Trenkler as "a smorgasbord of inconclusive circumstantial evidence and an inherently unreliable alleged jailhouse confession." *Id.* at 70.

During the pendency of Trenkler's direct appeal, this Court decided the direct appeal of Trenkler's co-defendant, Thomas Shay. *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995). The Court held that the trial judge had erred in excluding the proffered testimony of Dr. Robert Phillips, a psychiatrist, who was prepared to testify that Shay suffered from a recognized mental disorder known as "pseudologia fantastica," an extreme form of pathological lying. *Id.* at 129, 134. The Court remanded the case to the trial court for further proceedings to determine the admissibility of Dr. Phillips' testimony. On September 24, 1997, on remand, the trial judge determined that the testimony of Dr. Phillips was admissible, and on January 16, 1998, the trial court granted Shay a new trial on those grounds. On April 1, 1998, this Court affirmed the January 16, 1998 order granting Shay a new trial.

On December 22, 1995, Trenkler filed a motion for a new trial pursuant to F. R. Crim. P. 33 based on newly-discovered evidence. Trenkler claimed that the testimony of Dr. Phillips regarding Shay's psychological condition was newly-discovered, and thus entitled him to a new trial. On November 19, 1996, while that motion was pending, Trenkler filed a motion to inquire into possible juror misconduct and for a new trial. The district court denied both motions, respectively, on February 4 and May 22, 1997. In her February 4, 1997 decision, Judge Zobel ruled that the

evidence about Dr. Phillips' testimony was not unknown or unavailable at the time of Trenkler's trial. "In fact, Defendant's attorney concedes that prior to trial he considered offering the Phillips evidence but did not, figuring that it would be 'futile' in light of this Court's ruling in the Shay, Jr. trial." Memorandum of Decision at 2. *Add. 4.* The denial of both motions was affirmed by this Court on January 6, 1998. *United States v. Trenkler*, 134 F.3d 361 (1st Cir. 1998)(Table).

On January 5, 1999, Trenkler, acting *pro se*, filed a petition under 28 U.S.C. § 2255 seeking to vacate his convictions on the grounds of ineffective assistance of counsel. Specifically, Trenkler claimed that his trial counsel had been ineffective in failing to proffer Dr. Phillips' testimony at his trial. Trenkler argued that Dr. Phillips' testimony would have probably led the jury to discount Shay's statements introduced by the government against him, creating a substantial likelihood of a different verdict. *App. 5.* On April 18, 2000, the district court issued a Memorandum of Decision denying Trenkler's § 2255 petition on the grounds that it was time-barred. *Add. 1.* The district judge concluded: (1) Trenkler filed his § 2255 petition outside the applicable one-year period of limitation; (2) the limitation period was not tolled during the pendency of proceedings respecting Trenkler's Rule 33 motion for a new trial; and (3) this case presents no grounds for equitable tolling of the limitation

period. *Id.*

On May 16, 2000, Trenkler filed his notice of appeal from the district court's April 18, 2000 order denying relief. *App.* 53. The district court granted Trenkler's application for a Certificate of Appealability on November 9, 2000. *App.* 55. In granting the COA, the district judge stated: "Although I adhere to my view that the Petitioner is time-barred, Petitioner's tolling arguments are not frivolous. Accordingly, the application is granted as to these issues." *App.* 55. This appeal followed.

SUMMARY OF THE ARGUMENT

The Court should read into the habeas corpus statute for federal prisoners, 28 U.S.C. § 2255, a tolling provision similar to that contained in the habeas corpus statute for state prisoners, 28 U.S.C. § 2244(d)(2). The latter section provides that the one-year period of limitation is tolled during the pendency of state post-conviction litigation. As the Supreme Court has observed, the legislative draftsmanship of AEDPA is more like a pig's ear than a silk purse. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The courts have repeatedly had to interpret provisions into AEDPA, and specifically into its statute of limitations sections, to render the statute operative and logical. For instance, numerous courts have interpreted into § 2255 a provision that the period of limitation only begins running once the time for seeking review in the Supreme Court has expired, even in cases where the prisoner has not sought review in the Supreme Court. By incorporating such a provision, that is stated in § 2244(d)(1), but is omitted from § 2255, the courts have been faithful to Congress' intent that the state and federal remedy be read and interpreted together. And there is no indication that Congress meant to interpret them differently. It appears that the inclusion of the tolling language in § 2244(d) and not in § 2255 is nothing more than a legislative oversight. (Pages 10-16).

Incorporating a tolling provision into § 2255 would also be consistent with prior caselaw that forbade the consideration of a federal habeas petition in the district court so long as the case was pending on appeal in either the court of appeals or the Supreme Court . (Pages 16-19).

This Court and other courts have previously been required to read provisions into AEDPA in order to render the statute workable and to avoid constitutional problems. For instance, in *Rogers v. United States*, 180 F.3d 349, 354 (1st Cir. 1999), *cert. denied*, 528 U.S. 1126 (2000), the Court joined numerous other courts in ruling that federal prisoners whose convictions had become final before AEDPA's April 24, 1996 effective date had a one-year grace period to file their § 2255 petitions. (Pages 19-21).

If the Court declines to incorporate the tolling provision, federal habeas corpus will become a trap for the unwary. Prisoners who seek to litigate Rule 33 motions will be surprised to find that they have lost their right to bring a § 2255 petition. The only solution to this trap is to read into § 2255 a tolling provision like that for state prisoners in § 2244(d)(2). (Pages 21-27).

The Court should find that equitable tolling of the limitation period is appropriate in this case. Prior caselaw led the defendant to believe that he could not

litigate a § 2255 petition during the pendency of an appeal. This Court has never articulated procedural requirements for litigating simultaneous post-conviction motions. The defendant actively pursued the issue of Dr. Phillips' testimony, first in his Rule 33 motion, then in this § 2255 petition. The defendant is serving a life sentence and unless this court reverses, he will never have a court review the merits of his claims about the effect of Dr. Phillips' testimony and never have a chance to show that he is actually innocent of these charges. The co-defendant's case was reversed because of the wrongful exclusion of this same evidence. The defendant's trial lawyer did not make a proffer regarding Dr. Phillips' testimony because he thought it would be "futile." His appeals and post-conviction lawyer incorrectly thought the issue could be presented in a Rule 33 motion. It was only the defendant's *pro se* § 2255 petition that has correctly challenged the failure to proffer Dr. Phillips' testimony as ineffective assistance of counsel. And now the district court has ruled that it is too late to litigate the issue. Principles of equity should govern and the defendant should be permitted to proceed to the merits of the issue. (Pages 27-34).

ARGUMENT

I. A PROVISION PERMITTING A FEDERAL PRISONER TO DEFER FILING A § 2255 PETITION FOR RELIEF DURING THE PENDENCY OF OTHER POST-CONVICTION PROCEEDINGS, ANALOGOUS TO THE TOLLING PROVISION FOR STATE PRISONERS SET FORTH AT 28 U.S.C. § 2244(d)(2), SHOULD BE READ INTO 28 U.S.C. § 2255.

A. Summary of Applicable Law.

The federal post-conviction remedy of *habeas corpus*, embodied in 28 U.S.C. §§ 2254 and 2255, has constitutional underpinnings and enjoys special status as the “Great Writ.” *United States Constitution*, Article I, § 9; *Stone v. Powell*, 428 U.S. 465, 474, n.6 (1976). While § 2255 applies only to federal prisoners and § 2254 applies only to state prisoners, “... the unambiguous legislative history show[s] that § 2255 was intended to mirror § 2254 in operative effect.” *Davis v. United States*, 417 U.S. 333, 344 (1974). Although both Congress and the courts have imposed substantial restrictions on *habeas corpus* in recent years, those restrictions must not be applied so harshly that this important federal remedy is rendered nugatory. As the United States Supreme Court has observed:

Dismissal of a first *habeas* petition is a particularly serious matter, for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to important interests in human liberty.

Lonchar v. Thomas, 517 U.S. 314, 324 (1996).

The Anti-Terrorism and Effective Death Penalty Act of 1996 [“AEDPA”] established a one-year statute of limitations, with limited exceptions, for the filing of *habeas* petitions by both state and federal prisoners. The time limit for the filing of petitions by state prisoners is set forth at 28 U.S.C. § 2244(d), while the comparable time limit for the filing of *habeas* petitions by federal prisoners is spelled out in 28 U.S.C. § 2255. The limitations period for state prisoners contains a specific tolling provision, as follows:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). No similar tolling provision appears within 28 U.S.C. § 2255.

How significant it is that this tolling provision is contained within one section, but not the other, is critical to the adjudication of the instant appeal. Resolution of this appeal requires this Court to determine the significance of the linguistic difference. This interpretive task in the context of an AEDPA appeal is not unfamiliar to the Supreme Court, this Court, and the other courts of appeals. As the

Supreme Court observed in *Lindh v. Murphy*, 521 U.S. 320, 336 (1997), interpreting a different provision of AEDPA, “All we can say is that in a world of silk purses and pigs’ ears, the Act is not a silk purse of the art of statutory drafting.”

1. Court Interpretation of the AEDPA Statute of Limitation.

The difference in language between the state and federal habeas provisions in AEDPA has been the subject of extensive examination by the courts of appeals. The courts have struggled to decide whether the one year limitation period for federal prisoners seeking relief under § 2255 begins to run from the date of issuance of mandate by the court of appeals when no petition for certiorari is filed, or whether it begins to run when the ninety day period for seeking certiorari expires. For state prisoners, section 2244(d)(1)(A) provides that the limitation period begins to run on “the date on which the judgment becomes final by the conclusion of direct review or the expiration of time for seeking such review.” Section 2255, other the other hand, merely provides that the limitation period begins to run from “the date on which the judgment of conviction becomes final.”

The weight of authority now holds that federal prisoners who have not sought Supreme Court review have one year from the expiration of the time when they **could**

have sought certiorari. The leading case on the subject is *Kapral v. United States*, 166 F.3d 565, 575 (3rd Cir. 1999). There the Third Circuit held that the period for federal prisoners to seek habeas relief begins to run when the time for seeking certiorari expires, even when the prisoner did not seek certiorari. After examining the language of the statute and the legislative history, the court observed, “We also see no principled reason to treat state and federal habeas petitioners differently.” The court explained:

We reject the suggestion that, because the AEDPA has imposed stringent requirements for seeking and obtaining collateral relief, § 2255 must be interpreted to provide as little time as possible for a defendant to file for collateral relief. The “great writ” occupies far too important a place in our jurisprudence to justify such an assumption on the basis of the language of the AEDPA.

166 F.3d at 573.

The opposing view – that a federal conviction is “final” for § 2255 purposes when the mandate of the court of appeals issues if the prisoner does not seek certiorari – was articulated in a *per curium* opinion of the Seventh Circuit. In *Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998)(*per curium*), *cert. denied*, 526 U.S. 1113 (1999), the court relied on the different language in §§ 2244 and 2255 in holding that a conviction is final for a federal prisoner when the mandate

from the court of appeals issues. The court there relied upon the maxim of statutory construction that if “Congress includes particular language in one section of an act but omits it in another section of the same act, it is presumed that Congress intended to exclude the language, and the language will not be implied where it has been excluded.” 154 F.3d at 674. The Seventh Circuit was later joined by the Fourth Circuit in *United States v. Torres*, 211 F.3d 836 (4th Cir. 2000) (holding that the conviction of a federal prisoner becomes final on the date that the court of appeals’ mandate issues when the prisoner does not seek certiorari review). In dissent, Judge Hamilton observed: “[I]t makes no sense to conclude that Congress intended to treat state and federal prisoners differently.” 211 F.3d at 845.

The Tenth Circuit considered both of these views in *United States v. Burch*, 202 F.3d 1274 (10th Cir. 2000). It resolved the question by following the Third Circuit’s decision in *Kapral*. It found the statutory construction rationale “unpersuasive.” 202 F.3d at 1276. The court pointed out that the principle of statutory construction relied upon by the Seventh Circuit, known as the *Russello* doctrine, was based on the hypothesis of careful draftsmanship.^{1/} The *Burch* court rejected reliance on that maxim: “We recognize and agree that the AEDPA is not

^{1/} *Russello v. United States*, 464 U.S. 16, 23 (1983).

exactly a model of careful statutory drafting.” 202 F.3d at 1277. The court rejected the government’s argument that the language of the statute suggested that Congress intended use of different triggering dates for limitation purposes for state and federal prisoners. “We agree that there is simply no indication that Congress intended to treat state and federal habeas petitioners differently.” 202 F.3d at 1278.^{2/}

Those courts – the Third, Fifth, and Tenth Circuits – have been influenced by the longstanding view, articulated by the Supreme Court, that § 2254 and § 2255 were intended to mirror each other. *Davis v. United States*, 417 U.S. 333, 344 (1974)(Emphasizing that “the unambiguous legislative history showing that §2255 was intended to mirror § 2254 in operative effect.”) In his concurring opinion in *Kapral*, Judge Alito reached the same conclusion with regard to AEDPA: “[I]t seems unlikely that the disparate language in §§ 2244(d)(1) and 2255 resulted from a careful drafting decision – and this is borne out by an examination of the origins of those provisions.” 166 F.3d at 580. Judge Alito explains how S. 623, “the Habeas Corpus Reform Act of 1995” changed the statute of limitation for § 2254 petitions by

^{2/} In dictum, the Fifth Circuit has announced that it would follow the Third and Tenth Circuits. It rejected *Gendron* and established a rule that a federal conviction becomes “final” when the time for seeking certiorari expires, even when the prisoner does not seek certiorari. *United States v. Thomas*, 203 F.3d 350, 354 (5th Cir. 2000).

amending 2244(d)(1), including the tolling provision, without making any comparable change in § 2255. The amended version was then hurriedly enacted into law in the wake of the Oklahoma City bombing on April 19, 1995. 166 F.3d at 580-81. Thus, Judge Alito concluded that the differences in the two statutes of limitation – § 2244(d) and § 2255 – were the result of legislative happenstance rather than the result of substantive policy decisions.

2. Prior Caselaw Proscribing Consideration of a Habeas Petition While an Appeal Was Pending.

Before the enactment of AEDPA, the courts had imposed a rule that prohibited the filing of a habeas petition by a federal prisoner before the completion of his direct appeal. In *United States v. Dorsey*, 988 F. Supp. 917 (D. Md. 1998), the court reviewed this doctrine in the course of deciding that a federal conviction becomes final when the prisoner can no longer pursue his direct appeal. The court observed that § 2255, as amended by AEDPA, gives prisoners one year from “the date on which the judgment of conviction becomes final” to file a § 2255 motion. “Neither AEDPA nor § 2255 defines when a judgment becomes ‘final’ in this context.” 988 F. Supp. at 918. Section 2244 was amended to define “finality” for state convictions,

but there is no parallel definition for § 2255. “The legislative history of the Act provides no further guidance.” 988 F. Supp. at 918 (*Citing* H. Conf. Rep. No. 104-518 at 111 (1996), *reported* in 1996 U.S.C.C.A.N. 944. “There appears to be a growing consensus in the case law that a conviction becomes ‘final,’ for purposes of § 2255, on the date when the petitioner could no longer seek direct review.” 988 F. Supp. at 918. Importantly for purposes of the issue in this case, the court observed:

The consensus opinion on this issue comports with prior federal law on the timing of 2255 motions. Although the language of § 2255 itself does not obligate a petitioner to complete any direct review before filing a 2255 motion, the courts have created such a requirement in the interests of efficient administration of justice.

988 F. Supp. 918.

The court went on to look at the policy reasons behind the rule:

As the Advisory Committee Notes to Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (1997)(“Rules”) observe:

There is no requirement that the movant exhaust his remedies prior to seeking relief under § 2255. However, the courts have held that such a motion is inappropriate if the movant is simultaneously appealing the decision.

We are of the view that there is no

jurisdictional bar to the District Court's entertaining a Section 2255 motion during the pendency of a direct appeal but that the orderly administration of criminal law precludes considering such a motion absent extraordinary circumstances.

. . . *see also* . . . Hon Charles R. Richey, *Prisoner Litigation in the United States Courts* at 128-29 & n. 484 (1995) (“A petitioner must ordinarily complete a pending direct appeal prior to obtaining § 2255 relief.”)

The court concluded that “final” for § 2255 purposes is the date on which the petitioner can no longer pursue direct appeal.

In 1980, this Court adopted a rule prohibiting a district court from entertaining – even to deny – a habeas petition while a direct appeal is pending. *United States v. Gordon*, 634 F.2d 638, 638-39 (1st Cir. 1980):

Because we recognize and endorse the policy considerations that have led other courts to hold that in the absence of “extraordinary circumstances,” the “orderly administration of criminal justice” precludes a district court from considering a § 2255 motion while review of the direct appeal is still pending [citations omitted], we now adopt this rule.

The Court explained that a section 2255 motion is “a further step in the movant’s criminal case,” *quoting* Advisory Committee Note to Rule 1 of the Rules Government Section 2255 Proceedings, and went on to explain:

To an overburdened court these considerations dictate that its resources – including the cost of appointing an attorney – are not expended in processing an extraordinary remedy which, depending upon the outcome of the direct appeal, may be mooted or significantly altered.

634 F.2d at 639. The Court further noted that the defendant receives a more favorable standard of review on direct appeal than on the § 2255 motion:

This changing standard of review is one of the variables that militate against allowing a district court to entertain, even to deny, a § 2255 petition filed during the pendency of a direct appeal.

634 F.2d at 639 n.3. Other courts follow the same rule. *See, e.g., Feldman v. Henman*, 815 F.2d 1318, 1320 (9th Cir. 1987)(“A district court *should not* entertain a habeas corpus petition while there is an appeal pending in this court or in the Supreme Court.”)

3. The Courts Have Been Required to Read Provisions into AEDPA.

As noted above, AEDPA is not a model of legislative draftsmanship. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Historically, the courts have interpreted the habeas statutes providing review for state and federal prisoners in a similar fashion. Indeed, those courts which have delved into AEDPA’s legislative history have found

no reason to believe that Congress intended to differentiate between state and federal habeas, notwithstanding different linguistic formulations. Thus, as noted above, the courts have interpreted finality as used in § 2255(1) in a manner consistent with the explicit language used by Congress in §2244(d)(1).

This Court has followed the lead of other courts in reading provisions into AEDPA in order to render it a workable statute. In *Rogers v. United States*, 180 F.3d 349, 354 (1st Cir. 1999), the Court adopted a one-year grace period for filing a § 2255 petition for federal prisoners whose convictions had become final prior to AEDPA's April 24, 1996 effective date. "We now join those circuits by holding that the district court properly applied a one-year grace period in reviewing the timeliness of Rogers' § 2255 motion." The Court explained that creation of the grace period was necessary because Congress had not specified a grace period and because application of the statute would be impermissibly retroactive if no grace period were created. "The legislature cannot extinguish an existing cause of action by enacting a new limitation period without first providing a reasonable time after the effective date of the new limitation period in which to initiate the action." 180 F. 3d at 354, *quoting Block v. North Dakota*, 461 U.S. 273, 286 n.23 (1983). The Court rejected the argument that adopting a one year grace period "would trench upon the legislative powers vested

in Congress.” 180 F.3d at 354 n.11, *quoting United States v. Albertini*, 472 U.S. 675, 680 (1985).

4. The Fourth and Seventh Circuits Grapple with the Problem.

It appears that the only court which has addressed the precise question presented by this case is the Fourth Circuit in *United States v. Prescott*, 221 F.3d 686 (4th Cir. 2000). The court there rejected an argument that the pendency of a Rule 33 motion for a new trial tolled the one year limitation period for filing a § 2255 motion.^{3/} The defendant argued that tolling during the pendency of Rule 33 litigation was necessary to preserve the continued viability of Rule 33 and to maintain the efficient operation of the district courts. The defendant predicted that, absent tolling, defendants will clog the courts with § 2255 motions before Rule 33 motions are resolved.

^{3/} It may be helpful to set forth the pertinent dates in *Prescott*:

December 15, 1995	Prescott was convicted.
February 8, 1996	Defendant appealed.
September 24, 1996	Defendant moved for a new trial under Rule 33.
December 26, 1996	Defendant’s conviction affirmed on direct appeal.
April 1, 1997	District court denied new trial motion.
February 3, 1998	Court of appeals affirmed denial of new trial motion.
June 19, 1998	Defendant filed § 2255 motion.

The Fourth Circuit rejected those arguments. It pointed out that the two remedies are different. Rule 33 gives great discretion to the trial judge under an “interests of justice” standard. 221 F.3d at 688. The court conceded that some docket congestion may occur, but suggested that the district court was free to consolidate a Rule 33 motion and a § 2255 motion that are simultaneously pending before it. The court conceded, “A problem obviously may arise if ‘one motion is on appeal when the second reaches the district court.’” 221 F.3d at 684, *citing O’Connor v. United States*, 133 F.3d 548, 551 (7th Cir. 1998). However, the court found that problem manageable.

The court also rejected Prescott’s argument that tolling was appropriate for federal prisoners because § 2244(d)(2) provides a tolling provision for state prisoners who have post-conviction motions pending. The court disagreed, observing that the state tolling provision serves the interests of federalism and comity. It stated that Congress obviously knew how to toll, and chose not to do so for federal prisoners. 221 F.3d at 689.

In his concurring opinion, Judge King was troubled by the result. He concluded that AEDPA “encourages the filing of parallel petitions for collateral relief in certain circumstances.” 221 F.3d at 690.

That is, a prisoner in Prescott's position must file a section 2255 motion even when another collateral challenge – including a motion for a new trial – is already pending. If a prisoner waits until all pending motions have been resolved before filing for relief under section 2255, he risks a statute of limitations bar; such a scheme is plainly antithetical to the interests of judicial efficiency, leaving district courts to manage a new collateral challenge while one collateral challenge is pending.

Judge King could offer no explanation for why Congress enacted AEDPA as it did:

I am at a loss to explain why Congress would not have similarly insured that, in the section 2255 context, (1) other collateral challenges were resolved before a section 2255 challenge, and (2) the time limitations under 2255 were tolled during the pendency of other collateral challenges.

221 F.3d at 690.

Judge King found the Seventh Circuit's approach to this problem in *O'Connor v. United States*, 133 F.3d 548 (7th Cir. 1998), worthy of consideration. In *O'Connor*, the defendant had filed a Rule 33 new trial motion. He appealed after the district court denied the Rule 33 motion. While that appeal was pending in the Seventh Circuit, the defendant filed a § 2255 petition. The district court dismissed the § 2255 petition, holding that the defendant could not litigate both an appeal from the denial of a Rule 33 motion and a § 2255 petition in the district court at the same time.

The district court relied on a principle that as originally articulated was limited to direct appeals from the conviction and sentence. It makes no sense to crank up a collateral attack while a pending appeal may afford the prisoner the relief he seeks.

133 F.3d at 550. Writing for the court of appeals, Judge Easterbrook explained that the question presented was a novel one:

We have never considered whether the same approach is best when the appeal concerns the denial of a post-trial motion. Perhaps the question has not arisen because it did not matter before the AEDPA. A prisoner may select from a palette of post-trial motions the one that best suits his circumstances, and if more than one if made at the same time, the court can and should consider them together.

Id. Of course, if the new trial motion is being litigated in the court of appeals, it cannot be consolidated in the district court with the § 2255 motion. “Consolidation is harder if the decision concerning one motion is on appeal when the second reaches the district court, but until the AEDPA the prisoner could wait to file the second. No longer. Now delay can be dispositive.” 133 F.3d at 550-51. Because of AEDPA, “[p]riority now must go to petitions under § 2255, for once the direct appeal ends the clock starts ticking.” 133 F.3d at 551.

The Seventh Circuit then proposed a solution meant to conserve judicial resources and to prevent the prisoner from being lured into a trap for the unwary,

believing that the pendency of the Rule 33 motion would toll the time period for filing the § 2255 motion.

Today a district court that receives a Rule 33 motion during the year after the conviction has become final should ask the defendant whether he plans to file a § 2255 petition addressing other issues. If the answer is “yes,” the judge should defer adjudication of the Rule 33 motion so that all issues may be taken up together.

133 F.3d at 551. Judge Easterbrook concluded that this approach would ameliorate the problems with this aspect of AEDPA. “Any other course fractures the case into slices, jeopardizes the defendant’s opportunity for one complete collateral attack, or both.” *Id.*

B. Application of Law to Facts.

Section 2255 provides that a one-year period of limitation applies to habeas motions filed by federal prisoners. It provides that the limitation period runs from the latest of four different events – the date the conviction became final, the date when an impediment to filing a motion created by government action was removed, the date when a right was initially recognized by the Supreme Court and made retroactive, or the date when facts supporting the claim could have been discovered

through the exercise of due diligence.

Section 2244(d)(1) provides a one-year limitation period for state prisoners, and provides that the limitation period begins to run upon the occurrence of the latest of the same four dates described in section 2255. Congress also provided, however, in § 2244(d)(2), for excluding the time for state post-conviction proceedings:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The appellant contends that the Court should read a similar provision into the provisions of AEDPA for federal prisoners. First, there is no reason to treat federal prisoners differently from state prisoners in this regard. Second, there is no indication in the legislative history that Congress intended to treat federal prisoners differently from state prisoners. Third, the proposal is consistent with the caselaw, recited above, that forbids the pursuit of a federal habeas while a direct appeal is pending. Fourth, given the drafting problems with AEDPA, it is appropriate to read a provision similar to § 2244(d)(2) into the federal habeas statute, § 2255.

Finally, important policy reasons favor reading a tolling provision into § 2255. Historically, habeas corpus has been described as the Great Writ, enabling a prisoner

to seek relief of last resort from a federal court. As noted by Judge Easterbrook in *O'Connor*, the absence of such a tolling provision means that a § 2255 petition must be litigated within one year of the conclusion of the direct appeal. That will often occur before the expiration of the three year period following the verdict for bringing a Rule 33 motion based on newly discovered evidence. It makes far more sense for the § 2255 motion to follow the Rule 33 motion, but that may well be impossible unless the Court reads the tolling provision from § 2244(d)(2) into § 2255. The only solution to the ambiguity of this aspect of AEDPA is to read into § 2255 a tolling provision like the tolling provision for state prisoners in § 2244(d)(2).

II. EQUITABLE TOLLING IS APPROPRIATE HERE BECAUSE (1) PRIOR CASELAW REASONABLY LED THE DEFENDANT TO BELIEVE HE COULD NOT LITIGATE A § 2255 PETITION DURING THE PENDENCY OF AN APPEAL; (2) THE PROCEDURAL REQUIREMENTS FOR LITIGATING SIMULTANEOUS POST-CONVICTION MOTIONS HAVE NOT BEEN ARTICULATED BY THE COURT OF APPEALS FOR THE FIRST CIRCUIT; AND (3) THE DEFENDANT, WHO FILED HIS PETITION PRO SE, IS SERVING A LIFE SENTENCE AND CLAIMS ACTUAL INNOCENCE.

Those courts which have addressed the issue have held that the one-year periods of limitation set forth in AEDPA are subject to equitable tolling. In *Sandvik v. United States*, 177 F.3d 1269 (11th Cir. 1999), the court observed:

There is no obvious cause, and the parties offer none, why this interpretation of § 2244's statute of limitations should not be equally valid for § 2255's. A presumption that a statute of limitations may be equitably tolled applies with equal force to both statutes. [Citation omitted]. And like § 2244(d), there is every indication that § 2255's deadline is a garden-variety statute of limitations, and not a jurisdictional bar that would escape equitable tolling. . . . Section 2255's time limit shares a legislative history with § 2244 . . .

177 F.3d at 1271. The court explained: “The House Conference Report relating to the Act discusses the statutes of limitations together as a ‘limitation on an application for a habeas writ.’ H. Conf. Rep. No. 104-518, at 11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944.” 177 F.3d at 1271 n.4.

The court in *Sandvik* went on to describe the circumstances that would justify equitable tolling. “Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” 177 F.3d at 1271. The court held that the failure of Sandvik’s lawyer to use overnight mail so that the petition reached the court in a timely fashion was not the sort of problem that is appropriate for equitable tolling.

The *Sandvik* court noted that a number of courts have held that equitable tolling applies to state prisoners under AEDPA. 177 F.3d at 1271. This Court noted the question whether a state prisoner’s habeas petition was subject to equitable tolling under § 2244, without deciding it, in *Lilly v. Magnusson*, 177 F.3d 43, 48-49 n.2 (1st Cir. 1999). The Third Circuit held in *Miller v. New Jersey State Department of Corrections*, 145 F.3d 616 (3rd Cir. 1998), that the one year limitation period in § 2244 is subject to equitable tolling.

The Fifth Circuit has recognized that habeas petitions by state prisoners are subject to equitable tolling. In *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), *cert. denied*, 1221 S. Ct. 1124 (2001), the court explained:

As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules, but we draw on general principles to guide when equitable tolling is

appropriate. We must be cautious not to apply the statute of limitations too harshly. “Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.”

174 F. 3d at 713, *quoting Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). In a lengthy footnote, the court in *Fisher* reviewed the various formulations to assess claims of entitlement to equitable tolling:

Other circuits that have addressed equitable tolling under AEDPA have been no more specific. For example, the Ninth Circuit explains that equitable tolling is appropriate under AEDPA “if extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on time.” *Calderon [v. United States District Court]*, 163 F.3d 530, 541 (9th Cir. 1998)(en banc). The Third Circuit finds tolling proper “only when the principles of equity would make [the] rigid application [of a limitation period] unfair,” generally when “the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights” despite exercising “due diligence in investigating and bringing the claims.” *Miller v. New Jersey State Dep’t of Corrections*, 145 F.3d 616, 618-19 (3rd Cir. 1998)(alterations in original; quotations omitted). We look to our non-AEDPA cases for further elucidation of when to toll. *See Rashidi v. American President Lines*, 96 F.3d 124, 127 (5th Cir. 1996). “Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights; *Ynclan v. Department of the Air Force*, 943 F.2d 1388, 1392-93 (5th Cir. 1991)(delays by the court in filing

while related motions pending); *Loeber v. Bay Tankers, Inc.*, 924 F.2d 1340, 1343 (5th Cir. 1991)(when tolling does not defeat purpose of encouraging diligence and injustice to plaintiff would otherwise result); *Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989)(must show diligence, because “equity is not intended for those who sleep on their rights.”); *cf. Barrow v. New Orleans S.S. Ass’n*, 932 F.2d 473, 478 (5th Cir. 1991)(“lack of knowledge of filing deadlines,” “lack of representation,” “unfamiliarity with the legal process,” and “ignorance of legal rights” generally do not justify tolling).

Fisher, 174 F.3d at 713 n.11.

In Trenkler’s case, there are sound reasons for the Court to find that the statute of limitation should be equitably tolled. First, given the prior caselaw, there was ample reason for Trenkler to have believed that he could not litigate both claims – an appeal from the denial of a Rule 33 new trial motion and a habeas petition under § 2255 – simultaneously. The Rule 33 motion was filed in December 1995, before AEDPA was even enacted. *Cf. Rogers v. United States*. That new trial motion focused upon the very same subject matter as that raised in this habeas petition – Dr. Phillips’ testimony. Judge Zobel rejected Trenkler’s claim because she found that it was not based upon newly-discovered evidence. In fact, she found that Trenkler’s trial lawyer was aware of Dr. Phillips’ evidence, and thought it would be futile to proffer it since Judge Zobel had excluded it in Shay’s trial. It was that decision – to

forego an offer of proof because of futility – that Trenkler wished to litigate as ineffective assistance of counsel in this § 2255 motion. Trenkler’s Rule 33 motion was not finally disposed of by this Court until January 6, 1998. In light of *Gordon*, it was reasonable for Trenkler to believe that he could not file his *pro se* habeas petition until after his Rule 33 appeal was resolved.

Second, as Judge Easterbrook pointed out in *O’Connor*, if the Court declines to read a tolling provision analogous to § 2244(d)(2) into § 2255, then the federal habeas petitioner can easily fall victim to a trap for the unwary. In *O’Connor* the Seventh Circuit adopted guidelines designed to prevent federal prisoners from being deprived of their right to seek the Great Writ – requiring the district judge to inquire whether a Rule 33 movant intends to file a habeas petition. Here there was no reason for Judge Zobel to have made such an inquiry when the Rule 33 was filed in December, 1995, prior to enactment of AEDPA. She denied the motion in February 1997, after AEDPA was enacted, and could have made the appropriate inquiry at that time. Her failure to do so may well stem from the confusion wrought by the adoption of the poorly-drafted AEDPA. No one foresaw all of the traps that could arise for unwary litigants, particularly prisoners acting *pro se*.

Third, this Court has not yet addressed any of these complex issues. The lack

of guidance, especially for an individual who was proceeding *pro se* on his habeas petition, renders it fundamentally unfair to use the newly-enacted statute of limitation to bar access to the Great Writ. That is especially so because of the gradual emergence of the issue that Trenkler is trying to raise in this habeas petition – the failure of his trial lawyer to challenge Shay’s statements using the testimony of Dr. Phillips.

Finally, in deciding whether Judge Zobel abused her discretion in refusing to find equitable tolling, this Court should consider the critical importance of the issues that Trenkler seeks to litigate. First of all, Shay’s statements were critically important to Trenkler’s conviction. Second, Trenkler’s direct appeal was rejected by a two-to-one decision, Chief Judge Torruella dissenting. Thirdly, Shay’s conviction was reversed. Finally, Alfred Trenkler is serving a sentence of life in prison. Unless this Court reverses Judge Zobel’s refusal to address the substance of his habeas petition, he will not have had the opportunity to have any court review the merits of this claim.

Something is very wrong with a system where the co-defendant raises what is ultimately a winning issue at his separate trial, where the defendant’s trial lawyer fails to preserve the issue for no good reason, where the defendant’s appellate and post-conviction lawyer incorrectly seeks relief using Rule 33, the wrong vehicle, and

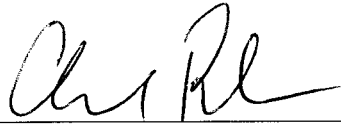
where, when the defendant – acting *pro se* – finally gets it right – using a § 2255 motion to raise ineffective assistance of counsel – the courts tell him that he waited too long. Equity demands that this Court remedy that injustice, and permit the defendant to try to show that he is entitled to relief and is actually innocent of this crime.

The Court should also hold that the doctrine of equitable tolling is available in order to avoid constitutional problems presented by this case. The Suspension Clause, U.S. Const. art. I, § 9, cl. 2, provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Whether the one-year limitation period violates the Suspension Clause depends upon whether the limitation period renders the habeas remedy ‘inadequate or ineffective to test the legality of detention.’” *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir.), *cert. denied*, 525 U.S. 891 (1998), *quoting Swain v. Pressley*, 430 U.S. 372, 381 (1977). In *Miller*, the court recognized that, “There may be circumstances where the limitation period at least raises serious constitutional questions and possibly renders the habeas remedy inadequate and ineffective.” 141 F.3d at 978. This is such a case.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court and remand the matter so that a hearing on the merits of his § 2255 petition can take place.

Respectfully submitted
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) because it contains 8,167 words, according to the word count feature of WordPerfect 9.0.



Charles W. Rankin

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-10074-RWZ

ALFRED TRENKLER

v.

UNITED STATES OF AMERICA

MEMORANDUM OF DECISION

April 18, 2000

ZOBEL, D.J.

Petitioner, Alfred Trenkler, was convicted in 1993 of violations of 18 U.S.C. §§ 844 (d) and (i), and conspiracy in violation of 18 U.S.C. § 371, all in relation to the production, placement under a car and ultimate explosion of a bomb that killed one Boston police officer and maimed another. The judgment of conviction was affirmed, and mandate issued on September 5, 1995. Petitioner did not apply for a writ of certiorari to the Supreme Court, but on December 22, 1995, he filed a motion for a new trial pursuant to Rule 33, Fed. R. Crim. P. based on allegedly new evidence. The denial of that motion was affirmed on January 28, 1998. On January 7, 1999, Trenkler filed the instant petition under 28 U.S.C. § 2255 seeking vacation of the judgment of conviction on the grounds of ineffective assistance of counsel.

In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") which became effective on April 24, 1996. Among other changes wrought, the statute amended Section 2255 to impose for the first time a limitations period for the filing of federal habeas petitions, and the government argues that, as a result, this

petition is time barred. The amendment provides that “[a] 1-year period of limitation shall apply” and, insofar as relevant to this case, that it shall run from “the date on which the judgment of conviction becomes final. . . .” 28 U.S.C. § 2255. For petitioners whose convictions became final before the AEDPA’s effective date, a one-year grace period was judicially imposed, allowing such petitioners until April 24, 1997 to file a Section 2255 petition. See Rogers v. United States, 180 F.3d 349, 354 (1st Cir. 1999) (joining other circuits in allowing one-year grace period for filing Section 2255 petitions).

Whether the judgment of conviction is deemed to be final when the mandate issued from the Court of Appeals or when the time for filing a petition for certiorari expired is, in this case, immaterial as both precede the effective date of the AEDPA so the period of limitations is set by the one-year grace period. Two timing issues do emerge, however. First, petitioner asserts that the date the Court of Appeals affirmed denial of the motion for a new trial, January 28, 1998, is the appropriate accrual date and the petition is thus timely. The difficulty with the argument is that the statute, which explicitly describes four sets of circumstances triggering the limitations period, does not include the one posited by petitioner.¹ Moreover, none of the circumstances set forth

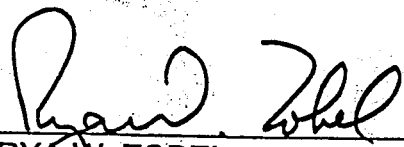
¹According to 28 U.S.C. § 2255, the limitation period runs from the latest of:

- (1) the date on which the judgment of conviction became 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, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly 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.

can be interpreted to encompass final resolution of a new trial motion postdating conviction and appellate review.

The second question is whether the AEDPA's one-year grace period is tolled during the pendency of the Rule 33 motion. The AEDPA expressly provides for tolling in the context of exhaustion of state postconviction review in state habeas corpus cases.² Because no similar language exists in the federal habeas corpus section, I conclude that tolling is not allowed under Section 2255. Finally, even if the limitations period is not jurisdictional and can therefore be equitably tolled, this case presents no grounds for equitable tolling. See Sandvik v. United States, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (holding that Section 2255 permits equitable tolling, relying on analysis of other circuits in cases construing Section 2254); cf. Libby v. Magnusson, 177 F.3d 43, 48 n.2 (1st Cir. 1999) (reserving judgment on whether equitable tolling might apply under Section 2254). Nothing in the papers suggests any wrongful government conduct that prevented petitioner from asserting his rights in a timely manner or any extraordinary circumstances beyond petitioner's control that made it impossible to file the petition on time. See, e.g., Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996) (discussing situations in which equitable tolling is appropriate).

Because the petition was filed too late, the petition is denied.



RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

April 18, 2000

²28 U.S.C. § 2244 (d)(2) provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO. 92-10369-Z

UNITED STATES OF AMERICA

v.

ALFRED W. TRENKLER

MEMORANDUM OF DECISION

DOCKETED

February 4, 1997

ZOBEL, D.J.

Alfred W. Trenkler ("Trenkler" or "Defendant") was convicted on November 29, 1993 of violations of 18 U.S.C. §§ 371 and 844 arising from the detonation, on October 28, 1991, of an explosive device that had been planted under an automobile in Roslindale, Massachusetts. Pending before this Court is Defendant's Motion for a New Trial pursuant to Fed. R. Crim. P. 33 on the grounds of newly discovered evidence, or, in the alternative, for an Evidentiary Hearing.

"A motion for new trial based on newly discovered evidence will not be allowed unless the movant establishes that the evidence was: (i) unknown or unavailable at the time of trial, (ii) despite due diligence, (iii) material, and (iv) likely to result in an acquittal upon retrial." United States v. Tibolt, 72 F.3d 965, 971 (1st Cir. 1995) (citing United States v. Ortiz, 23 F.3d 21, 27 (1st Cir. 1994)), cert. denied, 116 S. Ct. 2554 (1996). Defendant maintains that two matters constitute "newly discovered evidence" entitling him to a new trial. First, Defendant argues that the expert psychiatric testimony of Dr. Robert Phillips (the "Phillips

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evidence") which this Court had already precluded in the related Thomas Shay, Jr. trial constitutes new evidence.¹ The Phillips evidence was not unknown or unavailable at the time of Defendant's trial.² In fact, Defendant's attorney concedes that prior to trial he considered offering the Phillips evidence but did not, figuring that it would be "futile" in light of this Court's ruling in the Shay, Jr. trial. The Phillips evidence clearly fails to satisfy the first prong of the Ortiz test and, accordingly, Defendant's motion with respect to the Phillips evidence is denied. See Tibolt, 72 F.3d at 972-73 (failure to establish any of the four Ortiz factors defeats motion for new trial) (citations omitted).

Next, Defendant argues that the early release from a federal prison sentence of William David Lindholm ("Lindholm"), a government witness who testified against Trenkler, indicated evidence of a "sweetheart deal" between Lindholm and the government at the time of Lindholm's testimony which was not disclosed to Defendant. Based on the detailed written proffer submitted by the government and left unchallenged by Defendant, the record is devoid of any evidence to suggest that Lindholm's early release was the result of anything other than an arrangement made subsequent to the

¹ The United States Court of Appeals for the First Circuit in United States v. Thomas Shay, Jr., 57 F.3d 126, 134, 137 (1st Cir. 1995), ruled that this Court erred in excluding Dr. Phillips' testimony on the grounds stated and remanded the case for further proceedings.

² Nor does the First Circuit's opinion in Shay, Jr. constitute "new evidence." Defendant never offered or attempted to offer the Phillips evidence into evidence at trial and is therefore foreclosed from relying on the First Circuit's opinion in Shay, Jr. as grounds for a new trial.

trial (by several months) between Lindholm and the government based on Lindholm's cooperation in the Trenkler trial. Defendant is not entitled to an evidentiary hearing simply to engage in a "fishing expedition" on this matter. United States v. McAndrews, 12 F.3d 273, 280 (1st Cir. 1993) ("A district court need not grant an evidentiary hearing on a motion merely because a defendant's hopes spring eternal or because a defendant wishes to mount a fishing expedition [A] criminal defendant who seeks an evidentiary hearing on a motion must, at the very least, carry an entry-level burden by making 'a sufficient threshold showing that material facts [are] in doubt or in dispute.'" (citations omitted). Lacking any "new evidence" (or any evidence at all) of an agreement between Lindholm and the government at the time of Lindholm's testimony, Defendant's motion for a new trial is denied.

For all the reasons set forth above, Defendant's Motion for a New Trial or, in the alternative, for an Evidentiary Hearing is hereby denied.

February 4, 1997
DATE

Richard J. Zobel
DISTRICT JUDGE