

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO: 07-2764

THOMAS A. SHAY

APPELLANT,

VS.

UNITED STATES OF AMERICA,

APPELLEE.

MOTION REQUESTING PERMISSION TO AMEND APPELLANT'S
APPLICATION FOR A CERTIFICATE OF APPEALABILITY

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UNITED STATES COURT OF APPEALS
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Appeal No: 07-2764

THOMAS A. SHAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION REQUESTING PERMISSION TO AMEND
APPELLANT'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY

COMES NOW, the Appellant Thomas A. Shay, in propria persona acting as his own counsel respectfully files this Motion Requesting Permission to Amend Appellant's Application for a Certificate of Appealability as to the ground listed herein.

Appellant contends that his Certificate of Appealability (herein as a COA) was forwarded to this Court on June of 2008 which this Court has docketed this appeal as filed.

Appellant contends that this Amendment pertains to the government and the district courts denial of Appellant's 28 U.S.C. §2255 Motion to Vacate Set Aside or Correct Sentence. This denial was based on the court's determination that the Appellant was timed barred under the Anti-Terrorism and Effective Death Penalty Act (ADEPA).

The issues that were presented was (1) Whether Appellant's §2255 motion to set aside his 1998 conviction is timed-barred by the one-year statute of limitation.

Appellant contends that pursuant to amendments enacted as part of the (ADEPA) which became effective on April 24, 1997, Section 2255 provides for a one-year limitation period that runs from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by the 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 which was made retroactively applicable to cases on collateral review.
- (4) the date on which the facts supporting the claims or claims presented could have been discovered through the exercise of due diligence.

The government states that the judgment of conviction in Appellant's criminal case became final on November 23, 1998. Appellant's does not dispute this allegation. What the Appellant does dispute is his Conviction was not final until July 23, 2007. Appellant contends that this is where the government and the district court erred.

Appellant asserts that the final judgment on July 23, 2007, was the judgment from his Supervised Release Violation so Appellant's 28 U.S.C. §2255 Motion is not due until on or about October 23, 2008, therefore the Appellant's §2255 is within the time limitations under the (ADEPA).

In the case of United States v. Alvarez-Tautimez, 160 F.3d 573 (9th Cir. 1998) " held that Defendant arrested for supervised release violation may file habeas petition challenging underlying conviction.


Appellant contends that the violation of his supervised release was a final judgment in this case, that the violation falls back onto Appellant's underlying offense of conviction in 1998.

Appellant's contends that due to the fact the supervise release violation consisted of a new judgment in this case, and the violation was in fact based on the underlying 1998 conviction, the Appellant should not be timed-barred under the (ADEPA).

Appellant further contends that due to this error, Appellant prays that this Honorable Court will Remand this case back to the District Court with instruction to review the Appellant's 28 U.S.C. §2255 on its merits.

WHEREFORE, Appellant contends that the 28 U.S.C. §2255 Motion to Vacate should be reversed and remanded back to the district court without being time-barred under the (ADEPA).

Respectfully submitted,



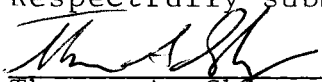
Thomas A. Shay

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Amend is true and correct and was forwarded by U.S. Mail postage prepaid to David Apfel, Assistant U.S. Attorney, 1 Courthouse Way, Ste 9200, Boston, MA. 02210

Executed on this the 18 day of July 2008.

Respectfully submitted,



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