No. 01-___

IN THE

Supreme Court of the United States

Erick Cornell Clay,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 5, 2002

QUESTION PRESENTED

A federal prisoner generally must file a post-conviction motion under 28 U.S.C. 2255 within one year of "the date on which [his] judgment of conviction becomes final." In cases in which the defendant loses on direct appeal but does not seek certiorari, the circuits have divided over the meaning of "final," a term not defined by the statute. As the government explained on appeal in this case, "[Petitioner] argues, and the Solicitor General agrees, that his judgment of conviction did not become final until the time for filing a petition for a writ of certiorari had elapsed." The Seventh Circuit nonetheless adhered to its contrary precedent, which holds that a conviction becomes "final" when the mandate issues on the defendant's direct appeal, and reiterated its refusal to revisit the issue "notwithstanding the circuit split." The Seventh Circuit specifically declined to overturn its settled rule "without guidance from the Supreme Court."

The Question Presented is:

Is a conviction "final" for purposes of 28 U.S.C. 2255 when (i) the appellate mandate issues on direct appeal (as the Seventh and Fourth Circuits hold), or instead (ii) when the defendant's time to petition for certiorari expires (as both Petitioner and the federal government argued below and as the Third, Fifth, Ninth, Tenth, and Eleventh Circuits hold).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Erick Cornell Clay respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinions of the Seventh Circuit (Pet. App. 1a-6a) and district court (*id.* 7a-9a) are unpublished. The court of appeals issued its opinion on January 25, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. 2255 provides in relevant part: "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final; * * *."

STATEMENT

1. A federal prisoner generally must file any motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 within one year of "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255. The motion must be filed in the judicial district in which the prisoner was convicted. *Id.*

2. On Petitioner's direct appeal in this case, the Seventh Circuit affirmed his conviction for arson and distribution of a Schedule II substance on November 23, 1998. No. 98-1783, 1998 U.S. App. LEXIS 30134 (Nov. 23, 1998), *reported at* 165 F.3d 33 (table). The court of appeals issued its mandate on December 15, 1998. The deadline to file a petition for certiorari was February 22, 1999. Petitioner did not seek certiorari.

Petitioner filed his *pro se* Section 2255 motion on February 22, 2000 – *i.e.*, exactly one year after the time to file for certiorari expired but a year and sixty-nine days after the mandate issued on his appeal. Petitioner is incarcerated in

Tennessee and filed his motion in the Northern District of Indiana, where he was convicted. Petitioner alleged, *inter alia*, that his trial counsel was constitutionally ineffective and that the indictment was defective.

The government acknowledged that the motion was filed too late under the Seventh Circuit's holding in *Gendron* v. *United States*, 154 F.3d 672 (1998) (per curiam), *cert. denied*, 526 U.S. 1113 (1999), that, in cases in which the petitioner does not seek certiorari, a judgment of conviction is "final" when the court of appeals issues its mandate. But the government identified a circuit split on the question and reiterated the Solicitor General's position from prior litigation that the Seventh Circuit's rule is wrong:

> The Department of Justice * * * has taken a position contrary to the Seventh Circuit's rule * * * and has instead supported the rule in *Kapral v. United States*, 166 F.3d 565, 566 (3rd Cir. 1999), that "a conviction does not become 'final' under § 2255 until expiration of the time allowed for certiorari review by the Supreme Court." * * *
>
> By the *Kapral* analysis, Mr. Clay's 2255 Petition would be timely * * * since he filed within one year from the time that he could have sought certiorari to the Supreme Court.

Gov't's Resp. to Mem. And Order of June 21, 2000, at 1-2.

3. The district court deemed itself bound to dismiss Petitioner's Section 2255 motion as untimely. Expressly recognizing that "other courts of appeal apply a different standard," the district court held the case was controlled by the Seventh Circuit's rule that "when a federal prisoner in this circuit does not seek certiorari with the United States Supreme Court, the conviction becomes 'final' on the date the appellate court issues the mandate in the direct appeal." Pet. App. 8a.

The district court furthermore held that the existence of the circuit conflict did not justify the application of equitable

tolling, for "[w]ithout more than a missed deadline based on an assumption that Third Circuit precedent controlled courts in the Seventh Circuit, Mr. Clay cannot meet the high threshold necessary to trigger equitable tolling." Pet. App. 8a. Nor, the district court held, may a federal defendant challenge his conviction pursuant to Fed. R. Civ. P. 60(b) rather than Section 2255. *Id.* 9a.

The district court accordingly dismissed Petitioner's Section 2255 application as untimely, Pet. App. 9a, but granted Petitioner a certificate of appealability, see *id.* 3a.

3. On Petitioner's appeal, the government again acknowledged the circuit conflict and again argued that Seventh Circuit precedent was wrong:

> The courts of appeals are divided over when a judgment of conviction becomes "final" under 28 U.S.C. 2255 ¶ 6(1) in cases in which the defendant files an appeal but not a petition for a writ of certiorari. The Fourth Circuit along with this Circuit have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review. * * *
>
> Four other circuits have held to the contrary, that a conviction does not become final under Section 2255 until the time for filing a petition for a writ of certiorari expires. In the Department's view, the reasoning and conclusions of those latter circuits is correct.

Gov't C.A. Br. 18-19. See also *id.* 17 ("Clay argues, and the Solicitor General agrees, that his judgment of conviction did not become final until the time for filing a petition for a writ of certiorari had elapsed.").

The Seventh Circuit nonetheless affirmed, deeming the timeliness issue "to be dispositive of the case." Pet. App. 3a. The court of appeals "decline[d] the invitation to reconsider [its] holding in *Gendron*," although it acknowledged that "the government correctly points out that [the Seventh Circuit's]

construction of section 2255 represents the minority view." *Id.* 5a. The court noted that "[s]ince *Gendron* was decided, we have declined to revisit its holding notwithstanding the circuit split." *Id.* (citing *Garrott* v. *United States*, 238 F.3d 903 (CA7), *cert. denied*, 532 U.S. 1072 (2001); *Gutierrez* v. *Schomig*, 233 F.3d 490 (CA7 2000), *cert. denied*, 532 U.S. 950 (2001)). "Bowing to *stare decisis*," the Seventh Circuit declined "to overrule a recently-reaffirmed precedent without guidance from the Supreme Court." *Id.*

4. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The question presented is the subject of a five-to-two circuit conflict openly acknowledged by the court of appeals and the federal government. Only the Fourth Circuit agrees with the Seventh Circuit's holding that a conviction becomes "final" for purposes of Section 2255 when the court of appeals issues its mandate. The Third, Fifth, Ninth, Tenth, and Eleventh Circuits flatly disagree, holding that finality attaches when the time to petition for certiorari expires; each of those courts has avowedly rejected the Seventh Circuit's rule. Compare *United States* v. *Torres*, 211 F.3d 836 (CA4 2000) with *United States* v. *Kaufmann*, No. 00-15458, 2002 U.S. App. LEXIS 2668, at *4-*11 (CA11 Feb. 21, 2002), *United States* v. *Garcia*, 210 F.3d 1058, 1059-61 (CA9 2000), *United States* v. *Gamble*, 208 F.3d 536, 536-37 (CA5 2000) (per curiam), *United States* v. *Burch*, 202 F.3d 1274, 1276-78 (CA10 2000), and *Kapral* v. *United States*, 166 F.3d 565, 568-77 (CA3 1999). See also, *e.g.*, *United States* v. *Hicks*, No. 01-3040, 2002 U.S. App. LEXIS 4948, at *15-*16 (CADC Mar. 26, 2002) (acknowledging the split).

2. This Court's intervention is required because the circuit conflict is intractable. The Seventh Circuit has acknowledged the split but, despite the government's urging, has declined to revisit its rule "without guidance from the Supreme Court." Pet. App. 5a. In *Torres*, the Fourth Circuit similarly acknowledged that it was expanding a circuit

conflict (154 F.3d at 838-39), rejected the government's argument that it should adopt the majority rule (*id.* at 838), and denied rehearing *en banc* (Order of July 7, 2000).

3. Certiorari is also warranted because the question presented is very important. The issue can potentially arise in essentially any case in which a federal prisoner appeals but does not seek certiorari on direct review. In the year ending September 30, 2001, prisoners filed 8644 motions to vacate their sentences in federal court; 1867 were filed in the Fourth and Seventh Circuits alone. See 2001 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, tbl. C-3.

This case amply demonstrates the significance of the question presented. As in this case, federal prisoners frequently seek relief under Section 2255 *pro se* without comprehending the significance of the circuit conflict. In addition, as in this case, petitioners are frequently incarcerated in a different circuit than the one in which they must file their Section 2255 motion and thus have further difficulties in determining the correct rule.

The importance of the conflict is heightened because it is outcome determinative. The federal courts, including in this case, uniformly refuse to apply equitable tolling when a petitioner errs in computing the deadline and furthermore refuse to permit federal prisoners to challenge their sentences through the alternative remedy provided by Fed. R. Civ. P. 60(b). The conflict thus extinguishes the principal post-conviction remedy available to federal prisoners.[1]

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[1] The circuit conflict perpetuates the disparate treatment of similarly situated federal prisoners in other ways as well because the date on which a federal conviction becomes "final" can have important collateral consequences. For example, under *Teague* v. *Lane*, 489 U.S. 288 (1989), it may determine whether a defendant is entitled to the benefit of a new constitutional rule. See, *e.g.*, *Caron* v. *United States*, 183 F. Supp. 2d 149, 153 (D Ma 2001). In addition, it may determine whether an amendment to the defendant's initial Section 2255 motion is timely. Finally, the proper test for determining "finality" may determine the date on which a

It is therefore not surprising that *seven* different circuits have been forced to confront the question presented in recent years, conclusively demonstrating that the issue is important and frequently recurring. In addition, district courts have repeatedly faced cases in which the choice between the competing rules was outcome determinative. See, *e.g.*, *Moultrie* v. *United States*, 147 F. Supp. 2d 405, 408 (DSC 2001); *Then* v. *United States*, 126 F. Supp. 2d 727, 729 (SDNY 2001); *Kamen* v. *United States*, 124 F. Supp. 2d 603, 604 (MD Tn 2000); *United States* v. *Swinton*, No. 94-8-1, 2000 U.S. Dist. LEXIS 18726, at *7 (ED Pa Dec. 8, 2000); *Jean* v. *United States*, No. 99-cv-8702, 2000 U.S. Dist. LEXIS 7224, at *5 (EDNY Apr. 4, 2000); *United States* v. *Gurrusquieta*, No. 3-97-CR-0158P(19), 1999 U.S. Dist. LEXIS 18694, at *4-*5 (ND Tx Nov. 30, 1999), *vacated* (CA5 Order Mar. 16, 2001 (No. 00-10498)); *United States* v. *Stead*, 67 F. Supp. 2d 1064, 1071-72 (DSD 1999). In other cases, district courts have taken sides in the conflict *sub silentio*, highlighting the need for clear guidance from this Court. See, *e.g.*, *Then*, 126 F. Supp. 2d at 729 (collecting cases).[2]

4. Certiorari furthermore is warranted because the Seventh Circuit's holding is wrong, principally for two

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Section 2255 motion must be filed in cases in which the petitioner did not file a direct appeal from his judgment of conviction. See, *e.g.*, *United States* v. *Sherrod*, 123 F. Supp. 2d 338, 339 (ED Va 2000) (based on Fourth Circuit's decision in *Torres*, *supra*, holding that 10-day period to file notice of appeal is not included in determining "finality"; rejecting Eleventh Circuit's contrary holding).

[2] Even the large number of reported cases on the question presented appears to understate substantially the frequency with which the issue arises. Most of the appellate decisions, for example, arose from district court rulings that were not reported, either electronically or in published volumes. The federal government is, of course, a party to each case in which the issue arises. Therefore, if the Solicitor General intends to attempt to suggest that the question presented is not sufficiently important to merit certiorari, Petitioner respectfully requests that he identify for this Court the district court cases in which the question has arisen.

reasons. *First*, "finality" is a term of art in the context of post-conviction review that, under this Court's precedents, attaches when "the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied" (*Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994)). See also *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987); *United States* v. *Johnson*, 457 U.S. 537, 542 n.8 (1982). *Second*, the one-year limitations period for state prisoners to seek relief under Section 2244 similarly runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" (28 U.S.C. 2244(d)(1)(A)) and there is no reason Congress would have intended a different test to determine finality under Section 2255. The Fourth and Seventh Circuits' emphasis on the omission in Section 2255 of language expressly referring to "the expiration of time for seeking such review" simply fails to appreciate that "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting" (*Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997)). See generally Gov't C.A. Br. 20-23; *Torres*, *supra*, 211 F.3d at 842-46 (Hamilton, S.J., dissenting); *Kapral*, *supra*, 166 F.3d at 569-77; *id.* at 577-81 (Alito, J., concurring).[3]

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[3] The question presented was previously raised in a petition from the Seventh Circuit's *Garrott* decision. In that case, this Court remanded for further consideration in light of *Slack* v. *McDaniel*, 529 U.S. 473 (2000), because it was unclear whether the petitioner qualified for a certificate of appealability. On remand, the court of appeals concluded that the petitioner's Section 2255 motion did not present any substantial constitutional question and denied the certificate. The petitioner sought certiorari from that ruling, the Solicitor General waived the right to respond, and this Court denied certiorari. See *Garrott* v. *United States*, Order (CA7 Jan. 28, 2000) (No. 99-2921), *vacated and remanded*, 531 U.S. 941 (2000) (No. 99-9743), *on remand*, 238 F.3d 903, *cert. denied*, 532 U.S. 1072 (2001) (No. 00-9634).

In a testament to the difficulties faced by *pro se* litigants in this context, the petitioner in the Fourth Circuit's *Torres* decision attempted to seek certiorari *pro se* but mistakenly filed the petition with the court of

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 5, 2002

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appeals, which of course rejected it. No. 98-7657, Oct. 10, 2000 Dkt. Notation. He then sought an extension of time from this Court, which refused to accept the motion as untimely. See Oct. 20, 2001 correspondence (on file with the Clerk's office).

ERICK CORNELL CLAY,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 00-3671

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September 28, 2001*, Submitted

*This appeal was submitted to the panel that decided Clay's direct appeal pursuant to OPERATING PROCEDURE 6(b). Judge Eschbach, who was a member of the original panel, has since retired from service. Judge Evans has been assigned at random to replace him on the panel. After an examination of the materials submitted by the parties, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See FED. R. APP. P. 34(a)(2).

January 25, 2002, Decided

COUNSEL: ERICK CORNELL CLAY, Petitioner-Appellant, *Pro se*, Manchester, KY.

For UNITED STATES OF AMERICA, Respondent-Appellee: Kenneth M. Hays, OFFICE OF THE UNITED STATES ATTORNEY, South Bend, IN, USA.

Before Honorable ILANA DIAMOND ROVNER, Circuit Judge, Honorable DIANE P. WOOD, Circuit Judge, Honorable TERENCE T. EVANS, Circuit Judge.

ORDER

During the summer of 1996, Erick Clay began selling crack cocaine to Tammy Sue Herring, who was renting a room in a house in South Bend, Indiana. On October 18, 1996, in an apparent effort to settle Herring's outstanding drug debt to him, Clay set the home on fire. The resulting conflagration severely damaged the residence and killed a dog and a kitten. A federal grand jury in Indiana subsequently charged Clay with arson and distribution of crack in violation of 18 U.S.C. § 844(i) and 21 U.S.C. 841(a)(1). On December 30, 1997, he was convicted of both counts by a jury, and the district court later sentenced him to 137 months in prison. Clay appealed his conviction, arguing that the Government had not produced enough evidence to convict him on either count and that the trial judge had improperly admitted "other crimes" evidence. On November 23, 1998, this Court affirmed his convictions in an unpublished order. *United States v. Clay*, 165 F.3d 33, No. 98-1783, 1998 WL 847098 (7th Cir. 1998). Clay did not file a petition for rehearing and the mandate was issued from this court on December 15, 1998. He did not thereafter file a petition for certiorari with the Supreme Court.

On February 22, 2000, more than a year after we affirmed his conviction, Clay filed a pro se motion with the district court to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, arguing principally that his counsel was ineffective at trial. The district court denied Clay's motion as time-barred on August 2, 2000. Clay subsequently filed a

notice of appeal on September 7, 2000. The district court sua sponte issued a certificate of appealability as to whether Clay was denied his Sixth Amendment right to the effective assistance of counsel. Clay's first appellate brief was stricken by this Court because he failed to address the Sixth Amendment claim for which the district court had issued the certificate of appealability. Contrary to this Court's instruction, Clay's second brief addressed only whether the district court properly denied his motion as untimely, not the Sixth Amendment claim. As it turns out, however, we need not reach the merits of the Sixth Amendment claim. The one issue that Clay addressed in his brief -- the timeliness of his motion -- turns out to be dispositive of the case. We find that the district court properly denied Clay's motion as time-barred pursuant to law of this circuit, and therefore we affirm on that basis.[1]

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[1] We had asked the parties to address in their briefs whether it was proper for the district court to deny Clay's § 2255 motion as untimely given that the government originally had responded to the merits of Clay's motion in the district court without raising the timeliness question -- thereby, arguably, waiving any defense based on the tardiness of the motion. *Cf. Acosta v. Artuz*, 221 F.3d 117, 122-23 (2d Cir. 2000) (holding that court may raise timeliness of § 2254 petition sua sponte); *Kiser v. Johnson*, 163 F.3d 326, 328-29 (5th Cir. 1999) (same). Notwithstanding our request, Clay did not address the potential waiver in his opening brief. Belatedly, in his reply brief, he did argue that the government waived the timeliness argument. This was too late. *See, e.g.*, *Help At Home Inc. v. Medical Capital, L.L.C.*, 260 F.3d 748, 753 n.2 (7th Cir. 2001) (arguments first raised in reply brief are deemed waived). Clay himself has therefore waived any waiver argument that he might have made. *See, e.g.*, *United States v. Anaya*, 32 F.3d 308, 312 (7th Cir. 1994). We note, in any event, that although it was the district court, rather than the government, that first raised the timeliness question below, the parties were given the opportunity to brief that question before the court dismissed Clay's motion. See R. 51 (ordering parties to show cause why Clay's section 2255 motion should not be dismissed as untimely); R. 52 (government's response); R. 53 (Clay's response). Clay was therefore not taken by surprise. *Cf. Venters v. City of Delphi*, 123 F.3d 956, 967-69 (7th Cir. 1997).

Section 2255 provides for a one-year period during which a federal prisoner may seek collateral review of his conviction. 28 U.S.C. § 2255. As relevant here, that one-year period began to run on the date on which the judgment of Clay's conviction became final. When an appellate court affirms a conviction and the defendant elects not to seek review by the United States Supreme Court, a question arises as to whether his conviction becomes final at the conclusion of the appellate proceedings, or at the expiration of the ninety-day period during which he may file a petition for certiorari. 28 U.S.C. § 2244, as amended by the Anti-Terrorism and Effective Death Penalty Act, answers this question for state prisoners by allowing them to initiate habeas review up to one year from "the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review." 28 U.S.C. § 2244(d)(1)(A) (emphasis added). In other words, this provision permits a state prisoner to file a habeas petition up to one year after the termination of the ninety-day period for filing a petition for a writ of certiorari, regardless of whether he actually filed such a petition. See SUP. CT. R. 13. The corresponding provision for federal prisoners, section 2255, lacks comparable language, however; and the omission has led this court to conclude that when a federal prisoner does not seek Supreme Court review of his conviction, he does not receive the benefit of the ninety-day period for filing a certiorari petition.

In *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998) (per curiam), *cert. denied sub nom. Ahitow v. Glass*, 526 U.S. 1113 (1999), we concluded that when a federal prisoner on direct appeal of his conviction does not file a certiorari petition, his conviction becomes final when the appellate court issues its mandate affirming his conviction. The movant in *Gendron* filed the motion to vacate his conviction one year and two weeks after this court had affirmed his conviction on direct appeal and issued the mandate. *Id.* 154 F.3d at 673. He had not filed a petition for

certiorari but argued that his conviction had not become final, for purposes of section 2255, until the time for filing that petition had expired. *Id.* In other words, "according to [appellant], the period of limitations should start to run, not from the date our mandate was issued, but [from] the date that review by the Supreme Court was precluded." *Id.* However, the absence of a provision akin to the one in section 2244 expressly providing for this particular time computation struck us as significant. "Because similar language is absent in § 2255, we conclude that Congress intended to treat the period of limitations differently under the two sections." *Id.* at 674. We held accordingly that "federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the date this court issues the mandate in their direct criminal appeal." *Id.*

We decline the invitation to reconsider our holding in *Gendron*, although the government correctly points out that our construction of section 2255 represents the minority view. *See United States v. Torres*, 211 F.3d 836 (4th Cir. 2000) (taking the same position as this court); *contra United States v. Garcia*, 210 F.3d 1058 (9th Cir. 2000); *United States v. Gamble*, 208 F.3d 536 (5th Cir. 2000) (per curiam); *United States v. Burch*, 202 F.3d 1274 (10th Cir. 2000); *Kapral v. United States*, 166 F.3d 565 (3rd Cir. 1999). Since *Gendron* was decided, we have declined to revisit its holding notwithstanding the circuit split. *See Garrott v. United States*, 238 F.3d 903 (7th Cir.), *cert. denied*, 121 S. Ct. 2230 (2001); *see also Gutierrez v. Schomig*, 233 F.3d 490 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1421 (2001) (holding that time during which state prisoner could have, but did not, petition Supreme Court for review of state post-conviction judgment did not toll the one-year limitations period under section 2244(d)(2)). Bowing to stare decisis, we are reluctant to overrule a recently-reaffirmed precedent without guidance from the Supreme Court.

Clay's first appeal was decided by this Court on November 23, 1998, and the mandate was issued on

December 15, 1998. He did not seek review by the Supreme Court. Under the prevailing law of this circuit, he had until December 15, 1999 to seek collateral review. Clay did not file his motion until February 22, 2000, sixty-nine days too late. The law in this circuit is clear; Clay's motion to vacate his conviction under 28 U.S.C. § 2255 was not timely. For this reason, we find that the district court was correct when it denied the motion. We AFFIRM the judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ERICK C. CLAY, Petitioner
vs.
UNITED STATES OF AMERICA, Respondent.

Cause No. 3:00CV117RM / Arising from 3:97CR46RM

MEMORANDUM AND ORDER

On November 23, 1998, [the] United States Court of Appeals for the Seventh Circuit affirmed Eric[k] Clay's conviction and sentence for arson and distribution of a Schedule II substance. On February 22, 2000, Mr. Clay filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his federal sentence and he requested leave to amend that motion on May 15. Mr. Clay's February 22 petition claims ineffective assistance of trial counsel and a defective indictment for arson. Mr. Clay's May 15 proposed amendment seeks to add an Ex Post Facto Clause argument and a claim of ineffective assistance of counsel during his plea bargaining stage. On June 21, the court afforded [the] parties to and including July 11 in which to show cause as to why Mr. Clay's § 2255 petition should not be dismissed as untimely. Both Mr. Clay and the government timely responded.

As more fully discussed in the court's order to show cause, The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") contains a one-year statute of limitations for petitions filed pursuant to 28 U.S.C. § 2255. Although other courts of appeal apply a different standard, *United States v. Garcia*, 210 F.3d 1058, 1058-1060 (9th Cir. 2000); *United States v. Gamble*, 208 F.3d 536, 536-537 (5th Cir. 2000); *United States v. Burch*, 202 F.3d 1274, 1279 (10th Cir.

2000); *Kapral v. United States*, 166 F.3d 565, 677 (3d Cir. 1999), when a federal prisoner in this circuit does not seek certiorari with the United States Supreme Court, the conviction becomes "final" on the date the appellate court issues the mandate in the direct appeal. *See Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1758 (1999); *see also Horton v. United States*, No. 98-3481, 2000 WL 862844, at *3 (7th Cir. June 29, 2000); *United States v. Marcello*, Nos. 99-2294, 99-2451, 2000 WL 580669, at *2 (7th Cir. May 15, 2000) ("For defendants who try unsuccessfully to take their case to the Supreme Court, their judgments of conviction become final on the date their petitioners for certiorari are denied."). Mr. Clay didn't seek Supreme Court review, so he had until November 23, 1999[4] (one year from the date the Seventh Circuit issued the mandate in his direct criminal appeal) to file his § 2255 petition. Because Mr. Clay's § 2255 petition was not filed until February 22, 2000, almost three months past this filing date, his petition is time-barred.

When extraordinary circumstances far beyond the petitioner's control prevent timely filing, equitable tolling may be applicable. *See United States v. Marcello*, 2000 WL 580669, at *5. Mr. Clay does not argue that equitable tolling is applicable nor does he make reference to any extraordinary circumstances which might excuse his late filing. Without more than a missed deadline based on an assumption that Third Circuit precedent controlled courts in the Seventh Circuit, Mr. Clay cannot meet the high threshold necessary to trigger equitable tolling. *See id.* (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999)). Accordingly, the court denies Mr. Clay's § 2255 petition as untimely filed.

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[4] The clerk of the court of appeals sent the November 23, 1998 mandate to this court on December 15, 1998. As stated in the show cause order, Mr. Clay had until, at the latest, December 15, 1999 to file his § 2255 petition—a petition not filed until February 22, 2000.

Citing *Sanders v. United States*, 113 F.3d 184, 187 (11th Cir. 1997) and *Small v. Endicott*, 998 F.2d 411, 417 (7th Cir. 1993), Mr. Clay urges the court to liberally construe his § 2255 petition as a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure, which provides an extraordinary remedy invested in the trial court "to correct any error of law in the interest of justice." He further argues that because his sentence violates the Ex Post Facto clause of the Constitution, he has shown the extraordinary circumstances, a "substantial danger to [sic] the underlying sentence was unjust," that allow him relief under Rule 60(b).

Under § 2255, a federal prisoner in custody may move the trial court to vacate or correct a federal sentence if it was imposed in violation of the federal constitution. *See* 28 U.S.C. § 2255. While Rule 60(b) provides relief from judgment in "exceptional circumstances" necessitating an "extraordinary remedy," including mistake, excusable neglect, newly discovered evidence, fraud, or manifest injustice, *see* Fed. R. Civ. P. 60(b), "a prisoner who challenges his federal conviction or sentence . . . must proceed under 28 U.S.C. § 2255." *Waletzky v. Keohane*, 13 F.3d 1079, 1080 (7th Cir. 1994). Because Mr. Clay attacks his sentence, his motion must be classified as a § 2255 action, an action he simply filed too late in the Seventh Circuit.

Because the court has denied Mr. Clay's § 2255 petition as time-barred, any motion to amend that petition must also be denied.

For the foregoing reasons, the court

(1) DENIES Mr. Clay's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 [Docket No. 1/44] and

(2) DENIES Mr. Clay's motion to [sic] for leave to amend [Docket No. 50].

SO ORDERED. ENTERED: August 2, 2000

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Robert L. Miller, Jr., Judge, United States District Court