

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

File No: 1:05-CR-247

v.

HON. ROBERT HOLMES BELL

ROBERT LEE KING,

Defendant.

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**ORDER**

On May 10, 2011, this Court entered a Notice and Order (Dkt. No. 89, Order)<sup>1</sup> advising Defendant of the Court's intention to recharacterize his Petition and Motions (Dkt. Nos. 86, 88) as a consolidated motion under 28 U.S.C. § 2255 and affording him the opportunity to withdraw the filings and thus avoid recharacterization. Additionally, the Court put Defendant on notice that a recharacterization "means that any subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions." Finally, the Court put Defendant on notice that if he did not withdraw his filings, the recharacterized and consolidated motion might be dismissed as time-barred.

Apparently in response to that Order, on June 10, 2011, Defendant filed a motion styled "Petition for Second or Successive Habeas Corpus Petition Under 28 U.S.C. §2241

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<sup>1</sup>All citations to the docket in this opinion refer to the criminal case docket in which Defendant's motion was originally filed, 1:05-cr-247.

for Review of a Sentence Imposed in Violation of Federal Law.” (Dkt. No. 90, Pet.) In the Petition, Defendant withdraws his previous Petition and Motions, and moves this Court to “grant this petition for second or successive Habeas Corpus Petition . . . .” (Pet. at 5.) The request gives the Court pause. As best this Court can determine, Defendant has not filed any previous § 2255 motions. It appears, rather, that Defendant misunderstood the Court’s warning that, if Defendant suffered his Petition and Motions to be recharacterized, “any *subsequent* § 2255 motion will be subject to the restrictions on ‘second or successive’ motions.” (Order at 7 (emphasis added).) By “subsequent” this Court referred to any motions *after* those presently under consideration. Thus, having withdrawn the previous filings, Defendant is not required to request certification of a second or successive § 2255 motion.<sup>2</sup>

This Court is cognizant of its duty to liberally construe motions by *pro se* litigants. *See Thomas v. Eby*, 481 F.3d 434, 437 (6th Cir. 2007). Thus, the Court will construe the present Petition in a manner which best effectuates Defendant’s clear intent. Defendant wishes to subject his conviction and sentence to such habeas corpus review as he is entitled. (*See* Pet. at 5.) The Court will thus construe his Petition as an application for habeas relief under 28 U.S.C. § 2255. (*See* Order at 4-6 (explaining that § 2255 governs this Court’s

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<sup>2</sup>If Defendant were required to request certification, this Court would not have the power to grant that request. *See* 28 U.S.C. § 2255(h).

discretion in providing Defendant with the relief he seeks).<sup>3</sup> The Court will also order the Clerk of Court to file the Petition under a new, civil case number. Defendant further wishes to challenge based on the reasons stated in his present Petition as well as those stated in his previous (now withdrawn) Petition and Motions. (Pet. at 1.) The Court will thus construe the present Petition to incorporate the substance of those previous filings.

## II.

The Court's May 10 Order required Defendant to show cause why his claims, recharacterized as a § 2255 motion, should not be dismissed as time barred. His present Petition suffers from the same deficiency. Defendant was indicted on June 27, 2006, for four counts related to the sale of drugs. (Dkt. No. 41.) He eventually pled guilty to distribution of fentanyl resulting in serious bodily injury and death, (Dkt. Nos. 57, 64), and all other charges were dismissed at the time of sentencing, (Dkt. No. 78). Defendant's appeal was denied by the Court of Appeals on February 19, 2008. *United States v. King*, No. 07-1012, slip op. (6th Cir. Feb. 19, 2008). Defendant began his most recent round of motions and petitions attacking his conviction and sentence with a "Petition for a Writ of Mandamus . . . for Review of a Sentence Imposed in Violation of a Federal Law" on July 19, 2010. (Dkt. No. 86.)

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<sup>3</sup>As noted in that May 10, 2011, Order, the Court is aware of its duty under *Castro v. United States*, 540 U.S. 375 (2003), to inform a litigant of the consequences of a recharacterization. Although this Court is recharacterizing a new motion, it nonetheless believes that the prior warnings were effective and that Defendant's present Petition constitutes his attempt to amend his previous filings pursuant to those warnings. *See Castro*, 540 U.S. at 377.

### III.

Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides that if it plainly appears from the face of the § 2255 motion, exhibits, and prior proceedings that the petitioner is not entitled to relief, the judge shall make an order for its summary dismissal. Upon initial consideration of the present recharacterized Petition, it plainly appears that Defendant is not entitled to relief. A threshold issue for § 2255 motions is whether the motion is filed within the one-year limitation period:

(f) 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;
- (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.

28 U.S.C. § 2255(f).

In most cases, the one-year statute of limitations runs from the date on which the judgment of conviction becomes final. Judgment was in this case on December 21, 2006. Defendant filed a timely notice of appeal on December 29, 2006. The Court of Appeals denied his appeal on February 19, 2008. The judgment on the appeal became final on May

19, 2008, when the 90-day period to file a petition for a writ of certiorari concluded. Sup. Ct. R. 13. Defendant had one year, until May 19, 2009, in which to file a motion under § 2255. Even liberally construing his present Petition as adopting and amending his first filed motion after the denial on appeal, Defendant did not file anything which could be construed as a motion under § 2255 until on or about July 19, 2010, over a year after the statute of limitations expired. Accordingly, Defendant's action is time-barred.

The one-year statute of limitations contained in § 2255 is not jurisdictional, and it is subject to equitable tolling. *Dunlap v. United States*, 250 F.3d 1001, 1007 (6th Cir. 2001). A court "must accord the parties fair notice and an opportunity to present their positions" before a petition is dismissed sua sponte on statute of limitations grounds. *Day v. McDonough*, 547 U.S. 198, 210 (2006). Although the Court put Defendant on notice that a recharacterized action may be time-barred, and, indeed, ordered him to show cause why it should not be, the order could have been read to apply only if Defendant suffered his previous filings to be recharacterized. The Court will now be more explicit.

**IT IS HEREBY ORDERED** that Defendant's "Petition for Second or Successive Habeas Corpus Petition Under 28 U.S.C. §2241 for Review of a Sentence Imposed in Violation of Federal Law" (Dkt. No. 90) is recharacterized as a motion under 28 U.S.C. § 2255.

**IT IS FURTHER ORDERED** that the Clerk of Court shall assign this action a civil case number.

**IT IS FURTHER ORDERED** that this order shall serve as notice that the Court may dismiss Defendant's application for habeas relief as time-barred.

**IT IS FURTHER ORDERED** that Defendant is given 14 days from the date of this order to **SHOW CAUSE** why his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence should not be summarily dismissed as time-barred.

Dated: July 12, 2011

/s/ Robert Holmes Bell  
ROBERT HOLMES BELL  
UNITED STATES DISTRICT JUDGE