

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDUARDO RUIZ-HERNANDEZ,

Petitioner,

v.

ORDER
07-C-228-S
03-CR-150-S-02

UNITED STATES OF AMERICA,

Respondent.

Petitioner Eduardo Ruiz-Hernandez moves to vacate his sentence pursuant to 28 U.S.C. §2255. This motion has been fully briefed and is ready for decision.

FACTS

On December 3, 2007 a federal grand jury sitting in the Western District of Wisconsin returned an eight-count superseding indictment charging Eduardo Ruiz-Hernandez and others with conspiracy to distribute 500 grams or more of a mixture or substance containing cocaine in violation of 21 U.S.C. §846. On February 20, 2004 petitioner pled guilty to the conspiracy pursuant to a written plea agreement.

The plea agreement set forth the maximum penalty he faced by pleading guilty to the conspiracy, forty years in prison. In the agreement, the government advised it would recommend a three-level

reduction for acceptance of responsibility. There was no mention of drug amounts or particular guideline calculations in the agreement.

Prior to sentencing a presentence investigation report (PSR) was prepared. The Addendum to the PSR determined that petitioner's relevant conduct was 5.28 kilograms of cocaine resulting in an offense level of 32. Petitioner agreed to this amount. The PSR recommended a three-level reduction for responsibility, resulting in an offense level of 29 and a guideline imprisonment range of 97-121 months. At the sentencing hearing on April 30, 2004 petitioner again agreed with the drug amounts set forth in the Addendum to the PSR. The Court sentenced petitioner to 109 months in prison.

The United States Court of Appeals for the Seventh Circuit affirmed the petitioner's judgment of conviction on December 21, 2005. Petitioner's conviction became final 90 days thereafter on March 21, 2006. Petitioner's 28 U.S.C. §2255 motion was dated April 15, 2007 and filed in this court on April 19, 2007.

MEMORANDUM

The statute, 28 U.S.C. § 2555 provides as follows:

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.

Since petitioner's conviction became final on March 21, 2006 he had until March 21, 2007 to file his motion but he did not file it until April 15, 2007 the day he mailed it to the Court. See Clay v. United States, 537 U.S. 522 (2003). The Court finds that petitioner's 28 U.S.C. § 2255 motion is untimely and must be dismissed.

In the alternative the Court addresses the merits of petitioner's motion. He contends that his counsel was ineffective by failing to argue that the government breached the plea agreement. The record is clear that the plea agreement was not breached. Accordingly, petitioner could not prevail on an ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 680, 688 (1984). Petitioner's 28 U.S.C. § 2255 motion will be dismissed.

Ruiz-Hernandez v. United States, 07-C-228-S

ORDER

IT IS ORDERED that petitioner's motion under 28 U.S.C. § 2255
is DENIED as untimely.

Entered this 6th day of July, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge