

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

GERARDO VALTIERRA,

Defendant.  
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OPINION AND ORDER

13-cv-499-bbc

06-cr-126-bbc

On July 10, 2013, defendant Gerardo Valtierra filed a motion for post conviction relief under 28 U.S.C. § 2255, alleging that he was denied the effective assistance of counsel. In an order entered on July 16, 2013, the court denied the motion after finding that it was untimely and therefore barred by the governing one-year statute of limitations. See 28 U.S.C. § 2255(f). Defendant then filed a motion for reconsideration in which he stated that because he was raising a claim under Alleyne v. United States, 113 S. Ct. 420 (2013), his motion was timely. Because defendant's Alleyne claim was not apparent in his original motion, I granted the motion for reconsideration and set it for briefing. On September 23, 2013, after reviewing defendant's motion and the government's response, I denied the motion because defendant had no factual basis for a claim under Alleyne. In his case, the jury had made the determination of the minimum amounts of drugs for which he was held responsible, which is what is required under Alleyne.

On December 17, 2013, defendant filed a motion under Fed. R. App. P. 4, for an extension of time to file an appeal from the court's September 23, 2013 order. In his motion, defendant explained that he was unable to file a timely appeal because he was in transit to a different prison facility when the court's September 23 order issued and he did not have access to his legal materials until November 1, 2013. In an order entered on December 31, 2013, I denied defendant's motion both because it was untimely and because defendant had failed to show excusable neglect or good cause as required under Fed. R. App. P. 4.

Now defendant has filed a motion to alter or amend the court's December 31, 2013 order, pointing out correctly that the court erred in calculating an extension of time to file an appeal under Fed. R. App. P. 4. When the United States is a party to a civil proceeding, the losing litigant has 60 days to appeal. Fed. R. App. P. 4(a)(1)(B). Lawuary v. United States, 669 F.3d 864 (7th Cir. 2012). Defendant's time to appeal expired no later than November 22, 2013 and his motion for an extension of time to file an appeal expired on December 22, 2013. Defendant filed his notice on December 17, 2013, which is within the thirty-day extended deadline for purposes of Fed. R. App. P. 4(a)(5).

Defendant's motion for an extension is timely and he has shown good cause because he lost more than half of his filing time while he was in transit and separated from his legal materials for about five and half weeks, from September 23 until November 1, 2013. Under these circumstances, I find that defendant has shown good cause for an extension under Fed.

R. App. P. 4(a)(5). Therefore, his request for an extension of time will be granted and I will construe his motion as a notice of appeal. Because defendant did not pay the \$505 appellate filing fee as is required under 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22, I will construe his motion as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915.

According to 28 U.S.C. § 1915(a), a defendant who is found eligible for court-appointed counsel in the district court proceedings may proceed on appeal in forma pauperis without further authorization "unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed." Because defendant had retained counsel during the criminal proceedings against him and on appeal, he is not automatically eligible for in forma pauperis status.

Defendant will have to show that he is entitled to pauper status on appeal. He may have until March 4, 2014 to complete and file the enclosed affidavit so that I may determine his financial eligibility to proceed on appeal without prepayment of the fee for filing his notice of appeal.

#### ORDER

Defendant's motion to alter or amend the court's December 30, 2013 order is GRANTED to correct the calculation of time in which defendant had to file a motion for an extension of time in which to file his appeal. Defendant's motion for extension of time in

which to file an appeal under Fed. R. App. 4 is GRANTED in light of his almost six weeks of transit status.

FURTHER, IT IS ORDERED that defendant shall have until March 4, 2014, in which to file an affidavit of indigency with the court so it can determine whether defendant is eligible to proceed on appeal in forma pauperis.

Entered this 5th day of February, 2014.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge