

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

JOHN SCHWIESOW,

Petitioner,

v.

MEMORANDUM and ORDER
04-C-284-S
92-CR-46-S-01

UNITED STATES OF AMERICA,

Respondent.

On May 13, 2004 judgment was entered in the above entitled matter denying petitioner's 28 U.S.C. §2255 motion to vacate his sentence with prejudice. On December 29, 2004 the United States Court of Appeals for the Seventh Circuit vacated this judgment and remanded the matter to this Court for further proceedings.

On February 28, 2005 this Court reopened the matter and entered a briefing schedule on whether equitable tolling should apply. Respondent filed a brief on March 28, 2005. Petitioner's brief which was to be filed not later than April 28, 2005 has not been filed to date.

MEMORANDUM

On May 12, 2004 this Court dismissed petitioner's motion to vacate his sentence as untimely. On appeal petitioner argues that this Court had dismissed his previous collateral attack as premature. Petitioner's argument lacks a factual basis.

Petitioner did not file a previous motion under 28 U.S.C. § 2255. Instead, when he was in state custody on August 26, 1997 he filed a petition for a writ of habeas corpus under 28 U.S.C. §2254. He was challenging his state court sentence. This Court dismissed his petition for his failure to exhaust his state court remedies.

In August 1997 this Court never advised petitioner that a collateral attack on his federal sentence was premature. Since petitioner did not receive erroneous instructions from this Court, he is not entitled to equitable tolling on time limits to file a 28 U.S.C. § 2255 motion.

Had petitioner filed a 28 U.S.C. § 2255 motion on the date he filed his petition for a writ of habeas corpus under 28 U.S.C. § 2254 it would still have been untimely. Since his conviction was final on February 3, 1993 the time for filing his motion expired one year after the effective date of the AEDPA or on April 23, 1997.

Petitioner's 28 U.S.C. § 2255 motion that he filed on May 10, 2004 is untimely. Accordingly, his motion will be denied with prejudice.

ORDER

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

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IT IS FURTHER ORDERED that judgment be entered denying petitioner's 28 U.S.C. § 2255 motion with prejudice.

Entered this 2nd day of May, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge