

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

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ORDER

01-CR-71-C-02

Defendant Stacey Miller has filed a motion to toll the running of the statute of limitations for filing a § 2255 motion “until the present and all governmental impediments that is preventing him from generating his 2255 motion, no longer exist”; in the alternative he requests the appointment of counsel to help him to file a post-conviction motion. In support of his motion for tolling, he says that as a consequence of having been attacked by gang members while incarcerated at USP Beaumont, he has been placed in segregation and has no access to the main library. He alleges that as a segregated inmate, he has access only to a “law room,” which contains a very limited legal materials. He may obtain copies of additional materials, but only if he makes a specific request for a particular case or particular law book. He adds that, in preparing this motion, he had the help of another inmate who

was in segregation with defendant for a brief period of time and was willing to help defendant with his request.

Although defendant's circumstances present some impediments to legal research, they are not so restrictive as to establish the kind of extraordinary conditions that would justify equitable tolling. The Court of Appeals for the Seventh Circuit has set the bar for "extraordinary circumstances" at a high level. United States v. Montenegro, 248 F.3d 585, 594 (7th Cir. 2001) (although defendant alleged that he never heard from his trial counsel, that he was unable to understand docket sheet his lawyer sent him because of language barrier, that his lawyer never consulted him about appealing, that he had limited education and lack of knowledge about United States legal system and that he was being transferred from prison to prison, he did not make out claim of extraordinary circumstances) (citing United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000)).

The court of appeals denied defendant's appeal on May 1, 2003. The statute of limitations did not start running on his § 2255 motion until the time for petitioning a writ of certiorari in the United States Supreme Court expired, which would have been 90 days from the day that the court of appeals issued its opinion, or July 30, 2003. Clay v. United States, 537 U.S. 522, 529 (2003). This means that defendant has almost nine months in which to prepare and file a motion for post-conviction relief. This should be adequate time, even with the restrictions under which he is operating.

Defendant asks in the alternative for appointment of counsel to assist him in determining and framing the issues he intends to present. He alleges that he functions at an eighth grade level or lower, that he has not had any formal or informal education in jurisprudence or any other academic area, that he does not have an aptitude for learning the fundamentals of investigating, organizing and composing legal issues and, as I noted earlier, that another inmate prepared his motions for tolling and for appointment of counsel.

Although defendant may have some difficulty preparing a motion for post-conviction relief, I am not persuaded that he needs appointed counsel at this stage of the proceedings. The requirements for a post-conviction are straightforward. Defendant must fill out a form indicating the reasons he thinks his conviction or sentence was unconstitutional. In his motion for appointment of counsel, he has already set out reasons why he thinks he would qualify for post-conviction relief: his lawyer failed to object to errors that the court made both during trial in the jury instructions; his lawyer failed to subpoena certain witnesses that defendant wished to present at trial; his lawyer failed to give him the correct information that would have enabled him to make a knowing choice between pleading guilty and proceeding to trial; his lawyer advised him to remain silent at his presentence interview and again at sentencing, although he could have explained what was really going on; and the government engaged in misconduct when it presented allegedly perjured testimony. It is not necessary for defendant to cite any cases or to make any legal arguments. All he needs to do

is to write down the facts he thinks will support his claims of ineffective assistance of counsel and governmental misconduct. If, after he has filed his motion, it appears that he needs the assistance of counsel to enable him to prosecute the motion, he may renew his motion for appointment of counsel at that time.

ORDER

IT IS ORDERED that defendant Stacey Miller's motion for a tolling of the statute of limitations for filing a motion pursuant to 28 U.S.C. § 2255 is DENIED; his alternative motion for appointment of counsel is DENIED, without prejudice.

Entered this 10th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge