

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

UNITED STATES OF AMERICA,

ORDER

Plaintiff,

v.

05-cr-39-bbc

FLORENTINO CASTILLO,

Defendant.

Defendant Florentino Castillo was sentenced in this court on April 25, 2006. The court of appeals denied his appeal on July 15, 2008. He now asks for an extension of time in which to file a motion for post conviction relief under 28 U.S.C. § 2255. Under § 2255, defendant had one year from the date on which “the judgment of conviction [became] final” in which to bring a post conviction motion. Defendant did not petition for a writ of certiorari, so his conviction would have become final 90 days after July 15, 2008, or October 13, 2008. Clay v. United States, 537 U.S. 529-30 (2003) (one-year statute of limitations does not begin to run until 90 days after time for filing petition for writ of certiorari has expired, even if defendant does not file such petition). Therefore, he had until October 14, 2009 in which to file a § 2255 motion.

In support of his request for an extension of time to file his motion, defendant says that the institution in which is he housed misplaced his legal materials. He asks the court to “restart his 1-year time limit” to file his § 2255 motion. With his request, he has included documentation from his unit counselor confirming that his legal materials have been lost.

It appears from Holland v. Florida, 130 S. Ct. 2549 (2010), that federal courts have the authority to grant extensions of the statutory one-year filing period. (Although Holland involved a late filing by a state prisoner, the holding gives no reason to think that the Court would not reach the same decision in a case involving a federal prisoner.) In Holland, the court reiterated its view that entitlement to equitable tolling requires a showing by the petitioner that he has been pursuing his rights diligently and that some extraordinary circumstances stood in his way. Id. at 2562 (citing Pace v. DiGuglielma, 544 U.S. 408, 418 (2005)). The Court did not give Holland an extension, but remanded his case so that the trial court could determine whether defendant’s efforts to see that his lawyer filed his post conviction motion amounted to “reasonable diligence.” Id. at 2565.

In this case, defendant has said only that this legal materials were lost. He does not say what steps he took to obtain new copies of the materials, when he began work on his post conviction motion, when he discovered the loss of his materials, how long it would take him to replace the materials or what he intends to do if he cannot replace the lost materials. Unless he can show, at a minimum, that he began work on his motion well before the end

of the first year following his conviction, that he took steps in that period to obtain copies of the papers he needs and that he is continuing to make diligent efforts to replace the materials, I will have to deny his motion as untimely. Defendant must show that the circumstances of his case are extraordinary and his efforts diligent. This is a difficult showing to make, as the cases illustrate. “[E]quitable tolling of the statute of limitations is such exceptional relief that “we have yet to identify a circumstance that justifies equitable tolling in the collateral relief context.” Modrowski v. Mote, 322 F.3d 965, 967 (7th Cir. 2003) (citing Lloyd v. VanNatta, 296 F.3d 630, 633 (7th Cir. 2002)).

ORDER

Defendant Florentino Castillo may have until November 5, 2010, in which to show cause why his motion for post conviction relief should not be denied as untimely

Entered this 19th day of October, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge