

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATTHEW EVANS,

Defendant.

ORDER

07-cr-159-bbc

Defendant Matthew Evans has filed a motion for extension of time in which to file a motion for post conviction relief under 28 U.S.C. § 2255. On March 20, 2008, a jury found defendant guilty of conspiracy to commit armed bank robbery, armed bank robbery and use of a firearm in furtherance of a crime of violence. He was sentenced on June 4, 2008 to a term of imprisonment of 382 months. Defendant appealed his conviction. On August 13, 2009, the court of appeals vacated and remanded defendant's sentence after the court determined that this court had erred in treating defendant's prior state court conviction for aggravated battery of a pregnant person as a crime of violence. United States v. Evans, 576 F.3d 766 (7th Cir. 2009). As a result, defendant no longer met the criteria for a career offender. Defendant was resentenced on April 22, 2010 to a term of imprisonment of 240

months. Defendant appealed. On October 28, 2010, the court of appeals dismissed defendant's appeal from his resentencing. Defendant then filed a petition for a writ of certiorari with the Supreme Court, which was denied on March 21, 2011.

Under § 2255, defendant had one year from March 22, 2011, or until March 22, 2012, in which to bring a post conviction motion. That time has expired without defendant's filing a motion; he asks for more time because his transfer from one prison to another and the late arrival of his legal papers have prevented him from working on his post conviction motion.

The Supreme Court has held that courts have the authority to accept petitions after the statutory one-year filing period has expired, but only in extraordinary circumstances. In Holland v. Florida, 130 S. Ct. 2549, 2560 (2010), the Court held that the one-year statute of limitations on petitions for federal habeas relief by state prisoners was subject to tolling for equitable reasons "in appropriate cases," but a petitioner is entitled to such tolling only if he can show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Id. (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). In Holland, the extraordinary circumstances were the grossly negligent, egregious actions and omissions of petitioner's court-appointed counsel.

In his motion, defendant states that he has been unable to complete his § 2255 motion because his transfer from one institution to another prevented him from preparing

his § 2255 motion. Defendant has not alleged any circumstances that come close to those discussed in Holland. The court of appeals has found similar claims insufficient to justify tolling of the time limits for filing. E.g., Modrowski v. Mote, 322 F.3d 965, 967 (7th Cir. 2003) (incapacity of counsel did not justify tolling); (Lloyd v. VanNatta, 296 F.3d 630, 633 (7th Cir. 2002) (state's failure to provide defendant transcript of trial did not justify tolling); Montenegro v. United States, 248 F.3d 585, 594 (7th Cir. 2001) (equitable tolling not justified in circumstances in which defendant's counsel failed to respond to a letter defendant sent him, defendant was unable to understand the docket sheet his counsel sent him because he spoke little English, he lacked knowledge of legal matters and had been transferred to a different prison before his year for filing had elapsed) overruled on other grounds by Ashley v. United States, 266 F.3d 671 (7th Cir. 2001); United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (death of attorney's father several weeks before deadline and uncertainty about deadlines did not justify equitable tolling); Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999) (counsel's mistake about deadline did not justify tolling)).

Defendant has not alleged that he has been working diligently on his § 2255 motion but that extraordinary circumstances prevented him from completing it, but I will give him an opportunity for doing so. If defendant thinks that he can show that extraordinary circumstances prevented him from preparing a timely motion or that actions of the

government kept him from doing so, he should submit a sworn affidavit, setting out exactly when he arrived at an institution at which he had access to his legal papers and what efforts he has made to complete his motion. The fact that he was later transferred is probably not an extraordinary circumstance, but he can try to explain why the court should find it to be one in this instance.

ORDER

IT IS ORDERED that defendant Matthew Evans may have until April 26, 2012 in which to file a sworn affidavit setting forth the efforts he has made since March 22, 2011 to prepare a motion for post conviction relief and whether any extraordinary circumstance or action of the government prevented him from filing a timely motion.

Entered this 5th day of April, 2012.

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