IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

CARLTON EMBRY,

Defendant.

OPINION AND ORDER

07-cr-58-bbc

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Defendant Carlton Embry has moved for reconsideration of his motion for an extension of time in which to file a post conviction motion under 28 U.S.C. § 2255. I denied his motion in an order entered on December 2, 2010, dkt. #38, explaining to him that it would be difficult for him to show that he could not file a timely motion, particularly when at that time he still had 44 days in which to do so.

In his motion for reconsideration, defendant explains why he has not filed his motion earlier: his trial counsel promised to find counsel for him, but did not; in February, his trial counsel advised him to wait to file until the Supreme Court had decided Welton v. United States, 583 F.3d 444 (7th Cir. 2009); Welton was decided in March 2010, but defendant was put on loss of telephone privileges for 90 day; in September, he was put into segregation

and when he finally was able to try to call his lawyer, the lawyer was not available to take the call and never responded to defendant's letters; and in October, defendant was transferred to "the SMU program" at USP Lewisberg. Finally, defendant started to work on his § 2255 motion on his own, but he has found it difficult because he has no training in the law and limited time to be in the library.

Unfortunate as defendant's circumstances are, they do not add up to an inability to prepare his § 2255 motion. As I explained to defendant in the December 2 order, 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.

Defendant has not alleged any circumstances that come close to those discussed in Holland. His allegations are that he chose to wait for the outcome of the petition in Welton, 583 F.3d 494, that he lost his telephone privileges for 90 days, was in segregation for a 3

period of time, was in transit for awhile and that he is unfamiliar with the law. Those same circumstances are true of many persons in defendant's position. It is not unusual to be in segregation, to be in transit or to be unfamiliar with the law. If these circumstances were enough to warrant equitable tolling of the limitations period, almost any inmate would be entitled to tolling. That is not the law.

Inmates with more compelling problems than defendant's have been denied extensions of time. E.g., Montenegro v. United States, 248 F3d 585, 594 (7th Cir. 2001) (no equitable tolling of deadline when defendant never received response from trial counsel to his letter, was unable to understand the docket sheet that counsel mailed to him because of language barrier, was never consulted on possibility of appeal, had limited education, lacked knowledge of United States legal system and was being transferred from one prison to another) (overruled on other grounds by Ashley v. United States, 266 F.3d 671 (7th Cir. 2001)); see also United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000) (no equitable tolling of statute of limitations for prisoner who argued that law was unclear, his delay was minimal, government was not prejudiced by delay and his attorney's father died two weeks before deadline).

After eleven months, defendant cannot point to any effort he has made to prepare a motion. He does not say that he has spent any time in the law library, sought help from any law library staff or otherwise attempted to learn what his rights might be. He has not

suggested that he is aware of any possible constitutional defect in his plea or sentence that he is still free to challenge.

It is unlikely that defendant could attack his sentence after taking two appeals to the Court of Appeals for the Seventh Circuit. His first sentencing was reversed because it had been imposed before the law changed to allow sentencing courts to consider the disparity in sentences between those ofr crack and those for powder cocaine. The court of appeals upheld the validity of the second sentencing, in which defendant challenged the court's alleged treatment of the career offender guidelines as binding. The court of appeals found that although the sentencing court had imposed a sentence within the career offender guidelines, it had done so after explaining that defendant's history of violent crime warranted a sentence at that level. Opin., dkt. #36-2, at 2. The court of appeals added that although United States v. Kimbrough, 552 U.S. 85 (2007), may have authorized sentencing courts to choose lower sentences than the career offender guidelines direct, it did not require them to do so if they believed that the policy decision behind the career offender guidelines was reasonable. Dkt. #32-2, at 2-3. This decision is the law of the case and cannot be challenged again, even in a different kind of proceeding.

In short, defendant has provided no reason for granting him an extension of time in which to file a motion for post conviction relief.

ORDER

IT IS ORDERED that defendant Carlton Embry's motion for reconsideration of the December 2, 2010 order denying him an extension of time in which to file a motion for post conviction relief under 28 U.S.C. § 2255 is DENIED.

Entered this 13th day of January, 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge