

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

CARRIE WHEATON,

Defendant.  
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ORDER

08-cr-34-bbc

12-cv-620-bbc

Defendant Carrie Wheaton has filed a motion for post conviction relief under 28 U.S.C. § 2255, asserting that she was denied the effective assistance of counsel. She has also asked for appointment of counsel.

The initial question is whether defendant's motion is timely. Section 2255 has a one-year period of limitations that begins running from the latest of (1) the date on which the defendant's conviction becomes final; or (2) the date on which any impediment to the filing of the motion has been removed, provided that the impediment was an illegal one created by government action and one that actually prevented the defendant from filing his motion; or (3) the date on which the right asserted was recognized initially by the Supreme Court, provided that the right was both newly recognized by the Court and made retroactively

applicable to cases on collateral review; or (4) the date on which the defendant could have discovered the facts supporting his claims through the exercise of due diligence.

Defendant argues that her petition is timely under subsection (3) in light of recent Supreme Court cases that set new standards for evaluating the effective assistance of counsel in plea bargaining. In Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012), the United States Supreme Court held that a defendant was denied effective assistance of counsel when the government sent a plea deal to his attorney but the attorney failed to communicate the offer to his client before it expired. In Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012), the court held that a defendant was denied effective assistance of counsel when his defense attorney received a formal plea offer but, relying on an unreasonable misunderstanding of the law, advised his client to reject the offer.

It is not clear how plaintiff's situation is similar to either of the situations in these two cases. She did not file a memorandum in support of her motion and she has not explained what happened with respect to any plea bargains that the government offered. She entered a plea of guilty to count one of the indictment; having done so, it seems unlikely that she could shown either that her attorney had withheld a proposed plea agreement from her or that he gave her bad advice about accepting it. Without more information I cannot determine whether her claims have merit or if they are timely under § 2255(3). Although the Supreme Court has established new standards for future conduct by counsel, no court

has yet determined whether the holdings in Frye and Lafler apply to closed cases.

Also, defendant should be aware that even if I determine that her petition is timely, she must have to show not only that her counsel was ineffective but that the ineffectiveness prejudiced or harmed her. Lafler, 132 S. Ct. at 1384-88. To meet the prejudice prong, defendant must demonstrate “a reasonable probability” that the government offered her a more favorable plea offer that she would have accepted the plea offer had it been for counsel’s deficient performance and that she received a harsher sentence than she would have received under the first offer. For instance, in Lafler, the defendant alleged that he rejected the government’s plea offer, stood trial, and received a harsher sentence as a result. Id.

In light of the lack of clarity in defendant’s motion, I will give her a chance to amend her motion. In particular, defendant should describe in clear, simple terms what happened with respect to any plea bargains that the government offered.

As to defendant’s motion for appointment of counsel, she has no right to a lawyer on a post conviction motion. It is within my discretion to appoint one for her but as a general rule, I do not appoint counsel on post conviction motions until and unless the defendant has brought a motion that requires an evidentiary hearing. If, after review of defendant’s amended § 2255 motion, I determine that an evidentiary hearing is necessary, I will appoint counsel to represent her at the hearing and preparation for the hearing.

ORDER

IT IS ORDERED that defendant Carrie Wheaton may have until September 28, 2012, to amend her motion for post conviction relief under 28 U.S.C. § 2255. If she does not file an amended motion by that date, the court will assume that she does not want to pursue the motion and it will deny the motion and close the case.

Defendant's motion for appointment of counsel is DENIED without prejudice.

Entered this 29th day of August, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge