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*** CURRENT THROUGH CHANGES RECEIVED DECEMBER, 2004 ***

RULES GOVERNING SECTION 2255 PROCEEDINGS

USCS Sec 2255 Proc R 9 (2005)

Review Court Orders which may amend this Rule.

Rule 9. Second or Successive Motions

Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion, as required by 28 *U.S.C.* § 2255, para. 8.

HISTORY:

(As amended Sept. 28, 1976, P.L. 94-426, § 2(9), (10), 90 Stat. 1335.)

(As amended Dec. 1, 2004.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1976. Act Sept. 28, 1976, in subdiv. (a), deleted "If the motion is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the movant, that there is prejudice to the government." after "government occurred."; and, in subdiv. (b), substituted "constituted an abuse of the procedure governed by these rules" for "is not excusable".

Other provisions:

Notes of Advisory Committee on Rules. Unlike the statutory provisions on habeas corpus (28 *USC* §§ 2241-2254, § 2255 specifically provides that "a motion for such relief may be made *at any time.*" [Emphasis added.] Subdivision (a) provides that delayed motions may be barred from consideration if the government has been prejudiced in its ability to respond to the motion by the delay and the movant's failure to seek relief earlier is not excusable within the terms of the rule. Case law, dealing with this issue, is in conflict.

Some courts have held that the literal language of § 2255 precludes any possible time bar to a motion brought under it. In *Heflin v United States*, 358 *US* 415 (1959), the concurring opinion noted:

The statute [28 *USC* § 2255] further provides; "A motion . . . simply means that, as in habeas corpus, there is no statute of limitations, no res judicata, and that the doctrine of laches is inapplicable. 358 *US* at 420.

McKinney v United States, 208 *F2d* 844 (*DC Cir* 1953) reversed the district court's dismissal of a § 2255 motion for being too late, the court stating:

McKinney's present application for relief comes late in the day: he has served some fifteen years in prison. But tardiness is irrelevant where a constitutional issue is raised and where the prisoner is still confined. 208 *F2d* at 846, 847.

In accord, see: *Juelich v United States*, 300 *F2d* 381, 383 (*5th Cir* 1962); *Connors v United States*, 431 *F2d* 1207, 1208 (*9th Cir* 1970); *Sturup v United States*, 218 *F Supp* 279, 281 (*EDN Car* 1963); and *Banks v United States*, 319 *F Supp* 649, 652 (*SDNY* 1970).

It has also been held that delay in filing a § 2255 motion does not bar the movant because of lack of reasonable diligence in pressing the claim.

The statute [28 *USC* § 2255], when it states that the motion may be made at any time, excludes the addition of a showing of diligence in delayed filings. A number of courts have considered contentions similar to those made here and have concluded that there are no time limitations. This result excludes the requirement of diligence which is in reality a

time limitation. *Haier v United States*, 334 F2d 441, 442 (10th Cir 1964).

Other courts have recognized that delay may have a negative effect on the movant. In *Raines v United States*, 423 F2d 526 (4th Cir 1970), the court stated:

[B]oth petitioners' silence for extended periods, one for 28 months and the other for nine years, serves to render their allegations less believable. "Although a delay in filing a section 2255 motion is not a controlling element . . . it may merit some consideration . . ." 423 F2d at 531.

In *Aiken v United States*, 191 F Supp, 43, 50 (MDN Car 1961), aff'd 296 F2d 604 (4th Cir 1961), the court said: "While motions under 28 USC § 2255 may be made at any time, the lapse of time affects the good faith and credibility of the moving party." For similar conclusions, see: *Parker v United States*, 358 F2d 50, 54 n 4 (7th Cir 1965), cert denied, 386 US 916 (1967); *Le Clair v United States*, 241 F Supp 819, 824 (ND Ind 1965); *Malone v United States*, 299 F2d 254, 256 (6th Cir 1962), cert denied, 371 US 863 (1962); *Howell v United States*, 442 F2d 265, 274 (7th Cir 1971); and *United States v Wiggins*, 184 F Supp 673, 676 (DC Cir 1960).

There have been holdings by some courts that a delay in filing a § 2255 motion operates to increase the burden of proof which the movant must meet to obtain relief. The reasons for this, as expressed in *United States v Bostic*, 206 F Supp 855 (DC Cir 1962), are equitable in nature.

Obviously, the burden of proof on a motion to vacate a sentence under 28 USC § 2255 is on the moving party. . . . The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case. While neither the statute of limitations nor laches can bar the assertion of a constitutional right, nevertheless, the passage of time may make it impracticable to retry a case if the motion is granted and a new trial is ordered. No doubt, at times such a motion is a product of an afterthought. Long delay may raise a question of good faith. 206 F Supp at 856-857.

See also *United States v Wiggins*, 184 F Supp at 676.

A requirement that the movant display reasonable diligence in filing a § 2255 motion has been adopted by some courts dealing with delayed motions. The court in *United States v Moore*, 166 F2d 102 (7th Cir 1948), cert denied, 334 US 849 (1948), did this, again for equitable reasons.

[W]e agree with the District Court that the petitioner has too long slept upon his rights. . . . [A]pparently there is no limitation of time within which . . . a motion to vacate may be filed, except that an applicant must show reasonable diligence in presenting his claim. . . .

The reasons which support the rule requiring diligence seem obvious. . . . Law enforcement officials change, witnesses die, memories grow dim. The prosecuting tribunal is put to a disadvantage if an unexpected retrial should be necessary after long passage of time. 166 F2d at 105.

In accord see *Desmond v United States*, 333 F2d 378, 381 (1st Cir 1964), on remand, 345 F2d 225 (1st Cir 1965).

One of the major arguments advanced by the courts which would penalize a movant who waits an unduly long time before filing a § 2255 motion is that such delay is highly prejudicial to the prosecution. In *Desmond v United States*, writing of a § 2255 motion alleging denial of effective appeal because of deception by movant's own counsel, the court said:

[A]pplications for relief such as this must be made promptly. It will not do for a prisoner to wait until government witnesses have become unavailable, as by death, serious illness or absence from the country, or until the memory of available government witnesses has faded. It will not even do for a prisoner to wait any longer than is reasonably necessary to prepare appropriate moving papers, however inartistic, after discovery of the deception practiced upon him by his attorney. 333 F2d at 381.

In a similar vein are *United States v Moore* and *United States v Bostic*, supra, and *United States v Wiggins*, 184 F Supp at 676.

Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims so as to prejudice the government both in meeting the allegations of the motion and in any possible retrial. It includes a reasonable diligence requirement for ascertaining possible grounds for relief. If the delay is found to be excusable, or nonprejudicial to the government, the time bar is inoperative.

Subdivision (b) is consistent with the language of § 2255 and relevant case law.

The annexed form is intended to serve the same purpose as the comparable one included in the § 2254 rules.

For further discussion applicable to this rule, see the advisory committee note to rule 9 of the § 2254 rules.

Notes of Advisory Committee on 2004 amendments. The language of Rule 9 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as indicated below.

First, current Rule 9(a) has been deleted as unnecessary in light of the applicable one-year statute of limitations for § 2255 motions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2255, para. 6.

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Second, the remainder of revised Rule 9 reflects provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 28 *U.S.C.* § 2255, parh. 8, which now require a moving party to obtain approval from the appropriate court of appeals before filing a second or successive motion.

Finally, the title of the rule has been changed to reflect the fact that the revised version addresses only the topic of second or successive motions.