

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GILLIAN VAN DE CRUIZE,

Petitioner,

MEMORANDUM AND ORDER

98-CV-3553 (ILG)

-against-

UNITED STATES OF AMERICA,

Respondent.

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GLASSER, United States District Judge:

Gillllian Van de Cruize, the petitioner *pro se* herein, has moved, pursuant to 28 U.S.C. § 2255, to vacate, set aside or correct a sentence entered on July 29, 1996 and affirmed by the United States Court of Appeals for the Second Circuit on May 19, 1997. Her petition is dated April 27, 1998 and was filed on May 11, 1998. In a letter dated May 8, 1998, petitioner requested an additional 120 days in which to file an amended petition.

In its June 15, 1998 response, the Government urged this Court to deny the request:

Holding otherwise would permit any defendant to toll the one year period of limitation in which to file a 2255 motion by simply filing a barebones petition within one year, and then requesting further time to file an "amended" petition. This would undermine the purpose of limiting the filing of petitions to a one year period.

June 15, 1998 Letter at 2. In support of this position, the Government cites to two decisions holding that courts are without authority to grant extensions to the one-year period of limitation set forth in 28 U.S.C. § 2255. See Simmons v. United States, 98 Civ. 3061 (E.D.N.Y. May 19, 1998); Thai v. United States, 97 Civ. 1219 (E.D.N.Y. March 24, 1997).

The question thus arises as to whether this Court may, consistent with the one-year period of limitation prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), see Pub. L. No. 104-132, 110 Stat. 1214 (1996), § 105, codified at 28 U.S.C. § 2255, entertain a motion for leave to amend filed after the expiration of the year.

Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts states that "[i]f no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the . . . the Federal Rules of Civil Procedure . . . to motions filed under these rules." Pursuant to this rule, courts have held that a § 2255 petition may be amended in accordance with Fed. R. Civ. P. 15. See Bilzerian v. United States, 95 Civ. 1215, 1996 WL

524340, *2 (S.D.N.Y. Sept. 13, 1996) (allowing § 2255 petitioner to amend his petition pursuant to Rule 15); Nunez v. United States, 892 F. Supp. 528, 531 (S.D.N.Y. 1995) (same). In addition, the only court that appears to have addressed the issue has allowed a petition to "relate back" under Fed. R. Civ. P. 15(c). See Williams v. Vaughn, 95 Civ. 7797, 1998 WL 217532. *2 (E.D. Penn. March 18, 1998) (after relating back amended petition to original petition pursuant to Fed. R. Civ. P. 15(c)¹, court determines that it is not subject to AEDPA).

The argument advanced by the Government – that allowing a party to amend a § 2255 petition after the one-year period of limitation has run would allow a petitioner to evade that

¹ Fed. R. Civ. P. 15(c) provides, in pertinent part, as follows:

"An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

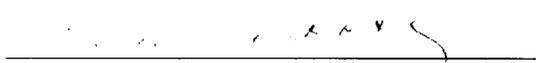
(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, . . ."

limitation period – would, if taken to its logical conclusion, preclude the use of Fed. R. Civ. P. 15(c) under all circumstances. Moreover, the use of Fed. R. Civ. P. 15(c) will not seriously jeopardize the structure set forth in the AEDPA for timely resolution of petitions to vacate, set aside or correct a sentence because Rule 15(a), which sets forth the procedure for amending a complaint, requires that the party seeking amendment apply to the court for an order permitting such an amendment if a responsive pleading has been served. Although “leave shall be freely given when justice so requires,” Fed. R. Civ. P. 15(a), a court ruling on a motion to amend may consider whether there has been, *inter alia*, undue delay in seeking to amend. Foman v. Davis, 371 U.S. 178, 182 (1962).

Petitioner is granted thirty (30) days from the date of this Memorandum and Order to move to amend her petition. Whether or not that motion will be granted will be determined under the guidelines set forth in Foman; leave will be freely given, absent “any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, . . . undue

prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Id.

SO ORDERED.



United States District Judge

Dated: Brooklyn, New York
June 17, 1998

Copies of the foregoing Memorandum and Order were this day sent to:

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Daniel Seth Dorsky
AUSA