



U.S. Department of Justice

U.S. Attorney's Office, District of New Jersey

Appeals Division

Steven G. Sanders
Assistant U.S. Attorney

970 Broad Street, Suite 700
Newark, NJ 07102

(973) 297-2019
FAX (973) 297-2007

December 19, 2018

BY ECF

Hon. Jose L. Linares, U.S.D.J.
U.S. District Court, D.N.J.
Martin Luther King Jr.
Federal Building & Courthouse
50 Walnut Street, P.O. Box 999
Newark, NJ 07101-0999

Re: *Bergrin v. United States*, Civil No. 16-3040

Dear Chief Judge Linares:

Yesterday, Your Honor entered an order (ECF No. 47) suggesting that proceedings on defendant Paul Bergrin's motion to vacate sentence under 28 U.S.C. § 2255 be stayed pending this Court's resolution of Bergrin's separately pending motion under Federal Rule of Criminal Procedure 33(b)(1). The Government agrees that a stay would conserve judicial resources for the reasons asserted in its § 2255 opposition: rejecting the merits of a claim in the Rule 33 motion would preclude an identical claim raised in the § 2255 motion. ECF No. 27 at 49 n.6.¹

Having said that, there may be a subset of claims in the Rule 33 motion that Bergrin initially did not assert in his § 2255 motion but tried to incorporate into it later. *See* ECF No. 47 at 2 ¶ 4 (Your Honor notes that Bergrin's § 2255 reply brief attempted to incorporate the entirety of his Rule 33(b)(1) motion). Although those later-added claims would be subject to the same preclusion principles described above, the Government notes that they face additional legal hurdles. We describe them briefly to preserve those arguments.

First, any claim in Bergrin's Rule 33(b)(1) motion that Bergrin did not initially assert in his initial § 2255 motion is untimely. Section 2255(f)(1) provides a one-year limitations period, which runs from the date Bergrin's conviction became final. Bergrin timely filed his initial § 2255 motion just before that one-year period expired in May 2016. But Bergrin did not file his Rule 33(b)(1) motion until June 2016—

¹ We cite the page numbers in the ECF legend at the top of the filed pleading.

after § 2255(f)(1)'s limitations period had expired. Thus, if the Rule 33(b)(1) motion (either initially or by way of reply) asserted claims that Bergrin did not assert in his initial § 2255 motion, those claims are untimely for § 2255 purposes (even if they were timely filed under Rule 33(b)(1)). Put simply, Bergrin cannot evade AEDPA's one-year limitations period through the simple expedient of using a § 2255 reply brief (filed two years after his conviction became final) to incorporate by reference claims he raised in his Rule 33(b)(1) motion.

Beyond the limitations bar, many of the claims in Bergrin's Rule 33(b)(1) motion are not cognizable under § 2255. Section 2255 exists to remedy violations of the Constitution or federal law, not to provide a forum to litigate the significance of supposedly newly discovered evidence that casts doubt on the verdict or impeaches a witness. See *United States v. Evans*, 224 F.3d 670, 674 (7th Cir. 2000) ("a conviction does not violate the Constitution (or become otherwise subject to collateral attack) just because newly discovered evidence implies that the defendant is innocent."). But Bergrin's Rule 33(b)(1) motion, for example, cites as "newly discovered evidence" an "affidavit" that Charles Madison provided about a conversation he allegedly had with Government witness Anthony Young in 2005. See *United States v. Bergrin*, Crim. No. 09-369 ECF 630-1 at 12-13 (citing *id.*, ECF No. 630-2 at 2-4). As Bergrin does not allege that the Government knew of or suppressed this information, a claim based on the Madison affidavit simply is not cognizable under § 2255. See *United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010) ("Such an evidence-based claim ... is not cognizable under § 2255."); *Conley v. United States*, 323 F.3d 7, 14 (1st Cir. 2003) (en banc) ("Merely to claim that new evidence casts doubt, even grave doubt, on the correctness of a conviction is not a ground for relief on collateral attack.").

In sum, although this Court's rejection of claims in the Rule 33(b)(1) motion will doom the merits of identical claims in the § 2255 motion, some of the claims in the latter also suffer from antecedent procedural flaws: they are untimely and/or not cognizable under § 2255 at all. We respectfully ask this Court to rule on those alternate grounds when resolving Bergrin's § 2255 motion, as doing so could be material to the availability of further review under § 2253(c)(2), which premises appellate review on the issuance of a certificate of appealability.

Respectfully submitted,

CRAIG CARPENITO
United States Attorney

By: s/ STEVEN G. SANDERS
Assistant U.S. Attorney

cc: Paul W. Bergrin
(by electronic delivery
& U.S. Mail)