

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**CRIMINAL ACTION NO. 3:06-CR-20-1
CIVIL ACTION NO. 3:08-CV-44
(BAILEY)**

TYRONE EUGENE YATES,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATIONS

On this day, the above-styled matter came before the Court for consideration of the Report and Recommendation of United States Magistrate Judge James E. Seibert. By Order [Doc. 43] dated January 28, 2008, this action was referred to Magistrate Judge Seibert for submission of proposed report and a recommendation ("R & R"). Magistrate Judge Seibert filed his R & R on May 16, 2008 [Doc. 60]. In that filing, the magistrate judge recommended that this Court order the defendant's Judgment and Commitment Order be amended and that it deny as moot the defendant's 28 U.S.C. § 2255 petition.

Pursuant to 28 U.S.C. § 636 (b) (1) (c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140, 150 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo* review and the petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); ***Snyder v. Ridenour***, 889 F.2d 1363, 1366 (4th Cir. 1989); ***United States v. Schronce***,

727 F.2d 91, 94 (4th Cir. 1984). Here, objections to Magistrate Judge Seibert's R & R were due within ten (10) days after being served with a copy of the R & R pursuant to 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b). The docket reflects that service was accepted on May 19, 2008. See Doc. 61. Counsel for the defendant, however, received notice via electronic filing on May 16, 2008. To date, no objections have been filed by either party. Accordingly, this Court will review the R & R for clear error.

On November 7, 2006, the defendant signed a plea agreement by which he agreed to plead guilty to Count 4 of the Superseding Indictment in violation of Title 21 § 841(a)(1), possession with intent to distribute 2 ounces of cocaine base. The defendant did not file an appeal of his conviction or sentence. The defendant claims he requested a notice of appeal be filed on his behalf, but that his attorney failed to do so.

On July 16, 2007, the defendant filed a Motion to Reinstate Appeal [Doc. 40]. Magistrate Judge Seibert set an evidentiary hearing for May 12, 2008, to determine whether the defendant requested his attorney to file an appeal and whether counsel ignored or refused such instructions. The defendant also filed a Motion to Vacate, Set Aside or Correct Sentence Under § 2255 [Doc. 46] February 8, 2008.

On May 9, 2008, counsel for Defendant filed an unopposed Motion for Entry of Amended Judgment and Commitment Order [Doc. 59], which contains a representation that the Government does not oppose an Amended Judgment and Commitment Order being entered. The motion seeks an amendment to the defendant's Judgment and Commitment Order reinstating the 10-day window, which would afford him the opportunity to file a direct appeal.

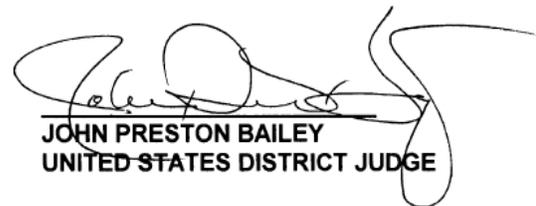
Having reviewed the record and the magistrate judge's R & R, it is the opinion of

this Court that the recommendations of Magistrate Judge Seibert **[Doc. 60]** should be, and are, hereby **ORDERED ADOPTED** for reasons more fully stated in that report. As such, the Court hereby **DENIES as moot** the petitioner's application under 28 U.S.C. § 2255 **[Doc. 46]**. Accordingly, the defendant's civil petition, **3:08-cv-44 [Doc. 1]**, is hereby **DISMISSED** and **ORDERED STRICKEN** from the active docket of this Court. Additionally, the Court hereby **GRANTS** the defendant's Motion for Entry of Amended Judgment and Commitment Order **[Doc. 59]** the Court hereby **ORDERS** the United States Probation Office to prepare an **AMENDED** Judgment and Commitment Order consistent with this Order. As a final matter, the Court hereby **DENIES** the defendant's Motion to Reinstate Appeal **[Doc. 40]**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: May 29, 2008.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE