

cocaine, possession of cocaine with intent to deliver, and second degree conspiracy.

On October 11, 1988, a jury in the Delaware Superior Court found Smith guilty as charged. The Superior Court (Gebelein, J.) sentenced Smith on February 13, 1989, to twenty-eight years in prison followed by twelve years probation. On direct appeal, the Delaware Supreme Court affirmed. *Smith v. State*, No. 84, 1989, 1990 WL 168245 (Del. Sept. 26, 1990).

Smith then filed in the Superior Court two motions for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. He filed his first Rule 61 motion on September 25, 1992, which was denied on December 18, 1992. The Delaware Supreme Court affirmed. *Smith v. State*, No. 33, 1993, 1993 WL 89783 (Del. Mar. 18, 1993). Smith filed his second Rule 61 motion on March 13, 1995, which the Superior Court denied on March 17, 1995. Again the Delaware Supreme Court affirmed. *Smith v. State*, No. 246, 1995, 1995 WL 567059 (Del. Sept. 13, 1995). Smith took no further action until April 9, 1998, when he filed in the Superior Court a motion for correction of sentence.¹ The Superior Court denied the motion on October 23, 1998, and the Delaware Supreme Court affirmed. *Smith v. State*, No. 501, 1998, 1999 WL 734772 (Del. Aug. 31, 1999).

Smith has now filed the current petition for federal habeas corpus relief. In his petition, Smith raises the following claims for relief: (1) his convictions for trafficking and possession of cocaine were based on “non-existent” crimes, because his accomplice obtained cocaine from a source other than the one Smith provided; (2) the state courts wrongly rejected his constitutional challenges to the Delaware trafficking and possession statutes without conducting an evidentiary

¹ Smith’s motion for correction of sentence is dated April 9, 1998, but was not docketed in the Superior Court until September 2, 1998. The record does not explain the five-month discrepancy. For current purposes, the court assumes a filing date of April 9, 1998.

hearing; and (3) the Superior Court enhanced his sentence without allowing a jury to decide the facts for enhancement in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (D.I. 1, 2.) The respondents argue that the petition is subject to a one-year period of limitation that expired before Smith filed it. Thus, they ask the court to dismiss the petition as time barred.

II. DISCUSSION

A. One-Year Period of Limitation

In the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Congress amended the federal habeas statute by prescribing a one-year period of limitation for the filing of habeas petitions by state prisoners. *Stokes v. District Attorney of County of Philadelphia*, 247 F.3d 539, 541 (3d Cir.), *cert. denied*, 122 S. Ct. 364 (2001). Effective April 24, 1996, the AEDPA provides in relevant part:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . . [or]
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . .

28 U.S.C. § 2244(d). In order to avoid any impermissible retroactive application of the one-year period of limitation, state prisoners whose convictions became final prior to the enactment of the AEDPA were allowed to file their habeas petitions under § 2244(d)(1)(A) no later than April 23, 1997. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998)(prohibiting dismissal of petitions

filed on or before April 23, 1997, as untimely under § 2244(d)(1)(A)).

Smith's conviction became final for purposes of § 2244(d)(1)(A) before the AEDPA was enacted. The Delaware Supreme Court affirmed Smith's conviction and sentence on September 26, 1990. Smith was then allowed ninety days in which to file a petition for a writ of certiorari with the United States Supreme Court. *See* Supreme Court Rule 13.1. Although Smith did not file a petition with the United States Supreme Court, the ninety-day period in which he could have filed such a petition is encompassed within the meaning of "the conclusion of direct review or the expiration of the time for seeking such review," as set forth in § 2244(d)(1)(A). *See Kapral v. United States*, 166 F.3d 565, 576 (3d Cir. 1999)(holding that on direct review, the limitation period of § 2244(d)(1)(A) begins to run at the expiration of the time for seeking review in the United States Supreme Court). Therefore, Smith's conviction became final on December 26, 1990, ninety days after the Delaware Supreme Court affirmed his conviction, and several years before the enactment of the AEDPA on April 24, 1996. Thus, he could have filed a timely habeas petition with this court not later than April 23, 1997. *See Burns*, 134 F.3d at 111.

The court's docket reflects that Smith's habeas petition was filed on August 31, 2000. (D.I. 1.) A pro se prisoner's habeas petition, however, is considered filed on the date he delivers it to prison officials for mailing to the district court, not on the date the court docketed it. *Id.* at 113. Smith has provided the court with no documentation establishing the date he delivered his petition to prison officials for mailing. The petition itself, however, is dated August 22, 2000. In the absence of proof respecting the date of delivery, the court deems Smith's petition filed on August 22, 2000, the date he signed it. *See Eley v. Snyder*, Civ. No. 00-34-GMS, 2002 WL 441325, *2 (D. Del. Mar 20, 2002). Notwithstanding, Smith's habeas petition was filed well

beyond the April 23, 1997 deadline imposed under § 2244(d)(1)(A).

Before concluding that Smith’s petition is untimely, the court must determine whether it could be considered timely under § 2244(d)(1)(C). As described above, Smith alleges a violation of his rights under *Apprendi*. Decided on June 26, 2000, *Apprendi* holds that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490. Obviously, Smith could not have pursued an *Apprendi* claim before the April 23, 1997 deadline. Thus, if his *Apprendi* claim falls within the scope of § 2244(d)(1)(C), the one-year period of limitation is measured from the date *Apprendi* was decided, not on the date Smith’s conviction became final.

By its terms, § 2244(d)(1)(C) applies only where a newly-recognized constitutional right “has been made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2244(d)(1)(C). Several courts of appeals have ruled that *Apprendi* does not apply retroactively to cases on collateral review. *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 848 (2002); *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir.), *cert. denied*, 122 S. Ct. 573 (2001).² Based on these decisions, the court concludes that § 2244(d)(1)(C) does not apply because *Apprendi* has not “been made retroactively applicable to cases on collateral review.”

² The court is aware that the Third Circuit has ruled that the United States Supreme Court has not made *Apprendi* retroactively applicable to cases on collateral review. *In re Turner*, 267 F.3d 225, 229 (3d Cir. 2001). *Turner*, however, does not address whether *Apprendi* is retroactively applicable to cases on collateral review for purposes of § 2244(d)(1)(C).

Accordingly, the one-year period of limitation must be counted from the date Smith's conviction became final, not from the date *Apprendi* was decided.

For the reasons described, the court finds that Smith's petition was filed beyond the one-year period of limitation prescribed in § 2244(d)(1)(A). That finding, however, does not necessarily require dismissal of the petition as untimely, because the one-year period may be either statutorily or equitably tolled. *See Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999).

B. Statutory Tolling

The AEDPA provides for statutory tolling of the one-year period of limitation as follows:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

Here, Smith filed a motion for correction of sentence in the Superior Court on April 9, 1998.³ The one-year period of limitation, however, expired on April 23, 1997. *See Burns*, 134 F.3d at 111. Smith's motion for correction of sentence, filed nearly a year after the period of limitation expired, has no tolling effect in this matter. *See Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001)(stating that application for postconviction relief filed after the expiration of the one-year period has no tolling effect), *cert. denied*, 122 S. Ct. 1789 (2002); *Harrigan v. Carroll*, Civ. A. No. 02-197-GMS, 2002 WL 1446695, *2 (D. Del. July 1,

³ The court's analysis assumes without deciding that Smith's motion for correction of sentence qualifies as an application for postconviction relief under § 2244(d)(2). The court is also aware that Smith filed two prior motions for postconviction relief in the state courts. These two postconviction proceedings concluded prior to April 24, 1996, the effective date of the AEDPA. Applications for postconviction relief that terminated prior to the enactment of the AEDPA are not relevant to the statutory tolling analysis.

2002)(same).

In sum, Smith filed his motion for correction of sentence after the one-year period of limitation had expired. Accordingly, the statutory tolling provision does not apply.

C. Equitable Tolling

The one-year period of limitation is not jurisdictional and is subject to equitable tolling. *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir.), *cert. denied*, 122 S. Ct. 323 (2001); *Jones*, 195 F.3d at 159; *Miller v. New Jersey State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998). The doctrine of equitable tolling applies:

only when the principles of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient.

Miller, 145 F.3d at 618-19 (citations omitted). In other words, equitable tolling “may be appropriate if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has ‘in some extraordinary way’ been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.” *Jones*, 195 F.3d at 159 (quoting *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998)).

Here, Smith has failed to articulate any extraordinary circumstances that prevented him from filing his habeas petition in a timely manner. Indeed, he has not provided any reason for his delay in filing the current petition. In short, the court can discern no circumstances which would permit applying the doctrine of equitable tolling. Smith’s habeas petition will be

dismissed.⁴

III. CERTIFICATE OF APPEALABILITY

Finally, the court must determine whether a certificate of appealability should issue. *See* Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

When the court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, the prisoner must demonstrate that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.*

For the reasons discussed above, Smith’s habeas petition was filed beyond the one-year period of limitation. The court cannot conclude that the period should be statutorily or equitably tolled. The court is persuaded that reasonable jurists would not debate otherwise. Smith has,

⁴ In a letter filed with the court on August 9, 2001, Smith complains that the Delaware Department of Correction has miscalculated his good time credits. (D.I. 14.) The court will not consider Smith’s complaint in the context of his current habeas petition, which challenges the legality of his convictions and sentences, not the execution of his sentences. If Smith wishes to challenge the execution of his sentences in federal court, he may file an appropriate habeas petition pursuant to 28 U.S.C. § 2254 after he exhausts available state court remedies. The court expresses no opinion on the merits of Smith’s challenge to the calculation of his good time credits.

therefore, failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED, and the relief requested therein is DENIED.
2. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Dated: September 4, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE