

Farnan, District Judge.

Presently before the Court is a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (D.I. 54) filed by Defendant, James Malloy. For the reasons discussed, Defendant's Motion will be dismissed as untimely and the relief requested therein will be denied.

BACKGROUND

On April 9, 1987, Defendant pled guilty to distribution of cocaine in violation of 21 U.S.C. § 841. Defendant was sentenced on May 21, 1987, to fifteen years imprisonment, three years of special parole, and a \$50 special assessment. Plaintiff appealed, and his appeal was dismissed on January 8, 1988. Plaintiff did not file a petition for a writ of certiorari, but did file a Section 2255 Motion on August 30, 1989, which the Court denied.

According to the Government, Defendant served a substantial portion of his original sentence and was released on parole. He was charged with a new state offense in September 2003, and placed in federal custody on October 2, 2003. (D.I. 60).

The instant Motion is dated March 23, 2004, and was filed on March 30, 2004. Several months later, on May 20, 2004, Defendant was released from federal custody into the custody of the State of New York, which was holding Defendant on a warrant or detainer from the State of Delaware. Defendant posted bail in New York on

June 8, 2004.

DISCUSSION

I. Whether Defendant's Section 2255 Motion Is Time-Barred

By his Motion, Defendant challenges the imposition of his original sentence of fifteen years and three years of special parole citing Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000). Specifically, Defendant contends that he should not have been sentenced to an additional three years special parole after the expiration of his original fifteen year sentence, because fifteen years is the statutory maximum for the offense he committed.

The Government has responded fully to the instant Motion, but contends, as a threshold matter, that the Motion is untimely, because it was not filed within the one-year limitations period required by the AEDPA. In the alternative, the Government contends that Defendant's motion should be denied on the merits.

Effective April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), amended 28 U.S.C. § 2255 to impose a one year limitations period on the filing of Section 2255 motions. In pertinent part, Section 2255 provides that the statute of limitations begins to run from the latest of:

- (1) the date on which the judgment becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the constitution or laws of the United States is removed, if the movant was prevented from making a motion by

such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

In this case, Defendant failed to file his Section 2255 Motion within one year of any of the four triggering events. Defendant was sentenced on May 21, 1987. He appealed to the Third Circuit, and his appeal was dismissed on January 8, 1988. Defendant's conviction became final in 1988, and the AEDPA became effective in 1996. Defendant's motion was filed approximately sixteen years after his conviction became final and nearly seven years after the AEDPA was enacted. Defendant has not asserted that any governmental action prevented him from filing a timely motion, and Defendant has not alleged any newly recognized right that applies retroactively to cases on collateral review. Indeed, courts have concluded that both Apprendi and Ring do not apply retroactively to cases on collateral review. See United States v. Jenkins, 333 F.3d 151, 153-154 (3d Cir.), cert. denied, 124 S. Ct. 350 (2003); United States v. Thomas, 2002 WL 31545772, *2 (D. Del. 2002) (Farnan, J.). Further, Defendant has not offered any new facts in support of his Motion. Thus, his Motion

has not been filed within one year of the discovery of any new facts supporting his claim. Accordingly, the Court concludes that Defendant's Motion is time-barred, unless the one-year limitations period has been tolled.

Defendant has not alleged any facts giving rise to statutory tolling of the one-year limitations period. In addition, the one-year period of limitation may be equitably tolled:

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 v. New Jersey State Dep't of Corr., 145 F.3d 616, 618-19 (3d Cir. 1998) (citations omitted). In this case, Defendant has not alleged any facts that would give rise to equitable tolling. Accordingly, the Court will dismiss Defendant's Section 2255 Motion as time-barred.¹

II. Whether A Certificate Of Appealability Should Issue

The Court may issue a certificate of appealability only if Petitioner "has made a substantial showing of the denial of a

¹ The Government notes that the Motion may also be considered a second, successive motion under pre-AEDPA standards, but contends that the Court need not consider this analysis. Regardless of whether the Motion is considered a second, successive Motion, the Court concludes that it is time-barred. See e.g. Woods v. Brennan, 2001 WL 1428343 (E.D. Pa. 2001) (declining to limit application of § 2244(d) to only first-time petitions and applying limitations period to arguably successive petition).

constitutional right." 28 U.S.C. § 2253(c)(2). In this case, Defendant's Motion is barred by the one-year limitations period, and the Court is not convinced that reasonable jurists would debate otherwise. Because Defendant has not made a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability.

CONCLUSION

For the reasons discussed, Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody is dismissed and the relief requested therein is denied.

An appropriate Order will be entered.

