



**Farnan, District Judge.**

Presently before the Court is a Motion To Correct Unconstitutional Imposed Sentenced Pursuant To Ring v. Arizona Appendi Sixth Amendment Violation (D.I. 183) filed by Defendant Victor Thomas. The Court has construed Defendant's Motion as a Section 2255 Motion and sent Defendant a Miller Notice Order requesting him to indicate whether he wished to proceed with his Motion. (D.I. 184). Defendant failed to complete his election form (D.I. 185), and the Court ordered the Government to file its response.<sup>1</sup> (D.I. 187). The Government contends that Defendant's Section 2255 Motion is time barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For the reasons set forth below, Defendant's Motion will be denied.

**FACTUAL BACKGROUND**

In November 1989, Defendant was indicted on charges of (1) conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846, and (2) attempted possession of cocaine with intent to distribute in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. Defendant was

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<sup>1</sup> Defendant has filed a Supplemental Memorandum Of Law On Behalf Of Petitioner's Motion To Correct Unconstitutional Imposed Sentence In Light Of Ring v. Arizona No. 01-488 (6/24/02) in which he restates his claim and disagrees with the Court's characterization of his Motion as a Section 2255 Motion, because it is a motion brought under the Ring case. The Court is not persuaded that its initial characterization of Defendant's Motion was erroneous, and therefore, the Court will proceed with the Motion as a Section 2255 Motion.

tried before a jury and convicted of attempted possession of cocaine with attempt to distribute, but acquitted of conspiracy to possess cocaine with intent to distribute. (D.I. 183, Exhibits).

On September 14, 1990, Defendant was sentenced to 293 months imprisonment. (D.I. 137). Thereafter, Defendant appealed, and the Third Circuit affirmed his conviction and sentence. (D.I. 160 & 161). Thereafter, Defendant filed a petition for writ of certiorari, which was denied on October 7, 1991. (D.I. 166 & 167).

## **DISCUSSION**

### **I. Whether The Motion Is Timely**

Effective April 24, 1996, the 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;
- (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. First, Defendant's conviction became final in late 1991. Second, Defendant has not asserted that the Government created an impediment which prevented him from filing his Motion earlier. Third, Defendant's Motion was not filed within a year of a newly recognized right made retroactively applicable to cases on collateral review. Defendant's Motion is based upon the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) which was decided on June 26, 2000, more than two years prior to the filing of the instant Motion. In addition, the Third Circuit has concluded that Apprendi is not retroactively applicable to cases on collateral review. In re Turner, 267 F.3d 225, 229 (3d Cir. 2001).

However, Defendant asserts that his Motion is not only based on upon Apprendi, but also upon a more recent Supreme Court decision, Ring v. Arizona, 122 S. Ct. 2428 (2002). The Ring case, however, is basically an application of Apprendi in the context of capital sentencing. In the Court's view, Ring does not create any new right that is relevant to Defendant's case, and in any event, Ring has not been made retroactively applicable to cases on collateral review. See e.g. United States v. Cannon, 297 F.3d 989, 994 (10th Cir. 2002).

Fourth, Plaintiff has not alleged any new facts upon which

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

After reviewing the record, the Court concludes that the AEDPA tolling principles are not applicable in this case. Defendant has not established any circumstances suggesting that his Motion should be tolled. Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999). Accordingly, the Court will deny Defendant's Motion as time-barred.

## **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 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 To Correct Unconstitutional Imposed Sentenced Pursuant To Ring v. Arizona Appendi Sixth Amendment Violation (D.I. 183) will be denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,           :  
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                                  Plaintiff,       :  
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                                  v.                :  
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VICTOR THOMAS,                       :  
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                                  Defendant.     :

**O R D E R**

At Wilmington, this 13th day of November 2002, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Defendant's Motion To Correct Unconstitutional Imposed Sentenced Pursuant To Ring v. Arizona Apprendi Sixth Amendment Violation (D.I. 183) is DENIED.

2. Because the Court finds that Defendant has failed to make "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2), a certificate of appealability is DENIED.

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JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE