IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEVIN BLACK,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. A. No. 02-468-KAJ
	)	Cr. A. No. 97-65-KAJ
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Kevin Black. *Pro se* Petitioner.

Richard G. Andrews, First Assistant United States Attorney, United States Department of Justice, Wilmington, Delaware. Attorney for Respondent.

September 8, 2004
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

Petitioner Kevin Black has filed with the Court the current motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (D.I. 29.) Black is presently in custody at FCI Schuylkill in Minersville, Pennsylvania. As explained below, I will dismiss Black's motion as time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2255. Moreover, I conclude that Black's *Blakely* amendment is without merit.

II. PROCEDURAL AND FACTUAL BACKGROUND

In October 1997, Black pled guilty to Possession of a Firearm by a Person prohibited in violation of 18 U.S.C. § 922(g)(1), punishable by a maximum penalty of ten years incarceration, or a maximum fine of § 250,000, or both. (D.I. 15.) On December 30, 1997, this Court[1] sentenced Black to 120 months imprisonment.[2] (D.I. 18.) Black did not appeal.

Black filed a Motion for Reduction of Sentence in this Court, which was denied on February 11, 1998. (D.I. 19; D.I.

---

[1]This matter was originally decided by the Honorable Joseph J. Longobardi, but was reassigned to the undersigned on January 7, 2003

[2]When he was sentenced in this Court, Black was serving a State of Delaware sentence. Both the State of New Jersey and the United States Marshal's Service had lodged a detainer with the prison in Delaware. (D.I. 26.)

22.) Thereafter, on May 31, 2002, Black filed in this Court a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. (D.I. 39.) His § 2255 motion asserts that neither the Government nor the Court complied with the Interstate Agreement on Detainers, and his defense counsel's failure to raise this issue constituted ineffective assistance of counsel.

The Government filed an Answer to Black's 2255 motion asking the Court to dismiss the motion as time-barred. (D.I. 47.)

In June 2004, Black filed a "Motion to Supplement 28 U.S.C. § 2255 Petition" with a claim that his sentence enhancement violates the recent United States Supreme Court decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004). Black's § 2255 motion is now ripe for review.

III. STANDARD OF REVIEW

After conviction and exhaustion, or waiver, of any right to appeal, courts can presume that a defendant stands fairly and finally convicted. *United States v. Frady*, 456 U.S. 152, 164 (1982). However, prisoners in federal custody may attack the validity of their sentences pursuant to 28 U.S.C. § 2255. Section 2255 cures jurisdictional errors, constitutional violations, proceedings that resulted in a "complete miscarriage of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 784 (1979).

A federal district court must hold an evidentiary hearing on a § 2255 motion only when the petitioner raises an issue of material fact because the court needs to determine the truth of the allegations. *See United States v. Essig,* 10 F.3d 968, 976 (3d Cir. 1993). However, a petitioner is not entitled to a hearing if his allegations are conclusively contradicted by the record, or if they are patently frivolous. *Solis v. United States*, 252 F.3d 289, 295 (3d Cir. 2001); *see Gov't of the Virgin Islands v. Forte,* 865 F.2d 59, 62 (3d Cir. 1989). Thus, if the motions, files, and records "show conclusively that the movant is not entitled to relief," then a district court may summarily dismiss a § 2255 motion. *United States v. Nahodil,* 36 F.3d 323, 326 (3d Cir. 1994) (quoting *United States v. Day,* 969 F.2d 39, 41-42 (3d Cir. 1992)).

Accordingly, as explained below, I find that the evidence of record conclusively demonstrates that Black is not entitled to the relief sought and that an evidentiary hearing is not required.

IV. DISCUSSION

A. One Year Filing Period

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year period of limitation on the filing of a § 2255 motion by federal prisoners. *See* 28 U.S.C.

§ 2255; *Miller v. New Jersey State Dep't of Corrs.*, 145 F.3d 616, 619 n.1 (3d Cir. 1998) (holding that one-year limitations period set forth in § 2255 is not a jurisdictional bar and is thus subject to equitable tolling). The one-year limitations period begins to run from the latest of:

> (1) the date on which the judgment of conviction 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.

Black did not file his original § 2255 motion within one year of any of the four triggering events in AEDPA. First, Black's judgment of conviction became final on January 29, 1998. *See Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999)(when a federal prisoner does not appeal his sentence or conviction to the appropriate court of appeals, the judgment of conviction becomes final, and the one-year period begins to run, upon the expiration of the thirty day (30) time period allowed for seeking appellate review). Accordingly, Black had to file

his § 2255 motion by January 29, 1999, but he did not file it until May 31, 2002.[3] Thus, under § 2255(1), Black filed his § 2255 motion approximately three and a half (3 ½) years too late.

Second, in his original § 2255 motion, Black does not allege that the statutory tolling provisions of § 2255(2),(3), or (4) apply, nor can I discern any facts indicating that such provisions apply. Thus, unless there are circumstances justifying the equitable tolling of the one-year limitations period, Black's original § 2255 motion is untimely.

B. Equitable Tolling

A court may, in its discretion, equitably toll the one-year filing period when "the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights". *Miller v. New Jersey State Dep't of Corrs.,* 145 F.3d 616, 618 (3d Cir. 1998). However, federal courts should invoke the doctrine of equitable tolling "only sparingly," *United States v. Midgley,* 142 F.3d 174, 179 (3d Cir. 1998), and the Third Circuit has enumerated only four limited circumstances in which equitable tolling may be warranted. *Jones v. Morton,* 195 F.3d 153, 159 (3d Cir. 1999).

---

[3]Black's § 2255 motion is dated May 31, 2002. I adopt this date as the filing date because I presume it to be the date Black delivered the § 2255 motion to prison officials for mailing to this court. *See Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998)(applying mailbox rule to § 2255 motions).

Black has not alleged, and I cannot discern, any extraordinary circumstances for equitably tolling the limitations period in this situation. Thus, I will dismiss Black's original § 2255 motion as time-barred.

C. Black's "Motion to Supplement" § 2255 Motion With *Blakely* Argument

Black has also filed a Motion to Supplement his original § 2255 Motion with an argument based on the recent United States Supreme Court decision *Blakely v. Washington*, 124 S.Ct. 2531 (2004). Federal Rule of Civil Procedure 15 governs amended and supplemental pleadings, and it is well-settled that Rule 15 applies to amendments of § 2255 motions. *Riley v. Taylor*, 62 F.3d 86, 89-90 (3d Cir. 1995); *U.S. v. Duffus*, 174 F.3d 333, 336-37 (3d Cir. 1999). In essence, because Black attempts to add an entirely new claim based on a new legal development, he has presented a Motion to Amend rather than a Motion to Supplement. *See, e.g., Iglesias v. United States*, 2001 WL 685520, at *1 n.1 (W.D. Tex. Feb. 26, 2001)(construing motion to supplement § 2255 motion with a new *Apprendi* claim as a motion to amend); *U.S. v. Hicks*, 283 F.3d 380, 385 (D.C. Cir. 2002)(same). Although I could engage in an analysis regarding the propriety of permitting this untimely amendment to Black's original § 2255 motion, in the interest of efficiency, I will permit the amendment.[4]

---

[4]The statutory tolling provision of § 2255(3) presents a curious situation when a petitioner files an untimely motion to

Having granted this amendment, I now turn to the substance of Black's *Blakely* claim. Black argues that his 10 year sentence was the result of additional fact finding in violation of *Blakely*. Specifically, he points to the recommendation in his pre-sentence report that his base offense level of 24 be enhanced to 28 for possessing the firearm in connection with another felony offense, namely, the possession of marijuana distribution. (D.I. 51, Exh. A.) Black contends that he never stipulated or admitted possessing the firearm in connection with another felony. He then states that the maximum sentence he could have received under the United States Sentencing Guidelines without this "enhancement" was 87 months, not 10 years. (*Id.* at 3.)

As an initial matter, I must note that the federal circuit courts disagree over *Blakely*'s applicability to the Federal Sentencing Guidelines.[5] Moreover, even if *Blakely* does apply to the sentencing guidelines, it is highly unlikely that it applies retroactively on collateral review.[6] Nevertheless, I need not

---

amend a time-barred § 2255 motion because, if triggered, § 2255(3) can render the untimely amendment timely.

[5] *See, e.g., United States v. Curtis,* 2004 WL 1774785, at *2 n.2 (11th Cir. Aug. 10, 2004)(collecting cases).

[6] Pursuant to 28 U.S.C. § 2255(3), if a claim based on a newly recognized right is filed within one year after the "right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," then the claim is timely. Here, Black's conviction became final January 29, 1999, *Blakely* was decided on June 24, 2004, and Black filed this amendment one month later. Assuming without analysis that

delve into the complexities of these arguments because I conclude that Black's *Blakely* claim is meritless.

In *Blakely*, the Supreme Court held that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 124 S.Ct. at 2537 (emphasis in original)(citations omitted). Here, Black pled guilty to violating 18 U.S.C. § 922(g)(1), which carries a maximum statutory penalty of 10 years imprisonment. Pursuant to the pertinent sections of 18 U.S.C. § 922(g)(1), "[i]t shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to possess in or affecting commerce, any firearm or ammunition."

The record reveals that Black's 10 year sentence was based on admitted facts, not on additional fact finding. First, Black's Plea Agreement states "[t]he defendant agrees to plead guilty to Count I of the Indictment, which charges a violation of

---

the *Blakely* rule constitutes a newly recognized right, the issue under § 2255(3) is whether *Blakely* applies retroactively. Although the Third Circuit permits lower federal courts to make this determination, *See U.S. v. Swinton*, 333 F.3d 481, 487 (3d Cir. 2003), the recent United States Supreme Court decision *Schriro v. Summerlin*, 124 S.Ct. 2519 (2004), indicates that *Blakely* does not apply retroactively on collateral review. *See, e.g., Garcia v. United States*, 2004 WL 1752588 (N.D.N.Y. Aug. 4, 2004); *United States v. Stoltz*, 2004 WL 1619131 (D. Minn. July 19, 2004).

[18 U.S.C. 922(g)(1)], which carries a maximum penalty of . . . imprisonment for not more than ten years," and "acknowledges that the possession of a gun by a felon charge has a base offense level of at least 24." (D.I. 15.) Second, at his plea colloquy, Black admitted the relevant facts necessary to establish the offense under 18 U.S.C. § 922(g)(1), namely, that he knew he was a convicted felon when he possessed the firearm, and the gun passed over state lines. (D.I. 31, at 15.) In fact, at sentencing, the sentencing judge stated that he was imposing the maximum statutory sentence because of Black's "criminal record and the use of guns." (D.I. 29, at 19.) Thus, because the 10 year sentence was based on Black's own admissions, and not on any additional findings by the judge, *Blakely* is inapplicable.[7]

---

[7]Indeed, the transcript of the sentencing hearing reveals that there was no mention of the four level increase to the base offense level for possessing the gun in connection to another felony offense. Regardless, even if the judge did rely on this increase, it did not constitute "additional fact finding" because Black admitted this connection in both his plea agreement and his plea colloquy. First, his plea agreement states "[t]he defendant understands that there is a possibility that he will get an upward adjustment of plus four for possessing the gun in connection with another felony offense." (D.I. 15, at 2.) Second, at his plea colloquy, Black admitted that he understood "there is a possibility that [he] could get an upward adjustment of plus 4 for possessing the gun in connection with another felony offense." (D.I. 31, at 8.)

V. CERTIFICATE OF APPEALABILITY

Finally, I must determine whether a certificate of appealability should issue. *See* Third Circuit Local Appellate Rule 22.2. A federal district 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). The petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

When a court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the petitioner must demonstrate that reasonable jurists would find it debatable: (1) wether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in is procedural rule. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). If the district court correctly invokes a plain procedural bar to dispose of a 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.*

In the present case, Black's § 2255 motion is time-barred by the one-year period of limitations. Moreover, his *Blakely* amendment is meritless. I am convinced that reasonable jurists

would not find these conclusions debatable. Therefore, Black has failed to make a substantial showing of the denial of a constitutional right, and I will not issue a certificate of appealability.

VI. CONCLUSION

For the reasons stated, I conclude that Black's § 2255 motion was filed after the one-year period of limitations expired. I also conclude that Black's *Blakely* amendment does not provide a basis for federal habeas relief. Accordingly, I dismiss Black's 28 U.S.C. § 2255 motion to vacate, set aside or correct sentence. I will issue an appropriate Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEVIN BLACK,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. A. No. 02-468-KAJ
	)	Cr. A. No. 97-65-KAJ
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

O R D E R

At Wilmington, this 8th day of September, 2004, consistent with the Memorandum Opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Construing Petitioner Kevin Black's motion to supplement his § 2255 motion to be a motion to amend, it is GRANTED. (D.I. 51.)

2. Petitioner Kevin Black's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, as amended, is DISMISSED, and the relief requested therein is DENIED. (D.I. 29.)

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).

Kent A. Jordan
UNITED STATES DISTRICT JUDGE