

violation of 18 U.S.C. § 1956(h). Count two charged Man with participating in a conspiracy to evade currency transaction reporting requirements and structuring, in violation of 18 U.S.C. §§ 5313, 5316, 5324. Count three charged Man with participating in a conspiracy to distribute and possess with the intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846. Count four charged Man with participating in a conspiracy to import heroin, in violation of 21 U.S.C. §§ 952(a), 963. On July 21, 1999, a grand jury returned a superseding indictment that charged Man with the same four counts.

On December 10, 1999, Man pleaded guilty to all four counts. In a written guilty plea agreement, Man stipulated, for the purpose of count one, that the money laundering involved more than \$100,000. He also stipulated that the heroin referred to in counts three and four weighed at least three kilograms, but less than thirty kilograms. Under the United States Sentencing Guidelines, if less than ten kilograms of heroin was involved in the crime, the base-offense level of 34 applies. U.S.S.G. § 2D1.1(c)(3). However, if the heroin weighed ten kilograms or more, the base-offense level of 36 applies. U.S.S.G. § 2D1.1(c)(2). The government and Man reserved the right to present evidence at the sentencing hearing as to whether Man's base-offense level was 34 or 36. The parties also reserved the right to present evidence as to whether Man possessed a firearm in connection with his drug trafficking offenses.

At the conclusion of the sentencing hearing, I determined that Man's drug trafficking offenses involved thirteen to fourteen kilograms of heroin, which corresponded with a base-offense level of 36. I also found that Man possessed a gun in connection with those offenses, which compelled a two-level upward adjustment of his base-offense level under U.S.S.G. § 2D1.1(b)(1) and precluded a two-level reduction under U.S.S.G. § 5C1.2(a)(2). Accordingly, I

sentenced Man to a term of imprisonment of 168 months, a sentence at the low end of the applicable guideline range.

Man's conviction was affirmed by the court of appeals on January 25, 2001, *United States v. Vi Man*, 254 F.3d 1079 (3d Cir. 2001) (unpublished table decision), and became final on April 25, 2001, at the expiration of the ninety-day period provided under 28 U.S.C. § 2101(c) to apply for a writ of certiorari.

On September 20, 2004, Man filed a *pro se* motion for re-sentencing pursuant to 28 U.S.C. § 2255, contending that he was sentenced in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000),² and *Blakely v. Washington*, 542 U.S. 296 (2004). *Blakely*, interpreting the rule of *Apprendi*, held that the State of Washington's sentencing scheme, which allowed judges to impose sentences based partly on facts neither found by a jury nor admitted by the defendant, violated the Sixth Amendment right to a jury trial. Man alleged that his sentence violated the Sixth Amendment as construed by *Blakely* because this court, rather than a jury, determined: 1) the amount of drugs involved in counts three and four, and 2) that he possessed a firearm in connection with his drug trafficking offenses.

On January 12, 2005, the Supreme Court announced *United States v. Booker*, 125 S. Ct. 738, 746 (2005), which held that "the Sixth Amendment as construed in *Blakely* does apply to the [Federal] Sentencing Guidelines."

II. Discussion

² *Apprendi* held that "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." 530 U.S. at 490.

The Antiterrorism and Effective Death Penalty Act of 1996 provides that a one-year period of limitation applies to a motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255. Section 2255 states, in relevant part,³ that the limitation period shall run from the later of: “(1) the date on which the judgment of conviction becomes final . . . [or] (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.” 28 U.S.C. § 2255. Because Man filed his motion (September 20, 2004) more than one year after his judgment became final (April 25, 2001), relief under section (1) is precluded. Accordingly, his motion will only fall within the one-year limitation period if, pursuant to section (3), the Supreme Court announced a new right and made it “retroactively applicable to cases on collateral review.” Otherwise, the motion will be time-barred.

Man argues that *Booker* announced such a retroactively applicable new rule.⁴ However,

³ Section 2255 also provides that the one-year limitation period can commence from: “(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 . . . [or] (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.” However, neither of those sections is applicable to this case.

⁴ Man’s motion originally sought to apply the reasoning of *Apprendi* and *Blakely* to the United States Sentencing Guidelines. However, after he submitted his motion, the Supreme Court announced *Booker*, which conclusively performed that application. Therefore, since the rule of *Booker* most specifically controls Man’s argument, I will use that case, rather than *Apprendi* or *Blakely*, to analyze Man’s motion. This is consistent with the Third Circuit’s treatment of a similar claim. In *Lloyd v. United States*, 407 F.3d 608, 611 (3d Cir. 2005), that court reasoned “Lloyd [the defendant] initially argued to us that his sentence was imposed in violation of *Blakely*. That argument is now, of course, governed by the intervening decision . . . in *Booker*.”

While it appears that the entirety of Man’s motion can be properly viewed as relying on *Booker*, any claim based solely on *Apprendi* is either procedurally defaulted or time-barred. A defendant “procedurally default[s] a claim by failing to raise it on direct review.” *Bousley v.*

the Third Circuit has recently rejected that argument.

In *Lloyd v. United States*, 407 F.3d 608 (3d Cir. 2005), the Third Circuit concluded that the rule in *Booker* is not retroactively applicable to cases on collateral review. The court held “[b]ecause *Booker* announced a rule that is ‘new’ and ‘procedural,’ but not ‘watershed,’ *Booker* does not apply retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005, the date *Booker* issued.” *Id.* at 615-16. Here, Man’s conviction became final on April 25, 2001, well before the Supreme Court issued *Booker*. Thus, because *Booker* is not retroactively applicable to Man’s case, and because his motion does not otherwise satisfy § 2255's one-year limitation period, his motion is time-barred. Accordingly, it will be denied.

An appropriate order follows.

United States, 523 U.S. 614, 622 (1998). When that occurs, “the claim may be raised in habeas only if the defendant can first demonstrate either ‘cause’ and actual ‘prejudice,’ or that he is ‘actually innocent.’” *Id.* (internal citations omitted). Here, it does not appear that Man presented any *Apprendi* claims on direct appeal, even though *Apprendi* had been announced (June 26, 2000) before his judgment became final (April 25, 2001). Finally, even if Man could avoid procedural default, he is now time-barred from bringing an *Apprendi* claim on habeas. He submitted his § 2255 motion three years after his conviction became final, and since none of the other § 2255 timing provisions are relevant to his motion, it falls outside that statute’s one-year limitation period.

