

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CIVIL ACTION NO. 01-3301
	:	
v.	:	CRIMINAL ACTION NO. 94-118
	:	
VITO MAZZOTTA	:	

MEMORANDUM AND ORDER

Kauffman, J.

October 25, 2006

Now before this Court is the Motion of Petitioner Vito Mazzotta (“Petitioner”) to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. Petitioner is currently incarcerated in the Federal Correctional Institution in Fort Dix, New Jersey. For the reasons that follow, his Motion will be denied.

I. Procedural History

On March 11, 1994, Petitioner was charged by indictment with one count of conspiracy to distribute a detectable amount of cocaine and methamphetamine in violation of 21 U.S.C. § 846, one count of distributing 900 grams of methamphetamine in violation of 21 U.S.C. § 841(a), and one count of forfeiture. Petitioner entered a guilty plea on all three counts on May 2, 1994 before the Honorable Robert S. Gawthrop, III. On October 31, 1994, Judge Gawthrop sentenced Petitioner to 120 months imprisonment on each of Counts One and Two, to run concurrently, and ordered Petitioner to forfeit \$315,800 for Count Three. Petitioner did not appeal.

Petitioner filed the instant Petition on June 25, 2001. He alleges that the district court lacked jurisdiction to receive his guilty plea to Counts One and Two because the indictment for

Count One did not specify a drug quantity, did not plead penalties, and did not make reference to 21 U.S.C. § 841(a) and because the indictment for Count Two failed to allege a penalty under 21 U.S.C. § 841(b). Petitioner argues that these alleged defects are violations of Apprendi v. New Jersey, which held 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.” 520 U.S. 466, 490 (2000).

II. Analysis

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. §§ 2241 et seq. Petitioner’s § 2255 Petition is specifically governed by the following statute of limitations:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall 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.

Petitioner’s judgment of conviction became final on November 10, 1994, when the time for filing an appeal expired. See Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999) (“If a

defendant does not pursue a timely direct appeal to the court of appeals, his or her sentence become[s] final, and the statute of limitation begins to run, on the date on which the time for filing such an appeal expired.”); Fed. R. App. P. 4(b)(1)(A) (“In a criminal case, a defendant’s notice of appeal must be filed in the district court within 10 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government’s notice of appeal.”). As previously noted, Petitioner filed the instant Petition on June 25, 2001, approximately five and one-half years after the judgment of his conviction became final and well after the one-year statute of limitations in § 2255 expired. Petitioner asserts, however, that his Petition is not time-barred because he filed it within a year of the Supreme Court’s June 26, 2000 Apprendi decision which he claims both recognized a new right and applied retroactively to cases on collateral review.

Under 28 U.S.C. § 2255(3), Petitioner’s claim is timely only if Apprendi recognized a new constitutional right and applied retroactively to cases on collateral review. Apprendi, however, does not apply retroactively to cases on collateral review. See United States v. Jenkins, 333 F.3d 151, 154 (3d Cir. 2003); United States v. Swinton, 333 F.3d 481, 491 (3d Cir. 2003); see also In re Turner, 267 F.3d 225, 231 (3d Cir. 2001); United States v. Crespo, Nos. Civ. A. 01-3214, Crim. A. 92-339, 2002 WL 47830, at *2 (E.D. Pa. Jan. 11, 2002); United States v. Gonzalez, Nos. Crim. A. 96-540-04, Civ. A. 00-4615, 2001 WL 1382522, at *2-3 (E.D. Pa. Nov. 6, 2001); United States v. Jones, Nos. Crim. 95-124-5, Civ. A. 99-3976, 2001 WL 1173980, at *11 (E.D. Pa. Oct. 3, 2001); United States v. Hunte, Nos. Crim. A. 96-539-9, Civ. A. 01-82, 2001 WL 1182894, at *2 (E.D. Pa. Aug. 27, 2001); United States v. Gibbs, 125 F. Supp. 2d 700, 703-07 (E.D. Pa. 2000). Accordingly, since Apprendi does not apply retroactively, Petitioner’s

motion is time-barred by the statute of limitations.

III. Conclusion

For the foregoing reasons, the Court will deny Petitioner's Motion to Vacate, Set Aside, or Correct Sentence. Because Petitioner has not made the requisite showing of the denial of a constitutional right, a certificate of appealability should not issue. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

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ORDER

AND NOW, this 25th day of October, 2006, upon consideration of Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (docket no. 22), and the Government's response thereto (docket no. 25), it is **ORDERED** that:

1. The Motion is **DENIED**.
2. The Clerk of the Court shall mark Civil Action No. 01-3301 **CLOSED**.
3. Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.