

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WILLIAM MENDEZ,	:
Petitioner,	:
	: Crim. No. 3:94cr 223 (PCD)
-vs-	: Civ. No. 3:01cv2192 (PCD)
	:
UNITED STATES OF AMERICA,	:
Respondent.	:

RULINGS ON MOTION TO VACATE SENTENCE, MOTION FOR LEAVE TO
CONDUCT DISCOVERY AND MOTION FOR APPOINTMENT OF COUNSEL

Petitioner moves *pro se*¹ pursuant to 28 U.S.C. § 2255 for an order vacating or modifying his sentence, for leave to conduct discovery and for appointment of counsel. For the reasons set forth herein, the motion is denied.

I. BACKGROUND

On July 26, 1996, petitioner was convicted following a jury trial of violation of two provisions of the Racketeering Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(c) and (d), of conspiracy in violation of 18 U.S.C. § 371, violation of the Violent Crimes in Aid of Racketeering (“VCAR”) statute by conspiring to commit VCAR murder, 18 U.S.C. § 1959(a)(4), and three counts of violation of 21 U.S.C. §§ 841(a)(1) and 846. On October 29, 1996, petitioner was sentenced to an effective term of imprisonment of 188 months and five years of supervised release.

¹ Mindful of his *pro se* status, all pleadings shall thus be construed as raising the strongest argument suggested. See *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996).

Defendant unsuccessfully appealed the sentence. *See United States v. Rivera*, 192 F.3d 81 (2d Cir. 1999), *cert. denied*, 528 U.S. 1129, 120 S. Ct. 965, 145 L. Ed. 2d 836 (2000) (January 18, 2000).

On November 26, 2001, petitioner filed the present petition alleging that the indictment was defective for failing to allege an element of the offense as to the violations of 21 U.S.C. §§ 841(a)(1) and 846 and ineffective assistance of counsel for failure to raise the issue of the defective indictment.

II. DISCUSSION

The Government argues that petitioner's motion is untimely as it was filed over one year after his judgment became final. Petitioner responds that the Government's argument simply avoids addressing the merits of the constitutional argument as alleged.

Review of a petition filed pursuant to § 2255 may be precluded by action of the one-year statute of limitations applicable thereto. *See Green v. United States*, 260 F.3d 78, 82 (2d Cir. 2001).

Events triggering the one-year statute of limitations include:

(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 sentence become final on January 18, 2000, the date on which the United States Supreme Court denied certiorari. As such, absent exceptional circumstances justifying a delay, petitioner was obligated to file his petition by January 18, 2001.

Nor does petitioner's claimed violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), cure the untimely filing. Although this Court has indicated that *Apprendi* "may be applied to cases on collateral review because it is a watershed rule necessary to the fundamental fairness of the criminal proceeding," *Parise v. United States*, 135 F. Supp. 2d 345, 349 (D. Conn. 2001), the fact that a case *may* be applied retroactively does not overcome the one-year statute of limitations.

As an initial matter, *Apprendi* was decided on June 26, 2000. The present petition was filed seventeen months after that date with no explanation for the delay. As such, the petition is untimely even if petitioner could benefit from the later filing date. In any event, *Apprendi* has been found not to be "made retroactive" for purposes of second or successive § 2255 petitions, *see Forbes v. United States*, 262 F.3d 143, 145 (2d Cir. 2001), which language is substantially the same as the phrase "made retroactively applicable" as used in 28 U.S.C. § 2255(3), which accords petitioners the benefit of a later filing date for purposes of the one-year statute of limitations. The interpretation of phrase as used elsewhere in the statute must therefore be applied consistently throughout the same statute. *See Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S. Ct. 607, 608- 609, 76 L. Ed. 1204 (1932). As such, petitioner would not be entitled to claim a commencement date other than January 18, 2000, the date on which his judgment became final, and as such his petition is time barred.

To the extent petitioner appears the one year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is itself unconstitutional, the argument is without merit. *See Lucidore v. New York State Division of Parole*, 209 F.3d 107, 113 (2d Cir. 2000).

Contrary to petitioner's argument, he is not entitled to raise a constitutional defect at any time and need only be afforded "some reasonable opportunity to have . . . claims heard on the merits." *Id.* (addressing statute of limitations in terms of per se violation of Suspension Clause). Petitioner cannot overcome the one-year statute of limitations, and his petition is therefore denied as untimely.

III. MOTIONS FOR DISCOVERY AND APPOINTMENT OF COUNSEL

A threshold issue which this Court must consider in deciding to appoint counsel is "whether the indigent's position seems likely to be of substance." *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986). The failure to file the present petition within one year precludes such a finding as consideration of the merits of petitioner's constitutional claims is barred by the applicable statute of limitations. *See Green*, 260 F.3d at 82.

The motion for discovery is similarly denied, as discovery will not cure the untimely filing of the present petition.

IV. CONCLUSION

Petitioner's motion to vacate or modify his sentence (Doc. No. 2248) is **denied**. Petitioner's motions for discovery (Doc. No. 2268-1) and for appointment of counsel (Doc. No. 2268-2) are **denied**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, March ____, 2003.

Peter C. Dorsey
United States District Judge