

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA, )  
 )  
v. )  
 )  
DAMION NELSON, )  
 )  
 )  
Defendant. )

CRIM. ACTION NO. 3:95CR00051-001

MEMORANDUM OPINION & ORDER

JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant's *pro se* Motion Requesting Extension of Time, received by the court on April 9, 2001. The defendant seeks an extension of time to file a motion for collateral review under 28 U.S.C. § 2255, in light of the recent Supreme Court cases of *Castillo v. United States*, 120 S. Ct. 2090 (2000) and *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

Motions under § 2255 must be filed within one year of the later of the date on which the judgment of conviction becomes final; or “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.”<sup>1</sup> § 2255. The defendant seeks to avail himself of the latter condition, implicitly arguing that *Castillo* and *Apprendi* are new rulings of law of sufficient magnitude to apply them retroactively to cases

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<sup>1</sup> Other circumstances listed in § 2255 which may trigger the one- year period of limitations are not alleged by the defendant to apply to this case, nor, in fact, do they apply.

on collateral review.

At the conclusion of a five-day criminal trial held in this court, the defendant was convicted by a jury on July 26, 1996 on charges of conspiracy to commit bank robbery, aggravated bank robbery, and using or carrying a firearm during and in relation to a crime of violence. On December 3, 1996, the court entered a Judgment and Commitment Order, sentencing the defendant to 60 months for the conspiracy, to be served concurrently with 96 months for the aggravated bank robbery count, to be served consecutively with 120 months on the firearm count. The Fourth Circuit affirmed the defendant's conviction and sentence, *United States v. Nelson*, 139 F.3d 895 (4th Cir. 1998) (table), and the Supreme Court denied certiorari, *Nelson v. United States*, 524 U.S. 920 (1998). When the Supreme Court denied certiorari on June 8, 1998, the defendant's judgment of conviction became final. *See United States v. Torres*, 211 F.3d 836, 839 (4th Cir. 2000). Thus, the time during which the defendant could have filed a § 2255 petition for collateral review expired one year later, on June 8, 1999.

Although the defendant's instant motion comes almost three years after his conviction became final, he seeks to file a § 2255 motion in light of *Castillo* and *Apprendi*, arguing that they are new legal rulings of constitutional magnitude. Thus, the defendant intends to file a § 2255 motion within one year from the *Castillo* and *Apprendi* rulings, both of which were announced by the Supreme Court in June 2000. However, due to a lockdown at the prison, the defendant anticipates that his motion will not be prepared by June 2001, and seeks a three month extension of time during which to file his § 2255 motion.

In a very recent panel decision written by Chief Judge Wilkinson, the Fourth Circuit held that *Apprendi* does not apply retroactively on collateral review. *See United States v. Sanders*, --F.3d--, No. 00-6281 (4th Cir. Apr. 13, 2001). In other words, contrary to the argument of the defendant, the *Apprendi* decision does not serve as the date from which the one year period of limitations to file a § 2255 petition runs. *See id.* *Castillo* also neither applies retroactively nor serves as the trigger for the one year period of limitations for a § 2255 petition. *See In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000). Because neither *Apprendi* nor *Castillo* apply retroactively to the defendant's case, the deadline for the defendant to file his § 2255 passed on June 8, 1999, one year after his judgment of conviction became final.

There is no recognized authority in the Fourth Circuit allowing this court to grant a motion for extension of time to file a § 2255 motion. However, assuming *arguendo* that the court has the authority to grant a motion for extension of time to file § 2255 motion, the court will not grant such motion if it is filed beyond the time during which the § 2255 motion could have been brought. Accordingly, the defendant's instant motion for extension, filed nearly two years after his window of opportunity to bring a § 2255 motion had closed, must be denied.

In accordance with the foregoing, it is this day

ADJUDGED, ORDERED, AND DECREED

that the defendant's April 9, 2001 Motion Requesting Extension of Time shall be, and hereby is, DENIED.

The Clerk of the Court hereby is directed to send a certified copy of this Opinion and Order to all counsel of record and to the *pro se* defendant.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

\_\_\_\_\_  
Date