

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,)
)
 v.) CR. No. 07-126 S
)
 NHEAT NHIM,)
)
 Defendant.)

MEMORANDUM AND ORDER

WILLIAM E. SMITH, United States District Judge.

Nheat Nhim has filed a Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate") (ECF No. 24) pursuant to 28 U.S.C. § 2255. For the reasons stated below, the Motion to Vacate is DENIED.

I. Background

On October 9, 2007, Nhim pleaded guilty to a three count information charging him with: conspiracy to obstruct, delay, and affect commerce by robbery in violation of 18 U.S.C. § 1951 (Hobbs Act) (Count 1); possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c) (Count 2); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count 3).

On January 4, 2008, Nhim was sentenced to a total of ninety-seven months imprisonment: thirty-seven months concurrent for Counts 1 and 3 and sixty months consecutive for Count 2. Judgment on the conviction was entered on January 4, 2008. Nhim did not file a direct appeal within the time permitted. See Fed. R. App.

P. 4(b)(1)(A)(i) (providing that appeals from criminal convictions must be filed within fourteen days of judgment).

On June 12, 2012, Nhim filed the instant Motion to Vacate. In his Motion to Vacate, Nhim asserts only one ground for relief. He claims that his conviction should be vacated because 18 U.S.C. § 1951, as applied to his conduct, exceeds Congress's power under the Commerce Clause. (Mot. to Vacate 10.) The government responded on July 23, 2012, asserting that Nhim's Motion to Vacate is time barred. (Gov't's Obj. to Def.'s Mot. under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.)

II. Discussion

28 U.S.C. § 2255(a) provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

Generally, the grounds justifying relief under § 2255 are limited. A court may grant such relief only if it finds a lack of jurisdiction, constitutional error, or a fundamental error of law. See United States v. Addonizio, 442 U.S. 178, 185 (1979) (“[A]n error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently

results in a complete miscarriage of justice.”) (internal quotation marks and citation omitted). Moreover, a motion under § 2255 is not a substitute for a direct appeal. See United States v. Frady, 456 U.S. 152, 165 (1982).

A one year period of limitation applies to motions filed pursuant to 28 U.S.C. § 2255. 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 government 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 government 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(f).

If a prisoner does not file a direct appeal, his conviction becomes final when the time for filing the notice of an appeal expires. See United States v. Plascencia, 537 F.3d 385, (5th Cir. 2008); Sanchez-Castellano v. United States, 358 F.3d 424, 428 (6th Cir. 2004). Since Nhim did not appeal his conviction within fourteen days, see Fed. R. App. P. 4(b)(1)(A)(i), it became final and the one year period of limitation began to run on January 18, 2008. As of January 18, 2009, Nhim was barred from filing a motion

pursuant to § 2255. Since Nhim filed his Motion to Vacate three and a half years after January 18, 2009, it is time barred.

Nhim attempts to rely on § 2255(f)(3) to overcome the statute's time bar. He asserts that since Bond v. United States, 131 S. Ct. 2355, 2360 (2011), establishes a new rule of constitutional law that retroactively applies to him, the period of limitation did not begin to run until Bond was decided. Bond held that a defendant has prudential standing to challenge the statute of conviction as violating the Tenth Amendment. Id. However, this ruling did not create a new rule of constitutional law because Nhim always had standing to raise a Tenth Amendment argument. See Matias v. Jett, Civil No. 12-63 (MJD/LIB), 2012 WL 983683, at *4 (D. Minn. Jan. 13, 2012), report and recommendation adopted, Civil No. 12-63 (MJD/LIB), 2012 WL 983758 (D. Minn. Mar. 22, 2012) (holding that Bond merely reaffirmed a standing status that the petitioner always possessed).

Even if Bond did create a new constitutional rule, Nhim's Motion to Vacate would still be time barred. Lower courts have declined to apply Bond retroactively to cases on collateral review. See, e.g., Wakefield v. United States, No. 2:12-CV-480 TS, 2012 WL 2150724, at *3 (D. Utah June 12, 2012) (finding nothing indicating that the ruling in Bond has been made retroactively applicable to cases on collateral review).

III. Conclusion

Because the Motion to Vacate is untimely, the merits of the claim do not need to be discussed. The instant Motion to Vacate pursuant to 28 U.S.C. § 2255 is hereby DENIED and DISMISSED.

RULING ON CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States District Courts, this Court hereby finds that this case is not appropriate for the issuance of a certificate of appealability ("COA") because Nhim has failed to make a substantial showing of the denial of a constitutional right as to any claim, as required by 28 U.S.C. § 2253(c)(2).

Nhim is advised that any motion to reconsider this ruling will not extend the time to file a notice of appeal in this matter. See Rule 11(a), Rules Governing Section 2255 Proceedings.

IT IS SO ORDERED:

/s/ William E. Smith

William E. Smith
United States District Judge
Date: July 2, 2013