

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ANSELMO HERRERA,

Defendant.  
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OPINION AND ORDER

12-cv-576-bbc  
09-cr-60-bbc

Defendant Anselmo Herrera has filed a motion for post conviction relief under 28 U.S.C. § 2255. He asserts that he was denied the effective assistance of counsel. Unfortunately for defendant, he has filed his motion too late.

Section 2255 has a one-year period of limitations that begins running from the latest of the following dates: (1) the date on which the defendant's conviction becomes final; (2) the date on which any impediment to the filing of the motion has been removed, provided that the impediment was an illegal one created by government action and one that actually prevented the defendant from filing his motion; (3) the date on which the right asserted was recognized initially by the Supreme Court, provided that the right was both newly

recognized by the Court and made retroactively applicable to cases on collateral review; or  
(4) the date on which the defendant could have discovered the facts supporting his claims through the exercise of due diligence. § 2255

Defendant was sentenced on April 21, 2010. He did not appeal his sentence or the judgment of conviction. On the government's motion for a reduction of sentence under Fed. R. Crim. P. 35(b) and 18 U.S.C. § 3553(3) defendant was resentenced on April 7, 2011; the judgment was entered on April 8, 2012. Under § 2255, defendant had one year from the date on which "the judgment of conviction [became] final" in which to bring a post conviction motion. The conviction would have become final 14 days after April 7, 2011, when the time for taking an appeal expired, or April 21, 2011. Therefore, defendant had until April 21, 2012, in which to file a § 2255 motion unless he can show he comes within one of the special circumstances in which the time for filing begins running later. Defendant has not alleged any facts from which an inference may be drawn that any one of those special circumstances applies in his case, and I am aware of none. Therefore, I conclude that defendant's motion is untimely because it was not filed until August 7, 2012.

Even if defendant's motion were timely, it would have to be denied on the merits. In his motion, defendant asserts that his counsel was ineffective for failing to advise him about the benefits of the fast track program. The fast track program was not available in this district the time that defendant was sentenced. Therefore, his counsel could not be held

ineffective for failing to advise defendant of the program.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Defendant has not made a substantial showing of a denial of a constitutional right so no certificate will issue.

#### ORDER

IT IS ORDERED that defendant Anselmo Herrera's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED as untimely. Defendant is not entitled to a certificate

of appealability because he has not made a substantial showing of the denial of a constitutional right.

Entered this 21st day of August, 2012.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge