

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

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TREVOR BJORKMAN,

Petitioner,

v.

ORDER  
05-C-388-S  
99-CR-37-S-03

UNITED STATES OF AMERICA,

Respondent.

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Petitioner Trevor J. Bjorkman moves to vacate his sentence pursuant to 28 U.S.C. §2255. The United States responded on August 5, 2005. Petitioner filed his reply on September 2, 2005.

FACTS

On June 3, 1999 a grand jury sitting in the Western District of Wisconsin returned a seven-count superseding indictment against seven individuals including Trevor Bjorkman. Count one charges all defendants with conspiring both to possess with the intent to distribute and to distribute marijuana from about February 1996 to August 13, 1998. Consistent with the then-existing case law, the indictment did not allege drug quantities.

Petitioner pled guilty to Count 1 on June 21, 1999. The plea agreement set forth the government's position that the amount of marijuana attributable to petitioner was 100 kilograms or more, but

less than 1,000 kilograms resulting in a mandatory minimum penalty of five years in prison with a maximum penalty of 40 years in prison. The government agreed to inform the Court that it could prove petitioner's relevant conduct involved at least 100 kilograms but less than 400 kilograms of marijuana.

On August 25, 1999 the Court sentenced petitioner to 146 months in prison. Petitioner filed a notice of appeal on September 7, 1999. Petitioner challenged the indictment pursuant to Apprendi v. New Jersey, 530 U.S. 46 (2000). The Court of Appeals affirmed petitioner's conviction. United States v. Bjorkman, 270 F. 3d 482 (2001). Petitioner's petition for certiorari was denied by the United States Supreme Court on May 28, 2002. Bjorkman v. United States, 535 U.S. 1095 (2002).

On April 12, 2005 petitioner filed a motion under 18 U.S.C. §3742 to review his sentence which was denied. Petitioner was advised that he could file a motion under 28 U.S.C. § 2255 which he did on July 1, 2005.

#### MEMORANDUM

The statute, 28 U.S.C. § 2555 provides as follows:

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 though the exercise of due diligence.

Petitioner's conviction became final on May 28, 2002 when the United States Supreme Court denied his petition for certiorari. He had until May 28, 2003 to file his 28 U.S.C. § 2255 motion but did not file it until July 1, 2005. Accordingly, petitioner's petition is untimely.

Petitioner argues that he should be entitled to equitable tolling. He has not shown that despite the exercise of reasonable diligence he could not have discovered all the information he needed to file his claim timely. Nolan v. United States, 358 F.3d 480 (7<sup>th</sup> Cir. 2004).

Petitioner also argues that the Court's decision in United States v. Booker, 125 S.Ct. 738 (2005) which clarified Apprendi v. New Jersey, 530 U.S. 46 (2000), should be applied retroactively to him. This decision does not apply retroactively to criminal cases that became final before its release on January 12, 2005. See McReynolds, et al v. United States, 397 F.3d 479 (7<sup>th</sup> Cir. 2005). Accordingly, Booker does not apply.

Petitioner's motion under 28 U.S.C. § 2255 is untimely and will be denied.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his motion must be denied as untimely. See Newlin v. Helman, 123 F.3d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that petitioner's motion under 28 U.S.C. § 2255 is DENIED as untimely.

Entered this 12<sup>th</sup> day of September, 2005.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge