

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERROL NELSON,

Defendant.

1:10-cr-00012

**TO: Errol Nelson, *Pro se*, #02179-094
Oakdale Federal Correction Institution
P.O. Box 5000
Oakdale, LA 71463**

REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon the Order (ECF No. 150) of Chief Judge Wilma A. Lewis in Criminal No. 10-00012 referring Defendant Errol Nelson's Motion under 28 U.S.C. § 2255¹ to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 138) for a report and recommendation. For the reasons that follow, the undersigned recommends that Errol Nelson's *pro se* motion be dismissed as untimely.

I. Background

Following a struggle with a police officer during which a gun dropped from Nelson's person, he was arrested and later charged with weapons violations under 18 U.S.C. Sections 922(g)(1), 922(k), 924(a)(2), and 924(a)(1)(B) and 14 V.I.C. Section 2253(a). Following a jury trial, Nelson was found guilty of the charges. His conviction and sentence were

¹ All citations to the United States Code are to the electronic version that appears in Lexis.

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affirmed by the Third Circuit on May 16, 2012. *United States v. Nelson*, 483 Fed. Appx. 677 (3d Cir. 2012). He did not appeal to the United States Supreme Court. On December 5, 2016, Nelson filed the instant § 2255 motion.

II. Legal Principals

"Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution." *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002) (citing *Davis v. United States*, 417 U.S. 333, 343 (1974)).

The Rules Governing Section 2255 Proceedings requires the district court to review a § 2255 motion and "dismiss the motion" if it "plainly appears from the motion . . . that the moving party is not entitled to relief." U.S.C. Sec. 2255 Proc R 4.

Pro se pleadings are construed liberally and must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Nonetheless, "pro se litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013).

III. Discussion

The statute of limitations for § 2255 habeas actions reads:

(f) 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;

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(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(f).

The Third Circuit Court of Appeals affirmed Nelson's conviction and sentence on May 16, 2012. *United States v. Nelson*, 483 Fed. Appx. 677 (3d Cir. 2012). Nelson's instant motion was filed December 5, 2016, nearly four and half years later. Consequently, Nelson's motion is untimely under section 2255(f). Nelson makes no claim for equitable tolling, nor does a liberal reading of his motion find grounds to toll the statute of limitations. He claims that his motion is timely "because subject matter jurisdiction can never be waived," citing *United States v. Cotton*, 535 U.S. 625 (2002). (ECF No. 138) at 6. Nelson has misapplied *Cotton*. A statute of limitations does not deprive the Court of jurisdiction. A statute of limitations limits the ability of a movant to bring an action. Simply put, there is a time limit to file a § 2255 motion and that time limit has expired.

In his motion, Nelson also references *Johnson v. United States*, 135 S. Ct. 2551 (2015). As explained in the Court's Order and Report and Recommendation (ECF No. 151), filed February 13, 2018, because he was sentenced under the post-*Booker* advisory

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Sentencing Guidelines, Nelson is ineligible for relief pursuant to *Johnson*.² Therefore, his motion is not timely under § 2255(f)(3) because the right that was newly recognized by the Supreme Court in *Johnson* and made retroactively applicable by *Welch* does not apply to persons sentenced under the advisory sentencing guidelines. *See Beckles v. United States*, 137 S. Ct. 886, 888 (2017) (“[t]he Federal Sentencing Guidelines, including §4B1.2(a)’s residual clause, are not subject to vagueness challenges under the Due Process Clause”).

IV. Conclusion

Based upon the foregoing, it is hereby

RECOMMENDED that Defendant Errol Nelson’s *pro se* Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 138) be **DISMISSED** as untimely.

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: March 8, 2018

/s/ George W. Cannon, Jr.
GEORGE W. CANNON, JR.
MAGISTRATE JUDGE

² See *United States v. Booker*, 543 U.S. 220 (2005), *Johnson v. United States*, 135 S. Ct. 2551 (2015), *Welch v. United States*, 136 S. Ct. 1257 (2016), *Beckles v. United States*, 137 S. Ct. 886, 890 (2017).