UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALEXIS SALAZAR TRIVINO,

Petitioner,

v.

Case No: 8:16-cv-2754-T-30TBM
Crim. No: 8:14-cr-518-T-30TBM

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE comes before the Court upon Petitioner Alexis Salazar Trivino's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 filed on September 26, 2016. (CV Doc. 1). Upon preliminary review of the motion, the Court concludes that Petitioner's motion should be dismissed as time-barred.

BACKGROUND

Pursuant to a written plea agreement, Petitioner pled guilty to conspiracy to possess with intent to distribute, and to distribute, five kilograms or more of cocaine while aboard a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§ 70503(a); 70506(a) and (b); and 21 U.S.C. § 960(b)(1)(B)(ii). (CR Docs. 58, 74, 156). On August 11, 2015, the Court sentenced Petitioner to 135 months' imprisonment and 5 years' supervised release. (CR Doc. 156). Petitioner did not file a direct appeal.

Because Petitioner did not file a direct appeal, her judgment of conviction became final under § 2255(f)(1) when the time for filing a direct appeal expired on August 25, 2015. *See Murphy v. United States*, 634 F.3d 1303, 1307 (11th Cir. 2011) (stating that "when a defendant does not appeal his [or her] conviction or sentence, the judgment of conviction becomes final when the time for seeking that review expires"); Fed R. App. P. 4(b)(1)(A)(i) (allowing a criminal defendant fourteen days after the entry of either the judgment or the order being appealed to file a notice of appeal). Petitioner therefore had until August 25, 2016, to file a motion under § 2255.

Petitioner filed the present motion on September 26, 2016, over a month after his time for filing a motion under § 2255(f)(1) expired. (CV Doc. 1). Petitioner raises one ground for relief, seeking a reduction of his sentence under an amendment to United States Sentencing Guideline § 3B1.2.

DISCUSSION

Under § 2255(f)(1), Petitioner's claim is untimely because he filed his motion more than a year after his judgment of conviction became final. Petitioner asserts that his motion should be considered timely under § 2255(f)(4) because of a recent amendment to U.S.S.G. § 3B1.2. (CV Doc. 1 at 4). Specifically, on April 30, 2015, the United States Sentencing Commission amended U.S.S.G. § 3B1.2, with the amendment effective as of November 1, 2015, to provide guidance in determining whether a mitigating role adjustment applies.

Petitioner argues the § 3B1.2 amendment renders his motion timely under § 2255(f)(4) because the motion was filed within 1 year of the amendment. Section 2255(f)(4) 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 . . . the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

However, the amendment to § 3B1.2 is not a fact discovered through due diligence, and, therefore, does not fall within § 2255(f)(4). As such, Petitioner's motion is untimely.

For Petitioner's benefit, even if his motion were not time-barred, he would not be entitled to relief. The amendment to § 3B1.2 was a clarifying amendment, not a substantive amendment. Generally, clarifying amendments to the sentencing guidelines are not cognizable on a § 2255 motion absent a complete miscarriage of justice. *See Burke v. United States*, 152 F.3d 1329, 1332 (11th Cir. 1998). Petitioner has not demonstrated a complete miscarriage of justice.

CONCLUSION

Accordingly, it is therefore **ORDERED AND ADJUDGED** that:

1. Petitioner Alexis Salazar Trivino's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 (CV Doc. 1) is DISMISSED as time-barred.

2. The Clerk is directed to terminate from pending status the motion to vacate found at Doc. 178 in the underlying criminal case, case number 8:14-cr-518-T-30TBM.

3. The Clerk is directed to terminate any pending motions and close this case.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district

court must first issue a certificate of appealability ("COA"). *Id.* "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). To make such a showing, Petitioner "'must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong,'" *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks omitted). Petitioner has not made the requisite showing in these circumstances.

Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal in forma pauperis.

DONE AND ORDERED at Tampa, Florida on this 11th day of October, 2016.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record