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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 STEPHEN SMITH,

10 Petitioner,

11 v.

12 UNITED STATES OF AMERICA,

13 Respondent.

CASE NO. C09-5600BHS  
(CASE NO. CR07-5823BHS)

ORDER DENYING 2255  
MOTION AND GRANTING  
CERTIFICATE OF  
APPEALABILITY

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16 This matter comes before the Court on Respondent's ("Smith") 28 U.S.C. § 2255  
17 motion to vacate, set aside, or correct sentence. Dkt. 1. The Court has considered the  
18 pleadings filed in support of and in opposition to the motion and the remainder of the file  
19 and hereby denies the motion and grants Smith a certificate of appealability for the  
20 reasons stated herein.

21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 On February 5, 2008, Smith pleaded guilty to wire fraud and aggravated identity  
23 theft. *See* Dkt. 5, App. 1 at 1-2 (Plea Agreement). The Court sentenced Smith to 75  
24 months of confinement and ordered restitution in the amount of \$120,807.73. *See* Dkt. 5,  
25 Appendix 3 (sentencing transcript). This sentence included a sentencing enhancement for  
26 multiple victims. *Id.* Smith stipulated in the plea agreement that the victims included  
27 fourteen individuals and five businesses. *See, e.g.*, Plea Agreement at 5-6. Given this  
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1 stipulation, the Court enhanced Smith’s sentence pursuant to USSG § 2B1.1(b)(2)(A)  
2 (more than ten victims). *See also* Sentencing Transcript.

3 On September 28, 2009, Smith filed the instant § 2255 motion based on a claim of  
4 ineffective assistance of counsel. On March 3, 2010, the Court ordered a response from  
5 the Government. Dkt. 3. On April 15, 2010, the Government responded. Dkt. 5. Smith did  
6 not reply.

## 7 II. DISCUSSION

### 8 A. Timeliness

9 Motions filed pursuant to 28 U.S.C. 2255, such as the instant motion, are subject to  
10 a “1-year period of limitation” that “shall run from the latest of  
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- 12 (1) the date on which the judgment of conviction becomes final;
- 13 (2) the date on which the impediment to making a motion created by  
14 governmental action in violation of the Constitution or laws of the United  
15 States is removed, if the movant was prevented from making a motion by  
16 such governmental action;
- 17 (3) the date on which the right asserted was initially recognized by  
18 the Supreme Court, if that right has been newly recognized by the Supreme  
19 Court and made retroactively applicable to cases on collateral review; or
- 20 (4) the date on which the facts supporting the claim or claims  
21 presented could have been discovered through the exercise of due diligence.

22 28 U.S.C. 2255(f).

23 Because Smith raises only an ineffective assistance of counsel claim, 2255(f)(1) is  
24 the applicable time period to consider in determining the timeliness of his motion. *See id.*  
25 Smith’s judgment became final on June 8, 2008, ten days after the Court entered Smith’s  
26 sentence in this case. *See United States v. Garcia*, 210 F.3d 1058, 1060 (9th Cir. 2000)  
27 (holding that, for the purposes of § 2255, judgment is final when the right for direct  
28 appeal is no longer available).

Because Smith did not bring his § 2255 motion until September 28, 2009, which  
was three months past the one-year limitation period (final judgment on June 8, 2008).

1 **B. Ineffective Assistance of Counsel**

2 To prevail on an ineffective assistance of counsel claim, Smith must establish that  
3 his “counsel’s performance was deficient” and that “the deficient performance prejudiced  
4 the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (firmly establishing the  
5 elements of an ineffective assistance of counsel claim). The failure to show one prong  
6 obviates the need to evaluate whether the other prong is established.

7 Smith’s ineffective assistance of counsel claim is predicated on his belief that his  
8 counsel should have raised a legal theory discussed in *United States v. Armstead*, 552  
9 F.3d 769 (9th Cir. 2008). *See, e.g.*, Dkt. 4 at 1 (letter from Mr. Smith to the Court).  
10 Smith’s contention is problematic.

11 *Armstead*, decided December 30, 2008, post-dates Smith’s final judgment, entered  
12 on May 29, 2008. *See* 552 F.3d at 780-81; *see also* Dkt. 5, Appendix 3 (sentencing  
13 transcript). Smith cannot have a viable claim for ineffective assistance based on an  
14 allegation that his attorney failed to raise a theory which would have been based on  
15 unsettled law,<sup>1</sup> which *Armstead* resolved. 552 F.3d at 780-81 (discussing the differing  
16 views among the circuits on the issue of counting victims for purposes of sentencing  
17 enhancement under USSG § 2B1.1(b)(2)(A) and adopting the majority’s rule). *See United*  
18 *States v. Tucker*, 716 F.2d 576, 584 (citing *Nelson v. Estelle*, 908 (5th Cir. 1981)  
19 (“counsel is normally not expected to foresee future new developments in the law”)).  
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21 Therefore, because Smith cannot establish the deficient performance prong of the  
22 *Strickland* test, his ineffective assistance of counsel claim is denied.

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25 <sup>1</sup>An evidentiary hearing on Smith’s ineffective assistance of counsel claim is  
26 warranted only if he has alleged facts that, if proven, would establish both elements of the  
27 *Strickland* test: deficient performance and prejudice. *See Gonzalez v. Plier*, 341 F.3d  
28 897, 903 (9th Cir. 2003). It is unnecessary here to consider whether Smith has alleged  
facts that, if proven, would establish prejudice because he has not alleged facts that, if  
proven, would establish deficient performance. *See Strickland*, 466 U.S. at 697.

1 **C. Certificate of Appealability**


2 The Court grants Smith a certificate of appealability on these two discrete issues:

3 (1) whether Smith's § 2255 motion is time barred by the one-year limitation and (2)  
4 whether Smith is entitled to relief based on his ineffective assistance of counsel claim.

5 **III. ORDER**

6 Therefore, it is hereby **ORDERED** that Smith's § 2255 motion is **DENIED** and  
7 the Court **GRANTS** Smith a certificate of appealability as discussed herein.

8 DATED this 1<sup>st</sup> day of July, 2010.

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12 BENJAMIN H. SETTLE  
13 United States District Judge  
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