

A P P E N D I X

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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-3229

Frank Collins, III

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:17-cv-04108-BCW)

JUDGMENT

Before BENTON, MURPHY and KELLY, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

January 19, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

A P P E N D I X

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dismissed as untimely because *Mathis* does not qualify as a new rule for purposes of § 2255(f)(3). Doc. 7, pp. 4-5.

28 U.S.C. § 2255(f) 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 through the exercise of diligence.

Movant's judgment was entered on July 30, 2015, and became final 14 days later, August 13, 2015, when his time for filing a notice of appeal expired. Movant signed his present § 2255 motion on June 1, 2017, well past the one-year limitations period in § 2255(1).

Although Plaintiff filed his present § 2255 motion within one year following the Supreme Court's decision in *Mathis*, *Mathis* does not qualify as a right that has been newly recognized for purposes of § 2255(f)(3). See *Reeves v. United States*, No. 13-03084-01-CR-S-RK, 2017 WL 1532605, at *2 (W.D. Mo. Apr. 27, 2017) (*Mathis* is an "old rule" that does not "trigger[] § 2255(f)(3)'s timeliness requirement."); *Mitchell v. United States*, No. 090301203CR1SRK, 2017 WL 1362040, at *2 (W.D. Mo. Apr. 11, 2017) (same); *United States v. Sonczalla*, No. CR 07-187 (RHK), 2016 WL 4771064, at *2 (D. Minn. Sept. 12, 2016) (holding that a § 2255 motion was not timely under § 2255(f)(3) because the movant's "*Mathis* argument [did] not raise a claim based on a right newly recognized by the Supreme Court and made retroactively applicable on

collateral review”); *United States v. Taylor*, 672 F. App'x 860, 864-65 (10th Cir. 2016) (*Mathis* did not announce a new rule for purposes of § 2255(f)(3)).

Instead, *Mathis*' holding was dictated by the holdings in a prior line of cases, including *Descamps v. United States*, 133 S. Ct. 2276 (2013). *Mathis*, 136 S. Ct. at 2251-54. “[R]ules that apply a general principle to a new set of facts typically do not constitute new rules.” *Headbird v. United States*, 813 F.3d 1092, 1095 (2016). In fact, *Descamp* itself does not trigger §2255(f)(3), because *Descamp* “was dictated by the general principles set forth in existing precedent.” *Headbird*, 813 F.3d at 1096-97. *Mathis* was similarly dictated by the same general principles and precedent relied on in *Descamp*. *Mathis*, 136 S. Ct. at 2251-54. Therefore, Movant may not use *Mathis* to excuse his otherwise untimely § 2255 motion under § 2255(f)(3).² Because Movant's § 2255 motion was untimely filed, Movant's motion is denied.

Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to Movant. A certificate of appealability may be issued “only if [Movant] has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Because Movant has made no such showing, the Court declines to issue a certificate of appealability.

² The *Mathis* decision is the only basis Movant presents to excuse his untimely § 2255 motion. Doc. 1, p. 12; Doc. 9, pp. 1, 6-7. Even if Movant intended Amendments 709 and 795 to excuse his untimely motion, such an argument would be without merit. Amendment 709 was implemented in 2007 and was in effect well before Movant's sentencing. Amendment 795 took effect in November 2015, well over a year before Movant filed his present § 2255 motion. Furthermore, insofar as Movant claims that he should receive retroactive application of Amendment 795, such a claim is more appropriately made under 18 U.S.C. § 3582(c)(2), not § 2255. Compare *Hamilton v. United States*, 67 F.3d 761, 763 (9th Cir. 1995) (holding that a § 2255 claim can be based only on a claim of lack of jurisdiction, constitutional error, an error resulting in “a complete miscarriage of justice,” or “a proceeding inconsistent with the rudimentary demands of fair procedure”) (quoting *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979)), with U.S.S.G. § 1B1.10(a)(1) (providing that a court may reduce a defendant's sentence as provided in 18 U.S.C. § 3582(c)(2) if the guideline range has been lowered as a result of an amendment to the Guidelines). Therefore, Movant's arguments regarding Amendment 709 and Amendment 795 fail to excuse the untimely filing of Movant's § 2255 motion.

Conclusion

For the foregoing reasons, Movant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is denied, a certificate of appealability is denied, and this case is dismissed.

It is so **ORDERED**.

/s/ Brian C. Wimes
BRIAN C. WIMES
UNITED STATES DISTRICT JUDGE

Dated: September 28, 2017.