

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20742



A True Copy
Certified order issued Sep 21, 2018

Steph W. Cuyce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROBERT DAVID WATSON,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

ORDER:

Robert David Watson, federal prisoner # 72972-279, moves for a certificate of appealability (COA) to appeal the dismissal as time barred of his 28 U.S.C. § 2255 motion challenging his conviction and sentence for securities fraud. Watson argued that he was denied his Sixth Amendment right to counsel of his choice in light of *Luis v. United States*, 136 S. Ct. 1083 (2016). To obtain a COA, Watson must show that "reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks and citation omitted). Watson has not made this showing.

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Watson's remaining claims--that (1) his conviction and sentence are void because there is no statutory or regulatory basis to give the statute of conviction extraterritorial application, (2) his motion to substitute counsel raised additional ineffective assistance arguments, and (3) the factual basis was insufficient to support his conviction--were raised for the first time in his COA brief. They are therefore not considered. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

COA DENIED.



KURT D. ENGELHARDT
UNITED STATES CIRCUIT JUDGE

ENTERED

October 19, 2017

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA

v.

ROBERT DAVID WATSON.

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CRIMINAL ACTION H-10-419

CIVIL ACTION H-16-1490

MEMORANDUM OPINION AND ORDER

Defendant Robert David Watson, proceeding *pro se*, filed this motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Docket Entry No. 66). The Government filed a motion to dismiss (Docket Entry No. 83), to which Defendant filed a response (Docket Entry No. 84).

Having reviewed the section 2255 motion, the motion to dismiss, the response, the record, and the applicable law, the Court GRANTS the motion to dismiss and DENIES the section 2255 motion for the reasons that follow.

Background and Claims

In 2009, the Securities Exchange Commission and the Commodity Futures Trading Commission brought civil lawsuits against Defendant, his co-defendants, and related entities for violations of securities and commodities laws through a multi-million dollar Ponzi scheme. The lawsuits were consolidated and assigned to this Court under C.A. No. H-09-1540. The Court froze the assets owned, controlled, managed, or held by or for the benefit of the defendants and appointed a receiver to recover and distribute funds to defrauded investors. Funds recovered by the receiver were ultimately distributed to the defrauded investors, and all remaining or unadjudicated claims against Defendant, co-

defendants, and the related entities were dismissed in 2013. Defendant was represented by retained counsel until counsel's withdrawal on July 28, 2009.

Criminal securities fraud and obstruction charges were brought against Defendant in 2010 in the instant case. Defendant pleaded guilty to one count of securities fraud on June 10, 2011, and was subsequently sentenced to 240 months of imprisonment on February 10, 2012. Judgment of conviction was entered on February 20, 2012. No direct appeal was taken. Defendant was represented by appointed counsel throughout the criminal proceedings.

Defendant filed the instant *pro se* motion for relief under section 2255 no earlier than May 23, 2016, claiming denial of his Sixth Amendment right to counsel of his choice pursuant to *Luis v. United States*, ___ U.S. ___, 136 S. Ct. 1083 (2016). The Government moves to dismiss Defendant's motion as time barred.

Legal Standards

Generally, there are four grounds upon which a defendant may move to vacate, set aside, or correct his sentence pursuant to section 2255: (1) the imposition of a sentence in violation of the Constitution or the laws of the United States; (2) a lack of jurisdiction of the district court that imposed the sentence; (3) the imposition of a sentence in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996). Section 2255 is an extraordinary measure, and cannot be used for errors that are not constitutional or jurisdictional if those errors could have been raised on direct appeal. *United States v. Stumpf*, 900 F.2d 842, 845 (5th Cir. 1990). If the error is not of

constitutional or jurisdictional magnitude, the movant must show the error could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *United States v. Smith*, 32 F.3d 194, 196 (5th Cir. 1994).

Analysis

In his single ground for relief, Defendant claims that his sentence violates the Sixth Amendment because he was denied counsel of choice. Because Defendant's judgment of conviction was entered in February 2012, Defendant must show that this section 2255 motion meets the one-year statute of limitations imposed by section 2255(f). Under that provision, the one-year limitation runs 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 due diligence.

Defendant relies here on section 2255(f)(3), and argues that limitations commenced on March 30, 2016, the date the United States Supreme Court issued its opinion in *Luis*. In *Luis*, the Supreme Court found that a pretrial restraint of assets needed to retain counsel violated the Sixth Amendment when the assets were not traceable to a crime or obtained

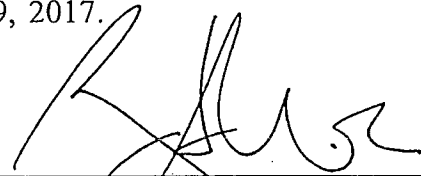
as a result of a crime; that is, the assets were "untainted." 136 S. Ct. at 1088. Defendant here contends that the facts of his case fall squarely within the parameters of *Luis*. However, Defendant does not cite any federal court case which has recognized a retroactive, collateral application of *Luis*. Indeed, to-date, neither the Supreme Court, the Fifth Circuit Court of Appeals, nor this Court has found *Luis* retroactively applicable on collateral review. Defendant further fails to show that *Luis* meets the requirements for retroactivity set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Consequently, Defendant does not establish timeliness of his motion under section 2255(f)(3).

Regardless, Defendant does not establish that *Luis* factually applies. Although he argues that untainted assets were recovered and held by the receiver, he supports this assertion with only his own conclusory, self-serving affidavit. Defendant does not show that he was denied counsel of his choice as a result of a pretrial restraint of his legitimate, untainted assets. *See Luis* at 1088.

Conclusion

The motion to dismiss (Docket Entry No. 83) is GRANTED and Defendant's section 2255 motion for relief (Docket Entry No. 66) is DENIED. A certificate of appealability is DENIED. Civil Action No. H-16-1490 is ORDERED ADMINISTRATIVELY CLOSED.

Signed at Houston, Texas on October 19, 2017.



Gray H. Miller
United States District Judge