

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 18-15261-F

---

LAVARES DETROEN WATKINS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

---

Appeal from the United States District Court  
for the Northern District of Alabama

---

ORDER:

Lavares Watkins is a federal prisoner serving a 210-month sentence after pleading guilty, in 2010, to being a felon in possession of a firearm. The district court enhanced his sentence under the Armed Career Criminal Act ("ACCA"), finding that his previous Alabama convictions qualified as ACCA predicate offenses. In June 2018, Watkins filed the instant *pro se* 28 U.S.C. § 2255 motion, claiming that, in light of *Johnson v. United States*, 135 S. Ct. 2251 (2015), his ACCA enhancement was unconstitutional. The district court dismissed the motion as untimely because it was filed more than one year after *Johnson* and determined that Watkins was not entitled to equitable tolling. He now seeks a certificate of appealability ("COA") and appointment of counsel.

In order to obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court denies a motion to vacate on procedural grounds alone, the COA applicant must show that reasonable jurists would find debatable (1) whether the district court was correct in its procedural ruling, and (2) whether the § 2255 motion to vacate stated “a valid claim of the denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) imposes a one-year statute of limitations for filing a § 2255 motion to vacate. 28 U.S.C. § 2255(f). The one-year period of limitations begins to run from the latest of four possible events:

- (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.

*Id.* Where a criminal defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a notice of appeal expires. *See Mederos v. United States*, 218 F.3d 1252, 1253 (11th Cir. 2000).

A *Johnson* claim is timely under § 2255(f)(3) if it is filed within one year of *Johnson*’s issuance date of June 26, 2015, because *Johnson* established a new right that was retroactively applicable to cases on collateral review. *See* 28 U.S.C. § 2255(f)(3); *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). Additionally, the discovery of a new legal theory does not constitute a

discoverable “fact” for purposes of § 2255(f)(4). *See Barreto-Barreto v. United States*, 551 F.3d 95, 99 n.4 (11th Cir. 2008).

However, the AEDPA limitations period may be equitably tolled where the movant shows that (1) he has been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his way to prevent timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). To show diligence, a petitioner must show that he made an effort to file a timely petition, but extraordinary circumstances “thwarted his efforts.” *See Arthur v. Allen*, 452 F.3d 1234, 1253 (11th Cir. 2006) (quotation omitted).

Here, reasonable jurists would not debate the district court’s dismissal of Watkins’s § 2255 motion as time-barred. First, because Watkins did not file a direct appeal, his judgment became final in July 2010, and his § 2255 motion, filed in 2018, was untimely by nearly seven years under § 2255(f)(1). Second, his § 2255 motion was untimely under § 2255(f)(3) because he raised a claim that relied on *Johnson*, which was decided nearly three years before he filed his § 2255 motion in 2018. Third, his motion was untimely under § 2255(f)(4) because his *Johnson* claim did not constitute a discoverable “fact,” and, accordingly, his discovery of it did not trigger a new one-year limitations period. *See Barreto-Barreto*, 551 F.3d at 99 n.4.

Watkins argued that he was entitled to equitable tolling because he did not know about *Johnson* while he was in state custody, as he lacked access to federal law. Even assuming, *arguendo*, that Watkins was entitled to equitably toll his time in state custody, he failed to justify the eight-month delay between October 2017, when he learned of his potentially-viable *Johnson* claim, and June 2018, when he filed his § 2255 motion. *Arthur*, 452 F.3d at 1253. Thus, he failed to show both diligence and extraordinary circumstances once in federal custody and was

not entitled to equitable tolling. *See id.* Accordingly, his motion for COA is DENIED and his motion for appointment of counsel is DENIED AS MOOT.

/s/ Kevin C. Newsom  
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 18-15261-F

---

LAVARES DETROEN WATKINS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

---

Appeal from the United States District Court  
for the Northern District of Alabama

---

Before: WILLIAM PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Lavares Detroen Watkins has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's March 27, 2019, order denying a certificate of appealability and appointment of counsel, following the dismissal of his petition for a writ of habeas corpus, 28 U.S.C. § 2255. Upon review, Watkins's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**LAVARES DETROEN WATKINS,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

**Case No.: 2:18-cv-8015-RDP  
(2:10-cr-00024-RDP-TMP-1)**

**ORDER**

Lavares Detroen Watkins (“Petitioner”) has filed with the Clerk of this Court a motion pursuant to 28 U.S.C. § 2255. Petitioner seeks to vacate the sentence imposed upon him on July 14, 2010 in the above-styled case and is asserting claims pursuant to *Johnson v. United States*, 135 S.Ct. 2551 (2015). A *Johnson* claim is timely under 28 U.S.C. § 2255(f)(3) if it is filed within a year of *Johnson*’s issuance of June 26, 2015 because *Johnson* establishes a new right that is retroactively applicable to cases on collateral review. *See Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). However, Petitioner filed his § 2255 Motion on June 4, 2018, which is outside of the allowed one-year time frame under 28 U.S.C. § 2255(f)(3). Furthermore, any other claims asserted by Petitioner appear to be barred by the applicable one-year statute of limitations of 28 U.S.C. § 2255(f)(1).

District courts determine the timeliness of a § 2255 motion on a claim-by-claim basis. *See Zack v. Tucker*, 704 F.3d 917, 918 (11th Cir. 2013) (en banc). Although not obligated to do so, district courts are permitted to raise the timeliness of a § 2255 motion *sua sponte*, even after the pre-answer screening stage, provided that a petitioner is afforded an opportunity to respond

before the motion is ultimately dismissed on such ground. *See Day v. McDonough*, 547 U.S. 198, 207-210 (2006) (establishing such a rule in the context of a district court's authority to raise the one-year statute of limitations of 28 U.S.C. § 2244(d) to bar a habeas petition filed by a state prisoner pursuant to 28 U.S.C. § 2254); *United States v. Bendolph*, 409 F.3d 155, 164-166 (3d Cir. 2005); *Gomez v. United States*, 2009 WL 1579510, \*6 (N.D. Ga. June 3, 2009).

The court notes that § 2255's limitations period is subject to equitable tolling, but only if a petitioner can establish that he "untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Outler v. United States*, 485 F.3d 1273, 1280 (11th Cir. 2007) (quoting *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000)). Equitable tolling is a remedy that "is sparingly applied," and a petitioner bears the burden of establishing the existence of both extraordinary circumstances and his due diligence. *Williams v. United States*, 491 F.3d 1282, 1284-1285 (11th Cir. 2007). Here, at least at first view, the record fails to reveal any circumstances that might entitle Petitioner to equitable tolling of the limitations period.

Therefore, Petitioner is hereby **ORDERED** to file, within **twenty (20) days** of the entry of this Order, any evidence or argument that **SHOW CAUSE** why the claims in his § 2255 motion are not due to be dismissed as untimely. Petitioner's failure to do so will subject all his claims in his § 2255 motion to dismissal without further notice.

The Clerk is **DIRECTED** to serve a copy of this Order upon Petitioner.

**DONE** and **ORDERED** this July 12, 2018.

  
R. DAVID PROCTOR  
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**LAVARES DETROEN WATKINS,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

**Case No.: 2:18-cv-8015-RDP  
(2:10-cr-00024-RDP-TMP-1)**

**ORDER**

This matter is before the court on Petitioner's Response to the court's Show Cause Order. (Doc. # 4). A review of the case materials makes clear that Petitioner's claims are untimely. The question therefore is whether there is a basis to find his claim was tolled and can be presented now. On July 12, 2018, the court ordered Petitioner to show cause why the claims in his § 2255 motion was not due to be dismissed as untimely. (Doc. # 3). In his Response to the Show Cause Order, Petitioner asserts that his § 2255 motion should not be dismissed as untimely because (1) he did not come into the custody of the United States Marshalls until September 13, 2017, (2) he has been pursuing his rights diligently, (3) he "self surrender[ed]" after he was "released from state prison by mistake," and (4) he was unable to research federal laws following his federal sentence because he was in state prison. (Doc. # 4).

After careful review, the court finds that Petitioner's reasons for filing outside the limitations period do not amount to "extraordinary circumstances that [were] both beyond his control and unavoidable even with diligence" and, therefore, these reasons do not justify equitable tolling of the § 2255's limitations period. *See Outler v. United States*, 485 F.3d 1273,



1280 (11th Cir. 2007) (quoting *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000)). Accordingly, Petitioner's § 2255 motion is **DENIED** as it is time-barred. See 28 U.S.C. § 2255(f).

This court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *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). The court finds Petitioner's claims do not satisfy either standard. Therefore, a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c).

The Clerk of Court is **DIRECTED** to close this action.

The Clerk is **FURTHER DIRECTED** to serve a copy of this Order upon Petitioner.

**DONE** and **ORDERED** this July 31, 2018.

  
R. DAVID PROCTOR  
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**LAVARES DETROEN WATKINS,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

**Case No.: 2:18-cv-8015-RDP  
(2:10-cr-00024-RDP-TMP-1)**

**ORDER**

This matter is before the court on Petitioner's Motion for Reconsideration. (Doc. # 8). Therein, Petitioner moves the court to reconsider its order denying Petitioner's § 2255 motion as untimely. Petitioner claims his sentence is unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015), which the Supreme Court made retroactive on collateral review in *Welch v. United States*, 136 S. Ct. 1257 (2016). Petitioner admits his § 2255 motion is untimely under 28 U.S.C. § 2255(f)(3). That provision requires prisoners to file their § 2255 motions within one year of "the date on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3). In Petitioner's case, § 2255(f)(3) required him to file his motion on or before June 26, 2016—one year from the date *Johnson* was issued. Petitioner did not file his motion until June 4, 2018, so his motion is untimely.

In his Motion for Reconsideration, Petitioner makes the same argument he made previously when the court ordered him to show cause why his § 2255 motion should not be denied as untimely. He contends that he is entitled to equitable tolling of § 2255(f)(3)'s one-year limitations period. Equitable tolling of § 2255(f)'s limitations period is appropriate only if the

prisoner shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). Petitioner was in custody at an Alabama state prison when *Johnson* was decided and was not committed to the federal bureau of prisons until October 2017, more than a year after § 2255(f)(3)’s limitations period expired. He claims the fact that he was confined in the state prison during the applicable limitations period, without access to federal legal materials, justifies equitable tolling of the limitations period. But “institutional transfers [and] lack of ready access to legal paperwork and law libraries are not ‘extraordinary circumstances’; they are usual incidents of prison life.” *Neal v. McNeil*, No. 3:09CV23/MCR/EMT, 2010 WL 298294, at \*8 (N.D. Fla. Jan. 15, 2010); *see also Wallace v. United States*, 981 F. Supp. 2d 1160, 1165 (N.D. Ala. 2013) (collecting cases making the same point). Again, after careful review, the court concludes Petitioner has not met his burden of showing that equitable tolling is appropriate in this case, and his Motion to Reconsider (Doc. # 8) is accordingly **DENIED**.

The Clerk of Court is **DIRECTED** to mail Petitioner a copy of this Order at his address of record.

**DONE and ORDERED** this October 18, 2018.

  
R. DAVID PROCTOR  
UNITED STATES DISTRICT JUDGE