FILED
United States Court of Appeal
Tenth Circuit

August 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY MICHAEL SALAZAR,

Defendant - Appellant.

No. 19-1119
(D.C. Nos. 1:19-CV-00140-PAB and 1:16-CR-00022-PAB-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **LUCERO**, **PHILLIPS**, and **EID**, Circuit Judges.

More than one year after his conviction became final, Anthony Michael Salazar filed a motion under 28 U.S.C. § 2255 to vacate his sentence. The district court dismissed the motion as untimely and denied a certificate of appealability ("COA"). Although we grant Salazar's motion to proceed *in forma pauperis*, we deny a COA and dismiss the appeal.

I. BACKGROUND

Salazar was sentenced to 12 months' imprisonment followed by five years' supervised release for failing to register as a sex offender in violation of 18 U.S.C.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

§ 2250(a). His supervised release began on July 22, 2015. But in September 2016, his probation officer filed a superseding petition alleging he had committed five supervised release violations. Salazar admitted to the fifth violation—"Certain Activities Relating to Material Constituting or Containing Child Pornography, in violation of 18 U.S.C. §2252A," ROA Vol. I at 28—and, in exchange, the government withdrew the other allegations. For this offense, he was sentenced to 60 months' imprisonment followed by five years' supervised release. His conviction became final on March 20, 2017.

Over a year later, in January 2019, Salazar filed a motion to vacate under 28 U.S.C. § 2255. Because Salazar filed his section 2255 motion more than a year after his judgment of conviction became final, it was untimely under section 2255(f)(1) unless he could establish an exception, such as equitable tolling or actual innocence. The district court concluded Salazar could establish neither, dismissed the motion as untimely, and denied a COA. Salazar appealed.

II. DISCUSSION

On appeal, Salazar argues that his motion is timely because of (1) intervening Supreme Court precedent recognizing a new right, (2) equitable tolling, or (3) actual innocence. We address each item in turn.

a. Newly Recognized Right

After the district court dismissed Salazar's motion, the Supreme Court decided *United States v. Haymond*, 139 S. Ct. 2369 (2019). *Haymond* considered the constitutionality of 18 U.S.C. § 3583(k). Section 3583(k) mandates a minimum five-

year term of imprisonment for certain supervised release violations committed by defendants who are "required to register under the Sex Offender Registration and Notification Act," 18 U.S.C. § 3583(k), "including the possession of child pornography." *Haymond*, 139 S. Ct. at 2374.

Four justices held that section 3583(k) violated Haymond's Fifth and Sixth Amendment rights. *See id.* at 2373. Justice Breyer concurred. *Id.* at 2385–86 (Breyer, J., concurring). Although he "agree[d] with much of the dissent," and unlike the plurality, "would not transplant the *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] line of cases to the supervised-release context," three specific aspects of the statute led him to conclude section 3583(k) was unconstitutional. *Id.*

> *First*, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. *Second*, § 3583(k) takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. *Third*, § 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of "not less than 5 years" upon a judge's finding that a defendant has "commit[ted] any" listed "criminal offense."

Id. at 2386. "Taken together," Justice Breyer posited, "these features of § 3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution." *Id.* He then concluded section 3583(k) violates the Court's holding in *Alleyne v. United States*, 570 U.S. 99 (2013), that "in an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term." *Id.*

Salazar contends that his sentence, which was imposed under 18 U.S.C. § 3583(k), is now unconstitutional. *See* July 10, 2019 28(j) Letter. Construing Salazar's briefing liberally, as we must, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), we interpret Salazar's 28(j) letter to argue that *Haymond* renders his motion timely under 28 U.S.C. § 2255(f). Section 2255(f) provides that "[a] 1-year period of limitation shall . . . run from the latest of" four options, the third of which is "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." If *Haymond* satisfies section 2255(f)(3), then Salazar's motion is timely. We therefore consider whether *Haymond* satisfies section 2255(f)(3).

We consider that question in the context of whether Salazar is entitled to a COA. "A COA is a jurisdictional prerequisite to our review . . . ." *United States v. Parker*, 720 F.3d 781, 785 (10th Cir. 2013); *see also United States v. Gonzalez*, 596 F.3d 1228, 1241 (10th Cir. 2010). And we will grant a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court dismisses a section 2255 motion on procedural grounds, such as timeliness, an applicant must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was

correct in its procedural ruling."[1] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Importantly, we review the district court's "*ultimate resolution* of th[e] claim," *Pruitt v. Parker*, 388 F. App'x 841, 845 n.4 (10th Cir. 2010), not the particulars of its analysis. *See Brown v. Roberts*, 501 F. App'x 825, 830 (10th Cir. 2012) ("While we arrive at [our] conclusion through a . . . different path than . . . the district court, we find that reasonable jurists could not disagree with the district court's ultimate *resolution* in dismissing the petition."). Thus, we consider whether reasonable jurists could debate the district court's ultimate resolution, even if our analysis differs from the district court's or considers issues not contained in the district court's discussion. *See, e.g., United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

Here, the district court's "ultimate resolution" was to dismiss Salazar's motion as untimely. It is in that context we consider whether *Haymond* renders Salazar's section 2255 motion timely under 28 U.S.C. § 2255(f)(3). Section 2255(f)(3) applies to "newly recognized" rights that have been made "retroactively applicable to cases on collateral review." Determining whether a new right is retroactively applicable entails a three-step inquiry: (1) whether Salazar's conviction became final before the Supreme Court's decision in *Haymond*; (2) whether the rule in *Haymond* "is actually 'new,' based on whether a 'court considering [Salazar's claim] at the time his conviction became final would have felt compelled by existing precedent to conclude

[1] Because we conclude that reasonable jurists would not debate the district court's procedural rulings, "we need not decide whether the petition states a valid claim of the denial of a constitutional right." *United States v. Harrison*, 680 F. App'x 678, 679 (10th Cir. 2017).

that the rule [announced in *Haymond*] was required by the Constitution"; and (3) whether, assuming the rule is new, the rule "falls within either of the two narrow exceptions to nonretroactivity" announced in *Teague v. Lane*, 489 U.S. 288 (1989). *United States v. Chang Hong*, 671 F.3d 1147, 1151 (10th Cir. 2011), *as amended* (Sept. 1, 2011) (quotations omitted).

Under *Teague* "[a] new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (quotations omitted). "A substantive rule is one that alters the range of conduct or the class of persons that the law punishes." *Chang Hong*, 671 F.3d at 1157 (quotations omitted). "By contrast, a procedural rule regulate[s] only the manner of determining the defendant's culpability." *Id.* (quotations omitted).

Haymond satisfies the first step of our inquiry: Salazar's conviction became final before the Supreme Court's decision in *Haymond*. As for the second step, we do not address it. Even if we were to assume that reasonable jurists would not debate that *Haymond* announced a new rule, *Haymond* does not satisfy the third step, and accordingly, does not satisfy section 2255(f)(3).[2]

[2] Because 28 U.S.C. § 2255(f) is not jurisdictional, *United States v. Miller*, 868 F.3d 1182, 1185 (10th Cir. 2017), we may consider its elements in any order. Indeed, we have previously considered the section 2255(f)(3) elements in order of analytical convenience. *See, e.g.*, *United States v. Shayesteh*, 54 F. App'x 916, 918 (10th Cir. 2003) ("Assuming without deciding that *Edmond* announced a new rule of law . . .

We begin our analysis of that step by determining whether *Haymond* announced a substantive or a procedural rule. We conclude *Haymond* announced a procedural rule. *Haymond* does not "alter[] the range of conduct or the class of persons that the law punishes"—possessing child pornography is still a crime after *Haymond*. But it does "regulate[] . . . the manner of determining the defendant's culpability." Indeed, *Haymond*, like *Alleyne*, "allocate[s] decisionmaking authority," *Schriro v. Summerlin*, between the judge and a jury. 542 U.S. 348, 353 (2004). And the Court has repeatedly held "[r]ules that allocate decisionmaking authority in this fashion are prototypical procedural rules." *Id.*

Haymond's status as a procedural rule signals the end of the road for its bid to become retroactive. "The exception [for watershed procedural rules] is quite narrow . . . ." *Chang Hong*, 671 F.3d at 1157. "To surmount th[e] 'watershed' requirement, a new rule . . . must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 1157–58 (quotations omitted); *see Whorton*, 549 U.S. at 420–21. "The Supreme Court has repeatedly identified its decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963)—recognizing an indigent defendant's right to counsel—as the only rule which, if *Gideon* had been decided after *Teague*, might have fallen within the second *Teague* exception." *Chang Hong*, 671 F.3d at 1158.

Shayesteh could not avail himself of it here . . . [because, *inter alia*,] *Edmond* does not announce a watershed rule of criminal procedure.").

"Simply put, [*Haymond*] is not *Gideon*." *Id.* *Haymond* does not "itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." Rather, *Haymond* is an extension of *Alleyne*'s holding that "in an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term." *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring) (citing *Alleyne*, 570 U.S. at 103). No court has ever recognized *Alleyne* as retroactive. *United States v. Hoon*, 762 F.3d 1172, 1173 (10th Cir. 2014). Even *Apprendi*, which formed the basis for *Alleyne*, was not a "watershed" procedural decision. *See United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002); *see also In re Payne*, 733 F.3d 1027 (10th Cir. 2013) (agreeing with the Seventh Circuit that "rules based on *Apprendi* do not apply retroactively on collateral review" (quotations omitted)). Considering all this, a reasonable jurist could not debate the conclusion that *Haymond* is not retroactive and does not satisfy section 2255(f)(3).

b. Equitable Tolling and Actual Innocence

We turn now to the considerations that formed the basis of the district court's dismissal of Salazar's motion: that Salazar's motion was untimely because he had failed to establish the requirements for equitable tolling and actual innocence. No reasonable jurist could dispute these holdings.

"To be entitled to equitable tolling, [Salazar] must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Fla.*, 549 U.S. 327, 336 (2007)

(quotations omitted). Salazar argues his counsel's "professional misconduct" satisfies the second element:

> Mr. Salazar has repeatedly called and written trial counsel complaining about his sentence and asked counsel to file a direct appeal. He was, however, told that he couldn't appeal. Counsel has refused to provide Mr. Salazar documents as retained by counsel in his criminal file so that he could attempt to formulate an appeal. Counsel further refused to advise Mr. Salazar as to the process of filing notice of appeal own [sic] his (Mr. Salazar's) own. This was in reference to both a direct appeal as well as a § 2255 Motion.

Aplt. Br. at 3. The district court rejected this argument for two reasons. First, Salazar had failed to provide specific facts demonstrating he had a "reasonable belief that the attorney appointed to represent him in connection with the charged supervised release violations would assist him in filing a § 2255 Motion." *United States v. Salazar*, No. 16-CR-00022-PAB, 2019 WL 1170551, at *3 (D. Colo. Mar. 12, 2019) (citing 18 U.S.C. § 3006A(c), which provides that appointed counsel shall represent the defendant "through appeal"). Second, "Salazar d[id] not explain why he needed access to documents in the case file to raise the claims asserted in his § 2255 Motion." *Id.*

As referenced above, because Salazar is a *pro se* movant, we construe his briefing liberally. *Hall*, 935 F.2d at 1110. But even under that standard, Salazar has not meaningfully refuted either of the district court's reasons for rejecting this claim. Instead, his appellate brief is general, vague, and fails to offer specific facts. No reasonable jurist could disagree with the district court that Salazar "failed to raise a

colorable claim that extraordinary circumstances prevented him from filing a timely § 2255 motion." *Salazar*, 2019 WL 1170551, at *3.

Salazar's last avenue for overcoming section 2255(f) is his claim of actual innocence.[3] "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotations omitted). The district court rejected this claim because Salazar's contentions only challenged the "legal sufficiency of his sentence and d[id] not demonstrate that he is innocent of the underlying offense." *Salazar*, 2019 WL 1170551, at *4. Salazar's appellate briefing suffers from the same infirmity. *See* Aplt. Br. at 4 ("Mr. Salazar . . . is actually innocent of any sentence above his statutory maximum and his sentence is illegal as argued in his brief."). We conclude that no reasonable jurist could debate the district court's resolution of this claim.

[3] We recognize that Salazar also contends it was improper for the district court to *sua sponte* raise the timeliness issue and that that his "§ 2255 Motion must be heard, regardless of whether the motion is untimely, because the Court lacked jurisdiction to impose an unconstitutional sentence under the Tenth Circuit's decision in *Haymond*." *Salazar*, 2019 WL 1170551, at *4. However, neither of these arguments is availing. Except in circumstances not present here, federal district courts generally have authority to *sua sponte* "consider . . . the timeliness of a" section 2255 motion. *Wood v. Milyard*, 566 U.S. 463, 472–73 (2012); *see also Day v. McDonough*, 547 U.S. 198, 209 (2006). And as the district court observed, Salazar's jurisdictional argument "ignores the plain language of the statute," which provides that all motions filed under section 2255 are "subject to the one-year limitation period of § 2255(f), regardless of the claim raised." *Salazar*, 2019 WL 1170551, at *4. Reasonable jurists could not debate the district court's decision to consider the timeliness issue or its rejection of the jurisdictional argument.

III. CONCLUSION

For the foregoing reasons, we DENY Salazar a COA, GRANT his motion to proceed IFP, and DISMISS the appeal.

Entered for the Court

Allison H. Eid
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 19-cv-00140-PAB
(Criminal Case No. 16-cr-00022-PAB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY MICHAEL SALAZAR,

Defendant/Movant.

ORDER DENYING § 2255 MOTION

Movant Anthony Michael Salazar has filed *pro se* a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (§ 2255 Motion) [Docket No. 42].[1] The Court construes the § 2255 Motion liberally because Mr. Salazar is not represented by counsel. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court does not act as a *pro se* litigant's advocate. *See Hall*, 935 F.2d at 1110. For the reasons stated below, the § 2255 Motion is dismissed as untimely.

I. BACKGROUND AND PROCEDURAL HISTORY

On March 16, 2015, Mr. Salazar was placed on supervision by the United States District Court for the District of Utah. Docket No. 22. Following a conviction for Failure to Register as a Sex Offender, in violation of 18 U.S.C. § 2250(a), he was sentenced to

[1] An identical § 2255 motion was filed on January 18, 2019. Docket No. 43.

a 12-month term of imprisonment followed by five years of supervised release. Docket No. 1-2. Supervision commenced in the District of Utah on July 22, 2015 and was transferred to the District of Colorado on January 15, 2016. Docket No. 1. On September 20, 2016, a United States Probation Officer filed a Superseding Petition Due to Violations of Supervision ("Petition"). Docket No. 22. The Petition alleged five violations, including, *inter alia*, Violation of Law, a Grade B violation of supervised release under United States Sentencing Guidelines Section 7, "Certain Activities Relating to Material Constituting or Containing Child Pornography in violation of 18 U.S.C § 2252A." *Id.* at 3. Mr. Salazar admitted to the violation and the Government withdrew the remaining four violations. *See* Docket Nos. 38, 39 and 40. On March 6, 2017, Mr. Salazar was sentenced to a 60-month term of imprisonment to be followed by a five-year term of supervised release. Docket No. 40. He did not file a direct appeal.

Mr. Salazar filed a § 2255 Motion on January 15, 2019. Docket No. 42. In the Motion, he asks the Court to vacate the period of supervised release on the basis that the Court had no jurisdiction to impose it. *Id.* at 3. Specifically, Mr. Salazar asserts that "[t]he revocation of [his] supervised release was a continuation of the original criminal action, not a separate proceeding" and, therefore, "the court could not impose another five years supervised release after imposing a five year sentence after revoking his supervised release." *Id.* at 9. He also challenges the constitutionality of the five-year sentence under *United States v. Haymond*, 869 F.3d 1153 (10th Cir. 2017), *cert.*

granted, 139 S. Ct. 398 (Oct. 26, 2018).[2] *Id.* at 24. In the alternative, Mr. Salazar argues that the conditions of his supervised release must be modified. *Id.* at 10-23.

On January 29, 2019, the Court issued an order directing Mr. Salazar to show cause in writing within thirty days why the § 2255 Motion should not be denied as untimely or as procedurally barred. Docket No. 45. Mr. Salazar filed a response to the show cause order on February 25, 2019. Docket No. 46.

II. ANALYSIS

Pursuant to 28 U.S.C. § 2255(f), a one-year limitation period applies to motions to vacate, set aside, or correct a federal sentence.

> 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 due diligence.

28 U.S.C. § 2255(f).

Because Mr. Salazar did not file a direct appeal, his conviction became final, under § 2255(f)(1), on March 20, 2017, fourteen days after the judgment was entered

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[2] In *Haymond*, the Tenth Circuit held that 18 U.S.C. § 3583(k), which mandates revocation of supervised release and imprisonment of no less than five years for the commission of certain crimes by defendants required to register under the Sex Offender Registration and Notification Act, violates the Fifth and Sixth Amendments. 869 F.3d at 1164-67.

on March 6, 2017. *See United States v. Burch*, 202 F.3d 1274, 1277 (10th Cir. 2000) (a conviction is final when the time for filing a direct appeal expires); Fed. R. App. P. 4(b)(1)(A) (defendant's notice of appeal in a criminal case must be filed within fourteen days after the entry of judgment). The one-year limitation period expired on March 20, 2018. *See United States v. Hurst*, 322 F.3d 1256, 1261 (10th Cir. 2003) (adopting the anniversary method for calculating the one-year limitation period in § 2255(f)). Consequently, the § 2255 motion, filed on January 15, 2019, is untimely, unless equitable tolling applies.

The statutory limitation period in § 2255 is not jurisdictional and is subject to equitable tolling if a movant can show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.'" *United States v. Grealish*, 559 F. App'x 786 (10th Cir. May 27, 2014) (unpublished) (quoting *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (applying equitable tolling to the one-year statute of limitations in 28 U.S.C. § 2244)). The movant must "allege with specificity the steps he took to diligently pursue his federal claims." *Yang v. Archuleta*, 525 F.3d 925, 930 (10th Cir. 2008) (internal quotation marks omitted). The movant bears the burden of demonstrating that he is entitled to equitable tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also U.S. v. Garcia-Rodriguez*, 275 F. App'x 782, 784 (10th Cir. April 28, 2008) (unpublished) (relying on *Yang* for conclusion that the movant in a § 2255 motion bears the burden to show specific facts in support of a claim of extraordinary circumstances and due diligence).

In his response to the order to show cause, Mr. Salazar does not dispute that he failed to meet the statutory deadline in § 2255(f)(1) or argue that the limitation period

commenced later than the date his conviction was final. Docket No. 46. Instead, Mr. Salazar maintains that he is entitled to equitable tolling because trial counsel refused to file a direct appeal and failed "to give documents in his file so he could appeal or tell him how to file . . . an effective § 2255." *Id.* at 2. He also contends that "further factual consideration is needed to determine whether counsel's failure to timely file the petition, to correctly determine the deadline, and to respond to petitioner's many requests for information warranted equitable tolling." *Id.*

The one-year limitation period may be subject to equitable tolling when "serious instances of attorney misconduct" have occurred. *Holland v. Florida*, 560 U.S. 631, 651-52 (2010) (addressing one-year limitation period for habeas petitions filed by state prisoners). *See also Fleming v. Evans*, 481 F.3d 1249, 1256 (10th Cir. 2007) (same). However, "a garden variety claim of excusable neglect" does not suffice. *Holland*, 560 U.S. at 651-52 (internal quotation marks and citation omitted). "[C]lients, even if incarcerated, must 'vigilantly oversee,' and ultimately bear responsibility for, their attorneys' actions or failures." *Fleming,* 481 F.3d at 1255-56 (internal citation omitted). Therefore, "attorney error, miscalculation, inadequate research or other mistakes have not been found to rise to the extraordinary circumstances required for equitable tolling," including a mistake by counsel in interpreting the applicable statute of limitations. *Id.* at 1256 (citation omitted).

In *Fleming*, the habeas petitioner sought equitable tolling because, during a thirteen-month period of time, his post-conviction counsel "deceived him into believing that he was actively pursuing Mr. Fleming's legal remedies when, in fact, he was not." 481 F.3d at 1256. The petitioner hired counsel nearly a year

before the deadline expired, contacted his counsel repeatedly during that time, and counsel "repeatedly assured" the petitioner that filing was forthcoming. *Id.* Ultimately, the petitioner prepared his own habeas petition and submitted it to counsel before the one-year limitation period; however, counsel failed to file the petition until after the statutory deadline passed. *Id.* The Tenth Circuit held that these circumstances constituted egregious attorney misconduct sufficient to warrant an evidentiary hearing to determine whether the petitioner was entitled to equitable tolling. *Id.* at 1256-57.

In the present case, Mr. Salazar does not state specific facts to demonstrate a reasonable belief that the attorney appointed to represent him in connection with the charged supervised release violations would assist him in filing a § 2255 Motion. *See* 18 U.S.C. § 3006A(c) ("A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance . . . through appeal, . . ."). *Cf. United States v. Gonzalez-Arenas*, No. 04-cr-00282-REB, 2016 WL 10859436 at *4 (D. Colo. April 22, 2016) (distinguishing *Fleming* on the ground that Mr. Gonzalez-Arenas had no reasonable basis to believe that an attorney was acting as his counsel for purposes of filing a § 2255 motion, where counsel did not make any promises to the petitioner to represent him or file a motion on his behalf). Moreover, Mr. Salazar does not explain why he needed access to documents in his case file to raise the claims asserted in his § 2255 Motion. The Court finds that Mr. Salazar has failed to raise a colorable claim that extraordinary circumstances prevented him from filing a timely § 2255 motion.

In addition, Mr. Salazar fails to establish that he pursued his claims with

due diligence before the one-year limitation period expired, especially where there are no facts to suggest that court-appointed counsel's representation extended to the filing of a § 2255 motion. *See United States v. Halcrombe*, 700 F. App'x 810, 816 (10th Cir. July 6, 2017) (unpublished) (concluding that movant did not demonstrate due diligence in filing a § 2255 motion, where movant asserted that trial counsel "abandoned" him on direct appeal, but movant did not explain how the alleged abandonment caused him to wait for three years to file a § 2255 motion; and movant failed to allege that trial counsel's representation extended to the filing of a § 2255 motion) (citing cases). *Cf. Holland,* 560 U.S. at 653 (finding petitioner had demonstrated diligent pursuit of his federal claims where petitioner "wrote [the attorney appointed to represent him in all state and federal postconviction proceedings] numerous letters seeking crucial information and providing direction; . . . repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have" his attorney removed from his case; and "prepared his own habeas petition pro se and promptly filed it with the District Court" the day he discovered that the AEDPA time limitation had expired due to his attorney's failings).

Moreover, a *pro se* prisoner's ignorance of the law does not entitle him to equitable tolling of the limitation period. *See Marsh v. Soares,* 223 F.3d 1217, 1220 (10th Cir.2000) (quotation omitted); *see also Yang,* 525 F.3d at 929-30; *Gibson v. Klinger,* 232 F.3d 799, 808 (10th Cir. 2000).

Mr. Salazar also claims actual innocence as a basis for equitable tolling. Docket No. 46 at 3. Equitable tolling may be appropriate where the movant can demonstrate

actual innocence. *See United States v. Messer*, 749 F. App'x 719, 725 (10th Cir. Sept. 13, 2018) (citing *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003)). To establish a credible claim of actual innocence, the movant must "support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The movant then must demonstrate "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327. Importantly, "actual innocence means factual innocence, not mere legal insufficiency." *United States v. Bousley*, 523 F.3d 614, 615 (1998).

Mr. Salazar asserts in his response to the order to show cause that he is "actually innocent of any sentence above his statutory maximum." Docket No. 46 at 3. However, this contention challenges the legal sufficiency of his sentence and does not demonstrate that he is innocent of the underlying offense.

Finally, Mr. Salazar suggests that the merits of his § 2255 Motion must be heard, regardless of whether the motion is untimely, because the Court lacked jurisdiction to impose an unconstitutional sentence under the Tenth Circuit's decision in *Haymond.* Docket No. 46 at 3-5. This argument ignores the plain language of the statute. A federal prisoner can move the court to vacate, set aside, or correct a sentence on the ground that the sentence "was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject

to collateral attack." 28 U.S.C. § 2255(a). A motion filed under § 2255(a) is subject to the one-year limitation period of § 2255(f), regardless of the claim raised.

In sum, the Court finds that the § 2255 Motion is untimely under 28 U.S.C. § 2255(f)(1) and Mr. Salazar has failed to demonstrate an entitlement to equitable tolling. Consequently, the § 2255 Motion will be dismissed.

Under Rule 11(a) of the Section 2255 Rules, a "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." When the district court denies relief on procedural grounds, the movant seeking a certificate of appealability must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing 28 U.S.C. § 2353(c)(2)). The Court denies Mr. Salazar a certificate of appealability because jurists of reason would not debate the correctness of the Court's ruling that the § 2255 Motion is untimely. Accordingly, it is

ORDERED that the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [Docket No. 42], filed by Anthony Michael Salazar *pro se* on January 15, 2019, is DENIED as untimely. It is further

ORDERED that the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [Docket No. 43] filed on January 18, 2019 is DENIED as duplicative. It is further

ORDERED that the Motion for Immediate Consideration [Docket No. 44] is DENIED as unnecessary. It is further

ORDERED that, under 28 U.S.C. § 2253(c)(2) and the Rules Governing Section 2255 Proceedings for the United States District Courts, a certificate of appealability is DENIED.

DATED March 12, 2019.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
Chief United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

August 30, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY MICHAEL SALAZAR,

Defendant - Appellant.

No. 19-1119

ORDER

Before **LUCERO**, **PHILLIPS**, and **EID**, Circuit Judges.

Appellant's "Motion for Reconsideration" is construed as a petition for panel rehearing, and, so construed, the petition is denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Lindy Lucero Schaible
Counsel to the Clerk