APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-41113

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMES EARVIN SANDERS,

Defendant-Appellant

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

ORDER:

James Earvin Sanders, Texas prisoner # 1579328, moves for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion challenging his conviction and sentence for possession of a firearm by a convicted felon. The district court determined that the § 2255 motion was time barred and that Sanders was not entitled to tolling of the limitations period. Sanders argues that the limitations period commenced either on the date on which an impediment to filing created by government action was removed or the date on which the facts supporting the claim could have been discovered through due diligence. He also argues for equitable tolling.

To obtain a COA, Sanders must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court

~~1st Amend. Right to Redress of Grievances.~~ Appendix A

But if u get shot ↓ on what u just sent in 7-22-19 through 7-26-19, this Constitutional Ground will be your final arguement. Unless u can find some other Const. Ground. B/c that's all they didn't ↓ it is a Const. Ground 2 give u action. They can't deny "Redress of Grievances." You could sue them for "Official Oppression" for a denial of that Right, b/c the decision was made in their "Official Capacity." They'd risk their 11th Amend. Absolute ↓ Immunity protection(s). But u'd have 2 make sure they know u know this. So, prepare yourself, just in case u've got 2 do a 1983 + Sue All Parties Involved.

Also when they triggered 2244(d)(1)(B), 2254(b)(1)(B)(ii) come into play.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAMES EARVIN SANDERS, #1579328	§	
	§	
VS.	§	CIVIL ACTION NO. 4:17cv324
	§	CRIMINAL ACTION NO. 4:06cr291(1)
UNITED STATES OF AMERICA	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Kimberly C. Priest Johnson. The Magistrate Judge issued a Report and Recommendation concluding that the motion to vacate, set aside, or correct sentence filed pursuant to 28 U.S.C. § 2255 should be denied and dismissed with prejudice. Movant filed objections.

Movant makes five objections.[1] Movant first objects to the Report's characterization of what happened to his legal documents while in his family's possession. Specifically, Movant objects to the Magistrate Judge's finding that Movant states the critical documents were destroyed, but later were found intact. *See* Dkt. 9 at 1. In his § 2255 motion, Movant states, "[t]he majority of those documents were damaged in a home flood and the rest were misplaced and not located until 2016." Dkt. 1 at 12. The Report does not misstate Movant's explanation.

Second, Movant objects to the Report's determination that Movant failed to allege an unconstitutional state action impeded his ability to file his § 2255 motion. *See* Dkt. 9 at 3. Movant alleges the United States Marshals Service took his paperwork while he was in transit, and that this

[1] Movant made eight objections, but the Court construes objections three and four to be one objection, as they both relate to the finding that Movant was not diligent in securing his documents. The Court additionally construes Movant's objections six, seven, and eight as one, as these objections relate to whether the Report and Recommendation was too "rigid." *See* Dkt. 9.

Appendix C

action impeded his ability to timely file his motion. *Id.* Movant further states this is contradictory to the AEDPA's one-year statute of limitations, in general, and that the action is inflexible, making it unconstitutional. *Id.* at 4. The Fifth Circuit notes:

> AEDPA relies on precise filing deadlines to trigger specific accrual and tolling provisions. Adjusting the deadlines by only a few days in both state and federal courts would make navigating AEDPA's timetable impossible. Such laxity would reduce predictability and would prevent us from treating the similarly situated equally. We consistently have denied tolling even where the petition was only a few days late.

Lookingbill v. Cockrell, 293 F.3d 256, 265 (5th Cir. 2002) (four days late). *See also In re Lewis*, 484 F.3d 793 (5th Cir. 2007) (one day late). Movant has not alleged a constitutional violation, and he fails to show the Magistrate Judge's Report is erroneous.

Third, Movant objects to the Magistrate Judge's finding that Movant was not reasonably diligent by waiting approximately four years before obtaining his discovery paperwork from his attorney. *See* Dkt. 9 at 5. Movant also objects to the finding that he was not reasonably diligent by waiting approximately five years to secure the paperwork from his family. *Id.* at 6. Again, Movant fails to allege unconstitutional action by the state or an adversary. Movant essentially alleges his family did not sufficiently value the documents, and that his family was going through hardships of their own. *Id.* This is not an exceptional circumstance. *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998), *cert. denied*, 526 U.S. 1074 (1999) (a movant must present "rare and exceptional circumstances" to warrant equitable tolling).

Fourth, Movant objects to the Magistrate Judge's comment that Movant waited eight months after receiving his legal documents before filing his § 2255 motion. *See* Dkt. 9 at 7. Movant states that, during that time, he was only able to view three legal items a day at the prison law library, and

that this hampered his ability to file his § 2255 motion. *Id.* at 8. Movant did not allege insufficient access to the library prior to filing his objections. *See* Dkt. 1, 5. The Court will not consider a new allegation that was not raised in the § 2255 motion. *See United States v. Cervantes*, 132 F.3d 1106, 1111 (5th Cir. 1998) (Claims raised for the first time in a reply or objections need not be considered by the court.). Moreover, the allegation does not excuse Movant's lack of diligence over the entire one-year period in which he failed to file his motion.

Fifth, Movant alleges the Report is based on an interpretation of the law that is too rigid. *See* Dkt. 9 at 9-12. Specifically, Movant alleges the Report is too rigid in: (1) its definition of rare and extraordinary circumstances; (2) setting an outside limit of timeliness that does not exist within the AEDPA standard; and (3) determining Movant is not entitled to a certificate of appealability. *Id.* Movant's allegations are conclusory, and he fails to state a constitutional violation. Movant also fails to show extraordinary circumstances or that he was diligent in preparing his § 2255 motion.

After conducting a *de novo* review of the record, the Court concludes the findings and conclusions of the Magistrate Judge are correct, and adopts the same as the findings and conclusions of the Court.

It is therefore **ORDERED** the motion to vacate, set aside, or correct sentence is **DENIED**, and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 1st day of November, 2018.

Amos Mazzant

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAMES EARVIN SANDERS, #1579328	§	
	§	
VS.	§	CIVIL ACTION NO. 4:17cv324
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UNITED STATES OF AMERICA	§	

FINAL JUDGMENT

Having considered the motion to vacate, set aside, or correct sentence, and rendered its decision by opinion and order of dismissal issued this same date, the Court **ORDERS** that the case is **DISMISSED** with prejudice.

SIGNED this 1st day of November, 2018.

Amos Mazzant

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
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UNITED STATES OF AMERICA	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Movant James Earvin Sanders filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The motion was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

BACKGROUND

On March 8, 2007, pursuant to a written plea agreement, Movant pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). *See* CR Dkt. #17. On November 28, 2007, the district court sentenced Movant to three hundred months' imprisonment. CR Dkt. #24. Judgment was entered on November 29, 2007. CR Dkt. #27. He did not file a direct appeal. Movant states he delivered his § 2255 motion in the prison mail system on May 8, 2017. Dkt. #1 at 13. Accordingly, Movant filed his motion on May 8, 2017, in accordance with the "mailbox rule." *See Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998). In Movant's § 2255 motion, he argues he is entitled to relief because his trial counsel provided ineffective assistance. The Government was not ordered to file a response.

Appendix E

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted. The AEDPA made several changes to the federal habeas corpus statutes, including the addition of a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). It provides the one-year limitations period shall run from the latest of four possible situations: (1) the date a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review; (2) the date an impediment to filing created by the State is removed; (3) the date in which a constitutional right has been initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. *Id.* at §2244(d)(1)(A)-(D).

In general, a movant for collateral relief has one year from "the date on which the judgment became final" to file a motion challenging a conviction. A conviction is final under § 2255 when a defendant's options for further direct review are foreclosed. *United States v. Gamble*, 308 F.3d 536, 537 (5th Cir. 2000); *United States v. Thomas*, 203 F.3d 350, 352 (5th Cir. 2000). When a defendant fails to file a timely notice of appeal from the judgment of the trial court, the conviction is final upon the expiration of the time for filing a notice of appeal, which is fourteen days after the entry of the judgment. Fed. R. App. P. 4(b); s*ee, e.g., Wims v. United States*, 225 F.3d 186, 188 (2nd Cir. 2000).

Judgment was issued on November 29, 2007; thus, Movant's notice of appeal was due fourteen days later. Fed. R. App. P. 4(b). Movant did not file a notice of appeal; consequently, his conviction became final for purposes of § 2255 fourteen days later, on December 14, 2007. *Bowles v. Russell*, 551 U.S. 205 (2007) (filing period is a jurisdictional limit). Accordingly, the

present § 2255 motion must have been filed within one year from the date on which judgment became final. Movant had until December 14, 2008, in which to file his § 2255 motion. He did not file it until May 8, 2017 – nearly eight and a half years beyond the limitations period. Accordingly, the instant § 2255 motion is time-barred unless Movant has demonstrated he is entitled to equitable tolling.

The Supreme Court of the United States confirmed the AEDPA statute of limitations is not a jurisdictional bar, and it is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). "A habeas petitioner is entitled to equitable tolling only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoting *Holland*, 560 U.S. at 649). "Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate." *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). The petitioner bears the burden of proving he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

The United States Court of Appeals for the Fifth Circuit held the district court has the power to equitably toll the limitations period only in "extraordinary circumstances." *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299 (5th Cir.1998). To qualify for equitable tolling, the petitioner must present "rare and exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998), *cert. denied*, 526 U.S. 1074 (1999). In making this determination, the Fifth Circuit has expressly held illiteracy, deafness, lack of legal training, proceeding *pro se,* and unfamiliarity with the legal process do not constitute extraordinary circumstances. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir. 2000).

Generally, equitable tolling has historically been limited to situations in which the movant "has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [movant] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Young v. United States*, 535 U.S. 43, 50 (2002) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Equitable tolling cannot be used to thwart the intent of Congress in enacting the limitations period. *Davis*, 158 F.3d at 811 (noting "rare and exceptional circumstances" are required). At the same time, the Supreme Court has noted dismissal of a first federal habeas petition is a "particularly serious matter, for that dismissal denies petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Gonzalez v. Crosby*, 545 U.S. 524, 542 (2005) (citing *Lonchar v. Thomas,* 517 U.S. 314, 324 (1996)).

The Fifth Circuit also held "[e]quity is not intended for those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999). To obtain the benefit of equitable tolling, Movant must establish he pursued habeas relief with "reasonable diligence." *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013); *Holland*, 560 U.S. at 653 (the diligence required for equitable tolling purposes is reasonable diligence).

Movant asserts equitable tolling should be granted in his case because he was not aware of the ineffective actions of his attorney until 2011, when his counsel mailed his "discovery paperwork" to Movant. *See* Dkt. 5 at 1. Sometime later, Movant alleges he was placed "on the chain" from Denton County Jail to his current place of incarceration. *Id.* at 2. As Movant was not able to take the discovery paperwork with him, Movant released the papers to his niece. *Id.* On July 2, 2012, Movant alleges his niece went through the paperwork, but the papers were later misplaced or destroyed by a flood. *Id.* These papers were later found, and were mailed to

Movant on or around September 6, 2016. *Id.* at 3-4. Therefore, Movant alleges that his access to the Courts were hindered during this time, and that he could not timely file his § 2255 motion. *Id.*

The Fifth Circuit and the United States District Courts have repeatedly considered which circumstances are "exceptional" warranting equitable tolling. Circumstances having been found to be "exceptional" include "active misleading conduct" by the state, *Lookingbill*, 293 F.3d at 264, "failure to give timely notice" by the state, *Hardy v. Quarterman*, 577 F.3d 596 (5th Cir. 2009), mishandling of prisoner filings by the state, *Critchley v. Thaler*, 586 F.3d 318 (5th Cir. 2009), and inadequate availability of AEDPA provisions in state prison library, *Edgerton v. Cockrell,* 334 F.3d 433 (5th Cir. 2003). Circumstances found to be *not* exceptional include "delay to file" by the movant, *Davis v. Cain*, 2014 WL 4678045 (2014), negligent miscalculation of time to file by counsel, *Jones v. Stephens*, 541 F. App'x 499 (5th Cir. 2013), ignorance of the law by the petitioner, *Sutton v. Cain*, 722 F.3d 312 (5th Cir. 2013), and any situation where the court found the movant was not diligent, *Manning v. Epps*, 688 F.3d 177, 187 (5th Cir. 2012).

Even if the Court assumed Movant is subject to tolling until 2011, when he received the discovery paperwork from his attorney, Movant makes no showing that unconstitutional State action prevented him from seeking federal habeas corpus relief in a timely manner, or that he is asserting a newly recognized constitutional right. Movant presents no evidence he was induced or tricked by his adversary's misconduct, which caused him to untimely file his petition or lose the paperwork. Additionally, Movant fails to show he was reasonably diligent when he waited approximately four years before obtaining the discovery paperwork from his attorney, and then approximately another five years to secure the paperwork on or around September 6, 2016, from his family. Movant then waited eight months to file the § 2255 motion. Movant fails to show

"rare and extraordinary circumstances" prevented him from timely filing. *Davis*, 158 F.3d at 810-11. In sum, Movant filed his § 2255 motion over eight years beyond the limitations period, and he fails to meet his burden of proving he is entitled to equitable tolling, *Phillips*, 216 F.3d at 511. Consequently, the § 2255 motion should be denied and dismissed as time-barred.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Movant has not yet filed a notice of appeal, it is respectfully recommended that the court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a [movant] relief is in the best position to determine whether the [movant] has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected constitutional claims on the merits, the movant must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the movant shows, at least, that jurists of reason would find it

debatable whether the motion 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. *Id.*

In this case, it is respectfully recommended reasonable jurists could not debate the denial of Movant's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is recommended the court find Movant is not entitled to a certificate of appealability.

RECOMMENDATION

It is recommended the above-styled motion for relief under 28 U.S.C. § 2255 be denied and this case be dismissed with prejudice. It is further recommended a certificate of appealability be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object *See Douglass v. United Servs. Auto. Ass'n*,

79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten (10) to fourteen (14) days).

SIGNED this 22nd day of May, 2018.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAMES EARVIN SANDERS, #1579328	§	
	§	
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UNITED STATES OF AMERICA	§	

POSTJUDGMENT ORDER

Movant filed a motion for certificate of appealability (Dkt. #13) and a motion for leave to appeal *in forma pauperis* (Dkt. #15). A movant must obtain a certificate of appealability before appealing a district court's decision, 28 U.S.C. § 2253(c)(1); however, a certificate of appealability may issue only if the movant has made a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2).

The Supreme Court of the United States explained what is required in the "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejects a petitioner's constitutional claims on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When the district court denies a habeas petition on procedural grounds without reaching the movant's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the [motion] 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." *Id.* The Supreme Court has held that a certificate of appealability is a "jurisdictional prerequisite" and a court of appeals lacks jurisdiction to rule on the merits until a certificate of appealability has been issued. *Miller-El v.*

Appendix F

Cockrell, 537 U.S. 322, 336 (2003).

Movant's § 2255 motion was denied because he failed to timely file it within the AEDPA statute of limitations. Movant fails to show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. He has not made a substantial showing of the denial of a constitutional right; thus, Movant is not entitled to a certificate of appealability.

Movant also filed a motion to proceed *in forma pauperis* on appeal (Dkt. #15). Because Movant has not shown that he is entitled to a certificate of appealability, he also has not shown that he is entitled to proceed *in forma pauperis* on appeal. *United States v. Delario*, 120 F.3d 580, 582-83 (5th Cir. 1997) (failure to show entitlement to a certificate of appealability warrants denial of a movant's motion to proceed *in forma pauperis* on appeal). Furthermore, a review of Movant's inmate financial statement shows that deposits in the last six months totaled $620.00. Thus, Movant is likewise not entitled to *in forma pauperis* status.

It is accordingly **ORDERED** that the motion for certificate of appealability (Dkt. #13) and the motion to proceed *in forma pauperis* on appeal (Dkt. #15) are **DENIED**. All motions by either party not previously ruled upon are **DENIED**.

SIGNED this 11th day of December, 2018.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE