APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONRICO SIMMONS, JR.,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 19-1757

Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.
Nos. 1:14-cr-20628; 1:18-cv-12557—
Thomas L. Ludington, District Judge.

Argued: August 5, 2020

Decided and Filed: September 11, 2020

Before: ROGERS, KETHLEDGE, NALBANDIAN,
Circuit Judges

COUNSEL

ARGUED: Jo-Ann Tamila Sagar, HOGAN LOVELLS US LLP, Washington, D.C., for Appellant. Patricia Gaedeke, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Jo-Ann Tamila Sagar, Neal Kumar Katyal,

HOGAN LOVELLS US LLP, Washington, D.C., for Appellant. Patricia Gaedeke, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee.

OPINION

NALBANDIAN, Circuit Judge.

Deadlines matter, especially in habeas cases. So we require good excuses to overcome them. One valid excuse is when the government itself creates an unconstitutional impediment to a prisoner's timely filing of a motion to vacate his sentence under 28 U.S.C. § 2255. That is what RonRico Simmons argues happened to him here. But he fails to allege facts that would establish that the supposed impediment to his late filing actually prevented him from filing earlier. Without a valid excuse, he filed his § 2255 motion too late. We **AFFIRM**.

I

RonRico Simmons, Jr. pleaded guilty to: (1) "conspiring to possess with intent to distribute and to distribute a substance containing heroin ... in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)," and (2) "caus[ing] others to use a house to use, store[,] and distribute controlled substances," in violation of 21 U.S.C. § 856(a)(1) and contrary to 18 U.S.C. § 2. (R. 37, Plea Agreement, PageID 140–41.) On September 8, 2016, the district judge entered judgment against Simmons. Simmons did not file a notice of appeal. Almost two years later on August 13, 2018, Simmons

moved to vacate his sentence under § 2255. On the same day he also moved to grant timeliness of his 28 U.S.C. § 2255 motion under Section 2255(f)(2).

Under Section 2255(f), the limitation period for moving to vacate begins to run on the latest of four dates. 28 U.S.C. § 2255(f). Subsection one usually governs, meaning Simmons had one year after his conviction became final to file his motion to vacate. *Id*. § 2255(f)(1). The parties do not dispute the district court's finding that Simmons's judgment became final on September 22, 2016, his deadline to appeal (fourteen days after the district court entered judgment). So he had one year after that—until September 22, 2017—to file his motion to vacate. But he did not file until August 13, 2018.

So Section 2255(f)(1) would ordinarily bar Simmons's motion.

Recognizing this, Simmons tried to rely on Section 2255(f) (2). That section says "[t]he limitation period shall run from ... 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[.]" 28 U.S.C. § 2255(f), (f)(2). Simmons explained that, after his sentencing in 2016, he returned to state custody to finish serving state time. He was in Michigan Department of Corrections (MDOC) custody until December 2016 and served time at Wayne County Jail for about nine months after that.

Simmons claimed that the law libraries in "MDOC custody" and at Wayne County Jail did not have

federal law materials. In his motion to grant timeliness he generally said he "had no access to a legal library; 2255 Petition; his legal materials or the Rules Governing 2255 Proceedings[.]" (R. 44, Mot. to Grant Timeliness, PageID 215.) But later in this motion he specified that he "had no access to [a] federal law library; legal materials; assistance by prison authorities in the preparation and filing of meaningful legal papers; and no access to the Rules Governing 2255 Proceedings and AEPDA [sic] statute of limitations[.]" (*Id*. at 217.) According to him, these inadequacies served as an impediment in violation of the Constitution that "prevented him from having the ability to timely pursue and know the timeliness for filing a 2255 Motion[.]" (*Id*.) He claims he did not gain access to these resources until September 27, 2017 when he entered federal Bureau of Prisons (BOP) custody. Thus, the statute of limitations did not start to run until Simmons had access to those resources that facilitated his ability to file a Section 2255 motion. And because he filed within a year of gaining such access (on August 13, 2018), his motion was timely.

In reply to the government's opposition to his motion, Simmons again explained that he lacked access to "some of his legal materials" or any federal law until September 27, 2017, when he entered federal custody. But he also admitted (after the government pointed it out) that he arrived at a federal facility—Federal Detention Center (FDC) Milan—on August 29, 2017. He said the court should hold an evidentiary hearing to assess the timeliness of his filing.

Simmons attached affidavits from himself and Benjamin Foreman, the jailhouse law clerk helping him with his post-conviction relief. In his affidavit, Simmons said: "While at the Wayne County Jail, I merely had access to state law, however as the result of me being convicted in federal court state law was of no benefit to me." (R. 52, Reply, PageID 325.) He mentioned nothing about his time in MDOC custody before January 2017. He said FDC Milan (where he arrived on August 29, 2017) only had a library computer, with no physical library or legal assistants to help. The lack of guidance "made it rough [for him] to begin legal research not having 'any idea' where to start." (*Id*. (emphasis added).) He again emphasized that he "did not have the opportunity and access to a federal Law Library and assistance until September 27, 2017[.]" (*Id*.)

In Benjamin Foreman's affidavit, he explained that he had been a law clerk at prisons for years and that:

> [V]ery few guys could navigate themselves through the Law Library system without the guidance of me or our other Law Clerk Mr. Bennett so, I can totally understand how Movant Simmons, Jr. *waited til he arrived* at FCI-Milan to seek the aid of an experienced Law Clerk to help him.

(*Id*. at 327 (emphasis added).) Foreman also explained that the only way to obtain Section 2255 materials while at FDC Milan was to request them from the law library technician, but "you have to know what you need." (*Id*.) Simmons requested nothing since he "knows nothing at all about federal law and how to research [and] identify errors." (*Id*.)

And in supplemental briefing, Simmons again asserted that during his time in state custody he "had no access to a law library (with federal case law and ADEPA [sic] statute of limitations period); 2255 Petition; his legal materials or the Rules Governing 2255 Proceedings[.]" (R. 60, Suppl. Br., PageID 366.) He had " 'no federal law' or 'federal forms' " and no "computer that accesses federal law cases." (*Id*. At 370.) He said he only had access to state law, and no one provided legal assistance.

The magistrate's final report and recommendation recommended denying the motion for timeliness. The district judge adopted the report and recommendation, accepting the magistrate's finding that Simmons's "allegations were broad and generalized, and that he has not sufficiently alleged what specific legal materials he was missing and how the lack of those materials prejudiced his ability to pursue his rights under section 2255." (R. 64, Order, PageID 419.) But the district judge noted the difficulties in deciding this Section 2255(f)(2) issue, especially with the lack of binding precedent. So he issued a certificate of appealability for us to assess: (1) "whether the lack of access to legal materials can support relief under 2255(f)(2)" and (2) "how specific a petitioner must be in alleging which legal materials he lacked access to and how that impacted his ability to pursue his rights under section 2255." (*Id*. at 419–20.)

II.

The Supreme Court has long recognized a constitutional right of access to courts. *See Lewis v. Casey*, 518 U.S. 343, 350, 116 S.Ct. 2174, 135 L.Ed.2d

606 (1996); *Bounds v. Smith*, 430 U.S. 817, 821, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). In *Bounds*, the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828, 97 S.Ct. 1491. In Lewis, the Court clarified that *Bounds* focused on the right of access to courts—not a "freestanding right to [an adequate] law library or legal assistance[.]" 518 U.S. at 350–51, 116 S.Ct. 2174. What's more, a state need not "enable the prisoner to discover grievances, and to litigate effectively once in court." *Id*. at 354, 116 S.Ct. 2174. The constitutional right to access courts does not impose such additional burdens on state prisons. *Id*. A state need only provide adequate tools for inmates to "attack their sentences, directly or collaterally," or "challenge the conditions of their confinement." *Id*. at 355, 116 S.Ct. 2174. *Bounds* and *Lewis*'s emphasis of a right to court access suggests that a lack of federal materials for a prisoner to challenge his conviction or confinement or a lack of a legal assistance program may constitute "impediment[s] ... by governmental action in violation of the Constitution[,]" depending on the other circumstances. 28 U.S.C. § 2255(f)(2); *see Id*. § 2244(d)(1)(B).

The circuits that have addressed this question agree that a lack of access to certain legal resources may constitute an impediment under Section 2255(f)(2) or Section 2244(d)(1)(B), the Section 2244 counterpart to Section 2255(f)(2). In *Whalem/Hunt v. Early*, the Ninth Circuit addressed impediments for Section

2244(d)(1)(B). 233 F.3d 1146 (9th Cir. 2000) (en banc) (per curiam); *see Shelton v. United States*, 800 F.3d 292, 294 (6th Cir. 2015) (reading Section 2244(d)(1)(B) and Section 2255(f)(2) as "virtually identical" (quoting *Ramos-Martinez v. United States*, 638 F.3d 315, 321 (1st Cir. 2011))). The court held that there could be "circumstances consistent with [the] petitioner's petition and declaration under which he would be entitled to a finding of an 'impediment' under § 2244(d)(1)(B)." *Id*. at 1148. The petitioner claimed that the law library in his prison did not have a copy of the Antiterrorism and Effective Death Penalty Act (AEDPA)—which established the relevant statute of limitations—until two years after his judgment of conviction became final, and he knew nothing about the AEDPA one-year statute of limitations. *Id*. at 1147. The district court dismissed the petition as time-barred, but the en banc court reversed and remanded, finding that the petitioner's allegations potentially suggested an impediment. *Id*. at 1147–48.

Similarly, in *Egerton v. Cockrell*, the Fifth Circuit concluded that "[t]he absence of all federal materials from a prison library (without making some alternative arrangements to apprise prisoners of their rights) violates the ... right ... [of] access to the courts[,]" and "an inadequate prison law library may constitute a state created [sic] impediment that would toll the AEDPA's one-year limitations period." 334 F.3d 433, 438–39 (5th Cir. 2003). And in *Estremera v. United States*, the Seventh Circuit held that a "[l]ack of library access can, in principle, be an 'impediment' to the filing of a collateral attack." 724 F.3d 773, 776 (7th Cir. 2013). But "[w]hether a prisoner has

demonstrated the existence of a state-created impediment is highly fact dependent." *Funk v. Thaler*, 390 F. App'x 409, 410 (5th Cir. 2010) (per curiam). "To hold that the absence of library access may be an 'impediment' in principle is not necessarily to say that lack of access was an impediment for a given prisoner. 'In principle' is a vital qualifier." *Estremera*, 724 F.3d at 777.

The parties do not cite authority from this Circuit establishing that the lack of federal materials in a prison can constitute a constitutional violation, nor have we, apparently, rejected that view either. For purposes of this case, we need not define the contours of such a right. We assume that a lack of federal materials for a prisoner to challenge his conviction or confinement, combined with a lack of a legal assistance program, constituted an unconstitutional impediment under Section 2255(f)(2).

III.

We next address what the prisoner must allege for Section 2255(f)(2) to apply. We review de novo whether a Section 2255 motion is time-barred. *See Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012) (finding the same in the context of a habeas petition under 28 U.S.C. § 2241).

Typically, a prisoner must file his Section 2255 motion within one year of his conviction's becoming final. By its terms, however, Section 2255(f)(2) effectively creates an exception to this rule by stating that the one-year period can begin on a later date—when an unconstitutional impediment to filing the motion is removed—provided that "the movant was

prevented from making a motion by such governmental action[.]" Thus, under the statute, an unconstitutional impediment is not enough, in and of itself, to delay the triggering of the statute of limitations. A movant must initially allege facts that will establish that the impediment actually prevented the movant from filing the motion.

That the statute requires a causal relationship between the impediment and not filing the motion is not controversial. We have said, in unpublished cases, that Section 2244(d)(1)(B), Section 2255(f)(2)'s counterpart, "requires a causal relationship between the unconstitutional state action and being prevented from filing the petition" and that the *prisoner* must allege the relevant facts. *Winkfield v. Bagley*, 66 F. App'x 578, 582–83 (6th Cir. 2003) (quoting *Dunker v. Bissonnette*, 154 F. Supp. 2d 95, 105 (D. Mass. 2001)); *see* also *Webb v. United States*, 679 F. App'x 443, 449 (6th Cir. 2017) (finding that a prisoner did not "show a causal relationship" between the governmental action and the prisoner's inability to file a Section 2255 motion on time).

Other circuits have arrived at similar conclusions. In *Krause v. Thaler*, for instance, the Fifth Circuit held that a prisoner "fail[ed] to even allege sufficient facts to show that he was prevented from timely filing" his habeas petition. 637 F.3d 558, 562 (5th Cir. 2011). The prisoner alleged that the library at his facility was inadequate and therefore an impediment to filing under Section 2244(d)(1)(B). *Id*. at 560, 562. But the Fifth Circuit concluded that the prisoner needed to allege more than that. He did "not at any point allege facts as to why the transfer facility's lack of legal materials prevented him from filing a timely habeas

application." *Id*. at 561. For example, he did not "allege that he had no knowledge of AEDPA's statute of limitations before he was transferred to the ... facility which he claims had an adequate library." *Id*.

So to invoke Section 2255(f)(2), it is the prisoner's responsibility to allege (1) the existence of an impediment to his making a motion, (2) governmental action in violation of the Constitution or laws of the United States that created the impediment, and (3) that the impediment prevented the prisoner from filing his motion. *See, e.g.*, *Krause*, 637 F.3d at 560–61. Thus, Simmons had to allege why his supposed impediment prevented him from filing earlier. In other words, to satisfy Section 2255(f)(2), he had to allege a causal connection between the purportedly inadequate resources at the state facilities and his inability to file his motion on time.

Here, we find that Simmons failed to adequately allege or explain how the supposedly inadequate state law libraries or lack of legal assistance had any bearing on his failure to file while in state custody. All he said in his motion was that he "had no access" to certain legal resources and that this lack of access "prevented him from having the ability to timely pursue and know the timeliness for filing a 2255 Motion[.]" (R. 44, Mot. to Grant Timeliness, PageID 217.) He did not allege any facts connecting the facilities' alleged lack of resources and his failure to file his motion within the normal one-year limitation period. He only provided the bare conclusory statement that the lack of access "prevented him" from filing earlier. But did Simmons try to go to the state library and get materials even once? *See Estremera*, 724 F.3d at 777 (asking whether the

prisoner even consulted a library before filing his petition). Did he seek out a legal assistant to help? As the Seventh Circuit pointed out: "If he didn't want or need a law library during the year after his conviction became final, its unavailability (if it was unavailable) would not have been an impediment." *Id*.

Simmons did not, strictly speaking, need to answer any particular question in his allegations, but he needed to allege something reflecting a plausible causal connection. We are left with no factual allegations that the supposed impediment prevented him from filing. "Because [Simmons] makes no attempt to explain how the transfer facility's alleged deficiencies caused him to untimely file his [motion], his claim amounts to little more than an incognizable complaint that his prison lacked an adequate library." *Krause*, 637 F.3d at 562 (citing *Lewis*, 518 U.S. at 351, 116 S.Ct. 2174). Thus, with only his mere conclusory assertion, Simmons failed to adequately claim that the alleged lack of resources prevented him from filing.[1]

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[1] Simmons also filed sworn affidavits from himself and his jailhouse law clerk, but those are even less helpful. In his affidavit, Simmons only references Wayne County Jail, not "MDOC custody" at all. So he failed to address whether MDOC custody lacked the same materials. And he mentioned even less in his affidavit about prevention than he did in his motion to grant timeliness. What's more, the affidavit from Foreman, the jailhouse law clerk, does not help Simmons because Foreman said, "I can totally understand how Movant Simmons, Jr. *waited til he arrived* at FCI-Milan to seek the aid of an experienced Law Clerk to help him." (R. 52, Reply, PageID 327 (emphasis added).) If anything, this comment suggests that the allegedly inadequate state resources were not what prevented Simmons from filing sooner—rather his decision to wait did.

Requiring Simmons to allege facts that would establish the causation between the impediment and his failure to file is not, as he argues, inconsistent with the general legal principle that defendants typically bear the burden to show that a plaintiff's claim is outside a statute of limitations. *See Griffin v. Rogers*, 308 F.3d 647, 652–53 (6th Cir. 2002) (holding that "the party asserting statute of limitations as an affirmative defense has the burden of demonstrating that the statute has run"). Here, Simmons himself recognized that he had a timeliness problem by raising the issue in his first filing before the government could point out that he had filed his motion late. So he started this case by rebutting a legitimate statute of limitations defense. And this makes sense.

It would be inconsistent with the text of Section 2255(f) and the context of (f)(1) to make the government allege that an impediment did not exist and did not cause an untimely filing. That's because the one-year period will, as a default, be triggered by Section 2255(f)(1). *See Hueso v. Barnhart*, 948 F.3d 324, 335 (6th Cir. 2020) (noting that "the default start date for the limitations period" is "one year after a final judgment"). The "judgment of conviction" referenced in Section 2255(f)(1) is the only event mentioned in Section 2255(f) that will necessarily occur in every case. Thus the government, consistent with general statute of limitations principles, must allege that the motion falls outside of the one-year statute of limitations as triggered by Section 2255(f)(1) (unless the prisoner makes the argument first, as occurred here). *See Griffin*, 308 F.3d at 652–53. The possible, later triggering dates listed in

Section 2255(f)(2), (f)(3), and (f)(4) may occur in certain cases or they may not. But forcing the government to make allegations that disprove those dates in every case makes no sense.

In sum, we hold that a prisoner is at least required to allege a causal connection between the purported constitutional impediment and how the impediment prevented him from filing on time. Simmons did not. His conclusory assertion that the lack of access "prevented him" from filing is not enough.[2]

For these reasons, we AFFIRM.

[2] Because Simmons failed to adequately allege a causal connection, an evidentiary hearing is unnecessary.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RONRICO SIMMONS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Crim. Case No.: 14-cr-20628
Civ. Case No.: 18-cv-12557

Signed: May 22, 2019

Attorneys and Law Firms

Janet L. Parker, U.S. Attorney's Office, Bay City, MI, for Respondent.

Judith S. Gracey, The Gracey Law Firm, Farmington Hills, MI, for Petitioner.

ORDER OVERRULING OBJECTIONS, ADOPTING REPORT AND RECOMMENDATION, DENYING MOTION TO GRANT TIMELINESS, DENYING MOTION TO VACATE, AND GRANTING CERTIFICATE OF APPEALABILITY

THOMAS L. LUDINGTON, United States District Judge

On October 8, 2014, Petitioner was indicted on two counts: (1) conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. § 846; and (2) willingly causing others to maintain a drug house in violation of 21 U.S.C. § 856(a)(1) and (b) and 18 U.S.C. § 2. After the trial began, Petitioner pleaded guilty to both counts pursuant to a Rule 11 plea agreement. (R. 37.) On September 8, 2016, judgment was entered, and Petitioner was sentenced to 190 months' imprisonment on each count, to be served concurrently. (R 40 at PageID.169.) Petitioner did not file an appeal.

On August 13, 2018, Petitioner filed a Motion to grant timeliness of his § 2255 motion and also filed Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (R. 44, 45.). The motions were referred to Magistrate Judge Patricia T. Morris. ECF No. 48No. 48. Petitioner states that after sentencing, he was taken into the custody of the Michigan Department of Corrections (MDOC) and served "roughly nine months in Wayne County jail, thereafter on September 27, 2017, he was committed to [the] Federal Bureau of Prisons['] custody and arrived at FCI-Milan on September 27, 2017." (R. 44 at PageID.214.) Petitioner contends that for roughly 13 months after the federal sentencing he was in MDOC custody and then was placed in Wayne County jail, however during this 13-month period [he] had no access to federal law library; legal materials;

assistance by prison authorities in the preparation and filing of meaningful legal papers; and no access to Rules Governing 2255 Proceedings and AEDPA statute of limitations; thus he argues that the lack of these critical sources certainly created an unconstitutional impediment. (Id. at PageID.217.) Petitioner argues that he was only obligated to file his motion by September 27, 2018, one year from when he arrived at FCI Milan, and that since he filed his motion on August 13, 2018, the motion should be considered timely. (Id.) The government responded only to the motion to grant timeliness. (R. 50.)

On October 30, 2018, Judge Morris entered a Report and Recommendation (R&R) suggesting that Petitioner's motion to grant timeliness be denied, that the motion to vacate be denied as moot, and that the civil case be dismissed. (R. 53.) On February 4, 2019, this Court adopted the R&R in part, ordering that Judge Morris "order supplemental briefing addressing whether petitioner's allegations entitle him to relief under 2255(f)(2), and to issue a new report and recommendation." (R. 56.) This Court clarified that "to the extent petitioner's initial arguments could be read to raise an equitable tolling issue, equitable tolling is not available on these facts as explained above. Indeed, petitioner does not appear to dispute that conclusion. However, it remains unclear whether, under Sixth Circuit law, the lack of library access is the type of impediment contemplated by 2255(f)(2). Neither the government's briefing nor the report and recommendation appear to have identified any controlling authority rejecting that notion." (R.56 at PageID.358.)

The parties submitted their supplemental briefing in March of 2019. ECF Nos. 60, 61. On April 23, 2019, Judge Morris issued a new report, recommending that petitioner's motion to grant timeliness and his motion to vacate be denied. ECF No. 62No. 62. Judge Morris concluded that, although there is no Sixth Circuit authority directly on point, the relevant legal authority suggests that Petitioner's allegations do not support relief under 2255(f)(2). Petitioner served his objection on May 6, 2019. ECF No. 63No. 63.

I.

Petitioner's objection largely recites the timeline of the relevant events including his conviction, sentence, incarceration in state custody, and incarceration in federal custody. His conclusion is that, based on the timeline of events, his petition would have been timely but for the impediment created by the state correctional facility, namely the lack of access to a law library and legal materials. The discussion is not particularly helpful to the analysis. There appears to be no dispute that the petition would be timely if the period of state incarceration is excluded from the calculation of the 1-year statute of limitations period. The question at issue is whether that period of time is excludable under 2255(f)(2) based on Petitioner's allegation that he lacked access to a law library and legal materials during that time. Judge Morris answered that question in the negative, and Petitioner's objection is non-responsive to that conclusion and the reasoning Judge Morris offered in support of that conclusion. The Court will briefly summarize that reasoning.

As explained in the Court's previous order adopting the report and recommendation in part (ECF No. 56No. 56), there is no dispute that Petitioner is not entitled to equitable tolling. Order at 6. Neither lack of access to a law library, lack of education, nor lack of legal knowledge were sufficient to equitably toll the one-year limitation period. *Caffey v. United States*, No. 2:07-CR-61, 2012 WL 3024741 (E.D. Tenn. July24, 2012) (citing *United States v. Stone*, 68 F. App'x 563, 565 (6th Cir. 2003)) (emphasis added). Judge Morris noted that "at least one circuit has concluded that § 2255(f)(2) presents a higher bar than equitable tolling." Rep. & Rec. at 7 (citing *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir. 2009)). Accordingly, Judge Morris reasoned that, if Petitioner's allegations are insufficient to support relief under an equitable tolling theory, then they are insufficient to support relief under section 2255(f)(2).

Judge Morris also noted, however, that the Seventh Circuit held in *Estremera* that " "[lack of library access can, in principle, be an 'impediment' to the filing of a collateral attack" under § 2255(f)(2)." *Estremera v. United States*, 724 F.3d 773 (7th Cir. 2013). The *Estremera* holding suggests that 2255(f)(2) does not necessarily impose a higher threshold but simply a different standard altogether, one which could be satisfied if a petitioner demonstrates he was deprived of access to legal materials. Similarly, Judge Morris noted that the Fifth Circuit held in *Egerton* that "[t]he State's failure to make available to a prisoner the AEDPA, which sets forth the procedural rules the prisoner must follow in order to avoid having his habeas petition summarily thrown out ... is just as much of an impediment as if the State were to take

'affirmative steps' to prevent the petitioner from filing the application." *Egerton v. Cockrell*, 334 F.3d 433, 436-38 (5th Cir. 2003).

Nevertheless, Judge Morris noted that courts interpreting *Egerton* have limited it to its facts, noting that whether a Petitioner was prevented from learning of AEDPA's statute of limitations is "highly fact dependent." Rep. & Rec. at 7. According to some courts, this fact dependent inquiry requires "more than a mere allegation that the library lacked adequate materials or resources but instead necessitated some factual background as to the limitations of his access, his need for resources, and his attempts to obtain the necessary legal resources or help." *Wiseman v. United States*, Nos. 16-cv-00700-JAP/KRS, 96-cr-00072-JAP, 2018 WL 3621022, at *8 (D. N.M. July 27, 2018). Applying this standard, Judge Morris concluded that Petitioner's allegations were broad and generalized, and that he has not sufficiently alleged what specific legal materials he was missing and how the lack of those materials prejudiced his ability to pursue his rights under section 2255. *Id.* at 7-8. Because Petitioner's objection is non-responsive to this analysis, his objection will be overruled, and his motion will be denied.

II.

Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must be issued. *See* 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2). When a court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that ... jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying that standard, a district court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id.* at 336-37. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254.

Here, a certificate of appealability is warranted. There is no controlling precedent squarely addressing the issues discussed above, including 1) whether the lack of access to legal materials can support relief under 2255(f)(2), and 2) how specific a petitioner must be in alleging which legal materials he lacked access to and how that impacted his ability to pursue his rights under section 2255. Thus, reasonable jurists could debate the answers to these questions.

III.

Accordingly, it is **ORDERED** that petitioner's objection, ECF No. 63No. 63, is **OVERRULED.**

It is further **ORDERED** that the report and recommendation, ECF No. 62No. 62, is **ADOPTED.**

It is further **ORDERED** that the motion to grant timeliness, ECF No. 44No. 44, is **DENIED.**

It is further **ORDERED** that the motion to vacate pursuant to 28 U.S.C. § 2255, ECF No. 45No. 45, is **DENIED.**

It is further **ORDERED** that a certificate of appealability is **GRANTED.**

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RONRICO SIMMONS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Criminal Case No.: 14- 20628
Civil Case No.: 1:17-cv-14162
Honorable Thomas L. Ludington
Magistrate Judge Patricia T. Morris

Dated: February 4, 2019

ORDER ADOPTING REPORT AND RECOMMENDATION IN PART AND REFERRING MOTIONS TO MAGISTRATE JUDGE PATRICIA MORRIS

On October 8, 2014, Petitioner was indicted on two counts: (1) conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. §846; and (2) willingly causing others to maintain a drug house in violation of 21 U.S.C. §856(a)(1) and (b) and 18 U.S.C. §2. After the trial began, Petitioner pled guilty to both counts pursuant to a Rule 11 plea agreement.

ECF No. 37. On September 8, 2016, judgment entered and Petitioner was sentenced to 190 months on each count, to be served concurrently. ECF No. 40 at PageID 169. Petitioner did not file an appeal. On August 13, 2018, Petitioner filed the instant Motion to grant timeliness of 2255 motion and Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 ECF No. 44, 45.) The government responded to the Motion to grant timeliness only. ECF No. 50.

The motions were referred to Magistrate Judge Patricia T. Morris. ECF No. 48. On October 30, 2018, Judge Morris issued a report, recommending that the motions be denied, as the habeas petition was untimely. ECF No. 53. Judge Morris noted that judgment was entered against petitioner on September 8, 2016, and that petitioner did not file a direct appeal. Rep. & Rec. at 2. His conviction became final after the expiration of the 14 day appeal deadline, on September 22, 2016. Accordingly, the one-year period set forth in 2255(f)(1) ended on September 22, 2017.

However, the one-year period can also run from "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." 28 U.S.C. § 2255(f)(2). Petitioner contends that, during the roughly 13 months he was held in the custody of the Michigan Department of Corrections (MDOC) following his conviction, he was not permitted access to a library or to legal materials. He was not committed to federal custody until September 27, 2017. Accordingly, Petitioner contends the one-year limitations period

began on September 27, 2017, and that his August 13, 2018 petition was therefore timely. Judge Morris rejected this argument and concluded that Petitioner's lack of legal resources while in state custody does not provide him relief from the one-year limitation period under § 2255(f)(2) or under equitable tolling.

I.

Pursuant to Federal Rule of Civil Procedure 72, a party may object to and seek review of a magistrate judge's report and recommendation. *See* Fed. R. Civ. P. 72(b)(2). Objections must be stated with specificity. *Thomas v. Arn*, 474 U.S. 140, 151 (1985) (citation omitted). If objections are made, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). De novo review requires at least a review of the evidence before the magistrate judge; the Court may not act solely on the basis of a magistrate judge's report and recommendation. *See Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). After reviewing the evidence, the Court is free to accept, reject, or modify the findings or recommendations of the magistrate judge. *See Lardie v. Birkett*, 221 F. Supp. 2d 806, 807 (E.D. Mich. 2002).

Only those objections that are specific are entitled to a de novo review under the statute. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). "The parties have the duty to pinpoint those portions of the magistrate's report that the district court must specially consider." *Id*. (internal quotation marks and citation omitted). A general objection, or one that merely restates the arguments previously presented, does not sufficiently

identify alleged errors on the part of the magistrate judge. *See VanDiver v. Martin*, 304 F. Supp. 2d 934, 937 (E.D. Mich. 2004). An "objection" that does nothing more than disagree with a magistrate judge's determination, "without explaining the source of the error," is not considered a valid objection. *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). Without specific objections, "[t]he functions of the district court are effectively duplicated as both the magistrate and the district court perform identical tasks. This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrate's Act." *Id*.

II.

Petitioner raises only one objection. He objects to Judge Morris's conclusion that his petition is untimely. First Petitioner takes issue with the authority Judge Morris relied upon in reaching her decision. Judge Morris cited *Caffey*, in which the court held that neither lack of access to a law library, lack of education, nor lack of legal knowledge were sufficient to equitably toll the one-year limitation period. *Caffey v. United State*s, No. 2:07-CR-61, 2012 WL 3024741 (E.D. Tenn. July24, 2012) (citing *United States v. Stone*, 68 F. App'x 563, 565 (6th Cir. 2003). In *Stone*, the court determined that petitioner's post-conviction transfer from federal to state custody did not justify equitable tolling, because "insufficient library access, standing alone, do[es] not warrant equitable tolling." *Stone*, 68 F. App'x at 565. Judge Morris also cited *Davis*, which held that petitioner's lack of law library access did not entitle him to equitable tolling nor did it entitle him to relief under

section 2255(f)(2). *United States v. Davis*, No. 1:14CV02521, 2015 WL 500169, at *2 (N.D. Ohio Feb. 4, 2015).

Petitioner argues that all of these cases should be rejected because "they were all decided upon the false pretense that common-law tolling controls the outcome of 2255(f)(2)." Indeed, petitioner underscores a relevant distinction. Section 2255(f)(2) and equitable tolling are two distinct avenues for relief. *See Estremera v. United States*, 724 F.3d 773, 777 (7th Cir. 2013) ("The United States observes that *Jones* . . . and *Tucker* . . . hold that lack of library access does not justify equitable tolling on the facts of those cases, but Estremera doesn't propose common-law tolling; he invokes § 2255(f)(2)").

A petitioner is entitled to equitable tolling 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." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Section 2255(f)(2), on the other hand, provides that the limitation period shall run from the latest of "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." (emphasis added).

2255(f)(2) is conceptually similar to equitable tolling in that both require the petitioner to demonstrate an impediment to his ability to seek habeas relief. Relief under 2255(f)(2), however, is governed by a different standard than the doctrine of equitable tolling. The former requires government action in violation of the

constitution or laws of the United States, whereas the latter requires "extraordinary circumstances" coupled with petitioner's diligent efforts. Not all "extraordinary" impediments amount to government action in violation of the Constitution. Moreover, not all government acts in violation of the Constitution are necessarily "extraordinary" impediments. Lack of law library access, for instance, is far from an "extraordinary" impediment, as recognized by the above cited authority declining to grant equitable tolling based on lack of law library access. This does not necessarily foreclose the notion that lack of law library access could, in some circumstances, be considered a constitutional violation to the extent it deprives a petitioner of his right to "meaningful access to the courts," as recognized in *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

Thus, Petitioner's argument is well taken that the above-cited cases addressing equitable tolling are not dispositive of the 2255(f)(2) analysis. *See Estremera*, 724 F.3d at 777 (noting that case law addressing law library access in the context of equitable tolling were not dispositive of the 2255(f)(2) inquiry).

Thus, the relevant inquiry here is whether and under what circumstances lack of law library access amounts to a constitutional violation under 2255(f)(2), and whether petitioner's allegations are sufficient to trigger an evidentiary hearing on that issue.[1] Judge Morris cited *Davis* to support her conclusion on this

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[1] As Judge Morris noted, the government's affidavit from the state custodian (which states the petitioner did have library access) is not dispositive of the issue, but rather creates a factual question involving a credibility determination.

point. In addition to addressing equitable tolling, *Davis* separately held that "limited access to the law library fails to trigger Section 2255(f)(2) because such actions were not 'in violation of the Constitution or laws of the United States.'" *United States v. Davis*, No. 1:14CV02521, 2015 WL 500169, at *2 (N.D. Ohio Feb. 4, 2015). *Davis* is an unpublished district court opinion, however. *Davis* also cited no authority to support that statement of law. The government also contends that "access to legal research materials" is not "constitutionally or legally mandated." Resp. at 3, ECF No. 50 (citing *United States v. Mullikin*, No. CIV.A. 5:13-7262-JMH, 2013 WL 3107560 (E.D. Ky. June 18, 2013)[2]). *Mullikin* analyzed equitable tolling, however, and did not discuss whether lack of law library access amounted to a constitutional violation under 2255(f)(2). *Id*.

In sum, to the extent petitioner's initial arguments could be read to raise an equitable tolling issue, equitable tolling is not available on these facts as explained above. Indeed, petitioner does not appear to dispute that conclusion. However, it remains unclear whether, under Sixth Circuit law, the lack of law library access is the type of impediment contemplated by 2255(f)(2). Neither the government's briefing nor the report and recommendation appear to have identified any controlling authority rejecting that notion. Petitioner, for his part, has identified authority from other circuits holding that, in some

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[2] Although the government's brief reflects that *Mullikin* is an opinion from the Sixth Circuit Court of Appeals, the westlaw citation provided corresponds to an opinion of the Eastern District of Kentucky.

circumstances, lack of access to legal materials can justify relief under 2255(f)(2). *See* Obj. at 4–5 (citing *Estremera*, 724 F.3d at 777; *Egerton v. Cockrell*, 334 F.3d 433, 438 (5th Cir.2003); *Whalem v. Early*, 233 F.3d 1146 (9th Cir.2000) (en banc). The matter will be referred to Judge Morris to order supplemental briefing addressing whether petitioner's allegations entitle him to relief under 2255(f)(2), and to issue a new report and recommendation.

Accordingly, it is **ORDERED** that the report and recommendation, ECF No. 53, is adopted in part.

It is further **ORDERED** that the motions to vacate and to grant timeliness, ECF Nos. 44, 45, are referred to Magistrate Judge Patricia T. Morris to direct supplemental briefing and issue a report and recommendation.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: February 4, 2019

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RONRICO SIMMONS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CRIMINAL CASE NO. 14-CR-20628
CIVIL CASE NO. 18-CV-12557

Attorneys and Law Firms

James L. Parker, U.S. Attorney's Office, Bay City, MI, for Respondent.

Judith S. Gracey, The Gracey Law Firm, Farmington Hills, MI, for Petitioner.

Signed: April 23, 2019

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PETITIONER'S MOTION TO GRANT TIMELINESS OF § 2255 MOTION AND PETITIONER'S MOTION TO VACATE SENTENCE UNDER 28 U.S.C. § 2255

Patricia T. Morris, United States Magistrate Judge

I. RECOMMENDATION

For the following reasons, **IT IS RECOMMENDED** that Petitioner's Motion to Grant Timeliness of § 2255 Motion (R. 44) be **DENIED,** that his Motion to Vacate Sentence (R. 45) be **DENIED AS UNTIMELY,** and that the civil case be **DISMISSED.**

II. REPORT

A. Introduction

On October 8, 2014, Petitioner was indicted on two counts: (1) conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. § 846; and (2) willingly causing others to maintain a drug house in violation of 21 U.S.C. § 856(a)(1) and (b) and 18 U.S.C. § 2. After the trial began, Petitioner pleaded guilty to both counts pursuant to a Rule 11 plea agreement. (R. 37.) On September 8, 2016, judgment was entered and Petitioner was sentenced to 190 months' imprisonment on each count, to be served concurrently. (R. 40 at PageID.169.) Petitioner did not file an appeal.

On August 13, 2018, Petitioner filed the instant Motion to grant timeliness of § 2255 motion and Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (R. 44, 45.) Petitioner states that after sentencing, he was taken into the custody of the Michigan Department of Corrections (MDOC) and served "roughly nine months in Wayne County jail, thereafter on September 27, 2017, he was committed to [the] Federal Bureau of Prisons[']

custody and arrived at FCI-Milan on September 27, 2017." (R. 44 at PageID.214.) Petitioner contends that

> For roughly 13 months after the federal sentencing he was in MDOC custody and then was placed in Wayne County jail, however during this 13-month period [he] had no access to federal law library; legal materials; assistance by prison authorities in the preparation and filing of meaningful legal papers; and no access to Rules Governing 2255 Proceedings and AEDPA statute of limitations, thus the lack of these critical sources certainly created an unconstitutional impediment.

(*Id.* at PageID.217.)

Petitioner argues that he was only obligated to file his motion by September 27, 2018, one year from when he arrived at FCI Milan, and that since he filed his motion on August 13, 2018, the motion should be considered timely. (*Id.*) The government responded only to the Motion to grant timeliness. (R. 50.) On October 30, 2018, the undersigned entered a Report and Recommendation (R&R) suggesting that Petitioner's motion to grant timeliness be denied, that the motion to vacate be denied as moot, and that the civil case be dismissed. (R. 53.) On February 4, 2019, United States District Judge Thomas L. Ludington adopted the R&R in part, ordering that the undersigned "order supplemental briefing addressing whether petitioner's allegations entitle him to relief under 2255(f)(2), and to issue a new report and recommendation." (R 56.) Judge Ludington clarified that "to the extent petitioner's initial arguments could

be read to raise an equitable tolling issue, equitable tolling is not available on these facts as explained above. Indeed, petitioner does not appear to dispute that conclusion. However, it remains unclear whether, under Sixth Circuit law, the lack of library access is the type of impediment contemplated by 2255(f)(2). Neither the government's briefing nor the report and recommendation appear to have identified any controlling authority rejecting that notion." (R.56 at PageID.358.)

B. Analysis and Conclusion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), established a one-year statute of limitations on § 2255 petitions, which begins to run on the latest of four possible dates. 28 U.S.C. § 2255(f). It usually runs from the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255(f)(1). When a § 2255 petitioner does not file an appeal, the judgment of conviction is final when the time for filing a notice of appeal expires. *Sanchez-Castellano v. United States*, 358 F.3d 424, 428 (6th Cir. 2004); *United States v. Cottage*, 307 F.3d 494, 499 (6th Cir. 2002). According to Federal Rule of Appellate Procedure 4(b)(1), a defendant has 14 days from the entry of judgment to file a notice of appeal. *Gillis v. United States*, 729 F.3d 641, 644 (6th Cir. 2013). Petitioner did not file a direct appeal and judgment was entered on September 8, 2016. Therefore, Petitioner's judgment became final on September 22, 2016, such that Petitioner should have filed the motion to vacate by September 22, 2017.

However, the one-year period can also run from "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." 28 U.S.C. § 2255(f)(2).

Pursuant to the order of reference, the sole question is whether petitioner's allegations, i.e., lack of federal legal resources while in state custody, provide him relief from the one-year limitation period under § 2255(f)(2). Research has not revealed any clear Sixth Circuit precedent addressing this issue; nevertheless, I conclude that under the available non-binding precedent and based on a commonsense reading of the AEDPA, Petitioner is not entitled to relief from the one-year limitation period based on § 2255(f)(2).

As noted above, Petitioner states that during his 13 months in state custody after his federal sentencing he "had no access to federal law library; legal materials; assistance by prison authorities in the preparation and filing of meaningful legal papers; and no access to Rules Governing 2255 Proceedings and AEDPA statute of limitations, thus the lack of access to these critical sources certainly created an unconstitutional impediment in which qualifies under 28 U.S.C. § 2255(f)(2)." (R.44 at PageID.217.) Petitioner also states that the "government-created impediment ... prevented him from having ability to timely pursue and know the timeliness for filing a 2255 motion." (*Id.*)

"Prior to the enactment of the AEDPA, that section [§ 2255] provided that such motions could be made 'at

any time.' " *Mickens v. United States*, 148 F.3d 145, 147 (2d Cir. 1998) (quoting prior version of § 2255). The timing of the filing was a ground for dismissal only if "it appear[ed] that the government ha[d] been prejudiced in its ability to respond to the motion by delay in its filing unless the movant show[ed] that it w[as] based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred." *Id.* (quoting Rule 9(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts). Congress's goal in adding time limitations to the state and federal habeas provisions (§ 2254 and § 2255, respectively) was to "further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Although comity and federalism principles apply only to state habeas petitions, certainly the goal of finality of conviction applies with equal force to federal habeas petitions and should influence any decision under § 2255(f)(2).

The standard under § 2244(d)(1) for state habeas petitions is nearly synonymous with § 2255(f)(2). Subsection B allows the limitation period to run from "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action." § 2244(d)(1)(B). The only real difference between the two subsections is that § 2244(d)(1)(B) refers to "state" action and "filing an application" while § 2255(f)(2) refers to "government" action and "making a motion[.]" Thus, case law interpreting

§ 2244(d)(1)(B) also informs the interpretation of § 2255(f)(2).

In contrast with these two synonymous standards, a 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." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citation omitted). In addition, a petitioner bears the burden of persuading the court that he or she is entitled to equitable tolling, which should be granted sparingly, see *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002) and *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002), respectively. Ignorance of the law, including the one-year limitation period that has been in effect long before a petitioner's conviction, generally does not excuse a late filing via equitable tolling. *Starnes v. United States*, 18 F. App'x 288, 293 (6th Cir. 2001). Nor have courts found that lack of library access warrants equitable tolling. *See United States v. Stone*, 68 F. App'x 563, 565-66 (6th Cir. 2003) ("[A]llegations regarding insufficient library access, standing alone, do not warrant equitable tolling."); *Munnerlyn v. United States*, 2009 WL 1362387, at *4-5 (S.D. Ohio May 13, 2009) (where legal and other mail remained deliverable, prison lock down that prevented access to library did not warrant application of equitable tolling, citing cases).

Pursuant to the instant order of reference, this court's task is to determine whether Petitioner's untimeliness should be excused under § 2255(f)(2) rather than equitable tolling. Suffice it to say, if § 2255(f)(2) presents a higher bar than equitable tolling, Petitioner faces a herculean task since many

cases have held that insufficient or non-existent law library access, standing alone, does not warrant equitable tolling. *See, e.g.*, *Stone*, 68 F. App'x at 565-566; *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

In comparing the two standards, equitable tolling versus § 2255(f)(2) or § 2244(d)(1)(B), at least one circuit court has concluded that § 2255(f)(2) presents a higher bar than equitable tolling. "Although similar in style, [plaintiff's] 28 U.S.C. § 2244(d)(1)(B) claim must satisfy a far higher bar than that for equitable tolling." *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir. 2009).

On the other hand, it appears that some case law interpreting § 2255(f)(2) or its counterpart, § 2244(d)(1)(B) has construed these statutory "tolling" provisions more leniently than equitable tolling. In other words, courts have granted relief under statutory tolling where no such relief would exist under equitable tolling. Petitioner relies on one of these cases, *Estremera v. United States*, 724 F.3d 773 (7th Cir. 2013). *Estremera* held that "[l]ack of library access can, in principle, be an 'impediment' to the filing of a collateral attack" under § 2255(f)(2). *Id.* at 776.

The Fifth Circuit has also held, in *Egerton v. Cockrell*, 334 F.3d 433, 436-38 (5th Cir. 2003), that "[t]he State's failure to make available to a prisoner the AEDPA, which sets forth the procedural rules the prisoner must follow in order to avoid having his habeas petition summarily thrown out ... is just as much of an impediment as if the State were to take

'affirmative steps' to prevent the petitioner from filing the application." The Fifth Circuit found that "[t]he absence of all federal materials from a prison library (without making some alternative arrangements to apprise prisoners of their rights) violates the First Amendment right, through the Fourteenth Amendment, to access the courts." *Id.* at 438. As noted in *United States v. Freeman*, 2008 WL 2051759, at *3 (WD. La. Apr. 4, 2008), "[s]everal courts have read *Egerton* narrowly, limiting its holding to its particular facts, i.e., a situation in which the prisoner is prevented from learning of the applicable statute of limitations."

Similarly, in *Whalem v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc), the Ninth Circuit concluded that the unavailability of the AEDPA in a prison law library may create an "impediment" for purposes of § 2244(d)(1)(B) but that the court's determination whether an impediment existed is "highly fact-dependent," which is why the court in *Whalem* remanded the case to the district court to conduct an evidentiary hearing on the issue. *See also Moore v. Battaglia*, 476 F.3d 504, 508 (7th Cir. 2007) (remanding the case to the district court to determine whether a copy of the AEDPA's statute of limitations was available in the prison library).

One district court applied *Estremera*, *Whalem*, and *Egerton* and found that this "highly fact-dependent" inquiry under § 2255(f)(2) required more than a mere allegation that the library lacked adequate materials or resources but instead necessitated some factual background as to the limitations of his access, his need for resources, and his attempts to obtain the necessary legal resources or help. *Wiseman v. United States*,

Nos. 16-cv-00700-JAP/KRS, 96-cr-00072-JAP, 2018 WL 3621022, at *8 (D. N.M. July 27, 2018).

In the instant case, Petitioner has not referenced any specifics regarding which particular resources were available and which were missing; instead, he broadly alleges that he was either missing library access altogether or that he had no access to any federal, including AEDPA, materials based solely on the fact that he in state custody. He has not described any attempts that he made (or the results of those attempts) to gain access to any of the federal materials that he states were missing from any source, either in book form or via computer assisted legal research. Without the requisite allegations of his attempts, I suggest that he is not entitled to an evidentiary hearing, nor is he entitled to relief under § 2255(f)(2). *See also United States v. Briggs*, Nos. 96–336–1, 06–cv–3142, 2014 WL 940341, at *4, n. 8 (E.D. Pa. Mar. 7, 2014) (petitioner argued that he "lacked access to resources concerning federal statutes and federal rules of procedure and thus he could not learn how to file federal habeas corpus petitions" but the court held that "limited access to federal legal materials" did not constitute the "type of 'governmental action' impeding timely filing contemplated by § 2255(f)(2)"); *McAlister v. United States*, Nos. 09-CV-854, 06-CR-142, 2010 WL 898005, at *2 (E.D. Wis. Mar. 10, 2010) (Petitioner argued that he "lacked access to an adequate law library prior to his transfer to federal custody" but the court held "the fact that several of the institutions where he was confined have 'virtually no federal law library' does not create a state impediment based on unconstitutional government action that precluded filing." The court noted that petitioner relied on

Bounds v. Smith, 430 U.S. 817, 828 (1977), but that "to state a *Bounds claim*, a petitioner must demonstrate that the alleged shortcomings actually hindered his efforts to pursue a claim" and that petitioner's "conclusory allegations" were "insufficient."); *United States v. Wampler*, Nos. 1:04-cr-00067-001, 1:08-cv-80020, 2008 WL 565108, at *2 (W.D. Va. Feb. 29, 2008) (Because petitioner "offers no evidence whatsoever of any attempts he made at the local jails to obtain access to legal materials or legal assistance" and since "[t]he mere fact that a facility has no law library or library clerk does not prove an unconstitutional denial of access to court," "the court cannot find that [petitioner] demonstrates any unconstitutional 'impediment' related to being housed in local jails that would entitle him to have the limitation period calculated under § 2255(f)(2)").

In a similar vein, at least one court has required allegations pointing to an actual injury caused by the lack of access to adequate legal materials. In *United States v. Tharp*, Nos. 5:07CR00063, 5:11CV80335, 2011 WL 2607166, at *2 (W.D. Va. June 30, 2011), the court considered the holding in *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (requiring an actual injury showing for access to the courts claims based on law library issues), and concluded that to prove that library problems caused a violation of the right to access the court, the petitioner "must demonstrate that the inadequacies of the available legal materials significantly hampered her ability to litigate a viable legal claim." *Id.* The petitioner had asserted that, after her federal sentencing, she was taken by state authorities to a state facility where she remained for two years. She further stated that the state facility

"did not house inmates facing federal charges and that while she was incarcerated there, she had no access to a 'federal law library to address the issues she [brings] before this court' in her § 2255 motion." *Id.* The court then found that because the petitioner did not allege that she ever attempted to research the federal habeas issues, or that she asked for access to federal legal materials but was denied, and because she did not point to any issue raised in her habeas motion that required research, she failed to meet the showing required by *Lewis*. The court noted that her claims were "based on facts well known to her, such as the conditions under which she accepted the plea bargain and the problems she and her family had with counsel," so she "fails to demonstrate how lack of library materials prevented her from filing a timely § 2255 motion" and was not entitled to relief under § 2255(f)(2). *Id.*

In the instant case, Petitioner also failed to delineate any attempts at research that he made and his underlying motion also alleges claims based on facts well-known to him, i.e., that his attorney failed to consult with him about an appeal, failed to object to the charges and imposition of a fine, failed to file a motion to dismiss Counts One and Two, and failed to investigate prior convictions. (R.45.) Thus, although Petitioner concludes that he was injured by a lack of federal library materials, I suggest that his situation parallels that of the petitioner in *Tharp*, such that he too is not entitled to relief under § 2255(f)(2). *Tharp*, 2011 WL 2607166, at *2; *see also Briggs*, 2014 WL 940341, at *4, n. 8; *McAlister*, 2010 WL 898005, at *2; *Wampler*, 2008 WL 565108, at *2.

In addition, as noted by another district court within our Circuit, the fact that a petitioner is imprisoned without access to a law library also fails to meet the criteria of § 2255(f)(2) because such actions are not "in violation of the Constitution or laws of the United States." *United States v. Davis*, Nos. 1:10CR021, 1:14CV02521, 2015 WL 500169, at *2 (N.D. Ohio Feb. 4, 2015). This holding is also found in cases outside our district that have summarily held that detention in state custody was not an impediment under § 2255(f)(2) that prevented petitioner from timely filing his motion because such action is not in violation of the Constitution or laws of the United States. *Layman v. United States*, No. 4:10–cv-01015–NKL, 2011 WL 666257, at *2 (W.D. Mo. Feb. 14, 2011); *see also Arnold v. United States*, Nos. 7:13–cv–03500–GRA, 7:09–cr–00561–GRA–1, 2013 WL 6780587, at *2 (D.S.C. Dec. 19, 2013) ("Petitioner's motion is also not timely under § 2255(f)(2), as Petitioner has not alleged, much less proven, that his confinement in state custody falls into the category of 'governmental action in violation of the Constitution or laws of the United States' "). I suggest that these cases also support the conclusion that § 2255(f)(2) does not provide Petitioner with any relief from the limitation period.

Finally, I suggest that this result is consistent with a reading of the AEDPA as a whole. "A prisoner in custody under sentence of a court established by an Act of Congress claiming the right to be released ... may move the court which imposed the sentence to vacate, set aside or correct the sentence." § 2255(a). Although the wording of § 2255 could lead one to conclude that a person is "in custody" only when

actually serving a federal sentence, courts have held otherwise. Instead, "[a] prisoner is in custody for purposes of § 2255 when he is incarcerated in either federal or state prison, provided that a federal court has sentenced him." *Ospina v. United States*, 386 F.3d 750, 752 (6th Cir. 2004).[1] As the First Circuit explained, since the United States Supreme Court held "that a defendant while serving the first of two consecutive sentences could attack the second [under § 2254], it does not seem to us a significant stretch to say that he may attack a federal sentence, yet to be served, while defendant is in custody completing a state sentence." *Desmond v. United States Bd. of Parole*, 397 F.2d 386, 389 (1st Cir. 1968) (citing *Peyton v. Rowe*, 391 U.S. 54 (1968)). The court further recognized that the "defendant is not physically 'in custody under sentence of a court established by Act of Congress', but if custody is to be construed as single and continuous, we may join the [other Circuit] courts as well." *Id.* "There is just as much reason to resolve

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[1] "Section 14 of the Judiciary Act of 1789 authorized all federal courts, including this Court, to grant the writ of habeas corpus when prisoners were 'in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same.' Congress greatly expanded the scope of federal courts to grant the writ, 'in addition to the authority already conferred by law,' in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. Before the Act of 1867, the only instances in which a federal court could issue the writ to produce a state prisoner were if the prisoner was 'necessary to be brought into court to testify' was 'committed ... for any act done in pursuance of a law of the United States,' or was 'subjec[t] or citize[n] of a foreign State, and domiciled therein' and held under state law." *Feiker v. Turpin*, 518 U.S. 651, 659-60 (1996) (internal citations omitted).

the legality of resumed incarceration under an existing sentence before such resumption occurs as to resolve the legality of continued incarceration under a consecutive sentence yet to commence," and "[f]ailure to allow such resolution would in both cases result in the possibility that later litigation might be successful but that 'each day [prisoners] are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men.' " *Id.* (quoting *Peyton*, 391 U.S. at 64). Thus, the rationale behind holding that a petitioner is in custody for purposes of § 2255 while in state custody and before he actually serves his federal sentence was to permit him to challenge the legality of the yet-to-be-served sentence as soon as possible, thereby potentially avoiding even commencing an illegal term of sentence. The same rationale supports enforcement of the limitation period: by requiring the legality of the sentence to be challenged sooner rather than later, any untoward incarceration can be avoided.

More importantly, it would be inconsistent to find that a petitioner should be considered "in custody" for § 2255 purposes while in state custody, thereby encouraging petitioner to file while still in state custody, but to then conclude that this same state custody (and attendant lack of federal library resources) should be considered an impediment to his filing a petition under § 2255. If state custody were considered an impediment to seeking recourse under § 2255, it would have made much more sense for courts to have concluded that a person is not "in custody" under § 2255 until he reaches federal custody and actually begins serving his federal sentence. *See Parkison v. United States*, Nos. EP-19-CV-26-DCG,

EP-14-CR-2070-DCG-1, 2019 WL 1430003, at *3 (W.D. Tex. Mar. 29, 2019) ("But it is well settled that serving time in state custody before beginning a federal term of imprisonment does not impede a movant from seeking relief under 28 U.S.C. § 2255."); *Arvin v. United States*, No. 2:12cv357–MEF, 2014 WL 1584460, at *2 (N.D. Ala. Apr. 21, 2014) (construing § 2255(f)(2) as not affected by the fact the petitioner is in state custody is consistent with the principle that a person is considered to be "in custody" for purposes of § 2255 when incarcerated in either state or federal custody); *Caffey v. United States*, No. 2:07-CR-61, 2012 WL 3024741, at *2 (E.D. Tenn. July 24, 2012) ("[T]he mere fact that petition was originally in state custody was not a bar to filing and this will not save his motion from being rendered untimely.").

Accordingly, I suggest that Petitioner's motion to grant timeliness of § 2255 motion be **DENIED**. Since his petition is otherwise untimely, I also suggest that his Motion to Vacate Sentence be **DENIED as UNTIMELY**.

III. REVIEW

Rule 72(b)(2) of the Federal Rules of Civil Procedure states that "[w]ithin 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." Fed. R Civ. P. 72(b)(2); *see also* 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 155; *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d

505, 508 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). According to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RONRICO SIMMONS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CRIMINAL CASE NO. 14-CR-20628
CIVIL CASE NO. 18-CV-12557

DISTRICT JUDGE THOMAS L. LUDINGTON
MAGISTRATE JUDGE PATRICIA T. MORRIS

Dated: October 30, 2018

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PETITIONER'S MOTION TO GRANT TIMELINESS OF 2255 MOTION AND PETITIONER'S MOTION TO VACATE SENTENCE UNDER 28 U.S.C. § 2255

Patricia T. Morris, United States Magistrate Judge

I. RECOMMENDATION

For the following reasons, **IT IS RECOMMENDED** that Petitioner's Motion to Grant Timeliness of 2255 Motion (R.44) be **DENIED,** that his Motion to Vacate Sentence (R.45) be **DENIED as UNTIMELY**, and that the civil case be **DISMISSED**.

II. REPORT

A. Introduction

On October 8, 2014, Petitioner was indicted on two counts: (1) conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. §846; and (2) willingly causing others to maintain a drug house in violation of 21 U.S.C. §856(a)(1) and (b) and 18 U.S.C. §2. After the trial began, Petitioner pleaded guilty to both counts pursuant to a Rule 11 plea agreement. (R.37.) On September 8, 2016, judgment entered and Petitioner was sentenced to 190 months on each count, to be served concurrently. (R.40 at PageID 169.) Petitioner did not file an appeal.

On August 13, 2018, Petitioner filed the instant Motion to grant timeliness of 2255 motion and Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (R.44, 45.) The government responded to the Motion to grant timeliness only. (R.50.)

B. Analysis and Conclusion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), established a one-year statute of limitations on 2255 petitions, which begins to run on the latest of four possible dates. 28 U.S.C. § 2255(f). It usually runs from the date on which the

judgment of conviction becomes final. 28 U.S.C. § 2255(f)(1). When a 2255 petitioner does not file an appeal, the judgment of conviction is final when the time for filing a notice of appeal expires. *Sanchez-Castellano v. United States*, 358 F.3d 424, 428 (6th Cir. 2004); *United States v. Cottage*, 307 F.3d 494, 499 (6th Cir. 2002). According to Federal Rule of Appellate Procedure 4(b)(1), a defendant has fourteen days from the entry of judgment to file a notice of appeal. *Gillis v. United States*, 729 F.3d 641, 644 (6th Cir. 2013). Petitioner did not file a direct appeal and judgment was entered on September 8, 2016. Therefore, Petitioner's judgment became final on September 22, 2016, such that Petitioner should have filed the motion to vacate by September 22, 2017.

However, the one-year period can also run from "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." 28 U.S.C. § 2255(f)(2). Petitioner states that after sentencing he was taken into the custody of the Michigan Department of Corrections (MDOC) and served "roughly nine months in Wayne County jail, thereafter on September 27, 2017, he was committed to Federal Bureau of Prisons custody and arrived at FCI-Milan on September 27, 2017. (R.44 at PageID. 214.) Petitioner contends that neither "MDOC custody" nor the Wayne County Jail provided him any access to a library or legal material. (*Id*.) Thus, Petitioner argues that he should have filed his motion by September 27, 2018, and that since he filed his motion

on August 13, 2018, the motion should be considered timely.

Although not argued by Petitioner, it should be noted that even though Petitioner was in state custody after his sentencing hearing, "[a] prisoner is in custody for purposes of § 2255 when he is incarcerated in either federal or state prison, provided that a federal court has sentenced him." *Ospina v. United States*, 386 F.3d 750, 752 (6th Cir. 2004).

Now turning to whether his lack of legal resources while in state custody provides him relief from the one-year limitation period under § 2255(f)(2), I conclude that it does not. In *Caffey v. United States*, No. 2:07-CR-61, 2012 WL 3024741 (E.D. Tenn. July 24, 2012), the petitioner made virtually the same argument presented here. He, too had been in state custody and he argued that the state prison library did not have federal legal materials, that there was no "prison lawyer" who could help him, and that he was not well-educated and did not know he could file a § 2255(f) motion nor that there was any deadline to do so until he reached federal prison. The Court held that neither lack of access to a law library, lack of education, nor lack of legal knowledge were sufficient to equitably toll the one-year limitation period under § 2255(f)(2). *Id*. at *2 (citing *United States v. Stone*, 68 F. App'x 563, 565 (6th Cir. 2003); *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002)). In addition, as noted by another district court within our Circuit, the fact that a petitioner is imprisoned without access to a law library also fails to meet the criteria of § 2255(f)(2) because such actions are not "in violation of the Constitution or laws of the United States."

United States v. Davis, No. 1:14CV02521, 2015 WL 500169, at *2 (N.D. Ohio Feb. 4, 2015).[1]

Accordingly, I suggest that Petitioner's motion to grant timeliness of 2255 motion be **DENIED**. Since his petition is otherwise untimely, I also suggest that his Motion to Vacate Sentence be **DENIED as UNTIMELY.**

III. REVIEW

Rule 72(b)(2) of the Federal Rules of Civil Procedure states that "[w]ithin 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." Fed. R. Civ. P. 72(b)(2); *see also* 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 155; *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 508 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers*

[1] Although the government attached an affidavit by a state custodian to prove that Petitioner's allegation that he did not have access to legal materials is false, the court did not consider the affidavit because such a factual dispute would be better determined at an evidentiary hearing that is not necessary in this case due to the legal precedents cited herein.

Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987). According to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: October 30, 2018

S/ PATRICIA T. MORRIS
Patricia T. Morris
United States Magistrate Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONRICO SIMMONS, JR.,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 19-1757

Filed: January 5, 2021

ORDER

BEFORE: ROGERS, KETHLEDGE, NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,
Respondent,
v.
RONRICO SIMMONS, JR.,
Movant.

Case No. 1:14-cr-20628-TLL

Filed: August 13, 2018

MOTION TO GRANT TIMELINESS OF § 2255
Motion Under 28 U.S.C. 2255 (f) (2)

COMES NOW, Ronrico Simmons, Jr., proceeding pro se Movant, moving this Honorable Court pursuant to 28 U.S.C. § 2255 (f) (2), respectfully requesting that this Court **GRANT** legal motion herein; and deem his 2255 Motion timely as the lack of library access and legal materials was an impediment to the filing of the petition, thus the one-year statute of limitations began on September 27, 2017, when he was committed to the Bureau of Prisons, thus such 2255 Motion is being timely filed based upon the foregoing:

Statement of Facts

On August 31, 2016, this Honorable Court sentenced Movant Simmons, Jr. to 190 months of imprisonment, however no direct appeal was filed and Attorney Crawford failed to consult with Mr. Simmons, Jr. even efter he expressed a dislike about his sentence and wanted to do smothing about it but Movant's ex-lawyer Attorney Crawford **never** consulted with him and he never from him again after his federal sentencing hearing. After Movant Simmons, Jr. federal sentencing he was taken back into the custody of the Michigan Department of Corrections and then he served roughly nine months in Wayne County Jail, thereafter on September 27, 2017, he was committed to Federal Bureau of Prisons custody and arrived at FDC-Milan on September 27, 2017. Because he was incarcerated in MDOC custody and then in Wayne County Jail he lacked access to library access and legal material an impediment in which falls under the purview of 28 U.S.C. § 2255 (f) (2), thus Movant Simmons, Jr. one year statute of limitations period should began on **September 27, 2017**, the day he was committed into BOP custody, thus his 2255 Motion To Vacate should be considered timely in the case herein. (emphasis added).

Standard of Review

As a threshold matter, 28 U.S.C. § 2255 (f), requires that collateral attacks be timely.

To be timely, a § 2255 motion must be filed within one year of the latest of:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making 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 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). See Phillips v. United States, 734 F.3d 573, 580-81 (6th Cir. 2013).

Movant Simmons, Jr., contends that his 2255 Motion is **timely** pursuant to 28 U.S.C. § 2255 (f) (2), in the case herein. (emphasis added).

Reasons To Justify To Hold That Movant's 2255 Motion Is Timely Via 2255 (f) (2)

Movant Simmons, Jr., asserts that on August 31, 2016, he was sentenced by this Honorable Court to 190 months of imprisonment, however after his federal sentencing he was taken into M.D.O.C. custody; and thereafter placed in Wayne County Jail. On **September 27, 2017,** Movant Simmons, Jr. was committed to Federal Bureau of Prisons custody, see Exhibit A (A copy of Sentencing Monitoring Computation Data Sheet dated November 29, 2017), thus prior to that date Movant Simmons, Jr. had no access to a legal library; 2255 Petition; his legal materials or the Rules Governing 2255 Proceedings, thus consistent with Estremera v. United States, 724

F.3d 773, 776-77 (7th Cir. 2013) (As to 28 U.S.C. § 2255 (f) (2), lack of library access can, in principle, be an impediment to the filing of a collateral attack. The Seventh Circuit **VACATED** the District Court's denial under § 2255 (f) (2); and remanded the case for evidentiary hearing to determine whether his 2255 Motion To Vacate was timely via 28 U.S.C. 2255 (f) (2)); and Egerton v. Cockrell, 334 F.3d 433, 438 (5th Cir. 2003) (holding that the absence of the Antiterrorism and Effective Death Penalty Act from the prison law library constituted a state-created impediment for purposes of the one-year limitations period of 28 U.S.C. § 2244 (d)). (emphasis added).

"Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/ or the Fourteenth Amendment." Chappell v. Rich, 340 F.3d 1279, 1282 (11th Cir. 2003). "The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libaries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72 (1977).

However, "[t]he mere inability of a prisoner to access the law library is not, in itself, an unconstitutional impediment." Akins v. United States, 204 F.3d 1086, 1090 (11th Cir. 2000). Rather, "[t]he inmate must show that this inability caused an actual harm, or in other words, unconstitutionally prevented him from exercising that fundamental right of access to the courts in order to attack his sentence or to challenge the condtions of confinement." That is, a prisoner may

demonstrate actual injury by establishing that prison officials' actions actually deterred his pursuit of a "non-frivolous post-conviction claim or civil rights action." See Al-Amin v. Smith, 511 F.3d 1317, 1332-33 (11th Cir. 2008).

In the instant case, Movant Simmons, Jr. states that his 2255 Motion is not timely pursuant to 28 U.S.C. § 2255 (f) (1). Mr. Simmons, Jr., argues firmly that the government's failure to provide an adequate law library prevented him from exercising his fundamental right of access to the courts. See **Akins,** 204 F.3d at 1090 (11th Cir. 2000); and **Tannenbaum,** 148 F.3d at 1263 (11th Cir. 1998).

Movant Simmons, Jr., contends that for roughly 13 months after his federal sentencing he was in MDOC custody and then was placed in Wayne County Jail, however during this 13-month period RonRico Simmons, Jr. had no access to federal law library; legal materials; assistance by prison authorities in the preparation and filing of meaningful legal papers; and no access to the Rules Governing 2255 Proceedings and AEPDA statute of limitations, thus the lack of access to these critical sources certainly created an unconstitutional impediment in which qualifies under 28 U.S.C. § 2255 (f)(2), in the matter herein. See **Akins,** 204 F.3d 1086, 1090 (11th Cir. 2000).

As the result of RonRico Simmons, Jr. presenting four (4) meritorious claims to this Honorable Court within his attcahed 2255 Motion To Vacte, thus he demonstrates actual injury based upon the impediment caused by government-created impediment in which prevented him from having the ability to timely pursue and know the timeliness for

filing a 2255 Motion, therefore Mr. Simmons, Jr. is entitled to proceed via 28 U.S.C. § 2255 (f) (2); and the one year statute of limitations period should begin from **September 27, 2017,** the day he arrived into BOP custody, see Ex. A, thus the clock should end on **September 27, 2018,** therefore his 2255 Motion attached herein is being timely submitted in the case herein. See Estremera v. United States, 724 F.3d 773 (7th Cir. 2013) (emphasis added).

CONCLUSION

In conclusion, Movant Simmons, Jr., concludes that this Honorable Court should hold that his 2255 Motion To Vacate is timely filed under 28 U.S.C. § 2255 (f) (2), or alternatively conduct a prompt evidentiary hearing to determine whether Movant Simmons, Jr. has met his burden to prove a Government impediment to justify holding his 2255 Motion timely under 2255 (f) (2), in the case herein.

Respectfully Submitted,

Date: 8 / 8 / 18

/s/ RonRico Simmons

Mr. RonRico Simmons
#51225-039
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190

Certificate of Service

I, Ronrico Simmons, Jr., certify that on August, 8th, 2018, I mailed by First Class U.S. Mail the original and two copies of my pro se Motion To Grant Timeliness of § 2255 Motion Under 28 U.S.C. § 2255 (f) (2), to this Honorable Court at the said address listed below herein:

Clerk of the Court
U.S. Post Office
1000 Washington Avenue
Room 304
Bay City, MI. 48708

Date: 8 / 8 / 18 /s/ RonRico Simmons

Mr. RonRico Simmons, Jr.
pro se Movant

EXHIBIT A (A copy of Sentencing Monitoring Computation Data Sheet dated November 29, 2017).

MILBA 540*23 * **SENTENCE MONITORING**
PAGE 001 * **COMPUTATION DATA**
AS OF 11-29-2017

* 11-29-2017
* 09:30:37

REGNO..: 51225-039
NAME: SIMMONS, RONRICO JR

FBI NO .....: 643240EB5
ARS1 .....: MIL/A-DES
UNIT.....: F UNIT
DETAINERS .....: NO

DATE OF BIRTH: 03-23-1980 AGE: 37

QUARTERS.....: F02-012U
NOTIFICATIONS: NO

HOME DETENTION ELIGIBILITY DATE: 12-10-2030

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S CURRENT COMMITMENT. THE INMATE IS PROJECTED FOR RELEASE: 06-10-2031 VIA GCT REL

-----CURRENT JUDGMENT/WARRANT NO: 010-----

COURT OF JURISDICTION.....: MICHIGAN, EASTERN DISTRICT
DOCKET NUMBER.....: 14-CR-20628-01

JUDGE.....: LUDINGTON
DATE SENTENCED/PROBATION
IMPOSED .....: 08-31-2016
DATE COMMITTED.....: 09-27-2017
HOW COMMITTED.....: US DISTRICT COURT COMMITMENT
PROBATION IMPOSED..... NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	$200.00	$00.00	$00.00	$00.00

RESTITUTION...: PROPERTY:

NO SERVICES: NO

AMOUNT: $00.00

----------CURRENT OBLIGATION NO: 010----------

OFFENSE CODE.....: 391
OFF/CHG: 21:846 CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE AND TO DISTRIBUTE ONE KILOGRAM OR MORE OF HEROIN, CT 1. 21:856(A)(1) WILLINGLY CAUSING OTHERS TO MAINTAIN DRUG HOUSE, CT 2.

SENTENCE PROCEDURE .....:3559 PLRA SENTENCE
SENTENCE IMPOSED/
TIME TO SERVE .....: 190 MONTHS
TERM OF SUPERVISION .....: 5 YEARS
DATE OF OFFENSE .....: 08-01-2012

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Name of Movant: RonRico Simmons, Jr.
Prisoner No.: 51225-039
Case No.: 1:14-cr-20628
Place of Confinement: Federal Correctional Institute Milan

UNITED STATES OF AMERICA,

v.

RONRICO SIMMONS, JR.,

(name under which convicted)

Filed: August 13, 2018

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

MOTION

1. Name and location of court which entered the judgment of conviction under attack

Eastern District of Michigan in Bay City, Michigan

2. Date of judgment of conviction September 08, 2016

3. Length of sentence 190 months of imprisonment

4. Nature of offense involved (all counts) Ct. 1, Conspiracy To Possess W/ Intent To Distribute One Kilogram Or More Of Heroin; and Ct. 2, Willingly Causing Others To Maintain Drug House

5. What was your plea? (Check one)

(a) Not guilty ☐

(b) Guilty ☒

(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☐

(b) Judge only ☐

7. Did you testify at the trial?

Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☒

9. If you did appeal, answer the following:

(a) Name of court

(b) Result

(c) Date of result

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court?

Yes ☐ No ☒

11. If your answer to question 10 was "yes," give the following information:

(a) (1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result

(6) Date of result

(b) As to any second petition, application or motion give the same information:

(1) Name of court

(2) Name of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result

(6) Date of result

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition Yes ☐ No ☐

(2) Second petition etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one:

Movant Simmons, Jr., asserts that his counsel provided him with ineffective assistance of counsel by failing to consult with him about an appeal when Simmons asked him after his federal

Supporting FACTS (state *briefly* without citing cases or law):

On August 31, 2016, Movant Simmons, Jr. was sentenced by this Court to 190 months of imprisonment and Attorney Alan A. Crawford represented Mr. Simmons, Jr., however directly after his federal sentencing was imposed he asked Attorney Crawford "what's next" ? Attorney Crawford informed him that he would be up to visit him to discuss where to proceed from here, however Movant Simmons **never** heard from him again. After Simmons, Jr. repeated calls to his law office and his family "no calls" were returned.

Therefore, Movant Simmons, Jr., argues that his ex-lawyer provided him with deficient performance by failing to consult

B. Ground two:

Movant Simmons, Jr., contends that his ex-lawyer provided him with ineffective assistance of counsel by failing to object to misadvisement of the nature of the charges as to Count One,

Supporting FACTS (state *briefly* without citing cases or law):

On May 16, 2016, before the Honorable Thomas L. Ludington Movant Simmons, Jr. plead guilty to Ct. One Conspiracy and Ct. 2, Willingly Causing Others To Maintain Drug House, however during the course of the Rule 11 Plea Colloquy at the Court's direction AUSA Parker "misadvised" Movant Simmons, Jr. as to the "essential elements" of Conspiracy and Mr. Simmons, Jr. was not advised as to the "imposition of a fine" as a potential direct consequence of his guilty plea, thus counsel's failure to object to these Rule 11 violations constitutes 'deficient performance'. Furthermore, Movant Simmons, Jr., argues

C. Ground three:

Movant Simmons, Jr., states that his counsel provided him ineffective assistance of counsel by failing to file a Motion To Dismiss Count One and Two of his Indictment for failing to state

Supporting FACTS (state *briefly* without citing cases or law):

On October 08, 2014, Movant Simmons, Jr.'s Two-Count Indictment was handed down by the Grand Jury and the Court appointed Asst. Federal Public Defender Judith Gracey to represent Movant Simmons, Jr., thus the Court ordered all pre-trial

motions to be filed no later than October 20, 2015. However, Movant Simmons, Jr., contends that the Court allowed retained counsel to file Appearance and replace Asst. Federal Public Defender Judith Gracey on October 27, 2015. Thus, the Court

Continuation of Ground One:

sentencing "what's next," thus expressing an desire to appeal; and therefore consistent with Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000), counsel had a duty to consult with Simmons his failure to do violates Movant's Sixth Amendment Rights in the case herein.

Continuation of Ground One Supporting Facts:

with about filing an notice of appeal after Mr. Simmons, Jr. asked his lawyer after his federal sentencing "what's next," thus he expressed an desire to appeal, therefore actual prejudice exist as the result of absent counsel's 'deficient performance' Movant Simmons, Jr. would have instructed his ex-lawyer to file a notice of appeal on his behalf, thus Movant Simmons, Jr.'s Sixth Amendment Rights were violated in the case herein.

Continuation of Ground Two:

Conspiracy and failing to apprise Mr. Simmons, Jr. as to direct consequences of his guilty plea "imposition of a fine" as to Ct. One, thus absent counsel's failure to object amounting to 'deficient performance,' therefore actual prejudice exist without counsel's 'deficient performance' RonRico Simmons, Jr. would not have plead guilty, however insisted on going to jury trial in the case herein.

Continuation of Ground Two Supporting Facts:

firmly that absent counsel's 'deficient performance' Movant Simmons, Jr. swears and declare under the penalties of perjury that he would have insisted on going to trial jury, thus actual prejudice exist in violation of his Sixth Amendment Rights in the case at bar.

Continuation of Ground Three:

an offense, thus violating his Fifth Amendment Grand Jury Clause Rights and Sixth Amendment Rights; and furthermore absent his counsel's 'deficient performance' RonRico Simmons, Jr. would not have plead guilty, however insisted on going to jury trial, thus his Sixth Amendment Rights were violated in the matter herein.

Continuation of Ground Three Supporting Facts:

ordered that all motions due by January 4, 2016, after Attorney Alan Crawford filed his Appearance thereto.

Movant Simmons, Jr., asserts that no pre-trial Motion To Dismiss Indictment for failure to state an offense was filed by his ex-lawyer, thus as the result of Count One and Two of Mr. Simmons, Jr.'s Indictment are fatally defective and must be dismissed, thus Attorney Crawford failure to file pre-trial Motion To Dismiss amounted to 'deficient performance' establishing the first prong of Strickland v. Washington.

Therefore, Movant Simmons, Jr., argues firmly that absent Attorney Crawford's 'deficient performance' his defective indictment would have been dismissed

with or without prejudice, thus actual prejudice exist in violation his Sixth Amendment Rights pursuant to the U.S. Constitution.

D. Ground four:

Movant Simmons, Jr., argues firmly that his ex-lawyer provided him with ineffective assistance of counsel during the sentencing phase by failing to investigate his prior convictions and research the law in reference to applying § 5G1.3 (d) to impo-

Supporting FACTS (state *briefly* without citing cases or law):

Movant Simmons, Jr., asserts that on May 28, 2015, the U.S. Magistrate Judge Morris issued a Writ of Habeas Corpus ad Prosequendum to produce the body of Mr. Simmons, Jr. from MDOC custody as he was serving time on a parole violation. It should be noted that page 19, Para. # 74, under Sentencing. Options the USPO Marvin J. Burns within Movant Simmons, Jr.'s PSI Report states that his sentence should be imposed consistent with § 5G1.3 (d).

Movant Simmons, Jr., contends that his ex-lawyer provided him 'deficient performance' by failing to investigate prior convictions and research the law in regards to § 5G1.3 (d), thus counsel's failure to raise this claim at Movant's sentencing hearing amou-

Continuation of Ground Four:

se a concurrent or partially concurrent sentence to his undischarged term of imprisonment, thus counsel's

performance during the sentencing phase violated his Sixth Amendment Rights of the U.S. Constitution, therefore his 190-month sentence should be **VACATED** in the case at bar.

Continuation of Ground Four Supporting Facts:

nted to 'deficient performance,' thus absent such 'deficient performance' there is a reasonable probability that this Court would have applied the application of U.S.S.G. § 5G1.3 (d), imposing an concurrent or partially concurrent sentence to Simmons, Jr.'s undischarged term of imprisonment, therefore there is a reasonable probability that the sentence would have been shorter actual prejudice exist in violation of his Sixth Amendment Rights pursuant to the U.S. Constitution.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

Movant Simmons, Jr., asserts that these claims were not raised on direct appeal because my ex-lawyer **never** consulted with me about filing a notice of appeal, thus he raises his claim under ineffective assistance of counsel on his 2255 Motion collateral attack proceedings.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing

Asst. Federal Public Defender Judith Gracey; Federal Defender Office; 653 S. Saginaw, Ste. 105; Flint, MI. 48502-1523

(b) At arraignment and plea

Attorney Alan A. Crawford; 120 N. Michigan Avenue; Ste. 303; Saginaw, MI. 48602

(c) At trial

None

(d) At sentencing Attorney

Alan A. Crawford; 120 N. Michigan Avenue; Ste. 303; Saginaw, MI. 48602

(e) On appeal

None

(f) In any post-conviction proceeding

None

(g) On appeal from any adverse ruling in a post-conviction proceeding

None

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

    Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

    Yes ☐ No ☒

    (a) If so, give name and location of court which imposed sentence to be served in the future:

    (b) Give date and length of the above sentence:

    (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

    Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

8 / 8 / 2018
Date

/s/ RonRico Simmons
Signature of Movant
Mr. RonRico Simmons, Jr.

#51225-039
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190

Affidavit of RonRico Simmons, Jr.

I, RonRico Simmons, Jr., swear and declare under penalties of perjury that all my sworn statements below are true to the best of my knowledge, information and belief.

If called to testify at a prompt Evidentiary Hearing, I RonRico Simmons, Jr., will testify consistent with my sworn Affidavit herein as all my sworn statements below are true and accurate.

1. I, was indicted by the Grand Jury on October 08, 2014, in a Two-Count Indictment for Drug Conspiracy and Maintaining Drug Premises.

2. On May 28, 2015, I was writed from the Michigan Department of Corrections via Writ of Habeas Corpus ad Prosequendum issued by U.S. Magistrate Judge Patricia T. Morris.

3. On May 11, 2016, the Jury Trial begun, however I requested an Continuance as at that time Attorney Crawford advised me to not to go through with my Jury Trial and to accept a guilty plea.

4. On May 16, 2016, I accepted a Rule 11 Plea Agreement and I plead guilty to Cts. 1 and 2, thus jury trial was cancelled.

4. On August 31, 2016, I was sentenced by this Honorable Court to 190-months of imprisonment.

5. This Honorable Court entered Judgment on September 08, 2016.

6. I, was sentenced on August 31, 2016, however right after my federal sentencing was over, I asked my ex-lawyer Mr. Crawford “what’s next” ? At that time

Attorney Crawford informed me that he would be up to visit me to discuss where to proceed from here, however I never heard from him again. Even after my repeated calls to his law office and my family calling him "no calls" were returned. My ex-lawyer provided me with ineffective assistance of counsel by failing to 'consult' with me about filing a Notice of Appeal, thus absent Attorney Crawford's failure to consult, I would have insisted on him filing a Notice of Appeal on my behalf as I expressed an interest to do so.

7. On May 16, 2016, before the Honorable Thomas L. Ludington, I plead guilty to Cts. 1 and 2, of my Indictment, however during the Rule 11 Plea Colloquy, I was misinformed altogether of the essential elements as to Counts 1 and 2; and was not advised to the "imposition of a fine" as a potential direct consequence of my guilty plea, therefore my Guilty Plea was unknowingly, unintelligently entered and involuntary the product of ineffective assistance of counsel for failing to object to such errors in which constitutes 'deficient performance' and absent such 'deficient performance', I swear and declare that, I would have went through with my Jury Trial and never plead guilty in the case herein. Thus, my ex-lawyer violated my Sixth Amendment Rights.

8. On October 08, 2014, I was indicted on a Two-Count Indictment and on October 27, 2015, Attorney Crawford was permitted to replace Asst. Federal Public Defender Judith Gracey and the U.S. Magistrate Judge Morris ordered all pre-trial motions to be submitted no later than January 4, 2016, however even though my Indictment is "fatally defective" as to Ct. 1 and 2, my ex-lawyer failed to file a pre-trial Motion To Dismiss Defective Indictment,

thus such failure constituted 'deficient performance' and absent such 'deficient performance', I would not have pled guilty, however insisted on going to trial in the case at bar.

9. A through review of my Sentencing Transcripts reveal that at no time did Attorney Crawford request that this Honorable Court apply U.S.S.G. § 5G1.3 (c) and (d) to my parole violation in which was undischarged at the time of my federal sentencing in fact I was writed out to face federal Indictment from the Michigan Department of Corrections and the pending felony charge identified at page 19, Para. # 74, thus counsel's failure to request application of § 5G1.3 (c) and (d), amounts to 'deficient performance' and absent such 'deficient performance' actual prejudice exist as there is a reasonable probability that my 190-month sentence would have been between 12 months & 27 days to 27 months & 29 days lesser, therefore establishing prejudice in violation of my Sixth Amendment Rights of the U.S. Constitution.

10. I, RonRico Simmons, Jr., respectfully request that this Court conduct a prompt evidentiary hearing as to my four colorable claims of ineffective assistance of counsel in violation of my Sixth Amendment Rights of the U.S. Constitution in the matter herein.

I, RonRico Simmons, Jr., declare and certify under penalties of perjury under the laws of the United States of America pursuant to 28 U.S.C. § 1746 (1), that the foregoing is true and correct.

Executed on August, 8th , 2018.

Date: 8 / 8 / 18

Respectfully Submitted,

/s/ RonRico Simmons

Mr. RonRico Simmons, Jr.
#51225-039
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190

MEMORANDUM OF LAW IN SUPPORT OF GRANTING MOVANT'S 2255 MOTION:

Movant Simmons, Jr.'s 2255 Is Not Barred By Collateral Waiver

Movant Simmons, Jr., asserts that on October 14, 2014, the U.S. Department of Justice announced a new policy no longer enforcing previously and previous claims of ineffective assistance of counsel on direct appeal or collateral attack, see Exhibit A (A copy of the DOJ's Memorandum from Deputy U.S. Attorney General Cole dated Oct. 14, 2014). Therefore, Movant Simmons, Jr.'s four claims of ineffective assistance of counsel in which presents arguable or claims that establish prejudice, thus his four claims of ineffective assistance of counsel in violation of his Sixth Amendment Rights are not barred by Movant's collateral waiver and are, therefore properly before this Honorable Court in the case herein.

GROUND ONE:

Movant Simmons, Jr., asserts that his counsel provided him with ineffective assistance of counsel by failing to consult with him about an appeal when Simmons asked him after his federal sentencing "what's next," thus expressing an desire to appeal; and therefore consistent with Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000), counsel had a duty to consult with Simmons his failure to do violates Movant's Sixth Amendment Rights in the case herein.

Standard of Review

Where the defendant does not instruct counsel to file an appeal, however, the court must ask "whether counsel in fact consulted with the defendant about an appeal," which entails "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." **Roe**, 528 U.S. 470, 478 (2000).

The U.S. Supreme Court held in **Roe**, it was held that Strickland v. Washington, 466 U.S. 668 (1984), provided the proper framework for evaluating a claim that counsel was constitutionally ineffective for failing to file a notice of appeal, as, among other matters, (1) counsel had a constitutionally imposed duty to consult the criminal defendant only when there was reason to think either that (a) rational defendant would have wanted to appeal, or (b) a particular defendant reasonably demonstrated to counsel that he was interested in appealing; and (2) the defendant was required to demonstrate that there was a reasonably probability that, but for counsel's deficient failure to consult with him about an appeal, the defendant would have timely appealed.

Statement of Facts

On August 31, 2016, Movant Simmons, Jr. was sentenced by this Honorable Court to 190 months of imprisonment and Attorney Alan A. Crawford represented Mr. Simmons, Jr., however directly after his federal sentencing was imposed he asked Attorney Crawford "what's next" ? Attorney Crawford informed him that he would be up to visit him to discuss where to proceed from here, however Movant Simmons, Jr.

never heard from him again. After Movant Simmons, Jr. repeated calls to his law office and his family "no calls" were returned.

Reasons To Justify Granting Relief As To Ground One

The Sixth Amendment guarantees "reasonably effective" legal assistance. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To show ineffective assistance, the two-prong Strickland test requires a defendant to show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) such deficient performance prejudiced the defendant. See Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (2000).

Movant Simmons, Jr., asserts the first step of Flores-Ortega, the first Strickland prong begins with the question whether counsel "consulted" with the defendant regarding an appeal. See **Roe**, 528 U.S. 470, 478 (2000). "Consulting" is a term of art that means "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." See United States v. Pham, 722 F.3d 320, 324 (5th Cir. 2013).

In the instant case, Movant Simmons, Jr., contends that his 2255 Petition and sworn Affidavit attached herein all fully support that after Mr. Simmons, Jr. federal sentencing proceedings on August 31, 2016, he **never** heard from Attorney Alan A. Crawford again and directly after his federal sentencing he asked his ex-lawyer "what's next" ?, thus he clearly had a desire to appeal, however Attorney Crawford failed

altogether to "consult" with RonRico Simmons, Jr. after his federal sentencing proceedings, thus as the result of Movant Simmons, Jr. expressed an desire to appeal, therefore that triggered a **duty** by Attorney Crawford to **consult**, see **Roe**, 528 U.S. 470, 480 (2000).

Thus, Movant Simmons, Jr., argues that he has satisfied prong number one 'deficient performance' in the case herein.

Movant Simmons, Jr., contends that pursuant to Flores-Ortega, a defendant satisfies the second Strickland prong if he shows "that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." **Roe**, 528 U.S. 470, 484 (2000). Consistent with Movant's sworn Affidavit attached herein, thus RonRico Simmons, Jr. swears and declares within his sworn Affidavit that but for Attorney Crawford's deficient failure to consult with him about an appeal, he would have timely appealed; and furthermore just because he has an appellate waiver consistent with Sixth Circuit precedents in **Campbell**, thus criminal defendants with appellate waivers still are afforded the protections guaranteed by **Roe** and **Ludwig**, see Campbell v. United States, 686 F.3d 353 (6th Cir. 2012).

Therefore, Movant Simmons, Jr., argues firmly that his ex-lawyer Attorney Crawford provided him with ineffective assistance of counsel in violation of his Sixth Amendment Rights pursuant to the U.S. Constitution.

Movant Simmons, Jr., states that he is entitled to have his 190-month sentence **VACATED**, thus he should be resentenced, so as to restore his right to appeal, but he may only argue the 18 U.S.C. § 3553 (a) factors at re-sentencing, and the Presentence Investigation Report will not be re-opened for new investigation or objections. See United States v. Uribe, 2017 U.S. Dist. LEXIS 56406 (W.D. Ark., Apr. 5, 2017) (The United States and counsel for the defendant agreed and stipulated as follows:

* The United States agreed to concede that Defendant's counsel at sentencing was ineffective in failing to counsel the Defendant as to his appeal rights following his sentencing, and thus, the Defendant was denied the ability to appeal his sentence.

* The Defendant should be re-sentenced, so as to restore his right to appeal, but he may only argue the 18 U.S.C. § 3553 (a) factors at re-sentencing, and the Presentence Investigation Report will not be re-opened for new investigation or objections), (emphasis added).

GROUND TWO:

Movant Simmons, Jr., contends that his ex-lawyer provided him with ineffective assistance of counsel by failing to object to misadvisement of the nature of the charges as to Count One, Conspiracy and failing to apprise Mr. Simmons, Jr. as to direct consequences of his guilty plea "imposition of a fine" as to Ct. One, thus absent counsel's failure to object amounting to 'deficient performance,' therefore actual prejudice exist without counsel's 'deficient performance'

RonRico Simmons, Jr. would not have plead guilty, however insisted on going to jury trial in the case herein.

Standard of Review

The **Hill** Court found in the plea bargaining context, a petitioner seeking to establish ineffective assistance of counsel must demonstrate that: (1) Counsel's advice and performance fell below an objective standard of reasonableness; and (2) The Petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. **Hill**, 474 U.S. 52, 59 (1985).

Statement of Facts

On May 16, 2016, before the Honorable Thomas L. Ludington Movant Simmons, Jr. plead guilty to Ct. One Conspiracy and Ct. 2, Willingly Causing Others To Maintain Drug House, however during the course of the Rule 11 Plea Colloquy at the Court's direction AUSA Parker "misadvised" Movant Simmons, Jr. in **open court** as to the "essential elements" of Conspiracy and Mr. Simmons, Jr. was not advised as to the "imposition of a fine" as a potential direct consequence of his guilty plea, thus counsel's failure to object to these Rule 11 violations constitutes 'deficient performance'. Furthermore, Movant Simmons, Jr., argues that absent counsel's 'deficient performance' RonRico Simmons, Jr. would have insisted on going to trial, thus actual prejudice exist in violation of his Sixth Amendment Rights in the case herein.

Reasons To Justify Granting Relief As To Ground Two

The Sixth Amendment guarantees "reasonably effective" legal assistance. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The first prong that must be proven to establish ineffective assistance of counsel is:

(1) Counsel's advice and performance fell below an objective standard of reasonableness;

In Count 1, Simmons, Jr. was charged with the following offense:

INDICTMENT

THE GRAND JURY CHARGES:

Count 1

21 U.S.C. § 846

From approximately 2011 to on or about August 1, 2012, in the Eastern District of Michigan, Ronrico Simmons, Jr., defendant herein, knowingly conspired with others both known and unknown to the grand jury to commit an offense or offenses against the United States contrary to 21 U.S.C. § 841 (a) (1), that is, to possess with intent to distribute and to distribute various quantities totaling a kilogram or more of a mixture or substance containing heroin, a Schedule I controlled substance, in violation of 21 U.S.C. § 846.

Movant Simmons, Jr., contends that, under the language in Count One, Conspiracy to Possess With Intent to Distribute and to Distribute One Kilogram or More of Heroin of the indictment, the grand jury

charged only "knowingly" conspired with others, however failed to charge "intentionally" in which is an essential element to sustain a conviction pursuant to 21 U.S.C. § 846, see United States v. Randolph, 794 F.3d 602, 608-09 (6th Cir. 2015) (To sustain a drug trafficking conspiracy conviction under 21 U.S.C. § 846, the government must have proved (1) an agreement to violate drug laws; (2) knowledge and **intent to join the conspiracy;** and (3) participation in the conspiracy. 21 U.S.C.S. § 841 (a) (1) makes it unlawful for any person to knowingly or intentionally manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.), thus the offense is not consistent with the language of the statute and Sixth Circuit precedents in the case herein.

Movant Simmons, Jr., asserts that, under the language in Count Two, knowingly maintain any place for the purpose of distributing a controlled substance of the indictment, the grand jury charged "willfully" instead of **"knowingly,"** moreover fails to charge "for the purpose of" in which is an essential aspect of the third essential element to sustain a conviction pursuant to 21 U.S.C. § 856 (a) (1), see United States v. Russell, 595 F.3d 633, 642-43 (6th Cir. 2010) (To convict a defendant under 21 U.S.C. § 856 (a) (1) for maintaining a premises for drug-related purposes, the government must prove beyond a reasonable doubt that he (1) knowingly, (2) maintained any place, whether permanently or temporarily, (3) for the purpose of distributing a controlled substance.), thus the offense is not consistent with the language of the statute and Sixth Circuit precedents in the case at bar.

To properly review and examine Movant Simmons, Jr.'s Ground Two , thus he will now rely upon his Rule 11 Plea Colloquy as follows:

> **The Court:** Ms. Parker, if you could outline the material provisions of the Rule 11 agreement, ma'am.
>
> **Ms. Parker:** Yes, Your Honor. As the Court's already indicated, the defendant is offering to tender a plea to both counts of indictment. The elements of those offenses are, for Count One, that two or more people agreed to possess with intent to distribute or distribute a controlled substance; two, the defendant knowingly joined the agreement; and, three, the object of the conspiracy involved drug quantities totaling 1 Kilogram or more of a mixture or substance containing heroin.
>
> As to Count Two the elements are that the defendant willfully caused another to use a residence; and two, at least one purpose for using that residence was to store, distribute or use a controlled substance.
>
> There is a stipulated factual basis for the plea. I will not go into that. I assume the Court will do that during the plea colloquy with the defendant.

See Change of Plea Transcripts before the Honorable Thomas L. Ludington on May 16, 2016, at page 8, line 7-23.

Movant Simmons, Jr., argues that during the Court's instruction for the Government prosecutor to

state the terms of the Rule 11 plea agreement in which was the only mention of the elements of the offense during the Change of Plea Proceedings, thus the Court failed altogether to explain the elements and the Government prosecutor misstated the essential elements of both Counts of Indictment as to Count 1 and 2, and as a result, the court also failed to ascertain that there was an adequate factual basis for a plea of guilty to the charge. It should also be noted that the Government's Rule 11 Plea Agreement also **misstates** the elements of the offenses of his Indictment as to Count 1 and 2. (emphasis added).

During the plea colloquy, however, the Court instructed the Government prosecutor to read into the record the Rule 11 plea agreement in which entails the Government's recitation of the essential elements of the offenses at Count 1 and 2, but this information was **"incorrect".** Movant Simmons, Jr., argues that he received ineffective assistance of counsel when his former attorney permitted him to plead guilty to Count 1 and 2 based on this **"incorrect"** statement of the charges.

During a guilty plea hearing, the court must "inform the defendant of, and determine that the defendant understands, . . . the nature of each charge to which the defendant is pleading." Fed. R. Crim. P. 11 (b) (1) (G). Further, before entering judgment on a guilty plea, the court must "determine that there is a factual basis for the plea." Fed. R. Crim. P. 11 (b) (3). Here, the Court through Government prosecutor AUSA Janet L. Parker did not inform Movant Simmons, Jr. correctly of the elements of Count 1 and 2 of the Indictment, and as a result, the court did not advise

Movant Simmons, Jr. properly of the nature of those charges. Therefore, the Court did not accurately determine that there was a factual basis for Simmons, Jr. to plead guilty to those charges.

In the context of a postconviction action, these facts give rise to the question of whether Simmons, Jr.'s counsel was ineffective in failing to point out to his client the court's errors. Thus, Movant Simmons, Jr., contends to be allowed to withdraw his guilty plea on the basis of ineffective assistance of counsel, he must show (1) his attorney's performance was deficient, and (2) he was prejudiced by his attorney's deficient performance, see McMullen, 86 F.3d at 137.

Deficient performance by counsel

Movant Simmons, Jr., states that his guilty plea was not knowing, intelligent and voluntary, given his counsel's advice or lack of advice regarding the proper elements of the offenses to which he was pleading guilty.

Because it waives numerous constitutional rights, a guilty plea must be knowing, intelliegnt, and voluntary. See Boykin v. Alabama, 395 U.S. 238, 242 (1969). A guilty plea must represent a volutary and intelligent choice among the various options available to the defendant. See North Carolina v. Alford, 400 U.S. 25, 31 (1970).

A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. See Henderson v. Morgan, 426 U.S.

637, 645-46 n. 13 (1976). A plea is involuntary if the defendant did not receive "real notice of the true nature of the charge against him." See Smith v. O'Grady, 312 U.S. 329, 334 (1941); and Ivy v. Caspari, 173 F.3d 1136, 1141-42 (8th Cir. 1999). See also, Bousley v. United States, 523 U.S. 614, 618 (1998) (plea cannot be intelligent unless defendant receives "real notice of the true nature of the charges against him, the first and most universally recognized requirement of due process.'"). (emphasis added).

The Court allowed the Government prosecutor who presented the Rule 11 plea agreement in which obtained the essential elements, however the Court did not correct nor did Simmons, Jr.'s counsel correct the **"incorrect"** statement of the elements as to Count 1 and 2, of his Indictment, thus Movant Simmons, Jr.'s ex-lawyer failure to object during the plea hearing by failing to advise Mr. Simmons, Jr. properly of elements of the charges to which he was pleading guilty. As a result, Movant Simmons, Jr. was not on notice of, and did not understand, the true nature of Count 1 and 2, with the result that he was unable to make an intelligent and informed decision to waive his right to trial and enter a plea of guilty to the charges.

Furthermore, Movant Simmons, Jr., asserts that the admissions made during the plea hearing were the result of ineffective advice of counsel. "A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed, self-determined choice if the accused relies upon counsel who performed ineffectively in advising him." Hawkman v. Parratt, 661 F.2d 1161, 1170 (8th Cir.

1981) (citing United States ex rel. Healey v. Cannon, 553 F.2d 1052, 1056 (7th Cir. 1977)). (emphasis added).

Movant Simmons, Jr., contends here Movant's ex-lawyer did not review the elements of Count 1 and 2 carefully, or he would have recognized that the Government's Rule 11 Plea Agreement was wrong and the Court through the Government prosecutor had advised Mr. Simmons, Jr. **incorrectly** as to the elements of the charges. As a result, Movant's attorney did not explain the elements of Counts 1 and 2 properly to Simmons, Jr., and Movant Simmons, Jr. did not receive effective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 62, 106 S. Ct. 366, 372, 88 L. Ed. 2d 203 (1985) (attorney's failure to inform client accurately as to relevant law "clearly satisfied the first prong of the Strickland analysis . . . [and] such an omission cannot be said to fall within "the wide range of professionally competent assistance' demanded by the Sixth Amendment.") (quoting Strickland, 466 U.S. at 690, 104 S. Ct. at 2066).

Therefore, Movant Simmons, Jr., argues firmly that he has satisfied the performance prong of the Strickland test.

Actual Prejudice

Movant Simmons, Jr., states that he must now establish prong two that he was prejudiced by his counsel's deficient performance. When challenging a guilty plea on the ground of ineffective assistance of counsel, to establish prejudice the defendant also must show there is a reasonable probability that, but for the errors of counsel, he would not have pled guilty

and would have proceeded to trial. Hill, 474 U.S. at 59, 106 S. Ct. at 370. Here, Movant Simmons, Jr., must show that if his attorney (and the Court) had explained the elements of Count 1 and 2 properly, he would not have pled guilty to the charges, but would have proceeded to trial.

Movant Simmons, Jr., argues firmly that actual prejudice exist as the result had his ex-lawyer Attorney Crawford properly advised him of the essential elements of Counts 1 and 2, he would not have decided to end his jury trial and accept the Government's Plea Agreement, thus his sworn Affidavit swears and declares that absent his ex-lawyer's 'deficient performance', he would have not pleaded guilty and would have insisted on going to trial, see **Hill**, 474 U.S. 52, 59 (1985). The U.S. Supreme Court in Lee v. United States, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), the Court noted that likelihood of success at trial was a strong indicator whether a defendant would plead guilty, but also concluded that "where [a court is] . . . asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking." id. at 1966-67. The Supreme Court in **Lee** also explained that "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pled but for his attorney's deficiencies[,]" and that they "should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." id. at 1967.

Therefore, Movant Simmons, Jr., argues firmly that actual prejudice exist in the case herein because he would not have ended his jury trial absent Attorney Crawford's misadvisement to do so, therefore Mr. Simmons, Jr. has shown a "reasonable probability that, but for [his] counsel's errors, he would not have pled guilty and would have insisted on going to trial." See **Hill**, 474 U.S. at 59 (1985). (emphasis added).

Thus, Movant Simmons, Jr., contends that a prompt evidentiary hearing should be conducted to permit him to fully develop his colorable claim raised within Ground Two in the case herein.

GROUND THREE:

Movant Simmons, Jr., states that his counsel provided him ineffective assistance of counsel by failing to file a Motion To Dismiss Count One and Two of his indictment for failing to state an offense, thus violating his Fifth Amendment Grand Jury Clause Rights and Sixth Amendment Rights; and furthermore absent his counsel's 'deficient performance' RonRico Simmons, Jr. would not have plead guilty, however insisted on going to jury trial, thus his Sixth Amendment Rights were violated in the matter herein.

Standard of Review

The **Hill** Court found in the plea bargaining context, a petitioner seeking to establish ineffective assistance of counsel must demonstrate that: (1) Counsel's advice and performance fell below an objective standard of reasonableness; and (2) The Petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial. **Hill,** 474 U.S. 52, 59 (1985).

Statement of Facts

On October 08, 2014, Movant Simmons, Jr.'s two-count Indictment was handed down by the Grand Jury and the Court appointed Asst. Federal Public Defender Judith Gracey to represent Movant Simmons, Jr., thus the Court ordered all pre-trial motions to be filed no later than October 20, 2015. However, Movant Simmons, Jr., contends that the Court allowed retained counsel to file Apperance and replace Asst. Federal Public Defender Judith Gracey on October 27, 2015. Thus, the Court ordered that all motions due by January 4, 2016, after Attorney Alan Crawford filed his Appearance thereto.

Movant Simmons, Jr., asserts that no pre-trial Motion To Dismiss Indictment for failure to state an offense was filed by his ex-lawyer, thus as the result of Count One and Two of Mr. Simmons, Jr.'s Indictment are fatally defective and must be dismissed, thus Attorney Crawford failure to file pre-trial Motion To Dismiss amounted to 'deficient performance' establishing the first prong of **Hill.**

Therefore, Movant Simmons, Jr., argues firmly that absent Attorney Crawford's 'deficient performance' by failing to file Motion To Dismiss Indictment, therefore his defective Indictment would have been dismissed with or without prejudice, thus actual prejudice exist in violation of his Sixth Amendment Rights pursuant to the U.S. Constitution.

Reasons To Justify Granting Relief As To Ground Three

The Sixth Amendment guarantees "reasonably effective" legal assistance. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To show ineffective assistance, the two-prong Hill v. Lockhart test in the plea bargaining context, thus he must demonstrate that:

(1) Counsel's advice and performance fell below an objective standard of reasonableness;

Rule 7 (c) (1) of the Federal Rules of Criminal Procedure requires that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." An indictment need only contain those facts and elements of the alleged offense necessary to inform the accused of the charge so that he or she may prepare a defense in the present case. See United States v. Davis, 184 F.3d 366, 367, 371 (4th Cir. 1999), and invoke the Double Jeopardy Clause in future prosecutions based on the same conduct. See Valentine v. Konteh, 395 F.3d 626, 631 (6th Cir. 2005). An indictment is not sufficient if it fails to state a material element of the offense. See United States v. Landham, 251 F.3d 1072, 1082 (6th Cir. 2001) (indictment charging violation of 18 U.S.C. § 875 (c) insufficient because indictment omitted 2 or 3 essential elements of claim); and United States v. Pickett, 353 F.3d 62, 67 (D.C. Cir. 2004) (indictment charging violation 18 U.S.C. § 1001 for making false statements and misrepresentations regarding matter within Executive's jurisdiction insufficient because indictment omitted essential element of crime).

"An indictment is sufficient if it contains the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy." U.S. v. Awad, 551 F.3d 930, 935 (9th Cir. 2009). "[A]n indictment's complete failure to recite an essential element of the charged offense is . . . a fatal flaw requiring dismissal of the indictment." United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999). "The test for Sufficiency of the indictment is not whether it could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." Awad, 551 F.3d at 935 (9th Cir. 2009).

Movant Simmons, Jr.'s conviction should be **VACATED** after he is permitted to withdraw his guilty plea based upon ineffective assistance of counsel because his Count 1 and 2 of the Indictment fails to ensure that he was prosecuted only "on the basis of the facts presented to the grand jury . . . ." United States v. Rosi, 27 F.3d 409, 414 (9th Cir. 1994). At common law, "the most valuable function of the grand jury was . . . to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony. . . ." Hale v. Henkel, 201 U.S. 43, 59, 50 L. Ed. 652, 26 S. Ct. 370 (1906). Incorporated into the Fifth Amendment thus requires that a defendant be convicted only on charges considered and found by a grand jury. See United States v. Hooker, 841 F.2d 1225, 1230 (4th Cir. 1988).

Failing to enforce this requirement would allow a court to "guess as to what was in the minds of the grand jury at the time they returned the indictment . . . ." United States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979) (citing Russell v. United States,

369 U.S. 749, 770, 8 L. Ed. 2d 240, 82 S. Ct. 1038 (1962)). Such guessing would "deprive defendant of a basic protection that the grand jury was designed to secure," by allowing a defendant to be convicted "on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." Id. (citing Russell, 369 U.S. at 770).

Thus, Movant Simmons, Jr., asserts that this Honorable Court may only guess whether the grand jury received evidence of, and actually passed on Simmons, Jr.'s **intent.** This Honorable Court may never know if the grand jury would have been wiling to ascribe criminal **intent** to RonRico Simmons, Jr.. See Stirone v. United States, 361 U.S. 212, 217, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960) (no court may "know" what the grand jury "would have been willing to charge"). Refusing to reverse in such a situation would impermissibly allow conviction on a charge never considered by the grand jury. Stirone, 361 U.S. at 219. See also, United States v. Miller, 471 U.S. 130, 139-140 (1985).

Movant Simmons, Jr., argues that his conviction must be **VACATED** because his indictment lacks a necessary allegation of **criminal intent** as to Count 1 and 2 of his Indictment, and as such does not "properly allege an offense against the United States." See United States v. Morrison, 536 F.2d 286, 289 (9th Cir. 1976); and United States v. Carll, 105 U.S. 611, 613 (1881) (such indictment fails to charge defendant with any crime).

Movant Simmons, Jr., contends that his Indictment at Count 1 and 2, is fatally defective, see Exhibit B (A copy of RonRico Simmons, Jr.'s Two-Count

Indictment, see Doc. # 1, Filed 10/08/14). Mr. Simmons, Jr., asserts that Count 1 of his Indictment is fatally defective as the result of it omitting the essential element in which is required to sustain an conviction for drug trafficking conspiracy conviction under 21 U.S.C. § 846, see United States v. Randolph, 794 F.3d 602, 608-09 (6th Cir. 2015) (To sustain a drug trafficking conspiracy conviction under 21 U.S.C. § 846, the government must have proved (1) an agreement to violate drug laws; (2) knowledge and **intent to join the conspiracy;** and (3) participation in the conspiracy. 21 U.S.C. § 841 (a) (1) makes it unlawful for any person to knowingly or intentionally manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.), thus Count 1, omits essential element number 2 **"intent",** thus because it lacks a necessary allegation of criminal intent it does not "properly allege an offense against the United States," see United States v. Morrison, 536 F.2d 286, 289 (9th Cir. 1976); and Carll, 105 U.S. at 613 (1881). (emphasis added).

Movant Simmons, asserts that his Indictment at Count 2, is fatally defective as the result of it omitting the essential element of **"knowingly"** and fails to charge **"for the purpose of",** thus these are essential elements of Knowingly maintain any place for the purpose of distributing a controlled substance, therefore the Sixth Circuit has held to sustain a conviction pursuant to 21 U.S.C. § 856 (a) (1), see United States v. Russell, 595 F.3d 633, 642-43 (6th Cir. 2010) (To convict a defendant under 21 U.S.C. § 856 (a) (1) for maintaining a premises for drug-related purposes, the government must prove beyond

a reasonable doubt that he (1) **knowingly,** (2) maintained any place, whether permanently or temporarily, (3) **for the purpose of** distributing a controlled substance.), thus Count 2, omits essential element number 1 **"knowingly"** and fails to charge an essential aspect of element number 3, therefore it lacks a necessary essential element of the charged offense, thus a fatal flaw requiring dismissal of the indictment as to Count Two, see United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999). (emphasis added).

Therefore, Movant Simmons, Jr., argues firmly that his ex-lawyer Attorney Crawford's representation fell below an objective standard of reasonableness by failing to file a Motion To Dismiss Indictment as to Count 1 and 2, see **Hill,** 474 U.S. 52, 62 (1985).

Actual Prejudice

Movant Simmons, Jr., contends that he must now establish prong two that he was prejudiced by his counsel's deficient performance. When challenging a guilty plea on the ground of ineffective assistance of counsel, to establish prejudice the defendant also must show there is a reasonable probability that, but for the errors of counsel, he would not have pled guilty and would have proceeded to trial. **Hill,** 474 U.S. at 59, 106 S. Ct. at 370. Here, Movant Simmons, Jr., must show absent his ex-lawyer's 'deficient performance' he would not have pled guilty to the charges, however insisted on proceeding to trial.

Movant Simmons, Jr., argues firmly that actual prejudice exist as the result had his ex-lawyer Attorney Crawford filed a pre-trial Motion To Dismiss

Indictment as to Ct. 1 and 2, he would not have decided to end his jury trial and accept the Government's Plea Agreement, thus his sworn Affidavit swears and declares that absent counsel's 'deficient performance', he would have not pleaded guilty and would have insisted on going to trial, see **Hill**, 474 U.S. 52, 59 (1985). Furthermore, Movant Simmons, Jr., argues firmly that consistent with the U.S. Supreme Court's Ruling in **Lee,** therefore because RonRico Simmons, Jr. was deprived altogether of his Sixth Amendment Right to proceed to trial, thus he is entitled to relief, see **Lee,** 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017).A prompt evidentiary hearing should be conducted to fully develop his colorable Ground Three claim of ineffective assistance of counsel in the case at bar.

GROUND FOUR:

Movant Simmons, Jr., argues firmly that his ex-lawyer provided him with ineffective assistance of counsel during the sentencing phase by failing to investigate his prior convictions and research the law in reference to applying § 5G1.3 (d) to impose a concurrent or partially concurrent sentence to his undischarged term of imprisonment, thus counsel's performance during the sentencing phase violated his Sixth Amendment Rights of the U.S. Constitution, therefore his 190-month sentence should be **VACATED** in the case at bar.

Standard of Review

The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions. See Yarborough v. Gentry, 540 U.S. 1, 5 (2003). To obtain vacatur of a sentence, the defendant must prove that (1) counsel's performance "fell below an objective standard of reasonableness," see Strickland, 466 U.S. 668, 687-88 (1984); and (2) counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome in the proceeding. See Strickland, 466 U.S. at 687, 691-92 (1984). However, during the sentencing phase, thus actual prejudice exist as there is a reasonable probability absent counsel's 'deficient performance' petitioner's sentence would have been shorter, see Glover v. United States, 531 U.S. 198, 201, 204 (2001).

Statement of Facts

Movant Simmons, Jr., asserts that on May 28, 2015, the U.S. Magistrate Judge Morris issued a Writ of

Habeas Corpus ad Prosequendum to produce the body of Mr. Simmons, Jr. from MDOC custody as he was serving time on a parole violation. It should be noted that page 19, Para. # 74, under Sentencing Options the USPO Marvin J. Burns within Movant Simmons, Jr.'s PSI Report states that his sentence should be imposed consistent with § 5G1.3 (d).

Movant Simmons, Jr., contends that his ex-lawyer provided him with 'deficient performance' by failing to investigate prior convictions and research the law in regards to § 5G1.3 (d), thus counsel's failure to raise this claim at Movant Simmons, Jr.'s sentencing hearing amounted to 'deficient performance,' thus absent such 'deficient performance' there is a reasonable probability that this Court would have applied the application of U.S.S.G. § 5G1.3 (d), imposing an concurrent or partially concurrent sentence to Simmons, Jr.'s undischarged term of imprisonment, therefore there is a reasonable probability that the sentence would have been shorter actual prejudice exist in violation of his Sixth Amendment Rights pursuant to the U.S. Constitution.

Reasons To Justify Granting Relief As To Ground Four

The Sixth Amendment guarantees "reasonably effective" legal assistance. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To show ineffective assistance the first prong requires Movant Simmons, Jr. to prove as follows:

(1) counsel's representation fell below an objective standard of reasonableness;

In the instant case, Movant Simmons, Jr., asserts that a thorough review of the Sentencing Transcripts reveal that Movant's ex-lawyer Attorney Crawford never requested that the Court apply the application of U.S.S.G. § 5G1.3 (d), to his federal sentence to run it concurrent or partially concurrent to his undischarged term of imprisonment in fact the Presentence Investigation Report acknowledges that this option was in fact available, see PSR at page 19, Para. # 74, which states as follows: "Docket Number 10-232454-FH under paragraph 51 is pending sentencing; therefore, pursuant to § 5G1.3 (d), any case involving an undischarged term of imprisonment may have the sentence for the instant offense be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense."

It should be noted that Mr. Simmons, Jr. was borrowed from the Michigan Department of Corrections by way of a Writ of Habeas Corpus ad Prosequendum issued by U.S. Magistrate Judge Morris on May 28, 2015, as he was serving a sentence for parole violation caused by the federal Indictment for the instant offense. Thus, Movant Simmons, Jr. in fact had two state charges in which were undischarged term of imprisonments, however neither was brought to the attention of the Court to request a concurrent or partially concurrent sentence to be imposed in fact for the parole violation a "downward departure" was warranted under U.S.S.G. § 5G1.3 (c), see U.S. v. Newby, 13 Fed. Appx. 324, 326 (6th Cir. 2006) (The Sixth Circuit has recognized that a district court has authority to depart from the

Guidelines under § 5G1.3 (c) to recognize the amount of time served without running afoul of the BOP's exclusive authority under 18 U.S.C. § 3621 (a)).

The U.S. Probation Officer recognized that consistent with § 5G1.3 (d), that Simmons, Jr.'s federal sentence could be ran concurrently, partially concurrently, or consecutively to his prior "future" state sentence. However, the U.S. Supreme Court has held that a district court has full discretion to order a defendant's federal sentence to run concurrent to an anticipated "future" state sentence, see Setser v. United States, 566 U.S. 231, 132 S. Ct. 1463, 182 L. Ed. 2d 455 (2012) ("it is within a district court's discretion to order a defendant's federal sentence to run consecutively or concurrently to an anticipated state sentence.").

Thus, Movant Simmons, Jr., argues firmly that his 190-month sentence was "substantively unreasonable" as the result of this Honorable Court's failure to consider the recommendations of the Guidelines and the pertinent policy statement (U.S.S.G. § 5G1.3 (c) & (d)), see 18 U.S.C. § 3553 (a) (4) & (5)(requiring consideration of recommended sentencing range and pertinent policy statements); U.S.S.G. § 5G1.3 (c) & (d)) (policy statement); see United States v. Williams, 432 F.3d 621, 623-24 (6th Cir. 2005) (noting the significance of the district court's reliance on pertinent policy statements). The District Court's must also consider 18 U.S.C. § 3584, imposition of a concurrent or consecutive sentence. See 18 U.S.C. § 3553 (a) (3) (requiring consideration of the "kinds of sentences available").

Therefore, Movant Simmons, Jr., argues that his sentence is "substantively unreasonable" and therefore illegal. See Rita v. United States, 551 U.S. 338, 372 (2007).

Movant Simmons, Jr., argues firmly that his ex-lawyer provided him with 'deficient performance' by failing to investigate prior and pending convictions; research the relevant law as to U.S.S.G. § 5G1.3 (c) & (d) and failing to request within his Sentencing Memorandum and at his federal sentencing to a "downward departure" under U.S.S.G. § 5G1.3 (c) as to the parole violation based upon federal offense; and a concurrent or partially concurrent sentence pursuant to U.S.S.G. § 5G1.3 (d) for the pending state case identified at PSR, page 19, Para. # 74, thus establishing the first prong of the **Strickland**, 466 U.S. 668, 687 (1984).

Furthermore, Movant Simmons, Jr., argues firmly that actual prejudice exist as there is a reasonable probability that Movant Simmons, Jr.'s sentence would have been lesser absent his ex-lawyer's 'deficient performance', thus he has established prejudice, see Glover v. United States, 531 U.S. 198, 148 L. Ed. 2d 604, 121 S. Ct. 696 (2001) (holding that any reduction in sentence constitutes substantial prejudice for purposes of Strickland analysis). In this case Mr. Simmons, Jr. received 0 days pre-trial detention credit and his federal sentence did not commence on the federal sentencing date of August 31, 2016, however as the result of Movant Simmons, Jr. being borrowed from the M.D.O.C. and then having to serve roughly 9 months in Wayne County Jail for the pending felony case, thus his federal sentence did not commence until September 27, 2017.

Therefore, Movant Simmons, Jr., argues that there is a reasonable probability that absent counsel's 'deficient performance' his 190-month sentence would have been between 27 mos. & 29 days or 12 mos. & 27 days lesser, thus actual prejudice exist in violation of his Sixth Amendment Rights pursuant to the U.S. Constitution. See Blount v. United States, 330 F. Supp. 2d 493 (E.D. Pa., 2004) (Defense counsel provided Blount with ineffective assistance of counsel by failing to seek a downward departure pursuant to U.S.S.G. Section 5G1.3, when the federal indictment was returned, Blount was serving a Pennsylvania state sentence of two to five year and a Philadelphia County sentence of eleven to twenty-three months on unrelated charges. The Government conceded that counsel was ineffective and agreed the proper remedy was to re-sentence Blount.). (emphasis added).

RELIEF SOUGHT

WHEREFORE, Movant Simmons, Jr., respectfully request that this Honorable Court permit him to withdraw his guilty plea to cure his ineffective assistance of counsel Sixth Amendment violation, thus vacating his conviction as to Count One and Two, thus relief is sought as to Grounds Two and Three; Movant Simmons, Jr., request that his 190-month sentence is **VACATED** as to cure ineffectiveness received during the sentencing phase as to Ground Four; and as to Ground One **VACATE** his 190-sentence and order a limited re-sentencing to restore his right to appeal permitting him only to argue the 18 U.S.C. § 3553 (a) factors at re-sentencing.

Thus, Movant Simmons, Jr. **PRAYS** that any of the relief sought is **GRANTED** by this Honorable Court in the interests of **JUSTICE** in the matter herein.

Date: 8 / 8 / 18

Respectfully Submitted,

/s/ RonRico Simmons

Mr. RonRico Simmons, Jr.
#51225-039
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190

Certificate of Service

I, Ronrico Simmons, Jr., certify that on August, 8th, 2018, I mailed by First Class U.S. Mail the original copy of my pro se Memorandum Of Law In Support Of Granting Movant's 2255 Motion and two copies to this Honorable Court at the said address listed below herein:

Clerk of the Court
U.S. District Court
1000 Washington Avenue
Room 304
Bay City, MI. 48708

Date: 8 / 8 / 18

Respectfully Submitted,
/s/ RonRico Simmons
Mr. RonRico Simmons, Jr.
pro se Movant

EXHIBIT A (A copy of the DOJ's Memorandum from Deputy U.S. Attorney General Cole dated October 14, 2014).

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 14, 2014

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Department Policy on Waivers of Claims of Ineffective Assistance of Counsel

As we all recognize, the right to effective assistance of counsel is a core value of our Constitution. The Department of Justice has a strong interest in ensuring that individuals facing criminal charges receive effective assistance of counsel so that our adversarial system can function fairly, efficiently, and responsibly. Accordingly, in recent years, the Department has made support of indigent defense a priority. We have worked to ensure that all jurisdictions — federal, state, and local — fulfil their obligations under the Constitution to provide effective assistance of counsel, especially to those who cannot afford an attorney.

When negotiating a plea agreement, the majority of United States Attorney's offices do not seek a waiver of claims of ineffective assistance of counsel. This is

true even though the federal courts have uniformly held a defendant may generally waive ineffective assistance claims pertaining to matters other than entry of the plea itself, such as claims related to sentencing. While the Department is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical, in order to bring consistency to this practice, and in support of the underlying Sixth Amendment right, we now set forth uniform Department of Justice policies relating to waivers of claims of ineffective assistance of counsel.

Federal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal. For cases in which a defendant's ineffective assistance claim would be barred by a previously executed waiver, prosecutors should decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when the defendant's ineffective assistance claim raises a serious debatable issue that a court should resolve.

As long as prosecutors exempt ineffective-assistance claims from their waiver provisions, they are free to request waivers of appeal and of post-conviction remedies to the full extent permitted by law as a component of plea discussions and agreements.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

RONRICO SIMMONS, JR.,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:14-cr-20628-TLL-PTM

Filed: March 5, 2019

SUPPLEMENTAL BRIEFING

COMES NOW, Ronrico Simmons, Jr., proceeding pro se Movant, moving this Honorable Court pursuant to 28 U.S.C. § 636, respectfully requesting that this Court issue Report and Recommendation to conduct a prompt Evidentiary Hearing or to deem Simmons, Jr.'s 2255 Motion timely via 2255 (f) (2), thus such should be granted based upon the foregoing:

Statement of Facts

On August 23, 2018, Movant Simmons, Jr.'s pro se Motion To Vacate 2255 was filed, see Doc. # 47; and on August 30, 2018, U.S. Magistrate Judge Patricia T. Morris ordered the Government to file a Response

Brief as to Doc. # 44 and # 45, thus also holding any Reply Brief is due in no later than October 4, 2018, by Movnat Simmons, Jr.. On September 20, 2018, the Government filed their Response Brief, see Doc. # 50 and # 51, however failed altogether to fully comply with the Court's Order by not addressing 2255 Motion and Memorandum of Law, see Doc. # 45. In the beginning of October of 2018, Movant Simmons, Jr. filed his pro se Reply Brief, however on Tuesday, October 30, 2018, U.S. Magistrate Judge Patricia T. Morris issued a Report And Recommendation to deny Movant's Motion to Grant Timeliness Of § 2255 Motion Under 28 U.S.C. § 2255 (f) (2); and that his 2255 Motion be denied as untimely. Movant Simmons, Jr. submitted his R. & R. Objections in mid-November of 2018; thereafter on February 04, 2019, the Honorable Thomas L. Ludington issued an Order Adopting Report And Recommendation In Part And Referring Motions To Magistrate Judge Patricia Morris to direct Supplemental Briefing, see Doc. # 56. On February 5, 2019, the U.S. Magistrate Judge Morris issued an Order Setting Briefing Schedule for the parties to file Supplemental Briefing on or before February 26, 2019, thus Movant Simmons, Jr. now files his Supplemental Brief with this Honorable Court in the matter herein.

Movant Simmons, Jr., respectfully request that this Magistrate Judge issue a Report and Recommendation to the District Court to conduct a prompt Evidentiary Hearing or to deem his 2255 Motion to be timely via 2255 (f) (2), in the matter herein. (emphasis added).

Movant Simmons, Jr.'s 2255 Motion Is Timely Via § 2255 (f) (2)

As a threshold matter, 28 U.S.C. § 2255 (f), requires that collateral attacks be timely.

To be timely, a § 2255 motion must be filed within one year of the latest of:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making 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 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). See Phillips v. United States, 734 F.3d 573, 580-81 (6th Cir. 2013).

Movant Simmons, Jr., contends that his 2255 Motion is **timely** pursuant to 28 U.S.C. § 2255 (f) (2), in the case herein. (emphasis added).

Movant Simmons, Jr., asserts that on August 31, 2016, he was sentenced by this Honorable Court to 190 months of imprisonment, however after his federal sentencing he was taken into M.D.O.C. custody; and thereafter placed in Wayne County Jail.

On **September 27, 2017,** Movant Simmons, Jr. was committed to the Federal Bureau of Prisons custody, see Exhibit A (A copy of Sentencing Monitoring Computation Data Sheet dated November 29, 2017), thus prior to that date Mr. Simmons, Jr. had **no access to a law library** (with federal case law and ADEPA statute of limitations period); 2255 Petition; his legal materials or the Rules Governing 2255 Proceedings, thus Movant Simmons, Jr., argues firmly that these obstacles were an impediment to the filing of his 2255 collateral attack; and an prompt evidentiary hearing is warranted to fully develop that his 2255 Motion is timely via 2255 (f) (2), see Estremera v. United States, 724 F.3d 773, 776-77 (7th Cir. 2013) (As to 28 U.S.C. § 2255 (f) (2), lack of library access can, in principle, be an impediment to the filing of a collateral attack. The Seventh Circuit **VACATED** the District Court's denial under § 2255 (f) (2); and remanded the case for an evidentiary hearing to determine whether his 2255 Motion To Vacate was timely via 28 U.S.C. § 2255 (f) (2)). (emphasis added).

"Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/ or the Fourteenth Amendment." Chappell v. Rich, 340 F.3d 1279, 1282 (11th Cir. 2003). "The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72 (1977).

However, "[t]he mere inability of a prisoner to access the law library is not, in itself, an unconstitutional impediment." Akins v. United States, 204 F.3d 1086, 1090 (11th Cir. 2000). Rather, "[t]he inmate must show that this inability caused an actual harm, or in other words, unconstitutionally prevented him from exercising that fundamental right of access to the courts in order to attack his sentence or to challenge the conditions of confinement." That is, a prisoner may demonstrate actual injury by establishing that prison officials' actions actually deterred his pursuit of a "non-frivolous post-conviction claim or civil rights action." See Al-Amin v. Smith, 511 F.3d 1317, 1332-33 (11th Cir. 2008).

In the instant case, Movant Simmons, Jr., asserts that he was in M.D.O.C. custody at the time he was indicted, thus he borrowed from the M.D.O.C. on May 28, 2015, so after his federal sentencing he was rightfully returned to M.D.O.C. custody, however after being paroled from the M.D.O.C. after returning there after his federal sentencing hearing but instead of returning to federal custody to began service of Simmons, Jr.'s 190-months of imprisonment he was taken into custody by the Wayne County Sheriff's Office to serve 1 year in Wayne County Jail. Mr. Simmons, Jr.'s 190-month federal sentence means a continuous sentence, unless interrupted by. . . some fault of the prisoner, and he cannot be required to serve it in installments. See Weekes v. Fleming, 301 F.3d 1175, 1179 (10th Cir. 2002). (emphasis added). The U.S. Marshal's Service should have taken custody of Movant's person after he was paroled out from M.D.O.C. custody to began service of his 190-month federal sentence, however there **failure to do so**

created an **impediment** which caused Mr. Simmons, Jr. to be held in Wayne County Jail for 1 additional year merely having accessing to **state law** while being housed at Wayne County Jail having no access to a federal law library, his legal materials, ADEPA statute of limitations, Rules Governing 2255 Proceedings, and the aid of legal assistance in which is available at every federal institution in the country and where Mr. Simmons, Jr. is currently housed at FCI-Milan in Milan, Michigan. (emphasis added).

Movant Simmons, Jr., attaches the Sworn Affidavit attached to his Reply Brief of Ronrico Simmons, Jr. and FCI-Milan Law Clerk Benjamin P. Foreman, see Exhibit B (A copy of Ronrico Simmons, Jr.; and Affidavit of Benjamin P. Foreman), thus these Affidavits must be taken as **true,** see Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Moreover, Movant Simmons, Jr., asserts that the Government presented as Exhibit C, the declaration of Wayne County Jail Sergeant Edith n once this impediment was "removed" by restoration of access. The United States offers two responses: first, that lack of library access never supports a reset of the time under § 2255 (f) (2); second, that Estremera's prison offered electronic access to persons in the special management unit, so there was no obstacle. Unfortunately, the record does not demonstrate what sort of electronic access was available and whether it was enough for any particular prisoner. Estremera is literate in English, but we don't know whether he would be competent to use Westlaw or Lexis without assistance. Librarians and experienced prisoners help inmates use physical law libraries; this record does not tell us whether electronic access was an adequate substitute. So the

second argument is premature. Thus, the Seventh Circuit held in **Estremera** that the lack of library access can, in principle, be an **"impediment"** to the filing of a collateral attack. The Seventh Circuit reversed 2255 denial petition and remanded for a prompt evidentiary hearing); and other federal circuit courts have held that a prison law library's failure to provide a copy of the AEDPA constitutes an unconstitutional impediment for purposes of 28 U.S.C. § 2244 (d) (1) (B), see Egerton v. Cockrell, 334 F.3d 433, 439 (5th Cir. 2003); and Whalem v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (Reversed and remanded for a prompt evidentiary hearing as to the unavailability of AEDPA in the prison law library was an "impediment" to filing an application, see 28 U.S.C. § 2244 (d) (1) (B)). (emphasis added).

Therefore, Movant Simmons, Jr., argues firmly that he is entitled to a prompt evidentiary hearing to fully develop the record as to the timeliness of 2255 Motion via § 2255 (f) (2), in light Mills in which states that Ronrico Simmons, Jr. was incarcerated at the Wayne County Jail, he had access to the Wayne County Jail law libraries, see ECF No. 50-4 filed 09/20/18 PageID. 313 Page 1 of 1, however Movant Simmons, Jr. will testify to consistent with his Supplemental Affidavit attached herein as Exhibit B, that the Wayne County Jail law library offers "no federal law" or "federal forms" as Mr. Simmons, Jr. needed the ADEPA statute of limitation; Rules Governing 2255 Proceedings; Legal Materials, and a computer that accesses federal law cases also the guidance of a experienced Law Clerk in which is available at every federal Law Library at FBOP facilities, thus while

being housed at Wayne County Jail was an **"impediment"** to the filing of his 2255 Petition, thus the such impediment was **removed** on as early as Ronrico Simmons, Jr.'s arrival at FDC-Milan on **August 29, 2017** or when the F.B.O.P. Sentence Computation Data Sheet reflects that Mr. Simmons, Jr. was actually **committed** on **September 27, 2017,** see Exhibit A. Thus, Movant Simmons, Jr., states that his 2255 Motion was filed on **August 13, 2018,** therefore either starting the statute of limitations period via § 2255 (f) (2), from August 29, 2017 or September 27, 2017, on either date Movant's 2255 Motion has been timely submitted via 28 U.S.C. § 2255 (f) (2), in the matter herein. A prompt evidentiary hearing is warranted in the case herein, see Estremera v. United States, 724 F.3d 773, 777-78 (7th Cir. 2013) (In Estremera he argued that he was entitled a new one-year clock via § 2255 (f) (2), thus as the result Estremera being in "special management unit" and could not use its law library. He characterizes the lack of library access between June 2008 and July 2009 as an **"impediment"** of the government's creation and contends that a new one-year period began of the governmental **"impediment"** that occurred in the matter herein which entitles him to reset clock to begin on August 29, 2017; or September 27, 2017, thus rendering his 2255 Motion timely via 2255 (f) (2), when filed on **August 13, 2018.** (emphasis added).

CONCLUSION

In conclusion, Movant Simmons, Jr., concludes that this Honorable Court should either recommend within it's Supplemental Report and Recommendation that

Movant's 2255 Motion is timely via § 2255 (f) (2); or alternatively **GRANT** a prompt evidentiary hearing to fully develop the record as to an governmental "impediment", thus timely via § 2255 (f) (2), in the case herein.

Date: 02/24/19

Respectfully Submitted,

/s/ RonRico Simmons

Mr. RonRico Simmons, Jr.
#51225-039
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190

Certificate of Service

I, Ronrico Simmons, Jr., certify that on February, 24th, 2019, I mailed by First Class U.S. Mail the original copy of my pro se Supplemental Brief to this Honorable Court and one copy to the opposing party listed below herein:

AUSA Janet Parker
U.S. Attorney's Office
101 First Street, Ste. 200
Bay City, MI. 48708-5747

Date: 02/24/19 /s/RonRico Simmons
Mr. Ronrico Simmons, Jr.
pro se Movant

NOTE: I, Ronrico Simmons, Jr., swear and declare under penalties of perjury that, I handed over my pro se Supplemental Brief to the FCI-Milan prison officials on **Sunday,** February 24, 2019, for mailing to this Honorable Court and the opposing party listed above herein, thus pursuant to the **"Mail-Box Rule"** of the U.S. Supreme Court's Ruling in Houston v. Lack, 487 U.S. 266 (1988), thus my Supplemental Brief are considered filed and are timely submitted in the case herein.

Date: 02/24/19 /s/RonRico Simmons
Mr. Ronrico Simmons, Jr.
pro se Movant

EXHIBIT A (A copy of Sentencing Monitoring Computation Data Sheet dated November 29, 2017).

MILBA 540*23 * **SENTENCE MONITORING**
PAGE 001 * **COMPUTATION DATA**
AS OF 11-29-2017

* 11-29-2017
* 09:30:37

REGNO..: 51225-039
NAME: SIMMONS, RONRICO JR

FBI NO .....: 643240EB5
ARS1 .....: MIL/A-DES
UNIT.....: F UNIT
DETAINERS .....: NO

DATE OF BIRTH: 03-23-1980 AGE: 37

QUARTERS.....: F02-012U
NOTIFICATIONS: NO

HOME DETENTION ELIGIBILITY DATE: 12-10-2030

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S CURRENT COMMITMENT. THE INMATE IS PROJECTED FOR RELEASE: 06-10-2031 VIA GCT REL

-----CURRENT JUDGMENT/WARRANT NO: 010-----

COURT OF JURISDICTION.....: MICHIGAN, EASTERN DISTRICT
DOCKET NUMBER.....: 14-CR-20628-01

JUDGE.....: LUDINGTON
DATE SENTENCED/PROBATION
IMPOSED .....: 08-31-2016
DATE COMMITTED.....: 09-27-2017
HOW COMMITTED.....: US DISTRICT COURT COMMITMENT
PROBATION IMPOSED..... NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	$200.00	$00.00	$00.00	$00.00

RESTITUTION...: PROPERTY:

NO SERVICES: NO

AMOUNT: $00.00

----------CURRENT OBLIGATION NO: 010----------

OFFENSE CODE.....: 391
OFF/CHG: 21:846 CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE AND TO DISTRIBUTE ONE KILOGRAM OR MORE OF HEROIN, CT 1. 21:856(A)(1) WILLINGLY CAUSING OTHERS TO MAINTAIN DRUG HOUSE, CT 2.

SENTENCE PROCEDURE .....:3559 PLRA SENTENCE
SENTENCE IMPOSED/
TIME TO SERVE .....: 190 MONTHS
TERM OF SUPERVISION .....: 5 YEARS
DATE OF OFFENSE .....: 08-01-2012

EXHIBIT B (A copy of Ronrico Simmons, Jr.; and Affidavit of Benjamin P. Foreman).

Affidavit of Ronrico Simmons, Jr.

I, Ronrico Simmons, Jr., swear and declare under the penalties that my statements below herein are true to the best of my knowledge, information and belief.

This is a Supplemental Affidavit to support my 2255 (f) (2) motion and establish an entitlement to a prompt Evidentiary Hearing in this matter.

1. While at the Wayne County Jail, I merely had access to state law, however as the result of me being convicted in federal court state law was of no benefit to me.

2. Although I did arrive at FDC-Milan on August 29, 2017, and was there for several weeks "if" you review my Exhibit A, Doc. # 44, BOP Computation Sheet clearly lists my commitment as September 27, 2017; and the FDC-Milan does not actually have a Law Library, however merely a Law Library computer within the Housing Unit itself, thus there is no experienced Law Clerks or any Law Clerks to aid and guide me so for me that made it rough to begin legal research not having "any idea" where to start.

3. Upon arrival at FCI-Milan, I quickly visited the Law Library and I met Law Clerk Benjamin P. Foreman and he guided me and helped me to navigate the federal Law Library and what I needed to prepare a 2255 Motion from getting legal forms to ordering Transcripts.

4. I did not have the opportunity and access to a federal Law Library and assistance until **September 27, 2017**, thus pursuant to 28 U.S.C. § 2255 (f) (2), the

impediment was removed on that date, however alternatively the impediment was removed on August 29, 2017, when the new clock began under 2255 (f) (2), therefore in either instance my 2255 Motion is timely via 2255 (f) (2), thus a prompt Evidentiary Hearing is required to resolve the timeliness claim in the matter herein.

I, Ronrico Simmons, Jr., declare and certify under penalty of perjury under the laws of the United States of America pursuant to 28 U.S.C. § 1746 (1) that the foregoing is true and correct.

Executed on October, 3, 2018

Respectfully Submitted,

/s/ RonRico Simmons

Mr. RonRico Simmons, Jr.
#51225-039
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190

Affidavit of Benjamin P. Foreman

I, Benjamin P. Foreman, swear and declare that my statements below herein are true to the best of my knowledge, information and belief.

This Affidavit is being submitted to tell the true factual aspects of my personal knowledge in reference to Ronrico Simmons, Jr. in reference to the timeliness of his 2255 Motion, thus a prompt Hearing is warranted.

1. I, have been a FCI-Milan Law Clerk since August of 2009; and before that I was a FCI-Gilmer Law Clerk in Glenville, West Virginia.

2. I, have helped 100's of federal prisoners navigate themselves through the federal Law Library system and aided them to obtain Transcripts and other federal documentation essential to fighting their criminal case via 2255 Motion.

3. I, being experienced Law Clerk at two federal facilities for over a decade I can honestly say that very few guys could navigate themselves through the Law Library system without the guidance of me or our other Law Clerk Mr. Bennett so, I can totally understand how Movant Simmons, Jr. waited til he arrived at FCI-Milan to seek the aid of an experienced Law Clerk to help him.

4. At FDC-Milan the federal detention center there are no 2255 Petitions or other legal forms available, however the only way to obtain them is by contacting FCI-Milan Law Library Technician Ms. Harkness via cope-out in which usually takes 7 to 10 days to receive the legal forms you requested, however

the key is you have to know what you need and without the benefit of experienced Law Clerk or paralegal to aid Mr. Simmons, Jr. who knows nothing at all about federal law and how to research & identify errors rendered having the 2255 forms would have been of no benefit to him anyhow because of the (ADEPA); and the one-year statute of limitations in which restricts your filing to giving a federal prisoner one bite at the apple through 2255 Motion, thus your one shoot must be an exhaustion of every colorable issue that exist within Mr. Simmons, Jr.'s case so he had to proceed with precision and wisdom.

5. Within a week after Mr. Simmons, Jr. arrived at FCI-Milan he met me and I begin assisting him, however due to the backlog, I have for assisting other federal prisoners with their case and the time it took to get all his Transcripts and etc. he did not file his 2255 Motion until August of 2018, however consistent with 28 U.S.C. § 2255 (f) (2), it should be timely as the "impediment" was not removed til he was committed to the Federal Bureau of Prisons on September 27, 2017; or alternatively on August 29, 2017, in either event "if" the clock starts from either his 2255 Motion is timely and this Court should proceed to a Merits Determination as occurred in **Estremera**. (emphasis added).

I, Benjamin P. Foreman, declare and certify under penalty of perjury under the laws of the United States of America pursuant to 28 U.S.C. § 1746 (1) that the foregoing is true and correct.

Executed on October, 3rd, 2018.

Respectfully Submitted,

/s/ Benjamin P. Foreman

Mr. Benjamin P. Foreman
#12658-040
FCI-Milan
P.O. Box 1000
Milan, MI. 48160-0190