APPENDIX-A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 7, 2021
Lyle W. Cayce
Clerk

No. 18-40790

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JULIO CESAR CARDENAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:16-cv-00306

Before JOLLY, DUNCAN, and OLDHAM, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*:

The question presented is whether Julio Cardenas timely filed a motion to vacate his sentence under 28 U.S.C. § 2255. The district court held the motion was time-barred by the one-year limitations period in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). We affirm.

I.

The Government charged Julio Cardenas with various firearms and controlled-substance offenses. A jury found Cardenas guilty on all charges. The district court sentenced him to life imprisonment.

Cardenas appealed. We affirmed. *See United States v. Cardenas*, 606 F. App'x 246, 247 (5th Cir. 2015) (per curiam). The Supreme Court denied certiorari on October 19, 2015, *see Cardenas v. United States*, 577 U.S. 945 (2015) (mem.), then denied rehearing on December 7, 2015, *see* 577 U.S. 1045 (2015) (mem.).

Cardenas (through counsel) then sought post-conviction relief. On December 4, 2016, he filed a motion under 28 U.S.C. § 2255(a) seeking to vacate his conviction and sentence. Cardenas raised two arguments. First, he argued that the prosecuting attorney in his case had a conflict of interest. According to Cardenas, "[t]he Supreme Court's decision in *Young* [*v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987),] categorically forbids an interested person from controlling the defendant's prosecution." Second, Cardenas argued his counsel was ineffective for failing to object to the conflict of interest.

The Government moved to dismiss. It argued Cardenas's motion failed to comply with AEDPA's one-year limitations period, set forth in 28 U.S.C. § 2255(f). Specifically, the Government noted Cardenas's conviction became final on October 19, 2015, the day the Supreme Court denied his petition for writ of certiorari. The one-year limitations period of 28 U.S.C. § 2255 thus expired on October 18, 2016. And Cardenas filed his motion for relief under § 2255 on December 4, 2016, roughly 46 days after the limitations period expired. The Government further argued there was no basis to equitably toll the limitations period, and alternatively, that Cardenas's motion did not warrant relief on the merits.

Several months later, Cardenas's post-conviction counsel (William Mallory Kent) filed a motion to withdraw and took responsibility for the untimely filing. Kent had erroneously believed that a petition for rehearing on denial of certiorari tolled the statute of limitations. According to Kent,

"Mr. Cardenas was concerned that we had missed the deadline and I assured him we had not." Because of his mistake, and the failing health of his wife, Kent asked the court for leave to withdraw. A magistrate judge granted the motion.

Cardenas (through new counsel) filed a response to the Government's motion to dismiss. He argued equitable tolling should apply to his § 2255 motion because Kent intentionally misled him regarding the limitations period. In the alternative, Cardenas argued the district court should recharacterize at least one of his earlier *pro se* filings as a timely § 2255 motion.

The magistrate judge issued a report and recommendation that Cardenas's motion be dismissed as untimely, or alternatively, denied as meritless. Cardenas submitted objections to the report. The district court concluded the § 2255 motion was untimely and Cardenas was not entitled to equitable tolling or recharacterization of his *pro se* filings. Cardenas appealed.

II.

It's undisputed that Cardenas's § 2255 motion is untimely. The only question is whether he's entitled to equitable tolling or recharacterization of his *pro se* filings. We review the district court's determinations for abuse of discretion. *See Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (equitable tolling); *United States v. Elam*, 930 F.3d 406, 409 (5th Cir. 2019) (recharacterization). Under that standard, we review factual findings for clear error and legal conclusions *de novo*. *United States v. Lipscomb*, 299 F.3d 303, 338–39 (5th Cir. 2002).

A.

AEDPA's statute of limitations may be equitably tolled. *See Holland v. Florida*, 560 U.S. 631 (2010). A prisoner "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." *Id.* at 649 (quotation omitted). As a general matter, equitable tolling is warranted only in "rare and exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *see also United States v. Patterson*, 211 F.3d 927, 931–32 (5th Cir. 2020) (per curiam); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002).

Cardenas says he's entitled to equitable tolling because his attorney erred in calculating the AEDPA limitations period. That argument is squarely foreclosed by our precedent: "[A]n attorney's error or neglect does not warrant equitable tolling." *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002). That's because an "attorney is the prisoner's agent, and under well-settled principles of agency law, the principal bears the risk of negligent conduct on the part of his agent." *Maples v. Thomas*, 565 U.S. 266, 280–81 (2012) (quotation omitted).

Cardenas tries to avoid this result by arguing that his attorney intentionally deceived him. *See Wynn*, 292 F.3d at 230. But this case is a far cry from *Wynn*. Wynn's counsel falsely claimed to have "filed [a] § 2255 motion and that a copy of the motion would be forwarded to petitioner." *Id.* at 228. After the clerk's office told Wynn that no motion had been filed, his attorney again lied and claimed to have "filed the habeas corpus petition directly" with the sentencing court. *Id.* at 228–29. We agreed that "Wynn's allegation that he was deceived by his attorney . . . present[ed] a 'rare and extraordinary circumstance' beyond petitioner's control." *Id.* at 230. Even then, the case presented "a close question as to whether Wynn was put on notice to make further inquiry despite the representations made by his attorney." *Ibid.* We therefore remanded for further factual findings as to "the reasonableness of Wynn's reliance of his attorney's representations and advice." *Ibid.*

Compare that case to *Riggs*. There, a federal prisoner sought to challenge his conviction under 18 U.S.C. § 924(c) for using a firearm during a drug-trafficking crime. 314 F.3d at 797. Post-conviction counsel erroneously "told him that the [AEDPA] limitations period did not expire until Riggs began to serve the § 924(c) sentence." *Id.* at 798. Following that advice, Riggs did not file a § 2255 motion until nearly five years after the limitations period had expired. *Ibid.* Noting there was no evidence counsel "intentionally deceived Riggs about the statute of limitations," we held Riggs's allegations did "not warrant equitable tolling of the statute of limitations." *Id.* at 799–800.

This case is squarely controlled by *Riggs*. The record shows that Cardenas's counsel, Mr. Kent, simply messed up: "Mr. Cardenas was concerned that we had missed the deadline and I assured him we had not. I had no doubt in my mind at that time that the deadline was on the one-year anniversary of the denial of rehearing by the Supreme Court." Kent further explained: "[A] petition for rehearing on a denial of certiorari on direct appeal does not toll the AEDPA time limit. All I can say in my defense is the concept is so counter intuitive [sic] that it did not even occur to me to check or research the question." Ignorant? Yes. Intentionally deceptive? No. This is precisely the kind of case that does not warrant equitable tolling under *Riggs*.

The district court therefore did not err, much less abuse its discretion, in declining to equitably toll AEDPA's statute of limitations.

B.

The next question is whether Cardenas made *pro se* filings that should have been recharacterized—either individually or together—as a timely § 2255 motion.

Generally, "*pro se* habeas petitions are not held to the same stringent and rigorous standards as are pleadings filed by lawyers." *Hernandez v. Thaler*, 630 F.3d 420, 426 (5th Cir. 2011) (per curiam) (quotation omitted). When reviewing a *pro se* litigant's filings, "[i]t is the substance of the relief sought by . . . [the] pleading, not the label that the petitioner has attached to it, that determines the true nature and operative effect of [the] habeas filing." *Id.* at 426–27. To that end, this court has liberally construed *pro se* filings as initial § 2255 motions under certain circumstances. *See, e.g.*, *Elam*, 930 F.3d at 410; *United States v. Santora*, 711 F.2d 41, 42 (5th Cir. 1983); *United States v. Flores*, 380 F. App'x 371, 372 (5th Cir. 2010) (per curiam); *United States v. Moron-Solis*, 388 F. App'x 443, 444 (5th Cir. 2010) (per curiam).

Cardenas argues that at least one of his *pro se* filings in the district court should have been recharacterized as a timely § 2255 motion under these standards. He says he raised the very issue argued in his § 2255 motion—the apparent conflict of interest with the prosecuting attorney in his case—multiple times before his one-year statutory deadline. He further argues that he submitted multiple requests for appointment of counsel and relief under the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015).

There are two fundamental defects with Cardenas's argument. First, the "substance of the relief" sought in most of the *pro se* filings was not *habeas* relief—that is, Cardenas did not challenge his custody by seeking vacatur of his conviction or sentence.* *Hernandez*, 630 F.3d at 426. In one of the filings,

* Section 2255 is, of course, a statutory *substitute* for habeas corpus. *See United States v. Hayman*, 342 U.S. 205, 219 (1952). But the *sine qua non* in habeas and § 2255 proceedings is the same: The prisoner must allege that his custody is unlawful. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866) ("If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from

Cardenas merely sought a status update on his compassionate-release motion, *see* 18 U.S.C. § 3582(c)(2), and asked the court to grant him leave to file a *pro se* appeal if that motion was denied. In another, Cardenas asked the court for a number of documents related to his case.

Those requests stand in stark contrast to filings we've previously recharacterized. Consider, for example, our decision in *Elam*. There, the § 2255 movant filed a "Motion Requesting SPECIAL DISCOVERY HEARING," in which he "asserted that his constitutional right to effective assistance of counsel had been violated, resulting in a deprivation of his liberty." 930 F.3d at 408, 410. He also "stated seven bases for [that] claim[,] . . . challenged his conviction, maintained that his guilty plea was entered under duress, and averred that counsel coerced his guilty plea." *Id.* at 410. That radically differs from asking a court to provide a status update or to produce documents.

Second, Cardenas's filings that *do* seek relief from his sentence assert an entirely different basis for relief from the one asserted here. In his motion for appointment of counsel, Cardenas argued his sentence violated *Johnson* because the district court treated his prior attempted-murder conviction as a predicate "crime of violence" for the § 4B1.2 career-offender enhancement. Even if we recharacterized that filing as a § 2255 motion, it would not help Cardenas. That's because Cardenas would still have to show his current § 2255 motion is an amendment that "relates back" to the original filing. *See* FED. R. CIV. P. 15(c); *United States v. Gonzalez*, 592 F.3d 675, 679 (5th Cir. 2009) (per curiam) (explaining that an amendment does not relate back if it "assert[s] a new ground for relief supported by facts that differ in both

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custody . . . ."); *Hayman*, 342 U.S. at 223 n.40 (noting § 2255 creates statutory "procedures providing the same relief" as the common-law writ of habeas corpus).

time and type from those the original pleading set forth" (quotation omitted)). Obviously, the old *Johnson*-based claim asserts a different "ground for relief" from the new conflict-of-interest claim. *Cf. Brannigan v. United States*, 249 F.3d 584, 588 (7th Cir. 2001) (holding the word "claim" in AEDPA means "a challenge to a particular *step* in the case, such as the introduction of a given piece of evidence, the text of a given jury instruction, or the performance of counsel").

Cardenas says that shouldn't matter because the district court should've (1) recharacterized his *Johnson* motion as a § 2255 motion; (2) given Cardenas notice of that recharacterization under *Castro v. United States*, 540 U.S. 375, 383 (2003); and then (3) allowed Cardenas to add whatever other claims he might've wanted to add under *Elam*. This misreads both *Castro* and *Elam*.

Start with *Castro*. That case stands for the proposition that when a district court recharacterizes a *pro se* litigant's motion it must provide him with certain procedural opportunities:

> [T]he district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on "second or successive" motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has.

Castro, 540 U.S. at 383. *Castro* thus prevents district courts from enforcing AEDPA's limitations on second-or-successive § 2255 motions against *pro se* litigants who think they are filing their first § 2255 motion. *See ibid.* (explaining that if a district court does not comply with the above-mentioned procedure, "the [first] motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions [AEDPA's] 'second or

successive' restrictions"). *Castro* does *not* purport to create a remedy for situations in which a district court failed to recharacterize a *pro se* litigant's filings. *Castro* is thus a shield, not an appellate sword.

Taken out of context, our decision in *Elam* could be read to suggest otherwise. There, we held it was an abuse of discretion not to recharacterize a *pro se* prisoner's filing as a timely § 2255 motion. 930 F.3d at 410. We directed the district court on remand to "give Elam notice that his special-discovery motion is being construed as a § 2255 motion and . . . allow a reasonable opportunity to amend or withdraw it." *Ibid.* (citing *Castro*, 540 U.S. at 377, 383). Cardenas takes that quote to mean the *Castro* procedure is required *every time* a district court should have recharacterized a *pro se* filing, and that a litigant may amend his recharacterized pleading to assert *any claim*.

But that can't be what *Elam* meant because such a broad reading would overrule our precedents governing Rule 15(c)'s "relation-back" standard in § 2255 cases. *See Gonzalez*, 592 F.3d at 679; FED. R. CIV. P. 15(c). Under Cardenas's distorted reading of *Elam* and *Castro*, a § 2255 movant could violate AEDPA's limitations period, look back with the benefit of hindsight to find *something* that might be recharacterized as a § 2255 motion, and then use that recharacterized motion to shoehorn all sorts of brand new (and otherwise time-barred) claims into the § 2255 litigation—including claims that "assert a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Gonzalez*, 592 F.3d at 679 (quotation omitted). That would be quite a bonanza, and it would conflict with both AEDPA's limitations period and *Gonzalez*.

We decline Cardenas's invitation to rewrite *Gonzalez*. Instead, we see *Gonzalez* and *Elam* as entirely consistent: When a district court recharacterizes a filing as a § 2255 motion, the movant must have the

opportunity to amend his now-recharacterized motion (*Elam*) to include any claims that relate back to the original pleading under Rule 15(c) (*Gonzalez*). Cardenas is not entitled to recharacterization of anything. And even if he were entitled to have his *pro se Johnson* motion recharacterized as a § 2255 motion, his current arguments alleging prosecutorial conflict of interest do not relate back to his *Johnson* filing under Rule 15(c).

AFFIRMED.

APPENDIX-B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JULIO CESAR CARDENAS, Movant,	§	
	§	
	§	Civil Action No. 1:16-cv-00306
v.	§	Criminal Action No. 1:12-cr-00512
	§	Criminal Action No. 1:13-cr-00171
UNITED STATES OF AMERICA, Respondent.	§	
	§	

ORDER

Before the Court is Julio Cesar Cardenas' (hereafter "Movant") "Objections to the Report and Recommendation of Magistrate Judge" (hereafter "Movant's R&R Objections") (Docket No. 61) and the "Report and Recommendation of the Magistrate Judge" (hereafter "R&R") (Docket No. 52). The R&R recommends dismissal of the Movant's "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Judgment and Sentence by a Person in Federal Custody" (Docket No. 1) (hereafter "§ 2255 Motion"). *See* Docket No. 52 at 29. Moreover, the R&R recommends dismissal of the Movant's "Motion for Leave to Amend Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255" (hereafter "Motion for Leave to Amend") (Docket No. 39).

For the reasons stated below, Movant's R&R Objections (Docket No. 61) are **OVERRULED.**[1] In addition, the § 2255 Motion (Docket No. 1) is **DISMISSED with prejudice**; and the Motion for Leave to Amend (Docket No. 39) is **DENIED as moot.**

I. RELEVANT BACKGROUND

On May 31, 2013, a jury found Movant guilty of the following sixteen counts:[2]

[1] After Movant's R&R Objections were filed through counsel of record, Movant filed the following pleadings, in a *pro se* capacity: (1) "Motion for Leave to file Supporting Affidavit" (Docket No. 62); and (2) "Julio Cesar Cardenas' Motion for Leave to File Documentary, Audiotape and Videotape Evidence" (Docket No. 63) with attached "Proof of Evidence Audio & Videos of Attorneys" (Docket No. 64) (collectively hereafter, "Movant's *pro se* Motions"). Movant's *pro se* Motions are **DENIED**. *See infra*, at 4.

[2] The sixteen counts are divided into four categories by the Court solely to reference the counts receiving a similar sentence.

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Category 1:

- One count of conspiracy to possess with intent to distribute more than 5 kilograms of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1);
- One count of conspiracy to possess with intent to distribute more than 100 kilograms of marihuana, in violation of 21 U.S.C. §§ 846, 841(a)(1);
- Two counts of possession with intent to distribute a quantity exceeding 5 kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 18 U.S.C. § 2;

Category 2:

- Five counts of possession with intent to distribute a quantity exceeding 100 kilograms of marihuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 18 U.S.C. § 2;

Category 3:

- Three counts of possession with intent to distribute a quantity exceeding 50 kilograms of marihuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2;
- One count of possession with intent to distribute a quantity less than 100 kilograms of marihuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2;

Category 4:

- Two counts of possession with intent to distribute a quantity less than 50 kilograms of marihuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 18 U.S.C. § 2; and
- One count of operation of an unlicensed money transmitting business, in violation of 18 U.S.C. §§ 1960 and 2.

See United States v. Cardenas, No. 12-cr-00512-1, Docket No. 334.[3] The jury also found Movant guilty of one count of possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). *See United States v. Cardenas*, No. 13-cr-00171-1, Docket No. 31. On December 11, 2013, the Court sentenced Movant to life imprisonment for each count in category 1; 40 years for each count in category 2; 20 years for each count in category 3; and 60 months for each count in category 4—all counts to run concurrent. CR Docket No. 473. Judgment was entered January 8, 2014.[4] *Id.*

[3] Hereafter, the style of each of Movant's cases will be referred to only by the docket entry numbers unless otherwise stated by the Court.

[4] Movant also received a sentence of 10 years imprisonment for the count of felony possession of a firearm; judgment was entered January 6, 2014. *See* 13-cr-00171-1, Docket No. 61 at 2.

On December 13, 2013, Movant filed a Notice of Appeal. CR Docket No. 449. On June 11, 2015, the Fifth Circuit Court of Appeals affirmed Movant's judgment. *See United States v. Cardenas*, 606 Fed. App'x 246, 247 (5th Cir. 2015). On October 19, 2015, the Supreme Court denied Movant's petition for a writ of certiorari. *See Cardenas v. United States*, 136 S. Ct. 373 (2015). On December 7, 2015, the Supreme Court denied Movant's petition for rehearing of the denial of certiorari. *See Cardenas v. United States*, 136 S. Ct. 611 (2015).

II. PROCEDURAL HISTORY

Movant filed his § 2255 Motion (Docket No. 1) December 4, 2016. The United States of America (hereafter "Respondent") filed "United States' Response to Cardenas' Motion for Relief under 28 U.S.C. § 2255 and Motion to Dismiss" (Docket No. 14) June 26, 2017. Movant's counsel filed "William Mallory Kent's Motion to Withdraw as Counsel" (Docket No. 21) September 22, 2017; the Magistrate Judge entered an "Order" (Docket No. 22) granting Kent's withdrawal on said date.[5] Subsequently, Jeremy Gordon (hereafter "Movant's counsel of record") entered his "Notice of Appearance" (Docket No. 26) as Movant's retained counsel. Movant filed a Motion for Leave to Amend (Docket No. 39) and a "Reply to the United States' Response to Motion under 28 U.S.C. § 2255 and Response to Motion to Dismiss" (Docket No. 40) February 19, 2018. Respondent filed "United States' Supplemental Response to Cardenas' Motion for Relief under 28 U.S.C. § 2255, Supplemental Motion to Dismiss and Motion to Compel Production of Attorney Affidavits" (Docket No. 41) March 5, 2018. Movant filed "Reply to United States' Supplemental Response to Cardenas' Motion for Relief under 28 U.S.C. § 2255, Supplemental Motion to Dismiss and Motion to Compel Production of Attorney Affidavits" (Docket No. 42) March 9, 2018.

The R&R (Docket No. 52) was entered May 7, 2018; the Court granted Movant's extension to file his responses on or before June 20, 2018 (Docket No. 55). Movant filed

[5] Movant was represented by William Mallory Kent (hereafter "Kent") at the time of the § 2255 Motion filing. *See* Docket No. 1. However, on September 22, 2017, Kent filed a motion to withdraw as counsel for Movant as a result of a potential conflict of interest. Based on a misunderstanding as to the filing deadline, Kent stated he was at fault in filing the untimely motion, and that no fault should be attributed to the Movant. *See* Docket No. 21 at 1-4.

Movant's R&R Objections (Docket No. 61) June 20, 2018. Movant filed Movant's *pro se* Motions (Docket No. 62) June 27, 2018, and (Docket No. 63) July 10, 2018.[6]

III. LEGAL STANDARD

A federal prisoner in custody may move to vacate, set aside or correct his sentence when "the sentence was imposed in violation of the Constitution or laws of the United States" or "the court was without jurisdiction to impose such sentence" or "the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter "AEDPA") provides that motions filed under § 2255 shall be filed within one-year from the latest of four triggering events[7]; the relevant event in this case was "the date on which the judgment of conviction bec[ame] final." § 2255(f)(1). However, the AEDPA limitations period is not jurisdictional and is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645-46 (2010). The movant "bears the burden of establishing equitable tolling is appropriate." *United States v. Petty*, 530 F.3d 361, 365 (5th Cir. 2008).

III. DISCUSSION

Before discussing Movant's R&R Objections, the Court will address Movant's *pro se* Motions.

A. Movant's *pro se* Motions

Movant's *pro se* Motions (Docket Nos. 62 & 63), distinct from the prior *pro se* handwritten letters (Docket Nos. 59 & 60), were filed after Movant's counsel of record filed Movant's R&R Objections. Title 28 of the United States Code, Section 1654, states "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 8 U.S.C. § 1654; *see Lee v. Alabama*, 406 F.2d 466, 469 (5th Cir. 1968) (holding a

[6] On May 29, 2018, Movant filed a *pro se* handwritten letter with the Court entitled "Julio Cesar Cardenas, Civil No. 1:16-cv-306 Sub: Complain [sic]" (Docket No. 59) addressing the merits of his § 2255 Motion, and a "Sworn Affidavit" (Docket No. 60) of Movant's Sister, Yovanna Hernandez, attesting her experience with working with Kent. Movant's *pro se* filings (Docket Nos. 59 & 60) were filed after the R&R was entered, but before Movant's counsel of record filed Movant's R&R Objections; Movant was represented by counsel at the time of said pro se filings, and was not entitled to hybrid representation. Accordingly, "Movant's *pro se* filings", Docket Nos. 59 and 60, are **STRICKEN** from the record. *See infra* at 4 (Hybrid Representation).

[7] *See* § 2255(f).

24.

habeas petitioner has "a right to represent himself or to be represented by counsel, but he has no right to a 'hybrid representation' partly by himself and partly by counsel"); *accord Battaglia v. Stephens*, No. 3:09-CV-1904-B, 2013 U.S. Dist. LEXIS 146473, 2013 WL 5570216, at *24 (N.D. Tex. Oct. 9, 2013). Previously, the Magistrate Judge struck Movant's January 10, 2018 *pro se* motion for extension of time file a reply brief (Docket No. 34) on the basis that Movant was represented by Movant's counsel of record; in addition, the Magistrate Judge admonished *pro se* Movant that "any and all future filings in this case must be filed by counsel" and any *pro se* filings would not be considered so long as Movant was represented by counsel. *See* "Order," Docket No. 35 at 1-2. Accordingly, Movant's *pro se* Motions are **DENIED** and hereby **STRICKEN** from the record.

B. Movant's R&R Objections

a. Timeliness of Movant's § 2255 Motion

The R&R recommended dismissal of Movant's Motion § 2255 Motion (Docket No. 1) and Motion for Leave to Amend § 2255 Motion (Docket No. 39); the R&R held (1) equitable tolling and/or (2) liberal consideration of previous *pro se* filings, were without merit.

1. Equitable Tolling:

Movant objected to the R&R finding that equitable tolling was not warranted.[8] *See* Docket No. 61 at 3. Movant alleges he was misled by Kent, his previous attorney, as to the incorrect filing deadline, despite Kent having "knowledge of the correct facts."[9] Equitable tolling applies if movant shows the following: "(1) that he has been pursuing his rights diligently,

[8] Movant's judgment of conviction became final October 19, 2015, the date the Supreme Court denied certiorari. *See* Wheaten, 826 F.3d at 846 (holding the Supreme Court's denial of a petition for a writ of certiorari finalizes the petitioner's federal conviction, for AEDPA purposes). Under § 2255(f)(1), Movant's deadline to file his § 2255 motion was October 19, 2016; said motion was untimely filed December 4, 2016. *See* Docket No. 1.

[9] In support of Movant's R&R Objection to equitable tolling, Movant cites the following correspondence attached to his sur-reply to Respondents' Response to Movant's § 2255 Motion (Docket No. 40): (1) 09/27/16-Movant's correspondence to Kent requesting Kent again confirm the deadline to file his § 2255 motion; Movant stated he reviewed the docket sheet and believed the § 2255 motion must be filed by October 20, 2016—contrary to Kent's belief that December 2016 was the deadline for filing. Docket 40-1 at 3. (2) 06/30/16-Movant's correspondence to Kent requesting that Kent again confirm the deadline to file his § 2255 motion; Movant stated he did not believe Kent's December deadline was accurate. Docket No. 40-1 at 4. (3) 05/24/16-Movant's correspondence to Kent requesting that Kent confirm the filing deadline; Movant stated "I have until October 2016 to file the 2255 motion." Docket No. 40-1 at 6. (4) 10/27/15- "On the 19th of October the Supreme Court denied my motion for Certiorari. It is my understanding I have a year to file the 2255 motion." Docket No. 40-1 at 6.

and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649. The movant must be "actively misled by [his counsel] about the cause of action or is prevented in some extraordinary way from asserting his rights." *United States v. Wheaten*, 826 F.3d 843, 851 (5th Cir. 2016).

Movant admitted "[he] was aware of the correct limitations date, and [he] relayed this information to [Kent] on numerous occasions." Docket No. 61 at 4. However, Movant failed to exercise due diligence despite being "aware of the correct limitations date," and instead relied on Kent's "incorrect legal advice." *See Manning v. Epps*, 688 F.3d 177, 185 (5th Cir. 2012) ("[T]he act of retaining counsel does not absolve [habeas] petitioner of his responsibility of overseeing the attorney's conduct" hence, a habeas petitioner must exercise due diligence even when counsel's legal representation is inadequate.). Furthermore, Kent's alleged misinterpretation of the deadline, coupled with Movant's insistence on the correct deadline for a period of 11 months, fail to constitute an "extraordinary circumstance" in satisfaction of equitable tolling. *See United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) (holding reliance on "mere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified"). Moreover, Movant's arguments of "lack of legal training, ignorance of the law, and unfamiliarity with the legal process" and of "ineffective assistance of counsel" are insufficient basis for equitable tolling. *See United States v. Petty*, 530 F.3d 361, 366 (5th Cir. 2008). Contrary to the advice of his own counsel and orders of the Court, Movant has demonstrated a consistent pattern of conduct via filed *pro se* documents with the Court—prior to, and concurrent with the current § 2255 Motion. Thus, the Court is not persuaded by Movant's claim that Kent actively prevented Movant from timely filing his § 2255 Motion. Therefore, the Court finds equitable tolling is not applicable as to the Movant.

2. Liberal Consideration of prior *Pro se* Filings:

Movant further objected to the R&R finding that Movant's *pro se* motions and letters filed prior to the October 19, 2016 deadline, not be liberally construed as an effective § 2255 motion. Movant argued his *pro se* filings, which consisted of an October 13, 2015 letter (CR Docket No. 616) and January 15, 2016 letter (CR Docket No. 644)—addressing the constitutional claim against AUSA Jody Young similarly set forth in Movant's § 2255 Motion—should be liberally construed as a timely filed § 2255 motion. *See* Docket No. 61 at 5-6. The

Fifth Circuit recognizes that "[i]t is the substance of the relief sought by a *pro se* pleading, not the label that the [movant] has attached to it, that determines [its] true nature and operative effect[.]" *Hernandez v. Thaler*, 630 F.3d 420, 426-27 (5th Cir. 2011). The R&R cited Movant's *pro se* filing of a letter dated December 7, 2015 (CR Docket No. 636), where Movant "ask[s] the [C]ourt not to take this request as a motion, and give [Movant] an opportunity to submit a proper motion" if the Court ruled against appointing counsel. *See* CR Docket No. 636. After considering the record, and the substance of the *pro se* documentation filed before the necessary deadline, the Court finds the relevant *pro se* filings cannot be characterized as a § 2255 motion.

Therefore, Movant's objections as to timeliness are **OVERRULED**; the Court finds Movant's § 2255 Motion is time-barred. Accordingly, the Movant's R&R Objections as to the merits are **OVERRULED as moot**.

b. Certificate of Appealability

A certificate of appealability from a § 2255 proceeding will not issue unless movant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Pursuant to the R&R's findings and conclusions, the Court finds a certificate of appealability shall not issue.

IV. CONCLUSION

For the foregoing reasons, Movant's *pro se* Motions (Docket Nos. 62 and 63) are **DENIED** and **STRICKEN** from the record. After a *de novo* review of the file, the Magistrate Judge's Report and Recommendation is **ADOPTED** with the following modification: Movant's § 2255 Motion (Docket No. 1) is **DISMISSED with prejudice**; and Movant's Motion for Leave to Amend § 2255 Motion (Docket No. 39) is **DENIED as moot**. A certificate of appealability shall not issue. The Clerk of the Court is hereby **ORDERED** to close this case.

Signed on this 17th day of August, 2018.

Rolando Olvera
United States District Judge

APPENDIX-C

United States Court of Appeals for the Fifth Circuit

No. 18-40790

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JULIO CESAR CARDENAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:16-CV-306
USDC No. 1:13-CR-171-1

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before JOLLY, DUNCAN, and OLDHAM, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.