

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-1741

William S. Divine

Movant - Appellant

v.

United States of America

~~Respondent - Appellee~~

Appeal from U.S. District Court for the Western District of Missouri - Joplin
(3:21-cv-05104-MDH)

JUDGMENT

Before BENTON, SHEPHERD, and KELLY, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

May 16, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX A

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

WILLIAM S. DIVINE,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

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Civil No. 3:21-cv-05104-MDH-P
Crim. No. 3:19-cr-05028-MDH-1

ORDER

Movant filed this case pro se pursuant to 28 U.S.C. § 2255, seeking to vacate, set aside, or correct the sentence entered against him in the above-cited criminal case. Doc. 1. For the reasons explained below, Respondent's Motion to Dismiss (Doc. 4) is granted and Movant's motion is dismissed as the case is untimely filed. *See* § 2255(f). The Court also denies a certificate of appealability.

I. Background

On June 11, 2019, a grand jury in the Western District of Missouri returned an indictment charging Divine with possession with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a) and (b)(1)(A). Crim. Doc. 11.¹ Divine pleaded guilty before this Court, on December 16, 2019, pursuant to a plea agreement with the Government. Crim. Docs. 44, 45. On August 6, 2020, this Court sentenced Divine to 120 months' imprisonment. Crim. Docs. 54-55. Divine did not appeal his conviction or sentence.

On December 22, 2021, Movant filed the instant motion under 28 U.S.C. § 2255 seeking to vacate his convictions and sentences. Doc. 1.

II. Legal Standard

Title 28 U.S.C. § 2255 provides that an individual in federal custody may file a motion to vacate, set aside, or correct his or her sentence by alleging "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction

¹ "Crim. Doc." refers to the docket number entries in Movant's first criminal case, Case No. 3:19-cr-05028-MDH-1. "Doc." refers to the docket number entries in Movant's civil case, Case No 3:21-cv-05104-MDH-P.

APPENDIX B

to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]” A motion under this statute “is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors.” *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (internal citations omitted). Instead, § 2255 provides a statutory avenue through which to address constitutional or jurisdictional errors and errors of law that “constitute[] a fundamental defect which inherently results in a complete miscarriage of justice.” *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (citations omitted).

“A § 2255 motion can be dismissed without a hearing if (1) the petitioner’s allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.” *Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003) (citation and quotation marks omitted). Additionally, a petition that consists only of “conclusory allegations unsupported by specifics [or] contentions that, in the face of the record, are wholly incredible,” is insufficient to overcome the barrier to an evidentiary hearing on a § 2255 motion. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

III. Analysis

Respondent argues Movant’s motion is time-barred as he did not file it within one year of the date his conviction became final.

A. One-Year Statute of Limitations

A one-year period of limitation applies in § 2255 cases. *See Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008) (recognizing the Antiterrorism and Effective Death Penalty Act of 1996 imposed a one-year statute of limitations on § 2255 motions). Motions that are not filed within this time frame should be dismissed as untimely. *See Moore v. United States*, 173 F.3d 1131, 1133-35 (8th Cir. 1999); *Campa-Fabela v. United States*, 339 F.3d 993, 993-94 (8th Cir. 2003). Although “not a jurisdictional bar,” *Moore*, 173 F.3d at 1134, a district court is precluded from considering the merits of untimely claims where, as here, the Government timely raises a statute-of-limitation defense. *United States v. Graycraft*, 167 F.3d 451, 457 (8th Cir. 1999).

Under § 2255(f), the one-year limitation period begins to run, as relevant here, from the date on which the judgment of conviction becomes final. For § 2255(f)(1) purposes, a judgment of conviction becomes final on the date when the time for filing a notice of appeal expires; it does not extend to the date on which any untimely appeal nevertheless pursued is denied as untimely.

See Roberts v. United States, No. 13-0772-CV-W-FJG, 2013 WL 5934134, at *1 (W.D. Mo. Nov. 4, 2013) (movant's judgment became final under § 2255(f)(1) "when the fourteen-day period for taking a direct appeal . . . expired"); *see generally Clay v. United States*, 537 U.S. 522, 525 (2003) ("For the purpose of starting the clock on a § 2255's one-year limitation period, we hold, a judgment of conviction becomes final when the time expires for filing a petition of certiorari contesting the appellate court's affirmation of the conviction.").

Here, Movant's judgment was entered on August 6, 2020. Under Fed. R. App. P. 4(b)(1)(A)(i), Movant had 14 days after entry of judgment to file a notice of appeal. Accordingly, to be considered timely, Movant was required to file a notice of appeal in the District Court on or before August 20, 2020. Thereafter, Movant had until August 20, 2021, to file a timely § 2255 motion. However, the certificate of service on Movant's motion is dated December 10, 2021, beyond the one-year period.² Because Movant did not file his § 2255 motion until December 22, 2021, his motion is untimely under § 2255(f)(1).

B. Untimeliness Exceptions

Movant contends the COVID-19 pandemic impacted his ability to timely file his motion. Doc. 1, p. 11. Specifically, Petitioner states he did not have access to the courts for six to eight months of the one-year period and had limited access to the law library due to the global COVID-19 pandemic, citing 28 U.S.C. § 2255(f)(2) and (f)(4). *Id.*

Equitable tolling is appropriate when (1) extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time, or (2) when conduct of the defendant has lulled the prisoner into inaction. *Green v. United States*, 2019 WL 2051955, at *2 (W.D. Mo. May 8, 2019). The doctrine applies "only when some fault on the part of the defendant has caused a plaintiff to be late in filing, or when other circumstances, external to the plaintiff and not attributable to his actions, are responsible for the delay." *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002). The petitioner must demonstrate "diligence in pursuing the matter." *United States v. Martin*, 408 F.3d 1089, 1095 (8th Cir. 2005). Equitable tolling grants a movant an "exceedingly narrow window of relief." *Jihad v. Hvass*, 267 F.3d 803, 805 (8th Cir. 2001). The burden of demonstrating the grounds warranting equitable tolling rests with the petitioner. *Pace v.*

² Under the prison mailbox rule, a § 2255 motion is deemed timely filed when an inmate deposits the notice in the prison mail system prior to the expiration of the filing deadline. *See Houston v. Lack*, 487 U.S. 266, 270 (1988); Fed. R. App. P. 25(a)(2)(A)(iii); Rule 3(d), Rules Governing Section 2255 Proceedings in the United States District Courts.

DiGuglielmo, 544 U.S. 408, 418 (2005). The application of equitable tolling “must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.” *Cross-Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir. 2003).

Specifically, Movant argues equitable tolling should be applied under 28 U.S.C. § 2255(f)(4). In the Eighth Circuit, to be entitled to a finding of timeliness under § 2255(f)(4), a movant must: (1) show the existence of a new fact; and (2) demonstrate diligence to discover the new fact. The Eighth Circuit has noted that § 2255(f)(4) does not require maximum feasible diligence, only due, or reasonable, diligence. *Anjulo-Lopez*, 541 F.3d at 818 (citing *Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000)). It is the court’s task to determine when a duly diligent person in movant’s circumstances would have discovered the new fact. *Id.* (citations omitted).

Movant admits he failed to file his § 2255 motion within the one-year statute of limitation but claims equitable tolling should be applied due to the challenges presented by his lack of access to the courts and law library as a result of the COVID-19 pandemic. Doc. 1, p. 11. However, Movant has not met this burden to warrant equitable tolling by explaining what circumstance, external to Movant and not attributable to Movant, was responsible for the delay in filing this case. *See Flanders*, 299 F.3d at 977.

Movant claims the BOP impeded his access to the Courts which was exasperated after he contracted COVID-19 in July 2021. Doc. 6, p. 1. However, a review of the record demonstrates Movant submitted motions to this Court in July 2021 and August 2021, prior to the lapse of the one-year period. Crim. Docs. 58, 59. On July 23, 2021, this Court received a request from Movant seeking a search warrant issued in McDonald County, Missouri, Circuit Court. Crim. Doc. 58. On August 2, 2021, this Court received a request from Movant seeking a 60-day extension to prepare and file his § 2255 motion. Crim. Doc. 59. This Court received and docketed those motions and on August 12, 2021, this Court denied the motions on the merits. Crim. Doc. 60. Movant appealed the denial of his requests and the Eighth Circuit summarily affirmed. Crim. Docs. 61-65.

Additionally, as to Movant’s placement in COVID quarantine, “conditions unique to prison life do not constitute extraordinary circumstances.” *Reeder v. Koster*, No. 4:14 CV 450 SNLJ / DDN, 2016 WL 6127702, at *5 (E.D. Mo. Sep. 8, 2016). Further, inadequate access to the prison’s law library does not amount to an extraordinary circumstance justifying equitable tolling. *Baker v. Norris*, 321 F.3d 769, 771 (8th Cir. 2003) (limitations on use of law library at facility insufficient

to require equitable tolling); *Curtis v. Kemna*, 22 Fed.Appx. 663, 664 (8th Cir. 2001) (an inadequate law library is generally not an extraordinary circumstance warranting equitable tolling).

For these reasons, Movant has failed to establish that equitable tolling of the statute of limitations is warranted in this case. Therefore, because the one-year period of limitation in § 2255(f) expired before Movant filed this case, the Court must dismiss the case without further review of Movant's claims. *Craycraft*, 167 F.3d at 456-57.

IV. Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to Movant. A certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because Movant has made no such showing, the Court declines to issue a certificate of appealability.

V. Conclusion

For the reasons explained above, it is ORDERED that Respondent's Motion to Dismiss (Doc. 4) is GRANTED, Movant's § 2255 motion (Doc. 1) is DISMISSED with prejudice as untimely, and a certificate of appealability is DENIED.

IT IS SO ORDERED.

/s/ Douglas Harpool
DOUGLAS HARPOOL, JUDGE
UNITED STATES DISTRICT COURT

Dated: March 23, 2022