No. 21-6111

FILED
Jun 22, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERIC CHRISTOPHER FALKOWSKI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: BATCHELDER, GRIFFIN, and MURPHY, Circuit Judges.

Eric Falkowski petitions for rehearing en banc of this court's order entered on May 11, 2022, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
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Filed: June 22, 2022

Mr. Eric Christopher Falkowski
F.C.I. Gilmer
P.O. Box 6000
Glenville, WV 26351

Re: Case No. 21-6111, *Eric Falkowski v. USA*
Originating Case No.: 3:21-cv-00657: 3:16-cr-00176-2

Dear Mr. Falkowski,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Amanda J. Klopf

Enclosure

APPENDIX A-1

No. 21-6111

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERIC CHRISTOPHER FALKOWSKI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: KETHLEDGE, Circuit Judge.

Eric Falkowski, a federal prisoner proceeding pro se, applies for a certificate of appealability, pursuant to 28 U.S.C. § 2253(c) and Rule 22(b) of the Federal Rules of Appellate Procedure, for review of the district court's order and judgment denying his motion to vacate, set aside, or correct his sentence that was filed pursuant to 28 U.S.C. § 2255. Falkowski has also filed a motion to proceed in forma pauperis and a motion to remand the case to the district court.

Falkowski participated in an enterprise with others to manufacture and distribute counterfeit Percocet pills using fentanyl, resulting in one death and multiple overdose hospitalizations around Murfreesboro, Tennessee. A grand jury indicted Falkowski on ten controlled-substance charges based on violations of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846. In July 2019, Falkowski pleaded guilty pursuant to a plea agreement on all ten charges and the district court sentenced him to 266 months of imprisonment, to be served concurrently with a 188-month custodial sentence for a conviction in the Middle District of Florida. The court entered an amended judgment confirming the sentence and correcting a clerical error on September 17, 2019. In June 2020, Falkowski filed a motion for leave to file an untimely appeal, which the district court

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Filed: May 11, 2022

Mr. Eric Christopher Falkowski
F.C.I. Gilmer
P.O. Box 6000
Glenville, WV 26351

Ms. Amanda J. Klopf
Office of the U.S. Attorney
719 Church Street
Suite 3300
Nashville, TN 37203

Re: Case No. 21-6111, *Eric Falkowski v. USA*
Originating Case No. : 3:21-cv-00657 : 3:16-cr-00176-2

Dear Mr. Falkowski and Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Sharday S. Swain
Case Manager
Direct Dial No. 513-564-7027

cc: Ms. Lynda M. Hill

Enclosure

No mandate to issue

APPENDIX A-3

denied on July 8, 2020. This court affirmed the district court's July 30, 2020, order denying his subsequent motion for reconsideration of his criminal judgment. *United States v. Falkowski*, No. 20-5936 (6th Cir. June 4, 2021) (order).

Falkowski filed his § 2255 motion in August 2021. He sought relief from both federal sentences through this single motion filed in the district court. The government filed a motion to dismiss the § 2255 motion as untimely.

The district court dismissed the § 2255 motion for lack of jurisdiction with respect to the sentence imposed by the Middle District of Florida and denied it with respect to the sentence it had imposed in 2019, agreeing with the government that the motion was time-barred. The court also determined that equitable tolling was not warranted. The court denied Falkowski a certificate of appealability.

Falkowski filed a timely notice of appeal. 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); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. When the district court's denial of the § 2255 motion is based on a procedural ground, the applicant must demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A prisoner may file a § 2255 motion only in "the court which imposed the sentence" at issue. 28 U.S.C. § 2255(a). Falkowski received sentences from the district courts for both the Middle District of Tennessee and the Middle District of Florida. The district court for this case—that is, for the Middle District of Tennessee—was not the court "which imposed the sentence" of 188 months, so it did not have jurisdiction to grant relief with respect to that sentence. Jurists of

reason would not find it debatable that the district court was therefore correct in dismissing the claims related to the criminal judgment from the Middle District of Florida.

As for the Middle District of Tennessee case, the district court entered judgment in Falkowski's criminal case on July 11, 2019, but a clerical error required the court to enter an amended judgment on September 17, 2019. Falkowski did not file a timely appeal of either the original or the amended judgment, so it became final, at the latest, when the period to appeal the amended judgment ended on October 1, 2019. *See* Fed. R. App. P. 4(b)(1)(A). Falkowski then had one year to file his § 2255 motion, until October 1, 2020. *See* 28 U.S.C. § 2255(f)(1). The § 2255 motion was filed on August 20, 2021, almost eleven months too late. Simply put, Falkowski's § 2255 motion was untimely, and jurists of reason would not find it debatable that the district court correctly denied the motion as untimely.

A prisoner intending to file a § 2255 motion "who misses the deadline [imposed by the statute of limitations] may still maintain a viable habeas action if the court decides that equitable tolling is appropriate." *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). Nevertheless, "equitable tolling relief should only be granted sparingly." *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). Equitable tolling is available if the movant can demonstrate that (1) he was pursuing his rights diligently and (2) some extraordinary circumstance stood in the way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011). It is a well-established principle that ignorance of filing deadlines does not warrant equitable tolling. *Hall*, 662 F.3d at 750-51; *Allen*, 366 F.3d at 403.

In his motion for a certificate of appealability, Falkowski attributes his untimely attempt to appeal his criminal judgment—which in turn led him to next file a motion for reconsideration of his criminal judgment rather than a § 2255 motion—to correspondence he had with his former trial counsel in May 2020, which he initiated "[i]n order to consult about an appeal." During his sentencing hearing months before, however, the district court told him that he had 14 days to file an appeal following the entry of judgment. *See Falkowski*, No. 20-5936, slip op. at 2. The procedural obstacles Falkowski encountered beginning with his untimely notice of appeal would

not have occurred had he timely appealed his convictions and sentence in the first place; in other words, Falkowski did not diligently pursue his rights from the start, and the problems he did experience are not extraordinary circumstances that prevented him from timely filing the § 2255 motion.

Falkowski takes issue with the district court's characterization of his argument below as being that his July 2020 motion for reconsideration should have qualified as a "defective" § 2255 motion. He concedes that he filed the motion in part to communicate his intention to have additional time to properly file a § 2255 motion; such additional time was necessary, according to Falkowski, because a tornado that struck his then-place of confinement, Federal Correctional Institution, Estill, South Carolina, on April 13, 2020, as well as restrictions imposed in response to the COVID-19 pandemic, deprived him of access to his legal materials and other personal property until March 2021. Although Falkowski at times characterizes the motion as a "placeholder," he also asserts that his motion for reconsideration was "an actual and timely habeas corpus motion." However, the only proper means for Falkowski to have secured additional time for his § 2255 motion was to have filed a timely direct appeal. And in his motion for reconsideration, Falkowski sought only to reopen his criminal judgment so that he could file a timely notice of appeal from his criminal judgment. This court has already explained why the motion for reconsideration, filed putatively pursuant to Federal Rule of Civil Procedure 60, was not a proper vehicle for pursuing habeas relief. *Falkowski*, No. 20-5936, slip op. at 3-4. In any case, while a tornado striking a prison is certainly extraordinary, Falkowski cannot demonstrate that the consequences of the tornado strike and the pandemic restrictions created extraordinary circumstances preventing him from properly filing a § 2255 motion because he in fact made numerous court filings during the 11-month period between April 2020 and March 2021. Significantly, Falkowski filed an amended § 2255 motion in the district court for the Middle District of Florida in October 2020 and a second amended § 2255 motion in March 2021, days before Falkowski was reunited with his personal property. Jurists of reason would not find it

debatable that the district court was correct in concluding that Falkowski did not satisfy the *Holland* factors for equitable tolling.

Falkowski additionally argued that he was led astray by the district court when the court stated, in an order filed while his appeal of the order denying his motion for reconsideration was pending, that it did not have jurisdiction over his criminal case until the appeal was concluded. That order, which Falkowski blames for misleading him, was issued on March 11, 2021. The period for filing the § 2255 motion had already ended when the district court issued the order. Jurists of reason would not find it debatable that the district court was correct in concluding that it did not mislead Falkowski into untimely filing the § 2255 motion.

Falkowski also argued against the untimeliness of his § 2255 motion based on actual innocence. A credible claim of actual innocence, where "it is more likely than not that no reasonable juror would have convicted [the petitioner] in light of . . . new evidence," can justify an equitable exception to the limitation period. *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). But Falkowski's claim of actual innocence relied solely on the government's decision to dismiss Count Six of the fifth superseding indictment before trying Falkowski's codefendants—against whom Falkowski testified at trial as part of his plea agreement to the fourth superseding indictment. *See United States v. Williams*, 998 F.3d 716, 727 (6th Cir.), *cert. denied*, 142 S. Ct. 728 (2021), *cert. denied*, 142 S. Ct. 730 (2021) and *cert. denied*, ___ S. Ct. ___ (2022). Falkowski offers no argument explaining why the government's decision makes it more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt of what Falkowski deems to have been the same charge in the fourth superseding indictment. Jurists of reason would not find it debatable that the district court was correct in concluding that Falkowski did not present a credible claim of actual innocence.

The application for a certificate of appealability is **DENIED**. The motion to proceed in forma pauperis and the motion to remand are **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

ERIC FALKOWSKI, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION
2021 U.S. Dist. LEXIS 220033
NO. 3:21-cv-00657
November 15, 2021, Filed

Editorial Information: Subsequent History

Appeal filed, 11/30/2021Appeal filed, 11/24/2021

Editorial Information: Prior History

Falkowski v. United States, 2021 U.S. Dist. LEXIS 198160, 2021 WL 4804990 (M.D. Tenn., Oct. 14, 2021)

Counsel {2021 U.S. Dist. LEXIS 1}Eric Falkowski, Petitioner, Pro se, Glenville, WV.

For United States of America, Respondent: Amanda J. Klopf, Brent Adams Hannafan, U.S. Attorney's Office (Nashville Office), Middle District of Tennessee, Nashville, TN.

Judges: ELI RICHARDSON, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: ELI RICHARDSON

Opinion

MEMORANDUM OPINION

Pending before the Court is Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 1, "Petition"), wherein Petitioner seeks vacatur of his convictions and sentence(s) in his underlying criminal case (no. 3:16-cr-176-2) by which he is serving an aggregate prison term of 266 months. The Government moved to dismiss the Petition on September 2, 2021 (Doc. No. 8, "Motion to Dismiss"). Petitioner responded to the Government's Motion to Dismiss on September 13, 2021 (Doc. No. 13, "Petitioner's Response") and filed a supporting memorandum four days later (Doc. No. 14, "Petitioner's Memorandum in Support"). On September 8, 2021, Petitioner filed a Motion to Appoint Counsel pursuant to 18 U.S.C. § 3006A(a)(1)(H) (Doc. No. 10). For the reasons discuss herein, the Motion to Dismiss (Doc. No. 8) will be **GRANTED**, and Petitioner's Motion to Appoint Counsel (Doc. No. 10) will be **DENIED**.

BACKGROUND

I. Procedural{2021 U.S. Dist. LEXIS 2} Background

On February 15, 2017, Petitioner was charged with conspiracy and intent to distribute and possess fentanyl resulting in the death of one individual and serious bodily injury of several others in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) ("Counts 1-10") (Doc. No. 174, "Fourth Superseding

APPENDIX B

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Indictment").1 On July 1, 2019, Petitioner pled guilty to Counts 1-10 of the Fourth Superseding Indictment (3:16-cr-176-2, Doc. No. 748). On the same date, visiting United States District Judge Jack Zouhary sentenced Petitioner to serve 266 months' imprisonment followed by five years of supervised release. (*Id.*). Thereafter, Petitioner did not appeal. Petitioner has been serving his sentence at Gilmer Federal Correction Institute. According to the Federal Bureau of Prisons, Petitioner's projected release date is July 9, 2037. *See Federal Inmate Locator*, Bureau of Prisons, https://www.bop.gov/inmateloc/ (last accessed Oct. 4, 2021).

II. Instant Petition

On August 20, 2021, Petitioner filed the instant Motion raising eleven grounds for relief: (1) cumulative error, (2) ineffective assistance of counsel, (3) lack of advice regarding plea agreement and guilty plea, (4) failure to investigate clear evidence of prosecutorial{2021 U.S. Dist. LEXIS 3} misconduct, (5) Sixth Amendment claim, (6) prosecutorial misconduct, (7) selective prosecution, (8) due process claim, (9) Fourth Amendment claim, (10) Fifth Amendment claim, and (11) Fourteenth Amendment claim. (Doc. No. 1 at 2).

Petitioner specifically contends that

> [u]ltimately . . . the United States acted intentionally to deprive him of a fair trial, first by eliminating all plausible defenses, by eliciting his coerced testimony through proffer sessions . . . second, by compelling him to be a witness against himself . . . and third, by weaponizing his attorneys [ ] against him. Further, . . . he was selectively prosecuted and received disparate treatment in comparison to his co-conspirators/codefendants who also provided substantial assistance to the government in the prosecution of others. *Id.*

SECTION 2255 PROCEEDINGS

28 U.S.C. § 2255 provides a statutory mechanism for challenging the imposition of a federal sentence:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or{2021 U.S. Dist. LEXIS 4} is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.28 U.S.C. § 2255(a). In order to obtain relief under Section 2255, a petitioner "'must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict.'" *Humphress v. United States*, 398 F.3d 855, 858 (6th Cir. 2005) (quoting *Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003)).

If a material factual dispute arises in a Section 2255 proceeding, the court must hold an evidentiary hearing to resolve the dispute. *Ray v. United States*, 721 F.3d 758, 761 (6th Cir. 2013). An evidentiary hearing is not required, however, if the record conclusively shows that the petitioner is not entitled to relief. 28 U.S.C. § 2255(b); *Ray*, 721 F.3d at 761; *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999). A hearing is also unnecessary "'if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Monea v. United States*, 914 F.3d 414, 422 (6th Cir. 2019) (quoting *Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007)).

MOTION FOR APPOINTMENT OF COUNSEL

Petitioner filed a Motion for Appointment of Counsel on September 8, 2021 (Doc. No. 10). The Sixth

Amendment secures the right of a criminal defendant who faces incarceration to be represented by counsel at all "critical stages" of the criminal process. *United States v. Wade*, 388 U.S. 218, 224, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). However, the constitutional right to assistance of counsel does not extend to{2021 U.S. Dist. LEXIS 5} motions for post-conviction relief. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *Shedwick v. Warden N. Cent. Corr. Inst.*, No. 16-3203, 2016 U.S. App. LEXIS 24551, 2016 WL 11005052, at *3 (6th Cir. Dec. 30, 2016) ("[T]here is no right to counsel in a post-conviction action.").

Movants do not possess a right to counsel in pursuing Section 2255 motions. *See Brown v. United States*, 20 F. App'x 373, 375 (6th Cir. 2001) (citing *Pennsylvania v. Finely*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987)); *Foster v. United States*, 345 F.2d 675, 676 (6th Cir. 1965) ("This Court and others, however, have recently reaffirmed the rule that the Sixth Amendment does not apply to collateral attacks.").

"In exercising discretion as to whether to appoint counsel, a court should consider several factors, including the nature of the case, whether the issues are legally or factually complex, and the litigant's ability to present the claims for relief to the court." *United States v. Woods*, No. 2:03-CR-069, 2020 U.S. Dist. LEXIS 177489, 2020 WL 5805324, at *3 (E.D. Tenn. Sept. 28, 2020) (citing *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1993)).

Petitioner fails to present any unique circumstances justifying appointment of counsel. Petitioner has failed to articulate why he is unable to present his 28 U.S.C. § 2255 motion *pro se*. Moreover, the Court believes that it is able to fairly adjudicate such motions even though one side (and not the other) is unrepresented by counsel. That is not to say that learned counsel cannot contribute something, especially something regarding nuances, to a petitioner's cause on these motions. But it is to say that typically, the degree of substantive merit of these motions is evident to the Court even{2021 U.S. Dist. LEXIS 6} without learned counsel advocating the merits on the petitioner's behalf. Accordingly, Petitioner's request for counsel is **DENIED**, and the Court will proceed to the merits of the Motion.

ANALYSIS

Via the Motion, Petitioner correctly concludes that "this Court will likely consider [his] claim[s] 'vague' or 'conclusory'". (Doc. No. 1 at 2). But that is not the only issue with Petitioner's Motion. It is also untimely, as the Government correctly asserts. (*See* Doc. No. 8 at 1). As the Government correctly explains, Petitioner's conviction became final on July 25, 2019, when his deadline for filing a notice of appeal expired. (*Id.* at 5). Section 2255 provides: "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the . . . date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). This means that Petitioner had one year from July 25, 2019 (i.e., until July 25, 2020) to file a Section 2255 petition, as the Government correctly notes. (Doc. No. 8 at 5). Petitioner did not do so; Petitioner filed his petition over one year past the deadline, on August 20, 2021.

Petitioner concedes that his motion is untimely but argues that he should be entitled to equitable{2021 U.S. Dist. LEXIS 7} tolling. (Doc. No. 1 at 11). This Court previously has explained equitable tolling as follows:

> Under limited circumstances, the period for filing a habeas petition under § 2255(f) may be tolled. *See Roberston v. Simpson*, 624 F.3d 781, 783-84 (6th Cir. 2010). To be entitled to equitable tolling, a habeas petitioner must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (quoting

Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). "The doctrine of equitable tolling is applied sparingly by federal courts," and is typically used "only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir.2003) (citations and internal quotations marks omitted).*Corley v. United States*, No. 3:18-CV-00485, 2019 U.S. Dist. LEXIS 122520, 2019 WL 3305119, at *1 (M.D. Tenn. July 23, 2019).

The Government contends that equitable tolling does not apply here because Petitioner has not diligently pursued his rights. Petitioner contends that he is entitled to equitable tolling because, according to him, (1) his motion to alter or amend the judgment in his criminal case, brought under Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60(b) Motion"), was really a "defective" collateral attack Section 2255 petition and thus grounds for equitable tolling; (2) he should be excused for not filing his Section 2255 petition while his Rule 60(b) motion was pending; and (3){2021 U.S. Dist. LEXIS 8} through the filing of the Rule 60(b) motion and otherwise, he has demonstrated due diligence while gathering evidence to support his claims. (Doc. No. 1 at 12-14). The Court rejects each asserted ground for equitable tolling.

First, Petitioner relies on the principle that equitable tolling may be appropriate where the claimant actively pursued his judicial remedies by filing a defective pleading asserting those remedies during the limitations period. (*Id.* at 12). "The Supreme Court has explained that '[w]e have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)). Petitioner claims that his Rule 60(b) Motion, filed in his underlying criminal case a few weeks before the expiration of the one-year limitations period, was a defective Section 2255 petition. The Court disagrees. To begin with, the Court fears that the entire policy behind the one-year limitations period would be circumvented if a would-be petitioner could file a barebones document (like the Rule 60(b) motion) that obviously{2021 U.S. Dist. LEXIS 9} does not suffice under Section 2255 and yet claim entitlement to equitable tolling on the grounds that the filing was effectively a defective Section 2255 petition. Additionally, Petitioner's Rule 60(b) Motion was not a "defective" attempt to do something (let alone a defective attempt specifically to present a Section 2255 petition) but rather a very intentional attempt to accomplish a particular strategic goal he had in mind. According to Petitioner, he filed the Rule 60(b) Motion to "reopen the judgment" because "the United States used the writ of habeas corpus ad prosequendum to implement a stratagem in which to coax him into waiving his privilege against self-incrimination." (Doc. No. 1 at 13-14). If Petitioner filed his Rule 60(b) Motion *in hopes of* shedding light on the Government's alleged wrongdoing, then Rule 60(b) Motion was filed for than distinct purpose and was not for the purpose of asserting a Section 2255 petition that just happened to be defective. Petitioner further contends that his "Rule 60(b) Motion was the equivalent of a 'bunt' to get Petitioner's 'runners' on base; meaning [Petitioner] filed the Rule 60(b) Motion in order to demonstrate due diligence while he gathered the necessary evidence to support his claims." (*Id.* at 15). Although Petitioners are entitled to{2021 U.S. Dist. LEXIS 10} make whatever tactical decisions they wish to make (and then live with the consequences), the Sixth Circuit has held that tactical decisions made while being aware of a filing deadline do not support a granting of equitable tolling. *See Jurado*, 337 F.3d at 643 (affirming lower court's holding that one-year limitations period would not be equitably tolled based on tactical decision not to file state postconviction application until completion of extensive 19-month investigation or counsel's alleged misunderstanding of statutory tolling.").

Finally, Petitioner confusingly notes that "although [he] maintains that Rule 60(b) was actually availed to him based on the Government's writ of habeas corpus ad prosequendum . . . the Rule 60(b) Motion was defective, because Rule 60(b) was not the most expedient manner in which to attack the judgment." *Id.* at 14. Whether true or not, this argument is irrelevant. It does not matter whether a Rule 60(b) motion was "the most expedient manner" to attack the judgment if that is the manner by which Petitioner chose to do so. Petitioner made a tactical decision to file a Rule 60(b) motion instead of a Section 2255 petition. It is clear from Petitioner's many filings and his self-proclaimed status as an "intermediate-level paralegal" that**{2021 U.S. Dist. LEXIS 11}** he is aware of the differences between the two forms of relief. (Doc. No. 1 at 12; Doc. No. 13 at 8). Petitioner does not claim that he was unaware of the filing deadline of a Section 2255 petition. Accordingly, Petitioner's reaching argument that his Rule 60(b) motion should be deemed defective because *he* chose to bring that motion instead of a Section 2255 petition at that time fails.

Second, Petitioner claims that "he could not have filed the instant petition until after the disposition of the Rule 60(b) Motion." (Doc. No. 1 at 12). Petitioner correctly points out that this Court (correctly) explained (in its Order case number 3:16-cr-176-2, Doc. No. 826 at 1-2) that while Petitioner's appeal of this Court's denial of his Rule 60(b) motion was pending, this Court could not rule on any motion seeking to modify Petitioner's sentence, including the particular motion then pending before the Court, *i.e.*, Petitioner's motion (Doc. No. 825) seeking reconsideration of this Court's order (Doc. No. 823) denying his motion (Doc. No. 822) for compassionate release. But a petition (motion) under 28 U.S.C. § 2255 is not a motion seeking merely to *modify* Petitioner's sentence; rather, it is a federal habeas corpus matter seeking to have his sentence *declared unlawful***{2021 U.S. Dist. LEXIS 12}** under the constitution and/or laws of the United States. In other words, the Court did not signal here (or anywhere else) that a Section 2255 petition could not be filed while his Rule 60(b) motion was pending.2 True, a Section 2255 petition is subject to dismissal as premature until the time the petitioner's conviction(s) and sentence(s) become final, if the petition is filed before that time. *See, e.g.*, *United States v. Johnson*, 484 F. App'x 847, 848 (4th Cir. 2012); *Castellano-Martinez v. United States*, No. CR B:12-255-1, 2012 U.S. Dist. LEXIS 193174, 2012 WL 12882104, at *1 (S.D. Tex. Nov. 14, 2012). But Petitioner's conviction became final almost a year before he filed the Rule 60(b) motion, the filing of which had no effect on Petitioner's prerogative to file a (not premature) petition under Section 2255. Certainly, a would-be petitioner is not allowed to buy himself additional time by the simple expedient of filing a Rule 60(b) motion long after his criminal judgment became final but just before his one-year limitations period expired.

In any event, the Sixth Circuit affirmed this Court's judgment denying Petitioner's Rule 60(b) motion on June 4, 2021. Petitioner then filed an appeal, which was denied. (Doc. No. 1 at 12). Petitioner subsequently filed a "petition for rehearing or rehearing en banc". *Id.* Petitioner notes that his petition for rehearing was denied on July 29, 2021 but that he did not receive notice of the denial order until August**{2021 U.S. Dist. LEXIS 13}** 6, 2021. Petitioner states that he then filed his "instant 2255 motion in the U.S. mail not long after." Doc. No. 13 at 8. Even if Petitioner's argument that he could not file his petition until the resolution of his Rule 60(b) motion was correct (which it is not), he should have filed his Section 2255 petition immediately after notice of the Sixth Circuit's denial, which he did not. He filed his petition two weeks later on August 20, 2021. Considering that at this point Petitioner's filing deadline had long expired (namely over one year later), diligence required a more immediate filing. Indeed, the Sixth Circuit has cautioned that "a court should not extend limitations by even a single day" unless there are "compelling equitable considerations." *Thomas v. Romanowski*, 362 F. App'x 452, 454 (6th Cir. 2010) (quoting *Graham-Humphreys v. Memphis Brooks Museum of Art*, 209 F.3d 552, 561 (6th Cir. 2000)). Here, Petitioner simply has not carried his burden of demonstrating that such equitable considerations are present, and the Petition must be dismissed

as untimely. The decision whether to grant equitable tolling is in the sound discretion of the district court. *See Ingraham v. Geren*, No. 3:07-0328, 2008 U.S. Dist. LEXIS 133202, 2008 WL 11510397, at *8 (M.D. Tenn. Aug. 19, 2008) ("[T]he Court may exercise equitable tolling at its discretion when justice so requires."). Although the Court has found that it cannot properly apply equitable tolling here because the{2021 U.S. Dist. LEXIS 14} justification for it is simply absent, the Court would decline to apply equitable tolling even if it did believe that it had the discretion to do so.3

Petitioner also claims that he diligently pursued his rights. The Court disagrees. For one thing, as suggested above, the Court does not believe that he demonstrated diligence as to his right to file a Section 2255 petition by filing the Rule 60(b) motion.

> To be entitled to equitable tolling, Petitioner must show that he was reasonably diligent in pursuing his claim. *See Holland*, 560 U.S. at 653 (stating that equitable tolling requires "reasonable diligence," not "maximum feasible diligence"). Reasonable diligence is typically measured through evidence of repeated efforts to communicate with counsel and/or the Court. *See id.* (finding reasonable diligence when a petitioner "wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association.... And, the very day that [Petitioner] discovered that his AEDPA clock had expired... [Petitioner] prepared his own habeas petition pro se and promptly filed it with the District Court."); *Jimenez v. Butcher*, 839 F. App'x 918, 919 (5th Cir. 2021) (finding that a petitioner had exercised{2021 U.S. Dist. LEXIS 15} reasonable diligence when "[He] sent 'voluminous' correspondence to his original postconviction lawyer; he wrote his trial lawyer, apparently expressing a desire to change lawyers; he asked his trial lawyer to send him the state court record; and he 'promptly retained' a second postconviction lawyer upon learning of his original postconviction lawyer's withdrawal."). Conversely, courts do not find reasonable diligence when a petitioner fails to show that he or she has consistently pursued their claim. *See Patterson v. Lafler*, 455 Fed. App'x 606, 610-11 (6th Cir. 2012) (finding that petitioner was not reasonably diligent because they failed to make consistent efforts to contact their attorney regarding their habeas petition); *Carpenter v. Douma*, 840 F.3d 867, 870-71 (7th Cir. 2016) (stating that large time gaps between a petitioner's actions to pursue his claims undermined a finding of reasonable diligence); *see also Mayberry v. Dittmann*, 904 F.3d 525, 531 (7th Cir. 2018) ("Petitioner's evidence of reasonable diligence lacked the specificity necessary to entitle him to equitable tolling."). *Thompson v. United States*, No. 3:20-CV-00700, 2021 U.S. Dist. LEXIS 112799, 2021 WL 2457750, at *3 (M.D. Tenn. June 15, 2021). Petitioner argues that he "filed [his] Rule 60(b) Motion in order to demonstrate due diligence while he gathered the necessary evidence to support his claims." Doc. No. 1 at 15. However, the evidence Petitioner discusses relates to claims concerning his Middle District of Florida{2021 U.S. Dist. LEXIS 16} criminal case, over which this Court lacks jurisdiction, and not to the claims concerning his criminal case in this Court. Petitioner's attempt to "combine" these two cases by bringing claims concerning both criminal cases, and then using an alleged excuse relating to the other criminal case to justify his delay bringing claims related to the criminal case in this Court is to no avail. Consequently, Petitioner has not shown that he has been diligent in pursuing his rights with respect to his claims concerning his criminal case in this Court.4

Even though the Court could deny Petitioner's equitable tolling claim on the sole basis that he did not diligently pursue his rights, the Court finds additionally that no extraordinary circumstances stood in his way of timely filing a Section 2255 petition. Petitioner claims that the tornado that occurred on April 13, 20205 also entitles him to equitable tolling. Specifically, Petitioner contends that "[b]efore the tornado strike [sic], he forwarded a copy of his MDFL 2255 motion to his wife, [and] this is how he was able to file an earlier 2255 motion in MDFL. He did not have the foresight to forward a copy of

the MDTN motion to his wife before he was separated from{2021 U.S. Dist. LEXIS 17} his legal materials." (Doc. No. 13 at 6-7). The Court takes Petitioner to be arguing here that the tornado is an extraordinary circumstance that prevented him from filing timely his Section 2255 petition. Ordinarily, this kind of argument might hold weight, but in this instance, it does not. The Government correctly notes that the tornado does not justify equitable tolling, because Petitioner made several filings in both his Middle District of Tennessee and Middle District of Florida cases during the time period he claims he was separated from his personal property (namely, April 13, 2020 through March 10, 2021). (Doc. No. 8 at 12). Defendant's argument is further contradicted by the fact that he *timely* filed a Section 2255 petition in his Middle District of Florida case during this time frame, showing that Defendant was aware of such a deadline in that matter and presumably also aware of the Section 2255 petition filing deadline in his MDTN case. It is clear from Petitioner's filings in his underlying criminal case and the instant (civil) matter involving the Petition that he is sufficiently well-versed in the law-and sufficiently motivated by a desire to obtain relief-to grasp and appreciate the significance and substance{2021 U.S. Dist. LEXIS 18} of timing requirements for particular filings and to draft and file requests for relief (albeit not necessarily *meritorious* requests for relief). In short, Petitioner has demonstrated that he is litigious and has not demonstrated why, especially considering that litigiousness, he did not initiate the instant litigation in a timely manner (within the one-year limitations period). The tornado does not constitute an extraordinary circumstance that stood in his way of a timely filing of the Petition. In his Response to the Government's Motion to Dismiss, Petitioner claims that "the limitations period may also be 'overcome' through a 'gateway' claim of actual innocence." (Doc. No. 13 at 3). Specifically, Defendant contends that he "did not learn that Anthony Wheeler died of an overdose of drugs not solely attributed to him, until after he reviewed the revised PSR on or about June of 2020" and "based on the fact he is only convicted of violating the U.S. Sentencing Commission's commentary." (*Id.* at 4). To obtain relief under Section 2255 based on errors that were not raised on direct appeal, a petitioner "must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting{2021 U.S. Dist. LEXIS 19} from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167-68, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). This standard is "a significantly higher hurdle than would exist on direct appeal." *Id.* at 166. A Section 2255 petitioner does have an alternative to meeting this high hurdle: showing actual innocence. *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (noting that a defendant may alternatively obtain relief under Section 2255 based on errors not raised on direct appeal if he demonstrates actual innocence) (citing *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). Petitioner's challenge here fails because "challenges to the weight or credibility of the evidence do not establish innocence, and claims of insufficient evidence short of establishing actual innocence-which appears to be at most all that Petitioner is claiming here-will not be reviewed in a § 2255 proceeding." *Goward v. United States*, 569 F. App'x 408, 411-12 (6th Cir. 2014) (citing *Zack v. United States*, No. 93-2493, 28 F.3d 1215, 1994 WL 284088, at *3 (6th Cir. 1994)). Therefore, Petitioner's claim of "actual innocence" fails, and Petitioner will not be granted equitable tolling on this ground.

Finally, Petitioner appears to request an evidentiary hearing to determine whether equitable tolling is appropriate in this matter. Doc. No. 1 at 11, 17-18. However, the Court is not required to hold an evidentiary hearing in every instance.

> A petitioner is not entitled to an evidentiary hearing if he has not alleged any facts that, if true, would entitle the petitioner{2021 U.S. Dist. LEXIS 20} to federal habeas relief. *See McSwain v. Davis*, 287 F. App'x 450, 458 (6th Cir. 2008). Even when material facts are in dispute, an evidentiary hearing is unnecessary if the petitioner is conclusively entitled to no relief. *See Amr v. United States*, 280 F. App'x 480, 485 (6th Cir. 2008). "Stated another way, the court is not required to hold an evidentiary hearing if the petitioner's allegations cannot be accepted as true

because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Id.; accord Arredondo*, 178 F.3d at 782. The decision whether to hold an evidentiary hearing is one committed to the sound discretion of the district court. *Huff v. United States*, 734 F.3d 600, 607 (6th Cir. 2013) ("A decision not to hold an evidentiary hearing on a motion for relief under 28 U.S.C. § 2255 is reviewed for abuse of discretion."). *Thompson*, 2021 U.S. Dist. LEXIS 112799, 2021 WL 2457750, at *1. Reviewing Petitioner's instant Petition, it is filled with baseless conclusions rather than statements of fact. "[W]here the record conclusively shows that the petitioner is entitled to no relief, a hearing is not required." *Dagdag v. United States*, No. 3:16-cv-364-TAV, 2019 U.S. Dist. LEXIS 91410, 2019 WL 2330274, at *1 n.1 (E.D. Tenn. May 31, 2019) (citing *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999)) (internal quotation marks omitted). Because Petitioner is not entitled to equitable tolling and has failed to bring his claim within the one-year limitations period, Petitioner is not entitled to relief and therefore no hearing is required.

CONCLUSION{2021 U.S. Dist. LEXIS 21}

For the reasons discussed herein, the Government's Motion to Dismiss (Doc. No. 8) will be **GRANTED**, and the Petition will be dismissed with prejudice as to the challenges to Petitioner's conviction and sentence in this Court and will be dismissed without prejudice as to his convictions and sentences in the Middle District of Florida. Petitioner's Motion to Appoint Counsel (Doc. No. 10) will be **DENIED as moot**. Further, based on this Order, all other pending motions related to Defendant's Section 2255 Petition, including Defendant's Motion to Compel (Doc. No. 6) and the Government's Motion for Extension of Time (Doc. No. 15), will be **DENIED** as moot.

An appropriate Order will be entered.

/s/ Eli Richardson

ELI RICHARDSON

UNITED STATES DISTRICT JUDGE

ORDER

Pending before the Court is Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 1, "Petition"), wherein Petitioner seeks vacatur of his convictions and sentence(s) in his underlying criminal case (no. 3:16-cr-176-2), whereby he is serving an aggregate prison term of 266 months. The government moved to dismiss the Petition on September 2, 2021 (Doc. No. 8, "Motion to Dismiss"). Petitioner responded to the Government's Motion{2021 U.S. Dist. LEXIS 22} to Dismiss on September 13, 2021 (Doc. No. 13, "Petitioner's Response") and filed a supporting memorandum four days later (Doc. No. 14, "Petitioner's Memorandum in Support"). On September 8, 2021, Petitioner filed a Motion to Appoint Counsel pursuant to 18 U.S.C. § 3006A(a)(1)(H) (Doc. No. 10). For the reasons discussed in the accompanying memorandum opinion, the Motion to Dismiss (Doc. No. 8) is **GRANTED**, and the Petition is dismissed with prejudice as to the challenges to his conviction and sentence in this Court and is dismissed without prejudice as to his convictions and sentences in the Middle District of Florida.

Petitioner's Motion to Compel (Doc. No. 6), Petitioner's Motion to Appoint Counsel (Doc. No. 10), and the Government's Motion for Extension of Time (Doc. No. 15) are **DENIED as moot**.

Rule 11(a) of the Rules Governing § 2255 Cases requires that a district court "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability may issue only if the "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Should Petitioner give timely notice of an appeal from this Order, such notice shall be treated as an application for a certificate of appealability,{2021 U.S. Dist. LEXIS 23} 28 U.S.C. § 2253(c). A district court may make a decision as to a certificate of appealability at the time it denies a § 2255 petition, even though the petitioner has yet to make an effective request for such a certificate by filing a notice of appeal (or otherwise). *See Castro v. United States*, 310 F.3d 900, 902 (6th Cir. 2002).

"To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 & n.4 (1983))). Or to put it only slightly differently, "[a] petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)).

In this case, a certificate of appealability will not issue from this Court, because the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right. As noted{2021 U.S. Dist. LEXIS 24} in the above-referenced Rule 11(a), however, Petitioner is free to separately request a certificate of appealability from the United States Court of Appeals for the Sixth Circuit pursuant to Rule 22 of the Federal Rules of Appellate Procedure.

This Order shall constitute the final order in this case for purposes of the above-referenced Rule 11(a) and also the judgment in this case for purposes of Fed. R. Civ. P. 58.

IT IS SO ORDERED.

/s/ Eli Richardson

ELI RICHARDSON

UNITED STATES DISTRICT JUDGE

Footnotes

1

On March 16, 2017 Petitioner was sentenced to 188 months' imprisonment for similar conduct by the United States District Court for the Middle District of Florida (that district's case no. 6:16-cr-224). Doc. No. 1 at 1. Several of Petitioner's grounds for relief in the Petition relate to his Middle District of Florida sentence. But a petition under Section 2255 must be filed in the court that imposed the sentence being collaterally attacked via the petition. *See* 28 U.S.C. § 2255(a). Thus, jurisdiction does not lie in this Court as to claims challenging the convictions and sentence(s) in the Middle District of Florida case, and accordingly this Court will dismiss such claims without prejudice.

2

If the Court had so signaled (which it did not), that might suggest that the Court should explain why it is now taking a view contrary to what it signaled previously. But what it would not suggest is that

Petitioner *relied* on such a signal in refraining from filing during the one-year limitations period; the Order cited by Petitioner here was not issued until March 11, 2021, long after the limitations period expired.

3

As previously mentioned, although this argument section mentions Petitioner's issues with his case and counsel in his Middle District of Florida case, the Court will not entertain such arguments as this Court has no jurisdiction over a collateral attack upon the judgment in that case.

4

The Court takes no position whether he has done so in his Middle District of Florida case.

5

Although in his various filings Petitioner mentions April 13, 2019 and April 13, 2020 as dates on which the tornado occurred, the tornado occurred on April 13, 2020 and the Court will use that date for purposes of this section. (*See* Doc. No. 8 at 12, fn. 6).

6

"It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 622.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERIC CHRISTOPHER FALKOWSKI, Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2021 U.S. App. LEXIS 16796

No. 20-5936

June 4, 2021, Filed

Notice:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Editorial Information: Subsequent History

Rehearing denied by, En banc United States v. Falkowski, 2021 U.S. App. LEXIS 22620 (6th Cir., July 29, 2021)Motion granted by Falkowski v. United States, 2021 U.S. Dist. LEXIS 198018 (M.D. Fla., Oct. 14, 2021)

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.United States v. Doe, 2020 U.S. Dist. LEXIS 134847, 2020 WL 4368282 (M.D. Tenn., July 30, 2020)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Cecil Woods VanDevender, Office of the U.S. Attorney, Nashville, TN.

ERIC CHRISTOPHER FALKOWSKI, Defendant - Appellant, Pro se, Glenville, WV.

Judges: Before: BATCHELDER, COOK, and STRANCH, Circuit Judges.

Opinion

ORDER

Eric Falkowski, a federal prisoner proceeding pro se, appeals the district court's order denying his motion to reconsider the judgment that sentenced him to 266 months in prison. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because Falkowski's motion relies on the Federal Rules of Civil Procedure even though his case is a criminal prosecution governed by the Federal Rules of Criminal Procedure, the order is AFFIRMED.

Falkowski participated in an enterprise with others to manufacture and distribute counterfeit Percocet pills using fentanyl, which resulted in one death and multiple overdose hospitalizations around Murfreesboro, Tennessee. Falkowski pleaded guilty pursuant to a plea agreement to all ten charges levied against him. He testified against five codefendants{2021 U.S. App. LEXIS 2} in their trial, and

APPENDIX C

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the jury returned guilty verdicts against four of them.

Falkowski's presentence report calculated a guideline sentence of life imprisonment based on a total offense level of 43 and criminal history category of IV. After granting the government's motion for a downward departure, *see* USSG § 5K1.1, and granting a further downward adjustment for time Falkowski had spent in pretrial custody, the district court sentenced Falkowski to a 266-month term of imprisonment, to be served concurrently with a 188-month sentence related to a conviction in the Middle District of Florida. The court advised Falkowski that, although he had waived some of his rights to appeal in his plea agreement, he had fourteen days from entry of judgment to appeal.

The district court entered judgment on July 11, 2019. A clerical error required the court to enter an amended judgment on September 17, 2019. Falkowski did not file a notice of appeal within fourteen days of either date, but on June 26, 2020, he filed a motion for leave to file an untimely notice of appeal. The court denied the motion, and Falkowski did not appeal from that denial.

On July 27, 2020, Falkowski filed a "Motion to Reopen Judgment under{2021 U.S. App. LEXIS 3} Rule 60(b)," relying on the Federal Rule of Civil Procedure that provides for relief from a final judgment in a civil case. Falkowski argued that he received ineffective assistance of counsel with respect to his right to appeal, that the district court's judgment was "wrought with countless instances of constitutional infirmities," and that the government committed "egregious" misconduct "through an elaborate stratagem" to cause him to incriminate himself.

The district court denied the motion on two alternative grounds. *United States v. Doe*, No. 3:16-CR-00176-2, 2020 U.S. Dist. LEXIS 134847, 2020 WL 4368282 (M.D. Tenn. July 30, 2020) (order). First, the court determined that Falkowski's claims were "entirely conclusory, with absolutely no accompanying allegations (let alone evidence) of supporting facts." 2020 U.S. Dist. LEXIS 134847, [WL] at *1. Second, the court concluded that the motion was untimely because it was filed more than a year after sentencing. *Id.* Falkowski filed a timely notice of appeal.

On appeal, Falkowski argues for the timeliness of his Rule 60(b) motion because his motion was made on July 27, 2020, for reconsideration of an amended judgment that was entered on September 17, 2019, and Rule 60(c)(1) provides for a one-year limitation period. The government responds that Falkowski is improperly relying on rules for civil procedure even though his case{2021 U.S. App. LEXIS 4} is a criminal matter.

The district court's denial of a motion for relief from a judgment under Rule 60(b) of the Federal Rules of Civil Procedure in a criminal proceeding is reviewed for an abuse of discretion. *United States v. Gibson*, 424 F. App'x 461, 463 (6th Cir. 2011). A court abuses its discretion if it relies on erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard. *Keith v. Bobby*, 618 F.3d 594, 597 (6th Cir. 2010).

The government is indeed correct. "[F]ederal criminal trials are governed by the Federal Rules of Criminal Procedure." *Gibson*, 424 F. App'x at 464. Rule 60(b) cannot be used to provide relief from judgment in criminal proceedings. *Id.*; *United States v. Diaz*, 79 F. App'x 151, 152 (6th Cir. 2003). Though this proceeding comes after Falkowski's conviction, it is still part of his criminal case because Falkowski seeks relief from the judgment entered in his criminal case. That is distinct from a collateral attack on the conviction such as a habeas petition, which would be a separate civil proceeding. The Federal Rules of Criminal Procedure apply to criminal proceedings, while the Federal Rules of Civil Procedure apply to collateral attacks "to the extent that [it is] not inconsistent with applicable federal statutes and rules." *Gibson*, 424 F. App'x at 464 (alteration in original) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 529, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)).

It is true that "[a] document filed *pro se* is 'to be liberally construed.'" *Erickson v. Pardus*, 551 U.S.

89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). But even so, none of the limited{2021 U.S. App. LEXIS 5} methods of challenging an entered judgment delineated in the Federal Rules of Criminal Procedure-that is, those under which we could possibly construe Falkowski's motion to have been made-apply here. *See* Fed. R. Crim P. 33, 34, 35, 36. Even were we to very liberally construe Falkowski's motion as having been made under its closest analogue in the Federal Rules of Criminal Procedure, a motion for a new trial under Rule 33, the motion would still be untimely. *See* Fed. R. Crim. P. 33(b)(2). When a Rule 33 motion is untimely, we will uphold a conviction "unless doing so would result in a manifest miscarriage of justice"; given the district court's reasonable findings, Falkowski has not so shown here (again, even if we were to construe his motion as having been made under Rule 33). For all of these reasons, the district court did not abuse its discretion in denying the motion; it is not necessary to specifically affirm the denial on the merits or further analyze the motion's timeliness.

Finally, we note that Falkowski filed what we construed as a motion to remand so that he could file a motion under 18 U.S.C. § 3582(c)(1)(A) in the district court, which we denied. Once the district court regains jurisdiction over this case, Falkowski may file such a motion in his criminal case, governed{2021 U.S. App. LEXIS 6} by the Federal Rules of Criminal Procedure.

The district court's order is **AFFIRMED.**

UNITED STATES OF AMERICA, v. JOHN QUINCY DOE, aka ERIC CHRISTOPHER FALKOWSKI
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION
2020 U.S. Dist. LEXIS 120214
NO. 3:16-cr-00176-2
July 8, 2020, Decided
July 8, 2020, Filed

Editorial Information: Subsequent History

Motion denied by United States v. Doe, 2020 U.S. Dist. LEXIS 134847, 2020 WL 4368282 (M.D. Tenn., July 30, 2020)Decision reached on appeal by, Sub nomine at United States v. Williams, 998 F.3d 716, 2021 U.S. App. LEXIS 15764, 2021 WL 2131289 (6th Cir. Tenn., May 26, 2021)Motion denied by, Request denied by United States v. Falkowski, 2021 U.S. Dist. LEXIS 186819, 2021 WL 4460512 (M.D. Tenn., Sept. 29, 2021)Post-conviction relief dismissed at, Motion denied by, As moot Falkowski v. United States, 2021 U.S. Dist. LEXIS 198160 (M.D. Tenn., Oct. 14, 2021)

Counsel {2020 U.S. Dist. LEXIS 1}For USA, Plaintiff: Amanda J. Klopf, LEAD ATTORNEY, U.S. Attorney's Office (MDTN), Middle District of Tennessee, Nashville, TN USA; Brent Adams Hannafan, U.S. Attorney's Office (Nashville Office), Middle District of Tennessee, Nashville, TN.

Judges: ELI RICHARDSON, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: ELI RICHARDSON

Opinion

MEMORANDUM OPINION & ORDER

Pending before the Court is Defendant's Application to Proceed In District Court Without Prepaying Fees or Costs (Doc. No. 813, "Application"). Defendant's Application is not necessary. As one district court explained:

> A declaration of in forma pauperis status is unnecessary for an indigent criminal defendant. In forma pauperis status basically permits a litigant to have access to the courts without the pre-payment of filing fees. 28 U.S.C. § 1915(a)(1). There are no filing fees in a criminal case. Although a defendant ultimately may file an appeal in a criminal case in forma pauperis, such a request is premature at this stage of the litigation.*United States v. Ford*, No. CRIM. 08-411-8, 2011 U.S. Dist. LEXIS 42150, 2011 WL 1496782, at *1 (W.D. Pa. Apr. 19, 2011); *see also Owens v. United States*, No. 1:08-CV-807, 2008 U.S. Dist. LEXIS 96108, 2008 WL 4997524, at *3 (W.D. Mich. Nov. 20, 2008) (relieving a defendant of a filing fee where he intended to file matters in his criminal case, rather than initiate a new civil action). Therefore, the{2020 U.S. Dist. LEXIS 2} Court DENIES Defendant's Application as moot.

Also pending before the Court is Defendant's Motion for Leave to File Untimely Notice of Appeal.

APPENDIX D

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(Doc. No. 812, the "Motion"). Via the Motion, Defendant requests the Court "to grant leave to file an untimely appeal" and to grant Defendant leave "to proceed under the pseudonym, John Quincy Doe." (*Id.*).

Defendant is serving a 266-month term of imprisonment on each of the following counts, with the sentence on each count to run concurrent with one another: one count of Conspiracy to Distribute and Possess with Intent to Distribute Fentanyl, Resulting in Death or Serious Bodily Injury, in violation of 21 U.S.C. §§ 846; and nine counts of Distribution and Possession with the Intent to Distribute Fentanyl, Resulting in Death or Serious Bodily Injury, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C). The judgment reflecting such sentence was entered on July 11, 2019 (Doc. No. 767). As Defendant was advised at his sentencing hearing, which had taken place 10 days earlier, he had 14 days to file a notice of appeal. (Doc. No. 801 at 51).1

Defendant acknowledges that his notice of intent to appeal is untimely but claims excusable neglect. He claims that his counsel, David I. Komisar, "failed to{2020 U.S. Dist. LEXIS 3} consult with him regarding his limited appeal rights following the July 1, 2019 sentencing hearing" despite an order from Judge Zouhary. (Doc. No. 812 at 2). Komisar allegedly later informed Defendant's wife that there had been no point in discussing appeal rights since Defendant had waived his right to appeal. (*Id.* at 2-3).

Under the Federal Rules of Appellate Procedure, to commence an appeal a criminal defendant must file a notice of appeal within 14 days after the entry of the judgment being appealed. Fed. R. App. P. 4(b)(1)(A)(i). Rule 4(b) allows for consideration of a motion to extend the time period for filing a notice of appeal. Specifically, Rule 4(b)(4) provides:

> Upon a finding of excusable neglect or good cause, the district court may-before or after the time has expired, without or without motion and notice-extend the time to file a notice of appeal for a period *not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)*.Fed. R. App. P. 4(b)(4) (emphasis added); *see also United States v. Aguilar-Rivera*, No. 2:17-CR-164(1), 2020 U.S. Dist. LEXIS 13438, 2020 WL 419728, at *2 (S.D. Ohio Jan. 27, 2020) (explaining that, even if the district court were to find excusable neglect or good cause shown, the court may only enlarge the time period to file a notice of appeal by 30 days from the expiration of the defendant's{2020 U.S. Dist. LEXIS 4} time to appeal); *United States v. Tolbert*, No. 3:08CR-142-M, 2012 U.S. Dist. LEXIS 862, 2012 WL 28757, at *2 (W.D. Ky. Jan. 5, 2012) ("Because Defendant did not file a notice of appeal within the period mandated by the Federal Rules of Appellate Procedure, Defendant's appeal is untimely, and the Court need not determine whether excusable neglect or good cause exists."); *United States v. Conley*, No. 1-03-cr-73-06, 2009 U.S. Dist. LEXIS 6729, 2009 WL 212543, at *3 (E.D. Tenn. Jan. 29, 2009) ("[I]t is immaterial whether Conley failed to receive by mail from the Clerk of the District Court a copy of the [court's] memorandum and order. Conley's alleged lack of notice of the entry . . . cannot enlarge or alter the strict time limits on this Court's jurisdiction and authority under Fed. R. App. P. 4(b)(4) to allow an extension of time to file a notice of appeal.").

Here, the Court entered judgment on July 11, 2019. Therefore, Defendant's time to file a notice of appeal expired on July 25, 2019. As noted, Rule 4(b)(4) provides that the Court with the authority to extend the time for Defendant to file a notice of appeal, upon excusable neglect or good cause shown, until 30 days later-August 24, 2019. Plaintiff filed his Motion for Leave to File Untimely Appeal over ten months later, on June 26, 2020. Accordingly, this Court does not have the authority to grant, and thus{2020 U.S. Dist. LEXIS 5} will not grant, Defendant the extension he seeks. Additionally, Defendant's request for leave to proceed with his appeal under a pseudonym is denied as moot. Thus, the Court denies the Motion in its entirety.