United States Court of Appeals for the Fifth Circuit

No. 22-50772

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RYAN DAVID GREEN,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:22-CV-105

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Before HAYNES, ENGELHARDT, and OLDHAM, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), the motion for reconsideration 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.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 23, 2023
Lyle W. Cayce
Clerk

No. 22-50772

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RYAN DAVID GREEN,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 7:22-CV-105
USDC No. 7:18-CR-31-2

ORDER:

Ryan David Green, federal prisoner # 00378-480, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his combined 420-month sentence for conspiracy to possess with intent to distribute methamphetamine and marijuana; aiding and abetting the use, carrying, and discharge of a firearm in furtherance of a drug trafficking crime; and aiding and abetting murder resulting from the use and discharge of a firearm in relation to a drug trafficking crime. He challenges the district court's

determination that his § 2255 motion was time barred. Specifically, Green argues that he is entitled to equitable tolling of the limitations period because difficulties arising from the COVID-19 pandemic prevented him from timely filing his § 2255 motion. Green also reasserts the constitutional claims raised in the district court. He abandons any challenge to the district court's alternative finding that his § 2255 motion was barred by the waiver provision in his plea agreement by failing to brief the issue. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA, Green must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on procedural grounds, the movant must demonstrate that reasonable jurists would find it debatable whether the motion states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Green has failed to make such a showing. *See id.*

Accordingly, Green's motion for a COA is DENIED. His motion for leave to proceed in forma pauperis is likewise DENIED.

/s/ Catharina Haynes
CATHARINA HAYNES
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	NO: MO:18-CR-00031(2)-DC
	§	MO:22-CV-00105
(2) RYAN DAVID GREEN	§	

ORDER DENYING MOVANT'S 28 U.S.C. §2255 AS TIME-BARRED, AND IN THE ALTERNATIVE, DUE TO HIS PLEA AGREEMENT WAIVER, AND DENYING A CERTIFICATE OF APPEALABILITY

Before the Court is Movant Ryan David Green's (Movant) initial Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed pursuant to 28 U.S.C. §2255 (§2255), mail-filed on April 9, 2022. [docket number 165]. Also before the Court are Movant's amended §2255, and his Motion for Equitable Tolling. [docket numbers 167, & 169, respectively]. After due consideration, this Court finds Movant's §2255 is not well-taken because it is time-barred and, in the alternative, fails due to his plea agreement waiver, therefore, his §2255 must be denied.

I. Facts & procedural history

On July 10, 2019, Movant pleaded guilty with a written plea agreement to Counts One, Two, and Three, which charged him with Conspiracy to Possess with Intent to Distribute a Quantity of Methamphetamine and 50 Kilograms or more of Marijuana (Count One); Aiding and Abetting Use, Carrying, and Discharge of a Firearm in furtherance of Drug Trafficking (Count Two); as well as Aiding and Abetting Murder resulting from the Use and Discharge of a Firearm During and in Relation to Drug Trafficking (Count Three). [docket number 136]. The underlying facts of his case are from his Presentence Investigation Report and are as follows:

> On July 17, 2015, Midland Police Department and Midland Fire Department personnel were called to 6308 Kanawha in Midland, Texas, after reporting that a fire and shooting had occurred at the residence. Upon arrival, emergency personnel found that a small structure behind the residence was fully engulfed in flames. After the fire was extinguished, "A.J." and "H.M.," were both found and believed to have been killed by .223 caliber rounds and their bodies

burned to an unrecognizable degree. They were located inside the small structure south of the main residence. Several spent .223 caliber casings were located near the bodies. A description of the bodies were provided by fire officials. The bodies were discovered in a supine position and were severely burned. Each received massive soft tissue and bone loss to extremities and skin. Remaining muscle tissue was charred black. Yellowish colored fat deposits were exposed. Facial features and tissue were missing, exposing the skulls. Hands, feet, and limbs were missing up to the knees and elbows. Clothing was missing or not recognizable. Both bodies demonstrated a pugilistic pose caused by intense heat exposure.

A report from the Office of Chief Medical Examiner in Fort Worth, Texas, for A.J. and H.M. dated July 19, 2015, listed the cause of death for each as multiple gunshot wounds, one of which was a shot in the face to H.M.

Midland police detectives conducted interviews of eight witnesses who were present at the location during the incident. These witnesses identified the two deceased victims as A.J. and H.M. and advised that both victims lived in the small structure that had been burned. These witnesses advised that two males, who were wearing masks and dark clothing, came to the home with firearms. One of the males was armed with an assault-type rifle and the other male was armed with a handgun. The witnesses heard several gunshots and observed that the small structure was on fire shortly afterwards. Witnesses told MPD that Trace Ryan Roland was a drug dealer to whom A.J. was deeply indebted and Roland was likely involved in the murder. As the investigation ensued, it was determined Ryan David Green was the individual who entered the structure and shot A.J. and H.M. and started the fire. Sean Blake Jobe held the witnesses at gunpoint with a handgun.

On the same day as the murders, MPD officers obtained consent to search Roland's residence. In the master bedroom closet, officers recovered a safe containing a small amount of marijuana, a black backpack containing shrink wrapped package of pills suspected to be narcotics, and an extended capacity "Magpul PMAG" magazine full of .223 caliber ammunition and 16 boxes of .223 ammunition. Inside Roland's vehicle, officers located two loaded firearms: a Classic Arms 1911 pistol and an AA arms AM-15 "AR-15" style rifle with scope attached. Roland denied any knowledge of the murders of A.J. and H.M.

A search of Roland's cellular telephone revealed Roland had contact with Ryan David Green and Sean Blake Jobe in the hours leading up to and after the murders. Additionally, video surveillance footage depicted a vehicle matching Green's personal vehicle, leaving the area of the murders, just after the call to the Midland Fire Department

was made. Cell phone location information also indicated Green's cell phone was in close proximity to the location of the murders.

On July 18, 2015, MPD detectives interviewed Witness#1 at the Midland County Jail. Witness#1 stated A.J. sold "weed" for him and owed him money. Witness#1 stated that the source of supply for marijuana, acid, and ecstasy was in Dallas and that A.J. owed the source of supply $10,000 in United States currency. Witness #1 admitted to being involved in the trafficking of marijuana and other drugs. Witness#1 stated that Roland was his best friend and that both he and Roland were sick of A.J.

On August 12, 2015, MPD detectives interviewed Green. Green initially denied involvement in and knowledge of the murders. Green claimed Jobe told Green that Roland had killed A.J. and H.M. Green acknowledged overhearing a conversation between Jobe and Roland in which the two discussed that A.J. was "a problem." Green admitted Roland had asked Green to drive Roland to A.J.'s residence to confront A.J. but denied knowing anything about Roland's intention to kill A.J.

MPD officers subsequently executed a search warrant at Green's residence, during which a green notebook was discovered that contained multiple hand-drawn diagrams of A.J. and H.M.'s residence and the surrounding area. Along with the diagrams were notes indicating Green had conducted surveillance of the residence and its occupants. The notebook contained detailed descriptions of A.J. and the surrounding area, as well as notes of the surveillance observations. Green was then arrested for the murder of A.J. and H.M.

Again, Green denied committing the murders, claiming that he had only driven Jobe to the residence where the murders occurred. Green stated he stayed in his truck while Jobe went up to the residence. Green also stated he could not see the residence from his truck, but that he heard approximately seven gunshots before seeing Jobe return to his vehicle. Green mentioned seeing the residents of the main house fleeing and that he then saw flames rising out of the residence before Green and Jobe fled the area.

Green admitted Jobe had told Green of the murder plan before he agreed to drive Jobe to the murder location. However, Green claimed he tried to dissuade Jobe from killing A.J., arguing that scaring him would be sufficient.

When asked about the firearms used to commit the murders, Green stated that Roland had told Green and Jobe that Witness#1 would provide them with a "burner weapon." Green knew Witness#1 to be a closer associate of Roland's who was involved in drug trafficking with Roland, Jobe, A.J., and others. Green stated he and Jobe received

the "burner weapon," which he believed to be a .40 caliber Glock, from Witness#1. Green stated that after the murders, Green and Jobe contacted Roland via cellular telephone and told Roland they were on their way to meet him. Roland met with Jobe and Green at a local football stadium and then all three departed the area.

When confronted by law enforcement about their role and/or participation in the deaths of A.J. and H.M., Roland and Jobe both denied any involvement in the murders. Roland did, however, confirm that he, along with Witness#1, A.J. and others were involved in trafficking high quality marijuana in Midland.

On August 26, 2017, Witness#1 was interviewed again by MPD detectives. Witness#1 stated Roland called him in June 2015 and told Witness#1 to get a gun and to meet with another individual to "take out" A.J. at his house that day. Witness#1 stated he declined to do what Roland directed. Witness#1 explained Roland was upset about an incident wherein A.J. robbed a local drug user then took the user to Roland's house. Witness#1 stated that same day, Roland called and advised that Jobe would be coming to Witness#1's house to obtain Roland's AR-15 rifle. Roland stored all of his firearms at Witness#1 residence. Witness#1 acknowledged that he provided Jobe the firearm and never saw it again.

Witness#1 stated that sometime in mid-July 2015, Witness#1, Roland, Green, Jobe, and others were at a bar. Witness#1 stated they discussed Jobe obtaining the AR-15 weeks earlier and that Green had said that he took Jobe to Witness#1's house to obtain the gun. Witness#1 stated Roland and Green went outside the bar to talk privately. Witness#1 stated Roland had previously told Witness#1 that Roland wanted to take A.J. to the gun range to kill A.J. there and bury his body. Witness#1 said Roland had talked for a long time about "taking care" of A.J. Witness#1 opined that the guns used in the homicide might be buried at a caliche pit where Roland and Witness#1 had often gone to shoot guns.

With the assistance of the Drug Enforcement Administration (DEA), the MPD subsequently spoke with multiple witnesses who advised that A.J. owed Roland as much as $100,000 in United States currency for marijuana that Roland had fronted to A.J. and that this debt prompted the murders.

DEA agents were also able to identify the marijuana source of supply who was located in the Dallas/Fort Worth area who confirmed he had been supplying Roland, Witness#1, Jobe, A.J. and others with quantities of marijuana for a period of time leading up to the murders.

Jobe requested to speak with law enforcement agents on October 31, 2017. Jobe admitted Jobe and Green, at the direction of Roland,

> traveled to A.J. and H.M.'s residence on July 17, 2015, with the intent to kill A.J. Jobe stated he and Green were both armed with firearms when they exited Green's vehicle and approached A.J.'s residence. Jobe admitted he was carrying a handgun, while Green was armed with a semi-automatic rifle. Jobe confirmed he held an occupant of the main residence at gun point in the yard while Green approached the shed where A.J. was located, after which Jobe heard multiple gunshots. Jobe admitted he then went to the back of the residence and observed Green pouring gasoline in the shed and setting the shed on fire. Both men then fled. Jobe admitted Jobe and Green then met with Roland and Roland directed them to take the weapons to Roland's storage building. Jobe advised that a couple of days later, Jobe and Green took multiple firearms and ammunition to a caliche pit in Midland County, Texas, to dispose of them. Law enforcement officers had previously recovered multiple firearms and rounds of ammunition from their location; however, Jobe provided detail that the weapon used by Green to shoot A.J. and H.M. was actually buried by Green after Green disassembled the firearm. Jobe described the location in careful detail, and law enforcement officers were then able to recover the disassembled parts of an AR-type rifle, just as Jobe described. The disassembling of the firearm was at the direction of Roland. It was also discovered Green and Jobe both destroyed their cell phones somewhere along Interstate 20 as to avoid detection by law enforcement.
>
> The disassembled firearms that were recovered at the caliche pit were sent to the Texas Department of Public Safety for testing and for comparison with the spent shell casings located near the bodies of A.J. and H.M. The firing pin that was recovered matched the shell casings recovered from the scene of the murders.
>
> As per Count 1 of the Indictment, a minimum of 50 kilograms of marijuana was involved in the offense.

[docket number 153 at ¶¶ 4–22] (emphasis omitted).

Movant was sentenced on October 10, 2019, to imprisonment within the Bureau of Prisons for 240 months (Count One) to run concurrently with Count Three; 120 months (Count Two) to run consecutively to Counts One & Three; and 300 months (Count Three) to run concurrently with Count One. [docket number 154]. On October 15, 2019, his Judgment and Commitment was entered. [docket number 158]. No notice of appeal was ever filed in conjunction with this case. [*See generally* docket]. Then, on April 9, 2022, Movant mail-filed what this Court would later construe, after a

warning under *Castro v. United States*, 540 U.S. 375, 383 (2003), as his initial §2255. [*See* docket number 165 at 4]. I was not warned but advised

In his amended §2255, Movant elaborated on his claims:

1. Liberty violation[1];
2. Due process violation[2]; — not considered.
3. Speedy trial violation[3]; and,
4. Ineffective assistance of counsel[4].

[docket number 167]. Movant also requested equitable tolling "due to the B.O.P.'s nationwide lockdown stemming from the COVID pandemic for the past 2 years." [*Id.* at 2]. Upon closer inspection, however, this Court determines that Movant's §2255 is barred by the one-year limitation period set forth in Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which amended 28 U.S.C. §2255 to provide for a one-year limitations period. *See* 28 U.S.C. §2255(f).

II. §2255 in general

In this collateral attack on a judgment of conviction, Movant has the burden of proving that his constitutional rights have been violated. *Hawk v. Olsen*, 326 U.S. 271, 279 (1945); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); *Rimanich v. United States*, 357 F.2d 537, 538 (5th Cir. 1966); *United States v. Atkins*, 834 F.2d 426, 435 (5th Cir. 1987).

---

[1] "I was not allowed in general population due to threats on my life, so I was housed in a one-man isolation cell for the duration of pre-trial and sentencing (4.5 years)." [docket number 167 at 3]. "The effects of isolation are lasting and take hold quickly, which caused undue hardship on the Movant and affected his ability to defend himself and have a meaningful relationship with his attorney." [*Id.* at 6].

[2] "Green's liberty was violated by a harsher incarceration in long-term isolation, when Movant requested housing in protective custody dorms/facilities...These experiences diminished my ability to have a meaningful with my attorney so that he could try my case effectively." [*Id.* at 2].

[3] "Reason for the delay: After 2.5 years on state charges, the federal court took the case. It lasted another 2 years due to changes of lawyers on a number of motions to continue by the defense." [*Id.* at 9].

[4] "I instructed my attorney to file a notice of appeal at the appropriate time. He did not do this. Prejudice: This took my ability to appeal directly after sentencing." [*Id.* at 13].

Under §2255, a federal prisoner can get relief if he can establish that: (1) his sentence was imposed in violation of the Constitution or laws of the United States; (2) the sentencing court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to a collateral attack. 28 U.S.C. §2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996); *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995). In other words, §2255 relief is reserved for errors of constitutional dimension and other injuries that could not have been raised on direct appeal. *United States v. Payne*, 99 F.3d 1273, 1281 (5th Cir. 1996); *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996).

A habeas petitioner has the burden of proving facts in support of his claims. Although courts must construe §2255 motions liberally, conclusory allegations unsupported by any specific facts do not raise a constitutional issue in a habeas corpus proceeding. *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993); *United States v. Woods*, 870 F.2d 285, 288 n. 3 (5th Cir. 1989). Unsupported conclusory allegations simply do not warrant habeas relief. *Uresti v. Lynaugh*, 821 F.2d 1099, 1103 (5th Cir. 1987); *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983).

III. Plea agreement waiver

Movant signed a Plea Agreement on July 10, 2019, containing the following waiver provisions:

> The Defendant further agrees to waive and give up the right to challenge the Defendant's conviction or sentence in a post-conviction collateral challenge on any ground, including but not limited to a proceeding pursuant to 28 U.S.C. §§ 2241 and 2255; except that, consistent with the principles of professional responsibility imposed on the Defendant's counsel and counsel for the Government, the Defendant does not waive the right to challenge the Defendant's sentence or conviction based on ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension. If the Defendant makes a claim of ineffective assistance of counsel, the Defendant is affirmatively waiving any claim of attorney/client privilege arising from counsel's representation.

[docket number 136 at ¶7].

The Fifth Circuit has upheld the informed and voluntary waiver of post-conviction relief in *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). In *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995), the Fifth Circuit held that a waiver may not be enforced against a §2255 Movant who claims that ineffective assistance of counsel rendered that waiver unknowing or involuntary. In *United States v. White*, 307 F.3d 336 (5th Cir. 2002), the Fifth Circuit held that an ineffective assistance of counsel claim raised in a §2255 proceeding survives a waiver only when the claimed assistance directly affected the validity of that waiver or the plea itself. The Fifth Circuit noted that it has upheld §2255 waivers except when there is an ineffective assistance of counsel claim that affects the validity of that waiver or the plea itself or when the sentence exceeds the statutory maximum. *United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004).

The Court notes that Movant does not allege that he unknowingly or involuntarily signed this plea agreement. Nor does this Court find any evidence that the plea was involuntary or unknowing. However, to the extent that this claim could be considered a challenge to the voluntariness of his plea, this Court finds that Movant knowingly and voluntarily pleaded guilty.[5]

Movant does not present an issue reserved for appeal in his waiver. His allegations do not allege that he suffered from ineffective assistance of counsel that affected the validity of the waiver itself or that he suffered from prosecutorial misconduct of a constitutional dimension. Consequently, Movant's narrow reservation to collaterally attack this conviction and sentence does not apply. Movant's grounds for relief are denied, in the alternative, because of his plea agreement waiver.

IV. Statute of limitations

The AEDPA applies to all §2255 motions filed after its effective date of April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *see also United States v. Flores*, 135 F.3d 1000, 1006 (1998). The AEDPA establishes a one-year limitations period governing §2255 motions. *United*

[5] Also of note, Movant's sentence did not exceed the statutory maximum, which was life imprisonment for Count Three.

States v. Thomas, 203 F.3d 350, 351 (5th Cir. 2000). The one-year limitations period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2255(f)(1)–(4); *Flores*, 135 F.3d at 1002 n. 3. Unless a movant alleges facts implicating subsections (2), (3), or (4), the limitations period begins to run from the date on which the judgment of conviction became final. *See United States v. Plascencia*, 537 F.3d 385, 388 (5th Cir. 2008).

The Federal Rules of Appellate Procedure in effect at the relevant time gave a defendant fourteen days to file a notice of appeal from a judgment of conviction. Fed. R. App. P. 4(b)(1)(A). Where a federal prisoner does not file a notice of appeal, his conviction becomes final, and the AEDPA limitations period begins to run, upon the expiration of the fourteen-day period allotted for filing a notice of appeal. *Plascencia*, 537 F.3d at 388. The Court entered the Petitioner's judgment of conviction on October 15, 2019, requiring that a notice of appeal be filed by Tuesday, October 29, 2019. *See* Fed. R. App. P. 26(a). Because no notice of appeal was filed, the Petitioner's conviction became final as of that date. Therefore, the AEDPA time period to file a §2255 motion challenging his judgment of conviction expired one year later on Thursday, October 29, 2020. *See Plascencia*, 537 F.3d at 390. Movant, however, did not mail-file his initial §2255 motion until April 9, 2022. [docket number 165]. When his §2255 was placed in the prison-mail system, it was already 527 days beyond his original deadline, or one year, five months, and eleven days late. Therefore, this Court finds Movant's §2255 to be time-barred under the AEDPA.

V. Equitable tolling

Movant specifically asks this Court for equitable tolling. [docket number 169]. As the Supreme Court has held, a movant is entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010). The movant bears the burden of establishing an entitlement to equitable tolling. *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). Equitable tolling decisions "'must be made on a case-by-case basis.'" *Palacios v. Stephens*, 723 F.3d 600, 606 (5th Cir. 2013) (quoting *Holland*, 560 U.S. 631, 649–650). Such decisions do not lend themselves to "'bright-line rules.'" *Id.* (quoting *Fisher v. Johnson*, 174 F.3d 710, 713 n.9 (5th Cir. 1999)). The Court finds Movant has failed to meet his burden regarding *Holland*'s two-part test as clarified below.

a. Special Housing Unit and inability to reach counsel

Movant argues that his placement in the Special Housing Unit (SHU) limited his ability to obtain legal advice or use the law library to file a timely §2255. [docket number 169]. Movant never accounts for the time allegedly spent outside the SHU, and the burden is entirely his own. Movant claims he was in the SHU for four and a half years prior to sentencing, and again in SHU after sentencing, giving Movant only three months to craft a §2255 raising his strongest claim, that counsel failed to file a notice of appeal when asked to do so. [docket number 169 at 2]. Because Movant did not point to any issue raised in his §2255 that required legal research, he failed to meet the showing required by *Holland*. His claims were based on facts well known to him, such as SHU conditions he was in for four and a half years prior to sentencing, and the problems he and his family had trying to reach counsel after sentencing. However, complete inactivity in the face of no communication from counsel does not constitute due diligence. *Manning v. Epps*, 688 F.3d 177, 186 (5th Cir. 2012). "The Sixth Amendment does not require counsel to apprise a defendant of the availability of collateral proceedings for attacking a conviction or any limitations on the seeking of

such relief." *United States v. Morfin*, No. 3-06-CV-2310M, 3-03-CR-434M, 2007 WL 837276 at *3 (N.D. Tex. Mar. 20, 2007) (movant not entitled to equitable tolling based on counsel's failure to inform movant about the one-year statute of limitations for §2255 motions); *see also United States v. Petty*, 530 F.3d 361, 366 (5th Cir. 2008) ("ineffective assistance of counsel is irrelevant to the [equitable] tolling decision because a prisoner has no right to counsel during post-conviction proceedings[:]...[m]ere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified"). Movant simply failed to demonstrate how lack of library access, or even his inability to reach counsel after sentencing, prevented him from filing a timely §2255 and is, therefore, not entitled to relief under §2255(f)(2).

Additionally, this Court would note that simply being placed in the SHU alone does not constitute a basis for equitable tolling. *See, e.g., Prescod v. Brown*, No. 10-cv-2395-SHS-AJP, 2011 WL 182063, at *4 (S.D.N.Y. Jan. 20, 2011), *report and recommendation adopted by* 2011 WL 497855 (S.D.N.Y. Feb. 10, 2011) ("SHU status does not provide a basis for equitable tolling"); *Pillco v. Bradt*, No. 10-cv-2393- SAS, 2010 WL 3398467, at *2 (S.D.N.Y. Aug. 26, 2010) ("To meet the extraordinary circumstances standard [for equitable tolling], a petitioner must prove that the cause of his delay was both beyond his control and unavoidable even with diligence. For example, difficulty in gaining library access, prison lockdowns, [petitioner's] lack of legal training, poor eyesight, and transfers to various prisons fail to meet the requisite extraordinary circumstances.") (citations and internal quotation marks omitted); *see also Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009) ("Ordinary prison limitations on [a prisoner's] access to the law library and copier...were neither 'extraordinary' nor made it 'impossible' for him to file his petition in a timely manner. Given even the most common day-to-day security restrictions in prison, concluding otherwise would permit the exception to swallow the rule"); *Adams v. Clark*, No. 1:10-cv-01325-AWI-JLT HC, 2010 WL 3245333, at * 4 (E.D. Cal. Aug. 17, 2010) ("Unpredictable lockdowns or library closures do not constitute extraordinary circumstances warranting equitable tolling."); *see, e.g., Williams v. Dexter*,

649 F.Supp.2d 1055, 1061–62 (C.D. Cal. Aug. 19, 2009) (petitioner's claim for equitable tolling based on "frequent" prison lockdowns was without merit because the claim was "unsupported by competent evidence and [was] grossly conclusory").

Solitary confinement, lockdowns, restricted access to the law library, and an inability to secure court documents do not qualify as extraordinary circumstances. *Warren v. Kelly*, 207 F.Supp.2d 6, 10 (E.D.N.Y. 2002); *see also Hizbullahankhamon v. Walker*, 105 F.Supp.2d 339, 344 (S.D.N.Y. 2000) ("While solitary confinement does present an obstacle to filing a timely habeas petition, it does not qualify as an extraordinary circumstance."), *aff'd*, 255 F.3d 65 (2d Cir. 2001), *cert. denied*, 536 U.S. 925, 122 S.Ct. 2593, 153 L.Ed.2d 782 (2002); *Montalvo v. Strack*, No. 99-cv-5087, 2000 WL 718439 at *2 (S.D.N.Y. June 5, 2000) (holding that transfers between prison facilities do not merit equitable tolling); *e.g., Reese v. United States*, No. 11-cv-5432-DLI, 2012 WL 195607 at *2 (E.D.N.Y. Jan. 23, 2012) ("Simply being placed in the SHU alone does not constitute a basis for equitable tolling."); *see, e.g., Muhammad v. United States*, 735 F.3d 812, 815 (8th Cir. 2013) (Defendant's detention in SHU for five months was not an extraordinary circumstance that would warrant equitable tolling of one-year statute of limitations, although defendant did not have access to prison law library or his personal legal materials during the five months in SHU, he was able to send letters, and he was not prohibited from contacting court or denied any mail sent from court.); *Vincent v. United States*, No. 1:10-cr-4-M, 2013 WL 149710, at *3 (W.D. Ky. Jan. 14, 2013) (concluding that petitioner's confinement in the SHU did not warrant equitable tolling where petitioner failed to explain how it prevented him from filing a motion with the court); *Burns v. Beck*, 349 F.Supp.2d 971, 974 (M.D.N.C. 2004) ("[P]rison conditions, such as lockdowns or misplacement of legal papers, [are not] normally grounds for equitable tolling."); *Allen v. Johnson*, 602 F.Supp.2d 724, 728 (E.D.Va. 2009) (holding that "solitary confinement [and] lockdowns...do not qualify as extraordinary circumstances" warranting equitable tolling (internal quotation marks omitted)), *appeal dismissed*, 396 F. App'x 46 (4th Cir. 2010). This Court now finds that neither Movant's time in the

SHU, nor his inability to reach counsel after sentencing, can be construed as an extraordinary circumstance warranting equitable tolling.

b. COVID-19

Movant has failed to allege any newly-discovered facts that could not have been previously discovered with the exercise of due diligence nor does he assert any other basis for excusing his failure to timely file his §2255. Movant simply argues that his tardiness should be excused, in part, due to COVID-19 lockdown restrictions at his prison. [*See* docket number 167 at 2]. Even assuming that a lockdown due to the COVID-19 pandemic delayed Movant's ability to file his §2255, it does not explain 527-day delay. COVID-19 measures have been in effect since March of 2020, and Movant was sentenced on October 15, 2019, therefore, Movant has barely known a federal prison *without* COVID-19 restrictions.

Furthermore, Circuits such as the Tenth Circuit have held that "allegations regarding insufficient library access, standing alone, do not warrant equitable tolling." *Weibley v. Kaiser*, 50 F. App'x 399, 403 (10th Cir. 2002); see also *United States v. Thomas*, Crim. No. 18-135, 2020 WL 7229705, at *2–3 (E.D. La. Dec. 8, 2020) (equitable tolling based on COVID-19 pandemic was unavailable where prisoner did not demonstrate due diligence); *and United States v. Pizarro*, Crim. No. 16-63, 2021 WL 76405, at *2 (E.D. La. Jan. 8, 2021) (holding that a COVID lockdown could not be considered as an impediment to filing for purposes of considering a late-filed §2255 petition as timely). Some courts have also declined to grant equitable tolling based on prison lockdowns due to COVID-19. *See, e.g., Moreno v. United States*, No. 1:17-CR-0446-TCB-RGV-1, 2020 WL 7091088, at *2 (N.D. Ga. Sept. 18, 2020), *report and recommendation adopted*, 2020 WL 5939887 (N.D. Ga. Oct. 7, 2020) (noting that the petitioner "does not allege when the prison's law library was initially closed, nor has he explained why he could not have filed his motion before COVID-19 restrictions were in place. In fact, [he] states that the law library is 'still closed,' and he has filed this motion without access to it."). Movant is similarly situated, obviously he would like this Court to excuse his

527-day tardiness due to COVID-19, however he was able to file this §2255 while still under lockdown conditions as a result of COVID-19.

A petitioner is entitled to equitable tolling only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Equitable tolling only applies when the limitation on library access "actually prevented [the prisoner] from timely filing his habeas petition." *Krause v. Thaler*, 637 F.3d 558, 561 (5th Cir. 2011). Movant argues that he would have timely submitted his §2255 if not for the prison lockdown in response to the COVID-19 pandemic. However, Movant had the same access to a law library after March of 2020 as every other inmate in America, and yet he was one of a few that has let his statute of limitations expire by his own inaction.

During the COVID-19 pandemic, courts have found that prisoners are not entitled to equitable tolling if there is no evidence that they diligently pursued their right to file a §2255 motion prior to the lockdowns. *See, e.g., United States v. Barnes*, No. 18-CR-0154-CVE, 2020 WL 4550389, at *2 (N.D. Okla. Aug. 6, 2020) ("Even assuming that a lockdown due to the COVID-19 pandemic delayed defendant's ability to file his motion, it does not explain the more than one-year delay. COVID-19 measures have been in effect since March 2020, and defendant could have filed his motion long before March 2020."); *United States v. Mayfield*, No. 4:16-CR-3077, 2020 WL 1663582, at *1 (D. Neb. Apr. 3, 2020) (holding that when, "as a result of the COVID-19 pandemic, his access to the law library has been limited, preventing him from completing his motion," equitable tolling would only be appropriate if the motion "was diligently pursued"). Movant has failed to provide any explanation for why he could not have filed his §2255 motion during the first year of his sentence. Therefore, Movant has simply not demonstrated that he has diligently pursued his claims.

c. Equitable tolling in general

Movant has failed to allege any newly discovered facts that could not have been previously discovered with the exercise of due diligence nor does he assert any other basis for excusing his

failure to timely file his §2255. Additionally, "lack of knowledge of the filing deadlines," "lack of representation," "unfamiliarity with the legal process," and "ignorance of legal rights" do not justify equitable tolling. *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 478 (5th Cir. 1991).

The limitations period for §2255 motions is subject to equitable tolling "only 'in rare and exceptional cases.'" *Riggs*, 314 F.3d at 799 (quoting *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). Courts must "examine each case on its facts to determine whether it presents sufficiently 'rare and exceptional circumstances.'" *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). "'Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.'" *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (quoting *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999)). The Fifth Circuit has held, for example, that a petitioner was prevented in some extraordinary way from asserting his rights where a court misled him into thinking that he had more time to file a habeas petition or §2255 motion than he actually had. *See United States v. Patterson*, 211 F.3d 927 (5th Cir. 2000) (allowing for equitable tolling when the trial court mistakenly granted Petitioner's motion to withdraw his §2255 motion ten days prior to the expiration of the one-year limitation and expressly referenced the wrong date, a year later, as the deadline for filing).

Movant's claims fail to establish a basis for equitable tolling. As the Fifth Circuit has stated, ignorance of the law does not establish equitable tolling. *See Felder*, 204 F.3d at 171–72 (finding ignorance of the law, lack of knowledge of filing deadlines, a prisoner's *pro se* status, illiteracy, lack of legal training and actual innocence claims do not support equitable tolling of the AEDPA statute of limitations). Movant has not provided this Court with a good reason for equitable tolling to apply. Therefore, this Court finds nothing to justify the extraordinary measure of granting equitable tolling. Movant's §2255 is, thusly in the alternative, time-barred by 28 U.S.C. §2255(f).[6]

[6] The Court also believes no evidentiary hearing is necessary in this case because the record is sufficient for the purpose of adjudication of Movant's §2255. *See United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992).

VI. Certificate of appealability

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. §2253. *See* Fed. R. App. P. 22 (b). Rule 11 of the Rules Governing §2255 Proceedings requires the Court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing §2255 Proceedings in the United States District Courts, Rule 11(a) (December 1, 2009). This Court may only issue a COA if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). A movant satisfies this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

A district court may deny a COA, *sua sponte*, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 898, 898 (5th Cir. 2000). Upon review and consideration of the record on whether Movant has made a showing that reasonable jurists would question this Court's rulings, the Court determines that he has not and that a COA should not issue for the reasons stated in this Order. The Court therefore denies a COA.

VII. Conclusion

This Court now denies Movant's §2255 because it is time-barred, and in the alterative, because of his plea agreement waiver, and also denies a certificate of appealability.

It is so **ORDERED.**

SIGNED this 9th day of August, 2022.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE