

No. _____

IN THE
Supreme Court of the United States

MERL SIMPSON,

Applicant/Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a criminal judgment is amended to impose restitution obligations that were generically imposed but left undetermined in the original judgment, does the one-year limitations period in 28 U.S.C. § 2255(f) run from the date of the amended judgment, as the Second and Tenth Circuits have held, or the date of the original judgment, as the Ninth Circuit alone has concluded?

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PETITION FOR A WRIT OF CERTIORARI

Merl Simpson petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JUDGMENT BELOW

The judgment for which review is sought is *United States v. Simpson*, No. 21-16204 (9th Cir. Mar. 22, 2024). (Appendix (“App.”) 2-6.)

JURISDICTION

On March 22, 2024, the Ninth Circuit Court of Appeals issued an unpublished decision affirming the district court’s denial of Petitioner’s motion pursuant to 28 U.S.C. § 2255 as untimely. (App. 2-6.) A timely petition for rehearing en banc was denied on June 21, 2024. (App. 1.) This petition is being timely filed within 90 days of the date of that June 21, 2024 order. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2255(f)

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run 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.

STATEMENT OF THE CASE

On January 13, 2017, Mr. Simpson pleaded guilty in the United States District Court for the Northern District of California to the following offenses: conspiracy to commit Hobbs Act robbery (Count 1), attempted Hobbs Act robbery (Count 2), substantive Hobbs Act robbery (Counts 4, 6, 8), discharging a firearm during a crime of violence (Count 9), and being a felon in possession (Count 10). (ER 95.)¹

On April 27, 2017, the district court sentenced Mr. Simpson to 120 months each for Counts 1, 2, 3, 6, and 18, to be served concurrently, plus 120 months for Count Nine, run consecutively, for a total of 240 months. (ER 89.) The court entered judgment on May 3, 2017. (*Id.*) Mr. Simpson did not appeal. (*See* ER 120.)

On October 12, 2018, the district court entered an amended judgment. (ER 33-41.) The term of imprisonment and length of the term of supervised release remained

¹ “ER” stands for the “Excerpts of Record” that were submitted alongside the opening brief before the Ninth Circuit.

unchanged, but the court imposed a new set of “standard” supervised release conditions. (ER 90) The court also modified the restitution award, awarding restitution to two additional victims. (ER 92.) There is no indication on the docket that Mr. Simpson was personally served with the amended judgment. (ER 121.)

On August 6, 2018, Mr. Simpson filed a motion to vacate the judgment under 28 U.S.C. § 2255. (ER-42-81.) The district court denied the motion as untimely, rejecting Mr. Simpson’s arguments for equitable tolling. (App. 13-15.)² The court also noted, in footnote, that the original judgment had been amended in October 2018—after Mr. Simpson filed his § 2255 motion. (App. 8 n.1.) However, the district court explained that because “the amendment only corrected a clerical error, the original judgment date controls for purposes of the one-year limitations period.” (*Id.*) Mr. Simpson appealed.

The Ninth Circuit affirmed the dismissal of Mr. Simpson’s § 2255 motion as untimely. (App. 6.) With respect to the Mr. Simpson’s argument that the October 2018 amended judgment restarted the clock, the court explained:

This argument is foreclosed by our precedent in *United States v. Gilbert*, 807 F.3d 1197 (9th Cir. 2015).

In *Gilbert*, we held that, when a judgment is issued that defers restitution, “the one-year statute of limitations to file a § 2255 motion does not restart when the specific amount of restitution is later entered.” *Gilbert*, 807 F.3d at 1201. We reasoned that because a defendant “is not permitted to challenge his restitution with a § 2255 motion, it would make no sense to let him restart the statute of limitations under § 2255 from an amended judgment that addressed only the specific amount of restitution.” *Id.* (citing *United States v.*

² Mr. Simpson’s equitable tolling arguments are not at issue in this Petition.

Thiele, 314 F.3d 399, 401 (9th Cir. 2002); *United States v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999)). That rationale applies equally here, where the only substantive change in the new judgment concerned restitution.

(App. 3-4.)

The court also declined to reconsider *Gilbert* in light of *Manrique v. United States*, 581 U.S. 116 (2017); in its view, *Gilbert* was “not clearly irreconcilable” with *Manrique* because “each decision concerns different procedural mechanisms.” (App. 4.)

REASONS FOR GRANTING THE WRIT

A. There exists a circuit split concerning whether, in a case where the judgment is amended to specify the amount of restitution, the 1-year limitations period in 28 U.S.C. § 2255(f) runs from the original or the amended judgment.

There exists a circuit split regarding whether amending a judgment to impose restitution obligations that were generically imposed but left undetermined in the original judgment should trigger the one-year limitations period in 28 U.S.C. § 2255(f). The Second and Tenth Circuits hold that the clock should run from when the amended judgment is final, *United States v. Anthony*, 25 F.4th 792, 804 (10th Cir. 2022); *Gonzalez v. United States*, 792 F.3d 232, 233 (2d Cir. 2015), while the Ninth Circuit holds that it should run from the original judgment, *United States v. Gilbert*, 807 F.3d 1197, 1200-01 (9th Cir. 2015).

In the first of these cases, *Gonzalez*, the petitioner raised a substantive challenge to his conviction in a § 2255 motion that would only be timely if the clock restarted with the entry of an amended judgment only modifying the restitution award. The Second Circuit held that the clock should restart for three reasons. First, the court pointed to an analogous scenario: where a criminal judgment is vacated and remanded for substantive

proceedings, the new judgment may be appealed or challenged by way of § 2255. *Id.* at 235. Second, the Court found that the rules of finality required this outcome; a defendant is entitled to appeal the initial judgment *and* the amended judgment, therefore he should be able to challenge either judgment by way of § 2255, as well. *Id.* 236-37.³ Third, and finally, the “nature of the § 2255 proceedings” supported the outcome, because in the Second Circuit, the petitioner could have challenged the revised restitution order in a § 2255 motion. *Id.* at 237-38.

In *Gilbert*, the Ninth Circuit considered the scenario in which a district court imposes judgment including restitution but leaves the restitution amount to be determined at a later date. In these circumstances, the court held, the final order of restitution does not restart the § 2255 clock. *Gilbert*, 807 F.3d at 1201. Noting the Second Circuit’s contrary decision in *Gonzalez*, the Ninth Circuit distinguished that case in two ways. First, the procedural posture was different, because *Gonzalez* involved a modification of the restitution award post-remand from the appellate court, while in *Gilbert*, there was no appeal and no remand. *Id.* at 1200-01. Second, the court found that *Gonzalez* was distinguishable because the Second Circuit had left open the possibility that defendants could challenge restitution by way of § 2255 motions, whereas in the Ninth Circuit, they cannot do so. See *Gilbert*, 807 F.3d at 1201 (citing *United States v. Thiele*,

³ *Gonzalez* predated this Court’s decision in *Manrique v. United States*, 581 U.S. 116 (2017), discussed below, but the rule it describes is nonetheless consistent with the rule announced in *Manrique*.

314 F.3d 399, 401 (9th Cir. 2002), and *United States v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999)). Accordingly, the Ninth Circuit explained:

Because Gilbert is not permitted to challenge his restitution with a § 2255 motion, it would make no sense to let him restart the statute of limitations under § 2255 from an amended judgment that addressed only the specific amount of restitution. We hold that when a judgment imposes a sentence but leaves the amount of restitution to be determined, the one-year statute of limitations to file a § 2255 motion does not restart when the specific amount of restitution is later entered.

807 F.3d at 1201.

Finally, in *United States v. Anthony*, 25 F.4th 792 (10th Cir. 2022), the Tenth Circuit weighed in. But in *Anthony*, unlike in *Gilbert* or *Gonzalez*, the court had the benefit of this Court’s decision in *Manrique v. United States*, 581 U.S. 116 (2017), which held that a single notice of appeal from an initial judgment that defers the determination of restitution does not “spring forward” to cover the later amended judgment that includes the restitution amount. *Id.* at 124.

In adopting the Second Circuit’s approach in *Gonzalez* rather than the Ninth Circuit’s approach in *Gilbert*, the Tenth Circuit held in *Anthony* that “a judgment of conviction becomes final for § 2255 limitations purposes when there is no further avenue for direct appeal of any portion of the sentence, including restitution.” *Id.* at 799; *see also id.* at 804 n.15 (“We disagree with the Ninth Circuit’s conclusion [in *Gilbert*] and side with the Second Circuit.”).

The court in *Anthony* held that, in deferred restitution cases, there are two judgments for purposes of direct appeal, under *Manrique*, but there is only one “judgment

of conviction” for purposes of § 2255: the amended judgment containing the final restitution amount. *Id.* at 801-02. For this reason, the court explained, “it does not matter that restitution is not subject to collateral attack” in the Tenth Circuit, just as it is not subject such attack in the Ninth Circuit. *Id.* at 802. “Because there is only one judgment of conviction for § 2255 purposes and restitution is part of the judgment of conviction,” the one-year clock only begins to run once restitution proceedings are concluded. *Id.*

In *Anthony*, the court cited to the Ninth Circuit’s decision in *United States v. Shehadeh*, 962 F.3d 1096 (9th Cir. 2020), and the decisions of other circuits likewise holding that a defendant in a deferred restitution case may wait until restitution is ordered before filing an appeal. *Id.* at 803-04. The court concluded in *Anthony*, “If a defendant can wait until after restitution is ordered to file his direct appeal, then it does not make sense that a defendant’s § 2255 clock would start before a final restitution amount is determined, as *Gilbert* holds.” *Id.* at 804 n.15.

This Court should grant Mr. Simpson’s Petition in order to resolve the circuit split and clarify that the approach taken by the Second and Tenth Circuits is the correct one.

B. The Ninth Circuit’s rule, as set forth in *Gilbert*, is in tension with this Court’s subsequent decision in *Manrique*.

After *Gilbert* was decided, this Court issued its opinion in *Manrique*, holding that a single notice of appeal from an initial judgment that defers the determination of restitution does not “spring forward” to cover the later amended judgment that includes the restitution amount. 581 U.S. at 124. While acknowledging that *Dolan v. United States*, 560 U.S. 605 (2010), had not decided the question, this Court cited its analysis

approvingly: “Our analysis in *Dolan* thus makes clear that deferred restitution cases involve two appealable judgments, not one.” *Id.* at 122-23.

The Ninth Circuit’s decision in *Gilbert* is in tension with *Manrique*, because it holds that the non-restitution components of the initial judgment must be challenged by collateral attack under § 2255 immediately after the initial judgment is issued, while *Manrique* suggests that those very same non-restitution components of the judgment may be challenged on direct appeal after an amended judgment is issued—even if the amended judgment does not alter them. This Court “has consistently treated restitution as part of the criminal sentence.” *Anthony*, 25 F.4th at 797.

This Court should grant Mr. Simpson’s petition to bring the Ninth Circuit’s rule in line with this Court’s precedents.

C. This case is an appropriate vehicle for this Court to resolve the circuit split and bring the Ninth Circuit’s rule in line with its own precedent.

This case is an appropriate vehicle through which this Court may resolve the circuit split and clarify when the § 2255(f) limitations period begins to run where the district court amends the judgment to include or modify a restitution amount.

In this case, Mr. Simpson’s § 2255 motion, filed August 8, 2018, is untimely if the limitations period began with the issuance of the original judgment on May 3, 2017, but timely if the limitations period ran from issuance of the October 12, 2018 amended judgment. Accordingly, whether his motion is timely or untimely depends on the Court’s resolution of the Question Presented.

Furthermore, the district court addressed the effect of the amended judgment in its order of dismissal. The Ninth Circuit issued a certificate of appealability that included the question of “whether an amendment to the judgment that increased the amount of restitution constituted a new intervening judgment that restarted AEDPA’s one-year statute of limitations.” Both parties addressed the merits of the question; there was no allegation of procedural default. The Ninth Circuit issued a reasoned opinion. The issue is preserved and properly presented for this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: September 18, 2024

By: 
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Attorney for Petitioner
**Counsel of Record*

APPENDIX

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 21 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MERL SIMPSON,
Defendant-Appellant.

No. 21-16204
D.C. No.
4:16-cr-00292-YGR-2

ORDER

Before: S. R. THOMAS, BEA, and CHRISTEN, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

Judge Christen has voted to deny the petition for rehearing en banc, and Judges Thomas and Bea have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 22 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MERL SIMPSON,

Defendant-Appellant.

No. 21-16204

D.C. No.
4:16-cr-00292-YGR-2

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Yvonne Rogers, District Judge, Presiding

Argued and Submitted February 15, 2024
San Francisco, California

Before: S. R. THOMAS, BEA, and CHRISTEN, Circuit Judges.

Merl Simpson appeals the district court's order denying his 28 U.S.C. § 2255 motion as time-barred. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. §§ 1291, 2253(a), and 2255(d). We review de novo dismissals based on statutes of limitations, including whether the statute of limitations should be equitably tolled.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

See Smith v. Davis, 953 F.3d 582, 587 (9th Cir. 2020). We affirm.

1. A § 2255 motion under the Antiterrorism and Effective Death Penalty Act is subject to a one-year statute of limitations period. *See* 28 U.S.C. § 2255(f). Relevant here, that period begins to run from the date on which the judgment of conviction becomes final. *Id.* Simpson filed his motion on August 6, 2018, but his judgment was entered on May 3, 2017, and it became final on May 17, 2017. Accordingly, his motion was untimely.

Simpson argues that his one-year limitations period restarted on October 12, 2018, when the district court entered a new judgment that increased his total restitution amount and altered the wording, but not substance, of the default mandatory and standard conditions of supervised release. This argument is foreclosed by our precedent in *United States v. Gilbert*, 807 F.3d 1197 (9th Cir. 2015).

In *Gilbert*, we held that, when a judgment is issued that defers restitution, “the one-year statute of limitations to file a § 2255 motion does not restart when the specific amount of restitution is later entered.” *Gilbert*, 807 F.3d at 1201. We reasoned that because a defendant “is not permitted to challenge his restitution with a § 2255 motion, it would make no sense to let him restart the statute of limitations under § 2255 from an amended judgment that addressed only the specific amount of restitution.” *Id.* (citing *United States v. Thiele*, 314 F.3d 399,

401 (9th Cir. 2002); *United States v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999)). That rationale applies equally here, where the only substantive change in the new judgment concerned restitution.

We decline Simpson’s request to reconsider *Gilbert* in light of *Manrique v. United States*, 581 U.S. 116 (2017). In that case, the Supreme Court held that “where a district court enters an initial judgment deferring restitution and subsequently amends the judgment to include the sentence of restitution,” a defendant must file a notice of appeal from the *amended* judgment. *Manrique*, 581 U.S. at 124. The reasoning in *Gilbert* is not “clearly irreconcilable” with the reasoning in *Manrique* because each decision concerns different procedural mechanisms. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). The court in *Gilbert* reasoned that, because a movant cannot challenge a restitution order in a § 2255 motion, the § 2255 limitations period does not restart with an amended restitution order. *See Gilbert*, 807 F.3d at 1201. By contrast, the Supreme Court in *Manrique* reasoned that, because a defendant *can* challenge a restitution order on direct appeal, the period in which to file a notice of appeal starts when the restitution amount has been decided, *i.e.*, when the amended judgment is issued in a deferred restitution case. *See Manrique*, 581 U.S. at 123–24.

Finally, because Simpson did not appeal his conviction, the grounds for restarting the limitations period identified in *United States v. Colvin* are not present here. 204 F.3d 1221, 1225 (9th Cir. 2000) (limiting its holding “to those cases in which we either partially or wholly reverse a defendant’s conviction or sentence, or both, and expressly remand to the district court”).

2. “The statute of limitations contained in § 2255 is subject to equitable tolling,” but only where “extraordinary circumstances beyond [the movant’s] control [made] it impossible to file a petition on time and the extraordinary circumstances were the cause of his untimeliness.” *United States v. Battles*, 362 F.3d 1195, 1197 (9th Cir. 2004) (quoting *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003) (second alteration in original)). The movant bears the burden of establishing that he is entitled to equitable tolling, *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002), *overruled on other grounds*, *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and must demonstrate “the necessary causal link” between the extraordinary circumstance and the untimeliness of the § 2255 motion, *United States v. Buckles*, 647 F.3d 883, 890 (9th Cir. 2011).

Simpson argues that his temporary transfer to Santa Rita County Jail in March 2018 deprived him of access to his legal materials and thus constituted “extraordinary circumstances” that prevented him from timely filing his § 2255 motion. Despite being afforded several opportunities to establish the dates of his

transfer to Santa Rita County Jail, however, Simpson failed to do so. Without providing this information to the district court, Simpson could not meet his “very high” burden, *see Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009) (quoting *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)), of demonstrating that it was “impossible” to file his motion on time, *see Battles*, 362 F.3d at 1197. For the same reason, we conclude that an evidentiary hearing is not warranted. *Cf. Laws*, 351 F.3d at 921 (evidentiary hearing appropriate when movant makes a “good-faith allegation that would, if true, entitle him to equitable tolling”). The type of additional support that Simpson contemplates might be useful is the kind of information that could have been included in the two affidavits he filed in the district court. Because Simpson does not meet the criteria for equitable tolling, the district court properly denied his § 2255 motion as untimely.

AFFIRMED.

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7 **UNITED STATES OF AMERICA,**
8 Plaintiff,
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10 v.
11 **MERL SIMPSON,**
12 Defendant.

13 CASE NO. 4:16-cv-00292-YGR-2
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**ORDER DENYING MOTION UNDER
28 U.S.C. § 2255 TO VACATE
CONVICTIONS AND SENTENCE**

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17 Re: Dkt. No. 89
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Defendant Merl Simpson, who is proceeding without counsel, moves to vacate his convictions and sentence under 28 U.S.C. § 2255. Having carefully considered the record and the papers submitted, and for the reasons set forth below, the Court **DENIES** the motion as time-barred.

I. BACKGROUND

On June 30, 2016, Simpson was indicted on the following counts: one count of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count One); one count of attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count Two); one count of possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), with the predicate offense being attempted Hobbs Act robbery (Count Three); three counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count Four, Count Six, Count Eight); two counts of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), with the predicate offense being Hobbs Act robbery (Count Five, Count Seven); discharging a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), with the predicate offense being Hobbs Act robbery (Count Nine); and one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count Ten). Docket No. 1.

1 On January 13, 2017, Simpson pleaded guilty, pursuant to a Rule 11(c) plea agreement, to
 2 Counts One, Two, Four, Six, Eight, Nine, and Ten of the Indictment. Docket Nos. 41, 43. The
 3 plea agreement provides that Simpson waived his “right to appeal [his] conviction, the judgment,
 4 and orders of the Court, as well as [his] sentence, including any orders relating to forfeiture and/or
 5 restitution, except that [he] reserve[d] [his] right to claim that [his] counsel was ineffective.”
 6 Docket No. 41 at 6. The plea agreement also provides that Simpson “agree[d] not to file any
 7 collateral attack on [his] conviction or sentence, including a petition under 28 U.S.C. § 2255 or 28
 8 U.S.C. § 2241, except that [he] reserve[d] [his] right to claim that [his] counsel was ineffective.”
 9 *Id.*

10 On April 27, 2017, the Court sentenced Simpson to a total term of imprisonment of 240
 11 months, comprised of 120 months as to each of Counts One, Two, Four, Six, Eight, and Ten to run
 12 concurrently, and 120 months as to Count Nine to run consecutively to the other counts. Docket
 13 No. 53. The Court dismissed Counts Three, Five, and Seven on the government’s motion. *Id.*
 14 The Court entered judgment on May 3, 2017.¹ Docket No. 57. Simpson did not file a notice of
 15 appeal within fourteen days of the entry of the judgment.

16 On October 16, 2017, more than six months after the Court entered the judgment, Simpson
 17 filed a letter with the Clerk requesting the transcripts of the plea and sentencing hearings in this
 18 matter. Docket No. 77. Simpson stated in that letter that he intended to seek to vacate his
 19 conviction on one count of discharging a firearm during a crime of violence in violation of 18
 20 U.S.C. § 924(c)(1)(A) in light of the Supreme Court’s ruling in *Johnson v. United States*, 135 S.
 21 Ct. 2551 (2015). *Id.* at 1-2.

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 23
 24 ¹ The Court amended the judgment on October 12, 2018, due to a clerical error on page 8
 25 of the original judgment. Docket No. 93. Because the amendment only corrected a clerical error,
 26 the original judgment date controls for purposes of the one-year limitations period under 28 U.S.C.
 27 § 2255(f). See *Brownlee v. Rommoro*, 1:14-cv-01990-LJO-SAB HC, 2015 WL 1013154, at *4
 28 (E.D. Cal. Mar. 6, 2015) (collecting cases, noting that the Ninth Circuit and several “other federal
 courts have also held that an amended judgment that corrects a clerical error in the original
 judgment does not begin the one-year limitations period anew”); *United States v. Greer*, 79 Fed.
 App’x 974, 974-75 (9th Cir. 2003) (unpublished disposition) (“Because the amended judgment did
 not substantively change the sentence imposed and added no new basis for appeal, it did not affect
 the finality of the original judgment.”).

1 On February 16, 2018, Simpson filed a second letter requesting the Clerk to provide him
2 with copies of the transcripts of the plea and sentencing hearings. Docket No. 81. In that letter,
3 Simpson acknowledged that the “one-year deadline to file a § 2255 will end in April 2018.” *Id.* at
4 2.

5 About six months later, on August 6, 2018, Simpson filed the present § 2255 motion.
6 Docket No. 89-2. There, Simpson seeks to vacate his convictions and sentence on the following
7 grounds: (1) that his conviction on one count of discharging a firearm during a crime of violence
8 in violation of 18 U.S.C. § 924(c)(1)(A) is invalid because Hobbs Act robbery is not categorically
9 a crime of violence in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Mathis v.*
10 *United States*, 136 S. Ct. 2243 (2016), *id.* at 14-23; (2) that the collateral-attack waiver in his plea
11 agreement is not enforceable because his sentence is unconstitutional, *id.* at 22-23; (3) that his
12 guilty plea is invalid because his trial counsel rendered ineffective assistance by failing to object to
13 certain guidelines calculations and enhancements, *id.* at 23-28; (4) that his conviction on one count
14 of discharging a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) is
15 invalid because his counsel rendered ineffective assistance by failing to explain the “nature” of
16 this count, by allowing Simpson to enter into an “unknowing and unintelligent plea” with respect
17 to this count, and by failing to file a notice of appeal as to this count, *id.* at 7-8; (5) that the Court
18 erred in imposing a sentence relating to a crime to which he did not stipulate, *id.* at 32-38; and (6)
19 that the Court failed to apply a reduction to his sentence under “Amendment 794” in light of
20 Simpson’s role as the getaway driver in the robberies alleged in the Indictment, *id.* at 36. Simpson
21 requests the appointment of counsel and a certificate of appealability in the event that the Court
22 denies his motion under § 2255. *Id.* at 37-38.

23 On October 24, 2019, the Court issued an order stating that Simpson’s § 2255 motion
24 appeared to be untimely because he filed it more than one year after the judgment of conviction
25 became final. Docket No. 115 at 2. The Court noted that the May 3, 2017, judgment became final
26 on May 17, 2017, which is the date on which the fourteen-day time period for filing a notice of
27 appeal expired. *Id.* The Court reasoned that, under 28 U.S.C. § 2255(f), Simpson had one year
28 from the date on which the judgment of conviction became final (May 17, 2017) to file a § 2255

1 motion; that one-year period expired on May 17, 2018. *Id.* The Court noted that Simpson filed
2 the present motion on August 6, 2018, approximately three months after the one-year limitations
3 period ended, and that Simpson had not provided any explanation in his § 2255 motion for his
4 delay in filing it. *Id.*

5 Accordingly, in the same order, the Court ordered Simpson by January 6, 2020, to show
6 cause why his § 2255 motion should not be denied as time-barred and to:

7 (1) explain why the one-year statute of limitations does not bar the
8 Motion;

9 (2) provide any explanation for his delay in filing the Motion
beyond the one-year period after the judgment became final; and

10 (3) demonstrate that such a delay is attributable to “extraordinary
11 circumstances.”

12 *Id.* at 2-3.

13 Simpson filed a response to the Court’s order on January 7, 2020. Docket No. 118.
14 There, Simpson stated that “extraordinary circumstances” exist for tolling the statute of
15 limitations, namely his transfer to another facility in March 2018 in connection with a then-
16 ongoing grand jury proceeding. *Id.* at 1. In support of this basis, Simpson attached a declaration
17 from his prior counsel, Edward Swanson, stating that Simpson was summoned to a grand jury
18 proceeding in early March 2018 and that he was unable to bring his paperwork with him when he
19 was moved from USP Atwater to Santa Rita County Jail. *Id.* at 4-6; *see also* Docket No. 83.
20 Swanson’s declaration also states that Simpson had been trying to obtain plea and sentencing
21 transcripts since October 2017 but he did not receive these documents until only a few days
22 before he was moved to Santa Rita County Jail. *Id.*

23 On March 23, 2020, the Court issued another order, in which it stated that Simpson had
24 identified a few grounds for potentially tolling the one-year limitations period, but that he failed
25 to proffer evidence in support of these grounds. Docket No. 123 at 2-3. With respect to the
26 delay caused by the transfer to Santa Rita County Jail, the Court found that Simpson did not
27 identify the length of the delay attributable to the move (in other words, he did not identify the
28 dates in which he was transferred to Santa Rita County Jail and the date he was transferred from

1 Santa Rita County Jail). *Id.* The Court further found that he did not explain why he could not
2 have filed his motion prior to his transfer to Santa Rita County Jail. *Id.* The Court advised
3 Simpson that, to the extent that he intends to argue that the statute of limitations should be tolled
4 because of a delay attributable to his attempt to obtain transcripts, Simpson must “demonstrate
5 the requisite causation – i.e., that the lack of access to these documents made it impossible for
6 him to timely file a habeas petition,” and that he also must show his diligence in attempting to
7 obtain the transcripts. *Id.*

8 To provide Simpson with a second opportunity to proffer evidence to support his request
9 for equitable tolling, the Court continued the order to show cause to June 23, 2020, and it ordered
10 Simpson to identify any evidence relevant to the following matters in his further response:

11 (1) With respect to the relocation to and from Santa Rita County
12 Jail: demonstrate that Simpson’s efforts constitute due diligence,
13 identify the length of the delay, including identifying the dates of
14 relocation to and from Santa Rita County Jail, and provide an
15 explanation as to why Simpson could not have filed the motion
16 prior to the relocation; and
17
(2) With respect to the transcripts: demonstrate that Simpson’s
18 efforts constituted due diligence, and that the lack of these
19 documents made it impossible for Simpson to file a habeas
20 petition, including why the transcripts were necessary for the
21 preparation of his motion.

22 *Id.* at 3. The Court cautioned Simpson “that failure to file a response making the showing
23 described in this Order may result in a finding that equitable tolling should not apply in this
24 case.” *Id.*

25 On April 9, 2020, Simpson filed a declaration in response to the Court’s order. Docket
26 No. 125. There, Simpson states that (1) he requested that his counsel file a notice of appeal with
27 respect to his convictions and sentence in this matter, but that his counsel failed to do so on the
28 ground that Simpson had waived his right to appeal pursuant to his plea agreement; (2) he asked
his counsel to forward him copies of the plea agreement and the transcripts of the plea and
sentencing hearings “so that [he] could be sure” that he had, in fact, waived his right to appeal
his convictions and sentence, but his counsel did not send him these documents; (3) he requested
copies of the transcripts of the plea and sentencing hearings from the Clerk, but the Clerk did not

1 send him copies of these documents until March 2018; (4) he was in the “process of reviewing
2 the transcripts to be sure that [he] had in fact waived [his] right to appeal” and he was “about to
3 file the 2255” motion when he was transferred to Santa Rita County Jail in early March 2018; (4)
4 he filed the present § 2255 motion “upon [his] return to USP Atwater” (Simpson does not specify
5 the date on which he returned); and (5) the plea and sentencing hearing transcripts were
6 “necessary for the preparation of the 2255 Motion” because Simpson wanted to avoid wasting
7 “time, effort, and judicial resources in pursuing claims that would not warrant relief.” Docket
8 No. 125.

9 In light of the filing of Simpson’s April 9, 2020, declaration, the question of whether
10 Simpson has shown that the one-year limitations period under 28 U.S.C. § 2255(f) is subject to
11 equitable tolling is now ripe for determination.

12 **II. LEGAL STANDARD**

13 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a defendant
14 may move to vacate, set aside, or correct his sentence “upon the ground that the sentence was
15 imposed in violation of the Constitution or laws of the United States, or that the court was without
16 jurisdiction to impose such sentence, or that the sentence was in excess of the maximum
17 authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). If any of
18 these grounds exists, the court “shall vacate and set the judgment aside and shall discharge the
19 prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.”
20 28 U.S.C. § 2255(b).

21 A motion under 28 U.S.C. § 2255 is subject to a one-year statute of limitations. *See* 28
22 U.S.C. § 2255(f). The one-year limitations period begins to run, in relevant part, from the date on
23 which the judgment of conviction becomes final. *Id.* “The statute of limitations contained in
24 § 2255 is subject to equitable tolling,” but only where “extraordinary circumstances beyond [the
25 movant’s] control [made] it *impossible* to file a petition on time and the extraordinary
26 circumstances were the cause of his untimeliness.” *United States v. Battles*, 362 F.3d 1195, 1197
27 (9th Cir. 2004) (citation and internal quotation marks omitted) (emphasis supplied). The movant
28 bears the burden of establishing that he is entitled to equitable tolling. *Smith v. Duncan*, 297 F.3d
App. 12

1 809, 814 (9th Cir. 2002). “[T]he threshold necessary to trigger equitable tolling is very high.”
2 *Spitsyn v. Moore*, 345 F.3d. 796, 799 (9th Cir. 2003) (citation and internal quotation marks
3 omitted). A petitioner’s pro se status, on its own, is not enough to warrant equitable tolling. *See*
4 *Johnson v. United States*, 544 U.S. 295, 311 (2005) (“[W]e have never accepted pro se
5 representation alone or procedural ignorance as an excuse for prolonged inattention when a
6 statute’s clear policy calls for promptness.”).

7 III. DISCUSSION

8 As noted, the one-year limitations period under 28 U.S.C. § 2255(f) began to run on the
9 date on which the judgment of conviction became final, which was on May 17, 2017, the date on
10 which the fourteen-day period expired for appealing the May 3, 2017, judgment pursuant to
11 Federal Rule of Appellate Procedure 4(b)(1)(A)(i). *See United States v. Schwartz*, 274 F.3d 1220,
12 1223 (9th Cir. 2001) (holding that the “statute of limitations within which [the movant] had to file
13 her § 2255 motion began to run upon the expiration of the time during which she could have
14 sought review by direct appeal”). Therefore, the one-year limitations period here ended on May
15 17, 2018.

16 Simpson filed the present § 2255 motion on August 6, 2018, almost three months after the
17 one-year limitations period ended. Simpson requests that the Court equitably toll the limitations
18 period on the ground that his delay in filing the motion was caused by his inability to obtain copies
19 of the transcripts of the plea and sentencing hearings until March 2018, and his transfer to Santa
20 Rita County Jail in early March 2018.

21 To receive equitable tolling, a § 2255 movant must show that “extraordinary circumstances
22 beyond [his] control [made] it *impossible* to file a petition on time and the extraordinary
23 circumstances were the cause of his untimeliness.” *Battles*, 362 F.3d at 1197 (emphasis supplied).

24 Simpson has not made the requisite showing. First, Simpson has not shown that
25 extraordinary circumstances beyond his control made it *impossible* for him to file a timely § 2255
26 motion. Simpson states in his declaration that he needed the plea and sentencing hearing
27 transcripts to prepare his § 2255 motion because they were necessary to determine whether he had
28 waived his right to appeal his convictions and sentence pursuant to his plea agreement, as the

1 waiver was the stated reason for his counsel's purported failure to file a notice of appeal. *See*
2 Docket No. 125 at 3, 5. Simpson argues that the waiver issue is relevant to his argument that his
3 counsel provided him with ineffective assistance by failing to file a notice of appeal. *Id.* Simpson
4 does not argue, however, that the question of whether he waived his right to appeal pursuant to the
5 plea agreement is or was relevant to any of the *several other grounds* he advanced in his § 2255
6 motion for vacating his convictions and sentence, which are described in more detail above.² This
7 suggests that his inability to obtain the transcripts did not affect his ability to file a § 2255 motion
8 within the one-year limitations period based on these other grounds, and that he could have filed a
9 timely § 2255 motion based on these other grounds.

10 Additionally, Simpson has not shown that his transfer to Santa Rita County Jail in March
11 2018 made it impossible for him to file a timely § 2255 motion. The transfer could not have
12 prevented him from filing a timely § 2255 motion between May 2017, when the one-year
13 limitations period began to run, and March 2018, when he was transferred to Santa Rita County
14 Jail.

15 Accordingly, the Court cannot conclude that Simpson's failure to obtain the transcripts
16 until March 2018 and his transfer to Santa Rita County Jail in March 2018 made it "impossible"
17 for him to file a timely § 2255 motion. *See Battles*, 362 F.3d at 1197.

18 Second, Simpson has not shown that extraordinary circumstances *beyond his control* were
19 the cause of his untimeliness. Simpson acknowledges in his declaration that the cause of his
20 untimeliness was *his own decision* to investigate the waiver issue before filing his § 2255 motion,
21 as he wished to avoid wasting time and effort on unmeritorious claims. *See* Docket No. 125 at 5.
22 This raises the inference that Simpson *could have* filed his § 2255 motion sooner, but he chose not
23
24

25 ² In his declaration of April 9, 2020, Simpson states that he wishes to withdraw all grounds
26 for vacating his convictions and sentence except for the ineffective assistance ground related to his
27 counsel's failure to file a notice of appeal, because he now believes that the grounds he wishes to
28 withdraw lack merit. Docket No. 125 at 3-5. Simpson's belated attempt to withdraw the other
grounds he asserted in his § 2255 motion does not change the Court's finding that the lack of
transcripts did not prevent Simpson from filing his § 2255 motion within the one-year limitations
period.

1 to do so. In light of this concession, the Court cannot conclude that Simpson's untimeliness was
2 caused by an external circumstance "beyond [his] control." *See Battles*, 362 F.3d at 1197.

3 For the foregoing reasons, the Court **DENIES** Simpson's motion under 28 U.S.C. § 2255 as
4 time-barred.

5 In his § 2255 motion, Simpson requests a certificate of appealability to the extent that the
6 Court denies his § 2255 motion. Where, as here, a § 2255 motion is denied on procedural
7 grounds, a court may issue a certificate of appealability only if the movant shows, in relevant part,
8 "that jurists of reason would find it debatable whether the district court was correct in its
9 procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, a certificate of
10 appealability is not warranted because the one-year limitations period plainly bars Simpson's
11 motion and, for that reason, a reasonable jurist could not conclude that the Court erred in denying
12 the § 2255 motion on procedural grounds. *See id.* (noting that no certificate of appealability
13 should be issued where "a plain procedural bar is present and the district court is correct to invoke
14 it to dispose of the case [because] a reasonable jurist could not conclude [in that circumstance]
15 either that the district court erred in dismissing the petition or that the petitioner should be allowed
16 to proceed further"). *Id.* Accordingly, the Court **DENIES** Simpson's request for a certificate of
17 appealability.

18 **IV. CONCLUSION**

19 In light of the foregoing, the Court **DENIES** Simpson's motion under 28 U.S.C. § 2255 as
20 time-barred, and it **DENIES** Simpson's request for a certificate of appealability.

21 This order terminates Docket Number 89.

22 **IT IS SO ORDERED.**

23 Dated: June 6, 2021


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

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