

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 26 2023

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERT CARRASCO,

Defendant-Appellant.

No. 23-55257

D.C. Nos. 3:22-cv-00234-JLS
3:17-cr-03938-JLS-1

Southern District of California,
San Diego

ORDER

Before: SILVERMAN and FRIEDLAND, Circuit Judges.

The request for a certificate of appealability is denied because the underlying 28 U.S.C. § 2255 motion fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (“When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both ‘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.’”) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

GILBERT CARRASCO,
Defendant/Petitioner.

Case Nos.: 17CR3938-JLS
22CV0234-JLS

ORDER:

**1) DISMISSING DEFENDANT'S
MOTION UNDER 28 U.S.C. § 2255
TO VACATE, SET ASIDE OR
CORRECT SENTENCE;
2) DENYING DEFENDANT'S
MOTION TO APPOINT COUNSEL;
and
3) DENYING CERTIFICATE OF
APPEALABILITY**

[ECF Nos. 103 and 109]

On February 18, 2022, Defendant Gilbert Carrasco filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 103). On September 6, 2022, Defendant filed a Motion to Appoint Counsel (ECF No. 109). Having considered Defendant's § 2255 motion and the record in the case, the Court concludes that the motion is time-barred and, therefore, must be dismissed for lack of jurisdiction. For this reason, the Court finds no good cause for the appointment of counsel.

Background

On July 11, 2018, Defendant Carrasco was convicted following a jury trial of possession of methamphetamine with intent to distribute (500 grams and more) in violation of 21 U.S.C. §841(a)(1). Defendant was subsequently sentenced by this Court to the statutory mandatory minimum term of imprisonment of 120 months. ECF 66. An appeal was taken, and the Ninth Circuit Court of Appeals affirmed the conviction in an order issued on May 13, 2020.¹ ECF 87. Defendant filed a petition for certiorari which was denied by the Supreme Court on October 5, 2020. Court of Appeals Docket # 18-50417 Doc. No. 62. More than 16 months later, on February 18, 2022, Defendant filed the Motion at issue here.

Discussion

Defendant contends that his conviction should be vacated because he received ineffective assistance of counsel because his conviction was based on perjured testimony, because this Court should have suppressed the fruits of Defendant's arrest at a Border Patrol checkpoint, and because appellate and trial counsel failed to properly argue these issues. The rulings made by this Court with respect to the substantive issues of the constitutionality of the checkpoint, Defendant's detention, and the chain of custody of the drug evidence were fully litigated before this Court and on appeal, thus there appears to be no basis for Defendant's assertions of ineffective assistance of counsel.

However, the Court lacks jurisdiction to consider this issue because his motion was filed more than one year after Defendant's conviction became final² and is thus untimely

¹ The Court notes that the issues raised in Defendant's § 2255 motion are the same as those raised on appeal, with the exception that Defendant now also contends that his trial and appellate counsel were ineffective for failing to properly argue those issues.

² Defendant's conviction became final on October 5, 2020, the day the Supreme Court denied certiorari review. *See Clay v. United States*, 537 U.S. 522, 527 (2003) (recognizing that finality attaches when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for certiorari, or when the time for filing a certiorari petition expires." (citations omitted)).

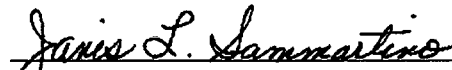
1 pursuant to 28 U.S.C. § 2255(f)(1).³ Defendant contends that his motion is timely filed
2 “per U.S. Supreme Court extensions due to Covid-19 wor[l]d pandemic,” however
3 Defendant presents no evidence of such extensions nor authority for this proposition. Nor
4 has Defendant presented any specific extraordinary circumstances impeding him from
5 filing a timely motion. Thus, the Court is unable to conclude that Defendant is entitled to
6 equitable tolling. *See, e.g., United States v. Cazarez-Santos*, 655 Fed.Appx. 543 (9th Cir.
7 2016) (unpublished) (recognizing that equitable tolling is not applicable absent a showing
8 of extraordinary circumstances impeding the filing of a timely petition). Accordingly,
9 Defendant’s motion must be dismissed as time-barred.

10 Conclusion

11 The Court finds that the record conclusively demonstrates that Defendant is entitled
12 to no relief because his motion was not timely filed under 28 U.S.C. §2255(f).
13 Accordingly, this Court lacks jurisdiction and Defendant’s Motion under 28 U.S.C. § 2255
14 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody is **Hereby**
15 **Dismissed**. IT IS FURTHER ORDERED that Defendant’s Motion to Appoint Counsel is
16 **Hereby Denied**. Additionally, the Court **Denies** Defendant a certificate of appealability,
17 as Defendant has not made a substantial showing that he has been denied a constitutional
18 right.

19 IT IS SO ORDERED.

20 Dated: February 27, 2023

21 
22 Hon. Janis L. Sammartino
23 United States District Judge
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³ 28 U.S.C. 2255(f)(1) establishes a 1-year period of limitation running from “the date on which the judgment of conviction becomes final.”

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 1 2024

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GILBERT CARRASCO,

Defendant-Appellant.

No. 23-55257

D.C. Nos. 3:22-cv-00234-JLS
3:17-cr-03938-JLS-1

Southern District of California,
San Diego

ORDER

Before: FRIEDLAND and MENDOZA, Circuit Judges.

Appellant's motion to alter or amend the judgment (Docket Entry No. 4) is construed as a motion for reconsideration. So construed, the motion is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

03/21/2023	<u>1</u>	Open 9th Circuit docket: needs certificate of appealability. Date COA denied in DC: 02/27/2023. Record on appeal included: Yes. [12678934] (JMR) [Entered: 03/21/2023 04:04 PM]
03/31/2023	<u>2</u>	Filed Appellant Gilbert Carrasco letter dated 03/26/2023 re: On 3/12/2023, mailed to this court, an application for COA to issue. Paper filing deficiency: None. [12686882] (HH) [Entered: 03/31/2023 03:39 PM]
05/26/2023	<u>3</u>	Filed order (BARRY G. SILVERMAN and MICHELLE T. FRIEDLAND)The request for a certificate of appealability is denied because the underlying 28 U.S.C. § 2255 motion fails to state any federal constitutional claims debatable among jurists of reason. See 28 U.S.C. § 2253(c)(2)–(3); Gonzalez v. Thaler, 565 U.S. 134, 140–41 (2012) (“When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both ‘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.’”) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Any pending motions are denied as moot. DENIED. [12723246] (ABT) [Entered: 05/26/2023 09:59 AM]
05/28/2024	<u>4</u>	Filed Appellant Gilbert Carrasco motion to alter or amend judgment pursuant to extraordinary circumstances. Deficiencies: None. Served on 05/24/2024. [12887756] (RL) [Entered: 05/28/2024 03:22 PM]
07/01/2024	<u>5</u>	Filed order (MICHELLE T. FRIEDLAND and SALVADOR MENDOZA, JR.) Appellant’s motion to alter or amend the judgment (Docket Entry No. [4]) is construed as a motion for reconsideration. So construed, the motion is denied. See 9th Cir. R. 27–10. No further filings will be entertained in this closed case. [12894661] (OC) [Entered: 07/01/2024 04:37 PM]
07/31/2024	<u>6</u>	Mail returned on 07/25/2024 addressed to Gilbert Carrasco, re: [5] Order. Returned envelope notes: return to sender, inmate not at FCI/FPC La Tuna, released 5/6/2024, refused, unable to forward. Resending to: 551 S 35th St, San Diego, CA 92113. [12899684] —[Edited: Updated Address. 07/31/2024 by TYL] (LA) [Entered: 07/31/2024 11:22 AM]
08/06/2024	<u>7</u>	Filed Appellant Gilbert Carrasco letter dated 08/01/2024 re: Request for copies of other case rulings. Paper filing deficiency: No further filings per 7/1/24 order. (Sent copy of 7/1/24 order & docket sheet) [12900720] (RL) [Entered: 08/07/2024 09:14 AM]

General Docket

United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 23-55257**Docketed:** 03/21/2023**Nature of Suit:** 2510 Vacate Sentence**Termed:** 05/26/2023

USA v. Gilbert Carrasco

Appeal From: U.S. District Court for Southern California, San Diego**Fee Status:** Due**Case Type Information:**

- 1) prisoner
- 2) federal
- 3) 2255 habeas corpus

Originating Court Information:**District:** 0974-3 : 3:22-cv-00234-JLS**Lead:**3:17-cr-03938-JLS-1**Court Reporter:** Amanda Marjorie LeGore,
Official Court Reporter**Court Reporter:** Noemy Martinez, Court Reporter
Coordinator**Court Reporter:** Frank Joseph Rangus, Official
Court Reporter**Court Reporter:** Gayle Wakefield**Trial Judge:** Janis L. Sammartino, District Judge**Date Filed:** 02/18/2022

Date	Date Order/Judgment	Date NOA	Date Rec'd
Order/Judgment:	EOD:	Filed:	COA:
02/27/2023	02/27/2023	03/20/2023	03/21/2023

Prior Cases:

<u>18-50417</u>	Date Filed: 11/23/2018	Date Disposed: 05/13/2020	Disposition: Affirmed – Memorandum
<u>18-55004</u>	Date Filed: 01/02/2018	Date Disposed: 05/18/2018	Disposition: Affirmed – Judge Order
<u>22-70150</u>	Date Filed: 07/18/2022	Date Disposed: 08/19/2022	Disposition: Denied – Judge Order

Current Cases:

None

UNITED STATES OF AMERICA
Plaintiff – Appellee,

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v.

GILBERT CARRASCO (–: 65905-298)
Defendant – Appellant,

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