

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO.: _____

(Eleventh Circuit No. 16-15512-EE)
(Southern District of Florida No. 05-CR-14098)

MARK PROCTOR,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals, Eleventh Circuit

APPENDIX FOR PETITIONER

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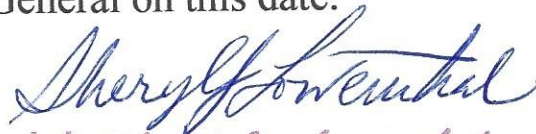
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CERTIFICATE OF ELECTRONIC FILING & SERVICE

I hereby certify that this Appendix was electronically filed with the Clerk of Court on April 28, 2018, and that it will be served via electronic filing with the Office of the Solicitor General on this date.



/s/ Sheryl J. Lowenthal

SHERYL J. LOWENTHAL
CJA Appellate Counsel
for Mark Proctor

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15512-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK PROCTOR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before: TJOFLAT, JULIE CARNES and NEWSOM, Circuit Judges.

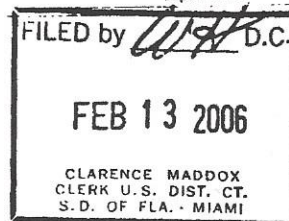
BY THE COURT:

The government's motion to dismiss the appeal for lack of jurisdiction is GRANTED. Mark Proctor's notice of appeal, dated August 9, 2016, is untimely to appeal from the district court's April 7, 2006, final judgment. *See* Fed. R. App. P. 4(b)(1)(A), (c). Because the government has moved to dismiss the appeal as untimely, "we must apply the time limits of Rule 4(b)." *United States v. Lopez*, 562 F.3d 1309, 1313-14 (11th Cir. 2009).

Even if Mr. Proctor's notice of appeal could be construed as expressing an intent to appeal from the district court's June 10, 2014, order denying his 28 U.S.C. § 2255 motion to vacate, it would still be untimely. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). (a)(7)(A)(ii).

Because the timely filing of a notice of appeal in a civil action is a jurisdictional requirement, we cannot entertain this appeal. *See Green v. Drug Enforcement Admin.*, 606 F.3d 1296, 1300-02 (11th Cir. 2010). This appeal is hereby DISMISSED. Any other outstanding motions are DENIED as moot.

United States District Court
Southern District of Florida
FT. PIERCE DIVISION



UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 05-14022-CR-MARTINEZ

MARK PROCTOR

USM Number: 65148-004

Counsel For Defendant: Richard D. Kibbey, Esq
Counsel For The United States: Robert Waters
Court Reporter: Larry Herr

The defendant pleaded guilty to Count(s) 1 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. § 2252A(a)(3)(B)	Promotion and distribution of child pornography	April 6, 2004	One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count(s) remaining are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
February 6, 2006


JOSE E. MARTINEZ
United States District Judge
February 13, 2006

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DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14022-CR-MARTINEZ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **151 months** as to Count One.

The Court makes the following recommendations to the Bureau of Prisons:

This defendant shall be designated to a facility closest to N. Carolina, that is commensurate with his offense and background.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

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DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14022-CR-MARTINEZ

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **10 years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14022-CR-MARTINEZ

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall register with the state sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, as directed by the Probation Officer. The Probation Officer will provide the state officials with any and all information required by the state sex offender registration agency and may direct the defendant to report to that agency personally for additional processing, such as photographing and fingerprinting.

The defendant shall not possess or use any data encryption technique or program.

The defendant shall consent to the U.S. Probation Officer conducting periodic unannounced examinations of the defendant's computer(s) equipment which may include retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with this condition and/or removal of such equipment for the purpose of conducting a more thorough inspection; and consent at the direction of the U.S. Probation Officer to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

The defendant shall not possess or use a computer that contains an internal modem and/or possess an external modem without the prior approval of the U.S. Probation Officer.

The defendant shall consent to third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

The defendant shall have no unsupervised, personal, mail, telephone, or computer contact with children/minors under the age of 18, or with the victim in this case.

The defendant shall not be involved in any children's or youth organization.

The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary.

The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14022-CR-MARTINEZ

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$100.00	\$	\$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

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DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14022-CR-MARTINEZ

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of \$100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

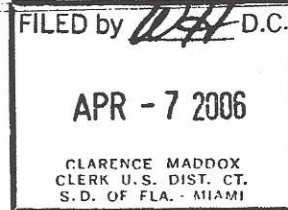
The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States District Court
Southern District of Florida
FT. PIERCE DIVISION



UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 05-14098-CR-MARTINEZ

MARK PROCTOR

USM Number: 65148-004

Counsel For Defendant: Robin Rosen-Evans, AFD
Counsel For The United States: Robert Waters
Court Reporter: Larry Herr

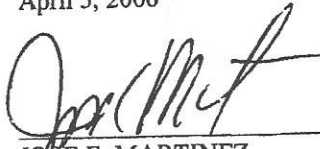
The defendant pleaded guilty to Count(s) 1 and 2 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. § 3146(a)(1)	Failure to appear	December 5, 2005	One
18 U.S.C. § 401(3)	Contempt	December 5, 2005	Two

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
April 5, 2006


JOSE E. MARTINEZ
United States District Judge

April 6, 2006

DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14098-CR-MARTINEZ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **12 months**. The term consists of a term of six (6) months as to Count Two to run concurrently to the term of imprisonment imposed in Southern District of Florida Case No. 05-14022-CR-MARTINEZ and **12 months** as to Count One to run **consecutively** to the terms of imprisonment imposed in Count Two in Case No. 05-14022-CR-MARTINEZ.

The Court makes the following recommendations to the Bureau of Prisons:

This defendant shall be designated to a facility closest to North Carolina.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14098-CR-MARTINEZ

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **2 years** as to Count One to run concurrently to the term of supervised release imposed in Case No. 05-14022-CR-MARTINEZ.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14098-CR-MARTINEZ

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

None

DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14098-CR-MARTINEZ

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$100-Ct. 1	\$	\$
\$10. Ct. 2		

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MARK PROCTOR
CASE NUMBER: 05-14098-CR-MARTINEZ

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of \$110.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the **CLERK, UNITED STATES COURTS** and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-14414-Civ-MARTINEZ
(05-14098-Cr-MARTINEZ)
MAGISTRATE JUDGE P.A. WHITE

MARK PROCTOR,

:

Movant,

:

v.

:

REPORT OF
MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

:

Respondent.

:

I. Introduction

Mark Proctor, a federal prisoner, has filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, challenging the constitutionality of his convictions and sentences entered in criminal case number 05-14098-Cr-MARTINEZ.

This case has now been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rule 8(b) of the Rules Governing Section 2255 Proceedings in the United States District Courts.

For its consideration of the movant's initial motion (Cv-DE#1), the Court has the movant's response on the limitations issue (Cv DE# 13), the government's response to this court's order to show cause (Cv DE# 14), Presentence Investigation Report, ("PSI"), the court's Statement of Reasons ("SOR"), as well as, all relevant portions of the underlying criminal case under attack here.

II. Claims

Construing movant's arguments liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 519 (1972), the movant seeks vacatur of his conviction and sentence on three grounds, as follows:

1. Ineffective assistance of counsel for failing to file a direct appeal. (Cv-DE#1:5).
2. The trial court improperly applied the sentencing guidelines in violation of the movant's constitutional rights. (Cv-DE#1:5).
3. The charge in this case constituted a violation of the protection against double jeopardy as the movant was charged with the same crime in case no. 05-CR-14022. (Cv-DE#12:5).
4. He entered his plea involuntarily. (Cv-DE#1:6).

III. Procedural History

On December 15, 2005, movant was charged by a federal grand jury in the Southern District of Florida in a 2 count indictment charging him with Failure to appear in violation of Title 18, U.S.C. Section 3146j(a)(1) and contempt of court in violation of Section 401(2), both misdemeanor offenses, (Cr DE# 1). These charges arose out of movant's failure to appear for sentencing, while on pre-trial release, for sentencing in case 05-14022-CR-MARTINEZ. On February 13, 2006 movant pled guilty to this indictment (Cr DE# 19, 20).

On April 7, 2006, the movant was sentenced to 12 months in prison as to count 1 and 6 months imprisonment as to count 2. Count 1 was ordered to be served consecutively to the sentence imposed in case number 05-14022-CR-MARTINEZ. Defendant was also ordered to serve 2 years of supervised release after incarceration (Cr DE#

28). The judgment was entered on the docket by the Clerk of Court on April 7, 2006. (Cr-DE#57). Movant did not appeal this sentence.

Consequently, the convictions became final at the latest on **April 17, 2006**, ten days after the entry of the judgment, when time expired for filing a notice of appeal.¹ Thus, the movant had one year from the time his conviction became final, or no later than **April 17, 2007**,² within which to timely file this federal habeas petition. See Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); see also, See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008) (citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)). Applying the anniversary method to this case means petitioner's limitations period expired on **April 17, 2007**

¹Where, as here, a defendant does not pursue a direct appeal, his conviction becomes final when the time for filing a direct appeal expires. Adams v. United States, 173 F.3d 1339, 1342 n.2 (11th Cir. 1999). On December 1, 2009, the time for filing a direct appeal was increased from 10 to 14 days after the judgment or order being appealed is entered. Fed.R.App.P. 4(b)(1)(A)(i). The judgment is "entered" when it is entered on the docket by the Clerk of Court. Fed.R.App.P. 4(b)(6). Moreover, now every day, including intermediate Saturdays, Sundays, and legal holidays are included in the computation. See Fed.R.App.P. 26(a)(1). However, since movant was sentenced prior to the effective date of the amendment, he had ten business days, excluding intermediate Saturdays and Sundays, within which to file his notice of appeal. See Fed.R.App.P. 26(a)(1)(B).

²See Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008) (citing Ferreira v. Sec'y, Dep't of Corr's, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007) (this Court has suggested that the limitations period should be calculated according to the "anniversary method," under which the limitations period expires on the anniversary of the date it began to run); accord United States v. Hurst, 322 F.3d 1256, 1260-61 (10th Cir. 2003); United States v. Marcello, 212 F.3d 1005, 1008-09 (7th Cir. 2000)); see also, 28 U.S.C. §2255.

Almost **7 years** after his conviction became final, movant filed the instant §2255 motion on **October 16, 2013**.³ (Cv-DE#1). The movant filed a response regarding the limitations issue and the government filed a response to the order to show cause wherein it argues that the motion should be dismissed as untimely. (Cv DE# 13, 14).

IV. Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255. In determining whether to vacate a movant's sentence, a district court must first determine whether a movant's claim is cognizable under Section 2255. See Lynn v. United States, 365 F.3d 1225, 1232-33 (11th Cir. 2004) (stating that a determination of whether a claimed error is cognizable in a Section 2255 proceeding is a "threshold inquiry"), cert. den'd, 543 U.S. 891, 125 S. Ct. 167, 160 L. Ed. 2d 154 (2004). It is well-established that a Section 2255 motion may not be a substitute for a direct appeal. Id. at 1232 (citing United States v. Frady, 456 U.S. 152, 165, 102 S. Ct. 1584, 1593, 71 L.Ed.2d 816 (1982)).

³Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1) ("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); See: Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

The Eleventh Circuit promulgated a two-part inquiry that a district court must consider before determining whether a movant's claim is cognizable. First, a district court must find that "a defendant assert[ed] all available claims on direct appeal." *Id.* (citing Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994)). Second, a district court must consider whether the type of relief the movant seeks is appropriate under Section 2255. This is because "[r]elief under 28 U.S.C. §2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Id.* at 1232-33 (quoting Richards v. United States, 83 F.2d 965, 966 (11th Cir. 1988) (internal quotations omitted)).

If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. §2255. To obtain this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." Fraday, 456 U.S. at 166, 102 S.Ct. at 1584 (rejecting the plain error standard as not sufficiently deferential to a final judgment).

Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933,

167 L.Ed.2d 836 (2007). See also Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002) (explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous"). As indicated by the discussion below, the motion and the files and records of the case conclusively show that movant is entitled to no relief, therefore, no evidentiary hearing is warranted.

V. Discussion

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") created a limitation for a motion to vacate. Pursuant to 28 U.S.C. §2255(f), as amended April 24, 1996, a one year period of limitations applies to a motion under the section. The one year period runs from the latest of:

- (1) The date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (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 is prevented from filing by such governmental action;
- (3) The date on which the constitutional 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 could have been discovered through the exercise of due diligence.

See 28 U.S.C. §2255(f); see also, Pruitt v. United States, 274 F.3d 1315, 1317 (11th Cir. 2001). The burden of demonstrating that the AEDPA's one-year limitation period was sufficiently tolled, whether statutorily or equitably, rests with the movant. See e.g., Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).

As is explained above, the movant's initial motion was not filed until October 16, 2013, almost seven years after the one-year federal limitations expired. Consequently, movant is not entitled to statutory tolling of the limitations period. Movant does not dispute here that the instant motion was not filed within one year from the date on which the judgment of conviction became final.

Nevertheless, movant suggests that he is entitled to tolling of the limitations because he has a constitutional right to an appeal and because he was ignorant of the law regarding his right to file a motion under 28 U.S.C. §2255. (Cv DE# 13).

However, none of his arguments, individually or cumulatively, entitle movant to equitable tolling of the limitations period. The United States Supreme Court has held that the one-year limitations period is subject to equitable tolling in appropriate cases. See Holland v. Florida, 560 U.S. ___, 130 S.Ct. 2549 (2010); San Martin v. McNeil, 633 F.3d 1257, 1267 (11th Cir. 2011). The burden is on the petitioner to demonstrate that he is entitled to the extraordinary relief of equitable tolling. Holland, 130 S.Ct. at 2562. See also Outler v. United States, 485 F.3d 1273, 1280 (11th Cir. 2007).

However, equitable tolling is a rare and extraordinary remedy. See San Martin, 633 F.3d at 1271. 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." Holland, 560 U.S. 649 (citation and internal quotation marks omitted); see also Diaz v. Secretary for Dept. of Corr., 362 F.3d 698, 702 (11th Cir. 2004) (characterizing the equitable-tolling standard as a two-part test, stating that "equitable tolling is available only if a petitioner establishes both extraordinary circumstances and due diligence." (emphasis supplied)).

The extraordinary circumstances must be circumstances beyond the petitioner's control. See Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009). Further, there must be a causal connection between the alleged extraordinary circumstances and the late filing of the petition. See San Martin, 633 F.3d at 1267. The diligence required for equitable tolling to be warranted is "reasonable diligence, not maximum feasible diligence." Id. (quotations omitted).

For example, the Supreme Court has rejected the contention that counsel's mistake in miscalculating the federal limitations period entitles a petitioner to equitable tolling. See Lawrence v. Florida, 549 U.S. 327, 336-37, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007). Specifically, the Court has held that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel." Id.

Next, in Holland, the Supreme Court, while reiterating that mere attorney negligence does not warrant equitable tolling,

nevertheless held that an attorney's serious misconduct may warrant such tolling. 560 U.S. at 652. The defendant in Holland filed a *pro se* federal habeas petition after the filing deadline had already passed, but he contended that the statute of limitations should have been equitably tolled. Id. at 635. In support, he alleged that, during the two years while his state habeas petition was pending before the Florida Supreme Court, his attorney, Mr. Collins, communicated with him only three times, and each time only by letter. Id. at 635-36. During this time, Mr. Collins never met with him or updated him on the status of his case. Id. After Collins argued Holland's appeal before the state supreme court, Holland wrote him multiple letters regarding the importance of filing his federal habeas petition timely. Id. at 637-39. Despite Holland's attempts to communicate, Mr. Collins ultimately missed the filing deadline for his federal habeas petition. Id. at 638-39. Once Holland learned-in the prison library, not from his attorney-that the Florida Supreme Court had already decided his case and the federal filing deadline had passed, he immediately filed his own *pro se* federal habeas petition. Id. at 639.

While the Supreme Court reiterated that "a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling," it concluded that Holland had not presented such a "garden variety claim." 560 U.S. at 651-52 (internal quotation marks omitted). Rather, the facts of Holland's case presented "far more serious instances of attorney misconduct." Id. The Court found that, while Mr. Collins' failure to timely file Holland's federal habeas petition and his apparent unawareness of the filing deadline date suggested simple negligence, that did not mark the end of Collins' failures:

Here, Collins failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.

Id. at 652. Further, during his state post-conviction proceedings, Holland had unsuccessfully sought to discharge his attorney, complaining to the Florida Supreme Court that there had been "a complete breakdown in communication," that counsel had "not kept him updated on the status of his capital case," and that counsel had "abandoned" him. Id. at 636-37 (quotation marks and brackets omitted). The Court concluded that under the circumstances, Mr. Collins' misconduct may have constituted extraordinary circumstances warranting equitable tolling, and remanded the case for such a determination. Id. at 652.

Two years later, in Maples v. Thomas, ___ U.S. ___, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012), the Supreme Court revisited the question of when attorney misconduct may rise to the level of "extraordinary circumstances beyond a [petitioner's] control," albeit in the context of what it takes to establish cause to excuse a state procedural bar to federal habeas relief. Id. at 924. In Maples, the petitioner, an Alabama death-row inmate, had been represented by two *pro bono* attorneys from a New York law firm and a local attorney recruited for the sole purpose of allowing the

out-of-state attorneys to be admitted *pro hac vice*. Id. at 918-19. While Maples' state post-conviction petition was pending, the two New York attorneys left their law firm for positions that rendered them ineligible to continue to represent him. Id. at 919, 924. Neither attorney, however, notified Maples of his departure and resulting inability to represent Maples. Id. at 919. Nor did either of them ask the state trial court for leave to withdraw or move for substitution of counsel. Id. Without the assistance of his listed attorneys of record, Maples did not receive timely notice of the denial of his state post-conviction petition and, as a result, failed to timely appeal that ruling, which led to the procedural default of his claims in federal court. Id. at 920-21.

As a result, in Maples, the Supreme Court reaffirmed the general rule that, "under well-settled principles of agency law," a petitioner "bears the risk of negligent conduct on the part of his [attorney]" and, for that reason, is ordinarily bound by counsel's failure to meet a filing deadline. Id. at 922 (quotation marks omitted). The Court held, however, that "[a] markedly different situation is presented ... when an attorney abandons his client without notice" and thereby "sever[s] the principal-agent relationship," at which point counsel's "acts or omissions ... cannot fairly be attributed to the client." Id. at 922-23 (quotation marks and brackets omitted). The Court concluded that counsel had abandoned Maples because, as a matter of both common sense and agency law principles, he was effectively "left without any functioning attorney of record" and had "been reduced to pro se status." Id. at 927.

The Eleventh Circuit, in its recent decision in Cadet v. Fla. Dep't of Corr's, ___ F.3d ___, 2014 WL 341050 (11th Cir. Jan.31, 2014), considered Holland and Maples, in determining the test for

equitable tolling of the AEDPA's statute of limitations period, where a petitioner alleges the late filing was caused by his attorney's conduct. The Eleventh Circuit held that "attorney negligence, however gross or egregious, does not qualify as an 'extraordinary circumstance' for purposes of equitable tolling; abandonment of the attorney-client relationship, such as may have occurred in Holland, is required." Cadet, 742 F.3d 473, 2014 WL 341050, at *8 (footnote omitted).

Unlike the situation in Holland, the circumstances in this case do not involve attorney misconduct. Movant suggests his attorney failed to advise him at the conclusion of his trial that he could pursue an appeal. (Cv-DE#13). Movant also suggests that he was not made aware by counsel or another that he had the right to file a §2255 motion. (Id.). Movant asserts that the erroneous advice or lack thereof that he received from counsel warrants application of §2255(f)(4), which allows the one-year statute of limitations to begin running on the date when the fact (apparently the fact that he could file a § 2255 motion) supporting his claim could have been discovered with due diligence.

Movant is not entitled to equitable tolling pursuant to §2255(f)(4). Learning at some unspecified time that he could file an appeal and/or seek collateral relief under §2255 does not qualify as factual information that supports a claim or claims. See cf., Madaio v. United States, 397 Fed.Appx. 568, 570 (11th Cir. 2010) ("[T]he discovery of a new court legal opinion, as opposed to new factual information affecting the claim, does not trigger the limitations period" under §2255(f)(4).). Here, movant is not entitled to equitable tolling based on counsel's purported lack of advice or misadvice regarding movant's postconviction rights. Nowhere does movant affirmatively state, much less show, that he

asked counsel about filing a \$2255 motion on his behalf. Finally, counsel's alleged legal misadvice or lack thereof, and movant's ignorance of his legal remedies, are not are not extraordinary circumstances warranting equitable tolling.

Next, to the extent movant suggests that he is an unskilled layperson who has limited knowledge of the law and is, therefore, entitled to liberal treatment, this argument also warrants no relief.⁴ Mere ignorance of the law or lack of knowledge of filing deadlines does not justify equitable tolling of AEDPA's limitation period. See Johnson v. United States, 544 U.S. 295, 311, 125 S.Ct. 1571, 1582 (2005) (stating that "the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness.").

The Eleventh Circuit has further held that a lack of a legal education and related confusion or ignorance about the law as excuses for a failure to file in a timely fashion does not warrant equitable tolling of the limitations period. See Perez v. Florida, 519 Fed.Appx. 995, 997 (11th Cir. 2013) (citing, Rivers v. United States, 416 F.3d 1319, 1323 (11th Cir. 2005) (holding that while movant's lack of education may have delayed his efforts to vacate his state conviction, his procedural ignorance is not an excuse for prolonged inattention when promptness is required)); see also Carrasco v. United States, 2011 WL 1743318, *2-3 (W.D.Tex.

⁴As correctly maintained by movant, *pro se* filings are subject to less stringent pleading requirements, Estelle v. Gamble, 429 U.S. 97, 106 (1976), and should be liberally construed with a measure of tolerance. See Haines v. Kerner, 404 U.S. 519 (1972). See also Gomez-Diaz v. United States, 433 F.3d 788, 791 (11th Cir. 2005); Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991). However, contrary to movant's apparent belief, the policy of liberal construction for *pro se* litigants' pleadings does not extend to a "liberal construction" of the one-year limitations period.

2011)(finding that movant's claim that he just learned of Padilla decision did not warrant equitable tolling, although movant was incarcerated and was proceeding without counsel, because ignorance of the law does not excuse failure to timely file §2255 motion); Felder v. Johnson, 204 F.3d 168, 172-73 & n. 10 (5 Cir. 2000)(citing cases), cert. denied, 531 U.S. 1035 (2000)(holding that ignorance of law and pro se status are insufficient to toll statute of limitations); Turner v. Johnson, 177 F.3d 390, 392 (5 Cir. 1999); United States v. Flores, 981 F.2d 231, 236 (5 Cir.1993)(holding pro se status, illiteracy, deafness, and lack of legal training are not external factors excusing abuse of the writ); Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9 Cir. 1986)(illiteracy of pro se petitioner not sufficient cause to avoid procedural bar); Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473, 478 (5 Cir. 1991)(holding equitable tolling of limitations period within the Age Discrimination in Employment Act was not warranted by plaintiff's unfamiliarity with legal process, his lack of representation, or his ignorance of his legal rights). As with any litigant, pro se litigants "are deemed to know of the one-year statute of limitations." Outler v. United States, 485 F.3d 1273, 1282 n.4 (11th Cir. 2007).

Under the totality of the circumstances present here, the movant's dilatory behavior cannot qualify him for equitable tolling. As a result of movant's failure to diligently pursue his rights, he has failed to demonstrate that he qualifies for equitable or statutory tolling. Consequently, this §2255 motion should be dismissed as time-barred.

VI. Evidentiary Hearing

To the extent movant requests an evidentiary hearing on these

claims, it should be denied. The movant has the burden of establishing the need for an evidentiary hearing, and he/she would only be entitled to a hearing if his/her allegations, if proved, would establish his/her right to collateral relief. See Townsend v. Sain, 372 U.S. 293, 307 (1963). A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. See Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989), citing, Guerra v. United States, 588 F.2d 519, 520-21 (5th Cir. 1979). As discussed in this Report, movant's motion is time-barred, and no evidentiary hearing is warranted in this matter.

VII. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255 Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a

§2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). After review of the record in this case, the Court finds the movant has not demonstrated that she has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997).

Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections.

VIII. Conclusion

Based on the foregoing, it is recommended as follows: (1) the motion to vacate be dismissed as time-barred; (2) that no certificate of appealability issue; and, (3) that the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 16th day of May, 2014.



UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Fort Pierce Division

Case Number: 13-14414-CIV-MARTINEZ-WHITE

MARK PROCTOR,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORDER ADOPTING REPORT OF MAGISTRATE JUDGE WHITE

THE MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, for a Report and Recommendation on Mark Proctor's ("Movant['s]") *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (D.E. No. 1). Magistrate Judge White filed a Report (D.E. No. 22), recommending that this Court: (1) dismiss the motion to vacate as time-barred; (2) issue no certificate of appealability; and (3) close this case. The Court has reviewed the entire file and record and notes that no objections to the Report of Magistrate Judge White have been filed. After careful consideration, the Court affirms and adopts the Report. Accordingly, it is hereby:

ADJUDGED that Report of Magistrate Judge White (D.E. No. 22) is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

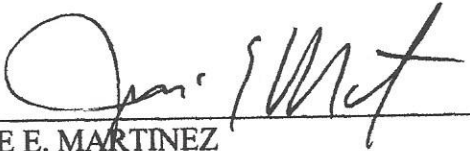
ADJUDGED that

1. Movant's *pro se* Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (D.E. No. 1) is **DISMISSED**.

2. A certificate of appealability **SHALL NOT ISSUE**.

3. This case is **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of June, 2014.



JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge White
All Counsel of Record
Mark Proctor, #65148-004