

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 17-13153-B

FERNANDO MORENO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Fernando Moreno moves for a certificate of appealability ("COA"), in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate sentence. To merit a COA, Moreno must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). Moreno has not met this standard, and his motion for a COA is DENIED.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-60856-Civ-COHN
(15-60094-Cr-COHN)
MAGISTRATE JUDGE P.A. WHITE

FERNANDO MORENO,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPORT OF
MAGISTRATE JUDGE

I. Introduction

This matter is before the Court on the movant's *pro se* motion to vacate, filed pursuant to 28 U.S.C. §2255, attacking the constitutionality of his convictions and sentences for conspiracy to violate the RICO statute and conspiracy to possess with intent to distribute one kilogram or more of heroin, entered following a guilty plea in **case no. 15-60094-Cr-Cohn**.

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B), (C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges; S.D. Fla. Admin. Order 2003-19; and Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

No order to show cause has been issued because, on the face of the petition, it is evident the petitioner is entitled to no relief. See Rule 4,¹ Rules Governing Section 2255 Proceedings.

¹Rule 4 of the Rules Governing Section 2255 Petitions, provides, in pertinent part, that "[I]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the

Because summary dismissal is warranted and the movant is not entitled to post-conviction relief, no order to show cause has been issued in the instant case and, therefore, the government was not required to file any additional response. See Broadwater v. United States, 292 F.3d 1302, 1303-04 (11th Cir. 2002) (a district court has the power under Rule 4 of the Rules Governing Section 2255 Cases to summarily dismiss a movant's claim for relief so long as there is a sufficient basis in the record for an appellate court to review the district court's decision).

Before the Court for review are the movant's §2255 motion (Cv-DE#1) with attached supporting memorandum and exhibits (Cv-DE#4), the Presentence Investigation Report ("PSI"), and Statement of Reasons ("SOR"), along with all pertinent portions of the underlying criminal file, including the plea agreement (Cr-DE#551), and the stipulated factual proffer (Cr-DE#552).

II. Claim

Construing the §2255 motion liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 519 (1972), the movant raises numerous grounds for relief with multiple sub-issues challenging counsel's effectiveness. (Cv-DE#1).

III. Procedural History

Briefly, movant was charged with and pleaded guilty to conspiracy to violate the RICO statute (Count 1), and conspiracy to possess with intent to distribute one kilogram or more of heroin

petitioner...."

(Count 14). (Cr-DE#64,551-552). Following a Rule 11 change of plea proceeding, the movant was adjudicated guilty and sentenced to a term of 120 months imprisonment, to be followed by 5 years supervised release. (Cr-DE#732). The judgment was entered by the Clerk on **March 21, 2016**. (Cr-DE#732). No direct appeal was prosecuted. Thus, the Judgment became final on **Monday, April 4, 2016**, fourteen days after the entry of the judgment, when time expired for filing a notice of appeal.² Consequently, the movant had one year from the time his conviction became final, or no later than **April 4, 2017**³ 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

²Where, 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 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).

³See 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.

this relief on collateral review, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." Frady, 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.

In addition, the party challenging the sentence has the burden of showing that it is unreasonable in light of the record and the §3553(a) factors. United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005). The Eleventh Circuit recognizes "that there is a range of reasonable sentences from which the district court may choose," and ordinarily expect a sentence within the defendant's advisory guideline range to be reasonable. Id.

V. Discussion-Timeliness

In his \$2255 motion, movant alleges that his \$2255 motion is timely because it was instituted one year and 90 days from the time his conviction became final. However, as will be recalled, movant's conviction became final on **April 4, 2016**, when time expired for filing a direct appeal. The movant waited until **April 25, 2017** to file this federal motion to vacate.

From review of this \$2255 motion, and from court records of which this Court can take judicial notice, it is apparent that this action is subject to dismissal as time-barred. It is now well settled that courts may sua sponte consider the issue of the timeliness of a motion to vacate. Day v. McDonough, 547 U.S. 198, 199 (2006) (holding that District courts are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition, even after the pre-answer, initial screening stage of the habeas proceeding); and Jackson v. Sec'y, Dep't of Corr's, 292 F.3d 1347, 1349 (11th Cir. 2002) (holding that the district court possesses discretion to sua sponte question the timeliness of a petition for the writ of habeas corpus); United States v. Terry, 1997 WL 662477 (N.D.N.Y. 10/22/97) (addressing the issue of timeliness under AEDPA sua sponte although the government did not contend petition was time-barred); Rivalta v. Artuz, 1997 WL 401819 (S.D.N.Y. 7/16/97) (same); Scire v. United States, 1997 WL 138991 (E.D.N.Y. 3/24/97) (same).

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:

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, 1088-89, 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 Cadet v. Fla. Dep't of Corr's, 742 F.3d 473 (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 at 481-82, at **8 (footnote omitted).

Unlike the situation in Holland, the circumstances in this case do not involve attorney misconduct. Rather, if movant attempts to argue that he is an unskilled layperson who has limited knowledge of the law and is, therefore, entitled to liberal

period, notwithstanding, petitioner has failed to make a substantial showing of actual innocence.

Were "actual innocence" an exception to the application of the one-year limitations provisions of §2255, the Court would still be precluded from reviewing the claim presented in the instant petition on the merits. "To establish actual innocence, [a habeas petitioner] must demonstrate that ... 'it is more likely than not that no reasonable [trier of fact] would have convicted him.' Schlup v. Delo, 513 U.S. 298, 327-328, 115 S.Ct. 851, 867-868, 130 L.Ed.2d 808 (1995)." Bousley v. United States, 523 U.S. 614, 623 (1998). "[T]he Schlup standard is demanding and permits review only in the "'extraordinary' case." House v. Bell, 547 U.S. 518, 538 (2006).

Courts have emphasized that actual innocence means factual innocence, not mere legal insufficiency. Id.; see also High v. Head, 209 F.3d 1257 (11 Cir. 2000); Lee v. Kemna, 213 F.3d 1037, 1039(8 Cir.2000); Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2 Cir. 2000) (citing Schlup v. Delo, 513 U.S. 298, 299, (1995); Jones v. United States, 153 F.3d 1305 (11 Cir. 1998) (holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him). See also Bousley, 523 U.S. at 623-624; Doe v. Menefee, 391 F.3d 147, 162 (2 Cir. 2004) ("As Schlup makes clear, the issue before [a federal district] court is not legal innocence but factual innocence.").

To be credible, a claim of actual innocence requires the movant to "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical

evidence--that was not presented at trial." Schlup v. Delo, 513 U.S. at 324. All things considered, the evidence must undermine the Court's confidence in the outcome of the trial. Id. at 316. No such showing has been made here. Even if such an exception exists, the movant has failed to make the requisite showing of actual innocence that would support consideration of his untimely motion to vacate on the merits. On the record before this court, no fundamental miscarriage of justice will result by time-barring this federal petition.

Movant has, therefore, not made the threshold showing of actual innocence. In other words, movant has not presented sufficient evidence to undermine the court's confidence in the outcome of his criminal proceedings. See Milton v. Sec'y, Dep't of Corr's, 347 Fed.Appx. 528, 531-532 (11th Cir. 2009) (unpublished) (holding that affidavits proffered by *pro se* habeas petitioner were insufficient to establish actual innocence of murder, as would allegedly have created an exception to one-year limitations period, because affidavits were presented more than ten years after murder and eight years after petitioner's trial, the affiants were in most cases aware of the alleged facts to which they attested before petitioner's trial, the affidavits were either not new evidence or were of questionable reliability, and none of the evidence negated petitioner's confession or his taped conversation with the victim's mother wherein he implicated another individual in the murder).

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.

This Court is mindful of the Clisby⁶ rule that requires district courts to address and resolve all claims raised in habeas proceedings, regardless of whether relief is granted or denied. Clisby, 960 F.2d at 935-36 (involving a 28 U.S.C. §2254 petition filed by a state prisoner); see Rhode v. United States, 583 F.3d 1289, 1291 (11th Cir. 2009) (holding that Clisby applies to §2255 proceedings). However, nothing in Clisby requires, much less suggests, consideration of claims or arguments raised for the first time in objections. Therefore, to the extent the movant attempts to raise arguments or further factual support for statutory or equitable tolling, the court should exercise its discretion and refuse to consider the arguments not raised before the magistrate judge in the first instance.⁷

VI. Evidentiary Hearing

Movant is also not entitled to an evidentiary hearing on the claims raised in this proceeding. Movant has the burden of establishing the need for an evidentiary hearing, and he would only be entitled to a hearing if his allegations, if proved, would establish his right to collateral relief. See Schriro v. Landrigan, 550 U.S. 465, 473-75, 127 S.Ct. 1933, 1939-40, 127 S.Ct. 1933 (2007) (holding that if record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). See also Townsend

⁶Clisby v. Jones, 960 F.2d 925, 936 (11th Cir.1992).

⁷The petitioner is cautioned that any attempt to provide due diligence in objections to this Report may not be considered in the first instance by the district court. See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, not only their best shot but all of the shots." Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987) (quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

v. Sain, 372 U.S. 293, 307 (1963); 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) (holding that §2255 does not require that the district court hold an evidentiary hearing every time a section 2255 petitioner simply asserts a claim of ineffective assistance of counsel, and stating: "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where the petitioner's allegations are affirmatively contradicted by the record.").

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 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)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing §2255 Proceedings, Rule 11(b), 28 U.S.C. foll. §2255.

After review of the record, Movant is not entitled to a certificate of appealability. "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." Id. 28 U.S.C. §2253(c)(2). To merit a certificate of appealability, Movant must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir.

2001). Because the \$2255 motion is clearly time-barred, Movant cannot satisfy the Slack test. Slack, 529 U.S. at 484.

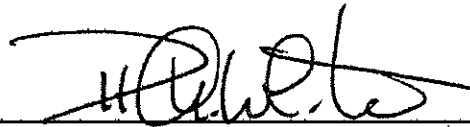
As now provided by Rules Governing \$2255 Proceedings, Rule 11(a), 28 U.S.C. foll. \$2255: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

VIII. Recommendations

Based on the foregoing, it is recommended that the motion to vacate be DISMISSED as time-barred; that no certificate of appealability issue; and, that this 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 10th day of May, 2017:



UNITED STATES MAGISTRATE JUDGE

cc: Fernando Moreno, Pro Se
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-60856-CIV-COHN/WHITE
(CASE NO. 15-60094-CR-COHN)

FERNANDO MORENO,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER ADOPTING REPORT OF MAGISTRATE JUDGE

THIS CAUSE is before the Court upon the Report of Magistrate Judge [DE 8] ("Report") submitted by United States Magistrate Judge Patrick A. White regarding Movant Fernando Moreno's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [DE 1] ("Motion"). Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a *de novo* review of the Motion, the Report, Movant's Objections [DE 9], and the record in this case, and is otherwise advised in the premises. Upon careful consideration, the Court will adopt the Report, overrule Movant's Objections, and deny the Motion.

As detailed in the Report, Movant was charged with and pleaded guilty to conspiracy to violate the RICO statute (Count 1), and conspiracy to possess with intent to distribute one kilogram or more of heroin (Count 14). Movant was sentenced to a term of 120 months imprisonment to be followed by five years of supervised release. The Judgement was entered on March 21, 2016. No direct appeal was filed. Therefore, the Judgement became final on April 4, 2016. Consequently, Movant had

Exhibit 3

one year from the time that his conviction became final, or no later than April 4, 2017, to file his federal habeas petition. See 28 U.S.C. § 2255(f)(1). Movant filed the instant Motion on April 25, 2017. DE 1.

Judge White concludes in the Report that the Motion is untimely. Movant filed the § 2255 Motion more than one year after his conviction became final, and he has not demonstrated that he is entitled to equitable tolling of the one-year limitations period. Accordingly, Judge White recommends that the Court dismiss the Motion as time-barred. The Court agrees with Judge White's analysis and conclusions, and will adopt the Report in full.

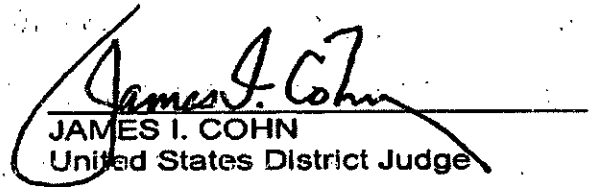
Movant objects to Judge White's conclusion that his Motion is time-barred because factual issues remain as to whether he is entitled to equitable tolling. This objection is without merit. "The *petitioner* has the burden of proving entitlement to equitable tolling by showing that 'extraordinary circumstances that were both beyond his control and unavoidable even with diligence' prevented filing the petition on time." Jones v. United States, 304 F.3d 1035, 1040 (11th Cir. 2002) (quoting Akins v. United States, 204 F.3d 1086, 1090 (11th Cir. 2000)) (emphasis in original). Movant put forth no grounds for equitable tolling in his Motion, and the only factual basis for equitable tolling asserted in his Objections is that he did not realize that his attorney had not filed an appeal. See DE 9 ¶ 5. According to Movant, "approximately one (1) month after sentencing" his attorney "advised Movant that he did not believe an appeal would be successful, but did not state that he would not file an appeal." Id. This does not constitute the type of serious attorney misconduct constituting an "extraordinary circumstance" preventing Movant from timely filing a habeas petition. See Holland v.

Florida, 560 U.S. 631, 649–52 (2010). Nor does the alleged miscommunication excuse Movant's failure to diligently pursue his rights. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Report of Magistrate Judge [DE 8] is **ADOPTED** in its entirety.
2. Movant's Objections [DE 9] are **OVERRULED**.
3. The Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [DE 1] is **DISMISSED** as time-barred.
4. A certificate of appealability is **DENIED**. The Court notes that pursuant to Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may now seek a certificate of appealability from the Eleventh Circuit.
5. The Clerk of Court is directed to **CLOSE** this case for all purposes and **DENY as moot** all pending motions.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 7th day of June, 2017.


JAMES I. COHN
United States District Judge

Copies provided to:
United States Magistrate Judge Patrick A. White
Counsel of record via CM/ECF
Fernando Moreno (*pro se*)