

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41428

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARK FRANCIS HONISH,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING EN BANC

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

- (✓) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.
- () The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41428

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARK FRANCIS HONISH,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motions for certificate of appealability and to proceed in forma pauperis. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

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

No. 16-41428
USDC No. 4:12-CV-521
USDC No. 4:07-CR-144-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARK FRANCIS HONISH,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas

O R D E R:

Mark Francis Honish, former federal prisoner # 14495-078, seeks a certificate of appealability (COA) to appeal the district court's denial and dismissal of his 28 U.S.C. § 2255 motion in which he challenged his conviction and sentence for possession of firearms and ammunition by a convicted felon.

According to Honish, he is entitled to equitable tolling or statutory tolling pursuant to § 2255(f)(4), because he acted with due diligence in filing his motion after learning in a separate criminal proceeding that officers had concealed the fact that they entered his property, specifically, his driveway, and inspected the exterior of his truck without a warrant. Similarly, he claims that he is entitled to statutory tolling pursuant to § 2255(f)(2), because the

officers' concealment of the fact of the warrantless search constituted a government-created impediment that prevented him from filing his § 2255 motion. In addition, Honish challenges the district court's alternative ruling that his claims are barred by the waiver provision of his plea agreement, and he argues that he was entitled to an evidentiary hearing.

To obtain a COA, Honish must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief based on procedural grounds, a movant satisfies this standard by showing 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Honish has not made the requisite showing.

Accordingly, IT IS ORDERED that Honish's motion for a COA is DENIED. His motion to proceed in forma pauperis on appeal is likewise DENIED.

/s/ Priscilla R. Owen
PRISCILLA R. OWEN
UNITED STATES CIRCUIT JUDGE



Certified as a true copy and issued
as the mandate on Oct 31, 2017

Attest: Jyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Received 1-5-17 from
TDCS Estelle
mail Room

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK FRANCIS HONISH

VS.

UNITED STATES OF AMERICA

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CIVIL ACTION NO. 4:12cv521
CRIMINAL ACTION NO. 4:07cr144

POSTJUDGMENT ORDER

Movant filed a motion for certificate of appealability (Dkt. #29). A petitioner must obtain a certificate of appealability before he can appeal a district court's decision. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court of the United States fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 l. Ed.2d 542 (2000). In cases where a district court rejects a petitioner's constitutional claims on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the movant's underlying constitutional claim, a COA should issue when the movant shows, at least, that "jurists of reason would find it debatable whether the [motion] 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." *Id.* The Supreme Court has held that a certificate of appealability

is a “jurisdictional prerequisite” and a court of appeals lacks jurisdiction to rule on the merits until a certificate of appealability has been issued. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003).

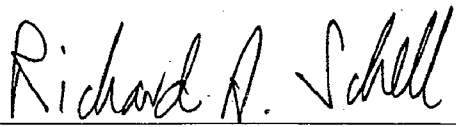
Movant’s § 2255 motion was dismissed because he filed it untimely. He has not shown that the decision dismissing his motion was wrong. He has not shown that jurists of reason would find the assessment of his claims debatable. In conclusion, he simply has not made a substantial showing of the denial of a constitutional right and is not entitled to a certificate of appealability.

Movant also filed a motion to proceed *in forma pauperis* on appeal (Dkt. #27). Because he has not shown that he is entitled to a certificate of appealability, he also has not shown that he is entitled to proceed *in forma pauperis* on appeal. *United States v. Delario*, 120 F.3d 580, 582-83 (5th Cir. 1997). Furthermore, a review of the financial information Movant submitted shows that he has average monthly deposits exceeding \$103.00. Thus, he is for that reason also not entitled to proceed *in forma pauperis*. It is accordingly

ORDERED that the motion for a certificate of appealability (Dkt. #29) is **DENIED**. It is further

ORDERED that the motion to proceed *in forma pauperis* on appeal (Dkt. #27) is **DENIED**.

SIGNED this the 21st day of December, 2016.



RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK FRANCIS HONISH

VS.

UNITED STATES OF AMERICA

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CIVIL ACTION NO. 4:12cv521
CRIMINAL ACTION NO. 4:07cr144

POSTJUDGMENT ORDER

Movant filed a motion for reconsideration (de#20) of the denial of his motion to vacate, set aside, or correct sentence, 28. U.S.C. § 2255. He claims that his objections were timely filed and should be considered.

MOTION FOR RECONSIDERATION

The Fifth Circuit has observed that “[a]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label.” *Harcon Barge Co. v. D&G Boat Rentals, Inc.*, 784 F.2d 665, 669-70 (5th Cir. 1986) (en banc) (citing 9 Moore’s Federal Practice ¶ 204.12[1] at 4-67 (1985)). “Rule 59(e) serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence. . . . Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.” *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (internal citations and quotations omitted). The Fifth Circuit recognizes that Rule 59(e) “favor[s] the denial of motions to alter or amend a judgment.” *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993). The rule does not exist to be a vehicle for re-litigating old issues, presenting the case

under new theories, obtaining a rehearing on the merits, or taking a “second bite at the apple.” *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998). However, it allows a party to “question the correctness of a judgment.” *Templet*, 367 F.3d at 478. The rule for reconsideration of a final judgment allows a court to alter or amend a judgment because of (1) an intervening change in controlling law, (2) the availability of new evidence not available previously, (3) the need to correct a clear error of law or fact, or (4) to prevent a manifest injustice. *Schiller v. Physicians Resource Group, Inc.*, 342 F.3d 563, 567 (5th Cir. 2003).

If a motion for relief from judgment is filed within twenty-eight (28) days of final judgment, the motion should be filed as a motion under Rule 59 rather than Rule 60. Fed. R. Civ. P. 59(e); *Ford v. Elsbury*, 32 F.3d 931, 937 (5th Cir. 1994) (citing *Lavespre v. Niagara Mach. & Tool Works, Inc.* 910 F.2d 167, 173 (5th Cir. 1990)). If the motion is served after that time, it falls under Rule 60(b). Fed. R. Civ. P. 60(b). Movant’s motion, filed within 28 days of final judgment, is properly filed under Fed. R. Civ. P. 59.

DISCUSSION

Movant filed objections after his case had been closed (de#19), but urges that his objections were timely filed. A review of the docket shows that the Report and Recommendation (de#14) was issued on September 10, 2015; thus, objections were due September 24, 2015. On September 28, 2015, having received no objections, the United States Magistrate Judge forwarded the case to the undersigned District Judge. On September 30, 2015, this Court issued its Final Judgment in this case (de#18). On October 5, 2015, Movant filed objections. A review of Movant’s Acknowledgment of Receipt, however, shows that Movant did not receive the Report and Recommendation until September 22, 2015; thus, his objections were timely filed.

This court has conducted a *de novo* review of Movant's objections. Having made a *de novo* review of the objections raised by Movant to the Report and Recommendation, the court concludes that the findings and conclusions of the Magistrate Judge are correct and the objections of Movant are without merit. His objections serve to reurge the issues he has already presented. He fails to show that he is entitled to relief pursuant to his § 2255 motion. Movant fails to show he is entitled to relief based on (1) an intervening change in controlling law, (2) the availability of new evidence not available previously, (3) the need to correct a clear error of law or fact, or (4) to prevent a manifest injustice. *Schiller*, 342 F.3d at 567.

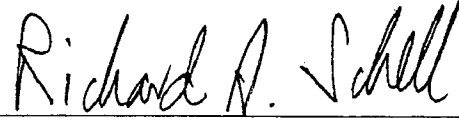
Movant also requests that an evidentiary hearing be held. However, evidentiary hearings are not required in federal habeas corpus proceedings. *See* Rule 8, *Rules Governing § 2255 Cases in the United States District Courts*; *see also McCoy v. Lynaugh*, 874 F.2d 954, 966-67 (5th Cir. 1989). Quite the contrary, "to receive a federal evidentiary hearing, a petitioner must allege facts that, if proved, would entitle him to relief." *Wilson v. Butler*, 825 F.2d 879, 880 (5th Cir. 1987), *cert. denied*, 484 U.S. 1079 (1988). *See also Townsend v. Sain*, 372 U.S. 293, 312, 83 S. Ct. 745, 756, 9 L. Ed.2d 770 (1963). "This requirement avoids wasting federal judicial resources on the trial of frivolous habeas corpus claims." *Wilson*, 825 F.2d at 880. In this case, Movant fails to show that he is entitled to an evidentiary hearing. *See United States v. Auten*, 632 F.2d 478, 480 (5th Cir. 1980) (noting that mere conclusory allegations are not sufficient to support a request for an evidentiary hearing). As the Report and Recommendation shows, Movant filed his motion beyond the statute of limitations. Furthermore, even if his motion was considered timely, the issues Movant raised do not entitle him to relief. It is accordingly

ORDERED that Movant's objections (de# 19) are **OVERRULED**. It is also

ORDERED that Movant's motion for reconsideration (de#20) is **DENIED**. Finally, it is

ORDERED that Movant's motion for an evidentiary hearing (de#21) is **DENIED**. All motions not previously ruled upon are **DENIED**.

SIGNED this the 26th day of September, 2016.

A handwritten signature in black ink, reading "Richard A. Schell". The signature is written in a cursive style with a horizontal line underneath the name.

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK FRANCIS HONISH

VS. —

UNITED STATES OF AMERICA

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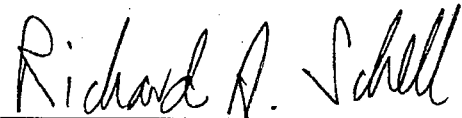
CIVIL ACTION NO. 4:12cv521
CRIMINAL ACTION NO. 4:07cr144

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Don D. Bush. The Report and Recommendation of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. No objections were filed. The court concludes that the findings and conclusions of the Magistrate Judge are correct, and adopts the same as the findings and conclusions of the court. It is therefore

ORDERED that the motion to vacate, set aside or correct sentence is **DENIED** and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this the 29th day of September, 2015.



RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK FRANCIS HONISH

VS.

UNITED STATES OF AMERICA

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CIVIL ACTION NO. 4:12cv521
CRIMINAL ACTION NO. 4:07cr144

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Movant Mark Francis Honish filed a *pro se* motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The motion was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

BACKGROUND

On January 3, 2008, after a plea of guilty pursuant to written plea agreement, Movant was sentenced to 24 months' imprisonment and three years supervised release for a conviction of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). He did not file a direct appeal.

The present motion was executed on August 1, 2012. Movant failed to specify the date that he placed it in the prison mail system. However, because he stated that he executed it on August 1, 2012, the motion is deemed filed on that day. *See Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998). In his motion, Movant claims that he is entitled to relief based on ineffective assistance of

counsel and newly discovered evidence. The Government filed a Response, asserting that Movant's motion is time-barred, barred by his waiver included in his plea agreement, and is alternatively, without merit. Movant filed a Reply.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. A one year statute of limitations was enacted for motions to vacate, set aside or correct a sentence pursuant to 28 U.S.C. § 2255. In general, a movant for collateral relief has one year from "the date on which the judgment became final" to file a motion challenging a conviction. A conviction is final under § 2255 when a defendant's options for further direct review are foreclosed. *United States v. Gamble*, 308 F.3d 536, 537 (5th Cir. 2000); *United States v. Thomas*, 203 F.3d 350, 352 (5th Cir. 2000). When a defendant fails to file a timely notice of appeal from the judgment of the trial court, the conviction is final upon the expiration of the time for filing a notice of appeal, which is ten days after the entry of the judgment. Fed. R. App. P. 4(b). *See, e.g., Wims v. United States*, 225 F.3d 186, 188 (2nd Cir. 2000).

Movant was sentenced on January 3, 2008, and his notice of appeal was due fourteen days later. Fed. R. App. P. 4(b). He did not file a notice of appeal; consequently, his conviction became final for purposes of § 2255 on January 17, 2008. *See Plascencia v. United States*, 2005 WL 2124465 (N.D. Tex. 2005) (Not Reported in F. Supp.2d);¹ *United States v. Cabrera*, 2005 WL 1422154 (N.D. Tex. 2005) (Not Reported in F. Supp.2d). Accordingly, the present § 2255 motion

¹The movant in this case, Plascencia, filed a motion for Certificate of Appealability, which was granted. However, on July 23, 2008, the Fifth Circuit affirmed the District Court's decision. *See United States v. Plascencia*, 537 F.3d 385, (5th Cir. 2008).

had to be filed within one year from the date on which the judgment became final. Movant had until January 17, 2009, in which to file his motion. It was not filed until August 1, 2012. Movant filed his § 2255 motion 3 years, 6 months, and 15 days beyond the limitations period.

The United States Supreme Court confirmed that the AEDPA statute of limitation is not a jurisdictional bar, and it is subject to equitable tolling. *Holland v. Florida*, 560 U.S. —, 130 S. Ct. 2549, 2560, 177 L. Ed.2d 130 (2010). “A habeas 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.” *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoting *Holland*, 130 S. Ct. at 2562). “Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.” *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). The Movant bears the burden of proving that he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

The Fifth Circuit has held that the district court has the power to equitably toll the limitations period in “extraordinary circumstances.” *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299 (5th Cir.1998). In order to qualify for such equitable tolling, the Movant must present “rare and exceptional circumstances.” *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir.1998). In making this determination, it should be noted that the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, unfamiliarity with the legal process, and claims of actual innocence are insufficient reasons to equitably toll the statute of limitations. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir.2000).

As a general rule, equitable tolling has historically been limited to situations where the Movant “has actively pursued his judicial remedies by filing a defective proceeding during the

statutory period, or where the [Movant] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed.2d 435 (1990). Furthermore, equitable tolling cannot be used to thwart the intent of Congress in enacting the limitations period. *See Davis*, 158 F.3d at 811 (noting that “rare and exceptional circumstances” are required). At the same time, the Court is aware that dismissal of a first federal habeas petition is a “particularly serious matter, for that dismissal denies the Movant the protections of the Great Writ entirely, risking injury to an important interest in human liberty.” *Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S. Ct. 1293, 134 L. Ed.2d 440 (1996).

Movant argues that he is entitled to equitable tolling based on newly discovered evidence. He alleges that, at the state hearing concerning a murder charge against him held on August 22, 2011, new evidence “came to light through the testimony of the 3 police investigators who led the [murder] investigation for the State,” that affected his federal conviction. Specifically, he says that the police officers revealed that they carried out a warrantless search of Movant’s truck while it was parked in his driveway – on private property, within the curtilage of his home.

Movant claims that, had his counsel known of the facts to which the officers testified – which he claims constitutes an alleged illegal search – counsel would not have advised Movant to plead guilty. Thus, he concludes, his counsel was ineffective. The Government contends that the testimony of the officers does not support Movant’s claim of ineffective assistance of counsel.

Counsel’s performance is evaluated from the perspective of the counsel, considering all aspects of the case as were known to counsel at the time in question. *Vela v. Estelle*, 708 F.2d 954, 965 (5th Cir. 1983). Movant’s claim that counsel was ineffective for advising him to plead guilty based on circumstances coming to light four years after the guilty plea is without merit. As noted,

counsel cannot be judged in the light of testimony surfacing years after Movant pleaded guilty.

Moreover, Movant's claim that the search warrant was tainted is also without merit. Officer Colin

J. Sullivan, Jr., stated the following in his affidavit in support of the search warrant:

Your Affiant has personal knowledge of the facts contained herein. Your Affiant has reason to believe and does believe that a white male known as Mark Francis Honish is in possession of property or items constituting evidence of murder at his residence and/or vehicle . . . because:

On June 21, 2007, at 2331 hours, Officer Chris Carroll of the Flower Mound Police Department was on routine patrol in the area of FM 1171 and Highway 377 in Flower Mound, Denton County, Texas. Officer Carroll observed a white 1999 Ford truck . . . parked off of the roadway on the dirt shoulder, facing Southbound with headlights activated, and engine running.

Officer Carroll parked his patrol car and approached the white truck suspecting a motorist in need of assistance. Upon approach, he observed a white male, later determined to be the victim, David Honish, deceased with an apparent wound to his face.

Your Affiant responded to the location with Detective Lucio of the Flower Mound Police Department, Texas Ranger Tracy Murphree of the Department of Public Safety, and Deputy Kish with the Denton County Sheriffs Office. An evaluation of the area surrounding the victim and his truck revealed a clear set of tire tracks traveling northbound alongside and in close proximity to the victim's driver side door. Detective Lucio made a cast of a segment of the tire tracks. Ranger Murphree observed and took note of the tire tracks, characteristics of the muddy shoulder of the roadway, and blood splatter on the victim and victim's vehicles.

An inventory of the victim's truck revealed a printed email from the victim to Mark Honish on June 6, 2007, at 1457 hours. Your Affiant read the printed e-mail and noted statements of, "You don't roar at me and wag your finger in my face, EVER AGAIN IN THIS LIFETIME ASSHOLE! I explained to you in FEB 2006 that I was finished taking shit from you. I meant it. There will be severe consequences for non-compliance . . . because of your own stupidity and your ongoing possession of firearms."

Captain Brooks of the Flower Mound Police Department spoke with the victim's ex-wife, Michele Boslet, who stated that the victim and his brother Mark Honish do not like each other and have been feuding for some time.

Your affiant located Mark Honish's address through the Texas Department of Public Safety Driver's License database. . . . Ranger Murphree and Deputy Kish drove to that location and observed a white male pulling out of the driveway in a 2006 black Ford truck. Ranger Murphree contacted the driver, who identified himself as Mark Honish, herein styled Defendant. Murphree notified Defendant about his brother being shot and killed in Flower Mound.

Ranger Murphree noted six drops of blood on the driver's side running board of the Defendant's truck, mud on the tail pipe located on the right side of the vehicle that matched the characteristics of the mud from the crime scene, and the tread pattern of the Defendant's truck matching those left at crime scene. When the Defendant was informed of his brother's death, he stated, ". . . he has been threatening me, but you probably know that by looking at the e-mail in his truck." Ranger Murphree advised your Affiant that he never told the Defendant that the victim was shot in his truck.

It is your Affiant's belief that on June 21, 2007, the Defendant met his brother on the muddy shoulder of the 5100 block of Highway 377 in Flower Mound, pulled alongside his brother's truck with his own 2006 black Ford (46V-TZ4), and shot his brother in the face with an unknown type caliber weapon.

It is your Affiant's belief that the suspected residence of . . . and a 2006 Ford Truck bearing 46V-TZ4 contains property or items constituting evidence tending to show that Mark Francis Honish committed the death of David John Honish.

On August 23, 2011, a suppression hearing was held in Movant's state murder trial. At the hearing, Ranger Murphree testified that he walked four to five feet onto Movant's driveway to inspect his black Ford truck after he arrived to conduct surveillance on Movant's residence. He observed, by flashlight, mud consistent with mud from the scene of the murder on Movant's truck. After stopping Movant as he left his residence early on the morning after the murder, Ranger Murphree noticed blood splatter on the driver's side door and running board of Movant's truck. The state court overruled Movant's motion to suppress any oral statements made by Movant and evidence obtained at the time he was detained by law enforcement.

Movant asserts that Ranger Murphree's walking four to five feet onto his driveway

constitutes a previously unknown illegal warrantless search. Thus, Movant claims that his trial counsel could not have possibly given him effective advice to enter a guilty plea because he did not know that officers would allegedly lie about the search of his vehicle while it sat in his driveway on the night that he murdered his brother. He concludes, therefore, that counsel was ineffective.

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* A review of the record shows that the affidavit used to obtain a search warrant did not contain information from the alleged illegal search. The determination by a magistrate judge issuing a search warrant is entitled to a presumption of validity. *United States v. Kolodziej*, 712 F.2d 975, 976-77 (5th Cir. 1983). Probable cause exists to issue a search warrant if the magistrate judge is provided with sufficient information from which he can reasonably conclude that the items sought in the warrant were probably at the location to be searched. *Id.* Search warrants are to be evaluated by the totality of the circumstances. *Id.* at 977. The information necessary to show probable cause to support a search warrant must be contained within a written affidavit given under oath. *United States v. Perez*, 484 F.3d 735, 774 (5th Cir. 2007). Probable cause to support a search warrant does not require proof beyond a reasonable doubt; a magistrate judge need only have a substantial basis for concluding that a search would uncover evidence of wrongdoing. *Id.* * Further, if a search warrant affidavit contains material misstatements made intentionally or with reckless disregard for truth, the court should excise such offensive language from the affidavit and determine whether the remaining portion establishes probable cause. *United States v. Namer*, 680 F.2d 1088, 1093 (5th Cir. 1983). Under the independent source rule, information received through an illegal search is considered to be cleanly obtained when it arrives through an independent source. *United States v. Hearn*, 563 F.3d 93, 102 (5th Cir. 2009). When evidence is unlawfully seized via a search warrant based on independent information, the independent source rule applies to both evidence seen for the

first time during the lawful search and evidence seen in plain view at the time of the warrantless search. *Id.* Whether the independent source rule applies depends on whether (1) the warrant affidavit, when purged of tainted information gained through the initial illegal search, contains sufficient remaining facts to constitute probable cause, and (2) the illegal search affected or motivated the officer's decision to procure a search warrant. *Id.*

The Government asserts that the affidavit in support of the search warrant did not contain references to information that was acquired by any alleged warrantless entry onto Movant's property. Even if any information was included that was allegedly obtained from a warrantless search, it could be purged from the affidavit. Removing any references to the mud or blood splatter, the affidavit would still show probable cause to support the search of Movant's truck and residence. The e-mail between Movant and the victim, alone, would have shown probable cause for a search warrant. Additionally, any information obtained through the alleged illegal entry onto Movant's property did not motivate the officer to get a search warrant. ^X The process of getting a search warrant was already in progress prior to the established surveillance on Movant's residence. Consequently, the alleged newly discovered evidence does not support a claim of ineffective assistance of counsel based on the advice to Movant to plead guilty. Any objection by counsel based on the alleged warrantless search would have been without merit, and it cannot be used as a reason to grant equitable tolling.

^X Furthermore, the "independent source" exception to the exclusionary rule allows the introduction of evidence of unlawfully discovered evidence when the police acquire evidence through a distinct untainted source. *United States v. Zavala*, 541 F.3d 562, 577-78 (5th Cir. 2008). For the independent source rule to apply, the evidence obtained through the independent source must be identical to the evidence unlawfully acquired. *Id.* at 578. Additionally, there is no legitimate

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expectation of privacy in any portion of an automobile visible from the outside. *Texas v. Brown*, 460 U.S. 730, 743-44, 103 S. Ct. 1535, 1544, 75 L. Ed.2d 502 (1983).

Any evidence obtained by law enforcement during the alleged illegal walk onto Movant's driveway was in plain view once he drove away from his house and then was stopped by law enforcement. Thus, it was independently obtained by law enforcement. Even if counsel for Movant had known that law enforcement had walked onto Movant's property and looked at his truck on the night of the murder, it would not have resulted in a different outcome. A motion to suppress any evidence discovered during the inspection of Movant's truck in his driveway would have been without merit. Consequently, the advice by Movant's counsel to enter a plea of guilty cannot be held to be erroneous or deficient performance.

Movant has not shown any valid basis upon which to equitably toll the statute of limitations. The "newly discovered evidence" does not entitle him to equitable tolling. Movant filed his motion 1292 days beyond the limitations period; accordingly, the motion should be dismissed as time-barred.

Even if the motion was not time-barred, the record shows that Movant pleaded guilty pursuant to a written plea agreement. Movant signed a plea agreement containing the following waiver provision:

Except as otherwise provided herein, the defendant expressly waives the right to appeal the conviction and sentence in this case on all grounds. The defendant further agrees not to contest the sentence in any post-conviction proceeding, including, but not limited to a proceeding under 28 U.S.C. § 2255. The defendant, however, reserves the right to appeal the following: (a) any punishment imposed in excess of the statutory maximum and (b) a claim of ineffective assistance of counsel that affects the validity of the waiver or plea itself.

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

PLEA AGREEMENT AND INEFFECTIVE ASSISTANCE OF COUNSEL

In the present case, Movant claims that he is entitled to relief because his counsel was ineffective in advising him to plead guilty. Because this issue could arguably concern the validity of a knowing and voluntary plea agreement, the court will examine the circumstances surrounding his plea agreement.

A movant who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence. *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995). In order to succeed on a claim of ineffective assistance of counsel, a movant must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L.

Ed.2d 864 (1984). The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* at 690.

The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981); *Rubio v. Estelle*, 689 F.2d 533, 535 (5th Cir. 1982); *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984). Secondly, the movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Petitioner must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If he fails to prove the prejudice component, the court need not address the question of counsel's performance. *Id.* at 697.

The duty of defense counsel to a defendant who desires to enter a plea of guilty is to ascertain that the plea is voluntarily and knowingly made. *United States v. Diaz*, 733 F.2d 371, 376 (5th Cir. 1984). The two-prong test *Strickland* test applies to cases involving guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 370, 88 L. Ed.2d 203 (1985). A movant must show that he did not understand the nature of a constitutional protection he was waiving or that he had "such an incomplete understanding of the charges against him that this plea cannot stand as an admission of guilt." *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). Thus, if a defendant understands the nature of the charges against him and the consequences of his plea, yet voluntarily chooses to plead guilty, the plea must be upheld on federal review. *Diaz v. Martin*, 718 F.2d 1372, 1376-77 (5th Cir. 1983).

Movant signed a plea agreement, which states:

I have read or had read to me this Plea Agreement. I have carefully reviewed every part of it with my attorney. I fully understand it and

voluntarily agree to it.

The plea agreement also states:

The defendant has thoroughly reviewed all legal and factual aspects of this case with defense counsel and is fully satisfied with defense counsel's legal representation. The defendant has received satisfactory explanations from defense counsel concerning each paragraph of this Agreement, each of the defendant's rights affected thereby, and the alternatives to entering a guilty plea. After conferring with counsel, the defendant concedes guilt and has concluded that it is in the defendant's best interest to enter this Agreement rather than proceeding to trial.

Additionally, Movant stated in his plea agreement that the "plea of guilty is freely and voluntarily made and is not the result of force, threats, or promises other than those set forth in this Agreement."

At the plea hearing held on July 3, 2007, Movant affirmed that he had read the information against him, and that he signed a waiver of indictment. The court reviewed Movant's rights with him – the right to a speedy trial, to confront and cross-examine witnesses, to present a defense, to have witnesses testify on his behalf, and to have effective assistance of counsel. Movant understood the rights and further affirmed that he was completely satisfied with his legal representation.

The court reviewed the elements of the offenses, which Movant stated that he understood. It then went over the minimum and maximum penalties Movant was facing, which Movant understood. The court further explained the rights Movant was giving up by pleading guilty to a felony.

The court also reviewed the plea agreement with Movant, and Movant stated that he understood all the terms of the plea agreement including the forfeiture provision and the rights that he was waiving. He also said that there had been no other promises made to him or threats against

him leading him to plead guilty. He said that he was pleading guilty voluntarily, of his own free will, because he is guilty of the crime charged. Movant also stated that nobody had forced him or threatened him or made promises to him to coerce him into pleading guilty. Formal declarations in open court carry with them a strong presumption of truth. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed.2d 136 (1977). Although a defendant's attestation of voluntariness at the time of the plea is not an absolute bar to later contrary contentions, it places a heavy burden upon him. *United States v. Diaz*, 733 F.2d 371, 373-74 (5th Cir. 1979). In cases where the record establishes that the defendant understood the nature of the charge against him and the direct consequences of his act, the rudimentary demands of a fair proceeding and a knowing, voluntary plea are satisfied. *Wright v. United States*, 624 F.2d 557, 561 (5th Cir. 1980).

The court reviewed, in detail, the rights that Movant was waiving by pleading guilty. Movant confirmed that it was his signature appearing on the factual statement, that he read it, and the facts stated therein are true and correct. The court found that Movant, after consultation with counsel, knowingly and voluntarily pleaded guilty to the charges. It also found that Movant was fully competent and capable of entering an informed plea, that he was aware of the nature of the charges and the consequences of the plea, and that his guilty plea is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offenses.

Additionally, Findings of Facts concerning this case were entered on July 10, 2007. Based on the hearing in which Movant pleaded guilty, the court found that Movant knowingly and voluntarily consented to the administration of the Guilty Plea and Allocution. It further found that Movant was fully competent and capable of entering an informed plea, that he was aware of the nature of the charges and the consequences of the plea, and that the plea of guilty was knowingly and

voluntarily made, supported by an independent basis in fact containing each of the essential elements of the offense.

Finally, Movant signed a Statement of Facts in Support of Plea Agreement, filed on July 3, 2007. In it, he stated that he knowingly possessed firearms and ammunition after having been previously convicted of a felony. He admitted that he knew that possession of the firearms was prohibited, and that the firearms had traveled in interstate commerce. Movant stated that he fully understood the facts stipulated, and agreed to them without reservation.

As shown in detail above, Movant knowingly and voluntarily pleaded guilty – he understood the elements of the crime, the maximum sentencing range, and the rights he was waiving by pleading guilty. He has not shown that he did not understand the nature of a constitutional protection that he was waiving or that he had “such an incomplete understanding of the charges against him that this plea cannot stand as an admission of guilt.” *James*, 56 F.3d at 666. If a defendant understands the nature of the charges against him and the consequences of his plea, yet voluntarily chooses to plead guilty, the plea must be upheld on federal review. *Diaz*, 718 F.2d at 1376-77. Movant has failed to prove that he was given deficient or misleading advice. As was shown above, the “newly discovered evidence” would make no difference in the outcome of his case. Thus, he cannot show that, but for trial counsel’s advice, he would have taken his chances at trial. Conclusory allegations and bald assertions are insufficient to support the motion. *See Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983); *Joseph v. Butler*, 838 F.2d 786, 788 (5th Cir. 1988).

Movant has failed to show deficient performance or that there is a reasonable probability that, but for counsel’s alleged unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Because this court has determined that

Movant's plea was voluntary and knowing, his waiver must be enforced. Movant's claim that counsel could not have given him effective advice to enter a guilty plea because he was unaware of the future testimony of law enforcement officers is insufficient to entitle him to relief. Counsel is evaluated in the light of the information that he knew at the time. *Vela*, 708 F.2d at 965. Testimony given approximately four years after Movant pleaded guilty cannot be used to hold counsel ineffective in this case.

Movant did not assert any claims that fall within the exceptions listed in his appeal waiver. His sentence of 24 months did not exceed the statutory maximum. His claim of ineffective assistance of counsel does not affect the plea or waiver itself. Therefore, Movant's informed and voluntary waiver of post-conviction relief is effective to bar relief. *Wilkes*, 20 F.3d at 653. This motion should be denied.

CONCLUSION

In conclusion, Movant failed to timely file his § 2255 motion. He filed his motion 1292 days beyond the limitations period. He fails to show that he is entitled to equitable tolling based on newly discovered evidence. Furthermore, his guilty plea was knowing and voluntary; thus, the waiver in his plea agreement bars relief in this matter. The alleged newly discovered evidence does not lead to the conclusion that trial counsel was ineffective in advising him to plead guilty. Movant fails to show deficient performance or that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 “unless a circuit justice or judge issues a certificate of appealability.” 28 U.S.C. § 2253(c)(1)(B). Although Movant has not yet filed a notice of appeal, it is respectfully recommended that the court, nonetheless, address whether Movant would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because “the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.”).

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a “substantial showing of the denial of a constitutional right” in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed.2d 542 (2000). In cases where a district court rejected a petitioner’s constitutional claims on the merits, “the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). “When a district court denies a habeas petition on procedural grounds without reaching the petitioner’s underlying constitutional claim, a COA should issue when the petitioner shows, at least, 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.” *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Movant's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003) (citing *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604). Accordingly, it is respectfully recommended that the court find that Movant is not entitled to a certificate of appealability.

RECOMMENDATION

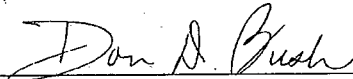
It is accordingly recommended that Movant's motion for relief under 28 U.S.C. § 2255 be denied and the case dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1)

(extending the time to file objections from ten to fourteen days).

SIGNED this 9th day of September, 2015.



DON D. BUSH

UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**