

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 25-12184

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JAY ANTHONY RICHITELLI,

*Petitioner-Appellant,*

*versus*

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

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Appeal from the United States District Court  
for the Southern District of Florida  
D.C. Docket No. 0:25-cv-60581-DMM

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ORDER:

Jay Richitelli, a federal prisoner serving a total 360-month sentence, filed the instant 28 U.S.C. § 2255 motion in March 2025. The district court ultimately dismissed Richitelli's motion as untimely, concluding that, because he had not offered any reason why he could not have discovered the relevant facts for his motion prior to the expiration of his one-year limitations period, and had not alleged that he was entitled to equitable tolling or claimed actual

innocence, his motion was due to be dismissed as time-barred. The district court also denied a certificate of appealability (“COA”). Richitelli appealed and moved for in forma pauperis (“IFP”), which the court also denied. He now seeks a COA and IFP in this Court.

Here, reasonable jurists would not debate the district court’s conclusion that Richitelli’s § 2255 motion was untimely. Because an appeal’s voluntary dismissal means that there is no underlying judgment for the Supreme Court to review, the 90-day period to petition for certiorari may be inapplicable under the circumstances of voluntary dismissal. *See* Sup. Ct. R. 13.1. Accordingly, Richitelli’s convictions and sentence became final on March 22, 2022, the date that his appeal was dismissed, and he had until March 22, 2023, to file a timely § 2255 motion. *See* 28 U.S.C. § 2255(f). He did not, however, initiate the instant § 2255 proceeding until February 2025, making his motion untimely by almost two years. And even if the 90-day period applied, Richitelli had until June 20, 2023, to file and he did not file until March 2025.

Moreover, Richitelli has not shown that he is entitled to equitable tolling, or claim that he is actually innocent. *Holland v. Florida*, 560 U.S. 631, 649 (2010); *McQuiggin v. Perkins*, 569 U.S. 383, 386, 395 (2013). Accordingly, Richitelli’s motion for a COA is DENIED. His motion for IFP is DENIED AS MOOT.

/s/ Adalberto Jordan

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 25-60581-CV-MIDDLEBROOKS  
(Case No. 09-60229-CR-COHN)

JAY ANTHONY RICHITELLI,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

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**ORDER DISMISSING MOTION TO VACATE PURSUANT TO 28 U.S.C. § 2255**

On March 26, 2025, Jay Anthony Richitelli moved pursuant to 28 U.S.C. § 2255, to vacate his total sentence of 360 months. (DE 1). He alleges his sentence violates 18 U.S.C. § 3584 because he is serving consecutive sentences for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery. The Government has responded (DE 5) and Mr. Richitelli has replied (DE 6). The Motion to Vacate is untimely and must therefore be dismissed.

**ANALYSIS**

Mr. Richitelli was initially sentenced after his conviction at trial to a total sentence of life plus 60 months imprisonment. His sentence was affirmed. *United States v. Richitelli*, 420 F.App'x 861 (11<sup>th</sup> Cir. 2011), *cert. denied*, 563 U.S. 952 (April 18, 2011).

However, after authorized successive § 2255 motions based upon *Johnson v. United States* and *United States v. Davis*, 588 U.S. 455 (2019), Mr. Richitelli's convictions and sentences on Counts 3 and 4 were vacated in Case No. 20-60925-CV-COHN and the Eleventh Circuit remanded Case No. 16-61345-CV-COHN back to the District Court. On November 3, 2020, Judge Cohn entered an Order granting that motion to vacate finding that Section 3559(c)(2)(F)(ii)'s residual

clause was unconstitutionally vague and vacated the sentences previously imposed as to Counts 1 and 2.

On February 23, 2021, Judge Cohn sentenced Mr. Richitelli to 360 months as follows: 240 months' imprisonment as to Count 1-, and 120-months' imprisonment as to Count 2, to be served consecutively with each other and 180 months' imprisonment as to Count 6, to be served concurrently with Counts 1 and 2. (CR-DE 481). Mr. Richitelli filed a notice of appeal.

However, on March 22, 2022, the Eleventh Circuit dismissed the appeal pursuant to Mr. Richitelli's motion for voluntary dismissal. (CR-DE 491).

On February 19, 2025, Mr. Richitelli filed a motion to correct his allegedly illegal sentences for Counts 1 and 2 (CR-DE 499). On February 20, 2025, Judge Cohn entered notice of his intention to recharacterize the pleading as a § 2255 motion to vacate because movant alleged that "his sentence violates 18 U.S.C. § 3584 because he is serving consecutive sentences for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery" (CR-DE 503). Mr. Richitelli was ordered to file his claim in an Amended § 2255 Motion to Vacate, and that that motion would be the "sole operative pleading, and only the claims listed therein [would] be addressed by the Court" (id., p. 4). On March 25, 2025, movant filed a § 2255 motion in accordance with the Court's instructions (except that he failed to label the motion as an "amended" motion) (CR-DE 504; Case No. 25-60581-CV-MIDDLEBROOKS, DE 1)<sup>1</sup>

The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations on federal habeas corpus motions filed under 28 U.S.C. § 2255, from the latest of:

- (1) the date on which the judgment of conviction became final;

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<sup>1</sup> This § 2255 case was assigned to me on March 25, 2025 (Case No. 25-60581-CV, DE 2).

(2) the date on which the impediment to making a motion created by government action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f)(1)-(4). Under sub-section (f)(1), when a defendant has pursued a direct appeal, the one-year limitation period begins to run when the ninety-day period for filing a petition for *certiorari* review expires. *See Clay v. United States*, 537 U.S. 522, 532 (March 4, 2003).

The Eleventh Circuit dismissed Mr. Richitelli's appeal upon his notice of voluntary dismissal on March 22, 2022. If a convicted person files, and then dismisses an appeal, what is the date of finality? When the appeal is dismissed or, that date plus 90 days to file a petition for *certiorari*?

The Eleventh Circuit has not definitively decided this question, although Judge Newsom in denying a motion for a Certificate of Appealability has said that "the 90 day period to petition for a writ of *certiorari* is inapplicable under the circumstances of the voluntary dismissal" as there is no underlying judgment for the Supreme Court to review. *Little v. United States*, 2021 U.S. App. LEXIS 23916 (11<sup>th</sup> Cir. 2021). Here, however, it makes no difference. If the date of the dismissal controls, Mr. Richitelli had until March 22, 2023, to file his motion to vacate. The ninety-days would take him until June 20, 2023. Either way his motion is almost two years too late.

Finally, Mr. Richitelli has not offered any reason why he could not have discovered the relevant facts for his motion prior to the expiration of the limitations period. Nor has he suggested any basis for equitable tolling or made any claim of actual innocence. Dismissal is therefore

required and since reasonable jurists would not find dismissal debatable no certificate of appealability shall issue.

For the foregoing reasons, the Motion to Vacate is dismissed as untimely.

### CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Movant's Motion to Vacate Pursuant to 28 U.S.C. § 2255 (DE 1) is **DISMISSED with prejudice as untimely.**
2. Judgment in favor of the Respondent will be entered by way of a separate Order;
3. All pending Motions are **DENIED as moot**; and
4. A Certificate of Appealability is **DENIED**.

**SIGNED** in Chambers at West Palm Beach, Florida, this 3<sup>rd</sup> day of June 2025.



Donald M. Middlebrooks  
United States District Judge

**Copies furnished to:**

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