IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff / Respondent, | ) | |
| | ) | |
| v. | ) | Case No. 05-20036-CM |
| | ) | Case No. 16-2472-JWL |
| FRANCISCO ORTIZ, | ) | |
| | ) | |
| Defendant / Petitioner. | ) | |
| | ) | |
| | ) | |

**MEMORANDUM AND ORDER**

This matter is presently before the Court on the Government's motion to dismiss (Doc. # 69) defendant Francisco Ortiz's petition to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255 (Doc. # 66). For the reasons set forth below, the Court **grants** the Government's motion, and it **dismisses** defendant's petition as untimely.[1]

## I. Background

In 2005, defendant entered into a plea agreement and pleaded guilty to one count of possession with intent to distribute five milligrams of methamphetamine, and in 2007 the Court sentenced him to a term of imprisonment of 480 months (the statutory maximum). Defendant did not file an appeal.

[1]Because the petition and records of this case conclusively show that defendant is not entitled to relief, the Court need not conduct a hearing. *See* 28 U.S.C. § 2255(b).

On June 27, 2016, defendant filed a pro se motion for appointment of counsel for purposes of filing a Section 2255 petition. The motion was docketed also as the petition itself. After retained counsel entered appearances on behalf of defendant, the motion for counsel was denied as moot. Counsel then moved on defendant's behalf for voluntary dismissal of the petition, on the basis that the motion for counsel had been misconstrued as a petition, and the Court granted the motion and dismissed the pro se petition without prejudice. Defendant's counsel then filed the instant Section 2255 petition on August 4, 2016. By the petition, defendant seeks to vacate his conviction and sentence, on the basis of his claim that his prior counsel rendered constitutionally defective assistance by failing to file a motion for withdrawal of defendant's guilty plea, failing to file a direct appeal, and failing to advise defendant with respect to seeking collateral relief. On June 23, 2017, after the Court ordered a response to the petition, the Government filed the instant motion to dismiss the petition as untimely.[2]

## II. Analysis

### *A. Second or Successive Petition*

The Government argues that defendant's Section 2255 petition may be dismissed as a second or successive petition filed without certification by the Tenth Circuit. *See*

[2]By order of July 17, 2017, the Court extended the Government's deadline to respond to the merits of the petition until 21 days after the Court's ruling on the motion to dismiss (assuming denial of that motion). On February 9, 2018, this matter was transferred to the undersigned judge.

28 U.S.C. § 2255(h). For purposes of that rule, the Government would count defendant's withdrawn pro se motion for counsel as a first petition. The Government notes that the basis for Section 2255 relief cited in the motion lacks merit (and has not been reasserted in the present petition) and that the motion (which the Court treated as a petition) was withdrawn only after the Government had filed a response pointing out that lack of merit. The Government urges the Court to follow law from the Seventh Circuit that allows a withdrawn petition to be counted as the first petition if denial on the merits has become expected and the petition is thus withdrawn for tactical reasons. *See United States v. Moore*, 2017 WL 1375034, at *2 (N.D. Ind. Apr. 17, 2017) (summarizing Seventh Circuit law).

The Court rejects this argument by the Government. In *Haro-Arteaga v. United States*, 199 F.3d 1195 (10th Cir. 1999), the Tenth Circuit addressed this same line of Seventh Circuit cases, and it noted that the Seventh Circuit had limited its exception (allowing a withdrawn petition to be counted) to a situation in which the petitioner conceded defeat on the withdrawn petition. *See id.* at 1197. The Tenth Circuit refused to count the withdrawn petition in that case because the defendant had not conceded any claim, the petition had not been decided on the merits, and the district court had not engaged in substantive review of those merits. *See id.* Similarly, in the present case, defendant's pro se "petition" was not considered or decided on the merits, and defendant did not concede a lack of merit in withdrawing the petition (he instead moved for dismissal because his motion for counsel had been misconstrued as an actual petition).

Therefore, under Tenth Circuit law, the pro se petition does not count as a first petition, and the instant petition filed by counsel therefore is not a second or successive petition requiring certification under Section 2255(h).[3]

*B. Untimely Petition*

The Government also seeks dismissal of the petition as untimely. Defendant concedes that the petition does not comply with Section 2255's one-year limitations period. *See* 28 U.S.C. § 2255(f). Defendant does not request application of any of the traditional bases for equitable tolling of that deadline. *See, e.g.*, *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000). Instead, defendant argues that the Court should extrapolate from certain Supreme Court holdings and rule that if a defendant misses the one-year deadline because of a lack of advice from counsel, such a "procedural default" should be excused.

The Court rejects that argument. Defendant relies on *Martinez v. Ryan*, 566 U.S. 1 (2012). In *Martinez*, the Supreme Court noted its general rule concerning "the doctrine of procedural default, under which a federal court will not review the merits of claims,

[3]Moreover, even if the Court had discretion to treat defendant's motion for counsel as a first petition despite the lack of a ruling on the merits of any claim asserted therein, it would not do so in these circumstances. The Supreme Court has made clear that before a court recharacterizes a pro se filing as a first Section 2255 petition, the defendant should have the opportunity to withdraw or amend that petition. *See Castro v. United States*, 540 U.S. 375, 383 (2003). In this case, defendant's motion for counsel was improvidently docketed as a petition without the required notice to defendant, who withdrew the petition once he had retained counsel. Thus, treatment of the motion for counsel as a first petition in this case would violate the spirit of *Castro*.

including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *See id.* at 9 (citing, *inter alia*, *Coleman v. Thompson*, 501 U.S. 722, 747-48 (1991)). The Court noted that in *Coleman* it had held that negligence by the defendant's attorney in postconviction proceedings does not constitute cause to excuse such a procedural default. *See id.* at 10. In *Martinez*, however, the Court recognized a limited exception to that rule of *Coleman*, and it held that inadequate assistance of counsel (because of a lack of counsel or ineffective counsel) at initial-review collateral proceedings (when the state's procedural rules require such claims to be raised only in postconviction collateral proceedings and not on direct appeal) may establish cause to excuse the procedural default of a claim of ineffective assistance by trial counsel. *See id.* at 9. Thus, the Court allowed the defendant in *Martinez* to pursue his federal habeas claim pursuant to 28 U.S.C. § 2254, by which he asserted ineffective assistance of trial counsel, despite his postconviction counsel's failure to assert that claim as required in state-court collateral review proceedings. *See id.* at 17. Subsequently, in *Trevino v. Thaler*, 569 U.S. 413 (2013), the Court extended the *Martinez* exception to include cases in which, although state law on its face does not *require* ineffective-assistance-of-trial-counsel claims to be raised initially in collateral proceedings, the state court system operates in a manner to make it virtually impossible for such a claim to be raised on direct review. *See id.* at 417.

Defendant here argues that the principles of *Martinez* and *Trevino* should be applied to ensure at least one review of a claim of ineffective assistance of trial counsel.

Thus, defendant asks the Court to excuse his "procedural default" of failing to abide by Section 2255's one-year deadline because he had no counsel to advise him concerning that deadline.

There is no basis to extend the holdings of *Martinez* and *Trevino* so far, however. The Supreme Court itself stressed the limited scope of the exception that it was creating to *Coleman* and the procedural default rule. Thus, in *Martinez*, the Court stated that it was recognizing a "narrow" and "limited" exception. *See* 566 U.S. at 9, 15, 16. The Court further stated:

> The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

*See id.* at 16 (citations omitted). In *Trevino*, the Court again described the *Martinez* exception as a "narrow" one. *See* 569 U.S. at 422, 428. Thus, the Supreme Court made clear that *Coleman* and the procedural default rule should govern except under the particular circumstances present in *Martinez* and *Trevino*. In the present case, defendant is not being prohibited from asserting his claim because of a failure to raise it in state-court collateral proceedings. Thus, the Supreme Court caselaw does not provide a basis to relieve defendant from the operation of Section 2255's one-year statute of limitations.

Moreover, defendant has not identified any court that has accepted this argument

and has excused compliance with the one-year deadline based on the *Martinez* exception. To the contrary, it appears that every federal circuit court that has addressed the question has rejected the argument based on *Martinez* that a violation of the deadline for federal collateral relief may be excused because of lack of effective assistance of postconviction counsel. *See Shank v. Vannoy*, 2017 WL 6029846, at *2 (5th Cir. Oct. 26, 2017); *Lombardo v. United States*, 860 F.3d 547, 557 (7th Cir. 2017), *cert. denied*, __ S. Ct. __, 2018 WL 466596 (Feb. 20, 2018); *Bland v. Superintendent Green SCI*, 2017 WL 3897066, at *1 (3rd Cir. Jan. 5, 2017); *Arthur v. Thomas*, 739 F.3d 611, 629-31 (11th Cir. 2014). Defendant argues in essence that those cases were wrongly decided because the Supreme Court in other instances has referred to a violation of the statute of limitations as a "procedural default." In *Martinez*, however, the Court made clear that the only "procedural default" to which its holding applied was the failure to abide by a state procedural rule. *See* 566 U.S. at 9. This Court agrees with the reasoning of the circuit courts in declining to extend the *Martinez* exception to cover the present circumstances.

In addition, the Court notes that the holding urged by defendant would effectively eviscerate the one-year statute of limitations under Section 2255. The Supreme Court has not recognized a constitutional right to counsel in all collateral proceedings, *see Martinez*, 566 U.S. at 9 (declining to recognize such a right), and defendant insists that he is not seeking recognition of such a right in this case. In the usual case, however, the defendant does not have the assistance of counsel in postconviction proceedings, and if

a defendant could simply ignore Section 2255's one-year deadline in such instances (claiming ignorance of the statute), the express terms of the statute (which contains no such exception) would be nullified, and the exception would effectively swallow the rule. For these reasons, the Court is confident that the Tenth Circuit would reject the argument raised by defendant here.

Accordingly, defendant has not identified any basis to excuse his failure to comply with the one-year requirement of Section 2255, and the Court therefore grants the Government's motion and dismisses defendant's petition.

## III. Certificate of Appealability

Effective December 1, 2009, Rule 11 of the Rules Governing Section 2255 Proceedings states that the Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).[4] To satisfy this standard, a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *See Saiz v. Ortiz*, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v. Dretke*, 542 U.S. 274, 282 (2004)). Because it is clear that

[4]The denial of a Section 2255 petition is not appealable unless a circuit justice or a circuit or district judge issues a certificate of appealability. *See* Fed. R. App. P. 22(b)(1); 28 U.S.C. § 2253(c)(1).

defendant is not entitled to relief on the constitutional claim that the Court has dismissed herein, the Court denies a certificate of appealability in this case.

IT IS THEREFORE ORDERED BY THE COURT that the Government's motion to dismiss (Doc. # 69) is hereby **granted**, and defendant's petition to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255 (Doc. # 66) is therefore **dismissed.**

IT IS SO ORDERED.

Dated this 13th day of March, 2018, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge