

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Hector Rivera Ayala,  
Petitioner

v.

Case No. 25-cv-45-SM-TSM  
Opinion No. 2025 DNH 130

United States of America,  
Respondent

**O R D E R**

In June of 2021, a federal grand jury indicted the petitioner, Hector Rivera Ayala, charging him with one count of bank robbery and four counts of Hobbs Act robbery (each of the latter four counts related to a separate robbery of a gas station). Ayala subsequently negotiated a plea agreement with the government pursuant to which he would plead guilty to all five counts in the indictment, in exchange for the government's agreement not to seek a sentence in excess of the properly-calculated advisory Guideline range. On April 18, 2023, the court accepted his plea of guilty to counts one through five. He was sentenced to serve a variant (below Guideline range) sentence of 130 months in prison.

Ayala now moves the court to vacate and correct his sentence on grounds that he received ineffective assistance of counsel. See 28 U.S.C. § 2255. See generally Strickland v. Washington, 466 U.S. 668 (1984). Specifically, Ayala contends that his attorney “did not properly object to the criminal history aspect of [his] guideline calculation.” Petition (document no. 1) at 2. As a result, says Ayala, he was improperly sentenced as though he is in Criminal History Category Six, when an accurate calculation would have placed him in Category Four. That is the sole claim advanced in Ayala’s petition. Id. The government objects.

For the reasons discussed, Ayala’s petition is necessarily denied as both untimely and factually unsupported.

### **Standard of Review**

“To succeed with an ineffective assistance of counsel claim under 28 U.S.C. § 2255, a petitioner must show both that his counsel’s representation fell below an objective standard of reasonableness (the performance prong) and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different (the prejudice prong).” Casey v. United States, 100 F.4th 34, 42-43 (1st Cir. 2024) (citation and internal punctuation

omitted). Stated slightly differently, Ayala must demonstrate "that the quality of legal representation at his trial was so inferior as to be objectively unreasonable, and that this incompetent lawyering redounded to his substantial detriment." United States v. McGill, 11 F.3d 223, 226 (1993).

### **Discussion**

Ayala has a significant criminal history. The probation office calculated his Criminal History Score at 22, placing him firmly in Category Six (Category Six includes all defendants with Criminal History Scores above 12). It is undisputed that the Total Offense Level for Ayala's crimes of conviction was 28.

At sentencing (and in his sentencing memorandum), defense counsel objected to the calculation of Ayala's Criminal History Score. After discussing and considering counsel's objections at length, the court agreed with the calculations set forth in the Presentence Investigation Report and concluded that Ayala's Total Offense Level was 28, and his Criminal History Category was Six. Accordingly, the recommended sentencing range under the Sentencing Guidelines was 140 to 175 months in prison. The government recommended a sentence of 160 months. Nevertheless, the court granted defense counsel's motion to vary downward and sentenced Ayala to serve 130 months in prison.

Ayala believes that a proper calculation of his criminal history would have placed him in Category Four - with only eight criminal history points, rather than 22. He claims that defense counsel provided constitutionally deficient representation by failing to adequately challenge the probation office's determination (and, later, the court's conclusion) that he was properly deemed to be in Criminal History Category Six.

Parenthetically, the court notes that Ayala's variant sentence of 130 months falls comfortably within the range suggested by the Guidelines for a defendant with an Offense Level 28 (like Ayala) and a Criminal History Category Four (as Ayala claims to be).

I. The Petition is Untimely.

Pursuant to 28 U.S.C. § 2255(f)(1), Ayala was required to file his petition within one year of the date on which his convictions became final. Although there are circumstances under which that one year period runs from a different date, none is applicable here. Judgment was entered on December 4, 2023. Ayala then had 14 days within which to file an appeal to the Court of Appeals for the First Circuit. See Fed. R. App. P. 4(b)(1)(A)(i). Ayala did not appeal. Consequently, his convictions became final on December 18, 2023, when the time for

filing a direct appeal to the Court of Appeals expired. See Murphy v. United States, No. CIV.08-CV-224-JD, 2008 WL 4224320, at \*1 (D.N.H. Sept. 9, 2008) (“[I]n the context of a petitioner who did not file a direct appeal, . . . the judgment of conviction becomes final after the [14-day] time period for bringing a direct appeal has expired.”) (emphasis supplied; citations omitted). See also Sanchez-Castellano v. United States, 358 F.3d 424, 427 (6th Cir. 2004) (“[W]hen a federal criminal defendant does not appeal to the court of appeals, the judgment becomes final upon the expiration of the period in which the defendant could have appealed to the court of appeals, even when no notice of appeal was filed.”) (emphasis supplied); Gillis v. United States, 729 F.3d 641, 644 (6th Cir. 2013) (“A conviction becomes final when the time for direct appeal expires and no appeal has been filed.”) (emphasis supplied).

Ayala mistakenly believes his convictions did not become final until 90 days after judgment was entered because, he says, he had that amount of time to file a petition for certiorari with the Supreme Court. That is not correct. Because Ayala failed to appeal his convictions or sentence to the Court of Appeals and because he could not file a direct appeal to the Supreme Court, that 90-day period is not relevant. Instead, as

noted above, his convictions became final on December 18, 2023, 14 days after this court entered judgment.

Ayala filed his pending petition on January 17, 2025 - thirteen months after his convictions became final. Plainly, then, his petition is untimely. See 28 U.S.C. § 2255(f)(1).

## II. The Petition Fails on the Merits.

Turning briefly to the merits of Ayala's petition, he asserts that trial counsel rendered constitutionally deficient representation by failing to "properly object to the presentence report's miscalculation of his criminal history" and by "fail[ing] to address the criminal history miscalculation in his sentencing memorandum." Petition at 5. That claim is, however, factually unsupported.

Defense counsel argued at length - both in his sentencing memorandum and at Ayala's sentencing hearing - that the probation office had incorrectly calculated Ayala's criminal history by improperly treating as separate offenses several that should (in defense counsel's opinion) more properly have been grouped together. See United States v. Ayala Case no. 21-CR-104-1-SM, Sentencing Memorandum (document no. 50) at 3-5. See also Transcript of Sentencing Hearing (document no. 56) at 3-11.

The court entertained those objections, discussed them at length with counsel and the probation officer, and considered them thoroughly before rejecting them.

To be sure, Ayala is correct in claiming that counsel appears not to have submitted a separate document objecting to the PSR. See generally Fed. R. Crim. P. 32(f). But that argument elevates form over substance. As discussed above, defense counsel did object to the calculation of Ayala's Criminal History Category - both in his sentencing memorandum and orally at the sentencing hearing - and the court considered those objections thoroughly. That counsel did not prevail on those arguments does not automatically render his performance constitutionally deficient. As the Court of Appeals has recognized, "To avoid the shoals of ineffective assistance, an attorney's judgment need not necessarily be right, so long as it is reasonable." McGill, 11 F.3d at 227.

Here, counsel's performance - in general and as it relates to the objections raised to the calculation of Ayala's Criminal History Category - was more than adequate to satisfy the Constitution's minimum requirements. It certainly cannot be said that Ayala's attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by

the Sixth Amendment.” Strickland, 466 U.S. at 687. That is particularly true given that the “court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id. at 689.

Defense counsel made cogent, plausible, evidence-based arguments in support of his view that Ayala’s Criminal History calculation was incorrect. The Constitution demanded nothing more.

### **Conclusion**

For the forgoing reasons, as well as those set forth in the Government’s Opposition Memorandum (document no. 4), Ayala’s Petition to Vacate, Set Aside, or Correct his Sentence (**document no. 1**) is necessarily denied as untimely. Moreover, even if Ayala had filed the petition in a timely matter, it would still be denied on the merits. There is no suggestion that his trial counsel provided constitutionally deficient representation as it relates to the calculation of Ayala’s Criminal History Category.


Because Ayala has not made a substantial showing of the denial of a constitutional right, nor has he shown that jurists of reason would find it debatable whether his petition was timely, the court declines to issue a certificate of



appealability. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).  
See also 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b)(1); Rule  
11(a), Rules Governing Habeas Corpus Cases Under Section 2255.  
Ayala is, however, free to seek such a certificate directly from  
the United States Court of Appeals for the First Circuit,  
located in Boston, Massachusetts. See Fed. R. App. P. 22(b)(1);  
Rule 11(a), Rules Governing Section 2255 Proceedings; First Cir.  
Local Rule 22.0(b).

The Clerk of Court shall enter judgment in accordance with  
this order and close the case.

**SO ORDERED.**

  
Steven J. McAuliffe  
United States District Judge

November 10, 2025

cc: Hector Rivera Ayala, pro se  
Counsel of Record