RECORD NO. 12-6129

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In The
# United States Court of Appeals
For The Fourth Circuit

## UNITED STATES OF AMERICA,

*Plaintiff – Appellee*,

v.

## MARCUS ANTONIO MCNEILL,

*Defendant – Appellant*.

### ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

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## BRIEF OF APPELLANT

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5. Is party a trade association? (amici curiae do not complete this question) NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? NO
   If yes, identify any trustee and the members of any creditors' committee:

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## STATEMENT OF JURISDICTION

This is an appeal from the District Court's summary dismissal of Appellant Marcus Antonio McNeill's motion for relief from his federal conviction and sentence for drug-related offenses. J.A. 93–97. The court below had jurisdiction under 28 U.S.C. § 2255. That court entered final judgment on December 13, 2011, and denied Mr. McNeill's motion for reconsideration on January 3, 2012. *Id*. at 93–97, 104–07. Mr. McNeill filed a timely notice of appeal on January 17, 2012. *Id*. at 108–09. This Court has jurisdiction over Mr. McNeill's appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

## STATEMENT OF THE ISSUES

1. Whether a federal inmate satisfies 28 U.S.C. § 2255's one-year statute of limitations when he deposits his motion, with prepaid first-class postage, in the prison's internal mailing system within the limitations period, notwithstanding that he addressed it to the wrong federal district court.

2. Whether a federal inmate's mailing of a motion under 28 U.S.C. § 2255, within the limitations period but addressed to the wrong federal district court, equitably tolls the statute of limitations when, despite the inmate's diligent efforts to confirm the status of his filing, circumstances beyond the inmate's control prevented its physical filing in any court during the limitations period.

## STATEMENT OF THE CASE

A federal grand jury indicted Marcus Antonio McNeill on several counts of drug-related offenses on June 25, 2008. J.A. 13–15. Mr. McNeill pleaded guilty to one count of knowingly and intentionally distributing more than five grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) on January 30, 2009. *Id.* at 67. That same day, a jury convicted Mr. McNeill of one count of conspiracy to distribute and possess with the intent to distribute cocaine base in violation of 21 U.S.C. § 841(a). *Id.* The district court sentenced Mr. McNeill to a total of 420 months in prison on April 28, 2009. *Id.* at 35.

On direct appeal, this Court affirmed the District Court's judgment and sentence on March 16, 2010. *United States v. McNeill*, 372 F. App'x 420, 423 (4th Cir. 2010) (unpublished). The Supreme Court denied Mr. McNeill's petition for a writ of certiorari on June 21, 2010. *McNeill v. United States*, 130 S. Ct. 3487 (2010).

On May 23, 2011, while incarcerated in the United States Penitentiary in Terre Haute, Indiana, Mr. McNeill deposited his *pro se* motion under 28 U.S.C. § 2255 in the prison's internal mailroom with prepaid first-class postage. J.A. 102. Mr. McNeill erroneously addressed his motion to the United States District Court for the Southern District of Indiana; the motion should have been addressed to the United States District Court for the Eastern District of North Carolina. *See* 28

U.S.C. § 2255(a). In November 2011, as a result of correspondence with the Indiana and North Carolina district courts initiated by Mr. McNeill, Mr. McNeill discovered that neither the Indiana nor the North Carolina district court had any record of his § 2255 motion. J.A. 103, 20. He promptly resubmitted his motion on November 27, 2011, only this time he addressed it to the correct court. *Id*. at 103, 20. That court summarily dismissed his motion on December 12, 2011, concluding it was barred by the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Id.* at 93–97. The court also refused to issue a certificate of appealability. *Id.* at 97.

Mr. McNeill filed a timely motion for relief from the district court's judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure on December 21, 2011. *Id.* at 98–101. The District Court denied reconsideration on January 3, 2012, and again refused to issue a certificate of appealability. *Id.* at 104–07. Mr. McNeill filed a timely notice of appeal on January 17, 2012. *Id.* at 108–09.

This Court granted Mr. McNeill's motion for a certificate of appealability on October 2, 2012, to decide whether a habeas motion addressed to the wrong federal district court and mailed through the internal mailing system of the federal penitentiary in Terre Haute, Indiana, extended or otherwise equitably tolled the statute of limitations under 28 U.S.C. § 2255(f)(1).

Mr. McNeill is currently incarcerated in the Terre Haute, Indiana, Federal Penitentiary serving the remainder of his 420-month sentence. *Id.* at 35.

## STATEMENT OF THE FACTS

Shortly after this Court affirmed his conviction and 420-month sentence, while his petition for certiorari was still pending in the Supreme Court of the United States, Mr. McNeill began the process of applying for relief under 28 U.S.C. § 2255. J.A. 17. When the Supreme Court denied his petition for certiorari on June 21, 2010, Mr. McNeill's conviction and sentence became final and the one-year statute of limitations for filing his § 2255 motion began to run. *See McNeill*, 130 S. Ct. at 3487; § 2255(f)(1). At every step of the process, Mr. McNeill diligently pursued post-conviction relief in the federal courts.

In February 2010, four months before the Supreme Court denied his petition for certiorari, Mr. McNeill retained a private attorney to file a motion for relief from his conviction and sentence under § 2255. J.A. 17. After receiving payment, however, the attorney did not communicate further with Mr. McNeill. *Id.* On March 16, 2010, Mr. McNeill sent the attorney a letter inquiring about the progress of his case. *Id.* at 92. The attorney never responded. *Id.* at 17.

Mr. McNeill thereafter sought to retain a second attorney to prepare his motion. *Id.* In January 2011, Mr. McNeill paid that attorney for a consultation on his case. *Id.* On January 28, 2011, that attorney offered to prepare Mr. McNeill's

motion for a fee ranging from $30,500 to $45,500, depending on whether he pursued an appeal if relief was denied in the district court. *Id.* at 22–32. Because Mr. McNeill could not afford such a fee, he decided to draft and file his § 2255 motion *pro se*, enlisting the assistance of a fellow inmate. *Id.* at 17–18.

Mr. McNeill used a standard Matthew Bender & Co. form to set out his claims for relief under § 2255 and erroneously addressed the motion and supporting memorandum to the District Court for the Southern District of Indiana, the district in which he was incarcerated.[1] *Id.* at 34. Mr. McNeill hand-delivered his § 2255 motion and memorandum of law with prepaid first-class postage to the prison mailroom staff on May 23, 2011, more than four weeks before the expiration of the one-year statute of limitations. *See id.* at 102.

After depositing his motion in the prison mailroom, Mr. McNeill assumed it had been delivered to the Southern District of Indiana and physically filed. *Cf.* Fed. R. Governing § 2255 Proceedings 3(b). Fellow inmates told him that it could be months before the court made any response to his motion. J.A. 102. By August, however, Mr. McNeill became concerned that he had not heard from the court. *Id.* at 103. On August 16, 2011, therefore, Mr. McNeill sent a letter to the Clerk of Court for the Southern District of Indiana, requesting confirmation that his motion

[1] Although the official § 2255 form, appended to the Federal Rules Governing § 2255 Proceedings, includes a cover sheet specifying the federal court to which a prisoner should send his motion, there is no evidence that the Matthew Bender & Co. form Mr. McNeill used provided such guidance. J.A. 94 n.3, 35–50.

had arrived and been physically filed. *Id.* at 90. The clerk did not respond. *Id.* at 18. On October 31, Mr. McNeill sent a second letter to the clerk, requesting information about the status of his case. *Id.* at 89. The clerk received the letter on November 3.[2] *Id.* In an undated response to his October letter, the Clerk of Court replied cryptically that his "material[s] . . . [did] not appear to be intended for filing in the U.S. District Court for the Southern District of Indiana."[3] *Id.* at 91.

Apparently, after receiving this note from the Southern District of Indiana, Mr. McNeill spoke to someone from that court regarding the status of his motion. *Id.* at 16. Then, on November 5, 2011, Mr. McNeill sent a letter to the Clerk of Court for the Eastern District of North Carolina explaining that the Indiana district court "told [him] that [his motion] was not on file there and should not have been filed in that court." *Id.* Mr. McNeill's letter further explained that a "law clerk told [him he] should have filed [his motion] in [the Eastern District of North Carolina], and that Indiana might have transferred it to [the Eastern District]." *Id.* Mr. McNeill asked the North Carolina clerk to inform him whether the district court

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[2] Mr. McNeill's October letter was returned to him, stamped as having been received by the clerk on November 3, 2011. J.A. 89.

[3] It is unclear whether the "material" to which the clerk is referring is Mr. McNeill's § 2255 motion, his August letter, or his October letter. J.A. 91. The only document returned to him by the Southern District of Indiana, however, was his October letter. *Id.* at 89, 91. Mr.McNeill's two letters were appropriately addressed to the clerk of the Southern District of Indiana and he obviously did not intend to file either letter.

had "received [his] petition, and, if so, what the status" of his motion was. *Id.* Mr. McNeill's letter was received by the Clerk of Court for the Eastern District of North Carolina on November 10, 2011. *Id.* at 11.

Before the North Carolina district court responded to his November 5 letter, Mr. McNeill undertook to resubmit an identical copy of his § 2255 motion to the correct court. *Id.* at 102–103. With assistance from another inmate, Mr. McNeill drafted a motion asking the North Carolina district court to accept as timely the § 2255 motion he filed on May 23. *Id.* Mr. McNeill deposited both motions with the prison mailroom and, to avoid further uncertainty, sent them by certified mail. *Id.* at 103. The Eastern District of North Carolina received the motions on December 5, 2011. *Id.* at 17.

One week later, on December 12, 2011, the Eastern District of North Carolina summarily denied Mr. McNeill's motion to accept his § 2255 motion as timely filed. *Id.* at 93–97. Mr. McNeill promptly submitted a motion for relief from the judgment, to which he attached a declaration sworn under 28 U.S.C. § 1746(2). *Id.* at 98–103. In the declaration, Mr. McNeill set out the undisputed circumstances under which he had attempted to file his habeas motion during the one-year limitations period. *Id.* at 102–03. He also swore that his original § 2255 motion, addressed to the Southern District of Indiana, was deposited with prepaid first-class postage in the prison mailroom on May 23, 2011, and that the § 2255 motion

mailed to the to the Southern District of Indiana was identical to the one he was attempting to file in the Eastern District of North Carolina. *Id.* The District Court summarily denied Mr. McNeill's motion for reconsideration on January 3, 2012. *Id.* at 104–07.

The foregoing facts are not disputed. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that "for the purposes of a motion to dismiss [the Court] must take all of the factual allegations in the complaint as true"). The United States has never opined on whether, in light of these facts, Mr. McNeill's § 2255 motion was timely filed.

## **SUMMARY OF THE ARGUMENT**

There are two independent reasons Mr. McNeill's motion, filed under 28 U.S.C. § 2255, should be remanded to the District Court for review on the merits. First, under the prison mailbox rule as codified in Rule 3(d) of the Rules Governing § 2255 Proceedings, Mr. McNeill's motion was filed the moment he deposited it in the prison's internal mail system on May 23, 2011. Rule 3(d) requires that a *pro se* prisoner deposit his motion in the prison's internal mail system within the applicable statute of limitations. The Rule also requires that the prisoner submit an affidavit pursuant to 28 U.S.C. § 1746(2), declaring that his motion was affixed with prepaid first-class postage. Because Mr. McNeill

complied with these requirements, his motion was timely filed on May 23, 2011, well before expiration of the one-year statute of limitations on June 21, 2011.

It is immaterial that Mr. McNeill addressed his motion to the incorrect federal district court. Under 28 U.S.C. § 1631, when a federal court receives a habeas motion over which it lacks jurisdiction, it is legally obligated to transfer the motion to the appropriate district court if transfer would be in the interest of justice. Here, Mr. McNeill sent his § 2255 motion to the Southern District of Indiana before the limitations period expired. From the cryptic note that the clerk of the Southern District of Indiana sent Mr. McNeill in November 2011, after expiration of the statute of limitations (that his "material . . . did not appear to be intended for filing in the U.S. District Court for the Southern District of Indiana"), it is possible that the court received his § 2255 motion and simply held it. Under that circumstance, however, the Indiana district court was obligated to transfer Mr. McNeill's motion to the Eastern District of North Carolina because it was "in the interest of justice." Failure to do so was an abuse of discretion.

Alternatively, Mr. McNeill's § 2255 motion is entitled to equitable tolling because he acted diligently and extraordinary circumstances prevented the timely filing of his motion. After depositing his *pro se* motion with the prison mailroom on May 23, 2011, Mr. McNeill's efforts to ensure that his motion had been filed were undeniably diligent. He made numerous attempts to confirm the status of his

motion (some of which were simply ignored) and, upon discovering that it had not been received, Mr. McNeill promptly resubmitted an identical copy of his motion to the proper court. Under these circumstances, Mr. McNeill was clearly diligent.

Despite Mr. McNeill's diligence, the government's mishandling of his motion prevented his compliance with the statute of limitations. Once Mr. McNeill deposited his motion with prison authorities, it was beyond his control and in the hands of government actors. After entrusting his motion with government officials well before the limitations period expired, it was lost or mishandled without fault on Mr. McNeill's part. Either would constitute an extraordinary circumstance warranting equitable tolling.

## STANDARD OF REVIEW

When a district court denies relief under 28 U.S.C. § 2255 without an evidentiary hearing, that denial is treated as a dismissal of the prisoner's motion as a matter of law and is reviewed *de novo* by this Court. *See United States v. Nicholson*, 475 F.3d 241, 248 (4th Cir. 2007). In these circumstances, this Court "review[s] the facts in the light most favorable to the non-moving party," which in this case is Mr. McNeill. *See id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And when "the relevant facts are undisputed and the district court denied equitable tolling as a matter of law," this Court also reviews the district court's decision *de novo*. *Rouse v. Lee*, 339 F.3d 238, 248 (4th Cir. 2003).

## **ARGUMENT**

The importance of equity in the context of a *pro se* prisoner's motion to seek habeas corpus relief cannot be overstated. From the Supreme Court's first application of the common law mailbox rule to the filings of *pro se* prisoners in *Fallen v. United States*, to its continued practice of liberally construing those filings, a clear interpretive preference has emerged: federal courts should view the filings of *pro se* prisoners through the lens of equity. *See* 378 U.S. 139, 143–44 (1964); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). This approach is particularly appropriate in the case of a prisoner attempting to vindicate his constitutional right to seek habeas corpus relief. Once such a litigant has entrusted his motion for relief to government actors for delivery, a federal court's equitable treatment of his filing is the only safeguard available to secure his constitutional rights.

Viewed through the lens of equity, this Court should remand Mr. McNeill's motion under 28 U.S.C. § 2255 for a decision on the merits for two independent reasons. First, under the "prison mailbox rule," as codified in Rule 3(d) of the Rules Governing § 2255 Proceedings, Mr. McNeill's § 2255 motion was filed the day he entrusted it to prison authorities; the fact that it was addressed to the wrong federal court is immaterial. Second, the doctrine of equitable tolling applies to extend the limitations period because the government's mishandling of Mr.

McNeill's motion constitutes an "extraordinary circumstance" that prevented its timely filing despite Mr. McNeill's diligence.

## I. UNDER THE PRISON MAILBOX RULE, AS CODIFIED IN RULE 3(d), MR. MCNEILL'S § 2255 MOTION WAS TIMELY FILED WHEN HE DEPOSITED IT IN THE PRISON'S INTERNAL MAILING SYSTEM WITHIN AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS.

Under the "prison mailbox rule," Mr. McNeill's § 2255 motion was timely filed when it was deposited with first-class postage in Terre Haute Penitentiary's internal mailing system on May 23, 2011. As the Supreme Court recognized when first applying the prison mailbox rule to petitions for habeas corpus, a *pro se* prisoner is in a uniquely vulnerable position when seeking to vindicate his legal rights. *Houston v. Lack*, 487 U.S. 266, 270–71 (1988). Thus, the timeliness of a *pro se* prisoner's filing, including a habeas petition, is determined solely by the date it is deposited in the prison mailroom. *Id.* The consequence of addressing the motion to an incorrect federal court is governed by jurisdictional rules and does not affect the timeliness of the filing in this case.

### A. Pursuant To Rule 3(d), Mr. McNeill's § 2255 Motion Was Timely Filed When He Deposited It In Terre Haute Penitentiary's Internal Mail System On May 23, 2011, Within AEDPA's One-Year Statute Of Limitations.

In *Houston v. Lack*, the Supreme Court applied the prison mailbox rule for the first time in a habeas case to accommodate the special circumstances of a *pro se* prisoner who had "no choice but to entrust the forwarding of his [filings] to

prison authorities . . . he [could not] control or supervise." 487 U.S. at 271. The *pro se* prisoner in that case delivered his motion to the prison mailroom three days before the applicable limitations period expired. *Id.* at 268. The district court did not actually receive the motion until after the statute of limitations had run. *Id.* at 269. The Supreme Court held that the timeliness of the petition could not properly be determined by the date of the district court's actual receipt because an incarcerated, *pro se* litigant "necessarily lose[s] control" over his papers the moment he surrenders them to prison officials for mailing. *Id.* at 275. Consequently, the date on which a *pro se* prisoner deposits his motion in the prison mailroom is the relevant date of filing for purposes of the statute of limitations. *Id.* at 270.

Rule 3(d) of the Rules Governing § 2255 Proceedings codifies the prison mailbox rule as applied in *Houston*. The Rule states:

> A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. . . . Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Parsing the text of Rule 3(d), a *pro se* prisoner must satisfy two requirements for filing under the rule. First, the motion must be "deposited in the [prison's] internal mailing system on or before the last day for filing." Second, the prisoner

demonstrates compliance with that requirement by submitting a declaration under 28 U.S.C. § 1746 affirming the date on which he deposited the motion, with proper postage, in the prison's mail system.

Rule 3(d) deems that Mr. McNeill's § 2255 motion was filed when he deposited it in the prison's internal mail system on May 23, 2011, over four weeks before the statute of limitations expired. Mr. McNeill subsequently submitted a declaration in the court below stating that he had filed the motion on May 23, 2011, with prepaid first-class postage, as required by § 1746(2). J.A. 102–03. Thus, it cannot be disputed that Mr. McNeill fully complied with the requirements of Rule 3(d). As shown below, the fact that he erroneously addressed the motion to the Southern District of Indiana is immaterial for purposes of the statute of limitations.

### B. Once Mr. McNeill Satisfied The Requirements Of Rule 3(d), The Fact That His Habeas Motion Was Erroneously Addressed Is Immaterial Because The Southern District Of Indiana Was Obligated To Transfer It.

Under Rule 3(d) of the Rules Governing § 2255 Proceedings, Mr. McNeill's motion was filed in the Southern District of Indiana on May 23, 2011, when he deposited it in the Terre Haute Penitentiary mailroom. At that moment, his motion was timely filed. What happened to the motion after its deposit is irrelevant for purposes of the statute of limitations.

The only communication that Mr. McNeill received from the Southern District of Indiana, after writing to the court twice to inquire about the status of his motion, was an undated note cryptically informing him that his "material[s] … [did] not appear to be intended for filing in the U.S. District Court for the Southern District of Indiana." J.A. at 91. Because this note was a response to Mr. McNeill's October letter, which was both properly addressed to the Indiana district court and clearly not intended for filing in that court, the content of this note suggests that the court received Mr. McNeill's § 2255 motion. Otherwise, the court's explanation that his "material" was not intended for filing in the Southern District of Indiana is baffling. If the Southern District of Indiana did in fact receive Mr. McNeill's § 2255 motion, the court was obligated to transfer it to the Eastern District of North Carolina without further effort on Mr. McNeill's part. Thus, the fact that the motion was not physically filed in the Eastern District of North Carolina was due entirely to the Indiana district court's abuse of discretion under 28 U.S.C. § 1631.[4]

A federal prisoner seeking relief under § 2255 must file his motion in the district court where he was convicted. 28 U.S.C. § 2255(a). If the prisoner files his

[4] Alternatively, the court could have returned the motion to Mr. McNeill for refiling in the Eastern District of North Carolina. Because Mr. McNeill deposited his motion in the prison mailroom more than four weeks before the one-year statute of limitations expired, if the court had promptly returned the motion, he would have had sufficient time to refile it within the limitations period. The court also could have dismissed the motion as frivolous, but that is not relevant here.

motion in any other federal district court, that court lacks jurisdiction to hear it. A court lacking jurisdiction, however, is obligated under § 1631 to transfer the prisoner's § 2255 motion to the court that sentenced him or to return the motion to him so he could refile it in the correct court.[5] The fact that a *pro se* prisoner filed his motion in the incorrect district court does not implicate the statute of limitations.

Rule 3(d) itself is silent as to the consequences of erroneously addressing a § 2255 motion. Instead, the rule resolves only the question of a motion's "timing, not destination." *Cf. Houston*, 487 U.S. at 273. Under § 1631, when a civil action[6] is filed in a district court without jurisdiction, that "court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action or appeal could have been brought at the time it was filed." § 1631. The purpose of the statute is to preserve valid causes of action by ensuring that an action filed in the wrong federal court does not become time-barred as a result of that mistake.

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[5] A district court lacking jurisdiction also has the discretion to dismiss a "clearly doomed" petition, in the interest of judicial economy. *See Phillips v. Seiter*, 173 F.3d 609, 610 (7th Cir. 1999). "A § 2255 petitioner is entitled to an evidentiary hearing on his claims, when he alleges facts that, if proven, would entitle him to relief." *Hall v. United States*, 371 F.3d 969, 972 (7th Cir. 2004). Because Mr. McNeill's motion alleges colorable claims for relief under § 2255, it would have been error for the Southern District of Indiana to dismiss his motion as frivolous. *See id.*; J.A. 33–87.

[6] Motions for habeas corpus relief under § 2255 are considered civil actions for the purposes of § 1631. *See Abdur'Rahman v. Bell*, 537 U.S. 88, 91 (2002).

Then-Judge Sotomayor, writing for the Second Circuit, concluded that in enacting § 1631 "Congress intended . . . to aid litigants who were confused as to the proper forum for review." *Paul v. INS*, 348 F.3d 43, 47 (2d Cir. 2003). To this end, § 1631 deems an action's filing date as the "date upon which it was actually filed in . . . the court from which it is transferred." § 1631. By operation of the prison mailbox rule, then, that is the date the prisoner deposited his motion in the prison mailroom.

Once a court has determined that transferring the case would be in the "interest of justice," such transfer is required. *Ruiz v. Mukasey*, 552 F.3d 269, 273 (2d Cir. 2009). "Normally transfer will be in the interest of justice" because the "dismissal of an action that could be brought elsewhere is time-consuming and justice-defeating." *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (quoting *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962)). The need for transfer is "particularly acute in prisoner cases, since prisoners do not have lawyers and so are apt to miss deadlines" within AEDPA's short, one-year limitations period. *Seiter*, 173 F.3d at 610; *see also Kolek v. Engen*, 869 F.2d 1281, 1284 (9th Cir. 1989).

In *Shaw v. United States*, this Court similarly recognized that it is in the interest of justice to transfer cases that are not frivolous and risk being time-barred if they are dismissed. 417 F. App'x 311, 312 (4th Cir. 2011) (unpublished). The litigant in *Shaw* errantly filed his § 2255 motion in the Eastern District of North Carolina; jurisdiction was proper only in the Northern District of Alabama. *Id.* The

Eastern District of North Carolina dismissed the case without prejudice because it lacked jurisdiction. *Id.* On appeal, this Court concluded that the district court should have transferred the motion to the court with jurisdiction. *Id.* Such transfer "serve[d] the interest of justice" because Shaw's claims would likely have been barred by the applicable one-year limitations period if he were forced to refile his § 2255 motion in the correct district. *Id.*

The principles underlying the result in *Shaw* are discussed more fully in the Second Circuit's decision in *Paul v. I.N.S.* 348 F.3d at 47. The litigant in *Paul*, attempting to appeal from a decision of the Board of Immigration Appeals, erroneously filed his petition for review in a federal district court instead of the Second Circuit. *Id.* at 44–45. Upon receiving Paul's petition, the district court neither docketed nor transferred it to the correct court. *Id.* at 45. Instead, the court returned Paul's petition, informing him that he had filed it in the wrong court. *Id.* When Paul subsequently attempted to file his petition in the Court of Appeals, it was time-barred. *Id.* Finding no evidence that Paul erroneously filed his petition in bad faith, however, the Second Circuit held that the district court's dismissal was an abuse of discretion under § 1631 because transfer was appropriate when "a new action filed by the litigant would be barred as untimely." *Id.* at 47; *see also Ruiz*, 552 F.3d at 276.

In this case, like in *Shaw* and *Paul*, if the Southern District of Indiana in fact received Mr. McNeill's motion, as the clerk's cryptic note to Mr. McNeill suggests, it should have transferred the motion to the Eastern District of North Carolina. As in *Shaw*, the facts here show that Mr. McNeill addressed his motion to the Southern District of Indiana in good faith. But by the time the Southern District of Indiana responded to Mr. McNeill's inquiries in November 2011, the statute of limitations for filing his § 2255 motion already had run. Thus, transfer under § 1631 was in the interest of justice and the Southern District of Indiana's failure to transfer Mr. McNeill's motion to the Eastern District of North Carolina was an abuse of discretion.

## II. THE STATUTE OF LIMITATIONS FOR MR. MCNEILL'S § 2255 MOTION SHOULD BE EQUITABLY TOLLED BECAUSE, NOTWITHSTANDING HIS DILIGENCE, EXTRAORDINARY CIRCUMSTANCES BEYOND HIS CONTROL PREVENTED ITS TIMELY FILING.

The doctrine of equitable tolling permits a court to suspend the running of a statute of limitations when rigid application of the limitations period would be unfair. *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010). The one-year limitations period for a § 2255 motion is subject to equitable tolling when the prisoner can demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *See id.* at 2562–63.

Because the "exercise of a court's equity powers must be made on a case-by-case basis," mechanical or bright-line rules are inappropriate. *Id.* at 2563. Due to its exceptional nature, however, equitable tolling does not extend to "garden variety claims of excusable neglect." *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Instead, equitable tolling should be reserved for rare cases in which, "due to circumstances external to the party's own conduct," it would be unjust to enforce the limitations period. *Id.* at 246 (quoting *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)). This is such a case.

Mr. McNeill deposited his motion with the prison mailroom for delivery over four weeks before the expiration of § 2255's one-year statute of limitations. J.A. 102–03. From the moment of deposit until he ultimately resubmitted his motion in the Eastern District of North Carolina, Mr. McNeill diligently attempted to ensure that his motion had been filed in the correct court. If he failed to file the motion within AEDPA's one-year statute of limitations, it was due entirely to extraordinary circumstances beyond his control.

### A. Mr. McNeill's Efforts To Comply With the Statute of Limitations Were Diligent.

The diligence required for the application of equitable tolling is "not maximum feasible diligence" but merely "reasonable diligence" under the circumstances. *Holland*, 130 S. Ct. at 2565 (quoting *Starns v. Andrews*, 524 F.3d

612, 618 (5th Cir. 2008)). Although it appears that this Circuit has not elaborated on what constitutes "diligence," other circuits have observed that the diligence requirement "does not demand a showing that the [litigant] left no stone unturned." *Ramos–Martinez v. United States*, 638 F.3d 315, 324 (1st Cir. 2011); *see also Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003) ("The standard is not extreme diligence or exceptional diligence."); *Harris v. Carter*, 515 F.3d 1051, 1054 n.5 (9th Cir. 2008) (explaining that, to grant equitable tolling, a timely filing does not have to be literally impossible); *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002) (determining that § 2255 "does not require the maximum feasible diligence" because the standard is "due diligence").

To determine reasonable diligence, courts consider the totality of the litigant's circumstances. *See Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004); *see also Doe v. Busby*, 661 F.3d 1001, 1013 (9th Cir. 2011) (determining diligence in "light of [the litigant's] . . . particular circumstances"). In the case of an incarcerated *pro se* litigant, courts necessarily must take into account the restrictions imposed by the prisoner's confinement when determining whether he has been sufficiently diligent. *See Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000); *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000).

After depositing his motion with the prison mailroom on May 23, 2011, Mr. McNeill's efforts to ensure that his motion had been filed were undeniably diligent.

When the Southern District of Indiana did not promptly acknowledge receipt his motion, Mr. McNeill wrote to the court inquiring about its status. J.A. 90. The court did not respond. Mr. McNeill then sent a second letter regarding the status of his motion, which the court received on November 3, 2011. *Id.* at 89. At some point after November 3, 2011, in a response to Mr. McNeill's second letter, the Clerk of Court cryptically replied that his "material[s] . . . [did] not appear to be intended for filing in [that court]." *Id.* at 91.

Immediately after receiving this communication from the Southern District of Indiana, Mr. McNeill sent a letter to the Eastern District of North Carolina dated November 5, 2011. *Id.* at 16. In the letter, Mr. McNeill asked whether his motion had been transferred to that court, as it should have been under 28 U.S.C. § 1631; a "law clerk," apparently in the Southern District of Indiana, previously told him it might have been. J.A. 16. Without waiting for a response from the Eastern District of North Carolina, Mr. McNeill promptly resubmitted his § 2255 motion attached to a motion asking the North Carolina district court to accept it as timely filed. *Id*.

From the moment he deposited his § 2255 motion in the mailroom on May 23 to his eventual resubmission of that motion on November 27, Mr. McNeill "did what he reasonably thought was necessary to preserve his rights . . . based on information he received." *See Holmes v. Spencer*, 685 F.3d 51, 65 (1st Cir. 2012). He "can hardly be faulted for not acting more 'diligently' than he did" because he

had no reason to believe his motion had not been filed. *See id.* Although Mr. McNeill sent his original motion to the wrong court, he was "actively pursu[ing] his judicial remedies by filing [the] defective pleading during the statutory period." *See Irwin*, 498 U.S. at 96 (citing *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424 (1965) (applying tolling when the plaintiff timely filed his complaint in the wrong court)). Moreover, once Mr. McNeill became aware that he had sent his motion to the wrong district court, he promptly corrected his mistake.

Limited by "confinement and the reality of the prison system," a *pro se* prisoner is not required to "exhaust every imaginable option" to vindicate his rights. *See Aron*, 291 F.3d at 712. Instead, only "reasonable diligence" is required. *Holland*, 130 S. Ct. at 2565. As a prisoner, Mr. McNeill could not personally go to the court to ensure the delivery of his motion. Because he was forced to communicate through the mail, delay was inevitable. Nevertheless, Mr. McNeill deposited his motion in the prison mailroom over four weeks before the statute of limitations expired. Following that, he made repeated efforts to ensure that his motion had been physically received and filed. On these undisputed facts, Mr. McNeill's efforts were clearly diligent.

### B. The Circumstances That Prevented Mr. McNeill From Complying With The Statute Of Limitations Were Extraordinary.

Extraordinary circumstances are assessed on a case-by-case basis to ensure that courts are able "to meet new situations [that] demand equitable intervention"

and “accord all the relief necessary to correct . . . particular injustices.” *Holland*, 130 S. Ct. at 2563 (internal quotation omitted). Generally, “attorney error, miscalculation, and inadequate research have not been found to rise to [the level of] extraordinary circumstances required for equitable tolling.” *See Rouse*, 339 F.3d at 248–49 (internal citations omitted). Instead, “equity should step in to give the party the benefit of his erroneous understanding” when the extraordinary circumstances preventing his timely filing are external to his control. *Id.* at 248 (quoting *Hutchinson*, 209 F.3d at 331).

Once Mr. McNeill deposited his § 2255 motion in Terre Haute Penitentiary’s internal mail system, what happened to it was beyond his control. One of three circumstances prevented its timely filing: (1) the motion was mishandled by the prison mailroom, (2) the motion was mishandled by the United States Postal Service, or (3) the Southern District of Indiana failed to transfer the motion to the Eastern District of North Carolina under 28 U.S.C. § 1631. Each would constitute an extraordinary circumstance warranting equitable relief for Mr. McNeill.

#### 1. Mishandling by the prison mail system constitutes an extraordinary circumstance beyond Mr. McNeill’s control.

Upon receipt of a prisoner’s legal papers, mailroom authorities are obligated to forward those papers to the Postal Service for mailing. As the Supreme Court has observed, however, prison officials “may have every incentive to delay” and

*pro se* inmates are "unlikely to have any means of proving it." *Houston*, 487 U.S. at 271. When the "wrongful conduct" of prison authorities "prevents a petitioner from filing a timely petition," equitable tolling is appropriate. *See Hutchinson*, 209 F.3d at 330.

In this case, Mr. McNeill deposited his motion with prepaid first-class postage in the prison mailroom more than four weeks before the expiration of the statute of limitations. If the prison mailroom failed to deliver his motion to the Postal Service, it was an extraordinary circumstance for which Mr. McNeill cannot be held responsible.

#### 2. Mishandling by the U.S. Postal Service constitutes an extraordinary circumstance beyond Mr. McNeill's control.

Equitable tolling also applies to ensure prisoners are not penalized when their papers are properly forwarded by the prison mailroom but lost or mishandled by the Postal Service. As this Court has previously acknowledged, even an "inordinate delay" in the delivery of mail can be regarded as an "extraordinary circumstance." *See Spencer v. Sutton*, 239 F.3d 626, 630 (4th Cir. 2001). Lost mail, of course, is both more exceptional and more damaging to a *pro se* litigant wholly dependent upon the Postal Service. Thus, the loss of a prisoner's legal documents in the mail is an extraordinary circumstance warranting equitable relief.

Here, Mr. McNeill affixed his motion with first-class postage and deposited it with the appropriate prison authorities prior to the expiration of the statute of

limitations. Whether the Postal Service mishandled or lost the motion, it was an extraordinary circumstance warranting equitable tolling.

#### 3. Mishandling by the District Court for the Southern District of Indiana constitutes an extraordinary circumstance beyond Mr. McNeill's control.

Had Mr. McNeill's motion arrived at the Southern District of Indiana, as that court's only communication with Mr. McNeill suggests, the Court was required to transfer it to the Eastern District of North Carolina under 28 U.S.C. § 1631. *See supra* I.B. The "compelling" need to transfer a case under § 1631 is "particularly acute" for *pro se* prisoners filing § 2255 motions because "prisoners [that] do not have lawyers . . . are apt to miss deadlines" under AEDPA's short, one-year statute of limitations. *Seiter*, 173 F.3d at 610. The Seventh Circuit, in which the Southern District of Indiana is located, has emphasized that "[e]xpedition is the byword in administering the new system of postconviction review created by [AEDPA]." *Id.* at 611 (citations omitted).

If the Southern District of Indiana received Mr. McNeill's § 2255 motion, its failure to transfer it was an extraordinary circumstance warranting equitable relief. Moreover, because Mr. McNeill mailed his motion to the Southern District of Indiana more than four weeks before the expiration of the statute of limitations, the failure of that court to promptly return the motion to him for refiling in the proper court was also an extraordinary circumstance warranting equitable tolling.

*See Parmaei v. Jackson*, 378 F. App'x 331, 332 (4th Cir. 2010) (unpublished) (concluding that the Clerk of Court's error in processing the plaintiff's case was an extraordinary circumstance warranting equitable tolling).

In light of the foregoing circumstances, Mr. McNeill can "only guess whether the prison authorities, the Postal Service, or the court clerk is to blame for any delay." *See Houston*, 487 U.S at 276. While Mr. McNeill's motion was in the custody and control of the federal government, it was either lost or mishandled, preventing its timely arrival at the correct federal court. Mr. McNeill did not, however, sleep on his rights. Despite the constraints of his incarceration, he attempted to confirm the status of his motion, sending letters to both the Southern District of Indiana and the Eastern District of North Carolina. When viewed through the lens of equity, Mr. McNeill's case presents one of those rare cases in which the application of equitable tolling is appropriate.

## CONCLUSION

This Court should reverse the District Court's order dismissing Mr. McNeill's motion filed under 28 U.S.C. § 2255 as time-barred and remand the case for consideration on the merits.

Respectfully submitted,

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Dated: November 13, 2012

/s/ James E. Coleman, Jr.
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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 13th day of November, 2012, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 13th day of Novmeber, 2012, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court.

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