RECORD NO. 12-6129

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

REPLY BRIEF OF APPELLANT

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I. MR. MCNEILL ENTRUSTED HIS § 2255 MOTION TO THE PRISON MAILROOM ON MAY 23, 2011.

Throughout its brief, the Government implies that Mr. McNeill may not have deposited his § 2255 motion in the prison mailroom on May 23, 2011. *See, e.g.*, Appellee's Br. 5, 6, 7, 15, 16. In its most direct attempt to raise this issue, the Government notes, "Petitioner provided no evidence in the district court of any contemporaneous records that would support his claim that he placed his 2255 Motion in the prison mail system in May 2011." *Id.* at 19–20 n.5. This effort is misplaced; 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). Consequently, 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.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

At this stage of the proceedings, then, the Court must treat as undisputed that Mr. McNeill deposited his § 2255 motion with prison authorities on May 23, 2011, affixed with first-class postage, as Mr. McNeill swore in support of his December

21, 2011, motion to the Eastern District of North Carolina.[1] J.A. 104. These facts are the established facts on appeal. *See Nicholson*, 475 F.3d at 248.

Moreover, as the Supreme Court noted in *Houston v. Lack*, the prison mailbox rule is intended to be "a bright-line rule," easily verified by prison logs and prison authorities. 487 U.S. 266, 275 (1988). Because the district court ruled *sua sponte*, the Government was unable to conduct the "straightforward inquiry" of checking the prison's records to confirm that Mr. McNeill sent his original § 2255 motion to the Southern District of Indiana on May 23, 2011, as he swore. *See id.* However, the Government cannot now raise that issue in this Court. *See Nicholson*, 487 U.S. at 275. Accordingly, Mr. McNeill is entitled to the full benefit of the prison mailbox rule without having to address the Government's insinuation that he may not have deposited his motion with the prison mailroom before the expiration of the statute of limitations.

II. MR. MCNEILL TIMELY FILED HIS § 2255 MOTION CONSISTENT WITH THE REQUIREMENTS OF RULE 3(d).

Consistent with the Supreme Court's articulation of the prison mailbox rule in *Houston*, Rule 3(d) deems an inmate's legal papers "filed" the moment they are deposited with prison authorities. *See* Fed. R. Governing § 2255 Proceedings 3(d). Any other interpretation of the Rule leads to absurd results and unnecessary

[1] Mr. McNeill's affidavit pursuant to 28 U.S.C. § 1746 is all that Rule 3(d) requires of him because Terre Haute Penitentiary does not have a formal legal mail system. *See* J.A. 100.

litigation. The fact that Mr. McNeill's motion was erroneously addressed to the Southern District of Indiana does not affect whether it was filed under Rule 3(d). Because Mr. McNeill timely deposited his motion with prison authorities prior to the expiration of the statute of limitations and confirmed that fact in a sworn affidavit, Mr. McNeill satisfied his obligations under Rule 3(d). J.A. 102. Consequently, Mr. McNeill's § 2255 motion was timely filed on May 23, 2011. Brief of Appellant at 12–19.

A. Rule 3(d) Is A Codification Of The Prison Mailbox Rule Adopted By The Supreme Court In *Houston* And Must Be Interpreted In Light Of That Decision.

The Government misinterprets Rule 3(d) by suggesting that it only applies to situations in which an inmate's legal papers are "actually filed." Appellee's Br. 9, 10, 13. This reading of the Rule directly contradicts the Supreme Court's holding in *Houston* that filings by *pro se* prisoners are "filed" the moment that they are deposited with prison authorities. 487 U.S. at 275. The Government cites no authority for its novel interpretation.

In *Houston*, the Supreme Court explicitly identified the issue presented as "whether the moment of 'filing' occurs when [a *pro se* prisoner's] notice is delivered to the prison authorities or at some later juncture in its processing." *Id.* at 273. In holding that "delivery to prison authorities" is the moment of filing for *pro se* inmates, the Court explained that "policy grounds . . . suggest that delivery to

prison authorities should [] be the moment of filing in this particular context." *Id*. at 275. Unlike average civil litigants capable of hand-delivering their papers directly to the court, "the moment at which *pro se* prisoners necessarily lose control over and contact with their [papers] is at delivery to prison authorities, not receipt by the clerk." *Id*. This is because, "[n]o matter how far in advance the *pro se* prisoner delivers his [legal papers] to the prison authorities, he can never be *sure* that [they] will ultimately get stamped 'filed' on time." *Id.* at 271 (emphasis in original). Thus, "filing" occurs when the *pro se* inmate delivers his papers to prison authorities—"filing" is not contingent on the subsequent actions of persons outside of his control "actually filing" his papers.

B. Rule 3(d) Establishes A Bright-line Rule For Determining When A *Pro Se* Prisoner Filed His Motion And Prevents Absurd Results.

The Government's interpretation of Rule 3(d) results in a truly absurd outcome for a *pro se* prisoner, such as Mr. McNeill, whose motion was timely deposited in the prison mailroom but lost or mishandled by a government actor. According to the Government, his motion would be timely but not "filed." Moreover, when a government actor mishandles the motion, the *pro se* prisoner has no recourse once the statute of limitations has run. Thus, under this interpretation, the Rule requires a *pro se* prisoner to somehow ensure that his papers are actually received and formally filed by the Clerk of Court during the statute of limitations period. This would force *pro se* prisoners to mail their

motions months before the end of the one-year limitations period to allow for timely resubmission in the event they learn their motions were lost in the mail. Rule 3(d), however, was not intended to be a vehicle for penalizing a *pro se* litigant for circumstances entirely beyond his control or to rob him of an opportunity to vindicate his constitutionally-protected right of habeas corpus. The Supreme Court, in *Houston*, explicitly rejected that approach.

Because a *pro se* prisoner is incapable of ensuring the arrival and proper handling of his papers, reading such a requirement into the text of Rule 3(d) would nullify the prison mailbox rule. Not surprisingly, the Government is unable to identify a single court that has adopted its reading of the Rule. As the Court explained in *Houston*, "making filing turn on the date the *pro se* prisoner delivers [his papers] to prison authorities for mailing is a bright-line rule, not an uncertain one." 487 U.S. at 275.

The Government's purported concern about "time consuming efforts to ferret out manipulation and fraud" is unwarranted. *See* Appellee's Br. 11. A *pro se* prisoner does not "anonymously drop" his papers in a mailbox; he gives them to prison authorities who have "well-developed procedures for recording the date and time at which they receive[d] papers for mailing." *Houston*, 487 U.S. at 275. These authorities can "readily dispute" an inmate's claims regarding the date he deposited his papers, removing any incentive a *pro se* prisoner might have to file his motion

after the expiration of the statute of limitations and claim it was a resubmission of a previously mailed motion that was lost in transit. *See id*. Thus, determining whether a *pro se* prisoner's motion was timely filed under Rule 3(d) by determining the date of its deposit with prison authorities is a "straightforward inquiry," easily confirmed and enforced by district courts. *See id*.

C. In *Houston*, The Supreme Court Anticipated That A Petition Might Be Lost Or Mishandled After Being Entrusted To Prison Authorities And Relieved The *Pro Se* Inmate Of The Consequences Of Such A Result.

A *pro se* prisoner cannot control the actions of those intermediaries on whom he is forced to rely when filing his legal papers. "[H]is confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received." *Houston*, 487 U.S. at 271. "Indeed, since, as everyone concedes, the prison's failure to act promptly cannot bind a *pro se* prisoner," it would be unjust to penalize him for the negligent or otherwise deficient conduct of prison authorities, postal workers, or court clerks. *See id.* at 276. Thus, the adequacy of a filing must be determined solely by assessing the conduct of the *pro se* inmate; any mishandling of his motion once it is out of his hands is not attributable to him.

Because a *pro se* inmate can "only guess whether the prison authorities, the Postal Service, or the court clerk is to blame for any delay" in the processing of his

legal papers, constructive filing is all that is, or can be, required of him. *See id*. Thus, when Mr. McNeill deposited his § 2255 motion with the prison authorities prior to the expiration of the statute of limitations, he timely filed his motion despite the subsequent mishandling of his papers by an anonymous government actor.

III. MR. MCNEILL IS ENTITLED TO EQUITABLE TOLLING.

The proper standard of review for Mr. McNeill's claim of equitable tolling is *de novo.* 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 Nicholson*, 475 F.3d at 248. Under 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.* Thus, the facts on appeal are undisputed and the proper standard of review is *de novo*. *See Rouse v. Lee*, 339 F.3d 238, 248 (4th Cir. 2003).

Mr. McNeill is entitled to equitable tolling because "he has been pursuing his rights diligently, and . . . some extraordinary circumstance stood in his way." *See Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). Mr. McNeill acted with reasonable diligence throughout this litigation. The fact that Mr. McNeill took extraordinary precautions to ensure the delivery of his correspondence in November 2011 is not the standard by which equity should judge his prior conduct.

Throughout this litigation, delays in Mr. McNeill's correspondence were attributable to his desire to balance respect for the court on the one hand and zealous vindication of his rights on the other. But at all times he was diligent.

Extraordinary circumstances prevented Mr. McNeill's timely filing. After he deposited his motion with prison authorities, Mr. McNeill could not reasonably be expected to know what happened to it. He was incarcerated and was unable to monitor his motion while it was in the hands of government actors. The fact that Mr. McNeill cannot show what happened to his original motion is not proof of a lack of extraordinary circumstances.

A. Mr. McNeill Was Reasonably Diligent.

Reasonable diligence is all that is required of a litigant seeking equitable tolling. *Holland*, 130 S. Ct. at 2565. This does not mean "maximum feasible diligence"; rather, it involves a holistic inquiry based on all of the litigant's actions considered in light of the circumstances surrounding those actions. *See id.*

1. The Government misapplies the diligence inquiry by erroneously juxtaposing Mr. McNeill's conduct in May with his conduct in November.

The Government argues that because Mr. McNeill called the Southern District of Indiana and mailed a copy of his § 2255 motion via certified mail in November 2011, his failure to take those same actions prior to the filing deadline shows a lack of reasonable diligence. Appellee's Br. 16–17. The Government

claims this conclusion flows from considering the totality of Mr. McNeill's circumstances. *See id.* at 17 (citing *Ramos-Martinez v. United States*, 638 F.3d 315, 324 (1st Cir. 2011)). The reasonableness of Mr. McNeill's conduct should not be judged by what he did in November 2011, after learning that his motion had not been docketed in the Southern District of Indiana. The case the Government cites for its position does not provide a license to ignore context when determining diligence. *See Ramos-Martinez*, 638 F.3d at 324 (noting that "[w]hat the petitioner knew and when he knew it [we]re important in assessing his diligence."). Nevertheless, the Government discounts the importance of when Mr. McNeill learned that his motion had not been docketed.

This Court similarly has emphasized the importance of context when determining whether a litigant has acted diligently. For example, in *Spencer v. Sutton*, 239 F.3d 626 (4th Cir. 2001), this Court explained that the reasonableness of taking precautions to meet the statute of limitations depends upon the foreseeability of a particular impediment to satisfying that deadline. *Id.* at 630. In other words, a reasonably diligent litigant is one who adjusts his conduct in response to reasonably foreseeable circumstances that might prevent timely filing. Simply put, context matters.

It was not reasonably foreseeable that Mr. McNeill's motion would get lost in the mail or otherwise disappear after he deposited it with prison authorities. In

fact, the Government's brief relies upon the implied premise that neither the prison nor the U.S. Postal Service loses mail, or at least that they most likely did not lose Mr. McNeill's motion. *See* Appellee's Br. 20. But Mr. McNeill also should have been entitled to assume that the motion he deposited with prison authorities in May 2011 affixed with first-class postage prepaid would be delivered to the court to which it was addressed within a reasonable period of time, certainly before expiration of the statute of limitations. He had no reason to use certified mail or to think that it would be necessary or appropriate to call the Southern District of Indiana to confirm delivery and filing. Indeed, the mailbox rule itself does not require any such extraordinary precaution. *See Houston*, 487 U.S. at 275.

On the other hand, Mr. McNeill's decision to take additional precautions in November 2011 only reaffirms his overall diligence. Once he had reason to believe that the court might not have received his original motion, Mr. McNeill adjusted his conduct by calling the court and by using certified mail in his November correspondence. Not taking these heightened precautions in May or June merely reflects his reasonable expectation that the prison mailroom, postal system, and Southern District of Indiana would properly handle his motion, not a lack of diligence.

2. The timeline of Mr. McNeill's actions was entirely reasonable.

The Government mischaracterizes the time elapsed between Mr. McNeill's letters and phone calls as indicative of a lack of diligence. In reality, Mr. McNeill, a *pro se* inmate unfamiliar with the judicial process, was not sure how long it would take the Southern District of Indiana to contact him regarding his initial motion. *See* J.A. 102 (stating that Mr. McNeill was under the impression that "it could be several months" before he heard back from the court). Nevertheless, by August 2011, less than three months after mailing his motion, Mr. McNeill sent a letter to the Southern District of Indiana to confirm that the court had received his motion. J.A. 90. After waiting approximately another two months for a reply, he sent a second letter but was concerned that the Court might be annoyed by his attempts to confirm his filing. *See* J.A. 89. Far from sleeping on his rights, he was "trying [not] to be rude or rush [the court]" as he waited for the court to respond. *See id*. However, as soon as he learned that the Southern District of Indiana had not docketed his motion, Mr. McNeill *immediately* contacted the Eastern District of North Carolina to determine if that court had received his motion from the Southern District of Indiana. J.A. 16.

Next, the Government argues that Mr. McNeill's decision to wait approximately three weeks for a response from the Eastern District of North Carolina before mailing the court a copy of his original § 2255 motion

demonstrates a lack of diligence. Appellee's Br. 17. The Government's position ignores the reality of *pro se* litigation from prison. It is unrealistic for a prisoner to expect a court to immediately respond to his inquiries. Nor do courts encourage a barrage of inquiries from prisoners by responding immediately, as Mr. McNeill assumed. Nevertheless, informed by his previous experience with the Southern District of Indiana, Mr. McNeill made productive use of the time during which he awaited a response from the court. And before the court responded, he sent a copy of his original § 2255 motion to the Eastern District of North Carolina by certified mail, accompanied by a *pro se* motion asking the court to accept his original motion as timely filed. Under the circumstances, three weeks were reasonable.

The relevant delay in Mr. McNeill's case was not caused by his conduct, but by the failure of both the Southern District of Indiana and the Eastern District of North Carolina to acknowledge, much less respond to, his correspondence. Under the circumstances, Mr. McNeill diligently pursued his rights throughout this litigation.

B. Extraordinary Circumstances Prevented Mr. McNeill From Timely Filing His § 2255 Motion.

The Government argues that, even assuming Mr. McNeill was diligent after entrusting his motion to prison officials, there were no extraordinary circumstances that prevented him from filing his § 2255 motion because he mailed the motion to the wrong court. Appellee's Br. 18. That argument rests on the erroneous premise

that Mr. McNeill's mistake is a *per se* bar to equity. *See id*. at 19. As this Court has explained, however, equitable tolling is "a discretionary doctrine that turns on the facts and circumstances of a particular case and, therefore, does not lend itself to bright-line rules." *Rouse*, 339 F.3d at 259–60 (citations omitted); *see Harris v. Hutchinson*, 209 F.3d 325, 330 (2000). And the Supreme Court has made clear that equitable tolling is available when a "claimant has actively pursued his judicial remedies" despite filing a defective complaint in the wrong court. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (citing *Burnett v. NY Cent. R.R. Co.*, 380 U.S. 424 (1965)).

Although Mr. McNeill originally mailed his motion to the wrong court, the government's subsequent loss or mishandling of his motion undoubtedly constitutes an extraordinary circumstance warranting equitable tolling. As the Supreme Court recognized in *Houston*, once Mr. McNeill entrusted his motion to prison officials, he could "only guess whether the prison authorities, the Postal Service, or the court clerk is to blame for any delay." *See* 487 U.S. at 276. But those are the only three circumstances that could have prevented Mr. McNeill's motion from being filed within the statute of limitations. Any one of them would constitute an extraordinary circumstance warranting equitable tolling.

The Government's suggestion that Mr. McNeill must actually prove what happened to his motion simply ignores reality. Mr. McNeill is incarcerated; he

cannot gather the evidence to prove what waylaid his motion. As the Supreme Court noted in *Houston*, the Government "will be the only party with access to at least some of the evidence needed to resolve such questions." *See id*. And because the district court disposed of this case *sua sponte*, there was no opportunity for either party to develop the kind of evidence the Government demands.

In sum, the Government's argument misses the mark. This *is* a case about the prison mail system failing to deliver mail. This *is* a case about the United States Postal Service failing to deliver mail. This *is* a case about a district court failing to transfer a case that it should have transferred. This is *not* a case about Mr. McNeill failing to take reasonable steps to ensure that his § 2255 motion was filed prior to the expiration of the statute of limitations. Simply put, Mr. McNeill did all he could have been reasonably expected to do to ensure that his motion was filed. He was defeated by extraordinary circumstances beyond his control. Those facts compel equitable tolling.

CONCLUSION

Mr. McNeill complied with all of the requirements of Rule 3(d). He diligently pursued his day in court but so far has been defeated by extraordinary circumstances beyond his control. This Court should reverse the judgment of the District Court and remand Mr. McNeill's § 2255 motion for further proceedings, consistent with him having filed his motion within the statute of limitations.

Respectfully submitted,

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Dated: February 4, 2013

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 4th day of February, 2013, I caused this Reply Brief of Appellant 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 4th day of February, 2013, I caused the required copies of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

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