

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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NO. 12-6129

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UNITED STATES OF AMERICA,

Appellee,

v.

MARCUS ANTONIO MCNEILL

Appellant.

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

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BRIEF OF THE UNITED STATES

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STATEMENT OF JURISDICTION

Petitioner, Marcus McNeill, appeals the dismissal of his motion for relief from his conviction and sentence for drug crimes pursuant to 28 U.S.C. § 2255 ("2255 Motion") by the district court. The district court dismissed Petitioner's 2255 Motion because he failed to file it within the one year statute of limitations. The district court dismissed Petitioner's 2255 Motion in an order dated December 13, 2011, (J.A. 104-07) and denied his motion for reconsideration in an order dated January 3, 2012. (J.A. 104-07). Jurisdiction to this Court is provided by 28 U.S.C. §§ 1291, 2253. Plaintiff filed a timely notice of appeal on January 18, 2012. (J.A. 108-09).

## STATEMENT OF ISSUES

1. Whether the district court properly dismissed Petitioner's 2255 Motion as untimely because the prison mailbox rule cannot retroactively make his 2255 Motion timely when it was never filed in the Southern District of Indiana and it was filed for the first time in the Eastern District of North Carolina after he placed it in the mail in November 2011, about five months after the statute of limitations had expired.

2. Whether the district court properly dismissed Petitioner's 2255 Motion as untimely instead of equitably tolling the statute of limitations period that expired in June 2011 until he filed it in the Eastern District of North Carolina after placing it in the mail in November 2011, about five months after the statute of limitations had expired, when Petitioner admits that his 2255 Motion was never filed in the Southern District of Indiana.

STATEMENT OF THE CASE<sup>1</sup>

On January 30, 2009, Petitioner was convicted of two drug-related crimes in the Eastern District of North Carolina ("EDNC"). (J.A. 1, 7-8). On April 28, 2009, the district court sentenced Petitioner to 420 months' imprisonment. (J.A. 8, 35). On March 16, 2010, this Court affirmed Petitioner's conviction and sentence. See United States v. McNeill, 372 F. App'x 420, 423 (4th Cir. 2010)(unpublished). On June 21, 2010, the Supreme Court denied Petitioner's petition for a writ of certiorari. See McNeill v. United States, 130 S. Ct. 3487 (2010).

On November 27, 2011, Petitioner sent a Motion to Accept Petition for Writ of Habeas Corpus along with his 2255 Motion to the clerk of court for the EDNC by placing it in the prison mail system. (J.A. 17-20, 35-87). On December 5, 2011, the EDNC clerk filed these two motions. (J.A. 17-20, 35-87). On December 12, 2011, the district court dismissed Petitioner's 2255 Motion as untimely.<sup>2</sup> (J.A. 93-97).

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<sup>1</sup> All factual citations are to the Joint Appendix ("J.A.") filed with this Court on November 13, 2012.

<sup>2</sup> While the district court did not consider the merits of Petitioner's 2255 Motion and the substance of the Motion is not before this Court, the United States specifically reserves its position that any court that considered his Motion on the merits would deny it.

On December 28, 2011, Petitioner filed a Motion for Relief from Judgment seeking to have the district court overturn its December 12 Order. (J.A. 98-101). On January 3, 2012, the district court denied Petitioner's Motion for Relief from Judgment. (J.A. 104-07). On January 18, 2012, Petitioner filed a timely notice of appeal. (J.A. 108-09).

STATEMENT OF FACTS

Petitioner's one year statute of limitations to file his 2255 Motion expired on June 21, 2011. (J.A. 17, 23). Petitioner should have sent his 2255 Motion to the EDNC. (J.A. 19, 103). Petitioner did not mail his 2255 Motion to the EDNC until November 27, 2011. (J.A. 17-20). To the extent that Petitioner raised some doubt about this fact, the United States agrees with the district court's determination that the 2255 Motion that Petitioner submitted to the prison mail system on November 27, 2011, was not timely and was properly dismissed. No attorney helped Petitioner draft or file his 2255 Motion. (J.A. 17-18).

Petitioner claims that he sent a copy of the same 2255 Motion that was filed in the EDNC on December 5, 2011, to the clerk of court for the Southern District of Indiana ("SDIN") by placing it in the prison mail system on May 23, 2011. (J.A. 18, 98, 102). However, Petitioner admits that his 2255 Motion was never filed in the SDIN. (J.A. 16, 18, 99, 103). Petitioner took no action related to his 2255 Motion from May 23, 2011, to August 16, 2011. On August 16, 2011, Petitioner sent a letter to the clerk of court in the SDIN acknowledging that he had not received confirmation that the clerk had received the 2255 Motion he claims he sent in May. (J.A. 90). Petitioner



received no response from the SDIN clerk to this letter. On October 31, 2011, Petitioner sent a second letter to the SDIN clerk inquiring about the status of his 2255 Motion that he claims he sent in May 2011. (J.A. 89).

Shortly thereafter, the SDIN clerk returned Petitioner's October 31 letter along with a standard printout that stated:

The material you have submitted does not appear to be intended for filing in the U.S. District Court for the Southern District of Indiana and is therefore being returned to you. If the material is intended for filing in the District Court, please return it and include the docket number for the case in which it is to be filed.

(J.A. 91). There is a handwritten note at the top of the printout that reads "[W]e do not [have] a case for you in this district." (J.A. 91). It is unclear who wrote this handwritten note. (J.A. 91). However, it is readily apparent that the SDIN never filed Petitioner's 2255 Motion that he claims that he sent to the clerk in May 2011.

Petitioner next spoke with someone from the SDIN on the telephone. (Brief 6). On November 5, 2011, after speaking with someone from the SDIN and realizing that he had no 2255 Motion on file in the SDIN, Petitioner sent a letter to the EDNC clerk of court asking if his 2255 Motion had been filed or transferred to the EDNC. (J.A. 16). Over three weeks later, on November 27, 2011, Petitioner sent his 2255 Motion to the EDNC by certified mail. (J.A. 17-20, 103).

## SUMMARY OF ARGUMENT

1. The prison mailbox rule makes a document that was filed in court after the statute of limitations had expired timely if it was submitted to the prison mail system on or before the last day of the statute of limitations. The prison mailbox rule does not apply to a document that was never filed. The only 2255 Motion that Petitioner filed was the one that he sent to the EDNC by placing it in the prison mail system on November 27, 2011. Therefore, the prison mailbox rule does not make Petitioner's 2255 Motion timely because it was filed on November 27, 2011, which is five months after the statute of limitations expired on June 21, 2011.

2. The Court should not apply equitable tolling to excuse Petitioner's late filing because he was not reasonably diligent and he did not suffer from extraordinary circumstances at the hands of some force outside of his control. Petitioner's diligent inquiries in November 2011 show that he could have easily avoided all of these issues if he had been similarly diligent in May 2011. If Petitioner actually tried to submit his 2255 Motion to the SDIN in May 2011, then it is his fault that it was not filed. He is trying to blame some governmental actor without any evidence to support his accusations. Therefore, Petitioner is not entitled to equitable tolling

because he cannot satisfy either of the two prongs much less both simultaneously.

## ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S 2255 MOTION AS UNTIMELY BECAUSE THE PRISON MAILBOX RULE CANNOT APPLY TO A DOCUMENT THAT IS NOT FILED WITH A COURT.

A. Standard of Review.

When the underlying facts are undisputed, this Court reviews a district court's decision to deny a § 2255 motion de novo. United States v. Nicholson, 475 F.3d 241, 248 (4th Cir. 2007). As it relates to the prison mailbox rule, there is no dispute that the SDIN never filed a 2255 Motion from Petitioner. Therefore, this Court should review the district court's decision to deny Petitioner's § 2255 motion de novo.

B. Discussion of Issue.

The Court should affirm the district court's rejection of the prison mailbox rule in this case because the prison mailbox rule only applies to documents that are actually filed and Petitioner never filed a 2255 Motion in the SDIN. The prison mailbox rule, as codified in Rule 3(d) of the Rules Governing § 2255 Proceedings, states that a document "is timely if deposited in the institution's internal mailing system on or before the last day for filing." Fed. R. Governing § 2255 Proceedings 3(d). (Emphasis added). The prison mailbox rule has no bearing on whether a document is filed. It only addresses potential statute of limitations issues for a document after that document

is actually filed. Petitioner never filed his 2255 Motion in the SDIN. Thus, the prison mailbox rule cannot apply to Petitioner's 2255 Motion because it was never filed in the SDIN.

In fact, applying the prison mailbox rule in this case makes the only 2255 Motion that Petitioner filed retroactively date back to the day that he placed it in the prison mail system. So Petitioner's 2255 Motion that was filed in the EDNC on December 5, 2011, actually dates back to the day he placed it in the prison mail system, November 27, 2011. However, applying the prison mailbox rule does not aid Petitioner's argument because he filed it about five months after the statute of limitations expired on June 21, 2011.

Petitioner argues that the prison mailbox rule stands for the proposition that once a prisoner places a document in the prison mail system, it is a filed document. The plain language of the rule belies that interpretation. The prison mailbox rule simply establishes whether a document is timely once it has been filed with a court. It cannot circumvent the requirement that a document must actually be filed with a court before the court will consider the document.

Petitioner has asked the Court to expand the interpretation of the prison mailbox rule far beyond its plain language. The Court should not expand the prison mailbox rule beyond the

unambiguous plain meaning of the words comprising it. See Hillman v. I.R.S., 263 F.3d 338, 342 (4th Cir. 2001). Such a reading of the prison mailbox rule would harm the operation and efficiency of the courts. Under Petitioner's proposed reading of the prison mailbox rule, a prisoner who missed a deadline could file a document for the first time after the statute of limitations had expired and then claim that a court lost or mishandled an identical copy of the document that had been sent in the prison mail system before the deadline expired. This would expose courts to time consuming efforts to ferret out manipulation and fraud. The current system is straightforward, fair, and based on longstanding procedures that are easily understood, even for a pro se inmate.

Petitioner's argument that the SDIN had an obligation to transfer his 2255 Motion is fundamentally flawed because the SDIN could not transfer a case that was never before it. Even if a court may have a duty to transfer a 2255 motion that should have been filed in a different court, such a duty was never implicated here. The district court in the SDIN neither abused its discretion nor failed to fulfill its duty because there was no case filed in the SDIN that it could have transferred. Thus, Petitioner's argument about the SDIN transferring his 2255 Motion is wholly inapplicable.

Petitioner's attempt to trump up questions about whether the SDIN received and ignored his 2255 Motion sometime in May or June 2011 is, at best, speculative. There is no evidence that the SDIN ever received a 2255 Motion from Petitioner. The only document that the SDIN ever received from Petitioner was the October 31 letter which it returned with the printout.<sup>3</sup> (J.A. 91). The printout was a simple explanation that the SDIN could not file Petitioner's October 31 letter because the letter was not connected to any case that had been filed in the SDIN.

While Petitioner claims to be baffled by the SDIN's response to his October 31 letter, the straightforward explanation is the only interpretation of that printout that makes sense. (Brief at 15). Petitioner asks the Court to speculate that the SDIN had received several other documents from him when it returned his October 31 letter with the printout. He then asks the Court to conclude that when the SDIN

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<sup>3</sup> Petitioner refers to this formulaic printout attached to the returned October 31 letter as "cryptic" in an effort to suggest that the SDIN received his 2255 Motion that he claims he sent it in May 2011. (Brief at 6, 9, 15, 19). However, the SDIN clerk's office returned his October 31 letter with this printout to let him know that there was nothing on file at the clerk's office to which the letter could refer. If the 2255 Motion was already on file at the SDIN clerk's office, then the clerk would have connected his October 31 letter to it and filed the letter on the docket associated with the 2255 Motion. This is not unclear or cryptic, it is generally understood and entirely appropriate procedure for the clerk's office. Clerk's offices cannot file random letters inquiring about nonexistent cases.

returned the October 31 letter with the printout, the SDIN actually intended to refer to other documents that it allegedly possessed but did not return to him.

Instead, this printout means exactly what it says at face value. The SDIN could not file a random letter that it received that had no connection to any pending case. So the SDIN returned the October 31 letter to Petitioner and asked him to resend it with identifying information connecting it to a pending case so that the SDIN could connect the letter to that related case. Of course, Petitioner could not do this, because there was no pending case. The Court should reject Petitioner's unsubstantiated interpretation in favor of the obvious explanation that requires no speculation.

The Court should affirm the district court's rejection of the prison mailbox rule because it cannot apply given these facts. A rule about timing of a document that is filed in a court cannot and does not apply until after the document is actually filed. Petitioner never filed his 2255 Motion in SDIN, so the prison mailbox rule cannot and does not apply.



II. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S 2255 MOTION AS UNTIMELY FINDING THAT HE IS NOT ENTITLED TO EQUITABLE TOLLING BECAUSE HE DID NOT ACT DILIGENTLY AND NO FORCES OUTSIDE HIS CONTROL PRESENTED EXTRAORDINARY CIRCUMSTANCES PRECLUDING HIM FROM FILING IN A TIMELY FASHION.

A. Standard of Review.

When the underlying facts are undisputed, this Court reviews a district court's decision to deny equitable tolling de novo. Rouse v. Lee, 339 F.3d 238, 248 (4th Cir. 2003). In all other circumstances, this Court reviews the denial of equitable tolling for an abuse of discretion. (Id.) Because the district court found that Petitioner used an incorrect address in sending his 2255 Motion to the SDIN in May 2011 and Petitioner disputes this fact, this Court should review the district court's decision to reject Petitioner's request to apply equitable tolling for an abuse of discretion.

B. Discussion of Issue.

The Court should affirm the district court's rejection of equitable tolling because Petitioner was not reasonably diligent, and he missed the deadline based on his own actions. Equitable tolling may apply to excuse an otherwise untimely habeas motion under rare circumstances. Harris v. Hutchinson, 209 F.3d 325, 328 (4th Cir. 2000). "A petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing

his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) (citation and quotation marks omitted).

Petitioner did not diligently pursue his efforts to comply with filing his 2255 Motion within the statute of limitations time period. While a petitioner need not employ maximum feasible diligence in pursuing the timely filing of a 2255 motion, he does need to use reasonable diligence. Id. at 2565. Petitioner did not use reasonable diligence to ensure that his 2255 Motion was filed in either the SDIN or the EDNC. First, it is undisputed that Petitioner should have filed his 2255 Motion in the EDNC, not the SDIN. 28 U.S.C. § 2255(a). This statute did not change from the time that Petitioner claims he originally submitted his 2255 Motion in May until the time that he realized that he should have filed it in the EDNC in November. There is no excuse for this mistake.

Next, Petitioner’s actions in November belie his claim that he was only able to communicate with the SDIN by using the mail. (Brief at 23). Petitioner claims that he mailed his 2255 Motion to the SDIN in May 2011 and then did nothing for about three months. He received no confirmation that the SDIN received or filed his 2255 Motion before the statute of limitations expired

on June 21, 2011. He knew that the statute of limitations expired on June 21, 2011. (Brief at 5; J.A. 23). Nevertheless, he took no action to confirm that any court had received and filed his 2255 Motion prior to the expiration of this deadline.

In August, about two months after the deadline had expired, Petitioner sent a letter to the SDIN asking if the court had received his 2255 Motion. (J.A. 90). Then he waited another two and one-half months before sending another letter to the SDIN on October 31, 2011, asking for confirmation of receipt of his 2255 Motion. (J.A. 89). When he received the standard printout along with his returned October 31 letter as a reply from the SDIN, Petitioner called the SDIN and spoke to someone who worked there. (J.A. 91, Brief at 6). During this conversation, he confirmed that his 2255 Motion that he claims he sent in May 2011 was not filed in the SDIN. (Brief at 6).

Petitioner was able to call the SDIN in November and confirm that his 2255 Motion had not been filed. This shows that he could have called the SDIN in May or June 2011 before the statute of limitations expired. Thus, Petitioner had the ability to make a telephone call to the SDIN and immediately obtain information. Petitioner has no good excuse for not calling the SDIN in May or June 2011, prior to the expiration of the statute of limitations. Had he taken this simple action

prior to the expiration of the statute of limitations, he could have timely filed his 2255 Motion in the EDNC.

Shortly after he realized that his 2255 Motion had never been filed in the SDIN, on November 5, 2011, Petitioner sent a letter to the EDNC asking if his 2255 Motion had been filed in that district. Petitioner waited more than three weeks, on November 27, 2011, to place a copy of his 2255 Motion in the mail to the EDNC. This three week delay, again, shows his lack of diligence.

When he finally sent his 2255 Motion to the EDNC, he sent it by certified mail. This allowed him to ensure that the EDNC received it. Petitioner could have used certified mail to send his 2255 Motion to the SDIN in May 2011. While there is no requirement that Petitioner send his 2255 Motion via certified mail, he chose to do so in November 2011. Thus, as seen by his own actions, his decision to not use certified mail in May 2011 was not reasonable diligence.

When considering whether an inmate employed reasonable diligence such that he could avail himself of equitable tolling, courts should consider the totality of his circumstances. See Ramos-Martinez v. United States, 638 F.3d 315, 324 (1st Cir. 2011). Thus, the Court should compare the totality of what Petitioner claims he did in May 2011 versus what the record

shows he did in November 2011. After doing so, the Court should conclude that Petitioner did not act with reasonable diligence to ensure that his 2255 Motion was filed before the statute of limitations expired in June 2011. Petitioner could have done much more in May and June 2011 as he eventually did in November 2011.

Even if the Court determines that Petitioner used reasonable diligence in pursuing the timely filing of his 2255 Motion, there were no extraordinary circumstances outside of his control that precluded him from filing before the statute of limitations had expired. Extraordinary circumstances exist in one of two ways:

The doctrine has been applied in two generally distinct kinds of situations. In the first, the [Petitioner was] prevented from asserting [his] claim[] by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond [Petitioner's] control made it impossible to file the claim[] on time.

Harris, 209 F.3d at 330. (citation and quotation marks omitted).

There is no allegation that the United States took a wrongful act to intentionally prevent Petitioner from filing his 2255 Motion, so the first situation is not at issue.

As to the second situation, Petitioner's own actions made his 2255 Motion untimely, not some extraordinary circumstance

outside of his control.<sup>4</sup> This is not a case about the prison mail system failing to deliver mail. This is not a case about the United States Postal Service failing to deliver mail. This is not a case about a district court failing to transfer a case that it should have transferred. This is a case about Petitioner failing to take the necessary steps to ensure that his 2255 Motion was filed prior to the expiration of the statute of limitations.

The district court concluded that the most likely reason that Petitioner's 2255 Motion was never filed in the SDIN was that he used an improper address. (J.A. 106). This does not qualify as an extraordinary circumstance outside of his control.

In any event, this explanation is more likely to have occurred than Petitioner's claim that the prison, the Postal Service, or the SDIN lost or mishandled his 2255 Motion in May 2011.<sup>5</sup> Petitioner provided no evidence that the prison, the

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<sup>4</sup> In his brief, Petitioner puts a great deal of emphasis on his unsuccessful attempts to hire counsel to assist him file his 2255 Motion and his subsequent reliance on assistance from fellow inmates in drafting and attempting to file his 2255 Motion. It is irrelevant that Petitioner unsuccessfully tried to hire counsel and that he relied upon his fellow inmates to help him draft and attempt to file his 2255 Motion. Petitioner chose to pursue his 2255 Motion as a pro se litigant. He was responsible for his filings. Any attempt to explain his failure to properly file his 2255 Motion, for whatever reason, is of no consequence and cannot excuse his own actions.

<sup>5</sup> Petitioner provided no evidence to the district court of any

Postal Service, or the SDIN lost or mishandled his 2255 Motion in May 2011. The only evidence is that the prison, the Postal Service, and the SDIN received his October 31 letter as evidenced by the SDIN returning the October 31 letter to Petitioner. To the extent that Petitioner relied upon the prison, the Postal Service, or the SDIN, those entities appeared to work fine when used properly with the October 31 letter.

Furthermore, Petitioner could have taken steps to ensure that his 2255 Motion had been filed after he sent it on May 21, 2011, before the deadline expired on June 21, 2011. He could have called the SDIN, as he did later. He could have sent his 2255 Motion by certified mail, as he did later. These steps were obviously not extraordinary because he was able to take them in November 2011. Instead, he did nothing for three months while his deadline expired.

The Court should protect against expanding the extraordinary circumstances that might give rise to equitable tolling because:

[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of

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contemporaneous records that would support his claim that he placed his 2255 Motion in the prison mail system in May 2011.

excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where-due to circumstances external to the party's own conduct-it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

Harris, 209 F.3d at 330. Petitioner has offered no evidence to support his claim that extraordinary circumstance outside of his control caused him to miss the deadline to file his 2255 Motion. His whole argument on the extraordinary circumstance is couched as a hypothetical. Simply put, Petitioner missed the statute of limitations deadline that he admittedly knew about and then, five months later, filed his 2255 Motion.

If the Court allows Petitioner to avoid the consequences of his failure to comply with the statute of limitations, the floodgates will be opened for other prisoners to make unsupported claims similar to Petitioner's that they submitted their 2255 motions before the statute of limitations but it got lost through no fault of their own. Under these facts, Petitioner failed to provide evidence of his reasonable diligence or extraordinary circumstances outside of his control that precluded him from complying with the statute of limitations. Therefore, the Court should affirm the district



court's decision to reject equitable tolling and dismiss  
Petitioner's 2255 Motion as untimely.

CONCLUSION

For the foregoing reasons, this Court should affirm the  
judgment of the district court.

Respectfully submitted, this 16th day of January, 2013.

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