

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

JUSTEN RUSSELL, :
Petitioner, :
-vs- :
LaSHANN EPPINGER, :
Respondent. :

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FOR PETITIONER:

Justen Russell
Grafton Corr. Inst.
2500 S. Avon-Belden Rd.
Grafton, Ohio 44044

Petitioner, in pro se

FOR RESPONDENT:

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Assistant Ohio Attorney General

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Justen Russell,)	CASE NO. 1:16 CV 2097
)	
Petitioner,)	JUDGE PATRICIA A. GAUGHAN
)	
vs.)	
)	
Margaret Bradshaw, Warden,)	<u>Memorandum of Opinion and Order</u>
)	
Respondent.)	

Introduction

This matter is before the Court upon the Report and Recommendation of Magistrate Judge Parker (Doc. 10) which recommends dismissal of the Petition for Writ of Habeas Corpus pending before the Court. Petitioner filed objections to the recommendation. For the following reasons, the Report and Recommendation is ACCEPTED:

Standard of Review

Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides, "The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any

proposed finding or recommendation.”

Discussion

Petitioner is incarcerated following his plea of guilty to aggravated vehicular homicide and felonious assault. The Magistrate Judge found the Petition, which raises one ground for relief, to be untimely. This Court agrees.

Under the AEDPA, petitioner had one year to file his Petition from the date his conviction became final by the conclusion of direct review, or the expiration of the time for seeking such review. Petitioner pleaded guilty on September 12, 2012, and agreed to his 15 year sentence. Petitioner was not informed of his appellate rights at sentencing, and he did not file a timely appeal. An attempt to file a delayed direct appeal was denied on April 23, 2015. The Ohio Supreme Court declined jurisdiction on August 26, 2015. The herein Petition was filed on August 18, 2016.

The Magistrate Judge agreed with respondent that the Petition is time-barred. This Court agrees. His conviction became final on October 22, 2012- one year after his September 20, 2012 sentence and his 30 day appeal time had expired. The statute of limitations began running on October 23, 2012 and expired on October 23, 2013 without petitioner filing a habeas petition. Despite petitioner's contentions, the trial court's failure to inform petitioner of his appellate rights did not constitute a state-created impediment to the filing of a timely petition thereby tolling the statute of limitations. *Miller v. Carson*, 49 Fed.Appx.495 (6th Cir. 2002, *Baker v. Wilson*, 2009 WL 313325 (N.D.Ohio Feb. 6, 2009)). Additionally, petitioner was aware of the factual predicate of his habeas claim (a constitutional violation based on the failure to be informed of his right to appeal) at least as of the date he filed his delayed appeal

(March 26, 2015) because the attempt to file the delayed appeal was based on the same failure to be informed of his appellate rights. This Petition was filed more than one year later.

Finally, petitioner is not entitled to equitable tolling given that he has not shown he was diligent in pursuing his rights or any extraordinary circumstances. In fact, petitioner agreed to the 15 year sentence as part of his plea agreement.

Petitioner's objections are without merit especially given that his request to file a delayed appeal shows that he became aware of his appellate rights at least at that time and still did not file a habeas petition within one year.

For these reasons, the Court finds the Petition to be untimely.

Conclusion

For the reasons set forth herein and for the reasons set forth in the Magistrate Judge's Report and Recommendation, the Petition for Writ of Habeas Corpus is dismissed. Furthermore, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b).

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Court
Chief Judge

Dated: 8/24/17

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Justen Russell,)	CASE NO. 1:16 CV 2097
)	
Petitioner,)	JUDGE PATRICIA A. GAUGHAN
)	
vs.)	
)	
Margaret Bradshaw, Warden,)	<u>Judgment Entry</u>
)	
Respondent.)	

This Court, having issued its Memorandum of Opinion and Order ACCEPTING the Report and Recommendation of Magistrate Judge Parker (Doc. 10), hereby dismisses the Petition for Writ of Habeas Corpus. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R.App.P. 22(b).

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Court
Chief Judge

Dated: 8/24/17

FILED
Jan 18, 2018
DEBORAH S. HUNT, Clerk

O R D E R

On August 18, 2016, Russell filed a federal habeas petition, arguing that he was denied due process, equal protection, and the effective assistance of counsel when the trial court and his counsel failed to notify him of his right to appeal and ensure that a timely appeal was filed. The

district court dismissed the petition as untimely and declined to issue a certificate of appealability.

To obtain a certificate of appealability, a habeas corpus petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where a district court has rejected a claim on procedural grounds, the petitioner must show both that jurists of reason would find the district court's procedural ruling debatable and that jurists of reason would find it debatable whether the petition states a valid constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Russell has made the showing necessary to obtain a certificate of appealability only as to the issue of whether the claim raised in his federal habeas petition is timely under 28 U.S.C. § 2244(d)(1)(D) and (d)(2).

Accordingly, Russell's motion for leave to proceed in forma pauperis is **GRANTED** and his application for a certificate of appealability is **GRANTED** as to whether his claim that he was denied due process, equal protection, and the effective assistance of counsel when the trial court and his counsel failed to notify him of his right to appeal and ensure that a timely appeal was filed is timely under 28 U.S.C. § 2244(d)(1)(D) and (d)(2). The Clerk's Office is directed to issue a briefing schedule as to the certified issue.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUSTEN RUSSELL,

Petitioner,

V.

MARGARET BRADSHAW,

Respondent.

Case No. 1:16cv2097

JUDGE PATRICIA A. GAUGHAN

MAGISTRATE JUDGE

THOMAS M. PARKER

REPORT AND RECOMMENDATION

I. Introduction

Justen Russell was sent to prison for an agreed 15 year term of incarceration after pleading guilty to aggravated vehicular homicide and felonious assault. He now petitions the court for a writ of habeas corpus claiming he was unconstitutionally denied the opportunity to appeal. Respondent Warden Eppinger¹ moves to dismiss on the ground that Russell's petition is time barred. Russell disagrees, explaining that he is entitled to a later statute of limitations expiration date under the statute or, in the alternative, to the application of a tolling provision. He bases his argument on the fact that his Fifth, Sixth and Fourteenth Amendment rights were violated when he was not informed of his appellate rights by the trial court and his trial counsel. Because I find that neither statutory nor equitable tolling is applicable and nothing required the

¹ Respondent informed the court that Russel was transferred to Grafton Correctional Institution on September 27, 2016. Thus, the actual respondent is Warden LaShann Eppinger.

Cason, 49 Fed. Appx. 495, 497 (6th Cir.2002) (“Although [failing to give notice of his appeal rights at sentencing and not timely appointing counsel to perfect a belated appeal] may have interfered with Miller’s direct appeal in state court in the early 1990s, Miller has failed to explain how the action prevented him from filing his federal habeas corpus petition until 2001.”). The Sixth Circuit is joined by several other courts in finding that the state-created impediment must prevent the petitioner from filing a federal habeas action, not just a direct appeal in state court. See *Smith v. Hudson*, No. 5:06cv2959, 2008 WL 2079386, *2 (N.D. Ohio May 15, 2008) (“Petitioner focuses on impediments that interfered with his ability to file a direct appeal in state court. None of these factors served to impede Petitioner’s ability to file his federal petition in a timely manner.”); *Neff v. Brunsman*, No. 1:06cv135, 2007 WL 912122, —7–8 (S.D. Ohio March 23, 2007) (no state-created impediment where appointed counsel informed petitioner of his right to appeal but did not tell him he only had thirty days to do so because petitioner “has not alleged any facts even remotely suggesting that his counsel or trial court improperly advised him that he had no federal remedies or engaged in any conduct that would have prevented petitioner from filing a timely habeas petition”); *Welches v. Lakeside Corr. Facility*, No. 3:08cv152, 2008 WL 4623055, *2 (N.D. Ind. Oct. 16, 2008) (petitioner’s allegation that he was not informed of his right to appeal his sentence is not a state action that prevented him from filing a federal habeas petition); *Pearce v. McNeil*, No. 4:08cv156, 2008 WL 4057760, *3 (N.D. Fla. Aug. 22, 2008) (“It is inconceivable that lack of advice regarding a state court direct appeal would ever *prevent* the filing of a § 2254 habeas petition in federal court. There is a difference between not knowing about the existence of a claim, which frequently happens, and an actual impediment that prevents the claim from being filed.”) (emphasis in original); *Stimel v. Dretke*, No. V–05–108, 2006 WL 2770025, *5 (S.D. Tex. Sept. 22, 2006) (same).

Id. at *8.

As in the cases mentioned above, Russell has not shown how the failure to give notice of his appellate rights prevented him from filing his federal habeas petition. The undersigned finds *Miller* and *Baker* to be more factually analogous to the present case⁴ than *Waldron*. As a result, I

⁴ Notably, one of the ways that this case is different from *Baker* actually weighs even more strongly in favor of finding that §2244(d)(1)(B) does not apply. In *Baker*, petitioner alleged that his guilty plea was not entered knowingly because his counsel advised him that he would not receive jail time, but he was sentenced to 10 years imprisonment. *Baker*, 2009 WL 313325 at *4. Here, Russell admits that he received the benefit of his bargain (i.e., the parties’ recommended that he received a 15 year sentence and that is what Russell received). Doc. 8-2, Page ID# 140, 151. Russel

find §2244(d)(1)(B) inapplicable, consistent with *Winkfield*. Russell is not entitled to calculation of the statute of limitations under §2244(d)(1)(B).

3. §2244(d)(1)(C) – New Constitutional Right

Russell has not argued, nor is there evidenced to suggest, that the provisions of 28 U.S.C. §§2244(d)(1)(C) applies to establish a later commencement of the statute of limitations.

4. §2244(d)(1)(D) – Factual Predicate

§ 2244(d)(1)(D) provides that the one-year habeas period could commence on “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” In his petition, Russell argues that he is entitled to a later start date pursuant to §2244(d)(1)(D) because he was not informed of his appellate rights. ECF Doc. No. 1, Page ID# 10. Russell’s sole claim is that the trial court and trial counsel failed to notify of him of his appellate rights. His delayed appeal was based on the same reasoning. ECF Doc. No. 8-1, Page ID# 89-98. Thus, Russell was aware of the factual predicate of his claim no later than the date he filed his delayed appeal – March 25, 2015. *Id.* at 89.

Thus, even if §2244(d)(1)(D) were applied, the AEDPA “clock” began running no later than March 25, 2015, and expired one year later on March 26, 2016. Russell filed his petition a little over four months after that, on August 18, 2016. Therefore, §2244(d)(1)(D) does not excuse the untimeliness of Russell’s petition.

B. Russell is Not Entitled to Tolling

1. Statutory Tolling

Under 28 U.S.C. § 2244(d)(2), Russell was entitled to toll the statute of limitations during the time “a properly filed application for State post-conviction or other collateral review...[was] pending...” However, “[t]he tolling provision does not... ‘revive’ the limitations period (i.e.,

restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations.” *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) (quoting *Rashid v. Khulmann*, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)); see *Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001). Thus, Russell’s March 2015 delayed appeal, filed over a year after the statute of limitations expired, neither re-started nor tolled the limitations period.

2. Equitable Tolling

The AEDPA’s §2244(d)(1) statute of limitations can be equitably tolled, “when a litigant’s failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond the litigant’s control.” *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011) (quoting *Robertson v. Simpson*, 624 F.3d 781, 783 (6th Cir. 2010)), cert. denied, 133 S. Ct. 187 (2012). See also, *Holland v. Florida*, 560 U.S. 631, 649 (2010) (the statute of limitations for habeas petitions is “subject to equitable tolling in appropriate cases.”). Russell bears the burden of establishing that equitable tolling applies. *McClendon v. Sherman*, 329 F.3d 490, 494 (6th Cir. 2003). The petitioner must point to extraordinary circumstance that prevented timely filing. Moreover, equitable tolling is granted “sparingly.” *Hall*, 662 F.3d at 749 (quoting *Robertson*, 624 F.3d at 784).

Russell’s argument that equitable tolling applies is not well taken. The Sixth Circuit has endorsed the two-part test established in *Holland v. Florida* as the “governing framework” to apply in determining the applicability of equitable tolling. *Hall*, 662 F.3d at 750 (citing *Robinson v. Easterling*, 424 F. App’x 439, 442 n.1 (6th Cir. 2011), cert. denied, 132 S. Ct. 456 (2011)). Therefore, a habeas petitioner is entitled to equitable tolling only if he demonstrates that (1) “he has been diligent in pursuing his rights;” and (2) that “an extraordinary circumstance

caused his untimely filing.” *Hall*, 662 F.3d at 750; *see also, Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 1815, 161 L. Ed. 2d 669 (2005). Russell has failed to establish an entitlement to equitable tolling.

First, Russell has not shown that he has been “diligent in pursuing his rights.” He waited until three years after his conviction to file his delayed appeal. A petitioner who sits on their rights for three years has not shown reasonable diligence. *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 463 (6th Cir. 2012)(finding that a petitioner was not diligent where he waited almost three years to file a motion after the state court decision); *See also Robinson v. Easterling*, 424 F. App'x 439, 443 (6th Cir. 2011)(“While this Court has recognized that attorney assurances and the realities of incarceration may justifiably delay a petitioner's request for a case status update, ... this Court has never granted equitable tolling to a petitioner who sat on his rights for a year and a half.”). Even if Russell's argument that he didn't know he had a right to appeal is credited, he still waited nearly a year and a half after he became aware of his right to appeal (again, as noted above, not later than March 25, 2015, the date he applied for leave to pursue a delayed appeal) before filing the instant habeas petition in August 2016.

Second, Russell does not show any “extraordinary circumstance” that caused his untimely habeas filing. Russell's ignorance of the law and lack of legal assistance do not amount to extraordinary circumstances. *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012) (“*pro se* status and lack of knowledge of the law are not sufficient to constitute an extraordinary circumstance and to excuse his late filing.”); *See also Farrow v. Anderson*, No. 1:08CV1429, 2009 WL 3004024, at *19 (N.D. Ohio Sept. 15, 2009) (finding that lack of knowledge and attorney ineffectiveness were not extraordinary circumstances to warrant equitable tolling). Because Russell has failed to demonstrate that he has pursued his rights

diligently or that some extraordinary circumstance prevented his timely filing, he has failed to demonstrate that the statute of limitations should be equitably tolled in this instance.

This is not a case like *Thompson v. Wilson*, 523 F. Supp.2d 626 (N.D. Oh. 2007, Gaughan, J.). There, a habeas petitioner who pleaded guilty and was sentenced was never told of his right to appeal by the trial court or his defense counsel. This court did not decide a statute of limitations issue. Instead, the court ruled that no procedural default had resulted from the failure to pursue a direct state court appeal, because petitioner had shown a cause for his failure to appeal (lack of notice) and prejudice (the non-pursuit of the appeal). Unlike the instant case, Thompson filed his federal habeas petition within less than a year from the date he discovered the factual predicate for his claim. Thus, the matter was timely filed under 28 U.S.C. § 2244(d)(1)(D). *Thompson* provides Russell with no basis for equitable tolling or an avoidance of the statute of limitations.

Russell is a petitioner who entered into a plea agreement under which a murder charge was dismissed in exchange for his agreement to plead guilty to aggravated vehicular assault and felonious assault. By pleading under this agreement, Russell protected himself from the potential for a sentence of 15 years to life by agreeing to serve a “flat” 15 year sentence. He does not assert that he was actually innocent of the charges to which he entered guilty pleas. Instead, he claims he was unconstitutionally deprived of his right to appeal from the sentence he agreed to serve. He has not identified any equitable grounds for tolling the AEDPA statute of limitations.

Absent equitable tolling, his sole ground for relief is untimely under the AEDPA and should be denied and dismissed as time-barred. I recommend that the warden’s motion to dismiss be granted.

C. No certificate of appealability should be granted


When a petition is to be dismissed on a procedural basis, the inquiry under § 2253(c) is two-fold. In such cases, a certificate of appealability “should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 485, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)(emphasis added). As the Court explained, “[w]here a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.” *Id.* at 486.

If the Court accepts the foregoing recommendations, Russell cannot show that the Court’s rulings on the statute of limitations issue is debatable. Thus, the undersigned recommends that the Court should conclude that Russell is not entitled to a certificate of appealability in this case.

IV. Recommendations

Russell’s petition for a writ of habeas corpus was filed after the statute of limitations expired. He has presented no grounds by which to overcome the effect of the statute of limitations. I recommend that the court **GRANT** respondent’s motion to dismiss and **DISMISS** the petition. I further recommend that no certificate of appealability be issued.

Dated: June 23, 2017


Thomas M. Parker
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days after being served with a copy of this document. Failure to file objections within the specified time may waive the right to appeal the District Court's order. See *U.S. v. Walters*, 638 F.2d 947 (6th Cir. 1981). See also *Thomas v. Arn*, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986).

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-3959

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 05, 2018
DEBORAH S. HUNT, Clerk

JUSTEN RUSSELL,

Petitioner-Appellant,

v.

MARGARET BRADSHAW, Warden,

Respondent-Appellee.

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) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE NORTHERN DISTRICT OF
) OHIO
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ORDER

Before: SILER and THAPAR, Circuit Judges; HOOD, District Judge.*

Justen Russell, an Ohio prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus under 28 U.S.C. § 2254. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Russell pleaded guilty to aggravated vehicular homicide and four counts of felonious assault. On September 20, 2012, the trial court sentenced Russell to an aggregate prison term of 15 years. On March 25, 2015, Russell sought leave to file a delayed appeal on the basis that the trial court and his counsel failed to advise him of his right to appeal. The Ohio Court of Appeals

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

denied Russell leave to file a delayed appeal, and, on August 26, 2015, the Ohio Supreme Court declined to review the case.

On August 18, 2016, Russell filed a federal habeas petition, arguing that he was denied due process, equal protection, and the effective assistance of counsel when the trial court and his counsel failed to notify him of his right to appeal and ensure that a timely appeal was filed. The district court dismissed the petition as untimely and declined to issue a certificate of appealability. We granted Russell a certificate of appealability as to whether his petition is timely under 28 U.S.C. § 2244(d)(1)(D) and (d)(2).

On appeal, Russell argues that the district court erred by dismissing his petition because it is timely under § 2244(d)(1)(D) and (d)(2), and, in any case, he is entitled to equitable tolling.

We review de novo a district court's dismissal of a habeas petition as untimely under 28 U.S.C. § 2244. *Board v. Bradshaw*, 805 F.3d 769, 771 (6th Cir. 2015). Under 28 U.S.C. § 2244(d)(1)(D), the applicable one-year limitations period begins running on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." A habeas petitioner bears the burden of proving that he exercised due diligence for the statute of limitations to begin running from the date he discovered the factual predicate of his claim. *DiCenzi v. Rose*, 452 F.3d 465, 471 (6th Cir. 2006). Under 28 U.S.C. § 2244(d)(2), the limitations period is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."

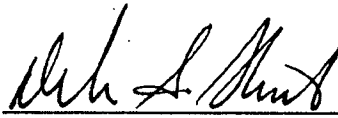
The district court determined that, if Russell were entitled to a delayed start date under § 2244(d)(1)(D), the limitations period would begin no later than March 25, 2015, when Russell filed his motion for a delayed appeal, rendering untimely his federal petition, which was filed almost 17 months later. But, because Russell is entitled to statutory tolling under § 2244(d)(2) during the five months that his motion for leave to file a delayed appeal was pending in state court, *see Board*, 805 F.3d at 770, his federal petition would be timely if the limitations period began on March 25, 2015. If, however, the limitations period under § 2244(d)(1)(D) began running prior to March 2015, Russell's federal petition is untimely.

Russell has not met his burden of showing that he exercised due diligence during the 29-month period between his sentencing in September 2012 and March 2015. He has failed to identify anything that he did during the period to inquire about his potential appellate rights, and has otherwise provided no adequate explanation for the long delay. *See Shorter v. Richard*, 659 F. App'x 227, 232 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 1348 (2017). Thus, Russell's federal habeas petition is untimely under § 2244(d)(1)(D).

We need not address Russell's argument that he is entitled to equitable tolling because it is beyond the scope of the certificate of appealability. *See Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 752-53 (6th Cir. 2011).

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

A handwritten signature in dark ink, appearing to read 'Deborah S. Hunt', is written over a horizontal line.

Deborah S. Hunt, Clerk