UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YUSUF O. BUSH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 19-1870 (KBJ)
	)	
DAVID J. EBBERT,	)	
	)	
Respondent.	)	
	)	

MEMORANDUM OPINION

Pro se petitioner Yusuf O. Bush ("Bush") is an inmate who is currently incarcerated at the United States Penitentiary in Pollock, Louisiana as a result of his pleading guilty in the Superior Court for the District of Columbia ("Superior Court") to a charge of first-degree sexual abuse (a plea that he later attempted to withdraw). Before this Court at present is a petition for writ of habeas corpus that Bush has filed pursuant to 28 U.S.C. § 2254, in which he names Bureau of Prisons Warden David J. Ebbert as Respondent. (*See* Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Pet."), ECF No. 1.) Bush alleges that his current confinement violates the Constitution because he received ineffective assistance of counsel on appeal. (*See id.* at 5–6.)[1] In response to the Petition, Ebbert has filed a Motion to Dismiss, in which he argues that this Court must dismiss Bush's Petition because it is untimely under the one-year statute of limitations that is applicable to habeas petitions brought under section 2254. (*See* Mot. to Dismiss, ECF No. 17, at 10–

[1] Page number citations to the documents that the parties have filed refer to those that the Court's electronic filing system automatically assigns.

"Appendix "B" "

12.) In addition, and in a footnote, Ebbert also states that even if Bush's Petition is timely, he "does not concede on the merits[,]" and that this Court must defer to the decision of the D.C. Court of Appeals denying Bush's motion to recall the mandate, wherein Bush made claims for ineffective assistance of appellate counsel, because that ruling was "neither unlawful, unreasonable in its application of the law, nor based on unreasonable facts." (*Id.* at 12–13 n.5.)

For the reasons explained below, this Court agrees with Ebbert that Bush's petition is barred by the applicable statute of limitations, because he has not complied with the one-year filing period for petitions brought under 28 U.S.C. § 2254, and he has not articulated any facts that would enable this Court to apply equitable tolling with respect to the statutory deadline. Therefore, as stated in the accompanying Order, Ebbert's motion to dismiss will be **GRANTED**, the Petition will be **DENIED**, and this case will be **DISMISSED**.

I. BACKGROUND[2]

On August 6, 2014, Bush was charged in the Superior Court with two counts of first-degree sexual abuse, one count of kidnapping, and two counts of simple assault. (*United States v. Bush*, No. 2014-CF1-8930 (D.C. Super. Ct.) ("Super. Ct. Docket"), Ex. A to Mot. to Dismiss, ECF No. 17-1, Aug. 6, 2014 docket entries.) Bush pled not guilty and proceeded to a jury trial on September 2, 2014, represented by counsel. Three days later, after many of the government's witnesses had testified during its case-in-chief, Bush accepted the terms of a plea agreement and pled guilty to one count of first-degree

[2] The underlying facts, which are undisputed, are drawn from the parties' pleadings, memoranda and accompanying exhibits, and the public dockets of the courts of the District of Columbia.

sexual abuse, and the jury was discharged. (*See id.*, Sept. 5, 2014 docket entries.) On September 17, 2014, Bush filed a motion to withdraw his guilty plea (*see id.*, Sept. 17, 2014 docket entry), but the trial judge denied that motion on April 2, 2015, following an evidentiary hearing (*see id.*, Mar. 20–26, 2015 & Apr. 2, 2015 docket entries). The trial judge then sentenced Bush to sixteen years of imprisonment, pursuant to the parties' plea agreement. (*See id.*, Apr. 2, 2015 docket entry; *see also Bush v. United States*, No. 15-CF-351, Mem. Op. & J. (D.C. Dec. 9, 2016) ("Appeal Decision"), ECF No. 21, at 4–5 (recounting Bush's trial, plea, and motion to withdraw).) On April 3, 2015, Bush's trial counsel filed a notice of appeal, and on April 10, 2015, the D.C. Court of Appeals appointed Gregory Gardner to represent Bush on appeal. (*See* Super. Ct. Docket, Apr. 3, 2015 & Apr. 10, 2015 docket entries.)

The D.C. Court of Appeals affirmed Bush's conviction on December 9, 2016, concluding, among other things, that the trial judge's undisputed finding "that appellant received the effective representation of counsel in connection with his trial and guilty plea" weighed "against allowing him to withdraw his guilty plea." (Appeal Decision at 10.) Following a comprehensive analysis of the trial record and Bush's mental state, the D.C. Court of Appeals further concluded that "the trial judge did not abuse her discretion in considering and denying appellant's motion to withdraw his guilty plea under the 'fair and just' standard." (*Id.* at 11.) Bush did not petition the Supreme Court for a writ of certiorari within ninety days (*see* S. Ct. R. 13(1)), thereby rendering his conviction final on March 9, 2017.[3]

[3] *See* S. Ct. R. 13(3) ("The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate or its equivalent under local practice.") (parentheses omitted)).

Meanwhile, on January 3, 2017, the D.C. Court of Appeals issued its mandate of affirmance. Bush moved to recall the mandate on June 16, 2017, questioning Gardner's performance. (*See* Pet. at 3; Mot. to Dismiss at 7–8.) On February 5, 2018, the D.C. Court of Appeals denied Bush's recall motion, concluding that Bush had failed "to set forth a sufficient fact-based argument that his appellate counsel provided ineffective assistance in failing to pursue appellant's claim that his trial counsel's supposed ineffectiveness rendered appellant's guilty plea involuntary." (ECF No. 21 at 14–15 (*Bush v. United States*, No. 15-CF-351, Order (D.C. Feb. 5, 2018)).)

The instant legal action was formally filed some sixteen months later, on June 21, 2019. (*See* Pet. at 1.) However, Bush states under penalty of perjury that he first placed his section 2254 habeas petition in his prison's mail system on November 22, 2018, and then re-sent it on May 8, 2019 (*id.* at 15).[4] For purposes of assessing the timeliness of the Petition, and in light of Bush's status as a pro se prisoner, this Court will use the alleged earlier mailing date as the filing date. Ebbert moved to dismiss the Petition on February 3, 2020, arguing that it is untimely (*see* Mot. to Dismiss at 10–12) and that this Court should defer to the findings of the D.C. Court of Appeals in any event (*see id.* at 12–13 n.5). In his response to the motion to dismiss, Bush contends that his one-year clock began running on February 5, 2018, when the D.C. Court of Appeals denied his motion to recall the mandate, and thus his November filing is

[4] The earlier mailing was the subject of a separate civil action in this district where the then-motions judge surmised that the Clerk received Bush's November 22, 2018 habeas petition but did not file it because of "one or more deficiencies." *Bush v. U.S. Dist. Ct. Clerk's Office*, No. 19-cv-2500 (UNA), 2019 WL 6034865, at *1 (D.D.C. Nov. 13, 2019). In that action, Bush sought to compel the Clerk to file the habeas petition, but the matter was dismissed under the screening provisions of 28 U.S.C. §§ 1915 and 1915A because (1) the Clerk did "not generally retain copies of returned mailings," (2) Bush had provided no "copy of the proposed pleading," and (3) the intervening filing of this habeas action had undermined any "First Amendment claim relating to lack of access to the courts[.]" *Id.* at *1–2.

timely. (*See* Opp'n to Resp't's Mot. to Dismiss ("MTD Opp'n"), ECF No. 19, at 1.) Bush supplemented this opposition in a filing that was docketed on February 21, 2020; he asserts that he has been prosecuting this matter diligently but that pro se litigants like him face "many impediments and unforeseen delays[,]" such that any untimeliness should be excused. (Suppl. Br. to Resp't's Mot. to Dismiss ("Suppl. Opp'n"), ECF No. 20, at 2.)

II. FEDERAL HABEAS PETITIONS FILED BY D.C. CODE OFFENDERS

Section 2254 of Title 28 of the U.S. Code vests federal district courts with jurisdiction to issue writs of habeas corpus with respect to a person who is in custody pursuant to a judgment of a state court, "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). This jurisdiction extends to individuals convicted in and sentenced by the Superior Court of the District of Columbia. *See id.*; *see also Smith v. United States*, No. 00-5181, 2000 WL 1279276, at *1 (D.C. Cir. Aug. 23, 2000) (per curiam) (explaining that a "conviction in the Superior Court of the District of Columbia is considered a state court conviction under federal habeas law," and a challenge to a Superior Court conviction is "properly brought under 28 U.S.C. § 2254" (citations omitted)). "In order to collaterally attack his sentence in an Article III court[,] a District of Columbia prisoner faces a [jurisdictional] hurdle that a federal prisoner does not[,]" *Byrd v. Henderson*, 119 F.3d 34, 37 (D.C. Cir. 1997)—namely, showing that "the local remedy is inadequate or ineffective to test the legality of his detention[,]" *Garris v. Lindsay*, 794 F.2d 722, 726 (D.C. Cir. 1986) (internal quotation marks and citation omitted); D.C. Code § 23-110(g) (divesting federal district courts of jurisdiction to adjudicate habeas

petitions filed by District of Columbia prisoners unless the relief available under the local collateral relief provision, D.C. Code section 23-110, "is inadequate or ineffective to test the legality of his detention"). As relevant here, the D.C. Circuit has long held that D.C. Code section 23-110 "is, by definition, inadequate to test the legality of [a prisoner's] detention" if the prisoner maintains that his Sixth Amendment right to effective assistance of *appellate* counsel was violated, because "the Superior Court lacks authority to entertain a section 23-110 motion challenging the effectiveness of appellate counsel[.]" *Williams v. Martinez*, 586 F.3d 995, 998 (D.C. Cir. 2009). Thus, in general, a District of Columbia prisoner can pursue a claim of ineffective assistance of appellate counsel on a motion brought pursuant to section 2254.

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, *see United States v. Saro*, 252 F.3d 449, 451 (D.C. Cir. 2001), imposed a one-year limitations period on habeas petitions brought under 28 U.S.C. § 2254 by individuals serving sentences on state charges, *see* 28 U.S.C. § 2244(d)(1). This limitations period typically runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[,]" 28 U.S.C. § 2244(d)(1)(A), and a criminal conviction becomes final when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires[.]" *Clay v. United States*, 537 U.S. 522, 527 (2003); *see also* S. Ct. R. 13(1) (setting a 90-day deadline for filing a petition for writ of certiorari).[5]

[5] Section 2244(d) also lays out three alternative dates not applicable here, such as when the claim arises from a newly recognized constitutional right or newly discovered evidence. 28 U.S.C. § 2244(d)(1)(B)–(D).

By statute, the one-year 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[,]" 28 U.S.C. § 2244(d)(2), until such time as "the application has achieved final resolution through the State's post-conviction procedures," *Carey v. Saffold*, 536 U.S. 214, 220 (2002), including any appeals in the state courts. Moreover, AEDPA's statute of limitations, which is not jurisdictional, can be equitably tolled where a party "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*, 560 U.S. 631, 645 (2010) (internal quotation marks and citation omitted); *Menominee Indian Tribe of Wisc. v. United States*, 764 F.3d 51, 58 (D.C. Cir. 2014) (internal quotation marks and citation omitted), *aff'd*, 577 U.S. 250 (2016); *see also Head v. Wilson*, 792 F.3d 102, 106–07 (D.C. Cir. 2015) (citing *Holland* 560 U.S. at 645). The bar for equitable tolling is high, and the D.C. Circuit has held that, to be sufficiently extraordinary, "the circumstances that caused a litigant's delay must have been beyond [his] control; in other words, the delay cannot be a product of that litigant's own misunderstanding of the law or tactical mistakes in litigation." *Head*, 792 F.3d at 107 (alteration in original) (internal quotation marks and citation omitted).

Finally, and significantly for present purposes, a federal court cannot grant a timely habeas petition that a person convicted in Superior Court has filed "unless it appears that . . . the applicant has exhausted the remedies available" in the local courts. 28 U.S.C. § 2254(b)(1)(A). This exhaustion requirement is based on comity and is not jurisdictional. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 684 (1984); *Rose v.*

Lundy, 455 U.S. 509, 522 (1982). To exhaust a claim of ineffective assistance of appellate counsel, a D.C. prisoner must file a motion with the D.C. Court of Appeals requesting that the court recall its mandate. *See Watson v. United States*, 536 A.2d 1056, 1059 (D.C. 1987) (en banc); *see also Ibrahim v. United States*, 661 F.3d 1141, 1142 (D.C. Cir. 2011).

III. ANALYSIS

Before this Court can consider the substance of Bush's habeas petition, it must first assure itself that the Petition was filed in accordance with section 2254's threshold requirements (*i.e.*, subject matter jurisdiction, exhaustion, and timeliness). There is no dispute that this Court has jurisdiction to consider Bush's claim of ineffective assistance of appellate counsel, and that claim has been exhausted at the state level. But, as explained below, Bush's submission of the petition to prison officials for mailing, which occurred on November 22, 2018, happened more than a year after his conviction became final, and no grounds exist for equitable tolling. Consequently, Bush's Petition must be dismissed.

A. Bush's Habeas Petition Is Untimely Because It Was Filed Outside Of AEDPA's One-Year Limitations Period

Bush's conviction became final on March 9, 2017, which was the deadline for him to seek certiorari with respect to the D.C. Court of Appeals' affirmance of his conviction. *See* S. Ct. R. 13(1). By June 5, 2017—the date on which Bush placed into the mail on his motion asking the D.C. Court of Appeals to recall its mandate—88 days had run. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding that, under the mailbox rule, a prisoner's court filing is deemed "filed at the time petitioner deliver[s]

it to the prison authorities for forwarding to the court clerk").[6] Per the statute, the filing of this motion tolled the limitations period for 234 days, until February 5, 2018, which is the date on which the D.C. Court of Appeals denied the recall motion. *See* 28 U.S.C. § 2244(d)(2); *Carey*, 536 U.S. at 220. And at that point, 277 days remained on the one-year clock, meaning that Bush had until November 8, 2018, to file his habeas petition. Thus, Bush was out of time when he first delivered the petition to prison officials on November 22, 2018.

Bush's argument that the one-year period for filing his section 2254 petition began running anew when the D.C. Court of Appeals denied his recall motion (*see* MTD Opp'n at 1) is incorrect as a matter of law. The governing statute expressly provides for a *pause* of the limitations period while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending[,]" 28 U.S.C. § 2244(d)(2), and it does not prescribe a wholesale renewal of the entire limitations period, as Bush suggests. To be sure, if the D.C. Court of Appeals had *granted* his motion to recall the mandate, direct review of his conviction would have been reopened, and the AEDPA limitations clock would have "start[ed] anew when the reopened appeal reache[d] a final judgment." *Blount v. United States*, 860 F.3d 732, 737 (D.C. Cir. 2017). But the D.C. Court of Appeals did not grant Bush's recall motion; rather, it denied that request, and that court has not adopted the position that Bush asks this Court to take here—namely, "that denying a motion to recall the

[6] Insofar as the parties have not provided this Court with the certificate of service for Bush's recall motion, the Court is accepting the government's representation that Bush "certified he mailed his motion to recall the mandate" on June 5, 2017. (Mot. to Dismiss at 11.)

Bush's assertion that he "has been in confinement on different occasions . . . and has had delays" and impediments due to this circumstance (Suppl. Opp'n at 1) is likewise insufficient for purposes of equitable tolling, *see Cicero*, 214 F.3d at 203–04 (finding that a habeas petitioner had not established that equitable tolling of AEDPA's filing deadline was warranted based on an unadorned claim that his work on his habeas petition "was hampered by reduced access to the prison law library due to his [protective] segregation"). And this is especially so where Bush has not specified how such conditions and incidences prevented him from filing the Petition in a timely manner. *See, e.g.*, *Blount v. United States*, 69 F. Supp. 3d 242, 248 (D.D.C. 2014) (noting that "[n]either petitioner's lack of access to a law library, nor his inability to secure transcripts, nor his transfer from one correctional facility to another is considered to be an extraordinary circumstance" for tolling purposes).

In short, because Bush filed the Petition outside of AEDPA's one-year limitations period and has failed to set forth any facts that would allow this Court to toll that period, his Petition must be dismissed.

IV. CONCLUSION

For the reasons stated above, the Court concludes that the habeas petition that Bush has filed is untimely. As a result, and as set forth in the Order that accompanies this Memorandum Opinion, Ebbert's motion to dismiss must be **GRANTED**, the Petition must be **DENIED**, and this case must be **DISMISSED**.

DATE: August 6, 2021

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States Circuit Judge
Sitting by Designation

mandate reopens an appeal[,]" such that the entire section 2254 limitations period restarts. *Id.*

This Court declines Bush's invitation to rely on an unfounded and novel proposition, and instead finds that Bush's Petition is untimely by approximately two weeks.

B. Bush Has Not Established Any Basis For Tolling The Limitations Period

As explained in Part III.A above, Bush's untimely petition must be dismissed unless he can establish that this Court can excuse his untimeliness by virtue of the doctrine of equitable tolling. *See* 28 U.S.C. § 2244(d)(1); *Head*, 792 F.3d at 106–07. In order for the Court to toll the limitations period on equitable grounds, Bush must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649 (internal quotation marks and citation omitted). And while this Court assumes that Bush has exercised diligence overall, his apparent miscalculation of the filing deadline is the type of "garden variety claim of excusable neglect" that the Supreme Court and the D.C. Circuit have long dismissed as not the kind of extraordinary circumstance that warrants equitable tolling. *Id.* at 651–52 (internal quotation marks and citations omitted)); *see also United States v. Cicero*, 214 F.3d 199, 203 (D.C. Cir. 2000) (explaining that "[t]he prisoner's ignorance of the law or unfamiliarity with the legal process will not excuse his untimely filing, nor will a lack of representation during the applicable filing period"). This Court is bound by those authorities with respect its assessment of whether equitable tolling is warranted under the circumstances presented here.

District of Columbia
Court of Appeals

No. 15-CF-351

YUSUF BUSH,

Appellant,

v.

2014 CF1 8930

UNITED STATES,

Appellee.

BEFORE: Glickman and McLeese, Associate Judges, and Steadman, Senior Judge.

ORDER

On consideration of appellant's motion and corrected motion to recall the mandate, and appellee's response thereto, it is

ORDERED that appellant's motions to recall the mandate are denied. *See Watson v. United States*, 536 A.2d 1056, 1060-61 (D.C. 1987) (en banc) (providing that the appellant carries the heavy burden of setting forth in detail, "chapter and verse," a persuasive, factually-based argument for recalling the mandate). Appellant's claim that trial counsel failed to investigate exculpatory information he provided regarding the victim's mental health and other potential impeachment evidence prior to trial lacks evidentiary support. As we previously stated, "The trial judge found that appellant received the effective representation of counsel in connection with his trial and guilty plea. Appellant does not dispute this finding. It weighs against allowing him to withdraw his guilty plea." *Bush v. United States*, No. 15-CF-351, Mem. Op. & J. at 7 (D.C. Dec. 9, 2016). Additionally, while appellant claims counsel badgered him into entering the plea, we previously noted the trial court credited "trial counsel's testimony about her discussions with appellant, the judge found that counsel had not overborne appellant's will in order to persuade him to plead guilty," *id.* at 8, n.21, and no basis exists to disturb that finding. As a result, appellant fails to set forth a sufficient fact-based argument that his appellate counsel provided ineffective assistance in failing to pursue appellant's

Appendix D

claim that his trial counsel's supposed ineffectiveness rendered appellant's guilty plea involuntary.

PER CURIAM

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-3060 **September Term, 2021**

1:19-cv-01870-KBJ

Filed On: March 24, 2022

Yusuf O. Bush,

Appellant

v.

David J. Ebbert,

Appellee

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Jackson*, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* Circuit Judge Jackson did not participate in this matter.

Appendix "C"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-3060 **September Term, 2021**

1:19-cv-01870-KBJ

Filed On: February 11, 2022

Yusuf O. Bush,

Appellant

v.

David J. Ebbert,

Appellee

BEFORE: Pillard, Wilkins, and Rao, Circuit Judges

ORDER

Upon consideration of the motion for certificate of appealability, styled as an "appeal of district court's denial of certificate of appealability," the response thereto, and the reply; the motion for leave to proceed on appeal in forma pauperis; and appellant's brief and the supplement thereto, it is

ORDERED that the motion for leave to proceed in forma pauperis be dismissed as moot. The district court granted appellant leave to proceed on appeal in forma pauperis in its order filed September 7, 2021. It is

FURTHER ORDERED that the motion for certificate of appealability be denied and the appeal be dismissed. Appellant has not demonstrated that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Nor has he shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" that his habeas petition was not timely filed, and that he had not shown extraordinary circumstances warranting equitable tolling of the limitations period. Id.; see United States v. Cicero, 214 F.3d 199, 203 (D.C. Cir. 2000). Appellant's assertion that the district court implicitly issued a certificate of appealability in the order dismissing his habeas petition is not meritorious, because a certificate of appealability "shall indicate which specific issue or issues satisfy the showing" of the denial of a constitutional right, 28 U.S.C. § 2253(c)(3), but the district court's dismissal order and accompanying opinion do not identify any such issues or otherwise mention a certificate of appealability. Finally, the court declines to consider appellant's argument that the 180-day time limit to file a motion to recall the mandate in the District of Columbia Court

"Apendix A"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-3060 **September Term, 2021**

of Appeals was an unconstitutional impediment that prevented him from filing his habeas petition. See Cruz v. Am. Airlines, Inc., 356 F.3d 320, 329 (D.C. Cir. 2004) (court has "well-established discretion not to consider claims that litigants fail to raise sufficiently below and on which district courts do not pass.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. Because no appeal has been allowed, no mandate will issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Manuel J. Castro
Deputy Clerk

Director, Criminal Division

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-CF-351

YUSUF BUSH, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CF1-8930-14)

(Hon. Jennifer Anderson, Trial Judge)

(Submitted October 28, 2016 Decided December 9, 2016)

Before GLICKMAN and MCLEESE, *Associate Judges*, and STEADMAN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Yusuf Bush appeals the trial court's decision to deny his motion to withdraw his guilty plea to first degree sexual abuse. He argues, among other things, that the court abused its discretion by requiring him to prove his innocence in order to be allowed to withdraw his plea. We disagree with this characterization of the court's decision, and for the reasons herein, we affirm the denial of appellant's motion.

I.

After a violent encounter with the complainant, appellant's girlfriend at the time, appellant was charged with two counts of first degree sexual abuse, one count of kidnapping, and two counts of assault.[1] A jury trial on these charges began on

[1] In violation, respectively, of D.C. Code §§ 22-3002 (a)(1), 22-2001, and 22-404 (2012 Repl.). The complainant testified at trial that during the incident,
(continued...)

Appendix E

September 2, 2014. In the middle of trial, following the testimony of multiple prosecution witnesses including the complainant, appellant pleaded guilty to one count of first degree sexual abuse pursuant to Super. Ct. Crim. R. 11 (e)(1)(C). In tendering this plea, appellant, under oath, described in his own words how he had committed this offense. Twelve days later, however, appellant moved to withdraw his plea. After an evidentiary hearing, at which the court received the testimony of appellant, his trial counsel, two psychologists, and a number of other witnesses, the trial judge denied appellant's motion and sentenced him to sixteen years' imprisonment in accordance with his plea agreement.

II.

"[W]ithdrawal of a plea is not a matter of right."[2] Rather, a defendant moving to withdraw his guilty plea has the burden of establishing either that there was a "fatal defect" in the proceeding at which the plea was taken – which appellant does not claim in this case – or that "justice demands withdrawal under the circumstances of the individual case, i.e., [where the motion is made prior to sentencing] it would be fair and just to allow withdrawal of the plea."[3] Three factors are particularly relevant to whether the "fair and just" standard is met: (1) whether the defendant credibly asserts his legal innocence; (2) the length of the

(...continued)
which took place in appellant's bedroom, he orally and anally raped her, urinated on her, physically assaulted her, and threatened her. Appellant's mother testified that she heard the complainant screaming in appellant's bedroom, and on entering the room, saw the complainant tied up and appellant standing over her. She instructed her son to untie the complainant; he responded that she could untie herself. The complainant immediately reported the assault to the police. Shortly afterward, appellant obtained a one-way bus ticket to California and left the jurisdiction. He was apprehended en route by U.S. Marshals. While in custody prior to trial, appellant continued to contact the complainant by phone. Their conversations were recorded.

[2] *Bennett v. United States*, 726 A.2d 156, 165 (D.C. 1999).

[3] *Id.* (quotation marks omitted); *see also, e.g.*, *White v. United States*, 863 A.2d 839, 841 (D.C. 2004); *Kyle v. United States*, 759 A.2d 192, 196 (D.C. 2000).

delay between the entry of the plea and the defendant's expression of a desire to withdraw it; and (3) whether the defendant had "the full benefit of competent counsel at all relevant times."[4] Other factors may be considered relevant under the facts of the case, and no single factor is controlling.[5] The weighing of these factors and the ultimate determination whether the defendant has met the "fair and just" standard are "left to the trial court's sound discretion."[6] This court will not reverse the denial of a motion to withdraw a guilty plea "absent a clear showing that the trial court abused its discretion."[7]

A. Assertion of Legal Innocence

Turning to the first factor, assertion of legal innocence, appellant argues that in support of his motion he sufficiently "set forth some facts, which when accepted as true, make out some legally cognizable defense to the charges, in order to effectively deny culpability."[8] That is, to counter the complainant's testimony that he sexually assaulted her (which appellant admitted doing when he pleaded guilty), appellant claimed that he and the complainant were engaged in consensual sex and that she consented to all his actions. According to appellant, the complainant fabricated the charges against him because he put his son's needs ahead of hers. Appellant contends that his assertion of facts making out a consent defense presented a plausible claim of legal innocence, and that the trial judge erred by assessing the merits of the claim instead of "accept[ing] appellant's complete account of the incident"[9] in considering the assertion-of-legal-innocence factor.

However, the judge's task was not simply to determine whether appellant articulated a facially plausible claim of innocence if everything he said were

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[4] *White*, 863 A.2d at 842.

[5] *Id.*

[6] *Bennett*, 726 A.2d at 165 (quotation marks omitted).

[7] *Id.*

[8] *Id.* at 166 (quotation marks omitted).

[9] *Binion v. United States*, 658 A.2d 187, 192 (D.C. 1995).

accepted as true; the judge also was charged with determining whether appellant's claim of innocence was "credible."[10] "In deciding whether a credible claim of innocence has been made, such an assertion is to be weighed against the proffer made by the government, appellant's sworn adoption of the facts contained in that proffer, and appellant's own sworn admissions made at the time the pleas were entered."[11] Here, the judge had ample grounds for finding that appellant failed to make a credible assertion of innocence. The government's "proffer" of his guilt was especially rich, inasmuch as it included the testimony and other evidence presented by the prosecution in the three days of trial before appellant tendered his guilty plea. In ruling on appellant's motion, the judge noted that she "had an opportunity to observe the demeanor and assess credibility" of all the witnesses at both the trial and the evidentiary hearing on the motion, and that the government's "evidence was overwhelming at trial."[12] In contrast, the judge found appellant's account to be "ever changing," unsupported by other evidence, and implausible; appellant could not explain satisfactorily "why the Complainant would make up the story about him."

Appellant's assertion of innocence also was contradicted by his sworn statements when he pleaded guilty. During the colloquy, appellant described "in his own words" and under oath what occurred as follows: "I assaulted [the complainant] physically with my hands and feet. Forced her to have -- to perform oral sex." The judge interjected to clarify whether appellant knew "that she didn't

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[10] *White*, 863 A.2d at 842.

[11] *Id.* (quotation marks omitted). "The judge is permitted to compare the two conflicting versions of events, and to credit one over the other." *Id.* "On appeal, we defer to the trial court's assessments of witnesses' credibility and we will not disturb the trial court's factual findings unless they lack support in the record." *Bennett*, 726 A.2d at 170.

[12] In brief, the judge found the complainant to be a credible witness and that her testimony about appellant's attack and his animus against her was corroborated by appellant's nephew and mother, the sexual assault nurse who examined the complainant, and other forensic testimony and evidence. In addition, the judge found that appellant's flight following the encounter with the complainant evinced his consciousness of guilt, and that his recorded phone conversations with her when he was in custody were inconsistent with his professed belief that she had accused him falsely.

want to give you oral sex at the time?" Appellant responded, "Yeah. She just -- she said she didn't want to." As we have said in other cases, "in evaluating [appellant's] claim of innocence under the fair and just standard, the trial [judge] was free to discredit [his] later testimony . . . in the face of [his] admissions at the plea hearing that he in fact took part in the commission of the offense."[13] "Such a finding by the hearing judge is particularly compelling where, as in the present case, the later assertion of innocence is unsupported by any other evidence."[14]

We are not persuaded by appellant's objection that the trial judge erroneously required him to *prove* his innocence. It is true that when the judge initially ruled from the bench on appellant's motion, she stated that he had "not met [his] burden of showing that he was innocent." However, the judge promptly issued a written order in which she *sua sponte* clarified that she had misspoken. Instead of finding that "defendant had not 'proven' his innocence,"[15] the judge explained that "based upon its factual findings, the court's conclusion is that the defendant had not 'asserted a credible claim of legal innocence.'"

In sum, we are satisfied that the record supports the trial judge's findings, that her credibility determinations must be accorded deference, and that the judge did not abuse her discretion in deeming appellant's assertion of innocence as incredible. Although this is not quite the end of our appellate inquiry, it strongly suggests that appellant cannot prevail, for we have said that "[t]he mere assertion of a defense is insufficient to allow withdrawal of a plea, and withdrawal will not be permitted where the defense, even if legally cognizable, is 'unsupported by any other evidence.'"[16]

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[13] *Bennett*, 726 A.2d at 167.

[14] *Id.* at 168; *see also White*, 863 A.2d at 843 ("The trial judge did not clearly err when she discredited the appellant's post-plea version of events, which is so greatly at odds with his earlier ratification of the government's strong factual proffer and his own description to the court [during his plea colloquy].").

[15] A statement the judge characterized as "an inexact articulation."

[16] *White*, 863 A.2d at 842 (quoting *Bennett*, 726 A.2d at 167).

considerations weighed against finding it fair and just to grant appellant's motion to withdraw his guilty plea.

C. The Full Benefit of Competent Counsel

The trial judge found that appellant received the effective representation of counsel in connection with his trial and guilty plea. Appellant does not dispute this finding. It weighs against allowing him to withdraw his guilty plea.

D. Other Factors: Appellant's Mental State

Finally, although appellant does not pursue the issue on appeal, in the hearing on his motion to withdraw his plea he raised his mental condition as a ground for granting the motion, and the judge considered it. Appellant claimed he was depressed and suicidal at the time he entered the plea, that he had stopped taking his psychiatric medications, and that his will had been overborne by his attorney. Two psychologists gave conflicting testimony at the motion hearing as to whether appellant made a knowing, intelligent, and voluntary waiver of his rights when he pleaded guilty.[20] The judge ultimately rejected appellant's claims of mental impairment and involuntariness. The judge's findings are supported by the evidence in the record, appellant does not challenge them, and we cannot fault them.[21]

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[20] Dr. Teegarden, the government's expert, concluded that appellant was competent to waive his rights and enter a guilty plea because neither his mental health issues nor any cognitive factors substantially impaired his capacity to have a factual and rational understanding of the proceedings and to assist his counsel appropriately with the preparation of his defense. Dr. Stejskal, appellant's expert, concluded that although appellant had the capacity to make a knowing and intelligent waiver of his rights, the voluntariness of his waiver was compromised because, in his depressed and deteriorating psychological state, he could not withstand the coercive influence or efforts of his attorney.

[21] In brief, the judge found that during his incarceration, appellant was diagnosed with a mental illness and received medication to address it. The judge did not credit appellant's testimony that he had stopped taking his medication

(continued...)

III. Conclusion

For these reasons, we conclude that the trial judge did not abuse her discretion in considering and denying appellant's motion to withdraw his guilty plea under the "fair and just" standard. Accordingly, we hereby affirm the ruling of the Superior Court.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

(...continued)
because jail records showed that he generally received the medication on a daily basis. The judge stated that she had observed appellant carefully during the plea colloquy and saw nothing amiss; if she had seen anything to suggest that he was "having trouble, [did] not understand or [was] having any kind of mental health issue," she "would have stopped the plea and spoken to counsel" about her observations. Moreover, the judge found that appellant's actions at the time he tendered his guilty plea did not suggest he was in despair and was willing to plead guilty because he planned to take his own life; the judge noted, for example, that appellant attempted to bargain with the prosecution for a better plea deal (involving less time in prison) and asked an astute question about lifetime supervised release. In addition, crediting trial counsel's testimony about her discussions with appellant, the judge found that counsel had not overborne appellant's will in order to persuade him to plead guilty. The judge also credited the government psychologist's opinion that appellant was competent during his plea colloquy and that his depression was not so severe as to undermine the voluntariness of his waiver. She did not credit the contrary opinion of the defense psychologist, in part because the latter had not listened to the recording of the plea colloquy (unlike the government psychologist, who had done so).

Exhibit 1

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

YUSUF O. BUSH	§	
VS.	§	CIVIL ACTION NO. 1:18-cv-595
T.J. WATSON, ET AL.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Yusuf O. Bush, a prisoner previously confined at the United States Penitentiary in Beaumont, Texas, proceeding *pro se* and *in forma pauperis*, filed this civil rights action pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), against Warden T. J. Watson, Lieutenant Hansen, Unit Manager Maze, Captain Duck, Officer Pitts, Case Manager Hunter, Officer Slaydon, and unidentified defendants.

The action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

Plaintiff alleges he was placed in solitary confinement based on allegations that Plaintiff assaulted another inmate. After the camera footage of the incident was reviewed, it was determined that Plaintiff was not involved in the assault, but Defendant Hansen told Plaintiff that he would remain in solitary confinement pending transfer due to information provided by another inmate. Plaintiff alleges that his placement in solitary confinement without being charged with a disciplinary infraction violates his constitutional rights to due process and to be free from cruel and unusual punishment. Plaintiff also contends that he has been denied access to the courts because there is no mailroom in solitary confinement, and the courts have not responded to his legal mail.

Standard of Review

An *in forma pauperis* proceeding may be dismissed pursuant to 28 U.S.C. § 1915(e) if it: (1) is frivolous or malicious, (2) fails to state a claim upon which relief may be granted or (3) seeks monetary relief from a defendant who is immune from such relief.

A complaint, containing as it does both factual allegations and legal conclusions, is frivolous if it lacks an arguable basis either in law or fact. *Neitzke v. Williams,* 490 U.S. 319, 325 (1989); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997). A complaint lacks an arguable basis in law if it is based on a clearly meritless legal theory. *See Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless. *Denton v. Hernandez*, 504 U.S. 25, 32 (1992).

A complaint does not need to contain detailed factual allegations, but the plaintiff must allege sufficient facts to show more than a speculative right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Dismissal for failure to state a claim is appropriate if the complaint does not include enough facts to state a claim that is plausible on its face. *Id.* at 570. Conclusory allegations and a formulaic recitation of the elements of a cause of action will not suffice to prevent dismissal for failure to state a claim. *Id.* at 555. The plaintiff must plead facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Analysis

A victim who has suffered a constitutional violation by a federal actor may, in some instances, recover damages in federal court. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S.

388, 395-97 (1971). Title 42 U.S.C. § 1983 allows individuals to sue for money damages when their constitutional rights are violated by state officials, but there is no analogous statute allowing individuals to recover damages for violations of their constitutional rights by federal officials. *Ziglar v. Abbasi*, _ U.S. _ , 137 S. Ct. 1843, 1854 (2017). An individual's right to recover damages from federal officials for violations of constitutional rights was first recognized by the United States Supreme Court in *Bivens v. Six Unknown Fed. Narcotics Agents*. In *Bivens*, the plaintiff alleged that federal agents entered and searched his apartment without a warrant and arrested him on a narcotics charge, and that all of these actions were taken without probable cause. *Bivens*, 403 U.S. at 389. The Supreme Court held that there was an implied cause of action for damages under the Fourth Amendment for alleged violations of the plaintiff's right to be free from unreasonable searches and seizures by federal officials. *Id.* at 397. The Supreme Court subsequently extended *Bivens* to create implied causes of action for gender discrimination under the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 422 U.S. 228 (1979), and for failing to provide adequate medical treatment as required by the Cruel and Unusual Punishment Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980).

Bivens, Davis, and Carlson were decided during a time when the Supreme Court "would imply causes of action not explicit in the statutory text itself" in order to provide a remedy to effectuate the statute's purpose. *Abbasi*, 137 S. Ct. at 1855. Under this judicial approach, it appeared to be possible that *Bivens* could be expanded to allow causes of action against federal officials for every constitutional cause of action against state officials permitted by § 1983. *Id.* In later cases, the Supreme Court took a more measured approach to implying causes of action for damages, and "the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored'

judicial activity." *Id.* at 1855-57 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). Over the past forty years, the Supreme Court has repeatedly declined to extend *Bivens* to allow new constitutional claims. *Hernandez v. Mesa*, __ U.S. __ , 140 S. Ct. 735, 743 (2020).

In light of the Supreme Court's current approach to such cases, federal courts must now engage in a two-step inquiry when deciding whether to extend *Bivens* to new cases. *Id.* First, the court must determine whether the request to extend *Bivens* "involves a claim that arises in a 'new context' or involves a 'new category of defendants.'" *Id.* (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)); *see also Cantú v. Moody*, 933 F.3d 414, 422 (5th Cir. 2019) (noting that the court must first determine whether the plaintiff's claims "fall into one of the three existing *Bivens* actions). A case presents a new context if it is different in a meaningful way from previous *Bivens* cases decided by the Supreme Court. *Abbasi*, 137 S. Ct. at 1860. The Supreme Court provided the following, non-exhaustive list of cases that present meaningful differences:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id.

Second, if the claim does arise in a new context, the court must consider whether there are "special factors" that counsel hesitation about extending *Bivens*. *Id.* Special factors may include, but are not limited to: the availability of a statutory cause of action; the length of time Congress has had to create a *Bivens*-like cause of action for that particular context, and the underlying nature of the federal official's activity. *Cantú*, 933 F.3d at 422. If there are special factors, then the court

should not extend *Bivens*. *Abbasi*, 137 S. Ct. at 1860; *see also Canada v. United States*, 950 F.3d 299, 309 (5th Cir. 2020) (noting that courts must refrain from creating an implied cause of action if any special factors exist).

Plaintiff's claims that he was denied due process by being placed in solitary confinement without disciplinary action, was subjected to cruel and unusual punishment by being assigned to solitary confinement, and was denied access to the courts are new contexts because the Supreme Court has not previously recognized an implied cause of action for these claims. There are special factors counseling hesitation in extending *Bivens* to create new causes of action for these claims, including the availability of other remedies.

First, the Bureau of Prisons's administrative remedy procedure provides an alternate method of relief. *Watkins v. Carter*, No. 20-40234, 2021 WL 4533206, at *2 (5th Cir. Oct. 4, 2021) (noting that the BOP's Administrative Remedy Program provides an alternative method of relief to a *Bivens* action). In some cases, the Federal Tort Claims Act also provides an avenue to pursue monetary claims for damages for negligent or wrongful acts committed by government employees. *Dickson v. United States*, 11 F.4th 308, 312 (5th Cir. 2021). Second, the separation of powers is another special factor weighing against extending *Bivens* because Congress has had the occasion to consider prisoner rights, but has not legislated to extend the reach of *Bivens*. *Watkins v. Three Admin. Remedy Coordinators*, 988 F.3d 682, 685-86 (5th Cir. 2021) (declining to extend *Bivens* to include a First Amendment claim of retaliation).

Because there is at least one other avenue of relief through the Administrative Remedy Program and Congress has not legislated to extend *Bivens* beyond the three causes of action recognized by the Supreme Court, Plaintiff does not have viable claims under *Bivens* against

individual defendants for claims of a due process violation, cruel and unusual punishment, and denial of access to the courts.

Recommendation

This civil rights action should be dismissed pursuant to 28 U.S.C. § 1915(e) for failure to state a claim upon which relief may be granted.

Objections

Within fourteen days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this the 11th day of April, 2022.

Christine L Stetson
UNITED STATES MAGISTRATE JUDGE

ALD-180

July 23, 2021
May 13, 2021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-3098**

YUSUF BUSH, Appellant

VS.

COUNSELOR GRIFFIN, et al.

(M.D. Pa. Civ. No. 1-19-cv-01521)

Present: MCKEE, GREENAWAY, Jr., and BIBAS, Circuit Judges

Submitted by the Clerk for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

in the above-captioned case.

Respectfully,

Clerk

ORDER

We decline to dismiss the appeal under 28 U.S.C. § 1915 or to take summary action. The Court has determined that counseled briefing would be helpful for the resolution of this appeal. Appellant is directed to inform the Clerk in writing within 21 days of the date of this order if he does not want counsel appointed on his behalf. If appellant does not object to appointment of counsel within that time, the Clerk will appoint counsel to represent him. A briefing schedule shall issue at a later date. In

addition to any other issues that they may wish to raise, the parties are directed to address whether Bush's claims fall under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). See Mack v. Yost, 968 F.3d 311 (3d Cir. 2020); Bistrian v. Levi, 912 F.3d 79 (3d Cir. 2018).

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: July 27, 2021
Sb/cc: Yusuf Bush
G. Michael Thiel, Esq.

Additional material from this filing is available in the Clerk's Office.