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Supreme Court, U.S.
FILED

AUG 25 2022

OFFICE OF THE CLERK

CASE NO.

SUPREME COURT OF THE UNITED STATES

SAMUEL TURNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
(Case No. 22-1205)

PETITION FOR WRIT OF CERTIORARI

Samuel Turner
Petitioner
Reg. No. 13254-047
FCI Edgefield
P.O. Box 725
Edgefield, SC 29824

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TO:
SUBJECT: QUESTIONS PRESENTED
DATE: 08/22/2022 08:22:57 AM

QUESTIONS PRESENTED

- I. WHETHER CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS REGARDING "EXCUSABLE NEGLECT" AS TO CALL FOR AN EXERCISE OF THIS COURT'S DISCRETION.
- II. WHETHER CERTIORARI SHOULD BE GRANTED WHERE AN ABUSE OF DISCRETION MEETS A CONSTITUTIONAL RIGHT REGARDING "EXCUSABLE NEGLECT" WHERE THE PRISONER HAS NO CONTROL OF HIS ACTIONS WHEN IT PERTAINS TO A COURT DEADLINE FILING AND HE HAS ATTEMPTED DILIGENTLY TO BE HEARD?
- III. WHETHER CERTIORARI SHOULD BE GRANTED WHETHER IT IS REASONABLE TO BELIEVE THE PRISONER IS AT FAULT FOR WHAT HE FAILED TO DO, SUCH AS FORGET TO SIGN HIS NAME TO A BRIEF OR WHAT THE BOP CAUSED, REGARDING "EXCUSABLE NEGLECT" SUCH AS IN A LOCKDOWN WHERE THE PRISONER HAS NO CONTROL OF HIS ACTIONS, SO AS NOT TO EXCUSE A MANDATE A COURT-ORDERED DEADLINE FILING?
- IV. WHETHER CERTIORARI SHOULD BE GRANTED WHETHER A PRISONER WHO IS QUARANTINED DUE TO A NATURAL PANDEMIC SUCH AS COVID-19 CAN BE TOTALLY RESPONSIBLE FOR A FILING DEADLINE WHEN WITH NO CONTROL OF HIS OWN HE IS LOCKED DOWN CAUSED BY THE BUREAU OF PRISONS AND OR AN ACT OF GOD?
- V. WHETHER CERTIORARI SHOULD BE GRANTED WHETHER IS IT REASONABLE FOR THE COURT TO EXCUSE THE GOVERNMENT FROM ITS ORDERED FILING IN RESPONSE TO THE PETITIONER'S BRIEF WHILE DENYING THE PETITIONER THE SAME COURTESY IN THE SAME PROCEEDING?
- VI. WHETHER CERTIORARI SHOULD BE GRANTED WHETHER IT IS REASONABLE FOR A COURT THAT HAS JURISDICTION IN EQUITY, A COURT THAT ALSO ADMINISTERS AND DECIDES CONTROVERSIES IN ACCORDANCE WITH THE RULES, PRINCIPLES AND PRECEDENTS OF EQUITY SHOULDN'T ALLOW A PETITIONER WHO INADVERTENTLY FAILED TO SIGN HIS MOTION TO HAVE A SECOND CHANCE TO SIGN?

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TO:
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PARTIES TO THE PROCEEDINGS

IN THE COURTS BELOW

The caption of the case in this court contains the names of all parties in the lower courts. More specifically, the parties are:

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Edgefield, SC 29824-000

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U.S. District Court
District of Nebraska
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Lincoln, NE 68508-3803

Neither of the aforementioned are a company, corporation or subsidiary of any corporation or company.

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Mullen v. Heinkel Filtering Sys., Inc., No. C12-2084, 2013 U.S. Dist. LEXIS 126292, 2013 WL 4766785, at *2 (N.D. Iowa Sept. 4, 2013)

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Pineda v. Am. Plastics Techs., Inc., No. 12-21145-CIV, 2014 U.S. Dist. LEXIS 67241, 2014 WL 1946686, at *5-6 (S.D. Fla. May 15, 2014)

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)

Rahn v. Hawkins, 464 F.3d 813, 822 (8th Cir. 2006)

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Scott v. Raudin McCormick, Inc., 2021 U.S. Dist. LEXIS 79792, 2010 WL 3125955, at *2 (D. Kan. Aug. 6, 2010)

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Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d at 1255

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28 U.S.C. 2255

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TO:
SUBJECT: PETITION FOR A WRIT OF CERTIORARI
DATE: 08/21/2022 02:19:32 PM

PETITION FOR A WRIT OF CERTIORARI

Samuel Turner, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on February 25, 2022.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, was filed on February 25, 2022 by Michael E. Gans, Clerk of Court.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on May 31, 2022 by Michael E. Gans, Clerk of Court and is reprinted in the separate Appendix to this Petition.

[REDACTED]

[REDACTED]

TO:

SUBJECT: CONSTITUTIONAL PROVISIONS, STATUTES AND RULES
DATE: 08/21/2022 07:51:28 PM

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be out twice in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TO:
SUBJECT: STATEMENT OF THE CASE
DATE: 08/21/2022 07:51:07 PM

STATEMENT OF THE CASE

The Appellant initially filed a request/letter for an Extension to file a Motion pursuant to 28 U.S.C. 2255 when he was infected with COVID-19 and placed in quarantine in February, 2021. The Court returned his request "Dismissed without Prejudice," which was received about February 28, 2021. But because the Appellant was on a lockdown status, caused by the BOP, he requested the help of Ms. Jones, a BOP Staff member to verify his allegations and plight. As a result, when he resent his request to the Court, it was returned as untimely because he inadvertently failed to sign his document request.

This is a typical case of "excusable neglect" initially caused by the Federal Bureau of Prisons, a government agency, who holds the Appellant in their custody. Because this is not the Appellant's fault, he cannot and should not be blamed for BOP's error and/or unavoidable unintentional "Obstruction of Process." Yes, the Appellant inadvertently failed to sign a paper in his hurry to communicate with the court to protect his right to redress his grievances, but that shouldn't be the end of the story. As such, Appellant's request should have been Granted, in fairness, but wasn't.

Appellant was and is presently incarcerated at FCI Edgefield, South Carolina and due to COVID-19 lockdowns because of fights, deaths, COVID-19 and quarantine procedures, K-2, K-2 laced with Fentanyl, Suboxone, and continuous lockdowns, FCI Edgefield experienced "Modified Operations" since March 17, 2020. The Appellant was also restricted from Law Library participation as part of these modified operations; the copy machine was broke as it currently is; he couldn't purchase stamps, paper, etc. For much of 2020, access to the Law Library and outside assistance was limited due to COVID-19. On February 11, 2021, the Appellant was placed in quarantine due to a positive COVID-19 test and was unable to access the Law Library or have access to outside assistance to help him file a 2255 Motion. Due to his limited education and knowledge of the law, he was unable to file the 2255 largely due to the foregoing reasons. He even lost the ability to write the court due to various restrictions including having the ability to have writing materials, etc. On March 19, 2021, Unit Manager M. Paimpalil wrote a letter to the District Court explaining that due to the Bureau of Prisons modified operations, which started on March 17, 2020, access to any Program Area, including the Law Library, had been limited. The Unit Manager also requested that this Court grant him a reasonable time to submit his Motions to the Court under the circumstances not due to his cause. Yet, even with this evidence and proof, this court denied his request.

Appellant's initial appeal was denied by the Eighth Circuit Court of Appeals on August 16, 2019 (filings 141-143), he petition for rehearing was also denied on September 30, 2019 (filing 143), and the United Stated Supreme Court denied his

petition for Writ of Certiorari on February 26, 2020 (filing 156). Appellant filed a motion to extend his time for filing a 28 U.S.C. 2255 motion on February 16, 2021, so his request was timely made, but that motion was denied on February 18, 2021 (filings 157-158). The court stated that more than one year had passed since the denial of Appellant's Petition for Certiorari, and he failed to file a post-conviction motion within the one-year time-frame allowed under 28 U.S.C. 2255 according to the court. The Appellant has exhausted his appellate rights and has filed a post-conviction Motion within the one-year time frame from his final disposition, but not according to the court, but even so, the law is made to allow for this court to excuse the circumstances which prohibited the defendant from filing his 2255 brief. This court held that for a variety of reasons, it would deny Petitioner's Motion for Extension of Time to File a 2255 Motion, which would demonstrate or suggest that the District Court used a subjective reason to deny an excusable neglect argument in the first instance. The Appellant hastily attempted to file his brief but forgot to sign the certificate of service, and even though the Appellant contacted the court in a timely fashion, the court stated that it had the authority to extend the time to file a 2255 motion, but declined to do so because the motion is untimely. A United States court is supposed to be a "court of equity." As the Appellant previously stated in prior filings, incorporated by reference, and noticed by the Federal Bureau of Prison's agent, there were excusable and reasonable reasons for said untimely filing, so when the defendant filed his Motion for Reconsideration of the court's order, he once again was denied, with reasons being that were indicated in the court's previous order (filing 165). Then after the Defendant attempted one more time to file a Motion for Reconsideration of that Order, the court ordered the Motion to be denied (filing 168). The U.S. Mail has been and is continuously late. It appears the District Court doesn't want to give the Petitioner "his day in court," to give him the opportunity to "redress his grievances" under the law with a proper evidentiary hearing.

TO:
SUBJECT: STATEMENT OF JURISDICTION
DATE: 08/22/2022 06:33:44 PM

STATEMENT OF JURISDICTION

The last judgment of the U.S. Court of Appeals was entered on February 25, 2022. A Petition for rehearing was timely filed and was denied on May 31, 2022. This court's jurisdiction is authorized pursuant to 28 U.S.C. 1254(l).

The judgment of the Court of Appeals was entered on 8-16-19. A petition for rehearing was timely filed and denied by the Court of Appeals for the Eighth Circuit on 9-30-19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

Appellant's Petition for Certiorari was denied by the Supreme Court on February 26, 2020. As a result, he had one year from that date in which to file a Motion for relief under 28 U.S.C. 2255(f)(1).

Appellant filed a Motion to Extend the time-period for filing a 2255 Motion on February 16, 2021 (filing 157). In that Motion, he sought to excuse a late filing based on his placement in quarantine from January 28, 2021, and his allegation that his prison had been in lockdown since December 23, 2020, and modified lockdown since April 2, 2020, limiting his ability to move around the facility. He sought a six-month extension of the one-year time limit. This U.S. District Court denied the Motion without prejudice stating it could be reasserted at such time as Defendant filed a 2255 Motion (filing 158). The lower court stated for a "variety of reasons, I will deny Defendant's Motion for Extension of Time to File a 2255 Motion," which may imply prejudice since the excusable neglect wasn't the only reason. The court stated first, Mr. Turner while signing the certificate of service, did not sign his motion. Second, to the extent that "I have the authority to extend the time to file a 2255 motion, I decline to do so because the motion is untimely." On May 11, the lower court ordered that the Petitioner's Motion for Extension of Time to File a 2255 Motion (filing 164) be denied, completely disregarding the Eighth Circuit's law on excusable neglect.

On May 10, 2021, Appellant filed a second Motion for an extension of the time to file a 2255 Motion (filing 164). In that Motion, he alleged that his prison was on "modified operations" since March of 2020, including "limited his ability to access the law library." He stated he had no access to the law library. He also alleged he was placed in quarantine due to a positive COVID-19 test and was unable to access the law library or obtain access to outside assistance for filing a 2255 motion. He also provided information regarding the length of his quarantine. Appellant also claimed due to his "limited education," he could not file a 2255 motion without assistance which he could not obtain due to the pandemic and "modified operations,"

showing how his ability to proceed was limited. On May 11, 2021, this Court denied Appellant's Motion, because he failed to sign it, and because it was untimely filed (filing 165).

Appellant filed a Motion to Reconsider on June 1, 2021 (filing 166) re-alleging the reasons for extending the time for filing a 2255 motion set out in his previous motions. He further alleged he provided medical records and a letter from his case manager in connection with his original motion (filing 157). This Court denied the motion on June 8, 2021, for the reasons set out in its prior Order (filing 167).

On July 1, 2021, Appellant filed a Motion for Leave to File Motion for Reconsideration of Court Order or in the Alternative, Motion for Relief from Judgment Pursuant to Rule 60(B)(6) (filing 168). In that motion, he again claimed he could not timely file a 2255 motion due to issues with COVID-19 restrictions within his prison. He claimed his trial counsel violated the rules of the American Bar Association which was a main reason for the filing of a 2255 motion. In doing so, he quoted ABA Model Rules of Professional Conduct setting forth examples how his counsel had allegedly violated those rules. The U.S. District Court also denied the motion on July 6, 2021 (filing 169).

This is a typical case of "excusable neglect" more specifically on the side of the Federal Bureau of Prisons, albeit unintentional and because of the BOP's fault, the Defendant cannot be blamed for their error and unintentional "Obstruction of Process."

On July 6, 2021, the court further ordered that the Appellant's "motion for leave to file motion for reconsideration of court order, or in the alternative, motion for relief from judgment pursuant to Rule 60(B)(6)" (filing 168) was denied.

On November 16, 2021, the court gave the government an extension of time. The lower court stated "although I doubt the defendant is entitled to relief, out of an abundance of caution, I will request the government's counsel to respond to the most recent motion." The lower court failed to apprise itself of Eighth Circuit precedent on the law of excusable neglect. The court ordered that no later than December 16, 2021, the government shall respond to the defendant's "motion for leave to allow for filing a 28 U.S.C. 2255 motion and memorandum of law nunc pro tunc due to clear and lawful excusable neglect, or in the alternative, motion for relief from judgment pursuant to Rule 60(B)(6)" (filing 170). This order explicitly determines that the defendant may not respond to the government's submission. The Appellant wasn't even permitted to provide a traverse to the government's brief. Was that fair?

The government filed a MOTION TO EXTEND TIME FOR FILING BRIEFS IN RESPONSE TO DEFENDANT'S MOTION, where the

United States requested that the time for filing the government's response to Defendant's Motion for Leave to Allow for Filing a 28 U.S.C. 2255 be extended. The court permitted the government its request for extension. The Court ordered the government's response brief December 16, 2021 (filing 171). The government's excuse was that Counsel for the government

has been preparing and is currently in a four-day trial before this Court in another matter. Counsel for the government needs additional time to complete research and prepare the response to defendant's motion. How is it that for reasons beyond the Appellant's control, he was not permitted the same courtesy to extend the time so he could be premitted law library access to complete research and prepare his motion to the court?

After the government filed their brief, on January 4, 2022, the court ordered that the motion for leave to file a late 2255 motion and the alternative motion for relief from judgment pursuant to Rule 60 be denied.

In the court's MEMORANDUM AND ORDER, it stated that Samuel Turner has filed a motion for leave to file a late 2255 motion (filing 170). "There is no reason to restate what counsel for the government argues. The motion, frankly, is frivolous. There is also no basis for filing a judgment under Rule 60." The court ordered that Appellant's motion for leave to file a late 2255 motion (filing 170) is denied. To the extent that the defendant seeks a motion under Rule 60, it is denied as frivolous. It is baffling for this Appellant to believe that the lower court could state that as an alternative, a Rule 60 motion would be frivolous.

On January 18, 2022, the Appellant filed a Notice of Appeal from this U.S. District Court's Order denying his requested leave to file a late 2255 due to excusable neglect, Ordered on January 4, 2022, including all filings that were also denied hereby incorporated by reference.

On February 25, 2022, the UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, on Appeal from U.S. District

Court for the District of Nebrasks - Lincoln (4:17-cr-03121-RGK-1), before Circuit Judges LOKEN, KELLY, and GRASZ, held that they reviewed the original file of the United States District Court and ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

The UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT then reviewed the Appellant's motion for extension of

time to file petition for rehearing and granted the motion and gave him until May 23, 2022 to file a petition for rehearing.

Appellant proved that he couldn't timely file a 2255 motion due to restrictions placed on his access to the law library and outside help in is prison, etc., beginning on about March or April of 2020, which continues to date. He has shown he diligently pursued the matter after his Petition for Certiorari was denied, and he has alleged facts sufficient for this Court to find the time for filing should be equitably tolled. As a result, his motion should be granted.

TO:
SUBJECT: REASONS FOR GRANTING THE WRIT
DATE: 08/22/2022 07:38:37 AM

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD GRANT MR. TURNER'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WITH REGARD TO "EXCUSABLE NEGLECT" AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10.

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise its power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States*, 318 U.S. 332(1943). See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960). As the Court stated in *McNabb*: "... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb*, 318 U.S. are 340.

Because there are material, factual and legal matters overlooked in the decisions of this court, this Court should reconsider its prior denial of the Appellant's Request. He asserts that his correspondences with the court has always been timely but receipt from the court has not. Evidence is something that tends to prove or disprove the existence of an alleged

fact.

Appellant hereby presents facts and evidence supported by 8th Circuit and U.S. Supreme Court Case Precedent to make his Case. There exists in this very Circuit, legal Precedent to support Appellant's argument that he should be afforded "Excusable Neglect." To deny the Appellant the ability to defend his cause to provide the court evidence that his Trial Counsel was ineffective in violation of the Sixth Amendment will prejudice him to his detriment and this Court has an obligation to address his arguments in light of the BOP's "Excusable Neglect."

FINDING OF GOOD CAUSE

The Eighth Circuit requires a finding of "good cause" before the question of "excusable neglect" need be considered. See *Albright ex rel. Doe v. Mountain Home Sch. Dist.*, 926 F.3d 942, 951 (8th Cir. 2019). "Excusable neglect encompasses four factors: prejudice to the non-moving party, the length of the delay, the movant's good faith, and the reason for the delay, where 'the reason for the delay is a key factor in the analysis.'" To show "good cause" here, Plaintiff must show that the May 29, 2020 deadline for fact discovery could not have "reasonably been met despite the diligence of the party seeking the extension." See *IBEW Loc. 98 Pension Fund*, 326 F.R.D. at 522. Petitioner also seeks relief under Federal Rule of Civil Procedure 6(b). Under Rule 6(b), "when an act may or must be done within a specified time, the court may, for good cause, extend the time to complete an act or motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(1)(B). "The determination as to what sort of neglect is considered excusable is an equitable one, taking account of all relevant circumstances surrounding the party's own omission." *Hawks v. J.P. Morgan Chase Bank*, 591 F.3d 1043, 1048 (8th Cir. 2010)(citation omitted).

DEFENDANT HAS SHOWN THAT "EXTRAORDINARY CIRCUMSTANCES" REQUIRED

As cited in *Hayes v. United States of America*, 2020 U.S. Dist. LEXIS 154589 (Aug. 26, 2020), on July 22, 2020, the court dismissed this habeas case with prejudice because it determined that it was a second or successive habeas petition that was not timely filed. The court also dismissed the petitioner's Case No. 19-cv-211 because the court determined that it was not a 2255 petition, but a motion under 18 U.S.C. 3583 to modify his criminal sentence. *United States v. Hayes*, Case No. 95-cr-135. Id. at 23. On August 20, 2020, the court received from the Petitioner in a closed civil case, a motion for extension of time and a brief in support of his motion. In the brief, the Petitioner explained that the court entered judgment, dismissing his petition as second or successive and not timely filed; he states that he would "strongly like to file a response to the prior ruling," but that he is in quarantine and he asks for an extension of "14 to 30 days." Because the Appellant filed the motion asking to respond to the ruling dismissing this case, the petitioner requested that the court give him additional time to file a motion asking to reconsider its order of dismissal. Also, a party may ask a court to reconsider a final order by filing either a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) or a motion for relief from a

judgment or order under Fed. R. Civ. P. 60(b). As an alternative, the Appellant may still seek relief under Fed. R. Civ. P. 60(b); the deadline for filing a Rule 60(b) motion is "within a reasonable time." Fed. R. Civ. P. 60(b). Rule 60(b) also allows a party to ask a court to grant relief from a final judgment or order for (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation or misconduct by the opposing party; (4) judgment is void; (5) the judgment has been satisfied or was based on a reversed or vacated judgment; or (6) "any other reason that justifies relief." The court granted the petitioner's motion for an extension of time. As cited in *Whitney v. Wendy Kelley*, 2020 U.S. Dist. LEXIS 123560 (July 13, 2020), on June 12, 2020, Chief United States Magistrate Judge Erin L. Wiedemann entered a report and recommendation (Doc. 20) recommending dismissal of Plaintiff's petition. On June 30, 2020, the court entered an order (Doc. 21) adopting the report and recommendations and judgment (Doc. 22) dismissing the case with prejudice. On July 9, 2020, the Clerk entered Plaintiff's motion (Doc. 23) for extension of time to file his objections to the report and recommendations, which was accompanied by those objections (Doc. 23-1). The Petitioner stated that his prison reported its first official case of COVID-19 in May, and that since that time Petitioner has been subject to various quarantine and isolation protocols that have denied him access to the law library and other services available to him and necessary for pursuing his case. Plaintiff's motion demonstrated both different scenarios of good cause for an extension and excusable neglect for the delay in filing his motion and the motion to extend should have been GRANTED. As an alternative, Fed. R. Civ. P. 60 contains six grounds in which the court may grant relief from an order or judgment. Those grounds are: "(1) mistake, inadvertence, surprise, excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment has been satisfied, released, discharged, or it is no longer equitable; or (6) any other reason that justified relief." *In re: Residential Capital, LLC* 2015 Bankr. LEXIS 1175, 2015 WL 1636440, at *4 (Bankr. S.D.N.Y. Apr. 10, 2015)(internal quotations omitted)(citing Fed. R. Civ. P. 60(b)).

In *Clark v. United States*, United States District Court for the Eastern District of Missouri, Eastern Division, 2022 U.S. Dist. LEXIS 4799 (Jan. 11, 2022), Petitioner claims he has not had access to the law library or his legal materials. Petitioner attached a letter from his Unit Manager at the Federal Bureau of Prisons indicating that Petitioner was recently placed on quarantine due to COVID-19 protocols. The Unit Manager requests that the Court "accept this letter as justification for Petitioner's delayed response." Due to circumstances beyond Petitioner's control, Petitioner appropriately requested an extension. Accordingly, the Court found that Petitioner had demonstrated excusable neglect and good cause to extend the deadline for appeal. Fed. R. App. P. 4(a)(5)(A). The Court extended Petitioner's deadline by 30 days, the maximum extension permitted under the rules. Fed. R. App. P. 4(a)(5)(C).

In Davis v. United States, United States District Court for the Western District of Kentucky, Louisville Division, 2021 U.S. Dist. LEXIS 108939 (June 10, 2021, the Sixth Circuit Court of Appeals issued a show-cause order on November 6, 2020, advising Davis that his notice of appeal would be dismissed as untimely unless he successfully filed a motion in the district court for either an extension of time to appeal under Federal Rule of Appellate Procedure 4(a)(5) or reopening of the time to appeal under Federal Rule of Appellate Procedure 4(a)(6). In response, Davis filed a statement from the prison mailroom supervisor who asserted that "the mail room at FCI McDowell was closed due to COVID-19 concerns on October 18th through October 20th, 2020 and during these dates mail was not processed." In Davis's declaration in support of his Rule 60(b) motion, signed under penalty of perjury, he stated that the Bureau of Prisons went on a national lockdown on June 1, 2020, until further notice "because of protesting around the United States." He maintained that the Court entered its Orders denying his 2255 motion on August 25, 2020, "while inmates' movements were modified." He submitted a request to a mailroom supervisor who "admitted to the error and agreed to send a memo to the Sixth Circuit." He took steps to remedy the untimeliness and demonstrate his efforts to file a timely notice of appeal. The Court was persuaded that Davis had no control over his mailing once he placed it in the prison mail system and that the delay in file-stamping his notice of appeal was in all likelihood a result of the prison's lockdown due to a COVID-19 outbreak and, whether it was intentional or an inadvertent clerical error, the result of a misconduct by prison officials. The Court found that the circumstances were extraordinary and that defeating Davis's right to appeal based on a one-day delay in filing the notice of appeal would not achieve substantial justice. Therefore, the Court found that Rule 60(b) relief is warranted. The U.S. District Court in the case sub judice thought the Appellant's Rule 60 alternative was frivolous.

TO:
SUBJECT: REASONS FOR GRANTING THE WRIT 2
DATE: 08/21/2022 07:41:13 PM

Davis's Rule 60(b) motion to set aside the Court's Order and Judgment was GRANTED.

In Katon v. United States, United States District Court for the District of South Dakota, Western Division, 2019 U.S. Dist. LEXIS 44768 (Mar. 18, 2019) the district court said the primary measure of good cause is the movant's diligence in attempting to meet the scheduling order's requirements. Bradford v. Dana Corp., 249 F.3d 807, 809 (8th Cir. 2001). Furthermore, when filing a motion outside of the applicable deadline, the movant must show excusable neglect for an extension of time under Federal Rule of Civil Procedure 6(b)(1). The court found no evidence of bad faith. Given these facts, Plaintiff has shown excusable neglect meriting relief.

This court may consider extraordinary circumstances or extreme and undue hardships as reasons to invoke it. See Marrero Pichardo v. Ashcroft, 374 F.3d at 56. Change of controlling law, new evidence, and need to correct a clear error and manifest injustice are also grounds to order relief under FRCP 60(b)(6). *Id.* (citing Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d at 1255). Relief must be sought within a reasonable time, no later than a year after the entry of judgment or order. See Fed. R. Civ. P. 60(c)(2). As cited in White v. Garman, 2021 U.S. Dist. LEXIS 129904 (July 13, 2021), Mr. White stated in his notice of appeal that he was "unable to timely and properly file an appeal in this matter" because, due to "enhanced COVID-19 quarantine restrictions," he was unable to access "legal aids or resources," the prison law library's computers, or a typewriter. Doc. No. 12 at 1. The court held that Mr. White had shown excusable neglect or good cause for having filed his motion 28 days past the date his notice of appeal was due. Fed. R. App. P. 4(a)(5)(A)(ii). "An inquiry into excusable neglect 'is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.'" *Driever v. United States*, No. CV 19-1807 (TJK), 2021 U.S. Dist. LEXIS 91932, 2021 WL 1946391, at *7 (D.D.C. May 14, 2021)(quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). These factors include "(1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395. On one hand, Mr. White filed his Notice of Appeal 28 days late. This was within Rule 4(a)(5)(A)(i)'s 30 day window to file a motion for an extension. Given the arguably minimal delay at issue here, the Court could not find that the government would be prejudiced if the Court granted Mr. White's motion for an extension of time, nor could the Court find that the impact to judicial proceedings would be significant. Mr. White also contended that he was unable to timely and properly file his notice of appeal due to COVID-19 restrictions in place at his correctional facility. See also *Appau v. Comm'r of Soc. Sec.*, No. CV 18-16415 (MAS), 2020 U.S. Dist. LEXIS

168750, 2020 WL 5526785, at *1 (D.N.J. Sept. 15, 2020)(finding third factor weighed heavily in favor of a petitioner with underlying health conditions given "the nature of the COVID-19 pandemic and its interruption upon the daily lives of citizens"). In light of those restrictions, and Mr. White's representations in his filing, the Court was satisfied that Mr. White acted in good faith in filing his notice of appeal and, consequently, in filing the motion for an extension of time for filing a notice of appeal.

"According to Rule 60(b), a court may enlarge the time period in which a party has to act, even upon motion made after the expiration of the specified time period, where the failure to act was the result of 'excusable neglect.'" *Osahar v. U.S. Postal Serv.*, 136 Fed. Appx. 259, 260-61 (11th Cir. 2005)(citing Fed. R. Civ. P. 60(b)). Generally, if a party seeks to file something out of time, the party must demonstrate excusable neglect. Fed. R. Civ. P. 60(b)(1)(B); see also *Scott v. Raudin McCormick, Inc.*, 2021 U.S. Dist. LEXIS 79792, 2010 WL 3125955, at *2 (D. Kan. Aug. 6, 2010). When determining whether neglect is excusable, some circumstances include: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its possible impact on judicial; (3) the reason for delay and whether it was within the reasonable control of the movant; and (4) the existence of good faith on the moving party's part. *United States v. Torres*, 372 F.3d 1159, 1162 (10th Cir. 2004)(citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)).

TO:
SUBJECT: SAMUEL TURNER REASONS FOR GRANTING THE WRIT 3
DATE: 08/23/2022 12:43:20 PM

EXCUSABLE NEGLECT

The Supreme Court and the Sixth Circuit have defined the "extraordinary circumstances" that might warrant equitable tolling of the statute of limitations very narrowly. In Holland, the Court reiterated its prior holding that a "garden variety claim of excusable neglect" will not warrant equitable tolling. Holland, 130 S.Ct. at 2564.

"District courts have broad discretion to set filing deadlines and enforce local rules." Iowa Great Lakes Sanitary Dist. v. Travelers Cas. & Sur. Co. of Am., No. C15-4252-LTS, 2017 U.S. Dist. LEXIS 208376, 2017 WL 4711438, at *1-2 (N.D. Iowa July 7, 2017)(quoting Reasonover v. St. Louis Cnty., Mo., 447 F.3d 569, 579 (8th Cir. 2006)), aff'd, 913 F.3d 760 (8th Cir. 2019). The court may extend a deadline after its expiration upon a showing of excusable neglect and good cause. Fed. R. Civ. P. 6(b)(1)(B). Excusable neglect "does not require a showing that the party was without fault." Huggins v. FedEx Ground Package Sys., Inc., 592 F.3d 853, 857 (8th Cir. 2010); Mullen v. Heinkel Filtering Sys., Inc., No. C12-2084, 2013 U.S. Dist. LEXIS 126292, 2013 WL 4766785, at *2 (N.D. Iowa Sept. 4, 2013)(“Excusable neglect … is not limited strictly to omissions caused by circumstances beyond the control of the movant.” (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 394, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993))). Excusable neglect may “encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 403-04 (8th Cir. 2000)(quoting Pioneer, 507 U.S. at 394). “Whether neglect is excusable is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” Kurka v. Iowa Cnty., 628 F.3d 953, 959 (8th Cir. 2010)(quoting Pioneer, 507 U.S. at 394). The third factor, the excuse given for the delay, carries the most weight. Gibbons v. United States, 317 F.3d 852, 854 (8th Cir. 2003). The court considers similar factors when determining whether good cause to extend a deadline exists, with the “primary measure of good cause” being “the movant’s diligence.” Albright ex rel. Doe v. Mountain Home Sch. Dist., 926 F.3d 942, 951 (8th Cir. 2019)(quoting Rahn v. Hawkins, 464 F.3d 813, 822 (8th Cir. 2006)). See Pineda v. Am. Plastics Techs., Inc., No. 12-21145-CIV, 2014 U.S. Dist. LEXIS 67241, 2014 WL 1946686, at *5-6 (S.D. Fla. May 15, 2014)(noting that a “mistake of fact” or “clerical error” is more likely to constitute excusable neglect than a mistake of law and holding that excusable neglect existed when counsel timely prepared a resistance that “was inadvertently not filed,” “a prototypical clerical error that constitutes a mistake of fact”).

“Excusable neglect is an ‘elastic concept’ that empowers courts to accept, ‘where appropriate … late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.’” Chorosevic v.

MetLife Choices, 600 F.3d 934, 946 (8th Cir. 2010)(omission in original)(quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)).

In *Seegrist v. Gustafson, et al.*, United States District Court for the District of South Dakota, Western Division, 2021 U.S. Dist. LEXIS 182138 (Sept. 23, 2021), "the district court's decision to dismiss an action for untimely service and to grant or deny an extension of time pursuant to Rule 4(m)" is reviewed for an abuse of discretion. *Kurka* 628 F.3d at 957.

Appellant avers that a showing of good cause requires at least 'excusable neglect' - good faith and some reasonable basis for noncompliance with the rules ... Good cause is likely to be found when (1) the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person; (2) the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances; or (3) the plaintiff is proceeding pro se or in forma pauperis.

The court held "to warrant a discretionary extension, the plaintiff must establish excusable neglect." *Kurka*, 628 F.3d at 957. Excusable neglect is "an 'elastic concept' that empowers courts to provide relief where a party's failure to meet a deadline is caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 959 (internal quotation marks and internal citations omitted). "In determining whether neglect is excusable, the following factors are particularly important: (1) the possibility of prejudice to the defendant, (2) the length of the delay and the potential impact on judicial proceedings, (3) the reason for the delay, including whether the delay was within the party's reasonable control, and (4) whether the party acted in good faith." *Id.*

Government failed to identify any prejudice to them. "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

See *Martin v. Fayram*, 849 F.3d 691, 698 (8th Cir. 2017)("An extraordinary circumstance must be beyond a prisoner's control and rise above a garden variety claim of excusable neglect") (citation and quotations omitted).

A court may extend the deadline "if the movant failed to act because of excusable neglect." *United States v. Boesen*, 599 F.3d 874, 879 (8th Cir. 2010)(citing Fed. R. Crim. P. 45(b)(1)(B)). The decision whether to grant an extension is within a court's discretion.

A rule 6(b) motion requesting an extension of time also may be made after time has expired may only be granted upon a showing of "excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'Ship*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the Supreme Court delineated four factors for evaluating whether a movant has demonstrated excusable neglect. Those factors are "(1) the danger of prejudice to the party opposing the modification, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209, 356 U.S. App. D.C. 70 (D.C. Cir. 2003)(citing *Pioneer*, 507 U.S. at 395).

When considering whether a party has demonstrated excusable neglect, the Court must consider "all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. at 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). See *Treasurer, Trs. of Drury Indus., Inc. Health Care Plan and Tr. v. Goding*, 692 F.3d 888, 893 (8th Cir. 2012)(citations omitted). See *Lowry v. McDonnell Douglas Corp.*, 21 F.3d 457, 462 (8th Cir. 2000)(internal citations and quotations omitted).

"When an act may or must be done within a specified time, the court may, for good cause, extend the time ... on motion made after the time has expired if the party failed to act because of excusable neglect." *Fed. R. Civ. P.* 6(b)(1)(B)(emphasis added). A court "must consider all relevant circumstances" when evaluating whether a party seeking an extension had demonstrated excusable neglect. *Sugarbaker v. SSM Health Care*, 187 F.3d 853, 856 (8th Cir. 1999)(internal quotation marks omitted).

TO:

SUBJECT: CONCLUSION, DECLARATION AND CERTIFICATE OF SERVICE
DATE: 08/22/2022 06:34:20 PM

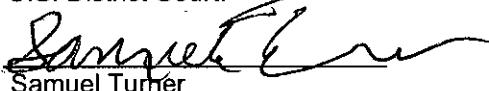
CONCLUSION

Appellant claims "excusable neglect" for his failure to timely file a 2255 motion for things and actions beyond his control. Courts considering such claims have stated the one-year time-frame may be subject to "equitable tolling" under limited circumstances. Allegations of lack of legal knowledge or lack of access to legal materials are sufficient to trigger equitable tolling. A defendant must also show they diligently pursued their claims and this Appellant has supported with evidence that he has made his best attempt to pursue the remedies he requested.

In United States v. Haro, Slip. Op., 2020 WL 5653520 (D. Ne. Sept. 23, 2020), Judge Rossiter found a similar claim. AEDPA's limitation period is subject to equitable tolling, but that doctrine "affords the otherwise time-barred petition an exceedingly narrow window of relief." Jihad v. Havas, 267 F.3d 803, 805 (8th Cir. 2001). It "is proper only to file a petition on time." Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2001). The prisoner seeking equitable tolling must also establish "that he has been pursuing his rights diligently." Muhammad v. United States, 735 F.3d 812, 815 (8th Cir. 2013)(quoting Holland, 560 U.S. at 649). The only hint in the record that the doctrine might be in play is Haro's reference to being in "lockdown," presumably as a result of COVID-19. The COVID-19 pandemic could - in certain circumstances - warrant equitable tolling. See Cowan v. Davis, No. 1:19-CV-00745-DAD, 2020 WL 4698968 at *6 (E.D. Cal. Aug. 13, 2020)(finding "the unprecedented and ongoing COVID-19 pandemic" warranted prospective equitable tolling).

The Appellant asserts that additional time was required because of pandemic lockdown. He offered plenty of explanations of how that limited his ability to prepare or file his motion as well as other efforts to pursue filing his motion. He has continuously showed diligence where reasons for his claim were documented in his brief as he continued asking the court to excuse a late filing before the filing expired. The Appellant diligently pursued a filing during the pandemic and relief is warranted. Appellant had no access to the law library due to COVID-19 and he had no time to file a motion prior to pandemic restrictions. Appellant has shown the pandemic prevented him from pursuing his claims, and has shown that restrictions imposed as a result of the pandemic prevented him from timely filing a 2255 motion under the circumstances.

For the foregoing reasons, the Appellant respectfully requests that his Motion and Memorandum of Law for En Banc Review be granted and further vacate the order of the U.S. District Court.


Samuel Turner

DECLARATION PURSUANT TO 28 U.S.C. 1746

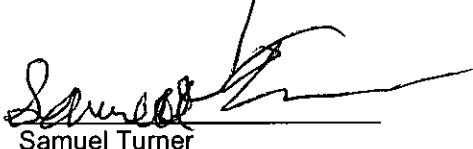
I hereby state, affirm and declare under the penalty of perjury that the herein information is true and correct to the best of my knowledge, information and belief.



Samuel Turner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August 2022, a copy of the aforementioned Writ of Certiorari with Points and Authorities is being served upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001, via First Class, United States Mail, Postage Prepaid.



Samuel Turner