

ORIGINAL

22-7234  
No.

FILED  
JAN 30 2023  
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SUPREME COURT, U.S.

IN THE  
SUPREME COURT OF THE UNITED STATES

Gerald Wayne LeBeau, pro se, — PETITIONER  
(Your Name)

VS.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE

EIGHTH CIRCUIT NO: 22-1780

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GERALD WAYNE LEBEAU, PRO SE,  
(Your Name)

PMB 1000

(Address)

TALLADEGA, AL. 35160  
(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

### Apposite Authority:

#### QUESTION ONE: WAS THE COURTS PROCEDURE RULING PROPER IN DENYING LEBEAU'S EQUITABLE TOLLING?

Anthony v. Lewis, 236 F.3d 568, 574-75 (9th Cir.2000)  
Cadet v. Fla Dep't of Corr, 853 F.3d 1216, 1221 (11th Cir.2013)  
Deroo v. United States, 709 F.3d 1242, 1246 (8th Cir.2013)  
Holland v. Florida, 560 U.S. 631, 645 (2000)  
Houston v. Lack, 487 U.S. 266, 276(1988)  
Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir.2001)  
Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)  
Miles v. Prunty, 187 F.3d 1104, 1107(9th Cir.1999)  
Lott v. Mueller, 304 F.3d 918, 922 (9th Cir.2002)  
Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir.2010)  
Sossa v. Diaz, 729 F.3d 1225, 1229 (9th Cir.2005)

#### QUESTION TWO: WAS THE COURTS PROCEDURE RULING PROPER IN DENYING LEBEAU'S EXTRAORDINARY CIRCUMSTANCES?

Holland v. Florida, 560 U.S. 631, 649 (2010)  
Lott v. Mueller, 304 F.3d 918, 922 (9th Cir.2002)  
Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.1999)  
Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)

#### QUESTION THREE: WAS THE COURTS PROCEDURE RULING PROPER IN DENYING LEBEAU'S DUE DILIGENCE?

Allen v. Lewis, 255 F.3d 798, 799 (9th Cir.2001)  
Corjasso v. Ayers, 278 F.3d 879 (9th Cir.2002)  
Holland v. Florida, 560 U.S. 631, 653 (2010)  
Lott v. Mueller, 304 F.3d 918, 924 (9th Cir.2002)

#### QUESTION FOUR: WAS THE COURTS PROCEDURE RULING PROPER IN DENYING LEBEAU'S CERTIFICATE OF APPEALABILITY?

Slack v. McDaniel, 529 U.S. 473, 483-84 (2000)  
Cox v. Norris, 133 F.3d 565, 569 (8th Cir.1997)  
Miller-El v. Cockrell, 537 U.S. 337 (2003)  
Caldwell v. Lewis, 414 F.Appx 809, 814-15 (6th Cir.2011)

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

**Mrs. Elizabeth B. Prelogar**  
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Washington, DC 20530-0001

**Clerk**  
United States Court of Appeals for the Eighth Circuit  
Thomas F. Eagleton Courthouse  
111 S. 10th Street, Room 24.329  
St. Louis, MO 63102-1125

## RELATED CASES

**United States v. Gerald Wayne LeBeau**, U.S. District Court for the District of South Dakota, Western Division.

2014 U.S. Dist. LEWIS 163528  
5:14-CR-50048-KES  
November 20, 2014. Decided

**United States v. Gerald Wayne LeBeau**, U.S. District Court for the District of South Dakota, Western Division.

2015 U.S. Dist. LEWIS 86195  
5:14-CR-50048-KES  
July 2, 2015. Decided

United States v. Gerald Wayne LeBeau, U.S. District Court for the District of South Dakota, Western Division.

2015 U.S. Dist. LEXIS 83328  
5:14-CR-50048-KES  
June 24, 2015, Decided

United States v. Gerald Wayne LeBeau, U.S. District Court for the District of South Dakota, Western Division.

2015 U.S. Dist. LEXIS 86841  
5:14-CR-50048-KES  
June 10, 2005, Decided

United States v. Gerald Wayne LeBeau, U.S. District Court for the District of South Dakota, Western Division.

2015 U.S. Dist. LEXIS 78614  
5:14-CR-50048-KES  
June 16, 2015, Decided

Gerald Wayne LeBeau v. United States, U.S. District Court for the District of South Dakota, Western Division.

2022 U.S. Dist. LEXIS 50407  
5:19-CV-05011-KES  
March 21, 2022, Decided

Gerald Wayne LeBeau v. United States, U.S. District Court for the District of South Dakota, Western Division.

2022 U.S. Dist. LEXIS 68306  
5:19-CV-05011-KES  
April 13, 2022, Decided

Gerald Wayne LeBeau v. United States, U.S. District Court for the District of South Dakota, Western Division.

2022 U.S. Dist. LEXIS 49671  
5:19-CV-05011-KES  
January 27, 2022, Decided

United States v. Gerald Wayne LeBeau, United States Court of Appeals for the Eighth Circuit, Western Division.

867 F.3d 960, 2017 U.S. App. LEXIS 15021  
No. 15-3592  
February 9, 2017, Submitted  
August 14, 2017, Filed

Gerald Wayne LeBeau v. United States, United States Court of Appeals for the Eighth Circuit.

2022 U.S. App. LEXIS 24903  
No. 22-1780  
September 2, 2022, decided

Gerald Wayne LeBeau v. United States, Application No:17-A-599

Gerald Wayne LeBeau v. United States, Application No: 22-A-510

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Filed 01/27/22

APPENDIX E ORDER FOR RESPONSE 5:19-CV-05011-KES (CR.Doc.6) Filed 10/17/19

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APPENDIX L Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeal,  
Eighth Circuit. Filed 06/22/22

APPENDIX M Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals,  
Eighth Circuit. Filed 09/02/22

APPENDIX N Application for an extension of time granted by Justice Kavanaugh, on  
December 8, 2022. Application No: (22A510).

APPENDIX O Application for an extension of time granted by Justice Gorsuch, on  
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### STATUTES AND RULES

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28 U.S.C. § 2253 (c)(2)

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28 U.S.C. § 2255

### OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix M to the petition and is

reported at 2022 U.S. App. LEXIS 24903 No: 22-1780; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is

reported at 2022 U.S. Dist. LEXIS 46671; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 20, 2022.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 02, 2022, and a copy of the order denying rehearing appears at Appendix M.

An extension of time to file the petition for a writ of certiorari was granted to and including December 8, 2022 (date) on January 30 2023 (date) in Application No. 22 A 510.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

**Due Process Clause of the Fifth Amendment of the United States Constitution**

## STATEMENT OF THE CASE

LeBeau was convicted of possession with intent to distribute cocaine, conspiracy to distribute cocaine, and conspiracy to distribute marijuana on August 14, 2015. (CR.Doc.467). An amended judgment of conviction was filed on November 9, 2015. (CR.Doc.507). LeBeau appealed his conviction, and the Eighth Circuit Court of Appeals affirmed his conviction on August 14, 2017. (CR.Doc.552). LeBeau moved for an extension of time to file a petition for writ of certiorari with the Supreme Court. See Gerald Wayne LeBeau, Applicant v. United States, Supreme Court of the United States, Justice Gorsuch granted this motion, extending LeBeau's time to file a petition for writ of certiorari until January 11, 2018. But then LeBeau did not file a petition for a writ with the Supreme Court.

LeBeau filed motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 on February 20, 2019. (CR.Doc.1,2). After the petition was untimely filed. LeBeau moved the court for an extension of sixty-days to file his petition. (CR.Doc.4). In the motion, LeBeau stated that he had been in transit to a different Penitentiary facility and although he had recently arrived his property had not. The extension motion was dated February 18, 2019, and received by the court on February 25, 2019. LeBeau then filed an amended § 2255 habeas petition on May 15, 2019. (CR.Doc.25). Respondent filed a motion to dismiss LeBeau's motion for failure to state a claim for relief and lack of subject-matter jurisdiction. (CR.Doc.9). Respondent argues that LeBeau motion is untimely because it was filed after the one-year limitation period under 28 U.S.C. § 2255 (f). (CR.Doc.10 at 3-7). LeBeau claims that equitable tolling should apply to the one-year limitation period because he alleges that extraordinary circumstances prevented him from timely filing his motion and that he pursued his rights diligently. (CR.Doc.21 at 2-9). The Magistrate Judge, in her report and recommendation, recommends that the motion be dismissed because the circumstances that LeBeau alleges do not

justify equitable tolling. (CR.Doc.29 at 7-12).

After de novo review of the records, the district court's adopts the Magistrate Judge's Report and Recommendation. Pursuant to the Order Denying LeBeau's Second Motion for Extension, it was ORDER, ADJUDGED, AND DECREED that judgment was entered in favor of respondent and against LeBeau. (CR.Doc.33 at 6-7). March 22, 2022. On April 13, 2022, On April 11, 2019. (CR.Doc.39 at 2). Thus, it was ORDERED: That a certificate of appealability be denied. On April 15, 2022. (CR.Doc.40). LeBeau filed a notice of appeal. On May 20, 2022. Application for Certificate of Appealability is denied [5159826][22-1780]. On June 21, 2022. LeBeau filed Motion for extension of time to file petition for rehearing. (CR.Doc.41). On June 22, 2022. JUDGE ORDER Granting motion for extension of time to file rehearing [5169574-2]. On August 3, 2022, Motion for Certificate of Appealability for rehearing was filed. (CR.Doc.42). On September 2, 2022. Petition for rehearing en banc was denied. Petition for rehearing by the panel is also denied. On September 9, 2022. Formal mandate was issued in the styled matter. Appeal from U.S. District Court for the District of South Dakota-Western (5:19-cv-05011-KES). On November 27, 2022. LeBeau filed for an extension of time the Supreme Court of the United States to file certiorari. On December 8, 2022. Justice Kavanaugh granted extension of time to and including January 30, 2023.

#### FACTS

In support of LeBeau's claim of equitable tolling and has been pursuing his rights diligence he declares the following facts and arguments: LeBeau alleges he is entitled to equitable tolling in his present § 2255 habeas petition and can demonstrate how external forces rather than his lack of diligence hindered his effort to pursue his claim in a timely matter. There was extraordinary circumstances that did interfere with LeBeau's timely filing of his § 2255 habeas petition which consisted of emergency situation of the Bureau of Prisons (BOP) that placed LeBeau into a emergency transit redesignation transfer at the United States Penitentiary (USP) in Yazoo, Mississippi,

on December 28, 2018, until his limitation period of January 11, 2018, up until his redesignation transfer to (USP) Coleman I in Coleman, Florida, on January 31, 2019.

Reasons why LeBeau was placed into a emergency transit redesignation transfer there was a hurricane that took place at the Federal Correctional Institution (FCI) in Merianna, Florida, causing a emergency closure of that Institution and all inmates from FCI Merianna to be immediately transported to USP Yazoo, Mississippi, were LeBeau was being housed. Therefore, it was determined by the Bureau of Prisons BOP that USP Yazoo will be changed from a "maximum" security facility to a "medium" security institution a FCI. Due to the classification status between inmates from USP/FCI it was determined by the BOP to place all USP Yazoo inmates into a emergency transit redesignation transfer to other USP's throughout the country. Therefore, LeBeau and all 250 plus inmates at USP Yazoo were ORDERED by the Warden to immediately pack their personal/legal property and deliver them to the Receiving/Departing Dep't for shipping. LeBeau could not complete his § 2255 habeas petition in a timely fashion. LeBeau was without his legal property after ORDERS by the Warden on December 28, 2018, through his limitation period of January 11, 2019, up until he received his legal property at Coleman I in Coleman, Florida, on February 18, 2019, and was restricted to his housing unit in lockdown status with no access to the law library or any other part of the facility at USP Yazoo. All 250 plus USP inmates were transported out of Yazoo within one months time. LeBeau was on the last bus load of inmates to leave Yazoo on January 31, 2019.

The Receiving/Departing Dep't (R/D) is where inmates and their personal property are received and shipped to their designated facilities. When inmates take their personal property to the R/D Dep't for shipping inmates are without their personal and legal property until the inmate arrives at the facility they were designated to. Afterwards, inmates may receive their property if it had arrived. It should be noted inmates who are placed into transit waiting to be transferred are not allowed to keep their personal or legal property are not allowed to be transported with nothing other than their personal self. LeBeau would have received an Incident Report for refusing a Direct

ORDER and been placed in the Special Housing Unit (SHU) for Disciplinary Segregation waiting for an investigation for an violation of Bureau regulations. Therefore, LeBeau did not keep his legal property to complete his § 2255 habeas petition in a timely fashion. LeBeau filed an extension of time with the Magistrate court on February 18, 2019, after mailing the motion LeBeau received his legal property later the same day and completed his § 2255 habeas petition and filed it with the court on February 20, 2019. 40-days after his limitation period deadline.

## REASONS FOR GRANTING THE PETITION

### I. THE DISTRICT COURT ERROR IN THE PROCEDURE RULING IN DENYING LEBEAU'S EQUITABLE TOLLING.

Under the prison "mailbox rule" "a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail." Lott v. Mueller, 304 F.3d 918, 921 (9th Cir.2002); accord Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 2385, 101 L.Ed.2d 245 (1988). The [mailbox] rule applies to prisoners filing habeas petitions in both federal and states courts." Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir.2001)(citation omitted); accord Anthony v. Camba, 236 F.3d 568, 574-75 (9th Cir.2000), cert. denied, 553 U.S. 941, 121 S.Ct. 2576, 150 L.Ed.2d 739 (2001). In the absence of evidence to the contrary, courts have treated a petition as delivered to prison authorities or the day the petition was signed, See Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir.2010) cert. denied, 132 S.Ct. 286, 181 L.Ed.2d 177, 2011 WL 4535775 (U.S. 2011) ("When a prisoner gives prison authorities a habeas petition or other pleading to mail the court, the courts deems the petition constructively 'filed' on the date it is signed.").

Here LeBeau is prose, needed no explanation regarding why he was able to prepare and file motions and not his § 2255 habeas petition during the same relevant time frame in the summer and fall of 2018. First, LeBeau had a total of 365-days under § 2255(f)(1) to file his motion. Second, The statute of limitation shall apply to a motion under §

2255 (f)(1) the date in which the judgment of conviction becomes final. Third, Federal inmates are afforded the benefit of the "mailbox rule" regarding timely filing of § 2255 petitions. Lastly, LeBeau could have filed his § 2255 habeas petition on the last day of his 365-days limitation period using the "mailbox rule."

Equitable Tolling can be available to save an untimely petition. Holland v. Florida, 560 U.S. 631, 645, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010). However, it should be noted that equitable tolling is available only in very narrow range of cases. Id. at 645 (2010), Deroo v. United States, 709 F.3d 1242, 1246 (8th Cir.2013); see also Cadet v. Fla. Dep't of Corr., 853 F.3d 1216, 1221 (11th Cir.2017) ("Equitable tolling is an extraordinary remedy to rare and exceptional circumstances and typically applies sparingly.") (internal question makes omitted)). A petitioner claiming equitable tolling must show." (1) that he has been pursuing his rights diligently, and (2) that same extraordinary circumstances stood in his way' and presented timely filing." Holland, 560 U.S. 631, 645, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2000) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)); see also Sossa v. Diaz, 729 F.3d 1225, 1229 (9th Cir.2013) ("Equitable tolling is available only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time and the extraordinary circumstances were the cause of the prisoner's untimeliness"). "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." Holland, 560 U.S. at 653 (internal quotations and citations omitted). "In addition [W]hen external forces, rather than a petitioner's lack of diligence, accounts for the failure to file a timely claim, equitable tolling may be appropriate." Lott v. Mueller, 304 F.3d 918, 922 (9th Cir.2002), quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.1999).

Here there was extraordinary circumstances that did interfere with LeBeau from continuing his work on his habeas petition that prejudiced him in meeting the one-year limitation period deadline. First, the hurricane that took place at the FCI Federal Correctional Institution in Merrianna, Florida, causing the closure of that institution

and the immediate transportation of all Merianna (FCI) inmates to (USP) United States Penitentiary in Yazoo, Mississippi, were LeBeau was being housed. Second, The changing of security level of the USP a "maximum" security facility to a FCI a "medium" security Institution, causing a classification status between USP/FCI inmates. Third, ORDERS from the Bureau of Prisons to the Warden at Yazoo to put all USP inmates into a emergency transit redesignation transfer to other USP facilities throughout the country. Fourth, ORDERS from the Warden at Yazoo to have all USP inmates pack up all their personal and legal property immediately and deliver them to the Receiving/Departing Dep't for shipping. Lastly, LeBeau took all his property to R/D for shipping leaving LeBeau without access to the courts and his legal file, restricted to his housing unit in lockdown status, no access to the library, typewriter, copy machine an/or any other part of the facility.

Whereas, LeBeau took all his legal property to R/D for shipping on December 28, 2018, under ORDERS of the Warden. LeBeau's limitation period was on January 11, 2019. Do to the large volume of LeBeau's § 2255 habeas petition 95 pages in all. It would have been impossible for him to attempt to start a new § 2255 habeas petition and complete it in 14-days without his legal file at hand. However, LeBeau was not transported out of Yazoo until January 31, 2019; he was on the last bus of inmates to leave ~~Yazoo~~. LeBeau received his legal property back after his arrival to USP Coleman I on February 18, 2019, at that time LeBeau completed his § 2255 habeas petition and filed it with the courts on February 20, 2019, that should constitute reasonable diligence along with all the above facts should entitle LeBeau to equitable tolling.

## **II. THE DISTRICT COURT ERROR IN THE PROCEDURE RULING IN DENYING LEBEAU'S EXTRAORDINARY CIRCUMSTANCES.**

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements. (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way". Holland v. Florida, 560 U.S. 631, 649 130 S.Ct. 2549, 177 L.Ed.2d 130 (2000) (quoting Pace v. DiGuglielmo, 544 U.S. 418, 125

S.Ct. 1814, (2005)). The Ninth Circuit found that the statute of limitation could be equitable tolled if extraordinary circumstances beyond prisoner's control made it impossible to file the petition on time". In addition, "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling may be appropriate". Lott v. Mueller, 304 F.3d 918, 922, (9th Cir. 2002), (9th Cir.2002), quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.1999). "The ~~minimum~~ ~~minimum~~ required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence requires for equitable tolling purposes is reasonable diligence, not maximum feasible diligence". Holland, 560 U.S. at 653,(internal quotations and citations omitted).)

Here LeBeau's explanation for the delay as afforded is unfortunate of what took place with LeBeau. First, The hurricane that took place at the FCI in Merrianna, Florida, causing the closure of that Institution and immediate transportation of all inmates to the United States Penitentiary USP in Yazoo, Mississippi, where LeBeau was being housed. Second, The changing of security level of the USP from "maximum" security to a "medium" security Institution. Therefore, causing a classification status between the USP/FCI inmates. Third, ORDERS from the Bureau of Prisons BOP to the Warden at Yazoo to place all USP inmates into a emergency transit redesignation transfer to other USP facilities throughout the country. Fourth, ORDERS from the Warden at Yazoo to have all USP inmates pack up all their personal/legal property immediately and deliver them to the Receiving and Departing Dep't for shipping. Lastly, LeBeau taking his legal property to R/D for shipping, leaving LeBeau without access to the courts and his legal file, no access to the law library, typewriter, copy machine an/or any other part of the facility.

Inmates are not allowed to keep anything while in transit for transportation other than their personal self. LeBeau would have received a Incident Report for refusing a Direct Order and would have been placed in the Special Housing Unit (SHU) for Disciplinary Segregation waiting for a investigation for a violation of Bureau regulations. Therefore, LeBeau was in a catch "22" situation and choose not to keep his legal property.

The emergency status LeBeau was placed into by the Warden, LeBeau could not request the the Warden to give him special time allowance for more research and preparation of documents to meet an imminent court-deadline without making some alternative arrangement to apprise LeBeau of his right violated the right of access to the courts and should constitute extraordinary circumstances. LeBeau had no authority to file his § 2255 habeas petition while being in the emergency transit redesignation transfer at USP Yazoo because he was ORDERED to take his legal property to R/D for shipping on December 28, 2018, however, his limitation period deadline was on January 11, 2019. LeBeau had no access to his legal file until February 18, 2019, after his arrival at USP Coleman I, unfortunately LeBeau's limitation period had already expired on January 11, 2019. Therefore, LeBeau should be able to use his emergency transit as his colorable basis for extraordinary circumstances as in Holland v. Florida, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed,2d 130 (2010)(quoting Pace v. DiGuglielmo, 544 U.S. 418, 125 S.Ct. 1814 (2005)). Lott v. Mueller, 304 F.3d 918, 922 (9th Cir.2002)(quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.1999)). Because it did prevent him from preparing his habeas rights. LeBeau makes his argument and cites facts that would lead this court to believe he was diligently pursuing his rights during the limitation period. LeBeau has demonstrated entitlement to extraordinary circumstances, and has done so on this record. LeBeau was not able to provide a reply responds on the deficiencies of the court's R/R because his second motion for an extension of time was denied by the district court and adopted the Magistrate Judge's R/R. LeBeau now states his deficiencies to the facts of what took place prior to his limitation period. LeBeau would have been able to complete and file his § 2255 motion on or before his limitation period if not for all the above facts.

If the court's would have stopped the tolling of the limitation period on December 28, 2018, through January 11, 2019, a total of 14-days until LeBeau received his legal property back at USP Coleman I on February 18, 2018, then the court's could have restarted the tolling of the limitation period from February 18, 2018, through March 4,

2019, for a total of 14-days. Whereas, LeBeau would not have been time barred to finish his § 2255 habeas petition in a timely fashion. After LeBeau received his legal property back on February 18, 2019, he completed his § 2255 habeas petition and filed it with the court's on February 20, 2019. Prior to LeBeau 351st-day before his limitation period deadline, LeBeau was still working on his § 2255 habeas petition researching case laws and cites, rules and procedures, regulations and preparing documents, requesting documents from his former attorney, filing motions with the courts to have his former attorney compel. LeBeau has established entitlement to extraordinary circumstances on the above facts.

### III. THE DISTRICT COURT ERROR IN THE PROCEDURE RULING IN DENYING LEBEAU'S DUE DILIGENCE

The Holland, Court held that a petitioner must establish "reasonable diligence" in pursuing his federal habeas right, not "maximum feasible diligence". Holland v. Florida, 560 U.S. 631, 653 (2010). A prison transfer may also generate the type of extraordinary circumstances that make equitable tolling available Allen v. Lewis, 255 F.3d 798, 799-800 (9th Cir.2001)(prison transfer may be circumstances beyond prisoner's control making it impossible to file a timely petition). Lott v. Mueller, 304 F.3d 918, 924 (9th Cir.2002) "In addition [w]hen external forces, rather than a petitioner's lack of diligence, accounts for the failure to file a timely claim, equitable tolling may be appropriate. Id at 922 (2002); ("temporary transfer" may lead to equitable tolling, issue "impossibility" to file court documents "should be resolved in [petitioner's] favor"). The inquiry then becomes whether the prisoner acts with "reasonable diligence to move his petition forward" after discovery of the source of the delay. Corjasso v. Ayers, 278 F.3d at 879 (9th Cir.2002).

Here when LeBeau legal property was taking to R/D Dep't for shipping by ORDERS from the Warden on December 28, 2018. On January 11, 2019, his limitation period expired. LeBeau received his legal property back on February 18, 2019, his one-year limitation period had already expired. The "extraordinary circumstances" and its consequence thus made it impossible for LeBeau to file his petition in a timely fashion.

Once LeBeau received his legal property he acted with reasonable diligence to move his petition forward and filed his § 2255 habeas petition on February 20, 2019, with the court. See Allen, 255 F.3d at 800-01 (if the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of 'causation between the extraordinary circumstances (2d. Cir.2000). Appropriate only during the delay caused by the extraordinary circumstances was beyond LeBeau's control.

LeBeau did not stay silent in his diligence prior to the 14-days in which he asserts he was in lockdown and without his legal file by ORDERS of the Warden. LeBeau had contact with his former attorney by telephone two times during the summer of 2018, requesting case files he needed. However, his former attorney never provided the case files. LeBeau filed a motion on July 6, 2018, with the courts to have his former attorney compel and produce his client file (CR.Doc.560). On July 12, 2018, the court denied the motion based on a pleading filed by LeBeau's former attorney stating that he previously provided a complete copy of the file to LeBeau. However, prior to LeBeau's 14-days before his limitation period, LeBeau was still preparing his § 2255 habeas petition researching case laws and cites, rules and procedures, preparing documents. LeBeau was not ready to file his § 2255 habeas petition prior to his 35<sup>th</sup>-day. LeBeau has established extraordinary circumstances beyond his control along with diligence an/or reasonable diligence to toll his limitation period.

#### **IV. THE DISTRICT COURT ERROR IN THE PROCEDURE RULING IN DENYING LEBEAU'S CERTIFICATE OF APPEALABILITY.**

To warrant a certificate of appealability defendant must make a "substantial showing of the denial of a constitutional right" as required by U.S.C. § 2253(c)(2). A "substantial showing requires a petitioner to establish that "reasonable jurists" would find the courts assessment of the constitution claims "debatable or wrong". Slack v. McDanial, 529 U.S. 473, 483-84 (2000). Stated differently, "[a] substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve

the issues differently, or the issues deserve futher processing". Cox v. Norris, 133 F.3d 565, 569 (8th Cir.1997). A certificate of appealability does not require a showing that the appeal will succeed Miller-El v. Cockrell, 537, U.S. 337, 123 S.C.T. 1029, 154 L.Ed.2d 931 (2003). Caldwell v. Lewis, 414 F.Appx 809, 814-15 (6th Cir.2011).

Here the scope of LeBeau's certificate of appealability is well defined "on the above issues". LeBeau allegations about his various Institutional barriers and his due process rights under the Fifth Amendment of the United States Constitution were violated by the Bureau of Prisons and the Warden at USP Yazoo, Mississippi, could pursuade a reasonable jurists to debate whether LeBeau applies to due process clause and appealability doctrine. The barriers were created by confiscating LeBeau's legal file on December 28,2018, 14-days prior to his § 2255 habeas petition limitation period on January 11, 2019. Denying LeBeau access to the courts and legal file by ORDERS of the (BOP) and the Warden at (USP) Yazoo.

First, the hurricane at (FCI) Merianna, Florida, causing the closure of that Institution and the immediate transportation of all (FCI) inmates at Merianna to the (USP) facility in Yazoo, Mississippi. Second, ORDERS by the (BOP) to re-classify the (USP) "maximum" security facility to a (FCI) "medium" security Institution. Third, (BOP's) ORDERS of all (USP) Yazoo inmates to be immediately redesignated to other USP facilities throughout the country. Fourth, ORDERS from Warden at (USP) Yazoo for all (USP) inmates to take all their personal and legal property to the R/D Dep't for shipping immediately. Lastly, LeBeau taking all his personal and legal property to R/D for shipping , leaving LeBeau without access to the courts and legal file, LeBeau's lockdown status, no access to the law library, typewriter, copy machine, an/or any part of the facility. Therefore all the above facts and issues have violated LeBeau's due process rights. LeBeau showed his issues were debatable among reasonable jurists and the court could have resolve the issues differently and that the issues deserve futher processing. the due process clause and appealability doctrine should apply to LeBeau on all the factual basis in the above certiorari petition.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

*Gerald W. LeBeau*  
Gerald Wayne LeBeau, pro se,

Date: January 26, 2023.

I declare under penalty of perjury 18 U.S.C. § 1476 that the above foregoing  
is true and correct. Dated this 26th day of January, 2023.

*Gerald W. LeBeau*  
Gerald Wayne LeBeau, pro se,