

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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GERALD WAYNE LEBEAU, Petitioner, vs. UNITED STATES OF AMERICA, Defendant.	5:19-CV-05011-KES ORDER TO SHOW CAUSE
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**INTRODUCTION**

This matter is before the court on the *pro se* petition of Gerald LeBeau seeking habeas relief pursuant to 28 U.S.C. § 2255. (Doc. 1). Mr. LeBeau's habeas petition arises from his underlying conviction in the U.S. District of South Dakota, file number 14-cr-50048-KES-1. Now pending is the Respondents' Motion to Dismiss Mr. LeBeau's petition without holding an evidentiary hearing. (Doc. 9). Respondent asserts Mr. LeBeau's petition is untimely, and therefore, should be dismissed. (Doc. 10). This matter was referred to this Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B).

**DISCUSSION**

Mr. LeBeau's § 2255 habeas petition is subject to a one-year statute of limitation that runs from the *latest* of four specified dates:

- ① the date on which the judgment of conviction becomes final;
- ② the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws

of the United States is removed, if the movant was prevented from making a motion by such governmental action;

- ④ the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- ⑤ the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Only one of the above dates appears to be relevant here—the date on which the judgment of conviction became final. The date on which the judgment of conviction becomes final is calculated as follows:

- ① If *certiorari* is sought following affirmance on direct appeal: judgment becomes final on the day the Supreme Court of the United States either denies *certiorari* or affirms on the merits. Clay v. United States, 537 U.S. 522, 577 (2003).
- ② If *certiorari* is not sought following affirmance on direct appeal: judgment becomes final when the 90-day period for filing *certiorari* expires. Id.; SUPREME COURT RULE 13.
- ③ If the conviction is reversed on direct appeal: the limitation period does not begin until both the conviction *and* sentence become final. Burton v. Stewart, 549 U.S. 147, 156 (2007).
- ④ If no appeal is filed to the Court of Appeals: there is a split in authority. The Eighth Circuit has not yet addressed this issue. The Second, Third, Sixth, Tenth, and Eleventh Circuits hold judgement becomes final upon expiration of the period in which the defendant could have appealed to the Court of Appeals. The Fourth Circuit has held judgment becomes final on the day the District Court entered the judgment. Permitting the approach which grants a longer time period, the judgment would become final on the day on which the period of time to appeal expired.

The one-year statute of limitations is not a jurisdictional bar to a district court's review, but rather, is an affirmative defense. Day v. McDonough, 547

U.S. 198, 205 (2006). The statute of limitations defense, therefore, can be waived by the government. Even if the government waives the limitations defense, the court has the discretion to dismiss a motion as untimely ~~sua sponte, so long as the court "accord[s] the parties fair notice and an opportunity to present their positions" and ensures the petitioner "is not significantly prejudiced by the delayed focus on the limitation issue."~~ Day, 547 U.S. at 210.

The statute of limitations is, however, subject to equitable tolling. Holland v. Florida, 560 U.S. 631, 650 (2010); United States v. Martin, 408 F.3d 1089, 1092 (8th Cir. 2005). A petitioner may toll the statute of limitations by showing "(1) he has been diligently pursuing his rights and (2) an extraordinary circumstance stood in his way." White v. Dingle, 616 F.3d 844, 847 (8th Cir. 2010) (citing Holland, 560 U.S. at 649). The burden is on the petitioner to demonstrate circumstances exist for equitable tolling. Holland, 560 U.S. at 650; Martin, 408 F.3d at 1092.

In the present case, the Court has not raised the statute of limitations issue *sua sponte*. Rather, the government has asserted the statute of limitations defense, and instead, urges this court to dismiss Mr. LeBeau's petition as untimely. (Docs. 9, 10). Mr. LeBeau was sentenced by the District Court and an amended judgement was entered on November 9, 2015. He filed a timely appeal to the Eighth Circuit on November 13, 2015. The Eighth Circuit Court of Appeals affirmed the judgment of the District Court on August 14, 2017. Mr. LeBeau did not file an appeal to the Supreme Court of the

United States. Ordinarily, Mr. LeBeau's conviction would have become final for purposes of a § 2255 habeas petition on the expiration of his date to appeal to the Supreme Court of the United States, *i.e.* 90 days following the Eighth Circuit Court of Appeal's judgment affirming the District Court. Mr. LeBeau's conviction would have then became final on November 12, 2017. However, Justice Gorsuch granted Mr. LeBeau a 60-day extension of time to file a petition for writ of certiorari with the Supreme Court of the United States.<sup>1</sup>

As such, Mr. LeBeau's conviction became finalized when he did not file an appeal to the Supreme Court of the United States on January 11, 2018. Mr. LeBeau had one year to file his present § 2255 habeas petition. As such, the deadline for filing the present habeas petition was January 11, 2019. Mr. LeBeau's present § 2255 habeas petition was not filed until January 30, 2019, or 19 days after the deadline had expired.<sup>2</sup>

### **CONCLUSION**

Based on the foregoing facts, law and analysis, it is hereby ORDERED that Mr. LeBeau shall, on or before December 13, 2019, file a response to this Court's Order and shall show cause why his § 2255 motion should not be dismissed as untimely.

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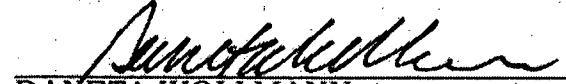
<sup>1</sup> Gerald Wayne LeBeau v. United States, Application No. 17A599, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17a599.html>

<sup>2</sup> Federal prisoners are afforded the benefit of the "mailbox rule" regarding timely filing of § 2255 petitions. The § 2255 habeas petition will be deemed "filed" the day it is placed into the prison mailing system. However, if the prison has a system designed for legal mail, the inmate must use that system to receive the benefit of the mailbox rule. Rules Governing § 2255 Cases, Rule 3. Mr. LeBeau certified that his petition was placed into the prison mailing system on January 30, 2019. (Doc. 1 at p. 13).

Mr. LeBeau is hereby specifically notified that failure to timely respond to this Order to Show Cause may result in dismissal of his § 2255 motion.

DATED this 22nd day of November, 2019.

BY THE COURT:

  
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DANETA WOLLMANN

United States Magistrate Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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GERALD WAYNE LEBEAU,

5:19-CV-05011-KES

Petitioner,

vs.

ORDER

UNITED STATES OF AMERICA,

Respondent.

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The Court having considered the United States' conditional order for an affidavit in this matter, finds good cause appearing and hereby,

ORDERS that in the event the Court finds movant's motion for relief pursuant to 28 U.S.C. § 2255 timely and denies the United States' pending Motion to Dismiss (Doc. 9), that the United States shall have ten days to move the Court for permission for former defense counsel and appellate counsel to file affidavits in this matter and the United States shall then have the opportunity to brief the merits of LeBeau's claims in the context of its pending motion to dismiss.

Dated this \_\_\_\_ day of November, 2019.

BY THE COURT:

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DANETA WOLLMANN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

GERALD WAYNE LEBEAU,  Petitioner,  vs.  UNITED STATES OF AMERICA,  Respondent.	5:19-CV-05011-KES  ORDER GRANTING MOTION FOR EXTENSION (DOC. 17); GRANTING MOTION TO ORDER THE RESPONDENT TO SERVE RESPONSIVE PLEADINGS (DOC. 18)
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This matter is before the court on the *pro se* petition of Gerald LeBeau seeking habeas relief pursuant to 28 U.S.C. § 2255. Now pending is the Petitioner's Motion for Extension of Time (Doc. 17) and Motion to Order the Respondent to Serve Responsive Pleadings (Doc. 18). These matters were referred to this Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B).

As it pertains to the first motion, Petitioner was ordered by this court to show cause why his § 2255 motion should not be dismissed as untimely. (Doc. 16). That order required Petitioner to file a response on or before December 13, 2019. Petitioner requests a 30-day extension from that deadline to file his response to the Order to Show Cause. (Doc. 17).

As it pertains to the latter motion, Petitioner argues he has not received Docket entries: 7, 8, 9, 10, 11, 12, 13, 14, and 15. When Petitioner filed his original habeas petition in this case, his address in the court docket was listed as a penitentiary in Coleman, Florida. Subsequent motions filed by Petitioner

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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GERALD WAYNE LEBEAU, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	5:19-CV-05011-KES REPORT AND RECOMMENDATION
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**INTRODUCTION**

This matter is before the court on Gerald Wayne LeBeau's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. (Doc. 1). The pending matter was referred to this magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the standing order of the Honorable Jeffrey L. Viken, United States District Court Judge.

**BACKGROUND**

On August 14, 2015, LeBeau was convicted of three offenses by a jury: (1) possession with intent to distribute cocaine; (2) conspiracy to distribute cocaine; and (3) conspiracy to distribute marijuana<sup>1</sup>. An amended judgment of conviction was filed on November 9, 2015. (Doc. 507). LeBeau timely filed a direct appeal and on August 14, 2017, the Eighth Circuit Court of Appeals affirmed his conviction. (Doc. 552). LeBeau did not file an appeal to the

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<sup>1</sup> The criminal file is 5:14-cr-50048-KES-1.

Supreme Court of the United States. Ordinarily, Mr. LeBeau's conviction would have become final for purposes of a § 2255 habeas petition on the expiration of his date to appeal to the Supreme Court of the United States, *i.e.* 90 days following the Eighth Circuit Court of Appeal's judgment affirming the District Court. Mr. LeBeau's conviction would have then become final on November 12, 2017. However, Justice Gorsuch granted Mr. LeBeau a 60-day extension of time to file a petition for writ of certiorari with the Supreme Court of the United States.<sup>2</sup>

As such, Mr. LeBeau's conviction became final when he did not file an appeal to the Supreme Court of the United States on January 11, 2018. Mr. LeBeau had one year to file his present § 2255 habeas petition. As such, the deadline for filing the present habeas petition was January 11, 2019. Mr. LeBeau's present § 2255 habeas petition was not filed until January 30, 2019, or 19 days after the deadline had expired.<sup>3</sup> The court received LeBeau's habeas

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<sup>2</sup> Gerald Wayne LeBeau v. United States, Application No. 17A599, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17a599.html>.

<sup>3</sup> Federal prisoners are afforded the benefit of the "mailbox rule" regarding timely filing of § 2255 petitions. The § 2255 habeas petition will be deemed "filed" the day it is placed into the prison mailing system. However, if the prison has a system designed for legal mail, the inmate must use that system to receive the benefit of the mailbox rule. Rules Governing § 2255 Cases, Rule 3. Mr. LeBeau certified that his petition was placed into the prison mailing system on January 30, 2019. (Doc. 1 at p. 13). However, a subsequent pleading filed by LeBeau undermines the credibility of this. At Doc. 21, p. 7, he explains that "Believing he would be departing USP Yazoo immediately, the Petitioner pre-dated his § 2255 habeas petition as January 30th, 2019 before placing it into his personal property. The Petitioner believed he would be receiving his personal property upon arrival at his designated facility in Coleman, Florida. However, he was not transported out of USP Yazoo

petition on February 20, 2019. (Docs. 1, 2). After the petition was untimely filed, LeBeau moved the court for an extension of sixty days to file his petition. (Doc. 4). In the motion, LeBeau stated that he had been in transit to a different correctional 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. (Doc. 25).

The United States filed an answer and motion to dismiss the petition on the grounds that the petition was untimely filed and therefore, LeBeau failed to state a claim for relief and/or that this court lacked subject matter jurisdiction. (Doc. 9). On November 22, 2019, the court entered an order to show cause directing LeBeau to show cause as to why his § 2255 motion should not be dismissed as untimely. (Doc. 16). LeBeau moved the court for an extension of time to file his response and the court granted the motion setting the deadline to respond to January 12, 2020. (Docs. 17, 19).

LeBeau filed his responses to the order to show cause on January 28, 2020. (Docs. 21, 22). Other non-responsive pleadings were also received from LeBeau during this time frame.<sup>4</sup> On July 13, 2020, LeBeau filed a

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until January 31st, 2019." It appears that LeBeau may not have mailed the petition until sometime in February 2019.

<sup>4</sup> On March 11, 2020, LeBeau objected to the government's motion to file affidavits. (Doc. 23). LeBeau also filed a motion to amend his § 2255 petition on April 9, 2020 (Doc. 24), as well as a "Supplement Motion for Supporting Facts" on May 15, 2020 (Doc. 25). Neither of these two pleadings address the timeliness issues, but instead raise additional arguments regarding the substance of his § 2255 petition.

supplemental response regarding equitable tolling. (Doc. 26). Another supplemental pleading from LeBeau was filed on June 22, 2021. (Doc. 27).

## **DISCUSSION**

The statute of limitations for § 2255 motions is as follows:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

See 28 U.S.C. § 2255(f).

Of the four specified dates listed in § 2255(f), only one is relevant here – “the date on which the judgment of conviction becomes final.” Id. A judgment is deemed final “where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed [or a petition for certiorari finally denied...].” United States v. Johnson, 457 U.S. 537, 543, n. 8 (1982) (citation omitted); see also Clay v. United States, 537 U.S. 522, 527 (2003) (for the purpose of starting § 2255’s one-year limitation period, “[f]inality attaches 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.”). The time for filing a petition for certiorari is 90 days after entry of the court of appeals’ judgment. Clay, 537 U.S. at 525.

As noted above, LeBeau’s conviction became final when he did not file an appeal to the Supreme Court of the United States on January 11, 2018. Mr. LeBeau had one year to file his present § 2255 habeas petition. As such, the deadline for filing the present habeas petition was January 11, 2019. Mr. LeBeau’s present § 2255 habeas petition was not filed until January 30, 2019. (Doc. 1). Initially, LeBeau conceded that his petition was untimely by nineteen days. (Doc. 21 at p. 2). However, for the first time, in his supplemental brief dated July 13, 2020, LeBeau asserts that his petition was not untimely because his one-year deadline to file should have been in February of 2019. (Doc. 26). In support of this, LeBeau states that he filed a second request for an extension of time to the Supreme Court and that Justice Gorsuch denied the motion on an unknown date in February of 2018. (Doc. 26 at p. 2). LeBeau’s assertion was not made under penalty of perjury, nor is it supported by any evidence. LeBeau cites “See DE 3-4” as support for the assertion that he made a request for and was denied an extension. (Doc. 26 at p. 2). However, no such attachment exists. Furthermore, a review of the file before the United States Supreme Court does not contain any evidence of the claimed continuance or denial. This court rejects LeBeau’s unsupported assertion that he requested a second extension and was denied the same. Therefore, LeBeau’s petition must be dismissed absent equitable tolling.

## I. **Equitable Tolling**

In the Eighth Circuit, the doctrine of equitable tolling applies to § 2255 motions. United States v. Martin, 408 F.3d 1089, 1092 (8th Cir. 2005). Equitable tolling is an extraordinary remedy used only in rare circumstances and “affords the otherwise time-barred petitioner an exceedingly narrow window of relief.” Jihad v. Hvass, 267 F.3d 803, 805 (8th Cir. 2001); United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2002). “[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.” Jihad, 267 F.3d at 806 (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)).

Equitable tolling is only applicable in two instances: “(1) if there are extraordinary circumstances beyond a movant’s control that would keep him from filing in a timely fashion or (2) if the government’s conduct ‘ lulled’ the movant into inaction through reliance on that conduct.” United States v. Hernandez, 436 F.3d 851, 858 (8th Cir. 2006) (internal citations omitted). “Equitable tolling only applies when the circumstances that cause the delay in filing are ‘external to the plaintiff and not attributable to his actions.’” Id. at 858 (citing Maghee v. Ault, 410 F.3d 473, 476 (8th Cir. 2005)) (additional citations omitted). Further, [t]he petitioner must also demonstrate that he acted with due diligence in pursuing his [§ 2225] petition. E.J.R.E. v. United States, 453 F.3d 1094, 1097 (8th Cir. 2006).

The burden is on Mr. LeBeau to demonstrate circumstances exist which would justify equitable tolling. Id. LeBeau sets forth several grounds for equitable tolling. (Doc. 21 at pp. 3-4). First, LeBeau argues that he filed a series of motions in his criminal file<sup>5</sup> in the summer and fall of 2018, including a motion to correct (Doc. 558), a motion for return of property (Doc. 559), a motion to compel the government to respond (Doc. 560), a motion requesting a remedy for destroyed property (Doc. 568), and a motion for legal advice from the court (Doc. 568). These pleadings all contained LeBeau's handwritten address as Yazzo, Miss. LeBeau does not provide any explanation regarding why he was able to prepare and file the above-described pleadings and not a § 2255 petition during the same relevant time period. The only explanation for the delay as offered by LeBeau is that he was an inmate at USP Yazoo, Mississippi during the month of December 2018, and due to a hurricane that struck the state of Florida, federal inmates at FCI Merianna were transported to USP Yazoo. (Doc. 21 at pp. 6-8). LeBeau believed that this would cause him to be redesignated to other federal facilities throughout the country. Id. LeBeau concedes that he was not transported out of Yazoo until January 31, 2019. Id. at p. 7. However, he states that he was without his personal property, in lockdown status, restricted to his housing unit and had no access to the law library. Id. LeBeau's remaining explanations are relevant to the time period *after* the filing deadline had passed. (Doc. 21 at p. 8; Doc. 22). Giving petitioner the benefit of the doubt, LeBeau provides an explanation for

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<sup>5</sup> Criminal file 5:14-cr-50048-KES-1.

the last 42 days of the filing time period; however, he offers no explanation for the preceding 323 days. The exhibit LeBeau attached to his brief demonstrates that from July 3, 2018, until January 31, 2019, he was housed at Yazoo, Mississippi. (Doc. 22 at p. 6).

#### **A. Extraordinary Circumstances**

“The extraordinary circumstance that prevents a petitioner from filing his federal application must be external to the petitioner and not attributable to his actions.” Johnson v. Hobbs, 678 F.3d 607, 610 (8th Cir. 2012).

A petitioner’s *pro se* status and failure to follow the rules does not constitute extraordinary circumstances. Id. Nor does lack of legal knowledge. Maghee v. Ault, 410 F.3d at 476-77; Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004). Lack of access to legal research materials or legal assistance is not, in and of itself, grounds for equitable tolling, but may suffice for tolling only if the petitioner can demonstrate *how* lack of access hindered his efforts to pursue his claim. Finch v. Miller, 491 F.3d 424, 427 (8th Cir. 2007). Here, LeBeau provides no explanation of how being on lockdown prevented him from continuing work on the motion, thus prejudicing him in meeting the one-year limitations deadline.

In the case of Muhammad v. United States, a § 2255 petitioner argued that a five-month detention in the Special Housing Unit constituted extraordinary circumstances warranting the application of equitable tolling. 735 F.3d 812 (8th Cir. 2013). The Eighth Circuit held:

While we do not foreclose the possibility that another movant might be able to show how the conditions of his confinement

constitute an extraordinary circumstance warranting the application of equitable tolling, [petitioner] fails to demonstrate how his five months of special confinement prevented him from meeting the one-year statute of limitations. He acknowledges that he was able to send letters during his confinement which suggests he had access to paper and writing implements. He does not claim that he was prohibited from contacting the court or was denied any mail sent from the court. Although he claims that he was not allowed access to the prison's law library during this special confinement, we have recognized that equitable tolling was not proper when an unrepresented prisoner claimed lack of legal resources. Accordingly, we agree with the district court that [petitioner's] five-month confinement in the Special Housing Unit does not constitute an extraordinary circumstance warranting the application of equitable tolling.

Muhammad, 735 F.3d at 815 (internal citations omitted). In recent years, several courts have addressed claims of equitable tolling due to prison lockdowns and the closure of prison law libraries as a result of COVID-19. Those courts<sup>6</sup> have held that petitioners are not entitled to equitable tolling if there is no evidence that they diligently pursued their right to file a § 2255 motion prior to being lockdown.

#### **B. Due Diligence**

The Holland Court held that a petitioner must establish "reasonable diligence" in pursuing his federal habeas rights, not "maximum feasible diligence." Holland v. Florida, 560 U.S. 631, 653 (2010).

The Eighth Circuit has summarized what does and does not constitute due diligence on the part of the petitioner:

A petitioner acts with diligence when, for example, he writes letters to his attorney asking her to file a habeas petition, contacts the

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<sup>6</sup> See United States v. Thomas, No. CR18-135, 2020 WL 7229705, at \*2 (E.D. La. Dec. 8, 2020); United States v. Barnes, No. 18-CR-0154-CVE, 2020 WL 4550389, at \*2 (N.D. Okla. Aug. 6, 2020).

court to learn about the status of his case, seeks to have his attorney removed for failure to pursue his case, and files a pro se petition the very day that he learns it is late. In contrast, a petitioner does not act diligently when he simply assumes that his attorney is working on his case even though she does not respond to his communication and hangs up on him when he calls.

See Williams v. Kelley, 830 F.3d 770, 773 (8th Cir. 2016).

In one case, where the petitioner was prevented from filing for three months due to his medical status (he was placed on suicide watch), the court held no extraordinary circumstances were presented because petitioner failed to show why he could not have filed in the nine months remaining of the limitations period. Gordon v. Arkansas, 823 F.3d 1188, 1195-96 (8th Cir. 2016). See also Nelson v. Norris, 618 F.3d 886, 892-93 (8th Cir. 2010) (petitioner failed to demonstrate due diligence when he failed to take any action for nine months).

In another case, a petitioner wrote a letter to the court six weeks before the AEDPA limitations period was going to expire, asking to speak to his public defender about some matters unrelated to filing a federal habeas petition.

English v. United States, 840 F.3d 957, 959 (8th Cir. 2016). No habeas petition was filed. Id. The petitioner waited another six months before filing the petition on his own. Id. The court held the petitioner did not act with due diligence. Id.

Here, LeBeau is completely silent as to what actions he took prior to the 42 days in which he asserts he was in lockdown and without his personal property. The pleadings in his underlying criminal file show that on June 25, 2018, Mr. LeBeau filed a motion requesting that the court review the

magistrate judge's report and recommendation regarding the suppression issues raised pretrial. (Doc. 558). The court filed an order denying the motion and explained that it previously ruled on all objections which were raised to the report and recommendation. (Doc. 563). Also on June 25, 2018, LeBeau filed a motion for return of property which was granted in part and denied in part. (Docs. 559, 565). On July 6, 2018, LeBeau filed a motion to compel his former attorney to produce his client file. (Doc. 560). LeBeau specifically acknowledged that he needed the files to prepare his § 2255 motion and that he was aware of the one-year filing deadline. (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. On September 14, 2018, LeBeau filed a pleading advising that his son was authorized to pick up his personal property. (Doc. 566). On October 25, 2018, LeBeau moved the court to order the government respond to the suppression motion which was raised pretrial and requested that the court rule on the suppression motion. (Doc. 567). On the same date, LeBeau made a motion for legal advice asking about reimbursement for his computer which was destroyed. (Doc. 568). On October 26, 2018, the court denied the motions and again informed LeBeau that the court previously ruled on the suppression motion in its order at Docket 324. (Doc. 569). LeBeau's filings make it clear that he was aware of the ability to file a § 2255 habeas action and that he knew there was a one-year filing deadline from the date that his judgment was final. (Doc. 560 at p. 2). Despite this knowledge, his filings during the relevant time

period involve asking the court to rule on a moot suppression issue, as well as litigating the return of personal property. The court finds that this does not constitute due diligence. Furthermore, the court finds that a single motion filed six months before the habeas filing deadline asking that his attorney produce client files does not constitute due diligence.

The court concludes that LeBeau has not established there were any extraordinary circumstances beyond his control that despite his due diligence, prevented him from timely filing his § 2255 motion. Because the initial motion is untimely filed, his proposed supplemental motions are also untimely.

### **CONCLUSION**

Based on the foregoing facts, law and analysis, this court respectfully recommends that Mr. LeBeau's § 2255 motion to vacate, set aside, or correct his sentence (Doc. 1) be denied with prejudice as untimely. It is further recommended that the United States' Motion to Dismiss (Doc. 9) be granted. The court further recommends that the Government's conditional motion for continuance (Doc. 11) be denied as moot. The court further recommends that no certificate of appealability be issued.

### **NOTICE TO PARTIES**

The parties have fourteen (14) days after service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require de novo review by the

District Court. Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

DATED this 27th day of January, 2022.

BY THE COURT:

  
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DANETA WOLLMANN  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

GERALD WAYNE LEBEAU,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

5:19-CV-05011-KES

ORDER FOR RESPONSE

Movant, Gerald Wayne LeBeau, has filed a pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. From a reading of the motion, the court cannot determine that "it plainly appears from the face of the petition . . . that the petitioner is not entitled to relief in the district court" warranting summary dismissal pursuant to Rule 4 of the Rules Governing Section 2255 Cases in the United States District Court. Therefore, it is

ORDERED that the United States Attorney for the District of South Dakota will serve and file an answer or responsive pleading to the motion, together with a legal brief or memorandum, on or before November 18, 2019.

Dated October 17, 2019.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

GERALD WAYNE LEBEAU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

5:19-CV-05011-KES

ORDER DENYING PETITIONER'S  
SECOND MOTION FOR EXTENSION,  
ADOPTING REPORT AND  
RECOMMENDATION, AND  
GRANTING MOTION TO DISMISS

Petitioner, Gerald Wayne LeBeau, filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Docket 1. The United States moves to dismiss the motion for failure to state a claim and for lack of subject matter jurisdiction. Docket 9. The matter was referred to United States Magistrate Judge Daneta Wollmann under 28 U.S.C. § 636(b)(1)(B) and this court's October 16, 2014, standing order. The Magistrate Judge recommends that LeBeau's § 2255 motion be denied with prejudice as untimely. Docket 29 at 12. LeBeau moved for a 30-day extension of the deadline to file objections, which this court granted, setting a new objection deadline of March 14, 2022. Dockets 30, 31. LeBeau now moves for another 30-day extension of the objection deadline. Docket 32. For the following reasons, the court denies LeBeau's second motion for an extension, adopts the Magistrate Judge's report and recommendation in full, and grants respondent's motion to dismiss.

## FACTUAL BACKGROUND

LeBeau was convicted of possession with intent to distribute cocaine, conspiracy to distribute cocaine, and conspiracy to distribute marijuana on August 14, 2015. CR Docket 467.<sup>1</sup> An amended judgment of conviction was filed on November 9, 2015. CR Docket 507. LeBeau appealed his conviction, and the Eighth Circuit Court of Appeals affirmed his conviction on August 14, 2017. CR Docket 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, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17a599.html> (last visited March 17, 2022). Justice Gorsuch granted this motion, extending LeBeau's time to file a petition for writ of certiorari until January 11, 2018. *Id.* But then LeBeau did not file a petition for a writ with the Supreme Court.

LeBeau filed this motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 on January 30, 2019.<sup>2</sup> Docket 1 at 14. Respondent

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<sup>1</sup> Within this order, the court cites to documents in LeBeau's civil § 2255 case by citing the court's docket number for that document. The court will cite to "CR" when citing to documents filed in LeBeau's criminal case found at *United States v. LeBeau*, 5:16-14-50048-KES-1.

<sup>2</sup> Under the prison mailbox rule, § 2255 motions are filed on the day they are placed into the prison mailing system. Rule 3(d), Rules Governing § 2255 Proceedings. LeBeau certified that he placed his motion into the prison mailing system on January 30, 2019. Docket 1 at 13. But in a later filing, LeBeau explained that he predicated his motion before placing it in his personal property upon belief that he would be transferred to a new facility. Docket 21 at 7. This transfer began on January 31, 2019, suggesting that LeBeau did not place his

filed a motion to dismiss LeBeau's motion for failure to state a claim for relief and for lack of subject-matter jurisdiction. Docket 9. Respondent argues that LeBeau's motion is untimely because it was filed after the one-year limitation period under 28 U.S.C. § 2255(f). Docket 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. Docket 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. Docket 29 at 7-12.

## **DISCUSSION**

### **I. LeBeau's Motion for an Extension of Time to File Objections**

LeBeau moves for a second 30-day extension of the time to file objections to the Magistrate Judge's report and recommendation. Docket 32. In a supplemental brief dated July 13, 2020, LeBeau argues that his motion was not untimely because he filed a second request for an extension of time to file a petition for writ of certiorari with the Supreme Court, which was denied on an unknown date in February of 2018. Docket 26 at 2. He also argues that this denial of his request for an extension pushed his one-year § 2255 motion deadline back until the same unknown date in February 2019, one year from the denial. *Id.* Now, he claims that his Supreme Court docket sheet is

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motion into the prison mailing system until February. *See id.* This court received LeBeau's § 2255 motion on February 20, 2019. Docket 1.

necessary to complete his objections because it will show that he filed a second request for an extension from the Supreme Court. *See Docket 32 at 1-2.*

LeBeau's argument fails for two reasons. First, he puts forth no evidence that the requested extension and denial occurred. LeBeau cites to "DE 3-4" to support his claim, but he has filed no documents or attachments with this label. *See Docket 26 at 2.* Further, the publicly available Supreme Court docket sheet shows that LeBeau's only request for an extension of time was granted by Justice Gorsuch, but no subsequent request was made or denied. *See Gerald Wayne LeBeau, Applicant v. United States*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17a599.html> (last visited March 17, 2022).

But even if LeBeau's allegation were true, his one-year § 2255 motion deadline would still be January 11, 2019, one year from the expiration of his granted Supreme Court extension. Under 28 U.S.C. § 2255(f)(1), the limitation period relevant to LeBeau's motion runs from "the date on which the judgment of conviction becomes final[.]" "Finality attaches 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) (emphasis added). LeBeau's time to file a certiorari petition expired on January 11, 2018. Regardless of whether a request to extend this deadline was made and denied, the deadline would have been January 11, 2018. LeBeau's argument would only have merit if his

request to extend his deadline were granted, which he does not contend. See Docket 26 at 2.

LeBeau asks this court for a second extension in order to find a publicly available Supreme Court docket sheet that does not provide evidence of a request for an extension that he alleges he submitted. Further, even if he had requested this extension, it would have no impact on his case because he admits the extension request was denied. Thus, this court denies LeBeau's request for an extension of the time to file objections to the Magistrate Judge's report and recommendation.

## **II. Respondent's Motion to Dismiss**

Respondent argues that LeBeau failed to timely file his motion under 28 U.S.C. § 2255(f). Docket 10 at 3-7. The Magistrate Judge recommends that this court grant respondent's motion to dismiss because LeBeau's motion is untimely. Docket 29 at 7-12. LeBeau has not filed objections to Magistrate Judge Wollmann's report and recommendation. After de novo review of the record, this court adopts the Magistrate Judge's report and recommendation.

LeBeau argues that the one-year statute of limitations should be equitably tolled because of a hurricane that struck his facility in December 2018, restricting his access to the prison law library and to his partially prepared § 2255 motion. Docket 21 at 6-8. "The one-year statute of limitation may be equitably tolled 'only if [the movant] shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing.' " *Muhammad v. United States*,

735 F.3d 812, 815 (8th Cir. 2013) (alteration in original) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). The Magistrate Judge explains that the hurricane may have impeded LeBeau's ability to file his § 2255 motion in "the last 42 days of the filing time period; however, he offers no explanation for the preceding 323 days." Docket 29 at 7-8. Further, LeBeau filed several motions in his criminal case during the one-year period, including one that referenced the one-year filing deadline. See CR Dockets 558, 559, 560 at 2. The Magistrate Judge explains that this merely shows LeBeau's awareness of the deadline, not that he was diligent in pursuing habeas relief. Docket 29 at 10-12.

This court agrees with the Magistrate Judge's report and recommendation. LeBeau cannot show extraordinary circumstances because the circumstance he alleges, the hurricane, only interfered with his ability to file his § 2255 motion during a small portion of the one-year period. He also cannot show due diligence because he was aware of the one-year deadline and put most of his efforts during that period toward litigating already-settled issues in his criminal case. Respondent's motion to dismiss is granted.

Thus, it is ORDERED:

1. That LeBeau's motion for an extension of time (Docket 32) is denied.
2. That respondent's motion to dismiss (Docket 9) is granted.

LeBeau's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Docket 1) is dismissed with prejudice.

3. That the Magistrate Judge's report and recommendation (Docket 29) is adopted in full.
4. That respondent's motion for conditional continuance to file affidavits (Docket 11) is denied as moot.
5. That LeBeau's miscellaneous motions (Dockets 4, 24, 27) are denied as moot.

DATED March 21, 2022.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

GERALD WAYNE LEBEAU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

5:19-CV-05011-KES

JUDGMENT

Pursuant to the Order Denying Petitioner's Second Motion for Extension,  
Adopting Report and Recommendation, and Granting Motion to Dismiss, it is  
ORDERED, ADJUDGED, AND DECREED that judgment is entered in  
favor of respondent and against petitioner, Gerald Wayne LeBeau.

Dated March 21, 2022.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

GERALD WAYNE LEBEAU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

5:19-CV-05011-KES

ORDER DENYING CERTIFICATE OF  
APPEALABILITY

Petitioner, Gerald Wayne LeBeau, filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Docket 1. The United States move to dismiss the motion for failure to state a claim and for lack of subject matter jurisdiction. Docket 9. This court granted respondent's motion and dismissed LeBeau's motion to vacate, set aside, or correct his sentence. Docket 33.

When a district court denies a petitioner's § 2255 motion, the petitioner must first obtain a certificate of appealability before an appeal of that denial may be entertained. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). This certificate may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" is one that proves "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (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 further proceedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). LeBeau has not made a substantial showing that his claims are debatable among reasonable jurists, that another court could resolve the issues raised in his claims differently, or that a question raised by his claims deserves additional proceedings. Thus, a certificate of appealability is not issued.

Thus, it is ORDERED:

1. That a certificate of appealability is denied.

DATED April 13, 2022.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

GERALD WAYNE LEBEAU,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

5:19-CV-05011-KES

ORDER GRANTING MOTION TO  
EXTEND

Plaintiff, Gerald Wayne LeBeau, moves for a 30-day extension of time to file objections to the magistrate judge's report and recommendation. As grounds for the extension, plaintiff states that the facility where he is incarcerated has been locked down, which has prevented him from conducting legal research. Good cause appearing, it is

ORDERED that plaintiff's motion (Docket 30) is granted. Plaintiff shall file objections or a notice of no objections on or before March 14, 2022.

Dated February 18, 2022.

BY THE COURT:

*/s/ Karen E. Schreier*

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 22-1780

Gerald Wayne LeBeau

Appellant

v.

United States of America

Appellee

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Appeal from U.S. District Court for the District of South Dakota - Western  
(5:19-cv-05011-KES)

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**ORDER**

If the original file of the United States District Court is available for review in electronic format, the court will rely on the electronic version of the record in its review. The appendices required by Eighth Circuit Rule 30A shall not be required. In accordance with Eighth Circuit Local Rule 30A(a)(2), the Clerk of the United States District Court is requested to forward to this Court forthwith any portions of the original record which are not available in an electronic format through PACER, including any documents maintained in paper format or filed under seal, pre-sentence report (3 copies), exhibits, CDs, videos, administrative records and state court files. These documents should be submitted within 10 days.

April 15, 2022

Order Entered Under Rule 27A(a):  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No: 22-1780

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Gerald Wayne LeBeau

Plaintiff - Appellant

v.

United States of America

Respondent - Appellee

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Appeal from U.S. District Court for the District of South Dakota - Western  
(5:19-cv-05011-KES)

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**JUDGMENT**

Before BENTON, SHEPHERD, and KELLY, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

May 20, 2022

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 22-1780

Gerald Wayne LeBeau

Appellant

v.

United States of America

Appellee

---

Appeal from U.S. District Court for the District of South Dakota - Western  
(5:19-cv-05011-KES)

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**ORDER**

The motion of Appellant for an extension of time until August 18, 2022, to file a petition for rehearing is granted.

Electronically-filed petitions for rehearing must be received in the clerk's office on or before the due date.

The three-day mailing grace under Fed.R.App.P. 26(c) does not apply to petitions for rehearing.

June 22, 2022

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 22-1780

Gerald Wayne LeBeau

Appellant

v.

United States of America

Appellee

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Appeal from U.S. District Court for the District of South Dakota - Western  
(5:19-cv-05011-KES)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 02, 2022

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Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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

VS.

**United States of America** — RESPONDENT(S)

**PROOF OF SERVICE**

I, **Gerald Wayne LeBeau, pro se,** do swear or declare that on this date, **January 26, 2023**, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

**Mrs. Elizabeth B. Prelogar—Solicitor General—United States Dep't of Justice**  
**950 Pennsylvania Avenue, NW**  
**Washington, DC 20530-0001**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **January 26, 2023**.

  
(Signature)