

No. 22A1076

IN THE
SUPREME COURT OF THE UNITED STATES

GARY LYNN McDUFF,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Supreme Court, U.S.
FILED
JUN 09 2023
OFFICE OF THE CLERK

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

APPLICATION TO EXTEND THE TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

To the Honorable Justice Samuel Alito

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**APPLICATION TO EXTEND THE TIME TO FILE A PETITION
FOR WRIT OF CERTIORARI**

To the Honorable Justice Samuel Alito.

COMES NOW, Petitioner, Gary Lynn McDuff, and makes application under Rules 30.2 & 30.3 and 13.5 to extend the time to file a petition for writ of certiorari. The specific reasons why an extension of time to file is justified is set out below in brevity.

NOTE: Page numbers referenced herein are the page numbers written by hand in the top right corner of each page in the attached APPENDIX OF EXHIBITS excerpts filed with this Application.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Fifth Circuit denied the my last motion for reconsideration on May 25, 2023 (Doc # 142-1) thus making this application timely within the 90 day jurisdictional requirements of this Court.

BACKGROUND AND REASONS FOR GRANTING AN EXTENSION

- 1) I am unable to timely file my petition for writ of certiorari without my copies of the records of the courts below (my legal materials from the Fifth Circuit Court of Appeals and the United States District Court for the Eastern District of Texas: 21-40073 and 4:17-cv-391 respectively).

- 2) I present the facts to you herein as clearly and succinctly as possible. I do not intend for any of my claims to be ad hominem attacks of the lower courts or any party opponent. I only seek relief to which I am entitled under the tenants and canons of fundamental fairness.

- 3) In a post-conviction hearing conducted by the Chief SEC Administrative Law Judge in 2016 I was provided with a copy of the entire "investigative file" a part of a discovery order issued by that court when it realized I had never seen the investigative file assembled by the investigative team who had testified at my trial. It consisted of several hundred thousand pages which has never been kept in less than 80 legal boxes stored in two designated areas on the prison with approximately 40 boxes in each area designated by prison staff (See page 128). I discovered and presented approximately 7000 pages of exculpatory evidence in that post-conviction hearing from the discovery material that had never been provided to me prior to trial or on direct appeal, and I prevailed in the outcome of that hearing. Thereafter, using those pages of exculpatory evidence (all from the government's investigative file) I timely filed my petition for habeas corpus relief pursuant to 18 U.S.C. §2255 (See pages 048-066).

- 4) To ensure that my §2255 petition, memorandum in support, and all the newly discovered evidence from the government's investigative file that supported the nine grounds for relief raised in my habeas petition to vacate were timely filed in the district court, my daughter personally delivered all of those documents to the office of the district court clerk. She provided the clerk with three copies of each item to be filed, and a bound copy of each of the five items for the judge, all of which she handed to the intake clerk for filing. That clerk assigned a case number to the filing and noted it in handwriting on the cover page of the §2255 petition

as well as on the one-page server's filing receipt, which the clerk date stamped (FILED Jun 02, 2017) and which described with particularity each of the five documents the clerk certified as received for filing. These documents are attached, see pages 048-051. The clerk handed my daughter the date stamped server's filing receipt and my daughter left the clerk's office. She drove back to Houston and mailed me a copy of the server's filing receipt to assure me that the filing was complete and on time. That date stamped receipt was my assurance that the newly discovered exculpatory evidence was properly before the district court to support my habeas petition (page 050). My daughter also confirmed mailing a complete copy of all five of the documents she filed for me to the AUSA's office.

- 5) Not until the district court denied the §2255 in 2021, and I filed a appeal in the Fifth Circuit, did I discover that the district court clerk had not recorded three of the five documents listed on the server's filing receipt, but instead had destroyed them before the magistrate or district judge had an opportunity to review them (See page 100, last paragraph).
- 6) When I received the ROA to prepare my appeal I was concerned and confused because it consisted of 1400 pages when it should have consisted of approximately 7500 pages given to the clerk by my daughter to be filed as was reflected on the filer's receipt given to her by the clerk of the court on the day of the initial filing (June 2, 2017). The BOP staff member who delivered the ROA to me sent by the district court provided me with a memo confirming the number of pages in the ROA a being only 1400 (See pages 078-088).
- 7) Using the memo from the BOP staff member and the filer's receipt given to my daughter by the district clerk, my daughter and my son, acting on

my behalf, contacted the clerk of the district court and the AUSA's office to ask for assistance in locating the missing three documents (Appendices 1, 2 & 3), to ensure that the ROA was complete for purposes of appeal and reconsideration. This search for the three missing documents, received by the clerk to be filed simultaneously with the §2255 petition and memorandum in support is presented in the record of communications with the clerk and AUSA and affidavits of my son and daughter (See pages 094-101).

- 8) The district court clerk's admission of the destruction of the missing and unaccounted for three appendices three years before the magistrate's R&R and the district judge's review and consideration of the §2255 merits will be the gravamen of my petition for a writ of certiorari as it was in the appellate and district court (See pages 051, 077, 084, 086, and 089).
- 9) The diminution of the record by the district court is the grounds upon which the granting of certiorari is the only remaining means by which that error of due process can be rectified.
- 10) Lastly, this request for an extension of time to file my petition for certiorari is reasonable and justified by the animus demonstrated by the BOP's knowing violation of both, Rule 32(a) of the Federal Rules of Appellate Procedure and Rule 36.1 of the Supreme Court. (see pages 020 & 143, and the May 31, 2023 Declaration of Gary Lynn McDuff attached to the end of the attached APPENDIX OF EXHIBITS.)
- 11) In support of this request for an extension I have attached only the relevant excerpts of the Exhibits filed in the court of appeals in this instant matter, and in the district court in support of the unrelated collateral §2241 proceedings that has been equally negatively impacted by the BOP's

taking and withholding of all my case records, legal materials and work product for 22 weeks, all of which has made it impossible for me to prepare and timely file my responsive pleadings (See pages 122-134).

- 12) The Fifth Circuit accepted and considered, but denied my last request to reconsider or rehear en banc my appeal for a COA on May 25, 2023 (Doc #142) which had been initially denied because it was mailed to the court timely, but unsigned by me. Pursuant to Rule 13.3 it is my understanding that the 90 days within which I must file for certiorari will end on August 23, 2023, instead of June 15, 2023, which is 90 days after the court granted (on March 17, 2023) my motion for leave to file out of time motion for reconsideration (See pages 115-116, Doc ##115-116 and 135). In either case I am unable to prepare my certiorari petition without all of the necessary records the BOP has yet to return to me (See pages 145, 149, 151-153, and 190-192).

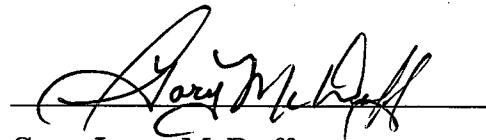
For these reasons I request any extension of time (i.e. 60 days) you are permitted to afford me under this unfortunate, if not extraordinary, circumstance; and if appropriate an Order to the BOP to locate or replace the contents of the undelivered legal materials removed from the 44 unaccounted boxes which was either boxes discarded by or retained by the BOP in apparent retaliation for my §2241 claims made against the FCC Beaumont warden for failure to follow the First Step Act as written by Congress. A directive from you to the BOP to afford me daily access to my legal materials to prepare my certiorari petition is also needed and requested (See page 128 which shows how the BOP complied with a lower court's order to do this).

I stand ready to provide you with any additional documents or information you may require deciding this matter. My only limitation in being able to fully comply is if such documents are not within the 52% of the documents the BOP

has returned to me. My family is making every effort to locate documents for me using PACER which is a cost imposed on them by the BOP's retention of my files and records.

PRAYER

I declare under penalty of perjury pursuant to 28 U.S.C. §1746 that the foregoing facts are personally known to me a being true and correct, and I pray for any other and additional relief in equity or in law to which you determine I may be entitled.

A handwritten signature in black ink, reading "Gary Lynn McDuff", is written over a horizontal line.

Gary Lynn McDuff

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