APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1766

DONTE PARRISH,

Plaintiff -Appellant,

v.

UNITED STATES OF AMERICA,

Defendant -Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Irene M. Keeley, Senior District Judge. (1:17-cv-00070-IMK)

Argued: March 8, 2023 Decided: July 17, 2023

Before NIEMEYER, GREGORY, and RICHARDSON, Circuit Judges.

Dismissed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Richardson joined. Judge Gregory wrote a dissenting opinion.

ARGUED: Rachel Martin, Andrew Nell, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. Jordan Vincent Palmer, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee. **ON BRIEF:** J. Scott Ballenger, Appellate Litigation Clinic, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. Erin K. Reisenweber, Assistant United States Attorney, Christopher J. Prezioso, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

NIEMEYER, Circuit Judge:

Because Donte Parrish did not file a timely notice of appeal from the judgment in this civil action, we dismiss his appeal for lack of jurisdiction. *See* 28 U.S.C. § 2107.

Parrish claimed that because of circumstances beyond his control, he did not receive notice of the district court's judgment for over 90 days after it was entered, and he filed a notice of appeal shortly after he did receive notice. In response, we found his notice of appeal untimely, but we construed the notice as a timely motion to reopen the appeal period pursuant to Federal Rule of Appellate Procedure 4(a)(6), which implements an exception found in 28 U.S.C. § 2107(c), and remanded the case to the district court. The

district court then entered an order under Rule 4(a)(6), reopening the time for noticing an appeal for 14 days from the date of its order. Parrish, however, failed to file a notice of appeal within the window so provided.

Section 2107(c) of Title 28, which is the statute prescribing the timing requirements for filing appeals in civil actions, provides that a would-be appellant who does not receive timely notice of a judgment and thereafter fails to file a timely notice of appeal may nonetheless request — not more than 180 days after the judgment is entered — that the district court exercise its discretion to reopen the time for appeal by providing a new 14-day window within which to file a notice of appeal. 28 U.S.C. § 2107(c); *see also* Fed. R. App. P. 4(a)(6). Compliance with this narrow supplemental opportunity for filing a timely notice of appeal is especially significant because the times specified by statute for filing appeals in civil actions are jurisdictional. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007); *see also Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17–18 (2017).

In defense of his failure to file a notice of appeal within the 14-day window, Parrish argues that we should treat the district court's order reopening the time for appeal as a *nunc pro tunc* "validation" of his earlier untimely notice of appeal and conclude therefore that he was not required to file a second notice during the 14-day window created by the district court's order. We conclude, however, that this argument is foreclosed by both the text of § 2107(c) and the text of the district court's order. Moreover, because Parrish's earlier filing has already been construed — to his benefit — as a motion under Rule 4(a)(6), we cannot now reconstrue it to be

simultaneously both the motion that must precede a district court's reopening order and the notice that must follow after the order is granted. Accordingly, we dismiss Parrish's appeal for lack of jurisdiction.

I

In 2017, while serving a 180-month term of imprisonment in federal prison, Parrish, proceeding pro se, commenced this civil action against the United States pursuant to the Federal Tort Claims Act. At its core, his complaint alleged that prison officials unlawfully detained him in administrative segregation for approximately three years. He demanded $5 million in compensatory damages. In a memorandum opinion and order, the district court granted the government's motion to dismiss the complaint on the grounds that one of Parrish's claims was time-barred and the remaining claims had not been administratively exhausted. The court entered final judgment dismissing Parrish's complaint on March 24, 2020.

Parrish claimed that he did not receive a copy of the district court's judgment until June 25, 2020, over 90 days after it was entered, and thus he filed a notice of appeal dated July 8, 2020. In his notice of appeal, he explained, "Due to my being transferred from Federal to State custody I did not receive this order until June 25, 2020. It is now 7/8/20 and I'm filing this notice of appeal."

We concluded that Parrish's notice of appeal was "clearly untimely." *Parrish v. United States*, 827 F. App'x 327, 327 (4th Cir. 2020) (per curiam). But in view of the circumstances — that Parrish did not receive notice of the district court's judgment "until 93

days after entry" and that he filed the notice of appeal "within 14 days after" receiving a copy of the judgment — we "construe[d] [Parrish's] notice of appeal as a motion to reopen the appeal period under Rule 4(a)(6)" and remanded the case to the district court "to determine whether the appeal period should be reopened." *Id.*

On remand, the district court granted Parrish's motion to reopen by order dated January 8, 2021, stating in its order, "[P]ursuant to Federal Rule of Appellate Procedure 4(a)(6), . . . the Court REOPENS the time for Parrish to file his appeal for fourteen (14) days following the entry of this Order." The court also directed the clerk of court to transmit the order to Parrish by certified mail, return receipt requested.

Parrish did not, however, file a notice of appeal — or anything else — during the 14-day period authorized by the district court's order. On January 27, 2021, five days after the 14-day period had closed, Parrish mailed a document to this court, which the Clerk docketed on February 2, 2021, as a supplemental informal brief.

To assist us with the somewhat involved procedural issues in this case, we appointed counsel to represent Parrish in this court.*

II

Parrish contends that when the district court reopened the time to appeal under Federal Rule of

* We are grateful to Professor J. Scott Ballenger, Director of the Appellate Litigation Clinic, University of Virginia School of Law, and law students Rachel Martin and Andrew Nell for their fine representation in service to Parrish and the court.

Appellate Procedure 4(a)(6) with its order dated January 8, 2021, it "validated" his prior untimely notice of appeal dated July 8, 2020, and he therefore was not required to file a second notice of appeal during the 14-day window. He explains that when a district court *extends* the time to file a notice of appeal under Rule 4(a)(5) based on excusable neglect, a previous untimely notice of appeal filed within the time so extended is validated. *See Evans v. Jones*, 366 F.2d 772, 772–73 (4th Cir. 1966) (per curiam). He argues that the same reasoning for validating a prior notice of appeal when "extensions" are granted under Rule 4(a)(5) should also apply to "reopenings" under Rule 4(a)(6). Accordingly, he maintains that with a "validated" prior notice of appeal, he need not have filed a second notice of appeal, which would simply amount to "empty paper shuffling." (Quoting *Hinton v. City of Elwood*, 997 F.2d 774, 778 (10th Cir. 1993)).

While Parish's argument relies on cases decided under Rule 4(a)(5), that rule is not itself jurisdictional. *See Hamer*, 138 S. Ct. at 17 (noting, while applying Rule 4(a)(5), that "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction" (cleaned up)). Rule 4(a)(5) simply implements 28 U.S.C. § 2107(c), id. at 21, and it is § 2107 that defines our appellate jurisdiction in this matter, *see id.* at 17–18; *Bowles*, 551 U.S. at 213–14. Accordingly, we must satisfy ourselves that, under § 2107(c), we have jurisdiction.

We begin with the statutory text. In 28 U.S.C. § 2107, Congress established mandatory timing requirements for conferring jurisdiction on courts of appeals in civil actions. In § 2107(a), it provided that in civil actions, courts of appeals have jurisdiction to

review district courts' judgments, orders, or decrees if the notice of appeal is "filed[] within thirty days after the entry of such judgment, order or decree." 28 U.S.C. § 2107(a). But § 2107(b) then lengthens the 30-day appeal period to 60 days where one of the parties is the United States. *Id.* § 2107(b). And finally, § 2107(c) provides two exceptions to those timing requirements.

The first exception, stated in the first sentence of § 2107(c) and implemented by Federal Rule of Appellate Procedure 4(a)(5), specifies that "[t]he district court may, upon motion filed *not later than 30 days* after the expiration of the time otherwise set for bringing appeal, *extend* the time for appeal upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c) (emphasis added); *see also* Fed. R. App. P. 4(a)(5).

The second exception, stated in the second sentence of § 2107(c) and implemented by Federal Rule of Appellate Procedure 4(a)(6), provides:

> [I]f the district court finds—
>
> > (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
> >
> > (2) that no party would be prejudiced,
>
> the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, *reopen* the time for appeal for a period of 14 days *from the date of entry of the order* reopening the time for appeal.

28 U.S.C. § 2107(c) (emphasis added). This exception thus authorizes the district court, in its discretion, to reopen the time for filing a notice of appeal for 14 days if it finds that (1) the appellant did not receive notice of the judgment to be appealed within 21 days of its entry; (2) the appellant files a motion to reopen within 180 days after the entry of judgment or within 14 days after receipt of notice of the judgment, whichever is earlier; and (3) no party would be prejudiced by granting the motion.

The Supreme Court has construed these statutory limits on appellate court jurisdiction strictly. In *Bowles*, the appellant failed to file a timely notice of appeal and thereafter moved to reopen the period during which he could file his notice of appeal pursuant to § 2107(c) and Rule 4(a)(6). 551 U.S. at 207. The district court granted the appellant's motion, but rather than reopening the filing period for 14 days, as authorized by statute, the district court's order "inexplicably" gave the appellant 17 days within which to file his notice of appeal. *Id.* The appellant thereafter filed his notice of appeal on day 16 — which was within the 17 days authorized by the district court but beyond the 14-day period authorized by § 2107(c). *Id.* Despite the fact that the appellant relied on the district court's error in authorizing 17 days, the Supreme Court concluded that the appellant's appeal had to be dismissed because *statutory* limitations on the timing of appeals are "mandatory and jurisdictional" and are not susceptible to equitable modification. *Id.* at 208–09 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam)). As the Court emphasized, "Because Congress decides whether federal courts can

hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Id.* at 212–13.

In this case, the exception stated in the first sentence of § 2107(c) — providing for extensions of time for excusable neglect or good cause — does not apply. If that exception *were* to apply, the period for filing a notice of appeal would be extended, and thus it would be reasonable to conclude that a notice of appeal filed at any time within the original time for appeal or the approved extension period would be timely. But that exception is applicable only when the appellant files a motion for an extension "not later than 30 days" after the established time for filing a notice of appeal — in this case, not later than June 24, 2020 (*i.e.*, 30 days after the 60-day appeal period in cases in which the United States is a party). It is undisputed that Parrish did not file a motion pursuant to that exception, and even if his July 8, 2020 notice of appeal were to be treated as such a motion, it still would be untimely, and therefore the first exception would not apply.

Because the first exception does not apply here, the only exception on which Parrish can rely is the one provided in the second sentence of § 2107(c), which does not purport to extend the time for appeal from the date of the judgment, but rather provides for a *new* 14-day window for filing a notice of appeal, running from the date of the district court's order granting the reopening. The district court in this case found that Parrish qualified for a reopening of the appeal period under the second exception and provided him with a new opportunity to file a notice of appeal within 14 days of its order, *i.e.*, by January 22, 2021. Thus,

before the date of the district court's order, any appeal by Parrish was foreclosed by the untimeliness of his notice because his notice was not filed within 60 days of the judgment or any possible extension of that period. The order granting the motion therefore "reopened," rather than "extended," the period so that he could file a notice of appeal that was timely. Indeed, Congress deliberately used "reopen" to imply that before such an order, the appeal was indeed foreclosed. *See Reopen*, Merriam-Webster's Collegiate Dictionary 1054 (11th ed. 2020) (defining "reopen" as "to open *again*" or "to begin *again*" (emphasis added)). Thus, to appeal in these circumstances, Parrish would have to file a appeal within 14 days of the entry of the order.

Not only does the text of § 2107(c) require that Parrish file his notice of appeal during the reopened period, the text of the district court's order granting his motion to reopen also explicitly advised him on this requirement. The court said that it was reopening "the time for Parrish to file his appeal for fourteen (14) days *following* the entry" of the order. (Emphasis added). This language does not purport to validate his earlier filed untimely notice of appeal, as Parrish would now have it.

Parrish nonetheless relies on court decisions addressing the first exception in § 2107(c) — the *extension* provision implemented by Rule 4(a)(5) — and argues that such caselaw "applies with equal force" to the *reopening* provision in § 2107(c). But the cases he cites provide him with little help, as they only address Rule 4(a)(5), not 4(a)(6), and apply the rule in materially distinct circumstances. In *Hinton v. City of Elwood*, on which Parrish relies, the appellant filed his notice of appeal one day beyond the 30-day period

specified in § 2107(a), therefore making it untimely. 997 F.2d at 777. But *Hinton* thereafter filed a motion for an extension of time *within the 30-day extension period* permitted by § 2107(c) and Rule 4(a)(5). *Id*. While the district court granted that motion, *Hinton* did not file a second notice of appeal. The Tenth Circuit concluded nonetheless that the district court's granting of the motion to extend "validated" the prior notice of appeal. *Id*. at 778. Similarly, in *Evans v. Jones*, on which Parrish also relies, we construed an untimely notice of appeal, which was filed after the 30-day period mandated by § 2107(a) but *within the subsequent 30-day extension period* permitted by Federal Rule of Civil Procedure 73(a) (the prior version of Federal Rule of Appellate Procedure 4(a)(5)), as a motion *to extend* under that rule based on excusable neglect. 366 F.2d at 772–73. We indicated that if the district court found that the delay was excusable, it would "validate" the prior notice of appeal "provided the effect [was] not to extend the time for filing more than thirty days from the expiration of the original thirty-day period." *Id*. at 773. Thus, these cases dealt with *extensions* of appeal periods sought by filing a motion (or a notice construed as a motion) within the permissible time period for requesting such an extension. And in that circumstance, it would reasonably follow that *extending* the time for filing the appeal validates any notice of appeal filed within the period of extension. But this case involves a motion *to reopen* the appeal time after it had long expired. In such a circumstance, Congress authorized a special exception by which a court could authorize *a new 14-day window* for filing an appeal, running from the date of the district court's order granting the 14-day

window. And that exception clearly requires that a notice of appeal be filed within the 14-day period.

In support of his position that Rule 4(a)(6) incorporates Rule 4(a)(5) jurisprudence, our good colleague in dissent states that "in at least one prior case, this Court has accepted a district court's holding that an order reopening the appeal period validated an earlier, untimely notice of appeal," citing *Grant v. City of Roanoke*, 810 F. App'x. 236 (4th Cir. 2020). *Infra* at 15. This unpublished decision, however, does not, in its one short paragraph, conduct any analysis of the Rule 4(a)(6) issue. This hardly constitutes binding, persuasive authority.

Finally, Parrish argues that he is "functionally in the same position as the *pro se* litigant" in *Clark v. Cartledge*, 829 F.3d 303 (4th Cir. 2016). In that case, we found that a pro se litigant's motion for an extension of time to request a certificate of appealability, which was filed within the 30-day window mandated by § 2107(a), was the "functional equivalent" of a notice of appeal sufficient to satisfy Federal Rule of Appellate Procedure 3. *Clark*, 829 F.3d at 304–06. In doing so, however, we emphasized that to benefit from such a ruling, "the litigant's motion *must* be timely under Rule 4." *Id*. at 307–08. Therefore, regardless of what *Clark* says about the importance of construing pro se filings liberally, it does not allow us to excuse Parrish's failure to comply with the timing requirements of § 2107(c).

Parrish filed only one notice of appeal in this case, and that notice was untimely under any relevant jurisdictional standard established by Congress. It was filed after the original 60-day period for appealing

expired, and it was filed after any extension period that could have been obtained. When a *new* period for appeal was given to Parrish, he did not file a notice of appeal within that new period. This "[f]ailure to comply with a jurisdictional time prescription . . . deprives a court of adjudicatory authority over the case, necessitating dismissal." *Hamer*, 138 S. Ct. at 17. Accordingly, we dismiss Parrish's appeal for lack of jurisdiction.

IT IS SO ORDERED

GREGORY, Circuit Judge, dissenting:

Through no fault of his own, Donte Parrish did not learn the district court had dismissed his Federal Tort Claims Act complaint until three months after the court entered judgment. After he finally received notice of the judgment on June 25, 2020, Parrish filed a *pro se* notice of appeal on July 8, 2020. This Court recognized that his notice of appeal was "clearly untimely," but construed it as a timely motion to reopen the appeal period under Federal Rule of Appellate Procedure 4(a)(6). *Parrish v. United States*, 827 F. App'x 327, 327 (4th Cir. 2020) (per curiam). The district court's judgment remained unchanged in the months between that filing and the district court's January 8, 2021 order reopening the appeal period, and the government agrees that Parrish's initial notice of appeal sufficiently informed all parties of his intent to appeal.

Yet my colleagues in the majority hold that we lack jurisdiction over Parrish's appeal because Parrish failed to *refile* his notice of appeal after the district court reopened the appeal period. Nothing in the text of 28 U.S.C. § 2107(c) compels such a formalistic and hollow requirement. To the contrary, Fourth Circuit precedent makes clear that the district court's order reopening the appeal period validated Parrish's earlier notice of appeal without the need for refiling. Because that precedent establishes that we have jurisdiction over Parrish's appeal, I respectfully dissent.

I.

Section 2107 prescribes a straightforward set of rules governing the timeliness of an appeal, which is a necessary prerequisite for a court of appeals to

exercise jurisdiction. To confer jurisdiction on this Court, an appellant generally must file a notice of appeal within 30 days after the district court enters judgment (60 days if the United States is a party). 28 U.S.C. § 2107(a) – (b). There are two exceptions to this deadline. First, the district court may extend the time to appeal if the appellant so moves no later than 30 days after the appeal deadline expires and can show "excusable neglect or good cause." § 2107(c). Federal Rule of Appellate Procedure 4(a)(5) elaborates on this exception, and provides that the court may grant an extension of up to 30 days after the original appeal deadline or 14 days after the court grants the motion for an extension, whichever is later. Fed. R. App. P. 4(a)(5).

Second, the district court may reopen the time to appeal for a period of 14 days if (1) the appellant did not receive notice of the judgment within 21 days of its entry; (2) the appellant moves to reopen within 14 days after receiving notice or within 180 days after the entry of judgment, whichever is earlier; and (3) the court finds that no party would be prejudiced by the reopening. § 2107(c). Rule 4(a)(6) reiterates these three requirements for reopening the time to file an appeal. Fed. R. App. P. 4(a)(6). When the district court reopens the appeal period, the new 14-day window for filing a notice of appeal runs from the date of the order granting the reopening. § 2107(c).

Each exception provides a way for an appellant to receive additional time to notice their appeal. The two exceptions just apply in different scenarios. An appellant may file a motion for an extension if they received notice of the district court's judgment at the proper time but, because of excusable neglect or good

cause, either (1) cannot file a notice of appeal before the deadline or (2) failed to file a notice of appeal before the deadline but discovered the oversight within 30 days after the deadline. *Id.* A motion to reopen, on the other hand, is the proper vehicle if the appellant did not receive notice of the judgment within 21 days of its entry, as long as no more than 180 days have passed since the date the district court entered judgment. *Id.* For our purposes, the key point is that an appellant may file either motion after the original appeal period closes.

The question in Parrish's case is whether the district court's order reopening his appeal period validated his earlier notice of appeal, which he filed after the 60-day appeal deadline passed. This Court's longstanding precedent readily answers that question in the affirmative. In *Evans v. Jones*, the appellant filed a notice of appeal one day after the appeal period closed, which this Court construed as a motion for an extension. 366 F.2d 772, 772–73 (4th Cir. 1966) (per curiam) (applying precursor to Rule 4(a)(5)). The Court made clear that a later district court order granting an extension would "validate" the appellant's untimely notice of appeal. *Id.* at 773.

Since our decision in *Evans*, other circuits have similarly held that a Rule 4(a)(5) extension retroactively validates an earlier, untimely notice of appeal. *Hinton v. City of Elwood*, 997 F.2d 774, 777–79 (10th Cir. 1993); *McNicholes v. Subotnik*, 12 F.3d 105, 107 (8th Cir. 1993). In *Hinton*, the Tenth Circuit explained that this scenario resembles a prematurely filed notice of appeal, which courts treat as valid "when the order appealed from is likely to remain unchanged in both its form and its content." 997 F.2d

at 778. Because a Rule 4(a)(5) motion for an extension "does not portend any substantive alteration in the form or content of the order being appealed from," the Tenth Circuit concluded that a district court's approval of an extension "validate[s] a prior notice of appeal." *Id.* The *Hinton* Court aptly noted that requiring the appellant to refile a notice of appeal in this context "would amount to little more than empty paper shuffling," and it did not believe that Rule 4(a)(5) was "designed to impose such a hollow ritual on a would-be appellant." *Id.* (internal quotation marks omitted).

The rule this Court established in *Evans* applies with equal force where, as here, a late-filed notice of appeal is followed by a successful Rule 4(a)(6) motion to reopen. Like a Rule 4(a)(5) motion for an extension, a Rule 4(a)(6) motion to reopen does not rely on any intervening change in the district court's judgment—it simply requests additional time to notice an appeal of the judgment. In both contexts, once the district court grants additional time to appeal, the only remaining question is whether the initial notice of appeal continues to "provide[] sufficient notice to other parties and the courts" that the appellant intends to seek appellate review. *Smith v. Barry*, 502 U.S. 244, 248 (1992). If it does—and it typically will—the district court's decision to grant an extension or reopen the appeal period validates the notice of appeal.

In fact, in at least one prior case, this Court has accepted a district court's holding that an order reopening the appeal period validated an earlier, untimely notice of appeal. After the district court granted the motion to reopen, it explained that "[b]ecause a notice of appeal has already been

docketed, [appellant] does not need to file a new notice of appeal." *Grant v. City of Roanoke*, No. 7:16-CV-00007, 2019 WL 6833664, at *3 (W.D. Va. Dec. 13, 2019). We then exercised jurisdiction over the appeal. *See Grant v. City of Roanoke*, 810 F. App'x 236 (4th Cir. 2020), *cert. denied*, 141 S. Ct 2471 (2021).

Given our decision in *Evans*, the jurisdictional question in Parrish's case should be easy to resolve. The district court's decision to reopen the time for an appeal validated Parrish's earlier notice of appeal, which gives us jurisdiction. The government agrees that Parrish's notice of appeal sufficiently communicated his intent to appeal the district court's judgment. That makes sense, as nothing about the judgment changed between July 2020, when Parrish filed the notice of appeal, and January 2021, when the district court reopened the appeal period. Requiring Parrish to refile merely duplicates his earlier notice of appeal and "amount[s] to little more than empty paper shuffling." *Hinton*, 997 F.2d at 778 (internal quotation marks omitted).

II.

My colleagues in the majority see things differently. They maintain that the question is not whether the court and government received notice of Parrish's intent to appeal, but whether Parrish complied with § 2107(c)'s jurisdictional rules governing the timing of appeals. In their view, the statute always requires an appellant to re-notice an appeal after the district court reopens the appeal period, regardless of any previously filed notice of appeal. Try as I might, my efforts to find such a requirement in the text of § 2107(c) come up empty.

Section 2107(c) is silent on the effect an order reopening the appeal period may have on a previously filed notice of appeal. The statute merely provides that the district court may "reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal." § 2107(c). In cases where the appellant has not yet filed a notice of appeal, § 2107(c) obviously requires the appellant to file one within the 14-day reopened period. In a case like Parrish's, though, nothing in the statutory text compels refiling.* If the statute required an appellant to refile a notice of appeal in this scenario, an appellant also would need to refile a notice of appeal after the district court granted a motion for an extension. After all, "reopening the time for appeal" is no less ambiguous on this issue than "extend[ing] the time for appeal." § 2107(c). But that interpretation, of course, would conflict with our decision in *Evans*.

Unsurprisingly, then, the majority embarks on an effort to evade *Evans* by distinguishing a Rule 4(a)(5) extension from a Rule 4(a)(6) reopening. As they see it, a successful motion for an extension simply prolongs the original appeal period. A motion to reopen is different, they argue, because it seeks a new

---

* The Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), does not support the majority's position. There, the Court held that it lacked jurisdiction to hear an appeal the appellant had noticed 16 days after the district court reopened the appeal period (for a period of 17 days). *Id.* at 207–09. The Court explained that the filing failed to comply with the plain text of § 2107(c), which sets a 14-day limit for a reopened appeal period. *Id.* at 209–10. By contrast, the statute simply does not address whether an order reopening the appeal period validates an earlier-filed notice of appeal.

window to notice an appeal after the original appeal period has closed. In other words, the majority asserts that our appellate jurisdiction is "foreclosed" prior to an order reopening the appeal period, which is not the case when a district court merely extends the appeal period. *Ante* at 8–9.

This attempted distinction quickly crumbles under scrutiny. True, a litigant may move for an extension before the original appeal period expires and this Court loses the capacity to exercise jurisdiction. But § 2107(c) and Rule 4(a)(5) also permit an appellant to file a motion for an extension up to 30 days *after the appeal period expires*. In such a case, an extension order does not retroactively create an unbroken, prolonged appeal period. Rather, the order permits the appellant to notice an appeal within a new window of time that ends either 14 days after the entry of the extension order or 30 days after the original appeal deadline, whichever comes later. Fed. R. App. P. 4(a)(5). Thus, when an appellant files a notice of appeal after the appeal deadline, then successfully files a motion for an extension, the notice of appeal does not fall "within" the extension period the district court grants. *Ante* at 5.

Evans involved that exact scenario. *See* 366 F.2d at 772–73. The appellant filed his notice of appeal one day after the original deadline, at a time when we were unable to exercise jurisdiction over the appeal. After treating the filing as a motion for an extension, we held that an order granting an extension would "validate" the appellant's notice of appeal, *id.* at 773—that is, the appellant would not need to refile it. That our jurisdiction was foreclosed when the appellant

filed the notice of appeal had no bearing on our analysis.

The majority's semantic distinction between an extension and a reopening runs headlong into this binding precedent. If the appellant in *Evans* did not need to re-notice his appeal after we construed his late-filed notice as a motion for an extension, *id.* at 772–73, there is no principled reason to require Parrish to re-notice his appeal after we construed his late-filed notice as a motion to reopen and the district court granted that motion. In both cases, our inability to exercise jurisdiction when the appellant filed the untimely notice of appeal does not preclude the district court's later extension or reopening order from validating the notice. *Id.* Put simply, *Evans* directs us to treat Parrish's notice of appeal as validated and exercise jurisdiction over his appeal.

Separately, the majority reasons that Parrish's July 2020 filing cannot simultaneously serve as both a notice of appeal and a motion to reopen, so it ceased to be the former once we construed it as the latter. Once again, *Evans* easily defeats that argument. In *Evans*, we construed a late notice of appeal as a motion for an extension, then proceeded to hold that a district court order granting an extension would validate that same notice of appeal. *Id.* at 773.

Lastly, the majority finds it significant that the district court's order reopening the appeal period "explicitly advised" Parrish of the requirement to refile a notice of appeal within 14 days. *Ante* at 9. I agree that the district court apparently believed Parrish needed to file a new notice of appeal. But if appellate courts treated district courts' interpretations of the

law as dispositive, we would quickly find ourselves out of work. The question here is not what the district court told Parrish he needed to do; it's whether any "genuine doubt exist[ed] about who is appealing, from what judgment, [and] to which appellate court." *Clark v. Cartledge*, 829 F.3d 303, 305 (4th Cir. 2016) (quoting *Becker v. Montgomery*, 532 U.S. 757, 767 (2001)). It is beyond dispute that Parrish's July 2020 notice of appeal continued to convey his intent to seek appellate review in January 2021.

III.

In short, the majority is simply incorrect in holding that § 2107(c) required Parrish to file a duplicative notice of appeal during the reopened appeal period. If, as my colleagues assert, we must disregard a prior notice of appeal filed when our jurisdiction was "foreclosed," the notice of appeal in *Evans* could not have been validated by a later extension order. But the *Evans* Court held just the opposite. The majority's contrived distinction between motions to extend and motions to reopen flouts that precedent—and this Court's jurisdictional obligations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DONTE PARRISH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil action No. 1:17cv70
(Judge Keeley)

REPORT AND RECOMMENDATION

I. *Background*

On May 3, 2017, the *pro se* Plaintiff, an inmate then-incarcerated at USP Big Sandy[1] in Inez, Kentucky, filed a Federal Tort Claim Act ("FTCA") complaint. ECF No. 1. The Clerk of Court issued a Notice of Deficient Pleading, directing Plaintiff, *inter alia*, to file his complaint on a court-approved form and to file a motion to proceed as a pauper with supporting documents. ECF No. 3. On June 16, 2017, Plaintiff corrected his deficiencies. ECF Nos. 7, 8, 9, 10. By Order entered on June 19, 2017, Plaintiff was granted permission to proceed as a pauper but directed to pay

---

[1] Plaintiff is presently incarcerated at USP Lewisburg in Lewisburg, Pennsylvania.

an initial partial filing fee ("IPFF") within 28 days. ECF No. 11. On July 18, 2017, Plaintiff moved for an extension of time in which to pay the IPFF; by Order entered August 9, 2017, Plaintiff was granted the extension. ECF Nos. 13, 14. On September 8, 2017, Plaintiff moved for a second extension of time in which to pay the IPFF. ECF No. 16. He also filed a combined motion to proceed without payment of his IPFF; for a preliminary injunction/temporary restraining order; or in the alternative, for appointed counsel and/or for a copy of the Local Rules of Prisoner Litigation Procedure ("LR PL P"). ECF No. 17. By separate Orders entered September 13, 2017, the Warden was directed to respond to Plaintiff's allegations regarding the Trust Officer's failure to deduct Plaintiff's IPFF from his account [ECF No. 18]; Plaintiff's motion for appointed counsel was denied; the Clerk was directed to send him a copy of the LR PL P [ECF No. 19]; and Plaintiff's second motion for an extension of time in which to pay the IPFF was denied as moot. ECF No. 20. That same day, the undersigned issued a Report and Recommendation ("R&R") recommending that Plaintiff's motion for a preliminary injunction/temporary restraining order be denied. ECF No. 21. On September 14, 2017, Plaintiff paid his IPFF. ECF No. 22. On September 27, 2017, by special appearance of the Assistant United States Attorney ("AUSA"), the United States filed a response regarding Plaintiff's IPFF [ECF No. 25] along with a motion to seal. ECF No. 27. On October 2, 2017, Plaintiff filed objections to the R&R recommending his motion for a preliminary injunction/temporary restraining order be denied. ECF No. 28. By Order entered October 3,

2017, the United States' motion to seal was granted. ECF No. 29.

On November 21, 2017, Plaintiff moved for leave to file an amended complaint. ECF No. 34. By Order entered November 28, 2017, Plaintiff's motion to amend was granted and the Clerk was directed to send him a blank FTCA form to complete. ECF No. 35. On December 18, 2017, Plaintiff filed his amended complaint. ECF No. 39. On December 29, 2017, the United States moved to establish a time frame to answer or otherwise respond to Plaintiff's amended complaint. ECF No. 41. By Order entered January 3, 2018, the United States' motion to establish a time frame to answer or otherwise respond to Plaintiff's amended complaint was granted ECF No. 42.

By Order entered April 4, 2018, Plaintiff was directed to clarify the record by producing copies of the exhibits referenced, but not attached to his original complaint, and neither referenced nor attached to the amended complaint, as well as copies of his administrative tort claim(s) and the response(s) thereto. ECF No. 48. On April 16, 2018, Plaintiff filed a "memorandum of evidence" in response. ECF No. 51. By Order entered April 24, 2018, the United States was directed to produce copies of the Standard Form 95 administrative tort claims filed by Plaintiff. ECF No. 54. On April 25, 2018, the United States filed its response. ECF No. 55.

By Order entered on May 1, 2018, the United States was directed to file an answer on the limited issue of the timeliness of Plaintiff's claims. ECF No. 57. On May 17, 2018, Plaintiff filed a Notice of Timeliness. ECF No. 62. On May 30, 2018, the Plaintiff filed a

Motion for Summary Judgment with an attached memorandum of law, a memorandum of evidence, and multiple attachments. ECF No. 63. On June 11, 2018, the United States filed a Motion to Dismiss for Lack of Jurisdiction, attaching a memorandum in support and two sworn declarations. ECF No. 65. The United States also filed a Motion to Hold Consideration of Plaintiff's Motion for Summary Judgment in Abeyance. ECF No. 66. Because Plaintiff was proceeding *pro se*, a *Roseboro* Notice was issued on June 12, 2018, advising him of his right to respond to the United States' dispositive motion. ECF No. 67. By separate Order entered the same day, the United States' Motion to Hold Consideration of Plaintiff's Motion for Summary Judgment in Abeyance was granted. ECF No. 68. By Order entered June 18, 2018, the R&R recommending that Plaintiff's motion for a preliminary injunction be denied was adopted and Plaintiff's objections were overruled. ECF No. 69. On July 5, 2018, Plaintiff filed his response in opposition to the United States' dispositive motion. ECF No. 74.

This case is before the undersigned for a Report and Recommendation on Defendant's dispositive motion.

II. *The Pleadings*

A. *Amended Complaint*

Plaintiff's amended complaint [2] raises claims against Bureau of Prisons ("BOP") employees in six

[2] All of the claims raised in the amended complaint relate back to claims made in the original complaint. *See* Fed.R.Civ.P. 15(c).

federal institutions situated in five jurisdictions, [3] contending that:

1) he was falsely imprisoned by Defendant's employees from December 2009 through November 2012 without probable cause "for an alleged murder they knew I did not commit." ECF No. 39 at 6.

2) Plaintiff raises an abuse of process claim, claiming that the Defendant's employees misused the Administrative Detention process and the process of Special Management Unit ("SMU") for the sole purpose of illegally confining him for three years. *Id*. at 6–7.

3) The Defendant's employees intentionally inflicted emotional distress upon him by keeping him confined and denying him access to family and friends; denying his visits while he was at FCI Gilmer; giving him "racially motivated puzzles" at USP Hazelton; and labeling him a racist. *Id*. at 7.

4) The Defendant's employees were negligent for failing to review Plaintiff's case and timely releasing him from Administrative Detention. *Id*. at 8.

5) Defendant's employees committed malicious prosecution, pursuing a murder charge for which they had no probable cause, causing Plaintiff to lose good conduct time ("GCT"), which was ultimately restored to Plaintiff after a successful appeal. *Id*.

---

[3] Plaintiff alleges claims against BOP employees at: 1) USP Hazelton in Bruceton Mills WV; 2) FCI Gilmer in Glenville, WV; 3) USP Lewisburg, at Lewisburg, PA; 4) FCI Oakdale, in Allen Parish, LA; 5) USP Big Sandy, in Inez, KY, and 6) the staff at the BOP's Designation & Sentence Computation Center ("DSCC") in Grand Prairie, Texas.

Plaintiff contends that he filed an Administrative Tort Claim form regarding his claims, seeking $5,000,000.00. *Id*. at 4.

Plaintiff contends that as a result of Defendant's employees' actions, he suffered three years of illegal confinement in a 6 x 8' cell; was harassed; denied things afforded to similarly-situated inmates "out of pure spite;" and denied contact with family, which ultimately caused loss of relationships. *Id*. at 9.

As relief, he seeks $5,000,000.00. *Id.*

B. *Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(1)*

The United States contends that the amended complaint should be dismissed because

1) this court has no subject matter jurisdiction because Federal Courts lack subject matter jurisdiction to address lawsuits like the instant one that are untimely filed pursuant to the FTCA's procedural requirements;

2) Plaintiff did not file his complaint within six months after the BOP denied his underlying administrative claims.

3) Plaintiff mailed his original complaint on May 1, 2017; because there is no prison mailbox rule in the Federal Tort Claim Act, thus, Plaintiff is not entitled to equitable tolling of the deadline(s) within which he had to file his claims.

4) The deadline for Plaintiff to file suit over Administrative Tort claim TRT-MXR-2016-06283 expired on March 14, 2017, and the deadline to file suit regarding the claims raised in Plaintiff's

Administrative Tort claim TRT-MXR-2016-06710 expired on April 7, 2017. Thus, Plaintiff's claims are time-barred and must be dismissed for lack of subject matter jurisdiction.

ECF No. 65 at 2–9. The Defendant attached two sworn declarations to its dispositive motion.

See ECF Nos. 65-1 at 1 - 2, 65-2 at 1 - 2.

C. *Plaintiff's Response in Opposition*

Plaintiff reiterates his arguments and attempts to refute the United States' on the same. He contends that his complaint was timely filed "in accordance to [sic] the mailbox rule" and *Heck v. Humphries*,[4] and *Houston v. Lack* [5] "because it was given to the institution to forward to the courts the day I dated the complaint which was April 7, 2017 and no later." ECF No. 74 at 1–3. Further, he argues that the "actual accrual date" for his complaint is January 25, 2017 at 2:05 pm, the date when his murder charge was expunged by the Disciplinary Hearing Officer ("DHO"); otherwise, any filing before January 25, 2017 expungement would have been premature and would have rendered his filings not cognizable under 42 U.S.C. § 1983, FTCA, or *Bivens*.[6] *Id*. at 4.

---

[4] *Heck v. Humphries*, 512 U.S. 477 (1994).

[5] *Houston v. Lack*, 487 U.S. 266 (1988).

[6] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

III. *Standard of Review*

A. *Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(1)*

A party may move to dismiss an action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The burden of proving subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss is on the party asserting federal jurisdiction. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). A trial court may consider evidence by affidavit, deposition, or live testimony without converting the proceeding to one for summary judgment. *Id.*; *Mims v. Kemp*, 516 F.2d 21 (4th Cir. 1975). "Unlike the procedure in a 12(b)(6) motion where there is a presumption reserving the truth finding role to the ultimate factfinder, the court in a 12(b)(1) hearing weighs the evidence to determine its jurisdiction." *Adams*, 697 at 1219. Further, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. *Materson v. Stokes*, 166 F.R.D. 368, 371 (E.D. Va. 1996). Whenever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. Fed. R. Civ. P. 12(h)(3).

Parrish is representing himself, which requires the Court to liberally construe his pleadings. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251(1976); *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)(per curiam); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978); *Gordon v. Leeke*, 574

F.2d 1147 (4th Cir. 1978). While *pro se* pleadings are held to a less stringent standard than those drafted by attorneys, *Haines*, 404 U.S. at 520, even under this less stringent standard, a *pro se* complaint is still subject to dismissal. *Id.* at 520-21. The mandated liberal construction means only that if the Court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128 (10th Cir. 1999). A court may not construct the plaintiff's legal arguments for her. *Small v. Endicott*, 998 F.2d 411 (7th Cir. 1993). Nor should a court "conjure up questions never squarely presented." *Beaudett v. City of Hampton*, 775 F.2d 1274 (4th Cir. 1985).

III. *Analysis*

FTCA Statute of Limitations

It is well-established that the United States is immune from suit unless it consents to be sued. *See United States v. Testan*, 424 U.S. 392 (1976). However, the FTCA waives the federal government's traditional immunity from suit for claims based on the negligence of its employees. 28 U.S.C. § 1346(b)(1). Specifically, "[t]he statute permits the United States to be held liable in tort in the same respect as a private person would be liable under the law of the place where the act occurred." *Medina v. United States*, 259 F.3d 220, 223 (4th Cir. 2001). Nonetheless, the FCTA only waives the government's sovereign immunity if certain terms and conditions are met. *Honda v. Clark*, 386 U.S. 484 (1967). One of those conditions is that an FTCA action be filed within two years of the incident or within six months of the final claim denial. 28 U.S.C. § 2401(b). Title 28 U.S.C. § 2401(b) specifically states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun *within six months after the date of mailing*, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Moreover, 28 C.F.R. § 14.9(a) states that that

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and **shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification**.

28 CFR § 14.9(a)(emphasis added). Omission of this language from a denial letter prevents the limitations period from running. *See Barrett v. United States,* No. 86-0053, 1988 U.S. App. LEXIS 20301 * 3 - * 4 (4th Cir. July 5, 1988) *(per curiam*), *citing Dyniewicz v. United States*, 742 F.2 484, 486 (9th Cir. 1984); *Martinez v. United States*, 728 F.2d 694, 698 (5th Cir. 1984). *See also Boyd v. United States*, 482 F. Supp. 1126, 1129 (W.D. Pa. 1980) (Governmental failure to comply with the precise requirements of the final denial letter by making plaintiff aware of his rights will preserve a plaintiff's claim).

Here, the claims Parrish raised in his FTCA complaint were presented to the appropriate federal agency in two separate Administrative Tort claims:

TRT-MXR-06283 and TRT-MXR-06710. The timeliness of each claim is analyzed separately.

Administrative Tort Claim TRT-MXR-06283 was presented to the appropriate agency on September 1, 2016, within two years from the June 3, 2016 date Parrish's appeal was granted by Regional Director J.F. Caraway, Parrish's record was expunged, a rehearing was issued and the incident report was changed from a 100 series incident report (killing) to a 100A incident report (assisting in a killing). ECF No. 65-1 at 4. It sought $15,000.00 in compensation for claims of denial of access to the courts; the opportunity to have his custody level lowered; and access to certain institutional jobs; a violation of BOP Program Statement, CFR § 542 subpart B and violation of due care provision; the loss of liberty with loss of the right to rehabilitative programs; and loss of redress to wrongs in his first DHO hearing, arising out of the June 3, 2016 expungement of a 100(A) charge of assisting in a killing. *Id*. Plaintiff's administrative claim was denied on September 14, 2016. ECF No. 65-1 at 9. However, this letter was not a final denial; while it did advise Plaintiff that his claim was denied, it also advised him that he had a right to request reconsideration by submitting a request in writing and including additional evidence to support the request. *Id*. It did not advise Plaintiff of the six month deadline in which he was required to file suit to preserve the claim. Plaintiff did not request reconsideration of the claim. Pursuant to Fed.R.Civ.P Rule 6(a), 180 days or six months from the date of the September 14, 2016 letter was Tuesday, March 14, 2017. Parrish filed suit 50 days later, on May 3, 2017.

Nonetheless, because the government's September 14, 2016 letter did not include a statement specifically advising Parrish of the deadline in which he had to file suit, this "failure of the government to make plaintiff aware of his rights prevents this communication from being a proper final agency denial." *See Boyd*, 482 F. Supp. at 1129; *see also Barrett*, 1988 U.S. App. LEXIS 20301 * 3 - * 4. As noted *supra*, the failure to include this information prevents the limitations period from running. *Id*. at *4. Because there was no "proper final agency denial within 6 months of the claim as required by 28 U.S.C. § 2675, the plaintiff has the right at any time of his own option to deem such a failure to be a final agency denial." *Boyd*, *supra* at 1129, citing *Mack v. United States Postal Service*, 414 F.Supp. 504 (E.D. Mich. 1976). Accordingly, this claim is not barred by the § 2401(b) statute of limitations and this Court has subject matter jurisdiction over the claims raised therein, and the Defendant should be directed to answer the claims in Administrative Tort Claim TRT-MXR-06283 on the merits.

Administrative Tort Claim TRT-MXR-2016-06710 was presented to the appropriate agency on September 23, 2016, within two years from the June 3, 2016[7] date Parrish's appeal was granted by Regional Director J.F. Caraway, Parrish's record was expunged, a rehearing was issued and the incident report was changed from a 100 series incident report (killing) to a

[7] Although Plaintiff actually listed December 6, 2009 as the "day and date of accident" on the Standard Form 95 for this administrative tort claim, his § 8 "Basis of Claim" makes it clear that he is relying on the June 3, 2016 date that the DHO finding was cleared and the sanctions expunged. *See* ECF No. 65-1 at 11.

100A incident report (assisting in a killing). ECF No. 65-1 at 11. It alleged claims for 1) wrongful confinement; 2) denial of access to courts; 3) racial harassment by staff; 4) loss of eye sight; 5) loss of liberty/wrongful confinement; and 6) illegal use of restraints, and seeking $5 million in compensation. *Id*. Plaintiff's administrative tort claim TRT-MXR-2016-06710 was denied on October 7, 2016, and he was advised that he had six months from that date to file suit. ECF No. 65-1 at 18. Pursuant to Fed.R.Civ.P. Rule 6(a), 180 days or six months from the date of that final denial was Thursday, April 6, 2017. However, Plaintiff did not initiate the instant action until on May 3, 2017, 27 days after that date. Thus, this second administrative tort claim is clearly time-barred.

The undersigned recognizes that the United States Supreme Court has held that the FTCA's statute of limitations is a procedural, not jurisdictional bar. *United States v. Kwai Fun Wong*, 135 S.Ct. 1625, 1627 (2015). Accordingly, equitable tolling is applicable to FTCA's statute of limitation. However, equitable tolling in suits against the United States is only available in exceptional circumstances. *See Muth v. United States*, 1 F.3d 246, 251 (4th Cir. 1993). More specifically, the Fourth Circuit has stated that equitable tolling principles are appropriate only "where the defendant has wrongfully deceived or mislead the plaintiff in order to conceal the existence of a cause of action. " *Kokotis v. United States Postal Service*, 223 F.3d 275, 280–81 (4th Cir. 2000) (quoting *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987)).

Plaintiff's "Notice of Timeliness" first contends that his claims accrued between the dates of June 15, 2015,

when the FBI declined to prosecute the case, and June 3, 2016, when the incident report was expunged from his record. ECF No. 62 at 1. He argues that June 3, 2016 is the "most logical start date" because it was not until then that the FBI and the BOP were finished with their investigations. He asserts that USP Hazelton staff repeatedly told him that the matter was suspended until the FBI completed its investigation, and that he could do nothing about it until then. *Id.*

In his response in opposition to the defendant's dispositive motion, Plaintiff next argues that based upon *Houston v. Lack*, the prison mailbox rule should apply, asserting that, in *Houston*, the Supreme Court found that in prisoner cases, a filing is deemed "filed" at the moment that the prisoner places the document in the prison mail system. ECF No. 74 at 2. Plaintiff's response in opposition, sworn under penalty of perjury as true and correct, avers that he gave it to the prison officials to mail the same day he dated his complaint, "which was April 7, 2017 and no later."[8] *Id.* at 3. He contends that he put the motion in his door; the officer making rounds collected it; and that he recalls signing and dating it the day it left his cell because they were on lockdown that day. ECF No. 74-1 at 2. He avers that he was particularly mindful of the issue of timeliness and because he previously filed a § 2255 motion that was time-barred.[9] *Id.* He describes the

[8] Plaintiff's original complaint was dated April 7, 2017. *See* ECF No. 1 at 7, 8. However, it was postmarked May 1, 2017. [ECF No. 1-2] and not received by the court for filing until May 3, 2017. *Id.*

[9] A check of Plaintiff's underlying criminal docket in Case No. 1:05cr417 in the Middle District of Pennsylvania, available on

usual procedure for mail collection at the prison beginning with handing of the piece of mail to an

> officer who is not certified in handling mail . . . just a regular C.O. . . [who] inspects it and places it in his desk for a few hours . . . [until] it is normally collected anywhere from 8:00 at night until 10:00 p.m. then when the third shift comes in mail is escorted to the mailroom. It is not uncommon for mail to be misplaced, lost or late. Maybe even sent to the wrong block.

Id. at 3. He avers that he does not believe that the prison intentionally sent his mail out late, but believes that because they are sometimes so "overloaded with work" that they "make careless mistakes." *Id.* He contends that he wanted to make sure that his complaint was timely in case the court did not recognize the January 25, 2017 accrual date as the date the time limit began to accrue. *Id.*

Attached to the Defendant's dispositive motion is a sworn declaration from Gloria Hartzog, the Case Management Coordinator at USP Big Sandy, who states in pertinent part:

> 1) . . . I supervised mail room staff, and am familiar with mail room procedures at USP Big Sandy, including the process utilized to collect and send outgoing mail from inmates.
>
> 2) **USP Big Sandy staff collects outgoing mail from inmates on a daily basis every weekday, Monday through Friday, except for any Federal Holidays.**

PACER, corroborates that Plaintiff's § 2255 motion was dismissed as time-barred on December 21, 2011.

3) Specifically, **outgoing mail is collected from inmates and delivered to the USP Big Sandy mail room at approximately 6:00AM each morning every weekday, Monday through Friday.**

4) If an inmate sends an outgoing piece of correspondence using regular United States Postal Service mail, that piece of outgoing correspondence is not specifically logged or otherwise tracked at USP Big Sandy.

5) A staff member from the USP Big Sandy mail room transports all outgoing mail to the United States Post Office in Inez, Kentucky at approximately 8:00AM every weekday, Monday through Friday.

6) The outgoing mail is then transported on the same day from the United States Post Office in Inez, Kentucky to a United States Post Office Hub in Charleston, West Virginia where the outgoing mail is sorted, metered, and dispatched for delivery.

7) I am aware that inmate Donte Parrish, Federal Register Number 13493-067 has filed a lawsuit in the United States District Court for the Northern District of West Virginia.

8) The envelope that Parrish used to send his lawsuit reflects that Parrish used regular United States Postal Service mail . . .

9) The envelope that Parrish used to send his lawsuit was postmarked at the United States Post Office Hub in Charleston, West Virginia on Monday, May 1, 2017. . .

> 10) As described above, outgoing mail is collected and delivered to the USP Big Sandy mail room on a daily basis every weekday. **Therefore, the fact that Parrish's lawsuit was postmarked on Monday, May 1, 2017 reflects that the lawsuit was collected and delivered to the USP Big Sandy mail room on Monday, May 1, 2017. At the earliest, Parrish may have prepared the document and added it to the collection of outgoing mail from inmates at USP Big Sandy after mail was collected on Friday, April 28, 2017 or over the weekend on Saturday, April 29, 2017 or Sunday, April 30, 2017**.

ECF No. 65-2 at 1–2 (emphasis added).

Here, the parties' competing arguments over the date Plaintiff actually submitted his original complaint to prison authorities for mailing need not be addressed. Plaintiff's mailbox rule argument overlooks the fact that in *Houston*, the Supreme Court was considering the appeal of a federal habeas claim, not considering the application of the mailbox rule to the FTCA. While the undersigned does not dispute the Supreme Court's findings as to the mailbox rule with regard to habeas claims and appeals, as noted *supra*, the FTCA is a comprehensive statutory scheme that must be considered apart from all other tort actions, and therefore, its waiver of immunity must be strictly construed. Accordingly, the Court's rulings in *Houston* are not applicable here, and for the reasons stated above, the undersigned finds that the mailbox rule does not apply to FTCA claims. Nonetheless, even if the mailbox rule were applicable here, it still would not save the claims administratively exhausted in Plaintiff's Administrative Tort Claim TRT-MXR-2016-

06710; given that the 6-month deadline for the timely filing of those claims was April 6, 2017 and Plaintiff avers that he did not hand the complaint to a prison official for mailing until April 7, 2017, they would still be time-barred.

Plaintiff's response in opposition next argues that the "actual accrual date" for his complaint should be January 25, 2017, when the murder charge was finally expunged, appears to be an attempt to argue for equitable tolling of the statute of limitations based on a continuing tort. A review of Plaintiff's two administrative tort claims reveals that the basis for the claims raised in each was the DHO's June 3, 2016 ruling, the date Parrish's appeal was granted by Regional Director J.F. Caraway, when his record was expunged, but a rehearing was issued, and the incident report was changed from a 100 series incident report (killing) to a 100A incident report (assisting in a killing). Therefore, it appears that Plaintiff is attempting to argue that the statute of limitations should be tolled for 110 days to make his complaint timely. The plaintiff's claim is untenable, however, in light of the exact wording of the statute, and the strict construction the Court must give to the statute. Title 28 U.S.C. § 2401(b) specifically states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun *within six months after the date of mailing*, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Because the FTCA waives the United States traditional grant of sovereign immunity, the statute must be strictly construed. *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). Put simply, because the United States may not be sued without its permission, the Court may not take it upon itself "to extend the waiver beyond that which Congress intended." *Id*. Therefore, "[i]f an action is not filed as the statute requires, the six-month time period may not be extended" by the Court. *Tuttle v. United States Postal Service*, 585 F.Supp. 55, (M.D. Pa. 1983) (citing *Kubrick* at 117-18.)).

The statute specifically states that the claim must be filed within six months after the date of mailing. The plaintiff's contention that January 25, 2017 should be the "accrual date" for his claim, thus tolling the statute of limitations for 110 days, would extend the six-month period beyond what Congress intended and cannot stand. Equitable tolling in suits against the United States is only available in exceptional circumstances. *See Muth v. United States*, 1 F.3d 246, 251 (4th Cir. 1993). Equitable tolling is only available when a claimant has exercised due diligence in preserving his legal rights, *id*., or can show that the defendant "attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge." *See English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987). Here, despite being advised that he had six months in which to file suit over the claims in his Administrative Tort Claim TRT-MXR-2016-06710, inexplicably, Plaintiff waited until the time had elapsed before filing suit. Thus, the plaintiff's lack of diligence does not comport with a finding of equitable tolling.

Moreover, the agency's denial letter clearly and correctly informed the plaintiff that he had six months from the date of denial of Administrative Tort Claim TRT-MXR-2016- 06710 in which to file suit in federal court; it did not mislead Plaintiff or make any misrepresentations. Therefore, Plaintiff's FTCA claims first raised in Administrative Tort Claim TRT-MXR-2016-06710 should be dismissed as time-barred.

IV. *Recommendation*

Accordingly, for the foregoing reasons, the undersigned **RECOMMENDS** that the Defendant's Motion to Dismiss for lack of subject matter jurisdiction [ECF No. 65], be **GRANTED in part** as to Administrative Tort Claim TRT-MXR-2016-06710, because those claims are barred by the statute of limitations; that Defendant's motion be **DENIED in part** as to Administrative Tort Claim TRT-MXR-06283; and that the Defendant be **DIRECTED** to address the remainder of Plaintiff's as stated in Administrative Tort Claim TRT-MXR-06283 on the merits.

Within **fourteen (14) days** after being served with a copy of this Report and Recommendation, any party may file with the Clerk of Court written objections identifying those portions of the recommendation to which objections are made. Objections shall identify each portion of the magistrate judge's recommended disposition that is being challenged and shall specify the basis for each objection. Objections shall not exceed ten (10) typewritten pages or twenty (20) handwritten pages, including exhibits, unless accompanied by a motion for leave to exceed the page limitation, consistent with LR PL P 12. A copy of any

objections should also be submitted to the United States District Judge. **Failure to timely file objections to this recommendation will result in waiver of the right to appeal from a judgment of this Court based upon such recommendation.** 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1984).

The Clerk is directed to send a copy of this Report and Recommendation to the *pro se* Plaintiff by certified mail, return receipt requested, to his last known address as shown on the docket, and to transmit a copy electronically to all counsel of record.

Upon entry of this Report and Recommendation, the clerk of court is **DIRECTED** to terminate the Magistrate Judge association with this case until further Order of the District Judge.

DATED: September 24, 2018

/s/ Michael John Aloi
MICHAEL JOHN ALOI
UNITED STATES
MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DONTE PARRISH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil action No. 1:17cv70 (Judge Keeley)

MEMORANDUM OPINION AND ORDER OVERRULING OBJECTIONS [DKT. NO. 127], ADOPTING IN PART AND REJECTING IN PART REPORT AND RECOMMENDATION [DKT. NO. 121], GRANTING MOTION TO DISMISS [DKT. NO. 102], AND DISMISSING CASE

Pending before the Court is the Report and Recommendation of United States Magistrate Judge Michael J. Aloi ("R&R"), recommending that the Court grant the government's motion to dismiss or, alternatively, its motion for summary judgment (Dkt. No. 121). Also pending are Donte Parrish's ("Parrish") objections to the magistrate judge's recommendations (Dkt. No. 127). For the reasons that follow, the Court **OVERRULES** Parrish's objections (Dkt. Nos. 127), **ADOPTS IN PART AND REJECTS IN PART** the

R&R (Dkt. No. 121), **GRANTS** the government's motion (Dkt. No. 102), and **DISMISSES** the case.

I.

A. Procedural History

On May 3, 2017, Parrish, a federal inmate, initiated this action under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. ("FTCA") (Dkt. No. 1). Pursuant to 28 U.S.C. § 636 and its local rules, the Court referred the complaint to Magistrate Judge Aloi for initial screening.

On December 18, 2017, Parrish filed an amended complaint alleging false imprisonment, abuse of process, intentional infliction of emotional distress, negligence, and malicious prosecution related to the Bureau of Prisons's ("BOP") investigation of a 2009 incident at USP Hazelton, and his placement at various Special Management Units ("SMUs") during the pendency of that investigation (Dkt. No. 39). Parrish filed two Administrative Claim forms regarding these claims, both of which were subsequently denied by the BOP. Following the magistrate judge's order directing the government to address whether Parrish's FTCA claims were timely, the government moved to dismiss the amended complaint for the first time on June 11, 2018.

By Memorandum Opinion and Order entered on January 16, 2019, the Court granted in part and denied in part the government's first motion to dismiss (Dkt. No. 85). The Court denied the motion to dismiss Parrish's claim as stated in Administrative Tort Claim TRT-MXR-06283 ("Administrative Claim '283" or "the '283 Claim") based on the government's failure to advise Parrish of the six-month deadline within which

he was required to file suit. In the '283 Claim, Parrish had alleged that a BOP regional director "abused the process" when he remanded for rehearing a disciplinary hearing officer's ("DHO") decision on the incident report for the 2009 incident at USP Hazelton. The Court then granted the government's motion as to Parrish's claims in his Administrative Tort Claim TRT-MXR-2016-06710 ("Administrative Claim '710" or "the '710 Claim"). Specifically, the Court concluded that the '710 Claim was time-barred because Parrish had failed to file this action within six months after receiving adequate notice of the filing deadline.

On January 23, 2019, Parrish moved to amend his complaint a second time, seeking to "add more claims" to Administrative Claim '283 (Dkt. No. 90). He conceded that the claims he sought to add were originally raised in the '710 Claim, but argued that the '283 Claim stemmed from the '710 Claim. On July 19, 2019, the Court denied Parrish's second motion to amend, deeming it an attempt to add untimely claims (Dkt. No. 111). It concluded that the proposed amendment did not allege the same misconduct as in Claim '283, and explained that Parrish could not circumvent its prior determination that the '710 Claim was untimely by attempting to consolidate it with the timely '283 Claim.

The government filed a second motion to dismiss or, alternatively, motion for summary judgment on June 2, 2019 (Dkt. No. 102), in which it contended: (1) the charge pertaining to the 2009 incident at USP Hazelton was expunged from his prison disciplinary record; (2) the claims were not first presented to the appropriate federal agency; (3) the claims in the amended complaint were not meritorious under

applicable state law; and (4) Parrish is barred from seeking damages beyond those requested in the '283 Claim. Parrish responded to the motion on August 5, 2019 (No. 117). The government did not reply.

B. Report and Recommendation

On November 27, 2019, Magistrate Judge Aloi entered an R&R, recommending that Parrish's claims of false imprisonment and malicious prosecution be dismissed for lack of subject matter jurisdiction because they are not the same claims raised in the '283 Claim (Dkt. No. 121). The magistrate judge also concluded that Parrish's intentional infliction of emotional distress, negligence, and abuse of process claims, and his argument that the government had falsified documents, lacked merit. He further recommended that Parrish's claim for relief be denied because it exceeded the amount originally sought in the '283 Claim.[1]

The R&R informed the parties of their right to file written objections to the R&R. The Court received Parrish's timely objections to the R&R on January 2, 2020 (Dkt. No. 127).

C. Parrish's Objections

Parrish has objected to the entirety of the R&R. He specifically objects to the magistrate judge's conclusion that his false imprisonment and malicious prosecution claims are barred because they were not properly raised in the '283 Claim. He contends that the defendant was "on notice" of the circumstances

---

[1] The magistrate judge also recommended that the Court deny as moot a motion for summary judgment filed by Parrish on May 30, 2018, but the Court had already denied the motion (Dkt. No. 95).

surrounding his amended complaint. He further objects to the recommendations regarding the merits of his FTCA claims, the amount of his claim for relief, and his allegation that the government falsified documents.

II.

When considering a magistrate judge's R&R pursuant to 28 U.S.C. § 636(b)(1), the Court must review de novo those portions to which objection is timely made. Otherwise, "the Court may adopt, without explanation, any of the magistrate judge's recommendations to which the [defendant] does not object." *Dellacirprete v. Gutierrez*, 479 F. Supp. 2d 600, 603–04 (N.D. W. Va. 2007) (citing *Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983)). Courts will uphold portions of a recommendation to which no objection is made if there is no "clear error." *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

III.

The FTCA requires a plaintiff to file an administrative claim prior to commencing a suit against the United States. 28 U.S.C. § 2675. First, a plaintiff must timely file his claim with the appropriate federal agency, which then has the power to settle or deny it. § 2401(b). The plaintiff may file a civil action against the United States only if the agency has denied the claim. § 2675(a). Alternatively, "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall . . . be deemed a final denial of the claim" for the purposes of fulfilling the requirement. *Id.*

The FTCA's administrative exhaustion requirement is fulfilled when the agency "receives from a claimant . . . an executed Standard Form 95 or other written *notification of an incident*, accompanied by a claim for money damages in a sum certain." 28 C.F.R. § 14.2 (emphasis added). The purpose of this notice is to enable the agency to investigate and place a sum certain value on the claim. *Ahmed v. United States*, 30 F.3d 514, 516–17 (4th Cir. 1994); *cf. Henderson v. United States*, 785 F.2d 121, 124 (4th Cir. 1986) (quoting *Meeker v. United States*, 435 F.2d 1219, 1222 (8th Cir. 1970) (explaining that Congress intended to "improve and expedite disposition of monetary claims against the Government by establishing a system for prelitigation settlement, to enable consideration of claims by the agency having the best information concerning the incident, and to ease court congestion and avoid unnecessary litigation"). Consequently, a plaintiff cannot present an administrative claim based on one theory of relief and then maintain an FTCA suit based a different cause of action or set of facts. *Deloria v. Veterans Admin.*, 927 F.2d 1009, 1012 (7th Cir. 1991) (finding administrative notice of conspiracy to alter medical records was not sufficient notice of subsequent FTCA claims of medical malpractice and negligence because the "allegations involve wholly different incidents").[2]

---

[2] *Compare Doe v. United States*, 618 F. Supp. 71, 74 (D.S.C. 1985) (explaining that it "would be an act of legal socery [sic]" to "convert" an intentional assault and battery administrative claim to an FTCA claim of medical malpractice because "the facts simply do not support any claim other than one for assault and battery"), *with Munger v. United States*, 116 F. Supp.2d 672, 676–77 (D. Md. 2000) (allowing two plaintiffs to file separate FTCA

The government contends Parrish's amended complaint should be dismissed for lack of jurisdiction based on his failure to exhaust administrative remedies as to all of his claims (Dkt. No. 103 at 11). Indeed, the Fourth Circuit considers this requirement to be jurisdictional in nature. *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (affirming district court's denial of a motion to amend when there is "no jurisdiction to hear the case because [Plaintiff] failed to first submit those claims as administrative claims and exhaust her administrative remedies"); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986) ("It is well-settled that the requirement of filing an administrative claim is jurisdictional and may not be waived."); *Kielwien v. United States*, 540 F.2d 676, 679 (4th Cir. 1976) (stating that the "requirement is jurisdictional and is not waivable.").

Supreme Court precedent and the language of the FTCA confirm this line of authority. Recently, in *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019), a unanimous Supreme Court clarified that administrative requirements are jurisdictional in two instances: (1) When Congress clearly makes it so; or (2) when a "long line of Supreme Court decisions left undisturbed by Congress has attached a jurisdictional label to a prescription." *Id.* at 1849–50 (internal quotation marks omitted)[3]; *Cf. McNeil v. United States*,

---

claims even though the plaintiffs did not file separate administrative claims because the claims "arose out of the same facts").

[3] The Court in *Fort Bend County* distinguished between jurisdictional bars and mandatory claim-processing and other procedural preconditions of relief, explaining that the latter, but not the former, are subject to forfeiture. *Id.* at 1851–52 ("[A] rule

508 U.S. 106, 112 (1993) (upholding dismissal of FTCA claims for lack of subject matter jurisdiction where a pro se plaintiff had failed to exhaust administrative remedies prior to filing suit because "[t]he most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process.").

When Congress granted federal district courts exclusive jurisdiction to hear tort claims against the United States in the FTCA, it conferred such power "[s]ubject to the provisions of chapter 171." 28 U.S.C. § 1346(b)(1). Chapter 171, Tort Claims Procedure, in turn, contains the administrative exhaustion requirement, § 2675, which indicates that the requirement is a jurisdictional prerequisite because Congress has clearly stated it to be so. Accordingly, Fourth Circuit precedent, read together with *Fort Bend County* and *McNeil* and the language of the FTCA, confirms the administrative exhaustion requirement to be a necessary predicate to this Court's exercise of jurisdiction.

IV.

A. False Imprisonment

Because the Court has already dismissed as untimely Parrish's Administrative Claim '710, which included his claim of false imprisonment (*See* the Court's January 16, 2019 and July 19, 2019 Orders, Dkt. Nos. 85 at 15; 111 at 8), it declines to adopt the

---

may be mandatory without being jurisdictional."). Here, the government has not forfeited its argument that Parrish has not properly presented his FTCA abuse of process claim to the appropriate federal agency (Dkt. No. 102 at 11–13).

magistrate judge's recommendation that Parrish's false imprisonment claim be dismissed for lack of subject matter jurisdiction, and rejects Parrish's argument that his false imprisonment claim was adequately presented in his Administrative Claim '283. Accordingly, the Court dismisses this claim for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6)

B. Intentional Infliction of Emotional Distress and Negligence

Parrish's Administrative Claim '283 is the only timely underlying administrative claim remaining in this case. It contains one allegation that a BOP regional director "abused the process" when he remanded for rehearing a DHO's decision on a charge related to the 2009 incident at USP Hazelton. Parrish conceded as much in his response opposing the government's motion to dismiss: "The change of the charge from 100 (killing) to 100A (assisting in killing) on remand was the basis for TRT-MXR-2016-06283." Notably, the R&R observed that this underlying abuse of process claim is the only remaining claim.

Despite the lack of jurisdiction, the magistrate judge recommended that Parrish's intentional infliction of emotional distress and negligence claims be dismissed on their merits. The Court declines to adopt that recommendation, and will dismiss those claims for lack of subject matter jurisdiction because they allege theories of relief Parrish clearly did not present in Claim '283. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) (recognizing that "without jurisdiction . . . the only function remaining

to the court is that of announcing the fact and dismissing the cause").

C. Malicious Prosecution

Parrish's malicious prosecution claim must also be dismissed for lack of subject matter jurisdiction because it was not raised in the '283 Claim. This is so even though Parrish urges the Court to overlook the administrative exhaustion requirement, arguing that the government was on notice of the circumstances surrounding the claim because the '710 Claim referenced the '283 Claim and "[dealt] with the same matter."

Even when liberally construed, this argument fails. First, the '710 Claim did not include a claim for malicious prosecution. Second, as explained in the Court's Memorandum Opinion and Order denying Parrish's second motion to amend his complaint, Parrish cannot circumvent its prior determination that the '283 Claim is the only timely underlying claim. Therefore, because Parrish has failed to satisfy the necessary prerequisite to file a malicious prosecution claim, the Court overrules his objection and adopts the R&R's recommendation that Parrish's malicious prosecution claim be dismissed for lack of subject matter jurisdiction.

D. Abuse of Process

Parrish has failed to satisfy the administrative exhaustion requirement for the claim of abuse of process alleged in his amended complaint because it does not relate to the BOP regional director's remand, which was the subject of his '283 Claim. Parrish alleges that, although he appealed the DHO's decision that he had committed an offense of "killing," a

category 100 charge, upon remand for rehearing a BOP regional director changed that offense to "assisting in killing," a category 100A charge (Dkt. Nos. 117–1 at 5, 51–8 at 2).[4]

In contrast, the abuse of process claim in his amended complaint alleges that the government misused the processes of administrative detention and SMU designation for the sole purpose of illegally confining Parrish, and that his SMU hearing took place under false pretenses. The federal employees whose actions form the basis for this claim include the SMU hearing examiner, Designation and Sentence Computation Center staff, the wardens of three BOP facilities, and "all those employees who work[ed] for the FBOP and [were] assigned to USP Hazelton in 2009–10."

Although both are labeled abuse of process, any commonality between the '283 and FTCA claims ends there. Each sets forth a different theory of relief; each is based on a different set of facts; and each involves different BOP employees. Because these allegations "involve wholly different incidents," *Deloria*, 927 F.2d at 1012, the '283 Claim failed to provide proper notice for the government to undertake an investigation and evaluation of the abuse of process claim alleged in Parrish's amended complaint.

---

[4] The Court notes that the BOP's policy regarding the implementation of 28 C.F.R. § 541.3(b) pertaining to categories of disciplinary offenses states that "aiding another person to commit any of these offenses, attempting to commit them, or making plans to commit them is considered equivalent to committing the offense itself. In these cases, the letter "A" is combined with the offense code" (Dkt. No. 103–4 at 11).

Because Parrish has failed to satisfy the FTCA's jurisdictional prerequisite, the Court rejects the recommendation in the R&R that this claim be denied and, instead, pursuant to Federal Rule of Civil Procedure 12(b)(1), dismisses Parrish's abuse of process claim based on lack of jurisdiction.[5]

V. CONCLUSION

For the reasons discussed, the Court:

OVERRULES Parrish's objections (Dkt. Nos. 127);

ADOPTS IN PART AND REJECTS IN PART the Report and Recommendation (Dkt. No. 121);

GRANTS the United States's motion to dismiss or, alternatively, for summary judgment (Dkt. No. 102);

DISMISSES Parrish's false imprisonment claim **WITH PREJUDICE**; and

DISMISSES all other claims **WITHOUT PREJUDICE**.

It is so **ORDERED**.

The Court **DIRECTS** the Clerk to transmit this Order to counsel of record and to the pro se plaintiff, certified mail, return receipt requested.

Dated: March 23, 2020.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE

[5] Because the Court lacks jurisdiction to address the claims in Parrish's amended complaint, it need not address Parrish's remaining objections on their merits.

APPENDIX D

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1766

DONTE PARRISH,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Irene M. Keeley, Senior District Judge. (1:17-cv-00070-IMK)

Submitted: October 20, 2020 Decided: October 23, 2020

Before GREGORY, Chief Judge, DIAZ, Circuit Judge, and SHEDD, Senior Circuit Judge.

Remanded by unpublished per curiam opinion.

Donte Parrish, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Donte Parrish seeks to appeal the district court's order adopting in part and rejecting in part the magistrate judge's recommendation and dismissing Parrish's complaint pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-2680. The district court entered its judgment on March 24, 2020. Parrish filed his notice of appeal, at the earliest, on July 8, 2020. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (establishing prison mailbox rule). Parrish's notice of appeal is clearly untimely. *See* Fed. R. App. P. 4(a)(1)(B). Parrish, however, claimed that he did not receive a copy of the district court's order until June 25, 2020, and there is some evidence in the record supporting this assertion.

Pursuant to Fed. R. App. P. 4(a)(6), the district court may reopen the time to file an appeal for a 14-day period if: (1) the movant did not receive proper notice of the entry of the judgment within 21 days after entry; (2) the motion to reopen the appeal period is filed within 180 days after the judgment is entered or within 14 days after the movant receives proper notice of the entry, whichever is earlier; and (3) no party would be prejudiced. Fed. R. App. P. 4(a)(6); *see* Fed. R. Civ. P. 77(d). Because Parrish claimed that he did

not receive a copy of the court's judgment until 93 days after entry, and he filed the notice of appeal within 14 days after he purportedly received a copy of the court's judgment, we construe the notice of appeal as a motion to reopen the appeal period under Rule 4(a)(6). We remand to the district court to determine whether the appeal period should be reopened. The record, as supplemented, will be returned to this court for further consideration.

REMANDED

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DONTE PARRISH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil action No. 1:17cv70 (Judge Keeley)

ORDER REOPENING TIME WITHIN PLAINTIFF MAY FILE AN APPEAL

On May 3, 2017, the pro se Plaintiff, Donte Parrish ("Parrish"), filed a complaint against the United States of America ("United States") pursuant to the Federal Tort Claims Act (Dkt. No. 1). On March 23, 2020, the Court adopted in part and rejected in part the magistrate judge's Report and Recommendation and dismissed Parrish's complaint (Dkt. No. 130). Thereafter, the Clerk entered Judgment on March 24, 2020 (Dkt. No. 131).

It was not until July 8, 2020, however, that Parrish filed a Notice of Appeal challenging the Court's dismissal of his complaint (Dkt. No. 137). In support, he stated that he did not receive a copy of the Court's Order until June 25, 2020, because of his transfer from federal to state custody. *Id.* at 1.

In an unpublished opinion entered on October 23, 2020, the United States Court of Appeals for the Fourth Circuit noted that Parrish's appeal was untimely because he had not filed it within thirty (30) days after the entry of judgment on March 24, 2020. Fed. R. App. 4(a)(1)(A). However, the Court of Appeals construed Parrish's Notice of Appeal as a motion to reopen the time within which to file an appeal based on his assertion that he never received a copy of this Court's Judgment until ninety-three (93) days after its entry, and also on the fact that he had filed his Notice of Appeal within fourteen (14) days after receiving a copy of the Court's Order (Dkt. No. 142 at 2). Accordingly, the Court of Appeals remanded the matter for this Court to determine whether Parrish's appeal period should be reopened pursuant to Federal Rule of Appellate Procedure 4(a)(6). *Id.*

Federal Rule of Appellate Procedure 4(a)(6) provides that a district court may reopen the time to file an appeal if (A) the moving party did not receive notice of entry of judgment within twenty-one (21) days after its entry; (B) the motion is filed within one hundred and eighty (180) days of entry of judgment or within fourteen (14) days of receiving notice from the court, whichever is earlier; and (C) no party would be prejudiced.

Here, the Court's Order and Clerk's Judgment were mailed to Parrish by certified mail, return receipt requested, at USP Thomson, Illinois, on March 23 and March 24, 2020, respectively (Dkt. Nos. 130–1, 131–1). Although service of the Clerk's Judgment was accepted at USP Thomson on April 7, 2020 (Dkt. No. 132), the Court's Order was returned as undelivered and remailed by the Clerk to Parrish at SCI Coal

Township, Pennsylvania, a state facility, on June 23, 2020 (Dkt. No. 130–2). Service of the Court's Order was accepted at SCI Coal Township on June 29, 2020 (Dkt. No. 136).

Upon review, the Court concludes that Parrish has satisfied the requirements of Federal Rule of Appellate Procedure 4(a)(6), and that the time for him to file an appeal should be reopened. In the first place, it is not established that Parrish received notice of the Judgment within twenty-one (21) days after its entry, as required by Federal Rule of Appellate Procedure 4(a)(6)(A). Although service of the Clerk's Judgment was accepted by USP Thomson within fourteen (14) days after its entry on March 23, 2020, it is unclear when Parrish was moved from USP Thomson into Pennsylvania state custody at SCI Coal Township, or whether he actually received notice of the Clerk's Judgment when service was executed.

Moreover, it appears that service of the Court's Order was not completed until, at the earliest, June 25, 2020, ninety-eight (93) days after its entry. And Parrish filed his Notice of Appeal within fourteen (14) days after he received that Order, on June 25, 2020, thereby satisfying the time frame established by Federal Rule of Appellate Procedure 4(a)(6)(B). Finally, Federal Rule of Appellate Procedure 4(a)(6)(C) is satisfied because no party will be prejudiced if Parrish is allowed to refile his appeal.

Therefore, pursuant to Federal Rule of Appellate Procedure 4(a)(6), following a thorough review of the circumstances of this case, the Court **REOPENS** the time for Parrish to file his appeal for fourteen (14) days following the entry of this Order. The Clerk **SHALL**

supplement this Court's record accordingly, and transmit the same to the United States Court of Appeals for the Fourth Circuit.

The Court **DIRECTS** the Clerk to transmit this Order to counsel of record and to the pro se plaintiff, certified mail, return receipt requested.

Dated: January 8, 2020.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES
DISTRICT JUDGE

APPENDIX F

FILED: April 23, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1766
(1:17-cv-00070-IMK)

DONTE PARRISH,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

FILED: April 23, 2024

PROFESSOR BRYAN LAMMON

Amicus Supporting Rehearing Petition

ORDER

The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Diaz and Judges Wilkinson, Niemeyer, Agee, Harris, Richardson, Quattlebaum, Rushing, and Heytens voted to deny rehearing en banc. Judges King, Gregory, Wynn, Thacker, Benjamin, and Berner voted to grant rehearing en banc.

Entered at the direction of Judge Niemeyer.

For the Court

/s/ Nwamaka Anowi, Clerk

NIEMEYER, Circuit Judge, in support of denial of the supplemental petition for rehearing:

The issue in this case does not rise to the level that would justify an en banc rehearing, as it involves a straightforward application of 28 U.S.C. § 2107(c), which establishes a jurisdictional requirement for effecting an appeal, and Federal Rule of Appellate Procedure 4(a)(6), which implements § 2107(c).

When Donte Parrish filed a notice of appeal in this case that was over two months late, the untimeliness of his notice precluded us, as a jurisdictional matter, from considering his appeal. But upon receiving his explanation claiming that he had not timely received a copy of the district court's judgment dismissing his case, we treated his untimely notice of appeal as a motion to reopen the appeal period under Rule 4(a)(6) and remanded the case to the district court for consideration of that motion. *Parrish v. United States*, 827 F. App'x 327, 327 (4th Cir. 2020) (per curiam); 28 U.S.C. § 2107(c) (providing district courts with authority to "reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal"); Fed. R. App. P. 4(a)(6) (similarly authorizing a district court to "reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered").

On remand, after concluding that Parrish satisfied the requirements for reopening the time for filing an appeal, the district court entered an order authorizing Parrish to file a notice of appeal within a 14-day window that commenced with the date of the court's order. The order provided, "the Court REOPENS the time for Parrish *to file his appeal* for fourteen (14) days

following the entry of this Order." (Emphasis added). Despite the clear language of the district court's order, Parrish never filed an appeal within the time specified. In such circumstances, we were required to dismiss the appeal for lack of jurisdiction. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding that a court of appeals was *without jurisdiction* when the appellant failed to file the appeal within 14 days, as required by § 2107(c), and instead filed his appeal 16 days after the district court's reopening order, as the district court itself had authorized). It is thus clear that the texts of § 2107(c) and Rule 4(a)(6) did not permit a resurrection of Parrish's earlier notice of appeal, which was rendered ineffective because it was not only filed late but also filed beyond the period where an extension could have been granted under Federal Rule of Appellate Procedure 4(a)(5). Rather, § 2107(c) and Rule 4(a)(6) authorized the court to reopen the time to file an appeal but *required* that the notice be filed within a specified time, *i.e.*, 14 days after the date *of the reopening order*.

In his opinion dissenting from the denial of en banc rehearing, Judge Gregory laments that applying Rule 4(a)(6) to deny Parrish the right to appeal forecloses "access to our Court" and is most likely to affect the "elderly, unhoused, detained, imprisoned, and differently abled," suggesting that they should not be bound by the rule's requirements. Yet, gracious as such a position is, we are not free to rely on graciousness to bypass jurisdictional requirements established by Congress, including those in § 2107(c). *See Bowles*, 551 U.S. at 214.

Resolution of Parrish's appeal thus involved a straightforward application of § 2107(c) and Rule 4(a)(6), which need not be reviewed en banc.

GREGORY, Circuit Judge, with whom Judges WYNN, THACKER, and BERNER join, dissenting from denial of Appellant's petition for rehearing en banc:

At its core, this case requires us to determine whether access to our Court should be foreclosed for failure to refile a notice of appeal during the newly reopened period following success under Rule 4(a)(6). Section 2107(c) and Rule 4(a)(6) authorize a district court to, in its discretion, reopen the appeal period where the moving party files a motion within the earlier of 180 days of the district court's judgment or 14 days of receiving notice of the judgment; and the court finds that the moving party did not receive notice of the judgment within 21 days of its entry, and that no party would be prejudiced by its grant of the motion. 28 U.S.C. § 2107. The "hail mary" afforded by this rule, as compared to Rule 4(a)(5), is therefore permitted only under exceptional circumstances, rather than following a mere missed deadline or common mistake.

Given the infrequency with which district courts fail to issue notice of their judgments, Rule 4(a)(6) is usually invoked under circumstances where a party relocates, is relocated, or is otherwise unable to receive mail at the address listed with the court. Such relief is therefore most commonly, if not exclusively, sought by pro se litigants who were unable to notice their intent to seek our review during the statutory appeals period, often due to no fault of their own.

Both 28 U.S.C. § 2107(c) and the Federal Rules of Appellate Procedure are silent regarding whether an

untimely notice of appeal may be validated by a district court's subsequent grant of a Rule 4(a)(6) motion. They also fall short in answering whether a single filing may serve as both a motion to reopen the appeal period and a notice of appeal. As our sister circuit acknowledged, guidance from the Advisory Committee on the Federal Rules of Appellate Procedure appears necessary. *See Winters v. Taskila*, 88 F.4th 665, 671 (6th Cir. 2023) (collecting cases and stating that comment from the Advisory Committee "may be a profitable next stage for this debate"). Absent such guidance from the architects of the rules, however, it is no wonder that circuit courts and judges are split regarding the most appropriate course of action under the circumstances. The Fourth Circuit is no exception. Even a cursory review of our prior cases presenting this issue illustrates that our Court's treatment has not been uniform.

The Government contends that this issue will occur less frequently in the future as electronic filings and notifications become more prevalent. However, technological advances are often slow to reach members of our society unable to afford or access the luxuries those advances provide. The elderly, unhoused, detained, imprisoned, and differently abled are a few of the populations who may not be able to consistently access information electronically. Members of those populations and others similarly situated will presumably continue to rely on the protections of Rule 4(a)(6) despite the benefits that the era of electronic filing will unquestionably provide to others. More importantly, the infrequency of the occurrence of an issue does not speak to its significance

and is not dispositive in determining whether en banc review should be granted.

Rule 35 of the Federal Rules of Appellate Procedure reserves en banc determinations for those instances necessary to secure uniformity of this Court's case law or resolve a question of exceptional importance. This case meets both standards. Yet our Court has elected to close its door to litigants who fail to make a futile, likely duplicative filing within the 14 days following the often-hard-fought success of a Rule 4(a)(6) motion. As a result, litigants fortunate enough to obtain Rule 4(a)(6) relief will barely finish celebrating the success of the motion before facing the defeat of dismissal. In opting to require more of those who obtain relief under Rule 4(a)(6) than we do of those who obtain relief pursuant to Rule 4(a)(5), we seem to be requiring more of those who have less.

The Court's decision here demonstrates that even where both parties agree that the majority's jurisdictional conclusion was erroneous, en banc review may be denied where the issue will impact only a few individuals, despite the gravity of the impact on those it affects. I must dissent.

APPENDIX G

FILED: April 25, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1766
(1:17-cv-00070-IMK)

DONTE PARRISH
Plaintiff – Appellant

v.

UNITED STATES OF AMERICA
Defendant – Appellee

PROFESSOR BRYAN LAMMON
Amicus Supporting Rehearing Petition

O R D E R

Upon consideration of submissions relative to appellant's petition for rehearing, the court denies the motion.

Judge Niemeyer and Judge Richardson voted to deny, and Judge Gregory voted to grant.

For the Court
/s/ Nwamaka Anowi, Clerk

APPENDIX H

DONTE PARRISH

v. Civil Action No. 1:17-cv-70

UNITED STATES OF AMERICA

FILED JUL 13 2020
U.S. DISTRICT COURT-WVND
CLARKSBURG, WV 26301

Notice of Appeal

On 3/23/20 Irene M. Keeley issued a order dismissing my FTCA claim. Due to my being transferred from Federal to State custody I did not receive this order until June 25, 2020. It is now 7/8/20 and I'm filing this notice of appeal.

Please send me the proper forms and rules and procedures needed to appeal the decision in civil action no: 1:17-cv-70 dismissing part of my claim as with prejudice and part without prejudice.

Sincerely Yours,