No. 10-2614

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH DJOUMESSI,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
HOLLY A. THOMAS
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3714
Email: holly.thomas@usdoj.gov

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULE:

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe oral argument is necessary to resolve this matter.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. 2255(a). The district court entered final judgment denying Djoumessi's 28 U.S.C. 2255 Motion to Vacate Sentence on November 17, 2010, and, on the same day,

issued a certificate of appealability. (RE 149, Order, pp. 13-15).[1] Djoumessi subsequently filed a timely notice of appeal on December 8, 2010. (RE 150, Notice of Appeal, p.1). This court has jurisdiction pursuant to 28 U.S.C. 2253(c)(1)(B) and 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether Djoumessi was entitled to equitable tolling for the filing of his 2255 motion outside the one year statutory deadline set by 28 U.S.C. 2255(f)(1).

STATEMENT OF THE CASE

In 2005, Petitioner Joseph Djoumessi and his wife were indicted on a number of federal charges stemming from their enslavement and abuse of a teenage, alien victim in their Michigan home, namely, holding the victim in involuntary servitude in violation of 18 U.S.C. 1584 and 18 U.S.C. 2, conspiring to hold the victim in involuntary servitude in violation of 18 U.S.C. 371, and harboring an alien for private financial gain in violation of 8 U.S.C. 1324 and 18 U.S.C. 2. (RE 4, Indictment, pp. 1-4). After a bench trial, Djoumessi was found guilty on all counts.[2] (RE 91, Judgment, p. 1). He was sentenced to 204 months'

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[1] "RE" refers to the docket number of the pleading as entered in the district court.

[2] A jury convicted Djoumessi's wife of only the conspiracy charge. *United States* v. *Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008).

imprisonment (to run concurrently with a Michigan state sentence on charges stemming from the same actions, see generally *People* v. *Djoumessi*, No. 238631, 2003 Mich. App. LEXIS 2746 (Mich. Ct. App. Oct. 28, 2003) (unpublished)), and ordered to pay $100,000 in restitution to the victim. (RE 91, Judgment, pp. 3, 6).

Djoumessi's conviction was upheld on direct appeal on August 20, 2008. See *United States* v. *Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008).[3] The Supreme

[3] Affirming Djoumessi's conviction, this Court recounted the following details of the victim's plight:

> The Djoumessis required [the victim, Pridine] Fru to perform substantially all of their housework and to provide essentially all of the care for their children. She worked every day from 6:00 a.m. to 10:00 p.m. for no compensation other than room and board, and the Djoumessis never sent her to school. Her housing consisted of a dilapidated, dark and sometimes-flooded space in the Djoumessis' basement. The Djoumessis did not allow her to use any of the working showers in the home, reducing her to collecting hot water from the basement sink in a bucket to clean herself. When Fru started her menstrual cycle, Evelyn [Djoumessi, Joseph's wife] refused to give her sanitary pads, leaving her to use her clothing instead. The Djoumessis also closely controlled Fru's contact with outsiders, rarely allowing her to leave the property except to take the Djoumessis' children to the bus stop or to other events, and telling her that if she ever contacted the police she would go to jail because she was in the country illegally. When the Djoumessis were not satisfied with Fru's work, they beat her and threatened her. And on top of all of this, Joseph Djoumessi sexually abused Fru on three occasions.

Djoumessi, 538 F.3d at 549.

Fru finally escaped the Djoumessi home after a neighbor contacted the police about her situation. *Djoumessi*, 538 F.3d at 549.

Court denied his petition for certiorari on January 12, 2009. See *Djoumessi* v. *United States*, 129 S. Ct. 948 (2009). On January 25, 2010, Djoumessi filed a *pro se* 28 U.S.C. 2255 motion for vacation of his sentence, asserting that he had received ineffective assistance of counsel during his criminal prosecution. (RE 149, Order, p. 2). On May 3, 2010, the United States filed a brief in opposition to Djoumessi's motion, asserting that the motion was barred by the statute of limitations, and that, in any case, Djoumessi's ineffective assistance of counsel claims were without merit. (RE 149, Order, p. 3).

In July 2010, the district court granted Djoumessi's request for an evidentiary hearing on the timeliness issue and whether equitable tolling might apply, and held the hearing on September 8, 2010. (RE 149, Order, p. 3). On November 17, 2010, the court denied Djoumessi's motion on the grounds that it was filed outside of the statute of limitations, and that he had not established a basis for equitable tolling. (See generally RE 149, Order).

STATEMENT OF FACTS

There is no dispute that Djoumessi's 28 U.S.C. 2255 motion was due one year from the date of the Supreme Court's January 12, 2009, denial of his petition for certiorari. (RE 149, Order, p. 3); see also 28 U.S.C. 2255(f)(1) ("A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from * * * the date on which the judgment of conviction becomes

final.").[4] There is also no dispute that Djoumessi's motion was signed on January 15, 2010; and he testified that he mailed it "around January 15, 2010," after the deadline. (RE 149, Order, p. 4; RE 147, Transcript, p. 8 (Djoumessi)). The only question before the Court is whether Djoumessi is nevertheless entitled to equitable tolling.

In his initial memo on the timeliness issue filed in the district court, Djoumessi alleged two grounds upon which he was entitled to equitable tolling: 1) that he believed that the due date for his motion was January 26, 2010, which was one year from the time the district court docketed the Supreme Court's letter indicating that certiorari had been denied; and 2) that he was denied access to his legal documents from July 30, 2009, through mid-October 2009, while being transferred from state to federal custody. (RE 140, Petitioner's Reply to Respondent's Allegation that the Within Petition is Time Barred, pp. 2-3, 6). The district court heard evidence regarding both grounds at the evidentiary hearing.

[4] Although the parties and the district court concluded that the due date for Djoumessi's 2255 motion was January 13, 2010 (RE 149, Order, p. 3), the United States submits that, pursuant to Federal Rule of Civil Procedure 6(a)(1), the proper due date for Djoumessi's motion was January 12, 2010, or the anniversary date of the Supreme Court's denial of his petition for writ of certiorari.

1. Mistaken Date

At the evidentiary hearing, Djoumessi testified to the series of events that led him to conclude that the due date for his petition was January 26, 2010. Djoumessi testified that in January 2009 he received a letter from Andrew Wise, the attorney who had represented him at trial and in his direct appeals, advising Djoumessi that the Supreme Court had denied certiorari in his case. (RE 147, Transcript, p. 7 (Djoumessi)). The letter, addressed to Djoumessi, stated: "I regret that I must send you the enclosed letter from the Supreme Court indicating that our Cert. Petition was denied. As you know, you have one year from the entry of the denial to file your motion under 28 U.S.C. § 2255." (Appendix, Exhibit 1: Letter from Andrew Wise to Joseph Djoumessi, Jan. 14, 2009). Enclosed with Wise's letter was a letter from the Supreme Court regarding the denial of the petition. (RE 147, Transcript, p. 42 (Djoumessi)). That letter, dated January 12, 2009, read "Dear Clerk: The Court today entered the following order in the above-entitled case. The petition for writ of certiorari is denied." (RE 147, Transcript, p. 42 (Djoumessi)).

The letter from Wise advised Djoumessi that he should feel free to contact Wise if he needed any further assistance, and Djoumessi did indeed contact Wise's office in January, September, and October of 2009, but did not discuss the due date

for a possible 2255 motion.[5] (RE 147, Transcript, pp. 9-10, 40 (Djoumessi), 69-70 (Wise)). Wise testified that if Djoumessi had asked him for information regarding the meaning of "year from the entry of the denial" of his petition for writ of certiorari, he would have provided Djoumessi with that information. (RE 147, Transcript, pp. 69-70 (Wise)). Djoumessi, however, did not ask. (RE 147, Transcript, pp. 69-70 (Wise)).

Despite having received Wise's letter in January 2009, Djoumessi testified that it was not until September 2009 that he decided that January 26, 2010, was the filing deadline for his petition. (RE 147, Transcript, p. 44 (Djoumessi)). It was in September that Djoumessi obtained a copy of a docket entry from the district court, indicating that it had docketed the Supreme Court's judgment on January 26, 2009. (RE 147, Transcript, pp. 9, 44 (Djoumessi); see also RE 149, Order, pp. 4-5 (indicating that on January 26, the district court "docketed the Supreme Court's letter to the Clerk of the Sixth Circuit indicating the Supreme Court had denied cert")). Djoumessi testified that he believed the one year statutory deadline was

[5] Although another member of Wise's office advised Djoumessi that the office could not assist with the *preparation* of his 2255 motion, as Djoumessi planned to make an ineffective assistance of counsel claim, Petitioner nevertheless felt free to reach out to Wise for assistance obtaining the legal documents relevant to that claim, and indeed received such assistance. (RE 147, Transcript, pp. 10 (Djoumessi), 63-67 (Wise)).

measured from the date of the district court's filing, and that January 26, 2010, was therefore the due date for his 2255 motion. (RE 147, Transcript, p. 9 (Djoumessi)).

2. Access To Legal Documents

At the September 8 hearing, Djoumessi and the United States' witnesses also testified about the circumstances of Djoumessi's transfer from state to federal custody and his access to his legal documents and transcripts during the transfer.

Djoumessi testified that he was paroled from the custody of the State of Michigan to the Federal Bureau of Prisons on July 30, 2009, and that he was first to be transferred to the Sanilac County Jail. (RE 147, Transcript, pp. 14, 17 (Djoumessi)). On July 30, he packed up all of his legal papers into a foot locker, and also packed a box containing his books and parole papers. (RE 147, Transcript, p. 15 (Djoumessi)). The sheriffs who transported him to Sanilac took his box and foot locker and placed it in the vehicle in which he was being transferred. (RE 147, Transcript, p. 17 (Djoumessi)). Djoumessi testified that when he arrived at Sanilac he told the booking sergeant that he would need access to his legal papers in the foot locker, but was informed that their policy was that they would not allow him access to the foot locker and would have to put everything in storage. (RE 147, Transcript, pp. 17-18 (Djoumessi)).

About three weeks later, on August 18, Djoumessi was taken from Sanilac County Jail and placed on an airlift to take him to the Grady County Jail, where he

remained for three weeks before being transferred to federal prison. (RE 147, Transcript, pp. 21-22, 25, 29 (Djoumessi)). He testified that there were postings at Sanilac that inmates could not carry legal materials with them when they left the jail, and that he did not in fact take those or any other papers with him on the airlift. (RE 147, Transcript, pp. 20, 24-25 (Djoumessi)). Before he left Sanilac, he was told that the jail would store his foot locker and box for 30 days, and then throw everything away. (RE 147, Transcript, pp. 23-24 (Djoumessi)).

While being held at Grady County, Djoumessi wrote to his prior attorney, Wise, asking Wise if he would help get Djoumessi's property from the Sanilac County Jail. (RE 147, Transcript, p. 28 (Djoumessi)). In early September, Djoumessi was moved to the Federal Correctional Institution in Elkton, Ohio (Elkton). (RE 147, Transcript, p. 29 (Djoumessi)). He spoke with a counselor at Elkton about getting his property from Sanilac County, but Sanilac told the counselor that they could not ship the materials because they were too heavy and that someone would have to pick them up. (RE 147, Transcript, p. 30 (Djoumessi)). At that point, Djoumessi again contacted Wise, who had another attorney from his office pick up the property from Sanilac jail and mail it to Djoumessi. (RE 147, Transcript, pp. 30-31 (Djoumessi)). Djoumessi testified that he received his papers in October 2009. (RE 147, Transcript, p. 32 (Djoumessi)). A letter from Wise to Djoumessi dated October 1, 2009, states that, "By now, you

should have received the transcripts and other papers that I sent you."[6] (Appendix, Exhibit 6).

In contrast to Djoumessi's testimony regarding his lack of access to his legal papers while at Sanilac, Sergeant Bernard Hawk, a 20-year employee of the Sanilac County Sheriff's office, testified that inmates could, in fact, request access to their legal materials while at Sanilac Jail. (RE 147, Transcript, pp. 74, 87 (Hawk)). Hawk testified that to get access to legal papers, an inmate would fill out an intramural correspondence, in triplicate, requesting his legal materials. (RE 147, Transcript, p. 87 (Hawk)). Although the jail retains these requests, Hawk did not locate any such request from Djoumessi. (RE 147, Transcript, pp. 87-88 (Hawk)).

Djoumessi also testified that he received an inmate manual upon entering the Sanilac County Jail, which states that inmates are allowed to possess legal mail and documents. (RE 147, Transcript, pp. 47-48 (Djoumessi)). The inmate manual set forth a grievance procedure that inmates could use, and explained procedures for emergency inmate grievances; during the booking process, Djoumessi indicated that he understood the contents of that manual. (RE 147, Transcript, pp. 47-48, 52-

[6] United States' witness Kevin Pettit, a Deputy United States Marshal, testified that it is the responsibility of the federal marshals to transfer the property of inmates who have been moved from state prison to Sanilac, and are then airlifted to the federal system. (RE 147, Transcript, pp. 123-125 (Pettit)).

53 (Djoumessi)). However, at no time did he file a grievance regarding his lack of access to his legal materials. (RE 147, Transcript, p. 54 (Djoumessi)).

3. District Court Decision

On November 17, 2010, the district court issued an order denying Djoumessi's 2255 motion, holding that Djoumessi "has not established a basis for equitable tolling." (RE 149, Order, p. 1).

The court first found that the record did "not establish Petitioner's contention * * * that the Government 'significantly and unconstitutionally impeded [his] ability to prepare his motion'" during the period Djoumessi was in transit. (RE 149, Order, p. 6 n.3). The court observed that although Djoumessi had stated that he was denied access to his legal materials while at Sanilac, Djoumessi had also testified to receiving the "Inmate Guide * * * [which] specifically states, 'Inmates may possess legal mail/documents,'" and sets forth an inmate grievance procedure. (RE 149, Order, p. 7 n.3). Nevertheless, Djoumessi never filed a grievance regarding a lack of access to his legal materials. (RE 149, Order, p. 7 n.3). The district court also cited Sergeant Hawk's testimony that if an inmate wanted to request his materials, he would submit intramural correspondence, which the facility retained; the district court noted that Hawk had not found any such request from Djoumessi. (RE 149, Order, p. 7 n.3).

The district court further held that "even assuming *arguendo* that Petitioner was unable to access" his materials while in transit, "courts have repeatedly held that an inmate's time in transit is an unsuitable ground upon which tolling may be invoked." (RE 149, Order, p. 6). The court also found that even with his transit time, "Petitioner still had nearly ten months to work on and complete his § 2255 motion." (RE 149, Order, p. 8; see also RE 149, Order, p. 4 (describing the dates during which Djoumessi was allegedly denied access to his legal materials as "July 30, 2009 until approximately October 10, 2009," or "seventy-one days")).

Although the court acknowledged Djoumessi's testimony that he had to improperly arrange on his own to have his materials shipped from Sanilac to Elkton, the court held that "that does not establish that Petitioner * * * would have submitted his motion any earlier than January 15, 2010, since he wrongly believed that he had until January 26, 2010 to file the motion." (RE 149, Order, p. 7 n.3; see also RE 149, Order, p. 9 ("The record does not establish that even if he did have access to his legal materials during the * * * time period [from July 30, 2009 through mid-October], Plaintiff would have thought that the filing date was any different and would have submitted his documents" before the deadline)).

The court then turned to the question whether Djoumessi's "ignorance of the correct filing date was reasonable under the circumstances," concluding that it was not. (RE 149, Order, p. 9). The court observed that Djoumessi had received a

letter from his trial attorney, Wise, telling him that certiorari had been denied and alerting him to the one-year deadline. (RE 149, Order, pp. 9-10). The court held that "[n]othing in * * * Wise's letter indicates or even suggests that the filing date for the § 2255 motion had anything to do with the docketing in federal district court of the Supreme Court's letter stating that the cert. petition was denied. The letter does not even indicate the words 'district court.'" (RE 149, Order, p. 10). Nor, the court found, did the Supreme Court's letter denying certiorari mention the words "district court." (RE 149, Order, p. 10). The court thus held that even if, "for the sake of argument," it were to credit Djoumessi's testimony that he had a genuine belief that the filing deadline was one year from the district court's entry of the denial of his petition for certiorari, "such a belief was completely unreasonable." (RE 149, Order, p. 9). The court further found that nothing in the record explained why, having received Wise's letter in January 2009, Djoumessi waited "over seven months," until September 2009, "to ascertain what that vital date was." (RE 149, Order, p. 11).

Observing that "[s]imply claiming that one made an error in determining the filing date is an insufficient basis upon which [courts may] invoke equitable tolling," and finding no other no basis to toll the statute, the district court denied Djoumessi's 2255 motion as untimely. (RE 149, Order, pp. 12-13).

SUMMARY OF ARGUMENT

"[T]he doctrine of equitable tolling is used sparingly by federal courts." *Robertson* v. *Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); see also *Graham-Humphreys* v. *Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560 (6th Cir. 2000). The Supreme Court has held that a petitioner is entitled to tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010) (internal quotation marks and citation omitted). This Court has also set forth five factors to consider in determining whether equitable tolling is warranted, including, "(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim." *Solomon* v. *United States*, 467 F.3d 928, 933 (6th Cir. 2006) (citing *Dunlap* v. *United States*, 250 F.3d 1001, 1008 (6th Cir.), cert. denied, 534 U.S. 1057 (2001)). The absence of any prejudice to the opposing party "is a factor to be considered only after a factor that might justify tolling is identified." *Allen* v. *Yukins*, 366 F.3d 396, 401-402 (6th Cir.) (citation omitted), cert. denied, 543 U.S. 865 (2004).

Djoumessi has failed to demonstrate that he is entitled to equitable tolling. The uncontested facts show that he did not file his motion until January 25, 2010, over a week beyond the statutory deadline. (RE 149, Order, p. 4). Having received a letter from his trial attorney in January 2009, alerting him to the one-year statutory deadline for filing his motion (RE 147, Transcript, p. 7 (Djoumessi)) Djoumessi had clear notice of the filing requirement. No other circumstances either explain or excuse his mistake, and, as this Court has repeatedly held, "ignorance of the law alone is not sufficient to warrant equitable tolling." *Griffin* v. *Rogers*, 399 F.3d 626, 637 (6th Cir. 2005) (quoting *Rose* v. *Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991)).

Although Djoumessi claims that the United States deprived him of access to his legal materials, and that this lack of access prevented his timely filing, the evidence presented to the district court demonstrates that it was the mistake as to the filing deadline – and not his lack of legal papers – that caused him to miss the due date. Moreover, as the district court found, even considering the roughly seventy-one days that Djoumessi was without his legal materials, he still had nearly 10 months during which to prepare his motion. (RE 149, Order, pp. 4, 8). As this Court has held, time in transit alone is not a sufficient basis for equitable tolling. See *Brown* v. *United States*, 20 F. App'x 373, 375 (6th Cir. 2001) (unpublished) (denying equitable tolling where petitioner was in transit for 90

days). In any event, both Djoumessi's own testimony and that of Sergeant Hawk show that Djoumessi failed to take reasonable steps to access his legal papers while incarcerated at Sanilac Jail – failing to even file a grievance regarding his need to access his papers in order to work on his 2255 motion.

Because Djoumessi has not demonstrated any grounds that would support tolling of the statutory deadline, the district court was correct to deny his motion as untimely.

ARGUMENT

There is no dispute that Djoumessi's limitations period began to run on January 12, 2009, when the Supreme Court entered its order denying certiorari in his direct appeal, or that, in the absence of tolling, the deadline for the filing of his petition was one year from that date. See 28 U.S.C. 2255(f)(1) ("A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from * * * the date on which the judgment of conviction becomes final"); (see also RE 149, Order, p. 3). Nor is there any dispute that Djoumessi did not sign his motion until January 15, 2010, several days after the deadline, or that the motion was not filed until January 25, 2010. (RE 149, Order, p. 4). The only question before this Court is whether equitable tolling is available to extend the deadline in this case.

"[T]he doctrine of equitable tolling is used sparingly by federal courts." *Robertson* v. *Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); see also *Graham-Humphreys* v. *Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560 (6th Cir. 2000). The party seeking equitable tolling bears the burden of proving he is entitled to it. See *Griffin* v. *Rogers*, 308 F.3d 647, 653 (6th Cir. 2002). The Supreme Court's *Holland* decision sets forth the requirements for equitable tolling – that a petitioner is diligent in pursuing his rights and that there was some extraordinary circumstance that prevented his timely filing. See *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010). This Court has set forth five factors to consider in determining whether equitable tolling is warranted, including, "(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim." *Solomon* v. *United States*, 467 F.3d 928, 933 (6th Cir. 2006) (citing *Dunlap* v. *United States*, 250 F.3d 1001, 1008 (6th Cir.), cert. denied, 534 U.S. 1057 (2001)). The absence of any prejudice to the opposing party "is a factor to be considered only after a factor that might justify tolling is identified." *Allen* v. *Yukins*, 366 F.3d 396, 401-402 (6th Cir.) (citation omitted), cert. denied, 543 U.S. 865 (2004).

I

DJOUMESSI'S MISTAKE AS TO THE FILING DEADLINE WAS UNREASONABLE AND WAS THE CAUSE OF HIS UNTIMELY FILING

A. Standard Of Review

The district court concluded that Djoumessi's error as to his filing deadline was unreasonable, and that his ignorance of the law was an insufficient basis for tolling the deadline for his 2255 motion. (RE 149, Order, p. 12). "[W]here the facts are undisputed or the district court rules as a matter of law that equitable tolling is unavailable, [this Court] appl[ies] the *de novo* standard of review to a district court's refusal to apply the doctrine of equitable tolling; in all other cases, [the Court] appl[ies] the abuse of discretion standard." *Dunlap* v. *United States*, 250 F.3d 1001, 1008 n.2 (6th Cir.), cert. denied, 534 U.S. 1057 (2001). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, improperly applies the law, or uses an incorrect legal standard." *Robertson* v. *Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). Since Djoumessi argues that the district court misapplied the law, the abuse of discretion standard applies.

B. Argument

Djoumessi testified that he received Wise's letter indicating that he had one year from the denial of his petition for certiorari to file a 2255 motion and enclosing the Supreme Court's January 12, 2009, letter regarding the denial of certiorari. (RE 147, Transcript, pp. 7-8, 42 (Djoumessi)). In light of that

information, Djoumessi's belief that he had one year from the date the district court docketed the Supreme Court's ruling – January 26, 2009 (see RE 147, Transcript, p. 9 (Djoumessi)) – was completely unjustified. As the district court found, this unreasonable mistake was the cause of his late filing.

Wise's letter, which Djoumessi acknowledges having received, (RE 147, Transcript, pp. 7-8 (Djoumessi)), plainly states, "I regret that I must send you the enclosed letter from the Supreme Court indicating that our Cert. Petition was denied. As you know, you have one year from the entry of the denial to file your motion under 28 U.S.C. § 2255." (Appendix, Exhibit 1: Letter from Andrew Wise to Joseph Djoumessi, Jan. 14, 2009). Djoumessi further acknowledged that, enclosed with the letter, he received a letter from the Supreme Court, dated January 12, 2009, which read, "Dear Clerk: The Court today entered the following order in the above-entitled case. The petition for writ of certiorari is denied." (RE 147, Transcript, pp. 41-42 (Djoumessi)). The only reference to "denial" was of the petition for certiorari, and the only "entry of the denial" was made by the Supreme Court on January 12, 2009. As the district court observed, neither Wise's letter nor the letter from the Supreme Court mentions the district court or suggests that the date of that court's entry of the order on its docket was at all relevant to the deadline for the 2255 motion. (RE 149, Order, p. 10). In any event, simply making a mistake as to the filing deadline does not constitute a basis for tolling.

See *Griffin* v. *Rogers*, 399 F.3d 626, 637 (6th Cir. 2005) ("[I]gnorance of the law alone is not sufficient to warrant equitable tolling") (citation omitted).

Djoumessi's mistake is particularly unreasonable in light of his testimony that he had access to Westlaw at Sanilac, as well as access to an "average library," with "Shepard," "Federal Digest," and "other law books" while he was housed in state prison. (RE 147, Transcript, pp. 13, 18 (Djoumessi)). Yet, despite the availability of such resources, as the district court found, he appears to have made no independent effort to obtain information regarding the proper deadline. (RE 149, Order, pp. 11-12). He did not contact Wise to clarify the deadline (RE 147, Transcript, pp. 69-70 (Wise)) nor does the record indicate that he tried to contact the district court to discover the deadline (see RE 149, Order, pp. 11-12).

In short, Djoumessi's mistake as to the filing deadline was unreasonable. Given Wise's letter, the letter from the Supreme Court, and his access to legal research materials, nothing explains why he could not properly ascertain his filing deadline; and nothing suggests that it was a lack of access to his legal materials that prevented him from filing on time, given that he was unaware of what the proper deadline was.

II

DJOUMESSI'S LATE FILING IS NOT EXCUSED BY LACK OF ACCESS TO HIS LEGAL DOCUMENTS WHILE IN TRANSIT; IN ANY EVENT, DJOUMESSI HAS NOT SHOWN THAT THE UNITED STATES IMPEDED HIS ACCESS TO HIS LEGAL MATERIALS OR THAT HE TOOK REASONABLE STEPS TO OBTAIN ACCESS TO THOSE MATERIALS WHILE AT SANILAC

A. Standard Of Review

As previously noted, the standard of review is abuse of discretion. See *Dunlap* v. *United States*, 250 F.3d 1001, 1008 n.2 (6th Cir. 2001).

B. Djoumessi's Time In Transit Is Not A Basis For Equitable Tolling

This Court has previously held that a lack of access to legal materials while in transit, standing alone, does not constitute a basis for equitable tolling, particularly when a petitioner has otherwise had adequate time to prepare his brief. In *Brown* v. *United States*, 20 F. App'x 373, 375 (6th Cir. 2001) (unpublished), this Court rejected a petitioner's request for equitable tolling, holding that his "ninety days in transit do not explain his lack of diligence in filing his § 2255 motion during the nine-month period that remained open to him to file timely," and noting that petitioner "offer[ed] no explanation for his failure to file during this period." Similarly, in *United States* v. *Stone*, 68 F. App'x 563, 565 (6th Cir. 2003) (unpublished), this Court rejected a petitioner's claim that "state action inhibited him from filing his motion * * * during the one-year limitation period" where, almost six months after the statute began running, the petitioner was transferred

from a federal prison to a jail without his personal property or legal materials. In declining to toll the statute, this Court noted that Stone's "attorney advised him that his limitation period for post-conviction remedies began to run April 17, 2000, and the record reveals that Stone had almost six months before he was transferred to the Bedford Heights jail in which to file his § 2255 motion." *Ibid*.

Djoumessi's claim cannot be meaningfully differentiated from those this Court rejected in *Brown* and *Stone*. Even discounting the period when he was without his legal materials, Djoumessi still had nearly 10 months in which to prepare and complete his 2255 motion – a longer period of time than in either of the tolling cases discussed above. See *Brown*, 20 F. App'x at 375 (nine months); *Stone*, 68 F. App'x at 565 (six months).

Djoumessi's reliance on *Solomon* v. *United States*, 467 F.3d 928 (6th Cir. 2006), to support his arguments is misplaced. First, unlike Djoumessi, Solomon learned of his filing deadline just a few months before his April 24 deadline. *Id*. at 933. This Court found that Solomon's "delay [in learning the deadline did] not appear unreasonable" in light of the fact that the one-year limitations period for 2255 motions was not enacted until April 1996, and in light of Solomon's testimony regarding the "poor circulation of information on changing laws available to inmates" at his institution. *Id*. at 933. Secondly, Solomon's transfer between facilities both reduced the already short time he had to prepare his

petition, and directly interfered with his ability to file the petition; he was transferred just one month before his petition was due, and just three months after learning of the filing deadline, and, indeed, was without his legal papers at the time that the statute of limitations ran. See *id*. at 933-934. Moreover, this Court recited facts demonstrating Solomon's diligence in attempting to inform the district court of his situation, including asking prison staff for court contact information, speaking to a clerk, and filing a "Notification of Intent" informing the court that while he intended to file a 2255 motion, it was unlikely he would be able to file it on time due to his circumstances. See *id*. at 930, 934. After being returned to his original facility, Solomon "within a month completed his Section 2255 motion." *Id*. at 934.

Djoumessi, by contrast, had full possession of his legal papers during nearly 10 of the 12 months before his motion was due: from January 12, 2009, through July 30, 2009, while in state custody, and from at least the middle of October 2009 through the time his petition was due in January 2010. He also could have tried to get access to his legal papers during the three weeks he was at Sanilac Jail, but did not do so. Under such circumstances – and considering his failure to properly ascertain the due date for the petition – Djoumessi cannot be said to have been diligent in attempting to complete it on time.

Djoumessi nevertheless urges this Court to examine the circumstances of his prison placement in an effort to bolster his claim that his transit between facilities impaired his ability to timely complete his petition. Pet. Corrected Br. 26-27. But here again, his case falls short. By his own testimony, his work schedule while in state prison left him between five and seven hours a week to do legal research. (RE 147, Transcript, p. 13 (Djoumessi)). During his three weeks at Sanilac, he had access to Westlaw, and could do legal research for up to an hour per use. (RE 147, Transcript, p. 18 (Djoumessi)). And while at Elkton, he was able to use the library during evenings, from 6-8:30 p.m., for an average of five hours per week. (RE 147, Transcript, pp. 34-35 (Djoumessi)). At each of these facilities Djoumessi had access to legal research materials: to a library with Shepard, Federal Digest, and other law books in state prison; to Westlaw at Sanilac; and to a library with statutes and case books and American Jurisprudence at Elkton. (See RE 147, Transcript, pp. 13, 18-19, 33-35 (Djoumessi)). Thus, even accepting Djoumessi's testimony that there was high demand for the five available typewriters at Elkton (see RE 147, Transcript, pp. 33-35 (Djoumessi)), such circumstances can hardly suffice as a basis for Djoumessi's late filing.[7]

[7] Petitioner urges that the United States "cannot contend in good faith" that his delay in filing his brief "prejudices its position in any way." Pet. Corrected Br. 18. This argument, however, is irrelevant in light of his failure to identify any grounds upon which the statute should be tolled. "This [C]ourt has * * *

(continued…)

C. Djoumessi Has Not Shown That The United States Impeded His Access To His Legal Materials, Or Demonstrated His Own Diligence In Attempting To Access Those Materials While At Sanilac

As discussed *supra*, pp. 21-24, Djoumessi's time in transit cannot suffice to toll the statute of limitations. But, in any event, he has not shown that the United States impeded his ability to access those legal materials, or that he took reasonable steps to obtain them on his own.

Despite Djoumessi's claims, the evidence does not show that the United States impeded his access to his materials during the weeks he was at the Sanilac Jail. Sergeant Hawk testified that inmates could request access to their legal materials while at Sanilac by filling out an intramural form, in triplicate. (RE 147, Transcript, p. 87 (Hawk)). The district court credited Hawk's testimony that Sanilac retains these requests, and that his search of the records turned up no request from Djoumessi. (See RE 149, Order, p. 7 n.7; see also RE 147, Transcript, pp. 87-88 (Hawk)). Djoumessi himself testified that he received an inmate guide upon his entry to Sanilac, which indicated that inmates are allowed to

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(…continued)
emphasized that 'absence of prejudice is a factor to be considered only after a factor that might justify tolling is identified.'" *Allen* v. *Yukins*, 366 F.3d 396, 401-402 (6th Cir.) (citation omitted), cert. denied, 543 U.S. 865 (2004). Moreover, this Court has held that, "[a]bsent compelling equitable considerations, a court should not extend limitations by even a single day." *Graham-Humphreys* v. *Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000).

possess legal mail and documents, and set forth a grievance procedure inmates could use; yet at no time did he file a grievance to restore access to his legal materials. (RE 147, Transcript, pp. 47-48, 53-54 (Djoumessi)). This does not show the type of "diligence in pursuing one's rights" that would warrant tolling of the statute.[8] See *Solomon*, 467 F.3d at 933.

In any case, as the district court held, the record "does not establish that even if he did have access to his legal materials during the [relevant] time period, [Djoumessi] would have thought the filing date was any different and would have submitted his documents before the correct deadline." (RE 149, Order, p. 9). As a primary matter, as noted above, despite his lack of his legal transcripts while in transit, Djoumessi still had 294 days – nearly 10 months – during which he possessed his materials and could have worked on his motion. (See RE 149, Order, p. 4). Secondly, as the district court noted, Djoumessi admitted that he did not determine the filing deadline for over seven months, until September 2009, and

[8] Djoumessi has also argued that the United States impeded his access to his legal materials from the period from August 18, when he was taken on the airlift from Sanilac Jail, through early October, when he received his legal materials at Elkton, and that the deadline should therefore be tolled for a minimum of 50 days. (See RE 146, Petitioner's Supplemental Brief, p. 6; see also RE 149, Order, p. 4 n.2). Even assuming that the United States was responsible for transferring Djoumessi's legal materials from Sanilac to Elkton, for the reasons discussed *supra*, pp. 18-20, and as the district court held, the record still does not show that Djoumessi would have submitted his brief on time, given his mistaken belief that the deadline was January 26. (See RE 149, Order, p. 7 n.3).

nothing in the record shows that he made any attempt to discover it. (See RE 147, Transcript, p. 44 (Djoumessi); see also RE 149, Order, p.11). Finally, by his own admission, Djoumessi was able to complete and send the motion both prior to the date he believed it to be due, and just days after the actual deadline.[9] (RE 147, Transcript, pp. 8-9 (Djoumessi)). The district court's judgment should therefore stand.

[9] Although Djoumessi has claimed that he had planned to file the brief by December 30, 2009 (RE 147, Transcript, p. 9 (Djoumessi)), as the district court held, "the record does not establish that even with access to his legal papers he would have filed his motion in December 2009" (RE 149, Order, p. 9 n.4), since he believed the filing date was January 26, 2010.

CONCLUSION

For the reasons stated above, the district court's judgment denying Djoumessi's 2255 motion should be affirmed.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Holly A. Thomas
JESSICA DUNSAY SILVER
HOLLY A. THOMAS
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3714
Email: holly.thomas@usdoj.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2007 and contains 6,596 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

s/ Holly A. Thomas
HOLLY A. THOMAS
Attorney

Date: April 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2011, I electronically filed the foregoing Brief for United States as Appellee with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, which will accomplish service to Petitioner's counsel Patricia A. Maceroni, who is a registered ECF Filer.

s/ Holly A. Thomas
HOLLY A. THOMAS
Attorney

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number	**Title**
4	Indictment
91	Judgment
140	Petitioner's Reply to Respondent's Allegation that the Within Petition is Time Barred
146	Petitioner's Supplemental Brief
147	September 8, 2010, Transcript
149	Order Denying Petitioner's Motion to Vacate Sentence Under 28 U.S.C. § 2255
150	Notice of Appeal