

[DO NOT PUBLISH]

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 21-12000

Non-Argument Calendar

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CLYDE BERNARD JOHNSON, II,

Petitioner-Appellant,

*versus*

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Middle District of Florida  
D.C. Docket No. 8:20-cv-02280-JDW-TGW

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Before JORDAN, NEWSOM, and BLACK, Circuit Judges.

PER CURIAM:

Clyde Bernard Johnson II, a counseled federal prisoner, appeals the district court's dismissal of his *pro se* motion under 28 U.S.C. § 2255 as untimely.<sup>1</sup> Johnson does not contest the timeliness of his motion. His motion was based on *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), and he filed the motion on September 20, 2020, more than one year after the Supreme Court issued *Davis* on June 24, 2019. Thus, his motion was untimely as it was filed outside the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year limitation period. 28 U.S.C. § 2255(f)(3). Instead, Johnson contends the district court erred in denying his motion without an evidentiary hearing as he could have shown he was entitled to equitable tolling.

The AEDPA's limitation period may be equitably tolled, but the movant must show "(1) that he has been pursuing his rights

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<sup>1</sup> The district court granted a certificate of appealability, finding that reasonable jurists could disagree with its procedural rulings and find that Johnson adequately raised actual innocence to excuse his untimely filing, that he was actually innocent of his 18 U.S.C. § 924(c) offense, and that he did not have to prove he was actually innocent of Hobbs Act robbery. However, Johnson has abandoned the certified question of whether actual innocence excuses his untimely filing, as he does not address any aspect of actual innocence in his brief. See *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682-83 (11th Cir. 2014) (explaining an appellant abandons an issue on appeal by failing to address it in his opening brief).

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diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quotation marks omitted). Equitable tolling “is an extraordinary remedy which is typically applied sparingly.” *Dodd v. United States*, 365 F.3d 1273, 1282 (11th Cir. 2004) (quotation marks omitted). The focus of the “extraordinary circumstances” inquiry is “on the circumstances surrounding the late filing of the habeas petition . . . and whether the conduct of others prevented the petitioner from timely filing.” *Arthur v. Allen*, 452 F.3d 1234, 1253 (11th Cir. 2006) (quotation marks and citation omitted). The petitioner has the burden of showing that his circumstances justify equitable tolling. *Dodd*, 365 F.3d at 1282.

In *Dodd*, this Court declined to extend equitable tolling to a prisoner who argued he was entitled to tolling for his § 2255 motion because the statute of limitations began running in June 1999 and he was detained in a facility without access to his legal papers between October 1999 and September 2000. *Id.* at 1281-83. This Court determined his circumstances were not extraordinary because he did not show his detention was unconstitutional or inappropriate or that the transfer of a prisoner to a different facility was not a routine practice. *Id.* at 1283. This Court held he did not diligently pursue his rights, either, as he (1) “had nearly *five* additional months with no impediments” after the right under which he sought relief was established before he lost access to his legal papers, (2) did not request that his papers be sent to him, (3) did not attempt to contact counsel to assist him with timely filing his

motion, and (4) did not take any other specific actions that would suggest reasonable diligence under the circumstances. *Id.* (emphasis in original).

### DISCUSSION

Specifically, Johnson asserts he was entitled to equitable tolling because (1) he suffered from renal failure, requiring dialysis three days per week; (2) COVID-19 caused prison lockdowns, effectively eliminating any opportunity for him to timely file his motion; and (3) the American Leading Edge Research Team (ALERT) caused him to incorrectly file his § 2255 motion in the Western District of Missouri.

Johnson did not establish a sufficient basis for equitable tolling. First, Johnson was able to file pleadings in the Western District of Missouri, albeit incorrectly in that court, and petition this Court to allow him to file his § 2255 motion. Johnson has not explained how he was able to file those documents during the one-year limitation period, but not timely file his § 2255 motion. Although he argues his dialysis prevented him from filing documents three days a week, he did not explain before the district court, and does not explain on appeal, why he could not file his § 2255 motion on other days. He also did not explain to the district court when he began his dialysis treatments, so he did not show that his dialysis treatments “stood in his way and prevented timely filing.” *See Holland*, 560 U.S. at 649. The same is true of his argument regarding COVID-19 prison lockdowns. In addition to this Court’s precedent stating that lack of access to legal materials for part of the statute of

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limitations does not merit equitable tolling, Johnson did not show why he did not file, and could not have filed, his § 2255 motion before the lockdowns began in February 2020, over seven months after *Davis* was issued. *See Dodd*, 365 F.3d at 1281-83.

As to the American Leading Edge Research Team (ALERT) issue, Johnson and ALERT represented that he was proceeding *pro se* during the timeframe that he was communicating with ALERT. He does not argue that ALERT committed some form of misconduct that could qualify as more than “egregious negligence,” so he has not shown any misconduct ALERT may have committed could have triggered equitable tolling. *See Cadet v. Fla. Dep’t of Corr.*, 853 F.3d 1216, 1227 (11th Cir. 2017) (stating “attorney negligence, even gross or egregious negligence, does not by itself qualify as an ‘extraordinary circumstance’ for purposes of equitable tolling”).

The district court did not err in determining Johnson’s motion was time-barred, and it did not abuse its discretion in deciding not to hold an evidentiary hearing, as the case files and record showed he did not demonstrate any arguable basis showing he might be entitled to equitable tolling. *See Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014) (stating a district court abuses its discretion in denying an evidentiary hearing “if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous”). Accordingly, we affirm.

**AFFIRMED.**